

Disharmonization between Constitutional Court and Supreme Court Regarding Illicit Material on the Corruption Reviewed Concept of Pancasila Justice

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Abstract- The writing of this article is to discuss and analyze the disharmony problem between the decision of the Constitutional Court and the Supreme Court of the Republic of Indonesia in the scope of applying illicit material of corruption in Indonesia. Writing methodology use the doctrinal juridical approach. The constitutional court of the Republic of Indonesia stated that the explanation of Article 2 paragraph 1 illicit material in a positive function does not apply, but by the Supreme Court was re-applied based on the doctrine of La doctrine du Sen-Clair on the basis of the Indonesian judicial power law. of course in the disharmony, a regulation of judicial power and its limitations is needed in order to achieve the Pancasila justice which is the Ideology of the Unitary State of Indonesia.

Keywords- *Disharmonization, Illicit Material, Pancasila*

I. INTRODUCTION

The Constitutional Court was established due to the mandate of the 1945 Constitution of Republic of Indonesia amendment as the judicial power institution as stipulated in Article 24 paragraph 2 which reads as follows: "The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of public courts, religious affairs courts, military tribunals, and state administrative courts, and by a Constitutional Court". Due to the different function between the two judicial powers, they were being separated even though their essence was equal as a judicial power institution, wherein the Supreme Court of the Republic of Indonesia was more of a court of justice, while the Constitutional Court was more concerned with court of law [1].

Since the establishment of the courts, there have been different notions between the courts. Whereas, the model of submission of judicial review process at the two courts turned out to be vulnerable which later raised legal issues, even potentially causing damage to the legal pillars [2]. This can be seen clearly in cases such as when the Constitutional Court through the judicial review decision of the Constitutional Court Number 003/PPU-IV/2006 dated 25 July 2006, which stated that Article 2 paragraph (1) of the 2001 Corruption Law had no legal binding and even so the Court still adhered the illicit material in a positive function. It proved by the panel of judges of the Supreme Court who continued to use illicit material in a positive function by arguing as follows, "That the Indonesian Constitutional Court decision Number

003/PPU-IV/2006, stating the explanation of Article 2 paragraph (1) of the Corruption Law stated that it does not have binding legal force therefore the element of the law becomes unclear"[3]. Thus, based on the doctrine of Sen-Clair or La doctrine du Sen-Clair, judges must make legal discoveries. It led to the dualism of the Indonesian Supreme Court's to the application of the illicit material both before and after the form and enforcement of The Law of The Republic of Indonesia Number 20 Year 2001 Concerning Amendment of Law Number 31 Year 1999 Concerning Eradication of The Crime of Corruption, the Supreme Court of the Republic of Indonesia itself has applied 2 illicit material in both positive and negative functions. This article analyze whether Judicial Review of the decision of the Constitutional Court or the decision of the Supreme Court based on the doctrine of Sen-Clair or La doctrine du Sen-Clair as the basis for reusing illicit material in positive function based on the concept of Justice and State based on Pancasila?

II. RESEARCH METHOD

This study uses normative methods, which are explorative-analytical. The data used is secondary data, in the form of primary legal material and secondary legal material [4]. Conducting a scientific study clearly must use a method. The method means finding information in a planned and systematic manner. The steps taken must be clear and there are restrictions to avoid broad interpretation. To examine the existing problems, this study uses a doctrinal juridical approach; an approach that views law as a doctrine or normative set of rules. This approach is carried out through the efforts of literature review or legal research. In this case, the authors analyzes the comparison of laws, legal principles, positive legal norms, and opinions of scholars or legal experts. The data used in this study are secondary data in the form of documents, books, scientific works and papers, journal magazines and others. After the secondary data is collected, it is then analyzed qualitatively to analyze and answer the problem.

III. FINDINGS AND DISCUSSION

The first part of the 1945 Constitution fourth part (paragraph IV) contains the fundamentals basis of the state, such as: the objectives of the state, the provisions of the constitution in the form of the state and the basis of

the state philosophy of Pancasila. Therefore, paragraph IV has a "causal organic" relationship with the Articles of the 1945 Constitution, therefore it is closely related to the contents of the Constitution Articles [5]. Furthermore, Kaelan stated "in the Indonesia legislation system the whole system of legal norms is a Hierarchical system. Pancasila as the basis of Indonesia's State philosophy in the Indonesian legal order is a source because it is positioned as the basic norm of the state (*staatsfundamentalnorm*), consecutively *verfassungsnorm* or 1945 Constitution, *grundgesetznorm* or People's Consultative Assembly Provisions, and *gezetznorm* or Law [6].

The position of Pancasila in the hierarchical structure of the legal system in Indonesia, reminded to Hans Kelsen's legal theory of "*Grundnorm*" which discusses the position and role of the *Grundnorm* occupies basic norms as the "initial premise" which assumed to be the basis on which everything starts not derived from anywhere. Which Kelsen stated the validity and taken for granted. It is valid because it's presupposed to be valid [7]. Its formation and Pancasila are not produced by the legislature. This was also stated by Kelsen, who stated "the basic norm is not created by procedure by a law creating organ by legal act. It is presupposed to be valid because without this presupposition no human act could be interpreted as a legal, especially as norm creating, act" [8]. The authors will discuss whether Judicial Review of the Indonesian Constitutional Court Number 003/PPU-IV/2006 and the Supreme Court's Decision through its legal discovery based on the doctrine of Sen-Clair or La doctrine du Sen-Clair as a basis for reusing the illicit material in a positive function is in accordance with the Pancasila Philosophy as the source of all sources of law in Indonesia or in other words reflect decisions which are in accordance with the justice values in Indonesia stated in Indonesian law?

TABLE I COMPARATIVE RATIO DECIDENDI THE ILLICIT MATERIAL BETWEEN THE CONSTITUTIONAL COURT AND THE SUPREME COURT IN REPUBLIC INDONESIA.

Ratio Decidendi Judicial Review of the Constitutional Court of the Republic of Indonesia Number 003 / PPU-IV / 2006	Argument the Supreme Court Republic Indonesia in Ratio Decidendi to Reapply the Illicit Material in a Positive Function
1) Considering that the Elucidation of the Corruption Eradication Law Article 2 paragraph 1 basically covers the illicit formal and material so that even if it is not regulated in the law, if it is deemed disgraceful according to a sense of justice or the norms of social life in society, then the act can be convicted	1) Whereas "The aim of expanding the element of "the illicit", including both formal and material, is to facilitate its proof in court, so that an act which is seen by the public as against the law materially or is despicable in its actions, the offender can be convicted of committing a criminal act of corruption
2) Considering the said acts which are not written measurements other than the law. so, what is appropriate and that meets the	2) Whereas legal politics to eradicate corruption in the Decision of the Supreme Court of the Republic of Indonesia dated December

requirements of morality and a sense of justice that is recognized in a plural society can lead to the differentiation and disparity in the size of the illicit in one area with another	29, 1983 Number 275 K / Pid / 1983, became jurisprudence and doctrine is a source of formal law in addition to the Law used as a guideline for its application in cases of criminal acts of corruption to reflect values the value of law and justice that lives in society
3) Considering Article 28 D paragraph (1) of the constitution recognizes and protects the constitutional rights of citizens to obtain guarantees, definite legal protection, in the field of criminal law translated as the principle of legality in Article 1 paragraph (1) of the Criminal Code, that the principle of legal certainty with law written in advance; Such matter demands the principle of nullum crimen sine lege stricta. Thus requiring legislators to formulate as detailed as a condition to guarantee legal certainty (<i>bestimmtheitsgebot</i>).	3) Verdict of the Constitutional Court No. 003 / PPU-IV / 2006, states that Article 2 paragraph 1 of the Corruption Eradication Law is declared to have no legal force causing unclear elements of the illicit, the judge makes a legal discovery based on the <i>La Doctrine do Sen Clair</i> to reformulate the element

Legal considerations of the Constitutional Court stating that the teachings of lawlessness in the positive functions contained in the Corruption Law in Indonesia are inaccurate and not in accordance with the value of Pancasila as Indonesian philosophy, because the material test used in the judicial review is wrong because it still using principle of the legality of the Criminal Code inherited from the Dutch colonial which is even more connected as if in accordance with Article 28 D paragraph (1) of the 1945 Constitution. Even though Article 28 D paragraph (1) of 1945 Constitution is a concretization from the second point of Pancasila. In addition, by ignoring the sociological, philosophical aspects of the Indonesian nation, the judicial review of the Constitutional Court Number 003/PPU-IV/2006 directly as if it did not carry out judicial powers, such as "Judges must explore, follow and understand legal values and a sense of justice that lives in society". Thus, it does not reflect substantive justice in accordance with Pancasila due to positivistic legalistic thinking that is accustomed to limiting itself or being shackled by the principle of legality and derivatives in the form of *lex scripta* oriented to mere legal certainty by ignoring the values of justice in the Indonesian Society. Unlike the case with the material test used by the Supreme Court which retains the doctrine of the illicit material in a positive function, which is based on the First, the objective of act "against the law" expansion, which is not only in a formal sense, but includes material acts of law, is to facilitate verification at the trial, so that an act deemed by the community as materially against the law or violates propriety to its actions, can convicted person commit a corruption, even though his actions did not formally violate the law by using the doctrine of Sen-Clair or La doctrine du Sen-Clair. Secondly, corruption is illicit material, because the

act is an inappropriate, despicable and stabbing act to public, using benchmarks of general legal principles according to propriety in society. Based on this if the analysis, the consideration of the decision of the Supreme Court which continues to use the doctrine of the illicit material has considered the philosophical, sociological, and juridical aspects of Indonesianness. Therefore, it has been reflected the rule based on Indonesia, both socio-philosophical, socio-political, socio-cultural and socio-historic.

Basically, the determination of the improper nature of conduct in the doctrine of the illicit material in the positive and negative functions is very striking. As we know, the size of blameworthiness can be very diverse. First, an action is declared despicable if it is natural that the deed is indeed despicable. Secondly, an action is declared despicable if the action is against the prohibition norms stipulated in the laws and regulations. Third, an action is declared disgraceful if according to custom, such actions are addressed by the community. Such notion positioned its benchmark on social aspects only, as long as local customs still recognize it as an act which violates propriety. Fourth, an action is considered despicable if the action is concretely proven not to provide benefits. This notion view departs from the theological theory of ethics, good or bad judgments are apothecary because it has to wait in a while to accommodate the reactions of people who are directly affected by his actions [9]. of the four criteria above, if the correlation with terminology in the realm of criminal law such as "malum in se" with "malum prohibitum" can be attached to each criterion. Reviewing from the weight of crime, the actions categorized as malum in se have a high degree of reproach. Because in general, formal offenses contained in the provisions of criminal law are in this classification. Meanwhile the actions categorized as malum pribihitum are sometimes formulated as formal offenses, but can also be material offenses. The element illicit material in positive functions include detrimental finances and economy state, the offender enjoy profits, Illicit enrichment other parties / themselves. The element illicit material in negative function includes the public interest served, defendant not get profits, there is no detrimental finances and economy state. Thus, how is the reality of the application of the doctrine of illicit material both in positive functions and in negative functions in examining and adjudicating cases of corruption in Indonesia? To answer this, the authors present the data table as follows:

TABLE II. THE APPLICATION OF THE DOCTRINE OF ILLICIT MATERIAL BOTH IN POSITIVE FUNCTIONS AND IN NEGATIVE FUNCTIONS IN EXAMINING AND ADJUDICATING CASES OF CORRUPTION IN INDONESIA

Corruption Case	Doctrine of Illicit Material used The Supreme Court
Sisminbakum	<ul style="list-style-type: none"> District Court Level: Positive Illicit Material Doctrine High Court and Supreme Court Level Negative Illicit Material

	Doctrine
Procurement of tents	<ul style="list-style-type: none"> District Court Level: Negative Illicit Material Doctrine High Court and Supreme Court Level Poitive Illicit Material Doctrine
Corruption of the chairman of the West Pasaman Regency Regional Representative Council	<ul style="list-style-type: none"> Positive Illicit Material Doctrine
The act of renting Boeing 737-400 and Boeing 737-500 aircraft which caused losses to state finances.	<ul style="list-style-type: none"> District Court and Corruption Court Negative Illicit Material Doctrine Supreme Court Positive Illicit Material Doctrine

Based on the table presented by the author, it can be stated that both the Pre and Post Decisions of the Constitutional Court of the Republic of Indonesia stating the doctrine of illicit material in Positive Functions were declared to have no legal force and were not binding in the implementation of examining and adjudicating in the Supreme Court and there is a disparity between one another. There is a conflict between legal certainty and justice and there is also a gap between law and morality. Gustav Radbruch said that a good law is when the law contains the value of justice, legal certainty and usability. According to Radbruch, if there is tension between these basic values, we must use the priority principle or principle where the first priority always falls on the value of justice, and then the value of usability or benefit and finally legal certainty. This shows that Radbruch places the value of justice as more important than the value of benefits and the value of legal certainty, while places the value of legal certainty under the value of legal expediency. There is a conflict between law and morality. This can be seen when the debate between LA Hart and Dworkin. Dworkin establishes the importance of moral principles in legal decisions. Moral principles are related to individual rights. The principle applies according to the weight or depends on the case. Moral principles have a legal position because of their status. Many of the moral principles (such as the assumption that people should not take advantage of the mistakes they have made) are aspects that are integrated in the law and are used by judges in making decisions in trials. Hart's theory is thus insufficient. Dworkin rejected moral and legal separation. For Dworkin the moral principles contained in the law are not an agreement of law enforcers only, but because these moral principles are true [10]. Later, Dworkin criticized Hart's thesis of separation because there would be a law that did not have moral justification. Even though the law intends that moral rights be maintained. Therefore, it is impossible to separate law and morality. Whereas, according to Hart, Dworkin's argument contained errors. Legal rights and obligations originate from legal powers with their coercive powers serve to protect individual freedoms and to prevent people from committing violence against others. Whether the law is fair or unfair, morally good or bad, rights and obligations need to be considered as a focal point in the operation of law that is very important for humans and free from moral judgment. It is

not true if there is a statement that legal rights and obligations have meaning in the real world only if their existence is supported by moral grounds [11]. With the debate about law and morality, it is certainly very subjective in nature for law enforcement in Indonesia. Considering that in Indonesia the definition of the law adopted by the law enforcers is certainly inseparable from when he was pursuing his legal education. Is it positivistic or vice versa. So it is not surprising that there are disparities and inconsistencies in the application of the illicit material in Indonesia. As stated by Lon Fuller, "I have insisted that law be viewed as purposeful enterprise, dependent for its success on the energy, insight, intelligence and consciousness of those who conduct it"[12].

Thus, in the future efforts need to be made as follows, *First* the Constitutional Court in examining a Law which is fathomed to contradict the 1945 Constitution must use the juridical Meta of the constitution, by which is Pancasila, as based on the general acceptance of the same philosophy of government of the constitution, thus Pancasila is the basis of constitutional norms and must become a guideline and orientation in interpreting constitutional norms [13]. In order to be reflected and the creation of justice based on Pancasila as described earlier. Based on this, there is a relationship between law and ideology, called reciprocity. Law is not only an ideology supported by institutionalized social forces, but also institutionalized social forces articulated in and reinforced by ideology, in other words, the ideology of determining legal products and legal products will strengthen the prevailing ideology [14].

Second, the need for Indonesian legal reform especially by replacing or eliminating the Dutch colonial laws containing and in accordance with the Pancasila law in building a legal system, having three (axiological) values, by which are: (1) Basic Value of Pancasila are deity, humanity, unity, people's values, values of justice; (2) Instrumental Values; the general implementation of basic values, especially in the form of legal norms which are further crystallized in laws and regulations; (3) The value of praxis, the actual value of being a material test is the value of reality. For example, public compliance with law or law enforcement [15].

Third, it is necessary to regulate the separation of judicial powers in Indonesia, between judicial powers within the Constitutional Court and the scope of the Supreme Court. In order to ensure that the decision of each court is not disharmony and in accordance with ideology to reflect Pancasila justice. The development and legal character in Indonesia in the future which has the philosophy of the Pancasila must also be collaborated with a holistic approach. This holistic approach proposed by Sudjito has scientific goals (including legal science) which should be in the form of disclosure of the underlying unity of creation. This is where the need for a variety of disciplines is understood, worked on, and held

holistically to provide an overview of nature and life as a whole. Law can be categorized as actual knowledge if all of its scientific activities can bring human orientation closer to God, pivot to God and are intended to lead to the pleasure of God, both theoretically and practically [16].

IV. CONCLUSION

The consideration of the judicial review of the Constitutional Court of the Republic of Indonesia Number 003/PPU-IV/2006 was carried out with an approach that was not in accordance with the juridical meta of 1945 Constitution, Pancasila. This is because the material test used still holds the positivistic legalistic principle of the Criminal Code legality which is a heritage of to interpret that there is a relationship between legal protection based on Article 28 D paragraph (1) of the 1945 Constitution with Article 1 paragraph (1) of Criminal Code. Legal considerations used by the Supreme Court while continuing to use the doctrine of illicit material in a positive function have reflected the values that live in a society based on Indonesia in socio-philosophical, socio-political, socio-cultural and socio-historic as implicitly stated in Pancasila. When judges explore, dig, follow, and understand the legal values that live in society as mandated by Pancasila as a juridical meta 1945 Constitution of the Republic of Indonesia, depart from religious values in the form of revelations from God the Creator (Allah SWT). In addition, Article 18 B paragraph (2) of the 1945 Constitution reflected that the state recognized and respected the existence of customary law communities and Article 24 paragraph (1) of the 1945 Constitution. The demand to separate Judicial Power of the Constitutional Court and the Judicial Power of the Supreme Court, which regulates the limits of whether or not the discovery of the doctrinal law of *La doctrine du Sen-Clair*, in order to avoid disharmony must be reset.

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