

Constitutionality of Norms Used by Judges in Criminal Jurisdictions in Indonesia

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ABSTRACT

Legal norms are not only the basis for judges in examining and adjudicating a case. However, the essence of every court decision, in casu of a criminal judgment, is a matter of legal certainty for defendants to safeguard so that it does not violate the principles of human rights and constitutional rights of the defendant or any citizen who is dealing with a criminal case that is protected based on the Constitution, which is the basis of all legal norms, be they abstract or concrete legal norms. In principle, in any democratic country based on a rule of law system, every court decision is concrete legal norms in casu of criminal case decisions. In a system of legal norms, which is hierarchical, a law has validity or legality as long as it is formed based on norms of a higher degree and does not conflict with higher provisions, which lead to the most basic norms, namely the Constitution as the supreme law of the land and the basis for all lower norms. Thus, every legal norm, including a court decision that is concrete in nature, must be guaranteed to be constitutional. The constitutionality of norms is crucial as they form the basis for the concretization of law by judges in examining, trying, and deciding criminal cases to ensure the constitutionality of verdicts in order to realize justice, and protect the human and constitutional rights and constitutional rights of defendants, avoiding any violation of the defendant's rights in the sentencing decision. This study aims to identify the constitutionality of court decisions in criminal cases in Indonesia and analyze legal considerations by judges (*ratio decidendi*) and their use of legal norms to decide cases of questionable constitutionality, as well as legal remedies applied when those norms are of questionable constitutionality. This research is normative legal research with the main types of approaches to be statute and case approach. Sources used are primary, secondary, and tertiary sources of legal materials. The legal materials that have been collected are classified to make it easier to identify and analyze them. This research method is combined with the method of examination of court decisions.

Keywords: *Constitutionality, Legal Considerations, Legal Norms.*

1. INTRODUCTION

Legal norms in the theoretical hierarchical system of legal norms elaborated by kelsen are not only legal norms in legislation. However, court decisions are also concrete legal norms. therefore, court decisions must not conflict with higher norms, especially with the basic norms, namely the constitution. In connection with this, the reality shows that cases in indonesia are related to the constitutionality of norms used by judges in criminal case decisions in indonesia, namely in decision no. 1114/pd.b/2006/jkt.pst) and the unconstitutionality that occurred in articles 134 and 136 bis of the criminal code as the basis for judges in deciding the case was stated by the constitutional court, which examined the constitution. Unconstitutional articles occur when the constitutional court declares these articles to be contrary to the 1945 constitution, and no longer has binding legal force, judicial review of the act on the grounds of constitutional

losses suffered by the applicant because he has been tried and even punished based on provisions whose constitutionality is doubtful. the author raises two issues as follows: how is the constitutionality of norms used by judges in deciding criminal cases? how is legal consideration by judges (*ratio decidendi*) in using norms to decide cases of constitutional doubt?

2. RESULT AND DISCUSSION

State law is the law established by the decision of the state power as a result of regulatory, stipulation, or court action. The legal norms set by the court in question are other concrete and individual legal norms, namely those in the form of 'vonnis' or court decisions that can be supervised or controlled by a higher-level court.

The formation of rules (laws) is the duty of legislators. However, according to Franken,^[1] the formation of laws by judges is considered a good thing

because judges formulate rules in such a way that through the formulation also establish facts which in this case are facts. the law of the results of the examination which is a particular case becomes relevant. Then the final decision will flow from it as a concrete way of resolving the dispute.

The theory "Reine Rechtslehre" or "The pure theory of law." Law, as a rule, is used as the object of legal science. It is recognized that law is influenced by political, sociological, philosophical factors, and so on, but what he wants is a "pure theory" of law. Every rule of law is an arrangement of rules (stufenbau). At the top of the "stufenbau," there is a "grundnorm" or fundamental rule resulting from juridical thinking. A system of legal rules is a hierarchical system of legal rules, namely: (1) The legal rules of the Constitution; (2) General law rules or abstracts in-laws or customary law; (3) Individual legal rules or court concrete legal rules. [2]

Hans Kelsen further explains: "In resolving a dispute between two parties or when convicting a defendant with a sentence, the court applies a general norm of statutory or customary law.

Nevertheless, at the same time, the courts gave birth to a particular norm that stipulates that certain sanctions must be applied to a particular individual. These specific norms relate to general norms, such as laws relating to the Constitution. So, the court's function, like the legislator, is to make and apply the law. The court's function is usually determined by general norms regarding the procedure and the content of the norms that must be made. In contrast, the legislators are usually determined by the Constitution only regarding procedures. But it is only a degree difference. [3]

Furthermore, Hans Kelsen argues that a court decision is an act of applying general norms, and at the same time, is the formation of special norms. Special norms are binding on some handled instances but can give birth to a general norm in similar cases that may have to be decided by the court in the future. As Hans Kelsen explains: Court decisions can also create a general norm. Court decisions can have binding force not only for some handled instances but also for similar cases that may have to be decided by the court. A court decision can have a jurisprudential character, that is, a decision binding on future decisions of all the same cases. However, a decision can have a jurisprudential character only if it is not an application of a general norm of pre-existing substantive law, only if the court acts as a regulator. [4] Thus, the description above shows that court decisions are concrete legal norms, apart from abstract legal norms that exist in statutory regulations. Therefore, like it or not, the court's decision must be constitutional. That is, it must not conflict with the Constitution.

A constitutional question is meant that a judge who is adjudicating a case asks the Constitutional Court about the constitutionality of a law which is the basis of the case he is examining. If someone is brought to court for

violating specific laws whose constitutionality is doubtful, before deciding on the case, the judge must first ask the opinion of the Constitutional Court, whether the law is constitutional or not. Based on the decision or answer of the Constitutional Court to constitutional questions, the judge can then decide on the case he is handling. [5]

3. CONCLUSION

The norms used by judges in deciding criminal cases are based on positive law that applies and remains based on the Constitution. A judge adjudicating a case asks the Constitutional Court about the constitutionality of a law used as the basis for the case he is examining.

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