



PANCASILA AS AN ONTOLOGICAL BASIS OF COHABITATION CRIMINALIZATION

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Abstract

Pancasila merupakan ideologi negara Indonesia yang menjadikan posisinya menjadi sumber dari segala sumber hukum di Indonesia. Pancasila merupakan sumber hukum materiil yaitu tempat ditemukannya dan diambilnya suatu nilai-nilai yang menjadi aturan hukum positif atau undang-undang. Dikriminalisasinya kohabitasi dalam KUHP 2023 merupakan pengejawantahan dari nilai-nilai Pancasila tersebut dan menjadi landasan ontologis dari pengaturan kohabitasi dalam KUHP 2023. Penelitian ini merupakan penelitian hukum dengan pendekatan pendekatan perundang-undangan (*statute approach*), dan pendekatan konseptual (*conceptual approach*)

Abstract

Pancasila is the ideology of the Indonesian state which makes its position the source of all sources of law in Indonesia. Pancasila is a source of material law, namely the place where values are found and adopted which become positive legal rules or laws. The criminalization of cohabitation in the 2023 Criminal Code is an embodiment of the values of Pancasila and is the ontological basis for the regulation of cohabitation in the 2023 Criminal Code. This research is legal research using a statutory approach and a conceptual approach.

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INTRODUCTION

Pancasila as the ideology or foundation of the Indonesian state is stated in the Preamble to the 1945 Constitution of the Republic of Indonesia¹ namely in the fourth paragraph. In the legal order or in law, the position of Pancasila is emphasized as the source of legal order or what is known as the source of all sources of law through MPR Decree Number XX/MPRS/1966 in conjunction with MPR Decree Number V/MPR/1973 in conjunction with MPR Decree Number IX/MPR/1978 . Therefore, Pancasila is the main source in the legal order so that even though there are so many legal sources, these legal sources must be in accordance with Pancasila.

In the New Order regime, Pancasila became a static dogma because it was a cult by applying Pancasila and the 1945 Constitution (UUD 1945) in a pure and consistent manner, Pancasila was not only limited to being the source of all sources of law in the national legal order but also as providing valid legitimacy for authoritarian power. the new order regime. In the reform regime, the existence of Pancasila as the source of all sources of law still has a legal home through TAP MPR Number III/MPR/2000 concerning Legal Sources and the Sequence of Legislative Regulations. However, in this TAP MPR it is no longer explicitly stated about Pancasila as the source of all sources of law in the national legal system. The enactment of Law Number 12 of 2011 concerning the Formation of Legislative Regulations and its amendments, namely Law Number 15 of 2019, the first amendment and the second amendment to Law Number 13 of 2022, places the TAP MPR back under the 1945 Constitution in the hierarchy of statutory regulations. -invitation as stated in Article 7 paragraph (1) of Law no. 12 of 2011 which shows Pancasila as an important source of legal order to be given juridical legitimacy in order to fulfill the element of certainty in the legal system.

The existence of Pancasila as the source of all sources of law does not have an imperative element or binding power in the legal hierarchy..² Pancasila should always be the basic norm (grundnorm) or Staat fundamentalnorm (fundamental norm of the state) for every

¹ Henceforth, in writing this dissertation, the mention of the 1945 Constitution of the Republic of Indonesia refers to the results of changes in 1999, 2000, 2001 and 2002. Meanwhile, the mention of the 1945 Constitution refers to before the changes as a result of the ratification of the Preparatory Committee for Indonesian Independence on 18 August 1945

² Jawahir Thontowi, Pancasila in Legal Perspective; Views on the Threat of the Lost Generation, Yogyakarta: UII Press, 2016, p. 45.

legal regulation that is made .³ The waning view of Pancasila is partly due to the fact that the situation and life of the nation have changed both at the domestic, regional and global levels on the one hand, and the euphoria of reform as a result of the trauma of society regarding past abuses of power in the name of Pancasila on the other hand. In fact, nowadays it is almost impossible to hear about training courses in order to appreciate and practice Pancasila, nor are the 36 points of practicing the principles of Pancasila any longer taught. In fact, the founding figures of this country formulated Pancasila as an ideology that is timeless because it was born from the noble values of the nation and human conscience. Pancasila does not belong to an era or ornament of government power at a certain time, but Pancasila is the basis of the Indonesian state as long as Indonesia is still standing. Pancasila sebagai ideologi atau dasar negara seharusnya menjadi sumber dari segala sumber hukum di Indonesia termasuk dalam pembuatan undang-undang. Lahirnya Undang-Undang Nomor 1 Tahun 2023 tentang The Criminal Code (State Gazette of the Republic of Indonesia of 2023 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 6842) hereinafter written (KUHP 2023) which will come into force in January 2026 should also contain the soul or spirit of Pancasila as the source of all sources of law. . One of the acts that is declared to be contrary to the law and Pancasila values is the act of cohabitation. The word cohabitation related to this article is contained in the explanation of Article 412 that "the provisions regarding living together as husband and wife outside of marriage are known as cohabitation". In fact, the act of cohabitation is not in accordance with certain values of one of the points of Pancasila, namely developing an attitude of tolerance, but on the other hand it also violates other Pancasila values, namely where cohabitation is an act that violates the values of tolerance where cohabitation cannot be justified by society. because it is considered contrary to religious values.

RESEARCH METHODS

The research study uses 'doctrinal' specifications with a normative juridical type of research, namely the law is analyzed as a norm in carrying out actions which are implemented through positive law or applicable law, in uncovering theoretical and philosophical problems (Efendi et al., 2019). Collection techniques data and data analysis methods use secondary data analysis (data results obtained indirectly through library materials as a research source) with previous research, scientific books, online articles, papers

³ Regarding the position of Pancasila as a grundnorm or staatsfundamentalnorm, see Teguh Prasetyo in Law and Legal Systems Based on Pancasila, Yogyakarta: Media Perkasa, 2013, p. 69.

or legal research reports that are related to the research theme. The analytical method used is descriptive-qualitative with a philosophy of science perspective because it analyzes legal material sources in coherent and orderly sentences.

RESEARCH RESULTS AND DISCUSSION

Pancasila Philosophy as a Source of Criminal Law.

An ideology generally originates from a philosophical school, or ideology is the operationalization of a nation's philosophical system. Likewise, the Pancasila ideology is the operationalization of the philosophy of the Indonesian nation. The position of Pancasila as the ideology and basis of the state is like two sides of the same coin, each occupying its own position but both having a unified function in constitutional practice. Ideology as a framework of ideals, the basis of the state as a juridical framework for the implementation of a constitutional system for the survival of the nation and state. Pancasila memiliki dua kepentingan yaitu:

1. It is hoped that Pancasila will always be a guide and guide in living the daily lives of Indonesian people, whether in family, society or as a nation.
2. Pancasila is expected to be the basis of the state so that it is an obligation that in all state structures, whether legal, political, economic or social, society must be based on and aimed at Pancasila.

Pancasila is actually not the result of a new construction of Soekarno's thoughts but rather the reality of life of the Indonesian people and nation which has long been devout, civilized, familial, deliberative for consensus and just. Soekarno once emphasized that he was not the inventor of Pancasila but was only one of the explorers of Pancasila. At the same time Pancasila was also declared an ideology. Ideological truth is certainly not the same as philosophical truth, because ideological truth will accept the truth as it is. Ideological truth is believed to be true without questioning the nature of things, it is considered true because it is accepted as true.⁴

The position of Pancasila in national and state life is as the basis of the state, as the philosophy of the Indonesian nation and state, as state ideology and as a rechtsidee or legal ideal which is embodied in the existence of Pancasila as the source of all sources of law.

⁴ Kaelan, Pancasila Education, Yogyakarta: Paradigma Publishers, 2010, p. 117

Legal sources are essentially places where we can find and explore the law. As the source of all sources of law in Indonesia, Pancasila is placed as the ethical basis of law.

Zevenbergen divides two types of legal sources, namely material legal sources and formal legal sources. The source of material law is the place from which the legal material is taken. These material sources of law are factors that help form law, for example: social relations, political power relations, socio-economic situation, traditions (religious views, morality), international developments, geographical conditions. Formal legal sources are places or sources from which a regulation obtains legal force. This relates to the form or manner in which the regulations formally apply.⁵ Based on the division of two sources of law according to Zevenbergen, Pancasila is a source of material law because it is the place from which the law was taken and as a factor that helps form the law. This is because Pancasila contains main values which consist of:

Pancasila is the philosophical content of the Indonesian nation.

1. Pancasila as national legal identity.
2. Pancasila does not determine orders, prohibitions and sanctions but only determines the fundamental principles for the formation of law (meta-juris).⁶

Thus, Pancasila is the basic norm which is the main source which is the binder between all the different norms which form a norm order.⁷ According to Nawiasky, such norms are Staatfundamentalnorm or fundamental state norms (basic norms) which are the highest norms in a country and these norms are norms which are not formed by higher norms, but are pre-supposed or determined in advance by the people in the country and is a norm on which the legal norms below it depend. Nawiasky even emphasized that the content of the state's fundamental norms is the basis for the formation of a constitution or basic law.⁸

Among the ethical values contained in Pancasila are communal values in the form of strong togetherness which leads to a feeling of equality towards others. This concept of life is embraced by rural communities who feel the same fate, and all burdens must be shared among community members. These communal values are also tied to religious values, where

⁵ *Ibid.* p. 108

⁶ Dani Pinasang, "Pancasila Philosophy as a Basic Norm (Grundnorm) in the Context of Developing a National Legal System", UNSRAT Law Journal, Vol. XX, No. 3, April-June, 2012, p. 8

⁷ Hans Kelsen, General Theory of Law and State (translated from Hans Kelsen's book, General Theory of Law and State; New York: Russel and Russel, 1971), Bandung: Nusa Media, 2014, p.161

⁸ Maria Farida Indrati S., Legislative Science I (Types, Functions and Content), Yogyakarta: PT Kanisius Publisher, 2007, p. 46

each person feels that the actions he performs cannot be separated from the magical forces that influence him.

Pancasila as one of the ontological foundations for the criminalization of cohabitation.

Pancasila law means that the correct law is the law that contains the values of religiosity and togetherness values.⁹ These religious values and communal values do not override individual rights. Individual rights have their place in Pancasila law, individual rights remain respected and do not lose their place. If God is the main basis in forming Pancasila Law, then logically God becomes a role model for the Pancasila legal community. God accepts good deeds both individually and in groups (congregations). It is these Pancasila values that reject cohabitation.

Before cohabitation became popular as a term for living together between men and women without a legal marriage bond, in society it was better known as cohabitation, which in Dutch is known as *samen leven*.¹⁰ *Kumpul kebo* comes from Malay vocabulary, namely *koempoel* means gathering in Malay while *gebouw* means building or roof, so when put together it means gathering in one building or roof. However, as time goes by, Indonesian people call it *kebo* cohabitation because the word *gebouw* is interpreted as *kebo*.¹¹ Cohabitation is living together in one house between a man and a woman without a formal marriage bond.¹² Cohabitation is an act that is considered not to reflect the nation's religious and cultural values because all religions whose existence is recognized prohibit it, especially Islam because it includes adultery.¹³

Prior to the enactment of the 2023 Criminal Code, the act of cohabitation was not a criminal offense. The previous Criminal Code did not explicitly regulate sexual relations between unmarried men and women, especially on the basis of consensual or without coercion, making it difficult to be subject to the threat of criminal punishment. Society's rejection of the act of cohabitation is demonstrated by acts of persecution or taking the law

⁹ Soediman Kartohadiprodjo, *Pancasila as the Nation's Way of Life*, Jakarta: Gatra Pustaka, 2010, p. 248

¹⁰ Wojowarsito, *General Dutch Dictionary*, (Jakarta: PT. Ichtiar Baru-Van Hoeve, 1992), p. 559

¹¹ Dhestiani Amara Putri et al, "Lokika Sanggraha Based on Decision Number 997/Pid.Sus/2019/PN Dps According to Criminological Theory", *Gema Perempuan Journal*, Vol. 8, Ed. 3, 2021, p. 1-2

¹² I Gst Ngr Dwi Wiranata and Ibrahim R, "Criminalization Policy Against Cohabitation", *Jurnal Kertha Wicara*, Vol. 1, No. 3, 2013, p. 2

¹³ Irwansyah, "Criminalization of Cohabitation (*Samen Leven*) According to the Draft Criminal Code", *Student Online Journal (JOM)*, Vol. 3, no. 2, 2016, p. 10

into their own hands (*eigenrichting*) against perpetrators who are caught red-handed committing cohabitation.

Cohabitation that is not yet regulated by criminal law is that carried out by a man and a woman of legal age who are both unmarried or whether both or one of them are not married. Because if one or both of them are in a marital relationship with another, this is regulated in Article 284 of the Criminal Code. Before the act of cohabitation was criminalized, there were many facts about incidents where people, especially those around the location where the cohabitation occurred, showed their dislike for the act or act of cohabitation. This is shown by an attitude of rejection in the form of acts of persecution against the perpetrator.¹⁴ In Tangerang, Banten, there were cases of persecution in the form of acts of nudity and abuse of lovers who were suspected of committing immoral acts. This news went viral after a video was uploaded on the YouTube channel. The perpetrator with the initials "R" and "MA" was the victim of abuse by a group of people because he was accused of committing lewd acts in a rented house in the Cikupa area, Tangerang Regency. At around 22.00 WIB, R arrived at MA's rented house to deliver food. The two lovebirds went into the rented house to eat dinner together. "The head of the RT with the initials T banged on the door (of MA's rental), the door was not closed tightly,"... at that time T came along with two other people with the initials G and NA. After banging on the door and entering the rented house, the three people forced R and MA to admit that they had committed a perverted act. "Both of them were forced to admit to committing lewd acts and three people with the initials G, T and A forced the man to confess and strangled him," he said. R and MA don't want to admit it. "As a result, the loving couple were paraded by the crowd to the front of a shophouse which was about 200 meters from their rented house."¹⁵

Persecution regarding acts of cohabitation also occurs because the public is also aware and understands that when the perpetrator of cohabitation is reported by citizens to law enforcement officials or the police, legal action cannot be taken considering that cohabitation is not regulated by criminal law. Cohabitation is also considered an act that can pollute local culture and according to Islam is an act that can bring punishment from Allah SWT. Cohabitation is also considered an act that can trigger further criminal acts

¹⁴ In the Big Indonesian Dictionary (KBBI) online, it is stated that what is meant by persecution is "persecution/per-se·ku·si/ /pérsekusi/ v arbitrary hunting of one or a number of citizens and causing harm, trouble or annihilation"

¹⁵ Chronology of a Loving Couple Paraded, Tortured, and Naked, <http://megapolitan.kompas.com> published 14 November 2017, accessed on 23 March 2023 at 21.00 WIB

(criminogenic factor), namely the possibility of pregnancy outside of marriage which triggers the criminal act of abortion or even murder if one partner does not want to take responsibility for the pregnancy of the cohabiting partner.

To be effective, a law must adopt values that live and develop in society.¹⁶ The Indonesian people really appreciate religious, moral and cultural values. In line with Pancasila as the basis of the state, especially the first principle, namely, Belief in One Almighty God. This divine principle is interpreted by state administrators and citizens as meaning that all thoughts, actions and behavior must be correlated with religious values. All the good values contained in the divine principle can be reduced to other principles in Pancasila. So, whether an action is good or bad can be determined if it does not violate God's values, rules or laws.¹⁷

CONCLUSION

1. Pancasila as a state ideology is the source of all sources of law, including the source of criminal law. Specifically as a source of material law, namely where the values that form the ontological basis of a law are found.
2. The passing of the 2023 Criminal Code which criminalizes cohabitation is an embodiment of Pancasila values, namely religious values and community or group values.

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¹⁶ Otje Salman, Several Aspects of Legal Sociology, (Bandung: Alumni, 1993), p. 3-4

¹⁷ Arief Hidayat, Opinion of the Chairman of the Constitutional Court of the Republic of Indonesia (2015-2017), Professor of Law at Diponegoro University in the article Indonesia is a State of Belief, p. 3-5

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