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The Rule of Law and the Principle of Equality Before the Law: Theory and Its Manifestation in Indonesia

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Abstract

The rule of law and the principle of equality before the law require the lives of the nation and state without arbitrariness and discrimination. The state constitution should provide protection to citizens; in judicial practice, it turns out that not a few justice seekers, especially ordinary people, find injustice. The purpose of this research is to examine the concept of the rule of law and the principle of equality before the law philosophically, and what its manifestations are in Indonesia. This study uses a normative juridical method with a legislative approach and a conceptual approach. The results show that the rule of law talks about "everyone" not "this group and that group." While the principle of equality before the law contains the principle that all men are created as equal, that everyone is created as equal, especially with regard to basic human rights. Thus, the principle of equality before the law in the concept of the rule of law in Indonesia is believed to bring justice (access to justice) to anyone regardless of background because the essence of human beings has the same degree and therefore there should be no discriminatory treatment for any reason. Therefore, the conclusion of this research states that in the Indonesian state of law, the principle of equality before the law is not only formulated in the state constitution but is also recognized in various laws and regulations under it. In addition, the principle of equality before the law was implemented in various fields of citizens' lives, including the judicial world in Indonesia.

Keywords: Constitution; Equality Before the Law Principle; Indonesia; State of Law

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Introduction

The principle of equality before law is one of the several important principles in the concept of the rule of law. Based on this principle, every citizen is equal before the law and entitled to the same protection and justice before the law. Thus, this principle can be used as a benchmark for how the law is carried out and is fair to anyone without considering economic, political, religious, or other background aspects as something special from a person.

In the Indonesian constitution, this principle is enshrined in Articles 27 (1) and 28D (1) of the 1945 Constitution, each of which reads as follows:

Article 27 (1) of the 1945 Constitution:

"All citizens shall be equal before the law and government and shall uphold the law and government with no exceptions."

Article 28D (1) of the 1945 Constitution:

"Every person shall have the right to recognition, guarantees, protection, and certainty of a just law and equal treatment before the law."

The formulation in the above provision confirms that equality before the law is a principle that cannot be set aside in the practice of law enforcement in Indonesia because this principle is a mandate of the state constitution that must be carried out in the administration of the Indonesian state. Therefore, there should be no discriminatory treatment of one of the parties seeking justice in the judicial process by prioritizing subjective elements such as social status, skin color, political views, religion, and so on.¹

In the practice of law enforcement in Indonesia, there are often cases or cases that are considered to hurt people's sense of justice. For example, in the case of Mr. Busrin in Probolinggo, he was sentenced to imprisonment for two years and a fine of 2 billion rupiah by the Probolinggo District Court in the case of cutting down three mangrove trees in his village, which he used as firewood for cooking in his kitchen. However, he did not know and realize that cutting down mangrove trees is against the law and has criminal sanctions.² This was also the case with Aspuri, a resident of Serang Banten, who was charged with 5 years in prison for stealing a used shirt in front of his neighbor's house, even though the witness, who was none other than the maid who owned the shirt, had stated that he intentionally threw the shirt away because it was no longer suitable for use.³ On a different occasion, law enforcement in Indonesia against corruption cases is still concerning. This can be seen in the average sentence imposed on perpetrators of corruption in 2021, who received lenient sentences from the panel of judges, namely from 1,404 corruption defendants handled by the KPK and the Attorney General's Office; the average defendant was sentenced to three years and five months in prison. The giving of such sentences certainly does not illustrate the deterrent effect on perpetrators of corruption.⁴

Based on the portrait of law enforcement above, law enforcement in Indonesia still needs to be improved, especially in efforts to provide guarantees of protection to marginalized groups who are unfamiliar with the law. Thus, there is no longer an impression from the various layers of society in which the law is sharp downward and blunt upward. The continuation of such an impression or slogan against the law will actually further distort the law from the community, and the

¹ Moch Ichwan Kurniawan, "Penerapan Asas Persamaan di Hadapan Hukum dalam Praktik Peradilan Pidana (Studi Putusan Pengadilan Negeri Bandung Nomor: 221/Pid.B/2019/PN.Bdg)" (2021) 1:1 Jurnal Studi Hukum Pidana 34–43.

² Kompas, "Tebang 3 Pohon Mangrove, Kuli Pasir Divonis 2 Tahun Dan Denda Rp 2 M", (2014), online: <<https://regional.kompas.com/read/2014/11/24/18531221/Tebang.3.Pohon.Mangrove.Kuli.Pasir.Divonis.2.Tahun.dan.Denda.Rp.2.M.>>.

³ Tempo, "Pungut Kaos Bekas, Aspuri Diancam Lima Tahun Penjara" (2010) Tempo.

⁴ Kompas, "Rata-Rata Terdakwa Kasus Korupsi Pada 2021 Divonis Ringan Oleh Majelis Hakim" (2022).

community will ultimately not believe in the law as commander in every problem-solving that occurs in this country.

It cannot be denied that there have been many studies that take the issue of the rule of law and the principle of equality before the law, for example, the study entitled "The Realization of the Principle of Equality Before the Law for Prisoners in Correctional Institutions in Indonesia." The work of Julita Melissa Walukow states that Law No. 12 of 1995 concerning corrections contains the principle of equality before the law, as evidenced by the phrase giving the same treatment and services to prisoners without discriminating against people; however, in practice, there are rights given to prisoners who have a higher class than the rights granted by law.⁵

Bobi Aswandi and Kholis Roisah's research entitled "Pancasila State of Law and Democracy in Relation to Human Rights". This research confirms that the Indonesian state of law is based on Pancasila, not the result of the reincarnation of Western culture. In the context of the Pancasila State of Law, human rights principles have been contained in Pancasila, such as freedom of religion and belief. Therefore, the protection of human rights is not only a goal but also a prerequisite for the operation of democracy.⁶ In addition, there is also research from Lily Sania Kawuwung, J. Ronald Mawuntu, and Debby Telly Antow with the title "Juridical Review of the Principle of Equality Before the Law in the Protection of Victims and Perpetrators of Crime". The results of his research show that because the principle of equality before the law is an important feature of the rule of law, there must be a balance in the application of legal protection for each suspect/defendant and witness/victim.

Although there have been several studies that have raised legal issues surrounding the rule of law and the principle of equality before the law, the above studies focus on certain cases or legal facts, such as prisoners in prison and the legal protection of perpetrators and victims/witnesses, and some are related to Pancasila democracy. This shows that there is no research that speaks theoretically, reflectively, or philosophically about the concept of the rule of law and the principle of equality before the law, along with its implementation in the Indonesian legal state. This is important to be studied further because some people still do not understand the nature, concept, and characteristics of the rule of law and the principle of equality before the law. Therefore, the author will elaborate in this study.

⁵ Julita Melissa Walukow, "Perwujudan Prinsip Equality Before The Law Bagi Narapidana Di Dalam Lembaga Pemasyarakatan Di Indonesia" (2013) LEX ET SOCIETATIS.

⁶ Bobi Aswandi & Kholis Roisah, "Negara Hukum Dan Demokrasi Pancasila Dalam Kaitannya Dengan Hak Asasi Manusia (Ham)" (2019) 1:1 Jurnal Pembangunan Hukum Indonesia 128.

Research Problems

Based on the background explanation above, this study examined the following problems:

1. What is the concept of the rule of law and the principle of equality before the law from the perspective of legal philosophy?
2. How is the manifestation of the principle of equality before the law as the basis of the rule of law in Indonesia?

Research Methods

The method used in this legal study is the normative juridical research method that examines library materials or secondary data relevant to the legal issues studied.⁷ This research is conducted by collecting legal materials either primary, secondary, or tertiary. To obtain answers or solutions to the various problems examined in this study, two approaches were used, namely the statutory and conceptual approaches.⁸ This study was descriptive-prescriptive with content analysis.⁹

Discussion

1. Thoughts on the Rule of Law: A Philosophy of Law Review

Plato first contemplated the idea or concept of the rule of law. Plato's idea of the rule of law was born because of the influence of the reality of his country, which was ruled by greedy, honor-crazed rulers, who ruled arbitrarily without caring about the fate of the people. These conditions form the idea of an ideal state in Plato's thinking that is free from greedy, greedy, and cruel leaders towards their people by upholding the values of justice.¹⁰ Thus, Plato was disappointed to witness the condition of the state, which was only used as a tool to fulfill the ruler's lust. Therefore, Plato then emphasized in his work the Republic that the ideal state is a state led by philosophers which he called a utopian state, because in their hands the state will be guided by reason that leads to wisdom. The realization of a good state depends on whether it is governed by reason or not; just as the head governs the body, it is the philosopher who must govern society.¹¹

Plato's thinking about the ideal state then developed by stating that what can be realized is not the best ideal state version of the Republic, but the second-best state that places the rule of law or government by law.¹² This thought continued to be developed by subsequent figures and experts, such as John Locke with his concept of human rights, Montesqueieu with his theory of political trias, and Jean

⁷ S Soekanto, S dan Mamudji, "Penelitian Hukum Nomatif (Suatu Tinjauan Singkat)" (2021) Jakarta : Raja Grafindo Persada 13–14.

⁸ Peter Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi, 13th ed* (2017).

⁹ Soerjono Soekanto, *Pengantar Penelitian Hukum* (Yogyakarta: UII Press, 1996).

¹⁰ Mohammad Muslih, "Negara Hukum Indonesia Dalam Perspektif Teori Hukum Gustav Radbruch" (2013) 4:1 Legalitas 130–152.

¹¹ Jostein Gaarder, *Dunia Sophie sebuah novel filsafat* (Bandung : Penerbit Mizan, 2018 Copyright © The Author and H. Aschehoug o.1991, 2014).

¹² Jimly Asshiddiqie, *Menuju negara hukum yang demokratis / Jimly Asshiddiqie* (2009).

Jaques Rousseau with his theory of popular sovereignty. The thinking of these experts basically talks about the same thing, namely, how the state is present in the midst of society to realize the values of justice and equality, by avoiding things that can give birth to absolute and arbitrary ruling power.

One of the thoughts about the rule of law that developed later and was adopted in Anglo Saxon countries was the thought of Albert Van Dicey, or familiarly called A.V. Dicey who formulated 3 important things that must exist in the rule of law, namely the supremacy of law (supremacy of law or sovereignty of law), equality before the law (equality before the law), and constitution-based individual rights (guarantee of human rights).¹³ Based on some of these ideas, the essence of the rule of law is a state that is organized based on the law to guarantee the rights and justice of its citizens.

2. The Principle of Equality Before the Law in John Rawls' View

John Rawls' theory of justice is used to analyze the issues faced in this study. The idea developed by Rawls about the values of justice is known as the "original position," where Rawls tries to position the existence of the same and equal situation for everyone in society and no party has a higher position, such as in terms of position, social status, level of intelligence, strength, and so on. Thus, they can make various agreements with other parties in a balanced manner. This condition is what Rawls calls the 'default position.'¹⁴

Furthermore, Rawls asserts that in the default position, the parties will adopt two main principles of justice:

- a. Everyone has the same right as the most extensive basic freedom, which is compatible with similar freedoms for others.
- b. Social and economic inequalities are regulated in such a way that;
 - 1) The greatest benefit is obtained for the least advantaged members of society, and
 - 2) Offices and positions should be open to all circumstances in which there is equality of opportunity.¹⁵

The first principle is called the 'equal liberty principle, which guarantees freedom of politics, opinion, expression, and so on. Part (a) of the second principle is called the difference principle, and part (b) is called the equal opportunity principle. The difference principle can be justified through controlled discretion as long as it benefits weaker sections of society. Meanwhile, the principle of equal opportunity requires the existence of two things, namely, the quality of ability and the basic willingness and need of that quality.

¹³ Abdul Aziz Hakim, *Negara Hukum Dan Demokrasi Di Indonesia* (2011).

¹⁴ Pan Mohamad Faiz, "Teori Keadilan John Rawls" (2009) *Jurnal Konstitusi*.

¹⁵ *Ibid.*

In relation to the criminal justice system in Indonesia, every person undergoing the judicial process, starting from the investigation stage to the examination before the court, every statement submitted by the suspect/defendant must be based on his freedom of expression without intimidation or coercion from any party because everyone has the same rights and freedom to express his opinion in accordance with his will based on the equal liberty principle above. Even so, even though there is an inequality of position in social aspects between law enforcement officials and suspects/defendants, they must comply with the rules of law that have been enacted, such as not arbitrarily treating suspects/defendants but respecting and considering them as people who are still innocent before being found guilty according to an inkrah court decision in accordance with the principle of the presumption of innocence.

3. The Concept of Equality Before the Law as the Basis of the Rule of Law in Indonesia

The essence of the principle of equality before the law, or what is familiar among legal experts with the term equality before the law, is closely related to Thomas Jefferson's statement "that all men are created equal" that everyone is created equal, especially in relation to basic human rights.¹⁶ Thus, this principle is the basis for recognizing individual freedom. In law, this principle is interpreted as a principle that is believed to bring justice (access to justice) to anyone regardless of background because the essence of human beings has the same degree and therefore there should be no discriminatory treatment for any reason.¹⁷

In relation to the rule of law, the principle of equality before the law is an important principle that cannot be ignored. This is in accordance with the concept of the rule of law proposed by A.V. Dicey that the elements of the rule of law consist of the following 3 important things: Supremacy of law, Equal position before the law, and Guarantees of human rights.¹⁸

Based on the three principles above, the concept of the rule of law can be seen: a) government power is under the rule of law; b) all citizens, both as individuals and as state officials, have the same position before the law; and c) the state must guarantee and provide protection for the human rights of each citizen.

In the context of the Indonesian rule of law, theoretically, the principle of equality before the law is not only contained in the constitution or the 1945 Constitution, but is also recognized in the derivative rules under it, for example, in Law No. 39 of 1999 concerning Human Rights (Human Rights Law). Several articles in the Human Rights Law explicitly recognize the principle of equality before the law as a basic human right, such as Article 3 (2) and Article 4 of the Human Rights Law, which reads:

¹⁶ Teguh Prasetyo, *Hukum Pidana* (Jakarta : Rajawali Pers, 2011).

¹⁷ Danang Risdianto, "Perlindungan Terhadap Kelompok Minoritas Di Indonesia Dalam Mewujudkan Keadilan Dan Persamaan Di Hadapan Hukum" (2017) *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*.

¹⁸ Benny Bambang Irawan, "Perkembangan Demokrasi Di Negara Indonesia" (2007) 5:0854 *Hukum dan Dinamika Masyarakat* 54–64.

Article 3 (2) of the Human Rights Law

*"Every person is entitled to recognition, guarantees, protection and fair legal treatment as well as legal certainty and **equal treatment before the law.**"*

Article 4 of the Human Rights Law

*"The right to life, the right not to be tortured..., the right to be recognized as a person and **equal before the law**, and the right not to be prosecuted on the basis of retroactive laws are human rights that cannot be reduced under any circumstances and by anyone".*

From the two provisions above, it can be understood that there should be equal treatment in the eyes of the law for every person and citizen. In other words, there should be no exclusion of rights, discriminatory treatment, or differentiating one's status in the eyes of the law because it is a violation of human rights.

Likewise, Article 4 (1) of Law No. 48 of 2009 states that "Courts hear according to the law **with no distinction of persons.**" Based on this formulation, it is emphasized that the courts conducted by the Supreme Court and a number of courts under it, including religious courts, district courts, military courts, state administrative courts, special courts within the scope of the district courts, and the Constitutional Court, all of these judicial institutions have the duty to ensure equal treatment for everyone before the law (equality before the law). Therefore, when the principle of equality before the law is associated with the judicial function,¹⁹ every person dealing with the judicial process, starting from the investigation stage to the execution stage of the decision in a criminal case, has the right and position to be treated equally by not discriminating against the social, economic, political, and other status of the person.

4. Manifestation of the Principle of Equality Before the Law in the Indonesian Rule of Law

Before comprehensively describing the manifestation of the principle of equality before the law, it is important to understand the concept of the rule of law. The idea of the rule of law is based on the concept that the state or government must be run based on the applicable law. This was intended to prevent the state or government from arbitrary actions. When a government is not controlled by legal instruments, it is very vulnerable to deviant actions, and power tends to be abused.²⁰

Historically, the idea of the rule of law originated from the idea of Greek philosopher Plato, who was contained in his work entitled *Nomoi*. In the book, he states that a good government is a government governed by law. This statement emphasizes the importance of legal instruments in regulating a country.²¹ Furthermore, the concept of rule of law has experienced complex dynamics. For

¹⁹ Walukow, *supra* note 5.

²⁰ Dachran Busthami, "Kekuasaan Kehakiman Dalam Perspektif Negara Hukum Di Indonesia" (2018) Masalah-Masalah Hukum.

²¹ Janpatar Simamora, "Tafsir Makna Negara Hukum Dalam Perspektif Undang-Undang Dasar Negara Republik Indonesia Tahun 1945" (2014) Jurnal Dinamika Hukum.

example, in Europe, before the idea of a state based on law was born, Europe had to undergo various social, political, and cultural transformations that occurred for hundreds of years; until then, there was a transition from Staendestaat to a modern state and state of law. In Europe, the concept of the rule of law (rechstaat) is closely related to the emergence of the bourgeoisie, which is referred to as the rising economic class but politically stagnant (they did not or have not yet gained a place in the law at that time). This is because, at that time, the law was monopolized by the ancient regime (kings, nobles, and the church). Thus, the law only recognized this ancient regime as its address. The bourgeoisie struggled to guarantee independence and legal certainty that they had not gotten so far, until finally their struggle bore sweet fruit and made them a new constituent together with the ancient regime.²²

Owing to the success of the bourgeoisie in fighting for this guarantee of freedom and legal certainty, there was a major and fundamental change in the law. The principle of "equality of all people before the law" was a major victory achieved by the bourgeoisie. From then on, the rule of law spoke of "everyone" not "this group and that group" anymore'. It was with the birth of the term "no distinction between people or groups" that the bourgeoisie in Europe gained a place and protection in the law.²³

In subsequent developments, experts were born, who then formulated the characteristics of the rule of law, such as A.V. Dicey, Hans Kelsen, and Moh. Mahfud M.D, one of Indonesia's current legal experts. A.V. Dicey as explained in the previous section states that the rule of law has 3 characteristics, namely; 1) the supremacy of the multitude lies in the law not in the actions of the authorities, 2) Everyone is subject to the law or the principle of equality before the law applies, and 3) the constitution becomes the basis of law for the state. Meanwhile, Hans Kelsen explained that there are four characteristics of rechstaat (state of law): namely; 1) the administration of the state must be in line with the constitution and laws; 2) there are rules about the accountability mechanism for every policy and action taken by the authorities; 3) there is a guarantee of independence of judicial power and state administrative justice; and 4) there is protection of human rights.²⁴

Moh. Mahfud M.D. expressed a broader view of the characteristic of the rule of law, which include:

- 1) *the existence of constitutional protection, meaning that in addition to guaranteeing individual rights, the constitution must also determine the procedural way to obtain the guaranteed rights (due process of law),*
- 2) *the existence of a free and impartial judicial body,*
- 3) *the existence of free elections,*
- 4) *freedom of expression,*
- 5) *freedom of association and opposition, and*

²² Satjipto Rahardjo, *Negara hukum : yang membahagiakan rakyatnya* (Yogyakarta : Genta Publishing, 2009).

²³ *Ibid.*

²⁴ Simamora, *supra* note 21.

6) *the existence of civic education.*²⁵

Based on the above, there are no legal experts who deny the principle of equality before the law as one of the main requirements for the rule of law. In the context of the Indonesian state of law, the realization of the principle of equality in the field of law can be seen in the following matters:

- a. Police or police forces are prohibited from taking discriminatory action. For example, this is stated in Article 6 (1) of PERKAPOLRI No. 8/2009 on the Implementation of Human Rights Principles and Standards in the Implementation of National Police Duties that "the right to obtain justice: every person, without discrimination, has the right to obtain justice by filing complaints and reports in criminal cases, and to be tried through a free and impartial judicial process, in accordance with procedural law that guarantees an objective examination by an honest and fair judge to obtain a fair and correct decision". Even in the same provision, Article 8, paragraph 2, letter b expressly states that every police officer is obliged to act in a fair and non-discriminatory manner.
- b. Public Prosecutors or Prosecutors. For example, in the process of preparing criminal charges carried out by a prosecutor, it is important to pay attention to the human side. People who commit minor crimes should not be charged with laws that they do not deserve, as in the case of Aspuri in Banten and Busrin in Probolinggo. This shows that public prosecutors must not violate the mandate of Article 1 (3) of the 1945 Constitution, where the law is placed in the highest position, and power must also be subject to the law. While the principle of equality before the law is a manifestation of the rule of law, the law must apply to everyone, not to some people. In other words, there must be equal treatment of everyone before the law.
- c. Judges or courts, in accordance with the provisions in Article 4 (1) of Law No. 48 of 2009, that the court shall hear cases according to the law with no distinction between persons. This provision emphasizes that everyone who comes before the court, starting from the court of the first instance to the cassation level, including the Constitutional Court, has equal rights and status.
- d. Simultaneously, if a member of one of the above law enforcement agencies commits a criminal offense, the law is enforced against them. This is evidenced by the fact that many members of the police,

²⁵ Dede Rosyada, *Pendidikan Kewarganegaraan (Civic Education) : demokrasi, hak asasi manusia dan masyarakat madani* (Jakarta: Prenada Media dan ICCE UIN Syarif Hidayatullah, 2003).

prosecutors, and judges have been proven guilty and punished for their criminal acts, whether their acts are detrimental to the community (such as committing drug offenses) or detrimental to the state (such as committing corruption).

Conclusion

Based on the above discussion, it can be concluded that the concept of the rule of law in view of legal philosophy places the rule of law as its main pillar, where the government must be implemented by and/or based on the law. In its development, the concept of the rule of law is characterized by the supremacy of law, constitution-based individual rights, and equality before the law. The principle of equilibrium before the law contains the teaching that all men are created as equal, which is the basis for the recognition and guarantee of individual freedom. In the context of the rule of law, the principle of equality before the law is believed to be able to bring justice because everyone is treated equally regardless of background, skin color, race, ethnicity, religion, or others, so that there is no discriminatory treatment. As for the manifestation of the rule of law and the principle of equality before the law in Indonesia, apart from being realized in the constitution (1945 Constitution) and several applicable laws and regulations, the principle of equality before the law is a manifestation of the rule of law; for example, in judicial practice, judges should not discriminate against people.

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