

The role of the principle in the legal order in Indonesia

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ABSTRACT

In the formation of regulations in Indonesia, it cannot be separated from the name of the principle of law because it includes the fundamental in forming a regulation so that it does not conflict with existing regulations, or with terms that are in the law, namely truth coherence. The principle of law is an important element of a rule of law, it can even be said to be the 'heart' of the rule of law. The principle of law will remain and will give birth to further regulations. Ultimately, the principle of law has a dual function, namely as the foundation of a positive legal system and as a critical test stone to the prevailing positive legal system. How does the binding force of the validity of the legal principle and what if there is the principle of law that is contrary to the principle of law. The research method used in this study is normative juridical, with two approaches namely; *statute approach and conceptual approach*, as for the formulation of the problem in this research is what should be done if the principle is contrary to the principle? The results of this study are that even though the principle contradicts the principle, the solution is to use the principle as a basis in a regulation that is made and see also the conflicting rules for what are the contradictions.

Keywords: legal principles, regulations, law.

1. INTRODUCTION

Humans as social beings must be interconnected with one another. In its journey, humans need a mechanism or system that can guarantee the fulfillment of the need for survival, such as the need for security and a sense of justice. Therefore during life, human beings are obedient to the rules / norms that apply in society or an area.

Basically, humans are naturally bound by rules such as norms of decency, norms of decency, and customary norms as rules in their lives. However, these norms are deemed lacking in guaranteeing the continuity of human life. Therefore, an order of regulations was formed which was more able to guarantee the creation of life order in the state and society called the law.

In essence, the main objective of law is to create an orderly society order to create order and balance. Every social relationship must not conflict with the provisions in the existing legal regulations and apply in society. The law functions as a regulator of the balance between human rights and obligations as social creatures, and to realize justice in living together. Jeremy Bentham asserted: [1]

"The law is then recognized as law, if it gives maximum benefit to as many people as possible."

From this principle, it can be concluded that the law must benefit the public regardless of social status anyone. Because of the importance of the legal position in the social fabric, legal formation cannot be separated from the name of the principle of law, because the principle of law

is the main foundation in the formation of the law also called the starting point in the formation and interpretation of the law.

In the formation of a regulation, it must be based on legal principles so that one regulation and the other regulations are not contradictory or arguably coherent given the truth in the law, namely the truth that is coherent for the creation of legal harmony. Thus the principle of law is a principle that is considered basic or fundamental in law. Therefore, the principle of law is at the heart of the rule of law. It is said so because the principle of law is the broadest foundation for the birth of a rule of law. Based on the background that has been explained then the problem formulation can be taken as what efforts are made if the principle is contrary to the principle and when it wants to form a norm or rule why the principle of law is necessary.

2. Research Methods

research used in this paper is normative legal research, this research is focused on the legal norms in the legislation, which relates to the problems studied as primary legal material. Because this research refers to statutory regulations, this research uses a statute approach, in addition this study also uses a conceptual approach (conceptual approach), which is taken from secondary legal material [2].

3. Results and Discussion of the Definition of the Principle of Law

In terminology, the term "principle" has two meanings, namely the first is basic or fundamental. And the second is a truth that is the basis or foundation of thought or opinion. Meanwhile, the legal dictionary provides the meaning of the principle as a mind set broadly and underlies the existence of a legal norm.

So that the principle of law can also be understood as the general basis contained in the rule of law and the general basis is something that contains ethical values. The principle of law is not a concrete legal norm because the principle of law is the soul of the legal norm. Legal norms are a concrete translation of the principle of law. It is said that the principle of law is the soul of legal norms or legal regulations because it is the basis for the birth of legal regulations.

The legal principle definition according to Paul Scholten [3] is as follows; the basic thoughts, which are contained within and behind the respective legal system, are formulated in the statutory regulations and judges' decisions, with regard to individual provisions and decisions, they can be seen as the capitals.

The principle of law in general can be classified into two, namely:

1. The principle of general law, is the principle relating to the field of law and applies to all areas of law, such as the principle of equality before the law, the principle of *lex posterior derogate legi priori*, the principle that what is his birth seemed right, for the time being it must be considered thus until (otherwise) decided by the court. According to P. Scholten there are 5 general legal principles [4], namely:

- A. Personality principle
- B. The principle of partnership
- C. The principle of equality
- D. The principle of authority, and
- E. The principle of separation between good and bad

2. The principle of special law, is the principle that function in narrower fields such as in criminal law, civil law etc.

The principle of law is a very important element in the formation of legal regulations. Therefore, the author will elaborate a little discussion relating to this problem in the hope that it can bring our understanding of the principles of law closer.

The principle of law is the basic rules and principles of law that are abstract and generally form the basis for concrete regulations and the implementation of law. In English, the word "principle" is formatted as "principle", concrete regulations such as the law must not contradict the principles of law, as well as in judges' decisions, the implementation of the law, basic law, the basis of the basis of thinking or opinion and the legal system which was emphasized by Dragan Milovanovic: [5]

"Systematization of law takes place continuously into a collection of relevant laws, which are coordinated by several principles of justification."

Several definitions of legal principle opinions put forward by several experts are: "

1 Bellefroid, argues that the principle of law is a basic norm that is elaborated from positive law and which is not considered by legal science to come from more general rules.

2. Van Scholten, argues that the principle of law is a tendency required by our morality view of the law and is a general trait with all its limitations as a common trait, but which must not necessarily have to exist.

3. Van Eikema Hommes, believes that the principle of law is not concrete legal norms, but it is as a basis for general thought or instructions for applicable law.

4. Van der Velden, argues the principle of law is a type of decision used as a benchmark for assessing situations or used as guidelines for behavior. "

From the above understanding, it can be concluded that the principle of law is not a concrete law, but is a basic thought that general and abstract, or constitute the background of

concrete regulations contained in and behind every legal system that is embodied in statutory regulations and judges' decisions which are positive law and can be found by searching for general characteristics in the concrete regulations. Or more concisely, the principle of law is the background of the formation of a concrete law. According to Stammler, it must be distinguished between "the concept of law" and the idea of law which explains that the idea of law is the realization of justice with the following understanding: [6]

- a. "All positive law is an effort towards fair law;
- b. Natural law seeks to make a rational method that can be used to determine a relative truth of law in each situation;
- c. The method is expected to be a guide if the law fails the test and brings it closer to its goal;
- d. Law is such a structure, we must abstract these goals from real social life;
- e. With the help of logical analysis, we will find certain legal legal principles which are absolutely valid, which will guide us safely, in providing an assessment of which goals are worthy of recognition by law and how they relate each other legally (jurally related). "

Often we hear the legal principle that reads *Ius Curia Novit* " judges must not refuse a case ", the principle also contradicts the principle" *Nemo Judex Incausa Sua*"which says the judge must reject a case involving himself. The principles above are very contradictory, one says that the judge cannot reject the case, the other says that the judge must reject the case involving him, but we must remember that the principle is abstract, not concrete. But in practice, the judge rejects a case in the State Administrative Court (PTUN) case, but in this case the principle is contradictory. But because there are limits on the absolute authority or competence of the court, the priority is the absolute competency of the court.

Often reaping the notion that principles and norms are a unity that is no different, but that understanding is not entirely true because in the legal layer that is the basis for the birth of a rule is a value. Like virtue values that grow in society. Then the value develops into a principle, for example the principle of everyone being prohibited from enjoying goods that are not his right. Then the principle develops again into legal norms. For example, from the principle above developed into a norm prohibited from stealing. From this legal norm that underlies the birth of a written rule contained in article 362 of the Criminal Code which regulates theft.

Another example is the principle of *equality before the law* or all people are equal before the law. This principle implies anti-discrimination in law enforcement. Indicates that the law is indiscriminate in combating crime for the sake of justice. This principle is contained in every regulation in Indonesia. We can see that each article is preceded by the phrase "*whoever ...*" which

indicates that the article applies to everyone without exception if you see from the legal concept which means it can be directed to the recht person (individual) or nature person (legal entity), which means who can only both the State and its citizens. There is a legal adage which reads "*fiat justitia ruat caelum*" which means justice must continue to be upheld even though the sky will collapse and "*fiat justitia et pereat mundus*" which means law must be upheld even though the world will be destroyed.

The need for legal principles to form a norm is because the principle is fundamental or basic. That is the background of the formation of a regulation. The legal principle is abstract, the regulation is a concrete form of the legal principle, but it also needs to be remembered that the name of the principle is inseparable from the norm because the norm is a concept in the regulation. For example, the norm is prohibited from killing or stealing. And the value that is in a society that stealing or killing is not allowed to be done for the achievement of the rights of every person, from this new rule is emerging.

More easily it can be concluded that some fundamental differences between principles and norms are as follows:

1. The principle is a general and abstract rationale, while the norm is a real rule;
2. The principle is an idea or concept, while the norm is the translation of the idea;
3. The principle of law has no sanctions while the norm has sanctions. Of course the two are different, because the principle of law is the background of the existence of a concrete law, while the norm is a concrete law itself. Or it could also be said that the principle is the origin of the existence of a norm.

B. Function of Legal Principle

In legal science, the function of legal principle is divided into two functions, namely:

1. Function in law, basing its existence on the formulation by lawmakers and judges (this is a function that is legalized) and has a normative influence and bind the parties.
2. Functions in jurisprudence, only regulating and exploitative (explain). The aim is to give endeavor, not normative in nature and not included in positive law. [7]

4. CONCLUSION

In terminology, what is meant by principle has two meanings, namely the first is basic, or fundamental. And the second is a truth that is the basis or foundation of thought or opinion.

The principle of law in general can be classified into two, namely:

The principle of general law, is the principle relating to the field of law and applies to all areas of law, such as the principle of equality before the law, the principle of *lex posterior*

derogate legi priori, the principle that what is his birth seemed right, for the time being it must be considered thus until (otherwise) decided by the court.

Specific legal principle, is the principle that functions in a narrower field such as in the field of criminal law, civil law, etc.

The author can conclude when there are principles that contradict the principles as above, then the judicial absolute competency must take precedence, because it looks at a form of rule that applies in every country. If we see the strength of the principle of law in the validity of law in Indonesia is very strong because this has become the basis in the formation of law in Indonesia. A regulation can be said to be good if it does not cause an excessive reaction from the citizens and does not do a mechanism *judicial review* to the Supreme Court (MA), and or to the Constitutional Court (MK).

2. Suggestions

If you want to make regulations must be in accordance with the principle, but if there are principles that are less precise, then you should look at the local conditions because each region has different conditions and sociological factors of the community. As for if there is already a concrete form of a principle that is a regulation if it conflicts, then the way to overcome it is also with the principle, such as if there are laws that conflict with laws or local regulations that contradict regional regulations, then the solution uses the principle of preference which is the provision which must take precedence.

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