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The Concept of Grundnorm in the Customary Law System: Reconciliation of Hans Kelsen's Pure Legal Theory with Indonesian Legal Pluralism

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Abstract
Indonesia adheres to a pluralistic legal system, with state law, customary law, and religious law applying simultaneously. This study analyzes the relevance of Hans Kelsen's grundnorm concept in understanding the hierarchy and validity of the Indonesian customary law system. The focus of the research includes: (1) how the grundnorm concept can be applied in the context of Indonesian customary law, (2) how to reconcile Kelsen's pure legal theory with the reality of legal pluralism in Indonesia, and (3) the theoretical and practical implications of the application of the grundnorm concept to the existence of customary law. This study uses a juridical-normative method with a conceptual and philosophical approach. Secondary data were obtained from legal literature, scientific journals, and related laws and regulations. The results of the study indicate that: Kelsen's grundnorm concept can be adapted in the customary law system through the identification of basic norms derived from the philosophical values of indigenous communities; there is a possibility of reconciliation between the pure legal theory and legal pluralism through a multi-grundnorm approach that recognizes the existence of more than one basic norm in the national legal system; and the application of the grundnorm concept provides theoretical legitimacy for the existence of customary law as an autonomous legal subsystem but remains within the framework of the unity of the Indonesian national legal system.

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1. INTRODUCTION

Indonesia, as a country based on the rule of law, has a unique characteristic in its legal system, namely legal pluralism, which recognizes the existence of various legal systems simultaneously.[1] Legal pluralism in Indonesia is manifested in three main forms: state law (positive law), customary law, and religious law.[2] All three exist and develop in Indonesian society with varying degrees of influence and reach, but interact with each other and sometimes even compete with each other in regulating community life.

Customary law, as one of the pillars of the Indonesian legal system, has a long history that has existed long before Indonesian independence[3]. Customary law is a living law in society, growing and developing according to the needs and legal awareness of the local community[4]. Recognition of the existence of customary law has been explicitly stated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that the state recognizes and respects customary law community units 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.

On the other hand, Hans Kelsen, as one of the leading figures in legal philosophy of the 20th century, developed a pure theory of law (reine rechtslehre) which introduced the

concept of grundnorm or basic norms as the foundation of the validity of the entire legal system. According to Kelsen, grundnorm is a fundamental norm that is the source of validity for the legal norms below it in a hierarchical legal norm hierarchy (Stufenbau des Rechts)[5]. This concept provides a theoretical explanation of how a legal system obtains its legitimacy and how lower legal norms obtain their validity from higher norms.

Problems arise when we try to apply Kelsen's concept of the grundnorm in the context of Indonesian legal pluralism, particularly in relation to customary law. Kelsen's pure legal theory was essentially developed within the context of Continental European monistic legal systems, which tend to be centralistic and hierarchical. Meanwhile, the reality of Indonesian law demonstrates a plurality of legal systems that cannot always be explained by a rigid hierarchical approach.

Several fundamental questions then arise: Can Kelsen's grundnorm concept be applied to Indonesia's customary law system? If so, what form does the grundnorm take in customary law? Is it possible for there to be more than one grundnorm in Indonesia's pluralistic legal system? How can Kelsen's pure legal theory be reconciled with the reality of legal pluralism in Indonesia? And what are the theoretical and practical implications of applying or rejecting the Grundnorm concept for the existence and development of customary law in Indonesia?

This research is important for several reasons. First, from a theoretical perspective, it seeks to contribute to the development of Indonesian legal theory capable of explaining the phenomenon of legal pluralism by using or adapting concepts from Western legal theory, particularly Kelsen's pure theory of law. Second, from a practical perspective, a better understanding of the relationship between state law and customary law within a solid theoretical framework will provide a stronger foundation for the recognition, respect, and protection of customary law within the national legal system.

Third, this research is also relevant in the context of the ongoing discourse on national legal reform in Indonesia. By understanding the fundamental structure of Indonesia's pluralistic legal system, policymakers will have a more comprehensive perspective in formulating legal products that are not only formally valid but also socially and culturally legitimate.

2. RESEARCH METHOD

This research uses a juridical-normative method with a conceptual approach and a philosophical approach[6]. The juridical-normative research was chosen because the focus of the research is to analyze theoretical concepts in legal theory and examine legal norms related to customary law in the Indonesian legal system.

The data sources in this study are entirely secondary data consisting of: (1) Primary legal materials, including the 1945 Constitution of the Republic of Indonesia, laws related to customary law, and other relevant laws and regulations; (2) Secondary legal materials, including textbooks, scientific journals, academic articles, research results, and legal literature discussing legal theory, especially Hans Kelsen's pure legal theory, Indonesian customary law, and legal pluralism; (3) Tertiary legal materials, including legal dictionaries, encyclopedias, and other materials that provide explanations of primary and secondary legal materials.

Data collection techniques were conducted through library research, which involved inventorying, identifying, and reviewing various literature relevant to the research topic. The collected data were then analyzed qualitatively using conceptual analysis methods to understand key concepts in Kelsen's pure legal theory and Indonesian customary law.

The stages of data analysis include: (1) Description, namely systematically describing the concept of grundnorm in Kelsen's pure legal theory and the characteristics of Indonesian customary law; (2) Interpretation, namely interpreting and explaining theoretical concepts in the context of the Indonesian legal system; (3) Comparison, namely comparing Kelsen's grundnorm concept with the fundamental structure of customary law; (4) Evaluation, namely assessing the relevance and possibility of applying the grundnorm concept in the context of Indonesian legal pluralism; and (5) Construction, namely building a theoretical framework to reconcile Kelsen's pure legal theory with the reality of legal pluralism in Indonesia.

3. RESULTS AND DISCUSSION

3.1. The Concept of Grundnorm in Hans Kelsen's Pure Theory of Law

Hans Kelsen, through his pure theory of law, attempted to establish a pure science of law (reine rechtslehre), namely a science of law that is free from elements outside the law, such as politics, morals, sociology, or ideology.[7] In this effort, Kelsen developed the concept of grundnorm or basic norms as the foundation of the validity of the entire legal system. Grundnorm is a norm whose existence is assumed (hypothetical norm) and becomes the source of validity for the constitution and all legal norms under it.[8]

According to Kelsen, the validity of a legal norm cannot be derived from facts (das sein), but must be derived from another, higher norm (das sollen)[9]. This raises the question of where the highest norm in the hierarchy of legal norms derives its validity. To answer this question, Kelsen introduced the concept of grundnorm as a norm whose existence is assumed and no longer requires validation from another, higher norm.

Grundnorms have several important characteristics. First, they are hypothetical, meaning their existence cannot be empirically proven but must be assumed for a legal system to function. Second, they are transcendental-logical, meaning they constitute a logical condition necessary for understanding a legal system as a valid system of norms. Third, they do not contain specific legal material but merely provide the authority to create law. Fourth, they are specific to each national legal system.[10]

In the context of a modern national legal system, the grundnorm can be formulated as: the first historical constitution must be obeyed[11]. From this grundnorm then comes the validity of the constitution, and from the constitution comes the validity of laws, then implementing regulations, and so on down to individual decisions. This hierarchical structure is called by Kelsen as the stufenbau des rechts (hierarchical structure of law)[12].

Kelsen's concept of the grundnorm has received various criticisms, particularly due to its hypothetical and abstract nature. Critics argue that the grundnorm does not provide a satisfactory explanation of why a legal system should be obeyed, as it is ultimately merely a logical assumption with no empirical or moral basis. Nevertheless, the concept of the grundnorm continues to make important contributions to legal theory, particularly in explaining the hierarchical structure of legal systems and the validity relationships between legal norms.

3.2. Characteristics and Fundamental Structure of Indonesian Customary Law

Indonesian customary law has very different characteristics from the Western legal system that became the context for the birth of Kelsen's pure legal theory. Customary law is unwritten law, grows and develops in society, and has a dynamic and adaptive nature to social change. Van Vollenhoven, as the father of customary law

studies in Indonesia, defines customary law as the entire set of rules of conduct applicable to indigenous people and foreign easterners, which on the one hand have sanctions and on the other hand are in a state of uncodification[13].

Ter Haar, a student of Van Vollenhoven, developed a decision theory (beslissingenleer) which emphasized that customary law should be studied from the decisions made by customary leaders or customary institutions in resolving disputes.[14] This approach differs from the normative approach, which views law as an abstract system of norms, but rather places more emphasis on the practical and concrete aspects of customary law.

Hazairin made a significant contribution to the study of customary law by introducing the concept of kinship systems as a basis for understanding customary law. According to him, customary legal systems in Indonesia can be distinguished based on the kinship system adopted: patrilineal, matrilineal, or parental. These kinship systems then influence various aspects of customary law, including inheritance law, marriage law, and land law.

Soepomo explained that customary law has a communal, religious nature, meaning that customary law places collective interests above individual interests and is based on religious values or local community beliefs.[15] This nature is reflected in various customary legal institutions such as cooperation, deliberation for consensus, and customary sanctions that emphasize restoring social balance rather than retaliation.

From the various characteristics above, it can be identified that the fundamental structure of customary law differs significantly from the hierarchical structure described by Kelsen. Customary law does not have a clear and written hierarchy of norms as in continental legal systems.[16] The validity of customary law is more based on social acceptance and recognition as well as harmony with the cultural values and cosmology of the local community, rather than on logical derivation from higher norms.

3.3. Application of the Grundnorm Concept in the Customary Law System

The question of whether the concept of a grundnorm can be applied to customary law systems requires a thorough analysis of the fundamental structure of customary law. If we strictly follow Kelsen's logic, then every legal system, including customary law, must have a grundnorm as its ultimate source of validity. However, the very different characteristics of customary law from the legal systems that form the context of Kelsen's theory present a unique challenge.

In customary law, there is no written constitution or fundamental document that can be identified as the ultimate source of validity. However, each customary legal system possesses philosophical or cosmological values that serve as the foundation for all customary rules. These philosophical values can include concepts such as cosmic harmony, balance between the upper and lower worlds, or moral principles rooted in ancestral beliefs.

For example, in Balinese traditional society, the concept of Tri Hita Karana (three causes of well-being), which includes harmonious relationships between humans and God, humans and humans, and humans and nature, can be seen as a grundnorm in the Balinese customary law system.[17] All Balinese customary rules, whether related to religious ceremonies, land management, or dispute resolution, are basically aimed at realizing harmony as mandated by the Tri Hita Karana concept.

Similarly, in the Minangkabau indigenous community, the philosophy of Adat Basandi Syarak, Syarak Basandi Kitabullah (adat based on syarak, syarak based on the Quran) can be seen as the ground norm that provides legitimacy for the entire

Minangkabau indigenous legal system[18]. This philosophy shows that the validity of Minangkabau indigenous law ultimately stems from Islamic teachings contained in the Quran and Hadith.

In the Dayak indigenous community in Kalimantan, the concept of Belom Bahadat (living according to tradition), which emphasizes the importance of maintaining a balance between human life and the universe, can be identified as a grundnorm.[19] This concept provides a philosophical basis for various Dayak customary rules, including rules on forest utilization, customary land management, and customary sanctions for violations of the natural balance.

From the various examples above, it can be concluded that the concept of a grundnorm can be applied in customary law systems, but with some modifications or adaptations. Grundnorms in customary law are not abstract, hypothetical norms, as conceptualized by Kelsen, but rather philosophical or cosmological values that live within the consciousness of indigenous communities and are internalized in various social and ritual practices. The grundnorm of customary law is both substantive and normative, as it not only provides a basis for logical validity but also provides a moral and spiritual orientation for the lives of indigenous communities.

3.4. Legal Pluralism and the Possibility of Multi-Grundnorm

One of the biggest challenges in applying Kelsen's pure theory of law in the Indonesian context is the phenomenon of legal pluralism. Indonesia recognizes three legal systems that apply simultaneously: state law (positive law), customary law, and religious law (especially Islamic law).[20] These three legal systems have different sources of legitimacy, different scopes of application, and different enforcement mechanisms.

Kelsen's pure theory of law essentially assumes a unity of the legal system with a single grundnorm as the ultimate source of validity. However, the reality of legal pluralism in Indonesia demonstrates that there is more than one normative system, each claiming authority to regulate societal behavior. This raises the question: is it possible for a country to have more than one grundnorm?

From the perspective of Kelsen's orthodox theory of pure law, the answer to the above question is no. According to Kelsen, there can only be one grundnorm in a legal system.[21] The existence of more than one Grundnorm would destroy the unity of the legal system and give rise to irresolvable conflicts of validity. However, Kelsen himself acknowledged that in practice, situations can arise where two or more legal systems apply in the same area, which he called legal pluralism.

To address the tension between Kelsen's pure legal theory and the reality of legal pluralism in Indonesia, several alternative approaches can be considered. The first approach is a hierarchical approach, which places state law as supreme and customary and religious law as subordinate. In this approach, the grundnorm of the Indonesian legal system is Pancasila, as enshrined in the Preamble to the 1945 Constitution, and from this grundnorm derives the validity of all legal norms, including the recognition of customary and religious law.

The second approach is the multi-grundnorm approach, which recognizes the existence of more than one grundnorm in the Indonesian legal system. In this approach, state law has its own grundnorm (Pancasila), customary law has its own grundnorm (the philosophical or cosmological values of indigenous communities), and Islamic law has its own grundnorm (the Quran and Hadith). These three grundnorms apply in parallel, with varying domains or scopes.

The third approach is an integrative approach that attempts to synthesize the three legal systems into a single conceptual framework. In this approach, Pancasila is viewed as a meta-grundnorm or first-level grundnorm that provides space for the existence of second-level grundnorms, namely the philosophical values of customary law and the principles of Islamic law. Pancasila, with its principles of Divinity, Humanity, Unity, Democracy, and Social Justice, is seen as sufficiently abstract and inclusive to accommodate the plurality of legal systems in Indonesia.

Of the three approaches above, the integrative approach seems most appropriate to Indonesia's constitutional reality. While the 1945 Constitution affirms Pancasila as the foundation of the state, it also recognizes the existence of indigenous communities and their traditional rights. This constitutional recognition demonstrates the nation's founding fathers' desire for harmony between state law and other legal systems existing within society. Pancasila, as a meta-grundnorm, provides a constitutional framework for legal pluralism while simultaneously guaranteeing the unity of the national legal system.

3.5. Reconciliation of Pure Legal Theory with Indonesian Legal Pluralism

Reconciling Kelsen's pure legal theory with the reality of Indonesian legal pluralism requires modifications to several of Kelsen's basic premises. The first modification concerns the concept of a unified legal system. While Kelsen assumed a unified legal system in the monolithic sense with a single grundnorm, in the Indonesian context, the concept of unity needs to be understood more flexibly as unity in diversity, a unity that recognizes and accommodates diversity.

The second modification concerns the concept of the validity of legal norms. In Kelsen's theory, the validity of a legal norm is entirely determined by its derivation from a higher norm. However, in the context of Indonesian legal pluralism, the validity of legal norms is determined not only by formal-legalistic aspects but also by substantial-sociological aspects, namely societal acceptance and recognition. Customary law, for example, gains its validity not primarily because it is recognized by state law, but because it exists and is adhered to within society.

The third modification concerns the relationship between legal norms. Kelsen's theory depicts the relationship between norms as a vertical hierarchy, where lower norms are completely subordinate to higher norms. In the context of Indonesian legal pluralism, the relationship between norms needs to be understood not only vertically but also horizontally. Customary law, Islamic law, and state law often operate in parallel within different domains, rather than in a rigid hierarchical relationship.

With the modifications above, Kelsen's grundnorm concept retains its relevance in the Indonesian context, but with a more sophisticated understanding. The grundnorm in the Indonesian legal system can be understood as a multi-layered structure in which Pancasila, as a meta-grundnorm, provides constitutional legitimacy for the existence of substantial grundnorms in various legal systems existing in society.

This layered structure can be described as follows: At the first level, there is Pancasila as a meta-grundnorm that is abstract, inclusive, and provides a philosophical orientation for the entire national legal system. At the second level, there are substantial grundnorms from various legal systems: the philosophical values of indigenous communities for customary law, the Quran and Hadith for Islamic law, and modern legal principles for state law. At the third level, there are concrete norms that are the implementation of these substantial grundnorms in various areas of life.

This reconciliation does not eliminate all tensions between pure legal theory and legal pluralism. Normative conflicts can still arise, especially when a problem can be regulated by more than one legal system with different solutions. However, this reconciliation provides a conceptual framework for understanding and managing such conflicts, namely by referring back to Pancasila as a meta-grundnorm that provides principles for resolving conflicts, such as deliberation, justice, and respect for diversity.

3.6. Theoretical and Practical Implications

The application of the grundnorm concept in the Indonesian customary law system has various implications, both theoretical and practical. From a theoretical perspective, the application of the grundnorm concept provides philosophical and theoretical legitimacy for the existence of customary law as an autonomous legal subsystem within the framework of the national legal system.[22] By identifying the philosophical values of indigenous communities as the grundnorm of customary law, we acknowledge that customary law is not simply a collection of unsystematic customs, but rather a normative system with its own structure and rationality.

The second theoretical implication is that the concept of multiple fundamental norms or meta-concepts provides a conceptual solution to the problem of legal pluralism, which has long been a challenge in Indonesian legal theory. With this concept, legal pluralism is no longer viewed as an anomaly or deviation from the ideal legal system, but rather as an inherent characteristic of the Indonesian legal system, reflecting the social and cultural diversity of the Indonesian nation.

From a practical perspective, recognizing the fundamental norms of customary law has important implications for protecting the rights of indigenous peoples. If customary law is viewed as having its own fundamental norms, then it cannot simply be overridden or ignored by state law unless there is a strong constitutional justification. This recognition strengthens the bargaining position of indigenous peoples when dealing with the state or third parties in various issues such as customary land disputes, natural resource management, or cultural preservation.

The second practical implication is that the concept of a grundnorm can serve as an analytical tool for evaluating state legal products relating to indigenous communities. A law or regulation governing indigenous communities can be evaluated not only in terms of its alignment with the constitution but also in terms of its alignment with the relevant customary law grundnorm. Such an evaluation will ensure that regulations concerning indigenous communities are not only formally valid but also substantively legitimate.

The third practical implication relates to dispute resolution involving customary law. By understanding the fundamental structure of customary law through the concept of grundnorm, judges or arbitrators can better grasp the logic and rationality behind certain customary rules. This understanding is crucial to ensuring that dispute resolution fulfills not only formal justice but also substantial justice in accordance with the values held by indigenous communities.

However, the application of the grundnorm concept to customary law also presents several limitations and challenges. First, identifying the grundnorm of customary law is challenging due to its unwritten and often implicit nature. In-depth anthropological and ethnographic studies are required to identify the philosophical values underlying a particular customary legal system. Second, in customary communities undergoing rapid social change, the grundnorm of customary law itself

may undergo transformation or reinterpretation, necessitating a dynamic and contextual approach.

Third, in the context of globalization and modernization, universal values regarding human rights often clash with traditional values embodied in the customary law framework. The question of how to reconcile or balance these universal values with local values presents a complex challenge. In this regard, Pancasila, as a meta-foundation framework, can provide guidance by affirming that recognition of customary law must remain within the framework of fundamental principles of humanity and justice.

4. CONCLUSION

Based on the discussion above, several important conclusions can be drawn. First, Hans Kelsen's concept of grundnorm can be applied to the Indonesian customary law system with several adaptations and modifications. Grundnorm in customary law is not hypothetical and abstract, as Kelsen conceptualized it, but rather embodies philosophical or cosmological values that live within the consciousness of indigenous communities and are internalized in social practices. Each indigenous community has its own grundnorm, reflecting its unique worldview and value system.

Second, reconciliation between Kelsen's pure legal theory and the reality of Indonesian legal pluralism can be achieved through the concept of a meta-grundnorm or multi-layered grundnorm. Pancasila, as the foundation of the state, can be understood as a meta-grundnorm that provides constitutional legitimacy and a philosophical umbrella for the existence of various substantial grundnorms within the customary law system, Islamic law, and state law. This layered structure enables the achievement of a unified national legal system without sacrificing plurality and diversity.

Third, the application of the Grundnorm concept to customary law has significant theoretical and practical implications. Theoretically, this concept provides philosophical legitimacy for the existence of customary law as an autonomous legal subsystem and offers a conceptual solution to the problem of legal pluralism. Practically, this concept strengthens the protection of the rights of indigenous peoples, provides an analytical tool for evaluating regulations concerning indigenous peoples, and facilitates fairer and more just dispute resolution.

Fourth, although Kelsen's grundnorm concept can be adapted to the context of Indonesian customary law, there are several limitations and challenges that need to be considered. Identifying customary law grundnorms requires in-depth study and a contextual approach. Furthermore, in the era of globalization, efforts are needed to reconcile local values embodied in customary law grundnorms with universal human rights values.

Based on the conclusions above, several recommendations can be put forward. First, further research is needed to identify and document the philosophical values that serve as the underlying principles of various customary legal systems in Indonesia. Second, when formulating legislation relating to indigenous communities, policymakers need to consider the underlying principles of the customary law in question to ensure that the resulting regulations are not only formally valid but also substantively legitimate. Third, legal education needs to integrate an understanding of legal pluralism and the concept of multiple underlying principles so that legal scholars have a more comprehensive perspective on the complexity of the Indonesian legal system.

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