

LEGAL PHILOSOPHY AS THE FOUNDATION TO HUMAN RIGHTS REGULATION IN INDONESIA

Catherine Aiko Natania Simanjuntak

Idris

Universitas Padjadjaran

Abstract

Indonesia is a legal democratic state, which further pinpoints that the highest sovereignty is in the hands of their people. Some of the characteristics of a legal democratic country which are often implemented are the sufficient space for political activity and the protection of human rights. Protection of human rights is widely socialized in order promote the respect and protection of human rights as an important characteristic of a legal democratic state, however it must also be taken to a consideration every human being bears certain independent and fundamental rights since their birth. Another discussion is related to legal philosophy, which is a study that studies law philosophically. In the establishment of Indonesian law, legal philosophy has become one of the most fundamental aspects used, as long as it adapts to Pancasila and UUD 1945 as the source of all sources of state law. This article is a form of legal research that inquires about legal documents on the topic discussed, which is done with the juridical normative method.

Keywords: *Human Rights, Philosophy of Law, Regulation*

Introduction

As stated in our Constitution, Indonesia is a legal democratic state, which further pinpoints that the highest sovereignty is in the hands of their people. In every legal democratic country, the relationship formed between the state and its people is a reflection of mutualism. The characteristics of a legal democratic country which are often implemented are the sufficient space for political activity and the protection of human rights. When reviewed in more detail, one of these characteristics can be compared as political superstructure and infrastructure. Political superstructure can be interpreted as the atmosphere of political life at the government level which is related to the life of state institutions and relations between institutions. Whereas, implementation of the duties of state institutions. This of course is also related to the choice of a country's system of government, whether democracy (government of all people) or autocracy (government of one person). This then led to how democracy required the sovereignty of their people (civil society).¹

The next essence of state law is the protection of Human Rights, such as the constitutional protection of human rights with legal guarantees for enforcement demands through a process that is fair. Protection of human rights widely socialized in order promote the respect and protection of human rights as an important characteristic of a legal democratic state. Moreover, every human being bears certain independent and fundamental rights since their birth. How it's formed and exercised in

¹ Taufik H. Simatupang. 2021. "Hak Asasi Manusia dan Perlindungan Kekayaan Intelektual Dalam Perspektif Negara Hukum (Sebuah Pandangan Teoritik)", Jurnal HAM, Volume 12, No. 1, diakses dari <https://ejournal.balitbangham.go.id/index.php/ham/article/view/1627>.

a state must not reduce the meaning or significance of freedom and human rights, as the protection and respect for human rights is indispensable.²

Another discussion is related to philosophy. It can be concluded that legal philosophy is one branch of philosophy, namely the philosophy of behavior or ethics, which studies the nature of law. In other words, legal philosophy is a study that studies law philosophically. In the establishment of Indonesian law, legal philosophy has become one of the most fundamental aspects used. Here, laws are made by considering justice (*gerechtigheit*), legal certainty (*rechtssicherheit*) and expediency (*zweckmässigkeit*). Based on the matters described above, the author found several interesting things that may be brought to a discussion in this study, namely:

1. What is the role of legal philosophy in the establishment of Indonesian law?
2. What is the connection between legal philosophy and human rights law in Indonesia?

Within the wide scope of legal discipline, a researcher may choose their type of research method, whether it's juridical normative or empirical.³ This article is a form of legal research that inquires about legal documents on the topic discussed, which is done with the juridical normative method. The normative juridical research method is research carried out through a legal history approach, using data secondary in the form of primary legal materials, secondary law materials, and the tertiary legal materials, especially documents and literature related to the history of legal philosophy and human rights in Indonesia.

Furthermore, this paper will be structured into three main sections. **First**, the paper will provide a discussion regarding legal philosophy's role in the establishment of Indonesian law. In doing so, the author considers that legal philosophy has a very fundamental part in promoting and developing the Indonesian legal system. **Second**, the paper will provide a discussion regarding human rights law, this will include their history and purpose within the scope of the international and national law. **Lastly**, as the basic understanding for both topics has been described, this paper will provide a standpoint on the connection between legal philosophy and human rights. In doing so, this paper argues that the establishment of human rights law in Indonesia is not merely because it's a natural thing.

Result and Discussion/Analysis

Legal Philosophy's Role in the Establishment of Indonesian Law

Legal Philosophy

Philosophy was firstly acknowledged in the sixth century B.C. The term "philosophy" derived from the Greek words "philos" which means love and "sophia" which means wisdom or intelligence. By their words of origins, philosophy can be interpreted as the love of wisdom.⁴ The general understanding of the term philosophy is almost the same in any aspect, that is by learning the true nature of humans, the way we think, the nature of reality, our ability to know that reality, and collection of

² *Ibid.*

³ Taufik H. Simatupang, *Metode Penelitian dan Penulisan Hukum dalam Perancangan Proposal dan Skripsi* (Jakarta: Pusat Kajian Hukum UNIAT, 2017).

⁴ Darmodiharjo, D., & Shidarta, (2006). *Pokok-pokok filsafat hukum apa dan bagaimana hukum di indoensia*. Jakarta: PT. Gramedia Pustaka Utama, hlm.11.

issues related to each other.⁵ In the modern era, philosophy emerged with huge developments that increasingly changed as time progressed. The origin of it does not preclude philosophy from entering the field of education. Moreover, within its development, philosophy has become applied to the field of legal philosophy.

Legal philosophy is one branch of philosophy with a systematic and radical method regarding the essence and fundamental and marginal aspects of law in all its aspects, whose review focuses on the core problems within law. In other words, legal philosophy is a study that studies law from a philosophical perspective.⁶ There are many definitions of legal philosophy according to experts. According to Soetika, the function of legal philosophy is seeking the essence of law, knowing what is behind the law, what is hidden in the law, and investigating legal principles as considerations to reach the roots of the law.

Like minded, Otje Salman, defines legal philosophy as the mother of all juridical disciplines, because legal philosophy discusses and analyzes the most fundamental problems that may arise within law. Because it is very fundamental, legal philosophy is unsolvable for humans as it may exceed their thinking abilities. Legal philosophy will always develop in a never ending cycle as it will try to provide answers to the eternal questions resulting from the answers to the previous questions.⁷

In its development, legal philosophy has been closely related to legal studies, namely to search or to discover the relationships between schools of thought, some of them are:

School of thought: Law of Nature

This school of thought believes that natural law is universal and eternal. This theory emerged due to human's failure in seeking for absolute justice. This theory is looking for an explanation of law as a phenomenon based on some laws that have higher levels contained in several principles of morality. Natural law originates from God, which was pioneered by scholars who argue that the applicable law was created by God, as contained in the holy book, and originates from ratio, namely the source of natural law on human reasoning. The world is governed by provisions set by God, all society in the universe is governed by reason originating from the Lord. This school of thought believes that God's law is above all.

However, not all of God's laws can be obtained by humans. That's it this is expressed by man through the eternal law as the incarnation of God's wisdom, which governs all actions and movement. Natural law is part of the law God expressed in the mind of nature. Humans, as rational creatures, apply that part of God's law into human life so we can differentiate the good and bad. This comes from eternal legal principles, as revealed in the laws of nature, which is the source of all sources of human law.⁸

⁵ Peter Gibson, *Segala Sesuatu Yang Perlu Anda Ketahui Tentang Filsafat* (Jakarta: Gramedia Pustaka Utama, 2020); Andrei Marmor, 2011, *Philosophy of Law*, Princeton: Princeton University Press, hlm. 14.

⁶ Teguh Prasetyo and Abdul Halim Barkatullah, *Filsafat, Teori, & Ilmu Hukum: Pemikiran Menuju Masyarakat Yang Berkeadilan Dan Bermartabat* (Depok: Raja Grafindo Persada, 2017).

⁷ Otje Salman dan Anton F Susanto, 2005, *Teori Hukum (Meningat, Mengumpulkan dan Membuka Kembali)*, Bandung, PT. Refika Aditama, hlm 64.

⁸ Darji Darmodiharjo. *Shidarta, Pokok Pokok Filsafat Hukum*, PT. Gramedia Pustaka Utama, Jakarta, 2004, Hlm 105.

School of thought: Positivism

This school of thought only recognizes as the truth about how positively exists, and what empirically exists based on human experience. Law is a commandment that must be obeyed, then the nature of the law must be compelling and contain sanctions. The principles of legal positivism includes:⁹

- a. Law is the same regulation. The law exists because of the existence of the state, the right law is the law that applies within the country;
- b. There is no absolute relationship between law and morality. This law is the work of experts in the field law;
- c. Law is a closed logical system, where regulations can be deduced from the law without asking for consideration of norms.

The positivism school of thought divides laws made by humans into two, namely true law (*ius constitutum*) and untrue law (*ius constituendum*). The actual law is a positive law made by the government, while untrue laws are actually rules that are not made by the government but by organizations in society so that they do not meet the requirements as law.¹⁰

The Fundamentality of Legal Philosophy in Establishing Indonesian Regulation

As stated above, philosophy examines all the philosophical values of law. Meanwhile, law is all written or unwritten norms or rules or regulations consisting of orders or prohibitions as well as sanctions for those who violate them with the aim of achieving justice, happiness and prosperity. Furthermore, philosophy is called a science because philosophy has an object of study. The object of study of legal science itself is norms. Understanding the law as a rule must also recognize the law as a study. If the law is recognized as a norm, then the law must be obeyed. Legal theory teaches that law is a set of principles or rules that enable society to maintain order and freedom.¹¹

Laws that have real juridical meaning are laws determined by the government of a country, namely regulation. This is clear from the fact that the regulations that apply in non-state institutions require confirmation from the state in order to be legally valid. Just as customary law is only seen as valid law, if there is recognition by the state of citizens who will use their customary law.¹²

In the establishment of Indonesian law, legal philosophy has become one of the most fundamental aspects used. Here, laws are made by considering justice (*gerechtigheit*), legal certainty (*rechtssicherheit*) and expediency (*zweckmässigkeit*). The formation of laws in Indonesia has been regulated in type and hierarchy by Law of the Republic of Indonesia Number 12 year of 2011 concerning the Formation of Legislative Regulations. It's stated that Pancasila and UUD 1945 is the source of all sources of state law.

⁹ Theo Huijbers, *Filsafat Hukum*, PT. Kanisius, Yogyakarta, 1995., Hlm. 33.

¹⁰ Darji Darmodiharjo. *Shidarta*, *Op.Cit.* Hlm 114.

¹¹ Suteki Suteki, *Masa Depan Hukum Progresif* (Yogyakarta: Thafa Media, 2015)

¹² Abdul Ghofur Anshori, *Materi Kuliah Filsafat Hukum pada Program Pasca Sarjana Magister Hukum Universitas Janabadra Yogyakarta Tahun Akademi 2011-2012*. Hlm. 39.

Apart from that, in the formation of law there are at least three theories, namely: A) **Material theory**, which means that law must be dynamic, and the objectivity of justice can be easily realized; B) **Formile theory**, which means good law is law that completely regulates problems, there are no provisions regarding legislative delegation (*delegatie van wetgeving*), and there are no provisions (articles) that are elastic; C) **Philosofische theory**, which states that good law is law that applies philosophically, sociologically and applies juridically, which means that the law can realize truth and justice.¹³

The Human Rights Law

Humans and human rights are two terms that are difficult to separate. Since their birth on earth, humans are born with natural rights that are integral to their lives. On the other hand, humans are social creatures that cannot live alone, as they always live in the midst of their sociality, be it a small community group, tribe, nation or country. It is in the position of humans as social creatures that human rights issues become very complex.

Thomas Jefferson defines human rights as the freedom of human beings that are not given by the State. This freedom comes from God inherent in individual human existence. Government was created to protect the implementation of human rights.¹⁴ On the same boat, the outcome from the universal declaration of human rights defines human rights as natural rights which are obtained by every human being thanks to the gift of the Great God of Nature, in fact cannot be separated from human nature. Therefore, every human has the right to a decent life, freedom, safety and personal happiness.¹⁵

In general, experts in Europe agree that the birth of human rights in the European region began with the birth of Magna Carta which includes, among other things, the view that the king has absolute power (the king creates the laws, but he himself not bound by the laws they make), their powers become limited and they can begin to be held accountable in advance law. Magna Carta 1215 eliminated the king's absolutist rights, which meant that the king could be prosecuted if he violated the law.¹⁶

Alison Dundes, explained that empirically and historically important milestones in human rights thought and movement existed before World War II. In the history of Western civilization, individual rights at the national level have been promoted through various efforts.¹⁷ In the process of its journey, the Human Rights Commission prepared an international statement on human rights which was approved by the General Assembly on 10 December 1948, which is the Universal Declaration of Human Rights. This declaration is very widely known as a universal standard of achievement that applies to all people and all countries. Moreover, the derivatives of the universal declaration include not only statements of human rights in many national constitutions but also a number of international treaties on human rights.

¹³ Muchsan, Materi Kuliah Penemuan Hukum pada Program Pasca Sarjana Magister Hukum Universitas Janabadra Yogyakarta Tahun Akademi 2011-2012.

¹⁴ Majalah, What is Democracy, United State Information Agency, 1991, hlm. 8

¹⁵ *Ibid.*, hlm. 20.

¹⁶ Masyhur Effendi, Dimensi dan Dinamika HAM dalam Hukum Nasional dan Internasional (Jakarta: Ghalia, 1994), hlm. 29.

¹⁷ Faisar Ananda Arfa, Teori Hukum Islam Tentang Hak Asasi Manusia (Bandung: Citapustaka Media Perintis, 2008), hlm. 3-4.

Although the topic of Indonesia's human rights enforcement history is not really discussed, the struggle to uphold human rights had begun ever since colonialism existed in Indonesia. This struggle is not merely intended to expel colonialists, but rather beyond that as it's also a way to uphold human rights. Reviewing the history of colonialism that has existed in Indonesia, it can be understood that there have been many incidents of human rights violations such as kidnapping, forced labor, massacres, torture, oppression, arbitrariness which are common phenomena that occur. Apart from that, during the Dutch colonial period Indonesian society was divided into three social strata. This class distinction in society has far-reaching implications. This causes discrimination in all areas of economic, political, social, educational and justice. There is no freedom, justice, and sense of security as what is happening is massive exploitation of people and Indonesia's natural wealth for the interests of the colonialists.¹⁸

There had been a lot of historical milestones which marks our ancestor's struggle to enforce human rights in Indonesia, some of the most well-known are Indonesian National Awakening (Kebangkitan Nasional 20th May 1908), Indonesian Youth Pledge (Sumpah Pemuda 28th October 1928), and the Proclamation of Independence (Proklamasi Kemerdekaan 17th August 1945). Moreover, the concept of human rights of the Indonesian people can be traced on the proclamation of independence manuscript, preamble of UUD 1945, and Pancasila, that could be described as such:¹⁹

A. Proclamation of Independence Manuscript

The proclamation of independence manuscript is a statement of independence for the Indonesian nation. It implies freedom for its people, which is the basic element of human rights.

B. Preamble of UUD 1945

In the very first paragraph of UUD 1945, stated that independence is the right of all nations. According to Prof. Notonagoro, every nation as a unitary human group is an individual who has natural and moral rights to stand as a person or live freely. A nation that is under colonial rule is a real example towards the violation of human rights. It is further explained in the fourth paragraph of UUD 1945, that Pancasila is the moral foundation of the state. The principles of just and civilized humanity contain teachings about humanity and justice which are elements of human rights.

C. Pancasila

The concept of human rights in Pancasila is based on the teachings of the second principle of Pancasila which is just and civilized in unity with all of the other principles. The concept of human rights in Pancasila is more basic if explained in a philosophical order. Understanding Pancasila as a philosophy starts from the essence of human nature as individual and social human beings. The concept of human rights in Pancasila is not only based on individual freedom but also maintains social obligations in society. Freedom in Pancasila is freedom in the balance between rights and obligations between humans as individuals and society, humans as independent creatures and creatures of God, as well as balance between body and soul.

¹⁸ Sri Rahayu Wilujeng, "Hak Asasi Manusia: Tinjauan Dari Aspek Historis dan Yuridis", Jurnal Humanika, Vo. 18, No. 2, 2013, diakses dari <https://ejournal.undip.ac.id/index.php/humanika/article/view/5951>

¹⁹ *Ibid.*

The Connection Between Legal Philosophy and Human Rights Law in Indonesia

In its development, human rights are not only contained in the proclamation of independence manuscript, the preamble to the 1945 Constitution, and Pancasila, but also "Ketetapan MPR-RI No. XVII/MPR/1998" about human rights. The attitudes and views of the Indonesian people regarding human rights are firmly contained in this decree. For the first time it was explicitly formulated in the form of a Human Rights Charter. This charter consists of a Preamble and Body which contains X Chapters and 44 articles. In the opening statement, the Indonesian nation essentially recognizes, is aware of, guarantees and respects human rights. In implementing this, it is integrated into human obligations as individuals, members of the community family, nation and state as well as members of the community of nations in the world.

Moreover, due to the positivism school of thought that believes that Law is a commandment that must be obeyed, then the nature of the law must be compelling and contain sanctions, and therefore its needed for a nation to make their own regulation regarding human rights to establish a strong awareness of it. Some of those regulations are:

- A. **Law of Republic of Indonesia Number 29 of 2000 concerning Human Rights**, which is a regulation that was passed on September 23 2000, consisting of Chapter XI and 106 articles containing human rights as God's creation, humans as social creatures, humans as citizens.
- B. **Republic of Indonesia Law Number 5 of 1998**, Concerning the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Execution or Punishment.
- C. **Republic of Indonesia Presidential Decree Number 181 of 1989**, regarding the National Commission against Violence against Women.
- D. **Republic of Indonesia Presidential Decree Number 129 of 1998**, regarding the National Human Rights Action Plan.
- E. **Presidential Instruction Number 26 of 1998**, regarding the cessation of the use of the terms Indigenous and Non-Indigenous in all policy formulation and implementation, program planning or implementation of government administration activities.

Conclusion (and Recommendation)

Legal philosophy is one branch of philosophy with a systematic and radical method regarding the essence and fundamental and marginal aspects of law in all its aspects, whose review focuses on the core problems within law. In other words, legal philosophy is a study that studies law from a philosophical perspective. Meanwhile, human rights as the freedom of human beings that are not given by the State. This freedom comes from God inherent in individual human existence. Government was created to protect the implementation of human rights. There had been a lot of historical milestones which marks our ancestor's struggle to enforce human rights in Indonesia.

The concept of human rights of the Indonesian people can be traced on the proclamation of independence manuscript, preamble of UUD 1945, and Pancasila. In the establishment of Indonesian law, legal philosophy has become one of the most fundamental aspects used. Here, laws are made by considering justice (*gerechtigheit*), legal certainty (*rechtssicherheit*) and expediency (*zweckmässigkeit*). The formation of laws in Indonesia has been regulated in type and hierarchy by Law of the Republic of Indonesia Number 12 year of 2011 concerning the Formation of Legislative Regulations. It's stated that Pancasila and UUD 1945 is the source of all sources of state law.

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