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PANCASILA AS THE SOURCE OF ALL SOURCES OF STATE LAW TOWARDS CERTAINTY AND LAW ENFORCEMENT IN JUDGES' DECISIONS IN TERMS OF THE LEGAL SYSTEM THAT APPLIES IN INDONESIA

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Abstract

Pancasila, as a way of life and the identity of the nation and state of Indonesia, naturally obligates everything related to the interests of the nation and state of Indonesia based on Pancasila, including the legal system. Although Indonesia's legal system is pluralistic in nature, Pancasila should still be the basis for the implementation of the legal system because it is the source of all legal sources. The purpose of this research is to determine the implementation of Pancasila as the source of all legal sources of the state towards the certainty and enforcement of law in judicial decisions, in the context of the legal system in Indonesia. This research uses a normative research method with descriptive analytical specifications. The results of the study show that the increasing pluralism of the legal system in Indonesia, with several legal systems in place, namely Islamic law, customary law, civil law, and common law, requires a reform of the legal system in Indonesia so that the quality of law in Indonesia can be improved for the certainty and enforcement of law in judicial decisions. Therefore, a standardized legal system is needed in Indonesia as a Rechtsstaat, which is Pancasila as the source of all legal sources.

Keywords: Pancasila, Judges, Legal System

INTRODUCTION

Pancasila as in its existence as a way of life and identity of the nation and state of Indonesia naturally requires all matters concerning the interests of the nation and state of Indonesia based on Pancasila. Therefore, in the legal system as well. In the legal system, Pancasila is the basis of the foundation so that any law that is applied must be subject to and practice Pancasila. Therefore, although Indonesian law in its system is pluralistic, Pancasila is still the basis for the validity of these legal systems. On the basis of the above, if there is a legal system that is considered contrary to Pancasila then it is not allowed to be applied. This has actually been confirmed in the position of Pancasila as the ideals of law and the source of all sources of law which is the highest level in the theory of the level of legal norms. Pancasila in the legal system always gets a special place or position so that the ideals of law and the ideals of the state can be achieved through law. Furthermore, if it is associated with the conception of the rule of law, Indonesia also adheres to the principle of the rule of law but not the rule of law as in the conception of rechtstaat or in the conception of the rule of law. The Indonesian State of Law is a state of law based on Pancasila as the source of all sources of law, which means that all State of Law regulations are based on Pancasila. Very different from building a state of law on the European continent such as the state of law or the Anglo-Saxon state of law as a state of law.

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Therefore, the Pancasila state of law is a state of law based on the values contained in Pancasila as an entity that represents the reality of Indonesian society. Therefore, it is a demand and necessity that the Indonesian state of law is a harmonized state of law based on Pancasila. After Pancasila was constitutionally established on August 18 by PPKI as the basis of the state, Pancasila has an important position in the life of the Indonesian people. The importance of Pancasila then gives awareness to the Indonesian people to make it an absolute reference for the order of life both in social society, politics, religion, and law.

During the reformation period, the existence of Pancasila as the source of all sources of law still obtained a legal home through TAP MPR Number III/MPR/2000 concerning Sources of Law and Order of Legislation. However, this TAP MPR no longer explicitly emphasizes Pancasila as the source of all sources of law in the national legal system. However, although Pancasila as the source of all sources of law has juridical legitimacy both in the MPR Decree and in the Law, it still does not guarantee legal certainty in the order of laws and regulations. As a result, the existence of Pancasila as the source of all sources of law does not have an imperative element or binding power in the hierarchy of legislation (Thontowi, 2016). This is what then a problem becomes. The non-inclusion of Pancasila in the hierarchy of laws and regulations has resulted in the emergence of disharmonization between laws and regulations. Based on the background description of the problem, the researcher is interested in conducting research with the title "Pancasila as the Source of All Sources of State Law on Certainty and Law Enforcement in Judges' Decisions in Review of the Applicable Legal System in Indonesia".

LITERATURE REVIEW

Pancasila as the State Foundation

The basis of the state is the foundation of the life of the nation and state whose existence must be owned by every country in every detail of its life. The state basis for a country is a basis for regulating all operations formed in a country. As a concept of the highest legal norm or source of all sources of law in a country that contains a set of values that are comprehensive and deep as a solid and strong foundation and originate from a view of life and a reflection of civilization, culture, nobility of character and personality that grows in the history of the development of a country and is accepted by all levels of society (Eleanora et all, 2012). Pancasila as the source of all sources of law or as a source of legal order can be described as a system in the structure of Pancasila functions as: Pancasila as the basis of the state is the source of all sources of law (source of legal order) Indonesia.

Pancasila as the Source of All Sources of Law

Pancasila as the source of all sources of law (Staatsfundamentalnorm), which is emphasized in Law No. 10 of 2004 concerning the Formation of Legislation, especially Article 2, which states that Pancasila is the source of all sources of law or the source of legal order for legal life in Indonesia, then it can be interpreted that "The placement of Pancasila as the source of all sources of state law is in accordance with the Preamble of the 1945 Constitution of the Republic of Indonesia which places Pancasila as the basis and ideology of the state as well as the philosophical basis of the nation and state so that every material content of laws and regulations

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should not conflict with the values of Pancasila. The position of Pancasila as the basis of the state in the preamble of the 1945 Constitution is juridical - constitutional. This means that the value of Pancasila as the basic norm of the state (Grundnorm, fundamental state rules) is imperative; meaning that it binds and forces all those within the jurisdiction of the Republic of Indonesia to faithfully implement, inherit, develop and preserve it.

Certainty and Law Enforcement

The development of the issue of legal certainty in Indonesia between positive law and customary law of the Indonesian people then received special attention, namely with the promulgation of several laws and regulations in the Criminal Code Bill. The idea of legality that claims to provide legal certainty in law enforcement, especially in criminal law, is historically an idea that was born thanks to the idea of legism of L.J. van Apeldoorn, a tourist from the Netherlands. According to van Apeldoorn, the influence of Montesquieu and others during the 19th century gave birth to the legal movement "legism", which is a legal ism movement that assumes that every activity of applying the law is merely an application of the contents of the law to concrete cases. This application is carried out rationally and logically. This is because the law is considered a logical system, which can be applied to every case. Therefore, the legal certainty provided by legality should not be seen as disconnected with legism. Both are the basic foundation of legal certainty contained in the law (law) (Fernando et al, 2017).

In legal developments after Indonesia's independence, customary law was actually recognized in the legal system in Indonesia. This recognition of customary law is contained in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, namely: "The State recognizes and respects the unity of customary law communities and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law." However, Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia has not answered the problem between positive law in Indonesia and laws that live in the community or customary law. The Judicial Institution in Indonesia then attempted to resolve this issue, resulting in the enactment of Law No. 48/2009 on Judicial Power. Article 5 paragraph (1) of Law No. 48/2009 on Judicial Power explains that in deciding cases a judge is obliged to explore, follow, and understand the values of law and a sense of justice that live in society. Article 50 paragraph (1) explains that court decisions must not only contain the reasons and basis for the decision, but also contain certain articles of the relevant laws and regulations or unwritten sources of law that are used as the basis for judging. Law No. 6/2014 on Villages also recognizes the existence of Customary Village Regulations in Article 110, that "Customary Village Regulations are adjusted to customary law and customary norms prevailing in Customary Villages as long as they do not conflict with the provisions of laws and regulations". Article 111 paragraph (1) explains that the provision only applies to customary villages. In the Draft Criminal Code, there are two kinds of legality principles, namely formal and material legality principles. The formal legality principle is regulated in Article 1 paragraph (1) of the

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Draft Criminal Code

The article reads: "no one can be convicted or subject to action, unless the act committed has been determined as a criminal offense in the legislation in force at the time the act was committed". This article is actually still in line with the current principle of legality. The material legality principle is then specifically and explicitly regulated in Article 2 of the Draft Criminal Code. Article 2 paragraph (1) reads: "the provisions referred to in Article 1 paragraph (1) do not reduce the applicability of the law that lives in the community which determines that a person should be punished even though the act is not regulated in the legislation". This article has opened the applicability of "the living law in the community". In other words, a person can be convicted based on the laws that live in the community, even though the law does not explicitly determine that the act is a criminal act. Then in Article 2 paragraph (2) of the Draft Criminal Code, it is also stipulated that "the validity of the law that lives in the community as referred to in paragraph (1) is in accordance with the values contained in Pancasila, human rights, and general legal principles recognized by the community of nations". This paragraph intends to determine the limitations of the "law that lives in the community". However, the meaning of "law that lives in the community" still has a very broad scope, including customary law, habits, and local law or religious law, such as: Islamic sharia law in Aceh (Hairi et all, 2016).

Legal System

The legal system in countries around the world distinguishes two legal systems, first, civil law (Continental Europe Legal System) which is dominated by statutory law, second, common law (Anglo-American Legal System) which is dominated by unwritten law and previous court decisions (precedent). The legal system according to R. Subekti is an orderly arrangement or order, a whole consisting of parts related to one another, arranged according to a plan or pattern, the result of a thought to achieve a goal. The legal system according to Sudikno Mertokusumo is a unit consisting of elements that have interactions with each other and work together to achieve goals (Syahrani, 1999).

RESEARCH METHODS

Type of Research

This research is normative research, which is research focused on examining the application of rules or norms in positive law (Ibrahim, 2006). The reason researchers use normative legal research is to produce new arguments, theories or concepts as practitioners in solving the problems at hand. The object of normative legal research always takes issues from the law as a system of norms used to provide a "justification" perspective on a legal event. So that normative legal research makes the norm system the center of its study. The specification of this research is descriptive analysis, namely describing the findings of the research object related to legislation.

Data Collection Technique

The data collection technique used in this research is a literature study where the research technique of collecting written data and reading sources, for example through searching the

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library, including applicable legal regulations and books related to this research (Zed, 2004). Data Collection Techniques Legal materials are also collected through inventory procedures and identification of laws and regulations, court decisions as well as classification and systematization of legal materials according to research problems. In addition, this research also refers to materials or articles obtained through internet sites.

Data Analysis

Activities carried out in the analysis of normative legal research data by means of data obtained are analyzed descriptively qualitatively, namely analysis of data that cannot be calculated. Legal materials obtained are then discussed, examined and grouped into certain parts to be processed into information data. The results of the analysis of legal materials will be interpreted using the interpretation method (a) systematic (b) grammatical and (c) teleology.

DISCUSSION

The Concept of a Legal System

Modern jurists have paid increasing attention to the general concept and minimum requirements of a legal system as distinct from individual legal norms. A legal system underlies individual systems determined by a common sense rationale that is meant to constitute an integrated body of rules. Many individual legal norms may not rise to a legal system unless they are linked to each other in an integrated structure.

A similar conception underlies H.A.L. Hart's reasoning that reason differs between primitive and legal systems clearly through the distinction between primary rules of obligation and secondary rules of recognition. Hart's primary rules of obligation conform very rigidly to what is commonly described as rules of custom. Such rules which generally have to do with restrictions on the free use of force, and other basic forms of existence are sufficient for primitive communities, but insufficient for some developing societies because they are uncertain, static and inefficient. Hart's "second rule of recognition" is in brief an explanation for the main aspect of a modern institutionalized legal system, which develops the movement for elaboration by legal rules, for changes in rules and for courts. It is a concept of stratified legal rules that forms Kelsen's model of legal analysis, and in particular his "stufentheorie". This analysis reflects the nature of a legal system where there is a relationship of understanding between constitution-makers, law-makers, governments, prosecutors/judges and private legal subjects. The structural analysis of a legal system is of course more complicated than that of a primitive legal order. It means the rule of order norms that purport to govern a community through the use of posited authority, whether suppressive or liberal, socialist or capitalist in character. The structural requirements of a legal system must be accepted by positive school analysis as much as by natural law philosophy advocates. It is only a consideration related to the obvious concept of justice. Ethics and Morality. That we can explain the relationship of the rule of law to the values of life.

Development of Legal Pluralism

The concept of legal pluralism is generally contrasted with the ideology of legal centralism. The

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ideology of legal centralism is defined as an ideology that requires the enforcement of state law as the only law for all citizens, by ignoring the existence of other legal systems, such as religious law, customary law, and also all forms of local regulatory mechanisms that empirically live and develop in community life. In general, the conception of legal pluralism requires a diversity approach in law due to the context of community plurality in the form of ethnicity, culture, race, religion, class, and gender. In its development, legal pluralism is understood as an interaction between various state legal systems, customs, religions and other customs that are considered as law. The conception of legal pluralism emphasizes that society has its own way of law that is in accordance with their sense of justice and needs in regulating their social relations.

Pancasila as the Source of All Sources of Law in Indonesia

1. Pancasila as a Basic Norm in the Legal System

The effort to realize Pancasila as a source of value is to make the basic values a source for the preparation of legal norms in Indonesia. The operationalization of the basic value of Pancasila is the use of Pancasila as a basic norm for the preparation of legal norms in Indonesia. The Indonesian state has a national law which is a unified legal system. The Indonesian legal system is sourced and based on Pancasila as the basic norm of the state. Pancasila serves as a grundnorm (basic norm) or staatfundamentalnorm (state fundamental norm) in the level of legal norms in Indonesia. The values of Pancasila are further elaborated in various existing laws and regulations. Laws, decrees, decisions, government policies, development programs, and other regulations are essentially instrumental values as an elaboration of the basic values of Pancasila (Kurnia, 2009).

Another effort in realizing Pancasila as a source of value is to make the basic value of Pancasila as a source of ethical norm formation (moral norms) in the life of society, nation, and state. The values of Pancasila are moral values. Therefore, the value of Pancasila can also be realized in moral (ethical) norms. These ethical norms can then be used as guidelines or references in behaving and acting in the life of the nation and state. The Indonesian nation has now succeeded in formulating ethical norms as guidelines for behavior. These ethical norms are sourced from Pancasila as the nation's cultural values. The formulation of ethical norms is contained in MPR Decree No. VI/MPR/2001 on the Ethics of the Life of the Nation, State and Society. MPR Decree No. VI/MPR/2001 on the ethics of the life of the nation, state, and society is an elaboration of Pancasila values as guidelines in thinking, behaving, and acting which is a reflection of religious and cultural values that have taken root in the life of society (Mulyanto, 2009).

2. Implementation of Pancasila as a Paradigm in Various Fields

The implementation of Pancasila as the basis of the state gives the understanding that the Indonesian state is a Pancasila state. It means that the state must be subject to it, defend and implement it in all laws. With the harmonization of law, it is expected that there will be legal certainty, legal order, law enforcement and legal protection which is based on justice and truth so that scientifically and in depth so that it can give birth to a theory of justice based on Pancasila, namely the theory of justice and dignity. Dignified justice is justice that humanizes humans, which means that a justice that treats and upholds human values according to the nature

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and purpose of life. Thus, justice with dignity places humans as noble and civilized creatures of God as the second principle of Pancasila, namely Fair and Civilized Humanity, which has the value of recognizing human dignity with all its rights and obligations and getting fair treatment towards humans, towards themselves, the surrounding nature and towards God.

The above TAP MPR regulation further clarifies the meaning of the term source of law in the legal system in Indonesia that the source of law (the place to find and explore the law) is written and unwritten sources. In addition, it makes Pancasila the main reference for making all kinds of laws and regulations. However, the term Pancasila as the source of all sources of law is no longer found. This does not interfere with the existence of Pancasila as a basic norm that induces all norms but certainly reduces the supremacy and binding force of Pancasila in the legal order. It is said so, because the values of Pancasila as a way of life, consciousness, legal ideals and moral ideals no longer get juridical legitimacy. Especially, the modern legal system has been heavily influenced by the legal positivism school of thought which only recognizes written regulations. For this reason, it is a mistake not to explicitly explain Pancasila as the source of all sources of law. Interestingly, the supremacy of Pancasila in the legal system is again found in Law No. 10/2004 on the Formation of Legislation. Article 2 of this law states "Pancasila is the source of all sources of state law". The law was later replaced by Law No. 12/2011 which regulates similar matters. Article 2 of this Law still emphasizes the same thing as in Law NO. 10 Year 2004 that Pancasila is the source of all sources of state law. Thus, the existence of Pancasila has again become the supreme norm in the Indonesian legal system so that Pancasila as a way of life, awareness and ideals of law and moral ideals of the nation is legitimized juridical.

Pancasila as a legal system in Indonesia

Pancasila in the legal system, the expectation of realistic and concrete in the legal order as well as in the practice of legal life requires the existence of Pancasila in the law itself which is the source of legal order or commonly known as the source of all sources of law. Regarding the position of Pancasila in the law, it has been confirmed by the DPR-GR memorandum which was then given a juridical basis through MPR Decree No. XX/MPRS/1966, MPR Decree No. V/MPR/1973, MPR Decree No. IX/MPR/1978. Pancasila in the legal system is certainly not a thought born from resistance to legal pluralism or the flow of legal thought adopted in the Indonesian legal system. However, as a construction of legal thinking that tries to provide the breadth of the meaning of the importance of Pancasila in law Pancasila in the legal system is a necessity as long as law makers, justice stakeholders and the community as legal subjects have knowledge, awareness and obedience to the law based on Pancasila.

Pancasila, as in its existence as a way of life and identity of the nation and state of Indonesia naturally requires all matters concerning the interests of the nation and state of Indonesia based on Pancasila. Therefore, in the legal system as well. In the legal system, Pancasila is the basis of the foundation so that any law that is applied must be subject to and practice Pancasila. Therefore, although Indonesian law in its system is pluralistic, Pancasila is still the basis for the validity of these legal systems. On the basis of the above, if there is a legal system that is considered contrary to Pancasila then it is not allowed to be applied. This has actually been confirmed in the position of Pancasila as the ideals of law and the source of all sources of law

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which is the highest level in the theory of the level of legal norms.

CONCLUSIONS AND SUGGESTIONS

Conclusion

The strengthening of legal pluralism, namely the application of several legal systems at once such as Islamic law, customary law, civil law and common law, requires reform of the legal system in Indonesia, which is one way that the quality of law in Indonesia can be immediately improved. The inconsistency of judges in deciding in court poses a major problem in the Indonesian legal system. Therefore, a truly standardized legal system is needed in Indonesia. Actually, Indonesia already has sources and guidelines in its journey as a state of law (rechtsstaat), namely Pancasila as the source of all sources of law because Pancasila and the values contained in it are the realities (material, formal, and functional) that exist in Indonesian society as stated in the MPR tap NO.XVIII / MPR / 1998.

Suggestion

As input from the author for the Indonesian legal system which has not fully implemented a standardized legal system in the judge's decision in court. Pancasila as the source of law of all sources of law must be truly implemented in the legal system in Indonesia for the sake of reflecting Indonesia as a state of law (rechtsstaat) and for the achievement of legal justice das sollen and das sein as stipulated in the supremacy of Pancasila in the legal system again found in Law No. 10 of 2004 concerning the Formation of Legislation.

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