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The General Principles of Good Governance in Public Services

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This paper aims at describing the principles of good governance, which were part of nonstatutory Administrative Law in Indonesia. After the reformation era and the fall of the New Order, the principles have been developed as part of a statute of Administrative Law. This paper discusses those principles concerning public service policy in Indonesia. This paper's initial discussion presents the history of the development of those principles in Netherland Administrative Law, which then entered Indonesia. This paper concluded that the general principles of good governance in Indonesia were originally applied in the Dutch parliament. These principles are used as a means of preventive law protection for citizens against the bureaucrats' actions in performing their duties, including public services.

Key words: *Principles of Good Governance, Administrative Law, Public Service Policy.*

Introduction

Indonesia is one of the countries which implements a *welfare state* concept of government. This can be viewed from the fourth paragraph of the Indonesian State Constitution stating that the goals of the Indonesian include protecting the whole Indonesian nation and the entire people of Indonesia, promoting public welfare, enriching the lives of the nation, and participating in the implementation of the world order based on freedom, eternal peace, and social justice. This paragraph shows that Indonesia is a welfare state which requires state officials to run the government well. In carrying out the duties for realising the community's welfare, the government is required to perform good services to the community. Therefore, Public Administration officials are required to carry out their duties and tasks in a good and professional manner in order not to disappoint the society. This deals with the protection of citizens and residents of a region, including Indonesia.

There are legal means that can be used as a basis and guidance for public administration officials or often referred to as bureaucrats. According to Kelsen (2005), the law itself is

defined as an order of human action. "Order" is a system of rules, and the law is a set of rules that contain a unity that we understand through a system. Kelsen (2005) states that it is impossible to understand the essence of law if we limit our attention to one separate rule. The nature of law can only be well-understood based on a clear understanding of the relationships that shape the legal order.

Regarding the formation of law in the era of Ancient Greece, (Huijbers 1995), the philosophers began to be aware of the role of humans in forming a law. Socrates pushed that law enforcers must pay attention to justice as a value that transcends humanity. In addition, Plato and Aristoteles began to consider what fair rules to which the law should address, even though they remained obedient to the demands of nature. Aristoteles made a famous distinction between distributive and commutative justice, between the principle in which wealth and honor are addressed to citizens, individuals, and lawsuits. Concerning the concept of justice, there was an idea of how to bring people together and what they deserve ethically (Friedman, 1975).

Bureaucrats use certain means to carry out their duties. Some are in the form of laws and regulations if the content is regulating (*regeling*), and others are in the form of public administration decisions if the contents are determining (*beschking)*. The facility service policy can be in the form of law made by bureaucrats at the central or local government, either the provincial government or district/city government.

The bureaucrats in the central or local government are the subject of law within the Public Administration law, which have a duty and authority to organise the public interest. Bureaucrats are legal subjects that represent the State as a public legal body. To organise the public interest, bureaucrats must heed the principles applied in the public administration law. These principles are often referred to as the general principles of good governance. The actions of bureaucrats performed based on the general principles of good governance within the Public Administration Law are indispensable, since the power of the nation has a special authority in realising people's wellbeing and a broad public interest. Moreover, in Indonesia, as a legal and welfare state which has been described in the fourth paragraph of the 1945 Constitution concerning the goals of the State, the intensity of state intervention in the life of the society is increasing; therefore, the role of bureaucrats becomes more dominant and important.

In carrying out the duties and functions, bureaucrats who are equipped with extensive authority often perform tendentious actions that may disappoint the citizens. Thus, the need for legal protection is badly needed. The legal protection is not only needed for the citizens from the actions of the bureaucrats, which are considered to be disadvantageous, but also bureaucrats in performing their duties require it. Basah (1992) states that the protection of the

citizens is given when the attitude of the bureaucrats may harm them, whereas the protection for the bureaucrats is the protection from violating the law both statute and unstatutory law—in other words, protecting the bureaucrats from committing actions that break the law.

This paper discusses the general principles of good governance in public service policy in Indonesia from the perspective of Public Administration law, by presenting several discussions on the concept of general principles of good governance, public service policy in Indonesia, and the importance of the general principles of good governance in public services in Indonesia.

Discussion

The Concepts of General Principles of Good Governance

The general principles of good governance can be used as a means of legal protection for citizens against the violent actions of the bureaucrats. Hadjon (1987) states that there are two kinds of legal means for protecting the people. First, preventive legal protection is an important means of legal protection, especially when it is associated with the principle of *freies ermessen (discretionaire bevoegdheid)*. Second, repressive legal protection that can be performed through the courts, including the Public Administration courts. One of the legal means that can be used as legal protection for the citizens from the violent actions of the bureaucracy is the general principles of good governance.

The concept of the general principles of good governance (Fahmal, 2006) was first implemented in the Dutch Parliament in April 1950, presented by the Commission of *De 'Monchy* in the Dutch Parliament. According to *De' Monchy*, it is necessary to immediately provide legal protection for the citizens (*burger*) against the bureaucrats' actions, although their actions have obeyed the law. In addition, Monchy says that to implement a clean government, the administrators should not just stick to the normative rules of the law. They should also be guided by the general principles of good governance to enhance legal protection for the citizens.

In the Netherlands in 1950, the Committee of De 'Monchy made a report on the general principles of good governance, which was known as *Algemene Beginselen van Behoorlifk Bestuur (ABBB)*. The provisions in these general principles of good governance can serve as a basis for requesting appeals against decisions taken by governmental bodies. Thus, the general principles of good governance can be used as the basis of the appeal and/or testing of a decision/public administration stipulation. The bureaucrats, in carrying out their duties and functions, especially in the exercise of their authority, must always pay attention to the general principles of good governance.

In Indonesia, the general principles of good governance were introduced by Crince De Roy in the administrative law/constitutional law lecturers. Then, it was developed in the theory of legal science by prof. Kuntjoro Purbopranoto in which there are thirteen (13) principles, namely:

1. Principles of legal security;
2. Principles of proportionality;
3. Principles of equality;
4. Principles of carefulness;
5. Principles of motivation;
6. Principle of non-misuse of competence;
7. Principles of fair play;
8. Principles of reasonableness or prohibition of arbitrariness;
9. Principles of meeting raised expectation;
10. Principles of undoing the consequences of annulled decision;
11. Principles of protecting the personal way of life;
12. Principles of wisdom
13. Principles of public service.

The general principles of good governance are the legal norms that were formerly part of nonstatutory Administrative law. State bureaucrats should implement these principles in carrying out their duties, including public services. The concept of the general principles of good governance was initially used in the Netherlands as legal protection of citizens (*burger*) against the acts of the bureaucrats, although their actions have obeyed the laws and regulations. In addition, Monchy says that to implement a clean government, the administrators should not just stick to the normative rules of the law. They should also be guided by the general principles of good governance to enhance legal protection for the citizens.

De Monchy's thought is motivated by various doctrines about a constitutional life that enables fast, appropriate, and useful actions but still remains juridical. This action is often referred to as the principles of freedom of action given by the bureaucrats. This freedom is called *freiess ermessen* in Germany, *pouvoir discretion*ary in French, and *vrije bestuur* in the Netherlands. In Indonesia, the term policy or Public Administration freedom is used. *Freiess ermessen* (Panjaitan, 2016), initially, was often formulated as freedom given to the administration (*bestuur*) to perform an action that is deemed necessary and not expressly regulated in the provisions of the law. The actions must be fast, appropriate, and useful. Due to the freedom of actions given for the bureaucrats, the government must frame with the general principles of good governance (*Algemene Beginselen van Behoorlijk Bestuur*) abbreviated as ABBB as a legal means and part of the legal norm in carrying out their duties.

The general principles of good governance are eligible to be used by judges as rules in performing *administrative beschikking*, so that these principles are not only acting as the principle of law in general but also are transformed into legal norms made by judges through their decisions which deal with the administrative cases (judge-made law) (Panjaitan, 2016). In Indonesia, these principles, in fact, have been recognised and accepted as a means to realise a clean government. For example, the general principles of good governance are stipulated in Law No.28 of 1999 concerning the Implementation of Clean Government from Corruption, Collusion, and Nepotism. The provisions of these principles are also recognised as the basis for judicial examination in public administrative disputes, and as grounds for filing a lawsuit to the Public Administration Court[1].

The general principles of good governance are also stipulated in Law No. 25 of 2009 concerning Public Services as outlined in Article 4 stating that public services should consider: public interest, legal security, equality of rights, balance of rights and obligations, professionalism, participatory, equality of treatment/non-discrimination, transparency, accountability, facilities and special treatment for vulnerable groups, timeliness, and quickness, ease, and affordability.

Law No. 25 of 2009 on Public Services was issued by the government to respond to the demands from the Indonesian society who perceived that public services provided by the government officials in Indonesia had not met the expectations of the society. Therefore, it can be said that the law is part of the responsive law. Concerning this, Nonet and Selznick (2008) state that a good law should offer something more than procedural justice from the perspective of a responsive law. Also, good law must be competent and fair and able to recognise the public will and be committed to realising substantive justice. The theory of Nonet and Selznick (2008) of responsive law is related to the development of laws that go with the development of the country. It initially derived from the repressive law in which its development existed when a country experienced poverty of power. In this case, the power was weak, so that the law had to be repressive. In its further development, an autonomous law emerged, in which the State trusts increased, the dissolution narrowed, the bureaucracy was narrowed down to be rational, the law was made by and professionally in the state institutions without intervention and subordination from the state authorities. The next development was a responsive law that existed to overcome the chaos and insensitivity of the law to social development. Centralisation was reduced, and jurisdictional authority was given to the lower power units to better understand the core issues of the society. However, the theory of Nonet and Selznick (2008) was debated by Teubner (1983) who disagreed if the autonomous law directly developed into a responsive law because the development of an autonomous law into a responsive law had passed two periods, namely (1) the affirmative period, where law and government are directed to help society which became a victim of the

[1] See the Article 53 paragraph 2 of State Administrative Courts Law and its explanation

market economy, (2) the empowerment period, in which the community autonomously perform actions to improve their welfare. Therefore, concerning the community, Teubner (1983) divides three types of law which include (1) a formal law, which is applied in conjunction with the development of a market economy; (2) a substantive law, which is developed to assist those excluded from the economic competition; (3) a reflective law which is created to empower community groups.

Whether Law No. 25 of 2009 on Public Services belongs to a responsive law or not still requires research if bureaucrats and other public service providers have well-implemented the provisions of the law. Also, because the general principles of good governance were initially nonstatutory legal norms that developed in society, the formulation of general principles of public service stipulated in the provisions of Article 4 of the Law on Public Service should not be formulated in a limited manner. However, considering that the unstatutory legal norms can develop in the society, Indonesia has a diversity of people and customs which offers different ethical values. In addition, these ethical values can also be developed into nonstatutory legal norms, and need to be developed based on the values presented in the five principles of *Pancasila* as the ideology of Indonesia which are called the prismatic concept by Mahfud MD (2006) i.e., a combination of good values that can actualise themselves with development. The values include individualism and collectivism values, *rechtstaat*, and the rule of law, the tools of renewal and reflection of social condition, state religion, and the secular State.

The ethical values that transform into a nonstatutory law include the general principles of good governance, which can be stipulated as a norm in statute law. It should be formulated enumeratively so that it can be used as a guidance to behave for bureaucrats in Indonesia. This is also in line with the view of the late Rahardjo (1979), stating that the law works by regulating a person's behavior or the relationship between people in society. For regulating, the law describes its work in its various functions, namely: (1) Making norms, either addressing or determining the relationship among people; (2) Overcoming the disputes; and (3) Ensuring the survival of society in the midst of changes.

In this case, Rahardjo (1979) states that the law is used as a means to perform a social control, a process of influencing people to behave following the expectations of the society.

Public Service Policy in Indonesia

The public service policy is part of legal politics in Indonesia. Legal politics, in the narrow sense, is defined as a legal policy that will or has been implemented nationally by the government of Indonesia which includes: first, the development of the law that focuses on making and renewing legal materials in order to be suited with the needs; Second, the

implementation of the existing legal provisions which include affirming the functions of the institution and educating the law enforcers (Mahfud MD, 2006). Concerning this definition, Mahfud MD (2006) states that legal politics includes the process of making and implementing laws which can indicate the nature and direction where the law will be developed and enforced. Also, Mahfud MD (2006) says that when we talk about law and public policy, it means we talk about law and State policy that direct the public to join the State.

Concerning the policy of public services in Indonesia, which are part of the legal politics, the law No. 25 of 2009 on Public Service was issued, which intended to implement the fourth alinea of the 1945 Constitution concerning the goals of establishing the State of the Republic of Indonesia, which one of them is promoting the general welfare and intellectual life of the nation. The paragraph implies that the State is obliged to meet every citizen's needs through a government system that supports the implementation of excellent public services to meet their basic needs and civil rights on public goods, public services, and administrative services. The government issues this policy since today the implementation of public services is still faced with conditions that are not relevant to the needs and changes of many life aspects in the society, nation, and State. The unreadiness of bureaucrats may cause this in responding to the transformation of wide-dimension-values and the impact of complex development problems.

Law No. 25 of 2009 on Public Service was issued due to some considerations. The first consideration is that the State is obliged to serve every citizen to fulfill their basic rights and needs within the framework of public services implementing the mandate of the 1945 Constitution[2]. Another basic consideration is that building public trust in public services performed by public service providers must meet the expectations and demands of all citizens regarding public services.

The preambles of Law No. 25 Year 2009 explain that: (a), the State is obliged to serve every citizen and the people to fulfill their basic needs within the framework of public services, (b) building public trust on public service performed by public service providers is a must in order to meet expectations and demands of all citizens regarding the improvement of public services; (c) the norms which provide clear rules are badly needed as an effort to affirm the rights and obligations of every citizen as well as the realisation of State and corporate responsibility in the implementation of public services.

Philosophically, the issuance of Law on Public Service is good already because the bureaucrats have carried out their duties as public servants to prosper the citizens in the country, which applies the *Welfare State* concept of government. The country which applies

[2] See Law No. 25 of 2009 concerning the public policy in the section of considering

the concept of a welfare state must foster the prosperity of its citizens. Also, this State needs to have correct legal means viewed from the understanding of ontology, epistemology, and axiology so that the law can be used as the basis for the proper and fair implementation of the bureaucrats. The welfare state is one form of a Law-based State.

The concept of a legal State began to grow rapidly since the end of the 19th century and the beginning of the 20th century. In Europe Continental, Immanuel Kant and Friedrich Julius Stahl (Merbun, 2003) called it as *Rechtstaat*, whereas in Anglo-Saxon states, Albert Venn Dicey gave a term *Rule of Law*. F.J.Stahl states that the elements of *Rechstaat* include:

a. Protection of human rights;
b. Separation or distribution of State power to guarantee human rights;
c. Rule-based government;
d. The existence of administrative court.

Meanwhile, the elements of *Rule of Law* according to A.V. Dicey consist of:
a. The absolute supremacy or predominance of regular law;
b. Equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts;
c. A formula is expressing the fact that with us is the law of the constitution.

The concept of this legal State is also implemented by Indonesia and has been very popular. In general, the term is translated from two terms, namely, *rechtstaat* and the rule of law. This concept is often associated with the concept of legal protection because these concepts cannot neglect the idea of giving recognition and protection of human rights. However, these two terms have different backgrounds and institutionalisation, although both essentially intend to protect human rights through free and impartial judiciary institutionalisation. *Rechtstaat* is widely applied by Continental European countries based on the civil law system, while the rule of law is widely developed in the countries that adopt the Anglo Saxon traditions, which are based on the common law system. The system that becomes the foundation of the two concepts has different operations, civil law focuses on administration while the common law focuses on judicial. The concept of *rechtstaat* prioritises the principles of *wetmatigheid* which later becomes *rechmatiheid* while the rule of law prioritises equality before the law (Mahfud MD, 1999).

The proof on the assertion, which states that Indonesia is a State of law, lies in administering the government. The objectivity of the public service is a must, as a requirement to the realisation of clean governments. Moreover, in everyday life, the bureaucrats often confront the norm of positive law with reality, confronting legal security with the justice of society.

Therefore, it is necessary to have general principles of good governance to protect the law (Fahmal, 2006), especially in the context of public service.

Another consideration stated in the section of *considering* is that the norms which provide clear rules are badly needed as an effort to affirm the rights and obligations of every citizen as well as the realisation of State and corporate responsibility in the implementation of public services. In addition, setting the supporting legality is necessary as an effort to improve the quality and guarantee the provision of public services which are relevant with the general principles of good governance as well as to protect every citizen from power abuse in the implementation of public services[3].

The conditions and rapid changes that are followed by the shift of values need to be addressed wisely through continuous efforts and activities in various aspects of development to build public trust in order to realise the goals of national development. Therefore, it requires a conception of public service which contains values, perceptions, and behaviour guidance which are able to realise human rights as mandated by the 1945 Constitution[4]. This should be applied so that the people obtain services following their expectations and national goals. Considering this fact, Public Service law is required[5].

The Importance of Good Governance General Principles in Public Service Policy in Indonesia

It has been argued that the general principles of good governance were originally nonstatutory legal principles or norms that the bureaucrats had to obey in performing their duties. In a country that implements a welfare state concept of government, including Indonesia, the bureaucrats should pay attention to these principles in carrying out their duties. After the fall of the New Order, these principles began to be stipulated in the statute laws in Indonesia, such as in Law No 28 of 1999 on the Implementation of Clean Government from Corruption, Collusion, and Nepotism.

Therefore, the realisation of a good public service system that is suited with the general principles of good governance as stipulated in the provision of article 3 of the Law on Public Services referring to ABBB's findings of De 'Monchy has been implemented in Indonesia. However, the concepts of general principles of good governance which must be obeyed and used as a basis and direction for bureaucrats in performing various actions and implementing

[3] Law No. 25 of 2009 on Public Service.
[4] Actually, the idea of human rights in Indonesia had existed before it was declared by United Nations in *Universal Declaration of Human Rights* (UDHR) on 10 December 1948. This is indicated from Manan's article on the Development of Human Rights Thought in the book of "*Perkembangan Pemikiran dan Pengaturan Hak Asasi Manusia di Indonesia*," page: 9-28
[5] Law No. 25 of 2009 on Public Services, *op.cit* section of considering.

public services are often ignored. Nowadays, many statutory provisions are made in haste by the lawmakers (*wetgever*), and they even tend to be imposed (Fahmal, 2006). Therefore, the legal substance cannot be a means of enforcing real justice. Even many unscrupulous people do not feel guilty and are not responsible for the actions they carry out, although their actions may harm the State and the interests of the citizens. According to Suseno (2005), whether an action is good or bad can only be judged by the subject who acts, since judgment depends on how the subject in his decisions behaves towards what he perceives as a universal obligation, and in this case, the conscience is autonomous. It is impossible to give a moral judgment on actions by neglecting the judgment from the person who acts him/herself.

What has been written by Soseno (2005) is the autonomy of conscience in someone's behaviour; this action should also be performed by the bureaucrats. As a means of public administration, they must also serve the public by considering the conscience of good and bad deeds.

In Indonesia, the guidelines of implementing the general principles of good governance are actually stated in the opening of the 1945 Constitution, i.e., the State is based on the belief in the one and only God, a just and civilised humanity, the unity of Indonesia, democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives, and by creating social justice for all Indonesian people (Fahmal, 2006). The meaning of the sentences in the provisions of the opening of the 1945 Constitution requires the government to maintain noble values of humanity following the noble moral ideals of the people. Therefore, the principles of good governance require participation, transparency, public accountability, and legal certainty oversight.

Marbun (2003) argues that the fourth alinea of the 1945 Constitution expressly states that Indonesia protects the whole Indonesian nation and the entire people of Indonesia, promoting public welfare, enriching the lives of the nation and participating in the implementation of a world order based on freedom, eternal peace and social justice. In addition, the fifth principle of *Pancasila* declares social justice for all Indonesians. This fact indicates that Indonesia is a country that is included in the category of a welfare state, and the intervention of the State to the lives of its citizens becomes a juridical and philosophical basis. Thus it becomes something absolute and unavoidable.

Concerning the importance of the general principles of good governance, especially in public services, Fahmal (2006) states that the general principles of good governance as a guide for bureaucrats in interpreting the intentions of legal provisions, which are not concrete. However, it remains within the legal corridor towards the function of the government. The functions of the government in question are to lead the community, which includes: *governing*, *instructing*, *gathering*, *actuating*, *directing*, *coordinating*, *facilitating*, *evaluating*,

developing, *protecting*, *controlling*, and *supporting*. The realisation of those government functions often fails. In other words, the law fails to determine its concrete norms in the legal provisions. That is why the public administration is authorised to decide concretely by paying attention to the general principles of good governance.

The functions of the government mentioned above are also functions in performing the duties as a public servant. Therefore it can be said that public service is, in fact, the main duty of the bureaucrats. In order not to harm the citizens in performing public services, bureaucrats must heed the general principles of good governance. Moreover, the general explanation of public service law states that building public trust to realise the goals of national development requires the conception of public service, which contains values, perceptions, and behaviour guidance which are able to realise human rights as mandated by the 1945 Constitution. This should be applied so that the people obtain services following their expectations and national goals.

Conclusion

Based on the explanation presented above, it can be concluded that the general principles of good governance in Indonesia were originally applied in the Dutch parliament. Then, it was followed by several countries, including Indonesia. These principles are used as a means of preventive law protection for citizens against the bureaucrats' actions in performing their duties, including public services. The public service policy is part of legal politics in Indonesia. The implementation of the policy performed by bureaucrats should refer to the general principles of good governance that will serve as a guide for them in providing services to the citizens.

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