International Journal of Law
ISSN: 2455-2194; Impact Factor: RJIF 5.12
Received: 25-09-2020; Accepted: 10-10-2020; Published: 26-10-2020
www.lawjournals.org
Volume 6; Issue 5; 2020; Page No. 390-394

Philosophy of law as a teaching source of legal norm: An analysis of the philosophical basis of human rights regulations in the 1945 constitution of the Republic of Indonesia

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Abstract
The study of legal philosophy is basically a study of the nature of law which is fundamental and comprehensive. Philosophy of law can also be positioned as the mother of all juridical disciplines on the basis of which the most fundamental issues that arise in the process of legal formation can be discussed. The legal rules that govern the human rights of a country basically reflect the basic philosophy of law and philosophy. State of a nation. Liberalist philosophy, Human Rights (HAM) is naturally inherent in human dignity, so that it cannot be transferred to the state, even obliging the state to protect it. Social philosophy, Human rights are not seen as natural and essential, but rather seen as a form of state giving and Pancasila philosophy.Based on the basic idea of Pancasila, the relationship between the state and the people and the people and the people is based on a balance of rights and obligations.

Keywords: philosophy of law, liberalist philosophy, socialist philosophy, philosophy of pancasila, human right

Introduction
The study of philosophy of law is basically a study of the nature of law which is fundamental and comprehensive, so that the substance of the problems posed and the answers are also radically logical and profound. Such studies supply the essential values of building legal concepts to students of law which can be used as a reference to better understand legal norms and legal phenomena. Therefore, philosophy of law can also be positioned as the mother of all juridical disciplines on the basis of which the most fundamental issues that arise in the process of law formation can be discussed (Bruggink, 1996: 177) [1]. This is in line with D.H.M. Meuwissen's "*rechtsfilosofie* is philosophy" (Hadjon, 1994: 4) [5] which essentially places philosophy of law as an arena of general philosophical thoughts about law.
Various thoughts about general philosophy, philosophy of science, and philosophy of law have been put forward by philosophers and other philosophical thinkers, in speculative, contemplative, and deductive manners (Noor Syam, 2000: 24). The problem is, what are the objects of study of general philosophy, philosophy of science and philosophy of law? The answer, of course, has clear boundaries. While general philosophy focuses on logical, coherent and systematic laws of thought, or logic, then the philosophy of science focuses on the ontology, epistemology, and axiology of science (Noor Syam, 2000: 29). Conversely, the scope of the object of study in philosophy of law according to J.J.H. Bruggink (1996: 179) [1] includes legal ontology, legal axiology, legal ideology, legal epistemology, legal teleology, legal theory of science, and legal logic. Therefore, philosophy of law becomes the basic foundation for legal theories and dogmatic legal science as another part of legal studies. The relationship between the three is described by Bruggink (1996: 172) [1] as follows

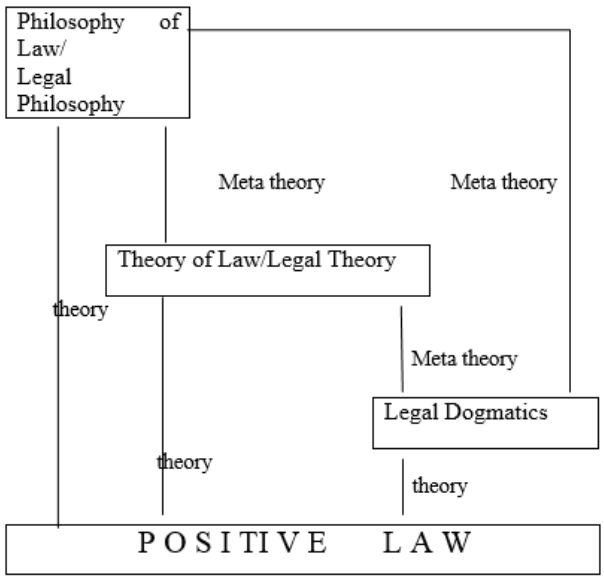

Fig 1: The Scheme of the Layers of the Study of Law

Based on the above scheme, it shows the position of philosophy of law as a meta theory for theory of law and a meta-meta theory for legal dogmatics. Theory of law becomes a meta theory for legal dogmatics, while philosophy of law does not have a meta theory since as a philosophy it reflects on itself to account for its existence and explain its meaning and character.
From this scheme it can also be concluded that philosophy of law, theory of law and legal dogmatics at the applicative level become the theoretical basis for positive law. In addition, it also contains a mandate for lawmakers to have sufficient knowledge of the applicable legal system, norming theory and philosophy of justice, so that juridical

and philosophical values can be realized into legislation norms and regulations that provide the values of justice, certainty, and legal benefits to human rights and the order of state life.

Literature Review

Various Philosophical Views of Human Rights

1. Liberalist Philosophy

The early thoughts of regulating human rights within the framework of a rule of law began when John Locke (1632-1704 put forward his speculative thoughts about the social contract (Schmid, 1980: 152). According to Locke, the state was the result of an agreement (*pactum unionis*) between the people controlled by the rulers *(pactum subjectionis*), where the position of each party must be protected and limited by a law called the constitution. Therefore, it is quite reasonable when Noor Syam (2000: 153) explained that based on its content, *pactum unionis mutatis mutandis* with the state constitution. It was emphasized that Locke's thoughts on human rights, the contextual nature of which are inherent in human dignity, so that they cannot be transferred to the state and even obliging the state to protect them. Concrete steps for a state that has a strong commitment to recognize and protect Human rights are normalized into a declaration, constitution, or statute

For example, France which was based on an agreement over the establishment of the 1st republic (circa 1792) tried to organize its state structure in order to produce a democratic state order (Poerbopranoto, 1978: 27). Very well-known basic slogans are *Liberte*, *Egalite*, and *Fraternite*. Likewise with the United States, its 1787 constitution preamble stipulated the principles of basic human freedom as individualistic rights inherent in human nature to be protected by the state (Noor Syam, 2000: 150; Hadjon, 1987: 41) [6]

The real form of a liberal and individualist philosophical thought can be seen in the formulation of the United Nations Human Rights Charter which was adopted on December 10, 1948. The word "everyone has right" indicates its liberal nature and is focused on individuals. In addition, many of the human rights arrangements regulate the state's obligation to fulfill the rights compared to the individual obligations towards the state. Therefore, the characteristics of the UN Charter are very universal and individual. As a consequence of such provisions, the UN Charter can apply generally to every independent nation that upholds human rights.

2. Socialist Philosophy

The principle of socialism originated from the basic thoughts of Karl Marx who tried to criticize the failure of individualist western capitalism. Karl Marx's teaching rests on the idea that a society or a group is the main focus, while individuals are subordinate to the society and groups. Human rights are seen as a form of community obligation to comply with state regulations, especially in the economic sector. Therefore, the political rights of the people are less regulated.

Human rights are not seen as natural and essential, but rather as a form of reward from the state. This view is more apparent if we look at the Marxist theory of law influenced by the thoughts of Karl Marx. The experiences of the Soviet Union after the Bolshevik revolution (which became the birth of this theory of law), taught three basic principles of the purpose of law (law as a product of the state): (1) security; (2) economic task; (3) education (Freeman, 1985: 987). Based on this theory, the recognition and protection of human rights must be devoted to the interests of national security in supporting economic developments (because capitalism with its liberalism is considered to have failed to generate welfare for the people).

3. Philosophy of *Pancasila*

The philosophical teaching of the Indonesian nation, framed in a state ideology called *Pancasila*, is the main foundation of all the administration systems of the Indonesian state. Law as a state product cannot be separated from the philosophy of the country. In this view, the philosophy of law cannot be separated from the philosophical thinking of its country.

A more detailed explanation of this can be studied from the thoughts of Noor Syam (2000: 68) as follows:

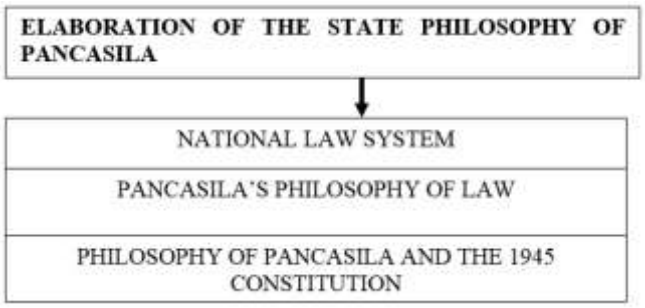

Fig 2: Elaboration Scheme of the State Philosophy of *Pancasila* in the Future State of Law

The schematic above describes the position of *Pancasila* as a state philosophy on the legal system. On the basis of this conception, the philosophy of law must be based on basic ideas existing in *Pancasila*. Furthermore, the established legal rules must be based on a philosophy of law that refers to the basic ideas of *Pancasila*. This can be seen more clearly in the thoughts of Philipus M. Hadjon (1998: 71) [7] who says that theory of law studies on the status of *Pancasila* as the foundation of the state through the routes of legal dogmatics, theory of law, and philosophy of law will arrive at a philosophy of law that places *Pancasila* as the foundation of Indonesian philosophy if law. Philosophy of law which is based on *Pancasila* as the foundation of the state is also known as the *Pancasila* philosophy of law. Its diagram would look like this:

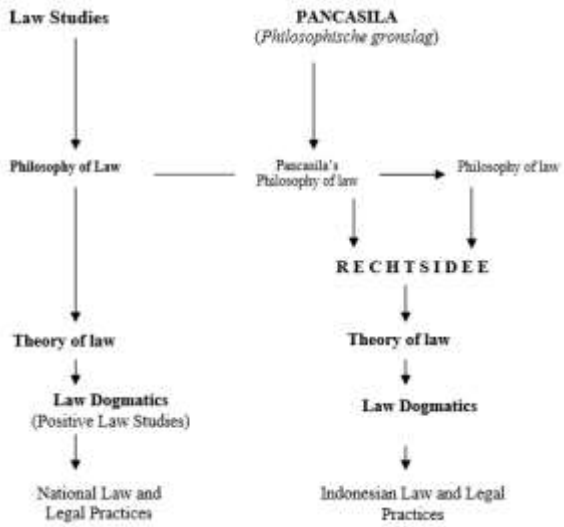

Fig 3: Philosophy of law which is based on *Pancasila*

If the view that *Pancasila*'s philosophy of law is accepted in the conception of legal thought and is used as a normative basis for the formation and implementation of law, then all patterns of state administration will rest on *Pancasila*.

In this regard, Moh. Mahfud MD (2007: 8) stated that in the *Pancasila* legal system the most common markers are prohibitions against the emergence of laws that contradict the values of *Pancasila*. Every statutory regulation must be a translation of the noble values of *Pancasila*, and of course it is not permissible to have laws that contradict the values of *Pancasila*. There should be no laws that contradict divine values and civilized religion, no laws that contradict human values and human rights, no laws that threaten or have the potential to destroy the ideological integrity and territory of the nation and state of Indonesia, no laws that violate the principles of people's sovereignty, and no laws that violate the values of social justice.

Therefore, a national law must: (1) be able to maintain the integrity in both ideological and territorial regions, in accordance with the objective of protecting the whole nation of Indonesia. Legal products that have the potential to break up the integrity of the Indonesian nation and state must be prevented, including discriminatory laws based on primordial ties; (2) built democratically and nomocratically, meaning that it must encourage participation and take in the aspirations of the wider community through fair, transparent and accountable procedures and mechanisms; (3) must be able to provide special protection for defenseless groups in dealing with stronger groups both from outside and from within the country; (4) must guarantee freedom of religion with civilized tolerance among its adherents.

This must also be followed in the formulation of legal rules that form the basis of the recognition and protection of human rights in Indonesia.

The idea of recognizing human rights in Indonesia is certainly not the same as what happened in Europe and socialist countries. Based on the basic idea of *Pancasila*, the relationship between the state and the people, and between the people themselves, is based on a balance of rights and obligations. Mohammad Noor Syam (2000: 157-160), formulated the principles of the *Pancasila* teachings about human rights as follows: (1) God the Almighty is the Source and Creator of the universe and everything in it, (2) God Almighty and All Sovereign, regulates and binds, to protect the universe; (3) God created the universe and its contents by controlling / binding laws for the sake of the harmony, welfare, and continuity of all creatures in the macrocosm, especially on Earth; (4) God blesses mankind (individual, nation, humanity) with life potentials to develop to be high and noble, and even great; (5) the human person with the potential for human dignity carries out human obligations which determine his dignity, (6) the human being as a person is actually a part of (live from, within and for) the family, society, state, nation, mankind (humanity), and culture or civilization (national, universal), and (7) the human person has the obligation to also be aware of the limits of his personal human rights, namely the personal rights of other humans.

The framework of thought of the relationship between the ruler and the people is also patterned on the "principle of harmony". This is in line with Hatta's thoughts on human rights which are stated as follows: "We want a management state, we build a new society based on "mutual cooperation" (Poerbopranoto, 1978: 104).

The purpose of this principle is that rulers and people should settle their problems as peacefully as possible. Thus, dispute resolution through the judiciary should be the last resort. The conception of human rights is a form of balance between rights and obligations.

In fact, for Indonesian people the issue of human rights is not a novel thing because at the time of the formulation of the 1945 Constitution of the Republic of Indonesia, the founders of the Republic of Indonesia had already debated human rights issues. Muladi (1993: 6) stated that from various writings or discussions there was a kind of conclusion that the inclusion of several human rights in the 1945 Constitution was the result of a compromise or consensus between opinions that believed that it was inappropriate to formulate human rights in the Constitution and those that argued that it was only natural that the Constitution contained provisions regarding human rights. It can be noted that the first view was represented by Soekarno and Soepomo, while the second view was represented by Moh. Hatta and M. Yamin (Yamin, t.t.: 259).

In accordance with its history and value system, Indonesian people have a slightly different perspective from the Western one on human rights. According to the Indonesian perspective, human rights rests on a monodualist notion or a belief that views humans not only as individuals but also as social beings. The ideas above are the basis for the insertion of the formulation of human rights as stated in Articles 27, 28, 29, 30, 31, 33 and 34 of the 1945 Constitution of the Republic of Indonesia. Actually human rights content is also implied in the entire Preamble, Body, and Explanation of the 1945 Constitution before the amendment.

After the fall of the New Order government which was later replaced by the next government in the Reformation Era, recognition and protection of human rights were further enhanced. This was marked by the successful enactment of the Republic of Indonesia's People's Consultative Assembly Decree No. XVII / MPR / 1998 concerning Human Rights which is a concrete manifestation of a more detailed regulation compared to that in the 1945 Constitution before the amendment. This was followed up by the issuance of Law No. 39 of 1999 concerning Human Rights, and finally by the issuance of Law no. 26 of 2000 concerning Human Rights Judiciary. The apex of the increased recognition and protection of human rights was marked by the inclusion of human rights as a separate chapter in the amendments to the 1945 Constitution of the Republic of Indonesia, namely Chapter X A which consists of Articles 28 A, 28 B, 28 C, 28 D, 28 E, 28 F, 28 G, 28 H, 28 I, and 28 J.

For Indonesian people, the principle of kinship is built on the basis of the philosophy of harmony of interest in the dimensions of human relations with God, between man and man, man and society, man and state, man and the environment, and man in international relations. Thus, for Indonesian people human rights as an idea and as a paradigm are not birthed together with the universal declaration of human rights on December 10, 1948. Historically, what happened on 10th December 1948 was the culmination point of the struggles of most of humanity, especially members of the United Nations, that human rights are respected and upheld for the sake of justice and world peace. The impetus for this had become even greater after humanity witnessed the cruelty of war in the past.

Human rights have become hot issues, because with the advancement of science and technology and globalization,

the reasoning of various nations is getting closer to one another, and as one of the impacts is the emergence of a desire to dominate the relations between nations based on the norms and values adopted by each nation, whether it is for political, economic, socio-cultural or legal purposes.

According to Muladi (1997: 2-4), the mapping of human rights problems in various regions of the world becomes even more interesting when examining the existence of various groups of thought, both those related to the establishment of states and to the non-governmental groups (Non-Governmental Organizations) The thought patterns can be broken down into at least 4 (four) groups of views as follows: (1) absolute universal group, that views human rights as universal values as formulated in The International Bill of Rights. They do not appreciate at all the socio-cultural profiles inherent in each nation. Adherents of this view are developed countries and in the eyes of developing countries they are often seem exploitative, because human rights issues are seen as being used as a tool of pressure and judgment. (2) Universal-relative group. They also view the issue of human rights as a universal problem and see international documents on human rights as an important reference. However, exceptions based on international legal principles are still recognized. For example, the provisions stipulated in the Universal Declarations of Human Rights Article 29 paragraph (2) which states that "In the exercise of his rights and freedoms, every one shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedom of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." (3) Absolute particularistic group. Adherents of this view see human rights as the business of each nation, without giving any strong rationale, especially in rejecting the validity of international documents. This view is chauvinist, selfish, defensive, and passive about human rights. (4) Relative particularistic group, which see the human rights issue as both a universal problem and also a national problem of each nation. The enactment of international documents must be harmonized, synchronized, balanced, and supported as well as be embedded and institutionalized in the nation's society as a national culture. This view is not only defensive against international documents on human rights, but also tries to be active, both in seeking to formulate and to justify the characteristics of human rights that it adheres to, according to the stages of development of the country.

The attitude of Indonesian nation is clear, that what we embrace is a relative particularistic view; by trying to find a dialogue point between the four views above on the basis of *Pancasila* and the 1945 Constitution of the Republic of Indonesia, without neglecting the substance of international documents on human rights. The Indonesian nation is fully aware that various thoughts will eventually return to the national agreement during the founding of the country. National ideals as expressed and implied in Paragraph II of the Preamble of the 1945 Constitution strongly signal an attention to human rights through the elements: freedom, unity, sovereignty, justice and prosperity. Likewise, Paragraph IV, which is a formulation of national goals, is full of the formulation of human rights, namely advancing public welfare, educating the generations, and participating in the implementation of world order based on independence, everlasting peace and social justice.

The awareness of the nation and state of Indonesia of human rights issues is getting bigger due to internal and external problems. Internal problems include, among others, the separatist movements in Irian Jaya (Papua), Aceh and others, which can lead to misinterpretation abroad; the problem of primordialism that does not support national policies, the problem of *Pancasila* which is not yet entrenched; and weak social solidarity and so on.

Urgent external problems include the entry of Indonesia as a member of the United Nations Commission on Human Rights, Indonesia's membership in the Commission on Crime Prevention and Criminal Justice, the UN Ecosoc since 1991, the quite large economic dependence on foreign aid (DSR, 1992: 26-27) so that Indonesia is vulnerable to international pressure, and the formulation of The Jakarta Message when Indonesia was the Chair of the Non-Aligned Movement, as conveyed in a speech to the United Nations on 24 September 1992 and which later was also included in the Bangkok Declaration during the Asian Conference on Human Rights in March 1993 to be brought to the second World Conference on Human Rights. The Jakarta Message, in particular point 18, states that:

"We reaffirm that basic human rights and fundamental freedoms are of universal validity. We welcome the growing trend towards democracy and commit ourselves to cooperative in the protections of human rights. We believe that economic and social progress facilitate the achievement of these objectives. No country, however, should use its power to dictate its concept of democracy and humnan rights or to impose conditionalities on others. In the promotion and the protection of these rights and freedoms, we emphasize the inter-relatedness of the various categories, call for the balanced relationship between individual and community rights, uphold the competence and responsibility of national goverments intheir implementation. The Non-Aligned countries therefore shall coordinate their positions and actively participate in the preparatory work of the Second World Conference on Human Rights in June 1993, in order to ensure that the Conference addresses all aspects of human rights on the basic of universality, indivisibility, impartiality and non-selectively" (Muladi, 1997:5).

On the basis of the above lines of thought, the nation and state of Indonesia must actively and defensively communicate its thoughts on human rights to the international community on the basis of *Pancasila* and the 1945 Constitution without forgetting the relations to international documents on human rights. This conception must be based on the principle of kinship, which emphasizes that for Indonesian people, rights cannot be separated from obligations. The pattern of upholding and protecting human rights is in accordance with the principles of a democratic rule of law, which was formulated in Article 28 I paragraph (5) of the 1945 Constitution of the Republic of Indonesia (amendment), "the implementation of human rights is guaranteed, regulated and set forth in statutory regulations". This pattern has advantages and disadvantages. The advantage is that it is sufficient to regulate human rights by compiling laws as implementing provisions. On the other hand, the weakness is the position of law as a political product. If the rulers of the country think that there is no need for human rights regulations, then the law is not drafted. Moreover, if human rights are deemed a danger to the government, then a law will be drafted which contains

restrictions on human rights itself.

Conclusion

Based on the description above, the following conclusions can be drawn: (1) philosophy of law is a very basic study in the scientific field of law, (2) the philosophy of law of a country cannot be separated from the basic idea of the state of mind of a nation and (3) the rule of law that regulates the human rights of a country basically reflects the basic philosophy of law and philosophy of the state of a nation.

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