

## General Principles of Good Governance in Indonesia: What are The Legal Bases?

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### ABSTRACT

*The concept of a welfare state starts from many typical countries, namely the Police State (Polizei Staat), the State of Formal Law (Liberal) and the State of Material Law (Welvaarstaat / welfare state). The Police State and the Welfare State are considered as extreme forms of legal state because the State Police is the beginning of the Law State. Welfare State is a type of legal state that is considered current. The Principles of Good Governance were born during the development of the Welfare State. This study reveals the legal basis of the General Principles of Good Governance of several regulations. The results show that the general principle of good governance is currently regulated comprehensively in regulation in Indonesia. The regulation includes 1) Act Number 28 of 1999 on State Implementation of the Clean and Free from Corruption, Collusion and Nepotism 2) Act Number 9 of 2004, concerning the Amendment to Indonesian Act Number 5 of 1986 on Administrative Courts Country 3) Act Number 25 of 2009 on Public Service 4) Act Number 30 of 2014 concerning Government Administration. As a modern country, general principles of good governance is the spirit for the implementation of the government administration of the Indonesian Republic, especially in the context of the implementation of clean governance based on expediency, justice, and legal certainty.*

**Keywords:** *The General Principles of Good Governance, The Law System, Welfare State*

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### 1. INTRODUCTION

The foundation of the concept of a constitutional state can be traced to the time of Plato and Aristotle, about five century BC. Plato put forward the concept nomoi which can regard as a forerunner of the idea of law state. Nomoi (Law) is the third written works created in his old age, while in the two previous issues, Politeia (State) and politicos (Politicians) is not the term the rule of law. Plato (429-347 BC) suggested that the implementation of sound State is based on regulation (law) is excellent. The idea of Plato's law state is increasingly assertive when supported by his student, Aristoteles, who wrote in the book Politica. According to Aristotle (384-322 BC), a country which is the well-governed state with a constitution and sovereign law (Bodin, 1992). For Aristotle, who ruled the state is not human, but good thinking and ethics that determine the merits of the proposal. People need to be educated as good citizens, who have good morals, which eventually will embody human being fair. If these circumstances had been realized, it creates a "Rule of Law."

The idea of a legal state according to Aristotle seems to be very close to the "justice," even a state would say as a state law if justice has been achieved. This way of thinking leads to a form of the rule of law in the sense of "ethical" and narrow because the purpose of the state solely to achieve justice (Dicey,

2013). The theories teach that called ethical theories because according to this theory, legal content should be determined exclusively by our ethical awareness of what is fair and what is unfair.

Aristotle was the most excellent pupil of Plato, but in many ways, there is a big difference between the two is influenced by the circumstances and the time of his life. Plato in his teachings are still mixing up all his research object, while Aristotle separates them, which is about justice written in the open it named *Ethica*, and of the state in his book called *Politica*. His book, *Ethica*, is an introduction than *Politica* (Irwin, 1995).

In the history of the concept of the rule of law that was born since the 5th century BC it had sunk centuries, then the new law state term became popular in the 19th century concept of a law state is applied in several stages, with the final stage as a law state is the welfare state that childbirth the general principles of good governance (Nadir, Soedarsono, Hamidi, & Syafaat, 2017). In Indonesia, the 1945 Constitution is a constitution which is also the implementation of the rule of law.

## 2. THEORITICAL FRAMEWORK

The concept of the rule of law seems in line with the history of human development to remove the system of absolute government, which kingdoms in ancient times until the beginning of the modern age, generally organized by the authorities in absolute terms. Forms of these countries persisted until a few centuries ago and recently began shifting after formal legal state concept emerged and human rights began to be protected.

(Machiavelli & Viroli, 2008) A historian and expert state, the author of the famous book "Il Principe (The Prince)" 1513. He lived at the time of intrigues and wars ongoing in Florence, where at times of national and state governance prioritize the interests of the country. Rules of safety and tranquility, as well as the majesty of the State, should be the majesty of the State, should be the purpose of the State, so that Italy became a national state. To realize the ideals of the king should feel itself bound by the norms of religious or moral rules. King recommended lest struggling to comply with the law; the king had to use force and violence as well as animals. The ruler according to him, the leadership of the State, should have the properties such as deer to find the hole nets and into the lion's surprising wolves.

These are some suggestions of Machiavelli to the king to implement absolutism in the State. It means that the Italian State into a big and powerful country.

Jean Bodin also advocated absolutism king. The king shall have the absolute right to make laws for the people governed. But contrary to Machiavelli, he said that the king was bound by the laws of nature. Further, he looked at the power centralized in the state; more and more assertive looks in the form of royal power. Therefore concludes that the basic rule is the rule that is absolute power of the king superior.

Thomas Hobbes (Hobbes, 2006) argues that human beings live in society before a state, living in nature. In the natural state of human beings have a natural right of the main one, namely the right to defend themselves. In such a situation the man is an enemy to the other man and ready to pounce on each other like wolves; the result is the proliferation of war all against all. However, guided by human minds to understand that if such a situation continues, everything will perish. Therefore man then joins select which guarantees legal authorities through a social agreement. In the theory of Hobbes, "covenant people who are not used to build the community (*civitas*) but to form the powers given to the king." So the king is not receiving power from the people, but he gained the authority and power of the individuals who make up the community agreement. However, because of the agreement that society individuals had handed over all authority and power to the king, the king's power was absolute.

Some of the views of experts above to get resistance from John Locke and Montesquieu (Dunn, 1982). The absolute power of the king in the concrete must be confronted with the fight for the constitutional system, the system of government based on the constitution. Power should not be done

according to the will of the king alone but must be based on constitutional law. (Dunn, 1982) argued, the king's power must be restricted by a "leges fundamentals" (a text resulting from the covenant held between the people and kings in their respective positions of equal) (Yang, 2005).

One expert suggests that quite instrumental in the conception of a constitutional state is (Stahl, 1847), a German scholar. According to him:

"The state must be a law state, that is the watchword and becomes the driving force in the development of this new age. States must establish hair-splitting roads and boundaries of its activities as well as the environment (atmosphere) the freedom of citizens according to the law and should ensure an atmosphere of freedom without permeable. The state should realize or enforce the idea of morality regarding the state, also directly no farther than they should be according to law atmosphere. Furthermore, according to (Stahl, 1847), elements of law state are:

1. The guarantee of human rights (grondrechten);
2. The division of powers (Scheiding van machten);
3. The government should be based on legal regulations (wet matigheid van het bestuur);
4. The existence of judicial administration (Administratief rechtspraak)

If in Continental European countries have developed the law system (rechtsstaat), then in the United Kingdom have been developing a concept: Rule of Law.

This concept became very popular by the description of (Dicey, 2013) in his book entitled "Law and the Constitution" (1952). In this book, he said that the elements of the Rule of Law include:

1. The supremacy of the rule of law (supremacy of law); absence of arbitrary power (absence of arbitrary power), in the sense that a person can only be punished if you break the law;
2. An equal footing in the face of the law (equality before the law), this proposition applies to both ordinary people and officials;
3. Ensuring human rights by law (in another country by the Constitution) as well as court decisions.

### 3. DISCUSSION

#### 3.1. The Stages of Law State.

Some authors have suggested the stages you've traveled with the long process of the countries of the world in finding the ideal concept of state law (Marbun & MD, 1987) by the terms as follows:

1. Police State (Polizei Staat);
2. Night Guard State (Nachtwakerstaat);
3. Welfare State (Welvaarstaat).

**First**, the type of police state, characterized in that although the king be held interests of the people, the people should not intervene, people do not have the right to the king, and everything is determined by the king, this time the State Administration Law was not known, there is only one branch of science about how a king should reign so that the people become prosperous called "*bestuurkunde*" or "*bestuurleer*", while the State Administration Law or "*bestuurrecht*" the newborn then after the position of the king and the people alike. The principle that applies in the form of state and government is that, that the king has determines everything for the people, but not by his people, and the principle of common interests cope with all laws and regulations (*Legibus solutus est, salus publica suprema lex*).

The police state in the form of kingship over its citizens, the relationship between the king and its people can be said to be one-sided, in the sense that the king has will determine everything. In fact, within the conceptual State Administration Law, intended as the rules that govern between the two sides, not just one party only. In this type of the Police State, even if there may be legal administration still too narrow, the same as a state in the form of *monarchy absolute*, where the State Administration Law only form of instructions (*instruktiefrecht*) to be ignored by the national authorities in performing their duties,

as well as a governing rule how countries perform its function fittings. Therefore, in this absolute monarchy form of the State, public administration employment was limited to maintaining the rules and decisions made by the king.

**Second**, the type of state Guard Night, by Immanuel Kant and Fichte refer to as a state of the law in the narrow sense, meaning that the State only maintain security solely, a new state to act when security and order disrupted. This type is sometimes referred to by state law or state law formally liberal.

In this narrow State law strictly separated between the State and the community. The state does not interfere in aspects of community life, both in terms of economic, social, cultural, and so on, because with the interference country into aspects of community life, can result in a lack of independence of the individual. In this law state type arises the slogan "*laissez faire laissez passer*" (let do let through). State administrative jobs in this kind of state law, simply create and maintain law alone. So in this narrow legal state Administrative Law began to appear, though still limited, and includes the administration of justice as one element.

**Third**, the type of the Welfare State often referred to as a state of the law in a broad sense. In this type of government in carrying out the task becomes very broad public interest, the possibility of violating the interests of the people by the state to be very large. To carry out these tasks the State administration requires independence, the freedom to be able to act on their initiative, especially in solving problems of precarious arising with the sudden and regulatory settlement yet, that has not been made by the bodies of state entrusted with the legislative function. In such a case, the State administration, forced to act fast, can not wait for orders from state agencies entrusted with the legislative function. Freedom to act on its initiative to resolve the problems being faced and needs to be resolved is known as *Freis Ermessen / Pouvoir Discretionnaire*. It is as a consequence of attachment of the public service function (*bestuutzorg*).

For such breadth of functions of government in a modern constitutional state, then, of course, the more comprehensive role of administrative law also states in it. Thus, in this type of welfare state is now the role of the State Administration Law is predominant.

### 3.2. *Algemene Beginselen Van Behoorlijk Bestuur* In the Legal System of the Welfare State.

(Notohamidjojo, 1970) The freedom of action by state administration (*Freis Ermessen*) in carrying out its duties to realize the welfare state (*welvaartstaat*) in the Netherlands, there is a fear that the result of *Freis ermessen* will cause harm to citizens. Therefore, to increase legal protection for citizens, in the form of government action that contrary to the law (*onrechtmatig overheidsdaad*), abuse of authority (*detournement de pouvoir*), as well as the attitude of arbitrary (*willekeur / abus de droit*), then in 1946 the government the Netherlands set up a commission headed by *de Monchy* duty to think about and examine some alternative increased protection for the people of the state administration actions that deviate (*Verhoogde Rechtsbescherming*) (Keane, 1984).

In 1950 the Commission de Monchy then reported the results of research on *verhoogde rechtscherming* in the form of "*Algemene beginselen van behoorlijk bestuur*" which translates to the general principles of good government. The results of the study commission are not fully approved by the government, or there are some things that cause disagreements between the Commission de Monchy with the government, which led to the commission was disbanded by the government. Then the *van de Greenten* commission, which was also formed by the government with the same task with the *de Monchy*, but the second commission have also suffered the same fate, namely because there are several opinions obtained from the research was not approved by the government, and the commission even this was dissolved without producing results.

Although the committee proposal *Algemene beginselen van behoorlijk bestuur* was not accepted entirely within the legislative system in the Netherlands, the doctrine was later developed by legal

science theory (doctrine) and consideration of the judge's decision that already have permanent legal force (jurisprudence).

*Algemene beginselen van behoorlijk bestuur* has gained a decent place in the legislation and jurisprudence in the Netherlands and developed by the theory of legal sciences, among others:

1. The principle of carefulness (*zorgvuldigheid beginsel*);
2. The principle of motivation (*motivering beginsel*);
3. The principle of legal certainty (*rechtszekerheid beginsel*);
4. The principle of equality (*gelijkheid beginsel*);
5. The principle of undoing the consequences of an annulled decision (*herstelbeginsel*);
6. The principle of metting raised expectation (*beginsel van appgewekte verctingen*);
7. The principle of wisdom (*sapientia*);
8. The principle of non misuse of competence;
9. The principle of reasonableness or prohibition of arbitrariness (*redelijkheid beginsel of verbod van willekeur*);
10. The principle of public service;
11. The Principle of balance (*evenredigheid beginsel*);
12. The principle of fair play;
13. The principle of protecting the personal way of life.

The formulation of these principles stems from the theories of general law and jurisprudence as well as the norms of living in society. Therefore, if these principles rather dug in the rule of Indonesian law, so principles that would not be separated from the theory of law, jurisprudence and legal norms in the society Indonesia as well as the basic principles of Pancasila, the 1945 Constitution and the objectives of the Republic Indonesia. Although the name is not universally valid principle because it depends on the time, place and circumstances, but not impossible among those principles of equality found in other places, for example in Indonesian law.

### 3.3. *Legal Position In Indonesia.*

*Algemene beginselen van behoorlijk bestuur* known in Indonesia in terms of the General Principles of Good Governance, they are rarely found. The first term may be found in Presidential Decree Number 15 of 1983 by using the term "Joint Fairness Implementation of Government" to achieve a state apparatus that is clean and efficient. Thus the use of the term General Principles of Good Governance does not yet have the force of law are nominally (Moh & Saragih, 1994) . However, apart from the matter of the term, those principles are material has been widely scattered in various laws and jurisprudence. Because the General Principles of Good Governance does not only have the binding force morally and doctrinally but more than that the General Principles of Good Governance also have legally binding force and is one source of Administrative Law formally (Azhary, 1992). Act as a source of formal law of state administration meant not only laws in the formal sense, but it covers all the laws in the sense of the material, which is a legal product that binds the entire population directly. Legislation within the meaning of the material is often also referred to legislation.

Thus, each agency / administrative official of State, judge of the Administrative Court (Administrative Court) and the entire population dependent on the General Principles of Good Governance (Good Governance Principles) are scattered in various laws and regulations of Indonesia (Asshiddiqie, 2006). Corruption is an example of abuse of power in almost all institutions in Indonesia. Corruption is not the only case of state administration, but also extends to a criminal case.

About shape, the General Principles of Good Governance should not be written and does not need to be formulated in the form of legislation. The consequences of this writing, it means state administrative law also recognize shapes unwritten sources of law, as well as conventions prevalent in Constitutional Law (Busroh & Busro, 1991).

At the time of the discussion of the act draft number 5 of 1986 on State Administrative Court took place in the House of Representatives, the fraction of the Indonesian Armed Forces have proposed that the General Principles of Good Governance was included as one of the reasons the lawsuit against the decision of the Agency / Officials of the State Administrative like contained in Article 53. However, the government (via the Minister of Justice: *Ismail Saleh*) gives the following reply:

"In our opinion in our constitutional practice as well as in the State Administrative Law in force in Indonesia, we do not have criteria about *Algemene beginselen van behoorlijk bestuur* of Netherlands. At this time we do not have a tradition of strong administration set as in Continental European countries. Thus the tradition can be developed through jurisprudence which would then lead to the norms. In general, the principle of State Administrative Law we have always been associated with clean apparatus and authoritative concrete norm and understanding is still very wide at all and need to be elaborated through concrete cases.

The government's answer was probably also a manifestation of the government as well as going concerns in the Netherlands at the beginning of that principle was introduced. However, the government's response to it as well as providing an alternative / possible opening of opportunities to develop the general principles of good governance through jurisprudence, so formed and firmly rooted in the tradition of the administration of Indonesian country, or other words, the answers it provides a new perspective in the scene of the history of law of administration of Indonesian country through jurisprudence by administrative court judge (Khumarga, 2013).

Along with the development of time, changes occurred in the state administration in Indonesia which started in 1998, when a new order of government falls, the order known as the order reforming rise, the constitution of the Republic of Indonesia 1945 was amended four times, namely changes the first was passed on October 19, 1999; The second change was passed on August 18, 2000; The third change was passed on 10 November 2001; fourth amendment was passed August 10, 2001.

Amendments of Indonesian constitution accompanied by the birth of hundreds of new Indonesian acts, the euphoria of political freedom was felt in the community, regional autonomy socialized, a direct election shall be conducted, both the President / Vice President, the House of Representatives-the Regional Representatives Council-Regional Representative Council, Governor and Regent / Mayor.

All of this also affects the courage to enter the General Principles of Good Governance in legislation are formulated in writing by the legislature. Principles that can now be found in Indonesian Act Number 28 of 1999 on State Implementation of the Clean and Free from Corruption, Collusion and Nepotism, stating the following principles:

1. The principle of legal certainty;
2. The Principle of Conduct State Implementation;
3. The principle of Public interest;
4. The principle of openness;
5. The principle of proportionality;
6. The principle of Professionalism;
7. The principle of Accountability.

It can also be found in the explanation of Article 53 paragraph 2 letter b Indonesian Act Number 9 of 2004, concerning the Amendment to Indonesian Act Number 5 of 1986 concerning the State Administrative Court, which refers to the principles as follows:

1. The principle of legal certainty;
2. The principle of orderly in the state organization;
3. The principle of openness;
4. The principle of proportionality;
5. The principle of professionalism;
6. The principle of accountability.

In Article 4 of Indonesian Act Number 25 of 2009 concerning Public Services mention the principles:

1. The principle of public interest;
2. The principle of legal certainty;
3. The principle of equal rights;
4. The principle of balance of rights and obligations;
5. The principle of professionalism;
6. The principle of participatory;
7. The principle of treatment / non-discriminatory and equality;
8. The principle of openness;
9. The principle of accountability;
10. The principle of special facilities and treatment of vulnerable groups;
11. The principle of timeliness;
12. The principle of speed service, convenience, and affordability.

While the most recent and mentioned in Article 10 of Indonesian Act Number 30 of 2014 on Government Administration, it states emphatically that the Good Governance Principles include the following principles:

1. The principle of legal certainty;
2. The principle of utilization;
3. The principle of Impartiality;
4. The principle of accuracy;
5. The principle of abuse of authority;
6. The principle of openness;
7. The principle of public interest;
8. The principle of good service.

Finally the Indonesian people should not hesitate anymore to apply the General Principles of Good Governance in protecting themselves from the action lawlessness, attitude goes beyond the authority of, and attitudes arbitrarily by officials of the state administration, because those principles are no longer only from the expert opinion (doctrine), court decisions that have permanent legal force (jurisprudence), but also written law.

#### **4. CONCLUSION**

The general principle of good governance is currently regulated comprehensively in regulation in Indonesia. Some of the regulations include: 1) Act Number 28 of 1999 on State Implementation of the Clean and Free from Corruption, Collusion and Nepotism 2) Act Number 9 of 2004, concerning the Amendment to Indonesian Act Number 5 of 1986 on Administrative Courts Country 3) Act Number 25 of 2009 on Public Service 4) Act Number 30 of 2014 concerning Government Administration. Especially for Act Number 30 of 2014 concerning Government Administration expressly states the term Principles of Good Governance. Some of the regulations above confirm that Indonesia is a country that is concerned about the Administration System in Indonesia. In addition, through the general principles of good governance is the spirit for the implementation of the government administration of the Indonesian Republic, especially in the context of the implementation of clean governance based on expediency, justice, and legal certainty.

#### **5. REFERENCES**

Asshiddiqie, J. (2006). *Pengantar Ilmu Hukum Tata Negara*. Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi RI.

- Azhary, M. T. (1992). *Negara Hukum. Bulan Bintang, Jakarta.*
- Bodin, J. (1992). *Bodin: On Sovereignty.* Cambridge University Press.
- Busroh, A. D., & Busro, A. (1991). *Asas-Asas Hukum Tata Negara.* Ghalia Indonesia.
- Dicey, A. V. (2013). *The law of the Constitution (Vol. 1).* OUP Oxford.
- Dunn, J. (1982). *The Political Thought of John Locke: An Historical Account of the Argument of the 'Two Treatises of Government'.* Cambridge University Press.
- Hobbes, T. (2006). *Leviathan.* A&C Black.
- Irwin, T. (1995). *Plato's ethics.* Oxford University Press.
- Keane, J. B. (1984). Contradictions of the welfare state.
- Khumarga, D. (2013). Persamaan dan Nuansa Perbedaan Antara Corak Peradilan Tata Usaha Negara Perancis, Belanda dan Indonesia. *Law Review, 1(1).*
- Machiavelli, N., & Viroli, M. (2008). *The prince (Vol. 43).* Oxford University Press.
- Marbun, S. F., & MD, M. M. (1987). *Pokok-pokok hukum administrasi negara.* Liberty.
- Moh, K., & Saragih, B. R. (1994). Susunan pembagian Kekuasaan Menurut Sistem Undang-Undang Dasar 1945. Jakarta: PT Gramedia Pustaka Utama.
- Nadir, N., Soedarsono, S., Hamidi, J., & Syafaat, M. A. (2017). Philosophical Validity, Theoretical, Normative and Empirical Paradigm of General Principles of Good Governance (Aupb) as a Review of Presidential Impeachment. *Brawijaya Law Journal, 4(1), 95–116.*
- Notohamidjojo, O. (1970). *Makna negara hukum bagi pembaharuan negara dan wibawa hukum bagi pembaharuan masyarakat di Indonesia.* Badan Penerbit Kristen.
- Stahl, F. J. (1847). *Die Philosophie des Rechts (Vol. 1).* JCB Mohr.
- Yang, H. (2005). The history and legal position of Confucianism in post-independence Indonesia. *Marburg Journal of Religion, 10(1), 1–8.*