



# National Legal Development and the Rule of Law: A Comparative Study of Indonesian and South African Law

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**Abstract:** Indonesia and South Africa are both countries that adhere to the principle of the rule of law, where the state is bound by and subject to the law. However, despite the similarity of this principle, the two countries show significant differences in how they conceptualize and formulate their constitutions, mainly due to their different historical, political and socio-cultural backgrounds. The main issue addressed in this research is how these different national contexts influenced the development and implementation of the constitutional rule of law in each country. This research aims to analyse the constitutional development of Indonesia and South Africa by examining the underlying philosophy, historical trajectory and structural design of each country's constitution. Using a historical and comparative approach, this research employs a literature review and descriptive qualitative methods to explore how the rule of law is embedded and operationalized in each constitutional system. The research seeks to show that the unique national experiences of Indonesia and South Africa played an important role in shaping their respective constitutional frameworks, and that these experiences influence how the rule of law is understood and implemented in practice.

**Keywords:** State Development, Constitution, Rule of Law

## 1. Introduction

The concept of the rule of law is realized through the establishment of a functional and just legal system, which is supported by the structured development of political, economic, and social institutions, both at the foundational and institutional levels. This system must be reinforced by cultivating a rational, objective legal culture and a collective legal consciousness within society, the nation, and the state. Accordingly, it is essential that the legal system be not only properly formulated (*law making*) but also effectively implemented (*law enforcing*) (Asshiddiqie, 2004). Within the framework of the rule of law, it is envisioned that law—not political or economic forces—should serve as the guiding authority in the functioning of the state. This is reflected in the widely known phrase, “*the rule of law, not of man*,” which underscores the idea that governance should be based on legal norms rather than the will of individuals. In this context, the government operates as an extension of the legal system itself, while individuals merely act as executors within the broader framework dictated by that system (Asshiddiqie, 2017).

The evolution of the rule of law can be traced back to Continental Europe, where the concept was shaped through the German notion of *rechtsstaat*, as articulated by thinkers such as Immanuel Kant, Paul Laband, Julius Stahl, and Fichte. In contrast, the Anglo-American legal tradition developed its own interpretation under the term Rule of Law, notably advanced by A.V. Dicey. Additionally, the idea of the rule of law is closely linked to the concept of nomocracy, which emphasizes that legal authority—rather than arbitrary power—should govern the exercise of state power (Asshiddiqie, 2005b).

The term “rule of law” pioneered by AV Dicey is often used to describe the understanding that it is the law that truly governs or leads in a country, not humans or people (Asshiddiqie, 2005b). This concept grew and developed in Anglo-American countries.

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AV Dicey introduced three important characteristics of every state of law, namely: supremacy of law, in the sense that there should be no arbitrariness so that a person can only be punished if he breaks the law; equality before the law, both for ordinary people and for officials, and the guarantee of human rights by law and court decisions. In contrast to Dicey's view, F. Julius Stahl stated that there are four important elements of a state of law, namely: protection of human rights; division or separation of powers to guarantee human rights; government based on law; and state administrative courts (Usman, 2023).

Explanation of the characteristics of a legal state from several experts who describe how a concept of thought influences the development of law as the foundation of state governance. Seeing the development of law in Europe which is very significant regarding the very rapid development of law can be used as a view of other countries such as Indonesia, Indonesia is a country located in the Southeast Asia region which is then seen from its historical background that, the development of a legal concept in Indonesia cannot be separated from the Netherlands which at that time colonized and made many regulations called colonial law in the Dutch East Indies which is now Indonesia.

After being colonized by the Netherlands, Indonesia at that time still used the legal system originating from the Netherlands, namely the Continental European legal system. However, over time and the development of Indonesian society, there have been changes in the legal system in Indonesia. At first the legal system applicable in Indonesia was only the continental European legal system, after which the legal system applicable in Indonesia experienced a combination of the continental European system and the Anglo-Saxon legal system (Maysarah, 2017). As for other examples such as in the African Continent, which can be said to have similar legal developments as in Indonesia, namely in the country of South Africa, which has developed continental European and Anglo-Saxon legal systems, the country of South Africa does not fully adopt one of these legal systems but rather combines them or a mixed legal system. South Africa has a mixed legal system: a combination of Dutch Roman civil law, English common law, customary law, and religious personal law (Melbourne, 2025). The development of the philosophy of thought of the two countries as an object of research with a comparative study on how countries determine their own national laws and place law as the supremacy of law used by the two countries.

Despite both nations claiming adherence to the rule of law, there is a lack of comparative research that critically analyzes how legal transplants and local legal cultures interact in shaping constitutional identity and practice. Most existing literature tends to examine these countries in isolation or focuses narrowly on legal doctrines without contextual analysis. This research fills that gap by offering a comparative constitutional study to explore the philosophical foundations, structural designs, and actualization of legal principles in both nations.

This study employs a historical and comparative legal approach, using qualitative analysis of secondary sources. The urgency of this comparison lies in the fact that both Indonesia and South Africa represent post-colonial, pluralistic societies attempting to harmonize traditional values with modern legal norms—making their experiences highly relevant for broader constitutional discourse in the Global South. The expected outcome is a deeper understanding of how differing historical contexts inform the development of rule-of-law states, and how such insights can contribute to improving constitutional practices, particularly in transitional and developing democracies.

## 2. Materials and Methods

This research uses normative juridical research methods, which are legal research methods through a process of legal studies and legal principles and opinions from experts. With a historical and comparative approach which with a historical approach is expected to provide a description based on events that occurred in the past. The historical

approach is employed to trace the evolution and development of the concept of the rule of law and constitutional governance in both Indonesia and South Africa. This includes analyzing the formation of legal institutions, the influence of colonial and post-colonial legal developments, and how these factors contributed to the current structure of each country's legal system. This approach follows Satjipto Rahardjo's framework of legal history analysis, which examines both external and internal factors that influence legal adaptation and institutional change. These questions include identifying the various factors that influence the birth of a legal institution and its formation process, including the dominance of certain factors in the process and the reasons behind this dominance. Furthermore, it is important to analyze how the interaction between external influences and internal forces of society in shaping law, as well as how the process of adaptation to foreign legal institutions occurs in a national legal system (Bachtiar, 2018). As in constitutional foundations between countries, namely in Indonesia, legal materials and literature produced from 1945 (post-independence) to the present and in South Africa, materials from 1994 (post-apartheid constitutional era). In a comparative law approach, namely by comparing the law of a country with the law of another country or the law of a certain time with the law of another time. Furthermore, the legal materials used in this research use primary legal materials in the form of related scientific journals and other article publications as references in this writing, so that the method of legal research is based on a comparative approach. Data are analyzed using qualitative descriptive techniques, which aim to present findings systematically while interpreting the underlying principles and meanings embedded within the legal frameworks of each country.

### 3. Results and Discussion

#### 3.1. Discussion

##### A. Development of National Law in Indonesia and South Africa

The development of the concept of national law in Indonesia began with the end of the Dutch colonial era in Indonesia and the implementation of the Proclamation of Indonesian Independence on August 17, 1945, the Indonesian people declared their independence through a proclamation. Independence means that the Indonesian people have the ability to identify their fate and their homeland in life (Ramadhani et al., 2024). The proclamation of Indonesian independence was a formal manifestation of one of the revolutionary movements of the Indonesian nation, to declare both to ourselves and to the outside world (the international world), that the Indonesian nation had from that time taken a stance to determine the nation and the fate of the homeland in the hands of its own nation, namely to establish its own country including, among other things, its legal system and state system (Joeniarto, 1996). Therefore, the proclamation serves as a basis for the latest legislation. The proclamation serves as a principle or guideline for national law, meaning that the Proclamation of Indonesian Independence on August 17, 1945 was established as a legal guideline for the legislation formed by the Republic of Indonesia. Implicitly stated in the Preamble to the 1945 Constitution, paragraph 4: "To form an Indonesian state government that protects all Indonesian people and all Indonesian territory and to advance public welfare, educate the nation's life, and participate in implementing world order based on freedom, eternal peace and social justice (Ramadhani et al., 2024).

With the declaration of the independence of the Indonesian nation, seen from a legal perspective, it means that the Indonesian nation has severed ties with the previous legal order, namely both the Dutch East Indies legal order and the Japanese occupation legal order. In other words, the Indonesian nation from that moment on had established a new legal order that was determined and would be implemented by the Indonesian nation itself. Therefore, from that moment on, an Indonesian legal order was established that was separate, independent, and separate from the previous Indonesian legal order. This

means that the history of the colonial legal order on Indonesian soil has ended (Joeniarto, 1996).

Before the 1945 Constitution of the Republic of Indonesia was formed as a constitution, the basic concept of the Indonesian state order was inseparable from the philosophical basis of our country, namely Pancasila. Pancasila is used as the basis for regulating all state administration, the order of life of the Indonesian nation, which means that all regulations that exist and apply in the Unitary State of the Republic of Indonesia must be guided by Pancasila (Muhammad et al., 2023), the position of Pancasila as the source of all laws. As the source of all laws or as the source of Indonesian legal order, every legal product must be sourced from and must not conflict with Pancasila. Pancasila is stated in the highest provisions, namely the Preamble to the 1945 Constitution, then embodied or further elaborated in the main ideas, which include the spiritual atmosphere of the 1945 Constitution, which is ultimately concretized or elaborated from the 1945 Constitution, as well as other positive laws (Muhammad et al., 2023) and, as the foundation of the state, Pancasila also has an essential role in the formation of laws and regulations. All laws and policies implemented in Indonesia must be in line with Pancasila, to ensure that every state action does not conflict with the noble ideals of the nation. Pancasila teaches the importance of maintaining human rights, social justice, and strengthening unity amidst diversity. Therefore, Pancasila is not only a legal basis, but a guideline for life that must be maintained and applied to every aspect of Indonesian society (Ardhiyaningrum, 2024).

Indonesia is the only country in the world that established its government and state based on Pancasila as the foundation and ideology of the state. Based on historical research, Pancasila was not born overnight in 1945, but after a long process that considered the history of the nation's struggle and the experiences of other countries around the world. Pancasila is based on the values and character of the nation, although it has been influenced by the greatest ideas in the world. Indonesia Any nation or state that wants to remain strong and resilient must have a strong and solid ideology and foundation. The state and country will not be safe without it. Pancasila as the principle and foundation of the state (Farid et al., 2024). Pancasila is not just a state ideology, but also a national philosophy of life formed from noble values and heritage of ancestors before the establishment of the Indonesian state. Pancasila is the formulation and standard of state behavior and independence for all Indonesian people. Pancasila makes the Indonesian state a nation that has self-respect and dignity because of the five precepts contained in it. One God, fair and civilized humanity, unity of Indonesia, democracy led by wisdom in deliberation/representation, and social justice for all Indonesian people. These five guidelines are stated in paragraph IV of the Preamble of the 1945 Constitution (Octavionica et al., 2023), which was put forward when there was a struggle for ideas about the basis of the state, which had actually been discussed in the BPUPKI and PPKI sessions, which had a role in designing and ratifying the "Basic Law", which was planned for an independent Indonesian state. The Basic Law of the BPUPKI's work by the PPKI session on August 18, 1945 was used as a draft of the Constitution of the Republic of Indonesia and was finally ratified by PPKI and the 1945 Constitution was finally the constitution in the country of Indonesia (Nurita, 2015).

Moving on to the country of South Africa, historically, although South Africa was colonized by the Dutch in 1652, starting with the establishment of a refreshment post at the Cape, then in the 1670s, the Dutch with their VOC declared their ownership of the Cape region in 1672 as a result of colonization (Wall, 2020). However, Great Britain took over the territory from the Netherlands in 1814. After a long period of British colonial rule, South Africa was able to create a Native Administration Act in 1927, historically Britain recognized customary law in the South African region unlike the Netherlands which did not recognize the customary law of the South African people (Rautenbach,

2008). The journey of a South African legal concept was not easy, the Native Administration Act as the forerunner of the South African constitution faced a civil war in 1899-1902 which was then consolidated into the Black Administration Act through the Vereeniging Agreement in 1910. In 1948, the ruling National Party introduced the apartheid policy. The regime implemented the doctrine of separate development through laws that enforced a system of racial segregation.

Beneath the Assistant Specialists Act 1951, the government built up an ad-ministrative pecking order of tribal, territorial and regional specialists inside conventional communities. This act got to be the premise for ensuing apartheid enactment, counting in particular the Bantu Self-Government Advancement Act of 1959, which gave for the foundation of countries, and the development of self-governing districts and free states. The status of standard law moved once again with the democratization of South Africa. The Intervals Structure of South Africa of 1993, and the modern Structure of 1996 solidly set up the put of standard law within the South African legitimate framework. Declared as the South African Structure Act, this enactment has been depicted as a perfect work of art of post-Cold War constitutional design. Drafted within the setting of South Africa's move to law-based run the show that started with Mandela's re-election in February 1990, Nelson Mandela declared the constitution into law on December 10, 1996, and it came into constraint on February 4, 1997. The structure totally reconfigured South Africa's political institutions, driving energetic and transformative modern changes over its political scene. It successfully finished decades of harsh white minority run the show. It has been revised sixteen times but remains the country's principal law (IDEA, n.d.).

#### B. Implementation of the Supremacy of Law in Indonesia and South Africa

The principle of the Indonesian state is a state based on the rights and principles of the constitutional system. Our constitution is the 1945 Constitution, which has placed the law in the highest position, while other provisions are below the constitution. In practice, the state must refer to the regulations contained in the 1945 Constitution. In its implementation, a state that is not based on the 1945 Constitution is unconstitutional and must be prevented. It can be understood that both implicitly and explicitly the 1945 Constitution requires the supremacy of law in our country. The supremacy of law in Indonesia is stated in the 1945 Constitution itself (Karyudi & Firdausiah, 2024).

The supremacy of law will only be meaningful if there is law enforcement, and law enforcement will only have evaluative value if accompanied by responsive law enforcement. This means that legal superiority will be manifested with law enforcement that is based on the principle of equality before the law based on values and a sense of justice. In order for a law to function as a means of driving, the law must be enforceable and for that the law must be accepted as part of a system of social values that are beneficial to citizens, so that the validity of the law is truly real in the empirical realm without coercion. Law enforcement in a country is very important, because the importance of law in a country will create a conducive and calm society for its citizens and at the same time citizens will greatly respect the law itself. Indonesia itself is a country of law. This is clearly stated in Article 1 paragraph (3) of the 1945 Constitution, the third amendment, which reads "The State of Indonesia is a country of law". 1945 Constitution As a consequence of Article 1 paragraph (3) of the Third Amendment to the 1945 Constitution, 3 (three) basic principles must be upheld by every citizen, namely the supremacy of law, equality before the law, and law enforcement in ways that do not conflict with the law (Karyudi & Firdausiah, 2024).

The implementation of the supremacy of law is currently something that needs to be taken seriously because of the still low legal culture and public awareness of legal order in their environment. The low legal culture of the community is reflected in the many acts that violate the law, such as traffic violations, destruction of public facilities, acts of vio-

lence, corruption, and various other violations of the law. In fact, it is not uncommon for these illegal acts to be considered commonplace and accepted by some people. This condition is caused by several factors, including the lack of education and socialization of the law to the community, the low role model of leaders and community figures, and the still weak enforcement of the law itself which makes the community less respectful of the law (Karyudi & Firdausiah, 2024).

According to Friedman's view, legal culture can change at any time as a result of the increasing awareness of the law. This change is embedded in the fact that certain values or attitudes towards the law are no longer appropriate for society. This occurs when a society develops awareness regarding individual rights and democracy (Suyatno, 2019).

This view explains that society and law enforcement are among the determining factors in how the supremacy of law can be implemented properly. Not only law enforcement as in implementing an action that is based on certain regulations but also society plays a role in implementing the supremacy of law by living their lives in society because in any case where there is society there is law or in Latin "*Ubi Societas Ibi Ius*" because in any case the law functions as a protection of human interests so that human interests are protected, the law must be implemented. The implementation of the law can take place normally, peacefully, but it can also be due to violations of the law (Saiful Ibnu Hamzah, 2020) and the law must be implemented and enforced. Everyone expects the law to be established in the event of a concrete event. How the law is that must apply; basically, it is not allowed to deviate; *fiat justitia et pereat mundus* (even if the world collapses, the law must be enforced) (Saiful Ibnu Hamzah, 2020).

Then, as in all constitutional states, in South Africa, the constitution is also recognized as the supreme law. The constitution recognizes basic human rights and freedoms, and its validity is binding on all organs of the state, including parliament, the President, the police, the armed forces, the civil service, and all judicial institutions. The constitutional court has the power to declare laws passed by parliament or government actions null and void if they are in conflict with the constitution (Asshiddiqie, 2005a). However, what is interesting here is that in interpreting the Constitution, the Constitutional Court is also required to consider international law in the field of human rights and is even allowed to consider the laws in force in other democratic countries as a reference. In the South African constitution, the Constitutional Court is considered the highest court in South Africa for all matters concerning the Constitution.

The contemporary legal framework is founded on the principle of constitutional supremacy, a shift that began with the enactment of the Interim Constitution in 1994 and was solidified with the adoption of the Final Constitution in 1996. Prior to this transformation, the legal system operated under the doctrine of parliamentary supremacy, although it is often contended that, in practice, executive authority held predominant influence. The notion of constitutional supremacy now serves as a foundational guideline in the interpretation and evolution of all legal sources. For instance, Section 39(2) of the Constitution mandates that all courts, tribunals, and relevant bodies must, in interpreting legislation or developing common or customary law, give effect to the values and objectives enshrined in the Bill of Rights. Consequently, both common and customary legal traditions must be aligned with and promote the core principles of the Constitution (Lutchman, 2018).

These elements represent the essential characteristics associated with the principle of the supremacy of law. They encompass the dominance of law over all entities, the principle of legal equality, accountability under the law, fair and consistent application of legal norms, the separation of powers, inclusive decision-making processes, legal certainty, protection against arbitrary actions, and transparency in both legal procedures and governance (Mubangizi, 2023). Transparency and accountability—core principles of the rule of law—serve as the foundation for civil society, opposition parties, the media, and the judiciary in their collective efforts to scrutinize and transform the state compre-

hensively. The drafting or amendment of a constitution often centers on leveraging the rule of law as a mechanism to advance equality and safeguard citizens and their assets from exploitative control. This legal framework also provides a normative basis for advocating the decentralization of power, ensuring governance is more accessible and responsive to the needs of the people (Mutua, 2016).

As the highest legal authority in the Republic, the Constitution affirms the equal entitlement of all individuals to the rights, benefits, and privileges of citizenship. Rooted in its preamble, the Constitution envisions the establishment of a democratic and transparent society shaped by the collective will of its people. This foundational document initiated a structural reconfiguration of the state, resulting in a government composed of three distinct but interconnected and mutually dependent spheres—namely, the national, provincial, and local levels (Constitution of the Republic of South Africa, 1996) (Kaywood, 2021). It is important to emphasize that human rights constitute a foundational pillar of both democratic governance and the rule of law. They ensure the protection of individual dignity and facilitate meaningful participation in political and legal processes. The synergy between human rights, democracy, and the rule of law establishes a framework in which individual freedoms are safeguarded, thereby fostering a more inclusive, equitable, and stable society (Mubangizi, 2023).

As stated above, when determining, under article 39 paragraph (2), the meaning of the 'spirit, intent and object of the Bill of Rights', article 39 paragraph (1) letter (a) mandates that the values underlying an open and democratic society must be promoted. This reinforces the dominant constitutional theme, namely, that the Constitution is a bridge between a past based on injustice and oppression, and a future based on equality, the pursuit of social justice and peace, and the recognition of human rights and freedoms. For the purposes of interpretation, the relevant values are those associated with the broad normative concept of an 'open and democratic society based on human dignity, equality and freedom' (Moosa, 2018).

#### 4. Conclusions

Although Indonesia and South Africa both regard the constitution as the supreme law and uphold the principle of the rule of law, there are fundamental differences in the philosophical foundations, key challenges and constitutional oversight mechanisms implemented by each country. Philosophically, Indonesia considers Pancasila as the source of all sources of law, which contains noble values such as social justice, democratic deliberation and divinity, and serves as the normative and ideological basis for the formation of all laws and regulations. Meanwhile, South Africa made the 1996 Constitution a manifestation of post-apartheid values of human rights, equality and reconciliation, explicitly reflecting the transition from a discriminatory system to a democratic society based on social justice. In terms of challenges, Indonesia faces serious problems in the low legal culture of the people, weak law enforcement, and the dominance of formalistic legal practices that have not fully internalized the values of substantive justice. Meanwhile, South Africa faces challenges in reconciling its plural legal system (common law, civil law, customary law and religious law) with modern constitutional principles, as well as the tension between the rule of law and the reality of socio-economic inequality inherited from apartheid. In terms of oversight mechanisms, Indonesia relies on the role of the Constitutional Court as the guardian of the constitution and examiner of the law, but political influence and inconsistencies in law enforcement are still notable. Meanwhile, South Africa places the Constitutional Court as the highest authority in constitutional matters, with an explicit mandate to refer to international law and the practice of other democratic countries in interpreting constitutional rights, and actively promote the values of an open and democratic society based on dignity, equality, and freedom.

Thus, based on the comparison between Indonesia and South Africa, it is recommended that Indonesia strengthen the internalization of Pancasila values in legal prac-

tice, not only as a normative basis, but also as a substantive guideline in upholding justice. Improving the legal culture of society needs to be done through continuous legal education as well as exemplary behaviour from law enforcement officials and public leaders. On the other hand, the independence and consistency of the Constitutional Court must be strengthened to avoid political influence and be able to carry out the constitutional oversight function objectively. Indonesia can also learn from South Africa in terms of managing a plural legal system while upholding constitutional principles. To realize substantive justice, legal reform is needed that is able to bridge between legal norms and social reality, so that the rule of law truly functions as a means of protecting rights and justice for all citizens.

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