THE IMPLEMENTATION OF COMMON PRINCIPLES OF GOOD GOVERNMENT IN A LAW PRACTICE

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ABSTRACT

Good government principles are law principles used by administrative functionary in making an administrative decree. Besides, these principles are also used by a judge to investigate that administrative decree. When an administrative is not proper or in line with the good government principles then the decree of administrative functionary can be cancelled by the judge of administrative court. In overcoming the case, if it is not organized in a law book, these law principles can be used by the judge of administrative court to investigate the administrative decree.

Keywords: Common Principles of Good Government, Decree of Administrative Functionary, Judge of Administrative Court

INTRODUCTION

Before investigating the implementation of common principles of good government, firstly, it will be discussed on law principles. Based on terms, the word 'principle' has a meaning 'basic, base and foundation which the truth becomes a principal foundation or a pillar of thought' (W.J.S. Poerwadarminta, 1987: 60-61). Hence, law principles can be described as a basis or foundation of thinking of law regulation. In line with this, it is not too much to say that law principles are the heart of law regulation (Ronny Hanintijo, Soemitro and Satjipto Rahardjo, 1985: 48-49). Thus, "it was said like that because "the law principles are the extensive base for the beginning of a certain law regulation. That means law regulations finally can be returned to those principles. These two law principles can be said to be a reason the appearance of law regulations or legal ratio of law regulations" (Ibid.). In relation with this, Paul Schoolmen states that law principles are " basic thoughts which are inside and behind each law system that are formulated in law regulations and the judge decrees which are related to the rules and individual's decision can be seen as the explanation" (J.J. H Bruggink, 1996: 119-120.). Based on the preceded breakdown, it can be said that law principles have a very close relation with the law because it can be used as a base thought for its formation. In its position as legal ratio, law principles become a heart of law regulation. For that reason, the chief of authority in formation and discovering of law in the development of recent inhabitants should better concern to law principles which is spread out among society.

In doing investigation towards the understanding of law principles implementation, it is better to understand about the character of law principles as the value norm which means the common norm consisting of the value standard. This value standard 'it is new in a attitude norm as the law norm specifically to get such result, then it comes a clear principal up for organizing the attitude, for instance, by providing a right or put the obligation" (Ibid. : 124). Regarding the implementation, Paul Scholten says that "law regulations rest upon the authority from the law maker or the judge whereas in a law principle does not go that way.

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Since the law regulation is based on the authority of functionary *(rechtsautoriteiten)*, then that regulation can be less in application although the law principles should be kept its validity" (Ibid. : 125). On the other hand, J. J. H. Bruggink points out that "the law principles which can never be lost its validity is not true. The same as the other positive regulation can also be lost its validity, it causes the value standard inside the law principles undergo changes" (Ibid: 126). Thus, the investigation of the understanding of law principle implementation in the recent development of law should better be based on the opinion from J. J. H. Bruggink because law principles and regulations can be lost its validity. For example, before the validity of law number 1 Year 1974 about marriage, in a customary law of Bali, people still believe polygamy principle which means a husband is allowed to have more than one wives but then after the implementation of these laws, the customary law of Bali believes monogamy principle.

In administrative law, there is also a change in a president and vice-president election which initially implements a representative principle. It means that president and vice president are elected by citizen through their representative in a house of representative. After the implementation of law number 23 Year 2003 about the general election of president and vice president, the representative principle lose its validity because there is an implementation of direct principle based on the second section which is "The election of president and vice president is done based on the direct, public, free, secret, honest andfair principle.All in all, based on these principles, president and vice president are directly elected by citizen so the implementation of representative principle experiences a change.

In relation to a very wide coverage of law principles, since it involves a variety of law field, then this investigation will limit on the law principles which relate to the government implementation. In practice, these law principles which are assumed as a common law norm are called common principles of good government. The investigation of these laws is done based on the consideration that recent administrative functionary is expected to implement a good and responsible government.

RESEARCH PROBLEM

In accordance with the explanation above, this investigation will be based on the law issue namely "Can common principles of good government be implemented in a law practice? This investigation will examine the implementation of common principles of good government in a law practice. It means that the implementation of these principles in verdicts of civil service arbitration tribunal as well as supreme court as the appraisal basis of the decrees which are declared by civil service arbitration tribunal.

DISCUSSION

Investigation Of The Common Principles Of Good Government Implementation In A Law Practice.

In a law practice, the implementation of this principle can be found in decree of Supreme Court Number 11 K/TUN/1992 in a letter of instruction of demolition of West Jakarta governor Number 893/1.785.2 on 9th of April 1991. This letter of instruction of demolition has a purpose to the people's right but then in a fact, the demolition is done because of individual's purpose. Therefore, the demolition done by the governor as the civil service arbitration tribunal has different goal from the letter of instruction. To see whether there is a infraction towards the authority misuse of exclusion principle can be based on the criteria as follows (Philipus M. Hadjon, 1985: 11-12):

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1. A government official uses an authority which is not clearly for public important rather only for an individual's or political purpose;
2. A government official uses an authority with a certain purpose (which should be real from pertinent letters) is in contradiction with the determination of law involving the law basis of that authority.
3. A government official runs an authority with different purpose from the real expectation by the laws with that authority.

In brief, the authority must be used for purpose accord with the basic regulation. So, the purpose should be dominant in taking the authority. In this way, administrative functionary is not permitted to disobey the authority misuse of exclusion principle. The investigation of law principle about prohibition of behave arbitrarily is done by "according to logic" because its law regulation emphasizes the word "consideration" namely " after considering all public importance involving that decree". The word "consider" has a logic concept which means that the consideration must be done rationally, genuine or reasonable. Furthermore, the decree made by administrative functionary must be in line with the valid lawand also citizen law awareness.

This implementation of this principle in a law practice can be seen on the decree of supreme court Number 48 K/TUN/1992 dated 4th of April 1994 in a case between Matawi against the regent Gresik. One of the considerations of Supreme Court in this case is "In civil service arbitration tribunal, the investigation of the fact completeness and appropriatenessof the common principles of good government should be concerned. The lack of fact in making the decree may cause the regent considered to disobey the authority misuse of exclusion principle. Consequently, within the decree, supreme court instruct the regent Gresik to withdraw the decree Number 117 Year 1991 dated 8th of June 1991 about dismissing the chief of Lebaniwaras village, Wringin anom sub district, Gresik regency. In the investigation of this principle implementation, logic has a predominant role. In keeping with this thing, Indroharto tells that " When a consideration in making the decree about the involving people within this decree which is not reasonable, then that decree should be suspended" (Indroharto, 1994 : 177).To investigate the happening trespass towards this principle, it can be based on :

a. If all the relevant facts have been submitted to be considered in the pertinent administrative decree;
b. If the administrative functionary which declares the pertinent administrative decree in preparing, deciding, and execution, has considered the valid principles;
c. If the taken decree will be the same as the decree which is being jerkedin caseof first and second point have been considered.

To be concerned with the formation of decree, it has been developed a formal accurate principle and a fair play principle. Formal accurate principle expects administrative functionary to act carefully in a preparation stage as well as making the decree. Before making the decree, it is better that the administrative functionary listens and collects information related to the future decree by this way:

a. Examine the same case which has happened to obtain the relevant information with the taken decree;
b. Provide a chance to people which have an interest to give a relevant additional information with the taken decree;

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c. Examine the relevant interests and facts with the taken decree.

Based on the explanation, it can be said that this principle needs to be concerned in making the decree; relevant factors should be thoroughly checked and completed so that those all can be used as a basis for composing the decree. In relation with this case, the concerned individuals with the taken decree should be considered if the final decree will be about withdrawal from the bechikking which will be beneficial or imposition for a doubt, then before the decree is declared, the concerned individual's view should be listened" (Indroharto, 1994: 155). Moreover, the related procedures with the decree must be concerned precisely.

In a law practice, the implementation of this law principle can be seen on the decree of civil service arbitration tribunal in Denpasar Number: 21/G/2000/PTUN.DPS in the case of double certificate between AA. Ngurah Semara Adnyana as a plaintiff is against the chief of land affairin Denpasar municipality as a defendant. One of the consideration of this decree said that, the chief of land affair in Denpasar municipality has breached the formal scrupulous principle since " it is not accurately booked and noted in the basic map or at least it has breached the order administration of land affair". Starting from the inaccuracy, then it moves the land of AA. Ngurah Semara Adnyana with the property's right Number 3331/ Pemogan is also declared a certificate numbered 2972/ Pemogan village and property's right Number 4656/ Pemogan village so that these certificates are overlapping.

In a fair play principle, the administrative functionary needs to be honest. They need to give an opportunity to the society who are given the charging decree to support their right. This opportunity should not be made difficult even it is based on the law regulation. This law principle provides the society's intended to propose an appeal to both a higher government and judicial courts upon the dissatisfaction of burden of decree. In a law practice, the principle implementation provides a composed decree to support by the real and exact fact. It also gives a chance to the behalf of people to bring forward their opinion related to the decree.

In a law practice, the principle implementation can be seen in a civil service arbitration tribunal's verdict, Jakarta Number: 74/B/1994/PT.TUN-JKT. It is assumed that the chairman of auction house breached a fair play principle because the information of auction is too short. It is only two days before the auction happened. So, the plaintiff does not have enough time to defend the right.

In connection to the decree formation created by the administrative functionary in a law practice, it has been developed several law principles as mentioned:

1. A certified law. This principle shows that the decree made by the government to give a certified law. To avoid from the unstable law if there is a change in a law regulation, it is a must to be permanently decided the shift period because without, it can cause the uncertainty of law.

A certified law consists of two aspects, namely material and formal aspect. Material aspect is an aspect that requires the taken decree by the government cannot be cancelled back to guarantee the certified law. The withdrawal of the decree without clear reason can make the society not to believe the government anymore. Based on an exist though, the withdrawal of decree is only limited by the common belief of the concerned people, then Prins points out that as follows (Moch. Faisal Salam, 2001: 67-68):

a. The decree obtained *(uitgelokt)* from the trick way, it can always be vanished by *"ab ovo"* (from the absent beginning);

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b. The content of decree which has been announced in behalf of people (nognietaan de betrokkenekanzijngeopenbaard), so that decree which has not been *" verkeershandeling"* (the act of belief/association) can be vanished by *"ab ovo"*);

c. The beneficial decree given by the requirement can be withdrawn back at the time of the concerned people are careless in keeping those requirement;

d. The beneficial of decree withdrawal in the past can be done when the condition is still based on the decree at the moment it is assumed legal*(rechtmatig),* later it becomes illegal *(onrechmatig)*

A formal aspect is related to the individual's right to see clearly and accurately about a concerned something. Therefore, "the burden and relevant decrees on the beneficial decrees (e.g. permissions) must be arranged using exact words (Philipus M. Hadjon*et.al*., 1994: 246). The announcement of clear and complete information about a decree, mainly, the decree which burdens the society is intended to make the people who get the decree can defend towards their right.

In a law practice, the implementation of this principle can be found in a decree of civil service arbitration tribunal in Denpasar Number: 12/G/1998/PTUN.DPS between Ir. M. Lutfi M., The owner of *Taliwang Bersaudara* restaurant as a plaintiff against the governor of Bali as a defendant. One of the considerations is to determine that "The moment of refusal towards the permission request of restaurant establishment principle pointed by the plaintiff. The governor of Bali refuses the request because the reason is easily changeable. The first refusal is the border of lake and the distance with the Ulun Danu castle while for the second one is the about the water of the lake is rising so the location does not meet the demand".

Credibility or prospect principles which have been coming out

The promises said by administrative functionary can create expectations to the society. If the authorized official acts for the government and gives the promise for a certain society, then "credibility principle demands the government (for instance, in an authority execution to give a decree) is bounded to the promise said" (Ateng Syafriudin, 1994: 42). The reluctance of the promise can make the society not believe to the government or administrative functionary. The society which loses their belief by a hope given by the government will get the law protection based on the credibility principle. The care of belief needs to be done so that the government gets the support from its society in doing the project.

In a law practice, this implementation of this principle can be discovered in a decree of civil service arbitration tribunal in Denpasar Number: 12/G/1998/PTUN. DPS as explained before. The governor of Bali as a defendant I is assumed to breach the principle in responding the common expectation with the reason that "*Taliwang Bersaudara* restaurant has been established on 29th of December 1989 and declared by the chief of tourism affair of Bali province". According to me, the prospect principle implementation in this case is not proper. Actually, the core of problem is that there is a promise from the administrative functionary who acts for the government in which the promises create the expectation from the society. However, the presence of the chief of tourism affair of Bali province in a opening ceremony, cannot be said as a giving a promise, except, the promise is said in the ceremony.

Equality principle

This principle requires a breach in the same condition must be equal in a treatment. The implementation of this principle needs to be done carefully. Before dealing with the decree, the problem should be accurately checked so that the same decree can be made for the same case. The administrative functionary may not discriminate in making the decree. If there are

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several people in the same law condition propose the request, then all of them have to get the same decree and there should be no subjective addition. In a law practice, this principle implementation can be found in Supreme Court's verdict Number 10 K/TUN/1992 dated 13th of September 1994 about the case between Lindawati as the applicant's appeal, in the past as a plaintiff, against the regent of Gianyar as a defendant appeal, in the past as a defendant. The law consideration for this case is "in a control execution in the same condition, the administrative functionary should do the common principles of good government called, an equality principle. It means that towards the same thing, it should be given the same treatment".

In this case, the demolition of the building assumed breaches the law is not based on the equality principle. Thus, a decree of the regent of Gianyar Number 46 dated 16th March 1991 and the decree Number 640/196/PU/1991 dated 5th of March 1991 can be cancelled because it is only intended for Lindawati. The other violators are allowed, so that this demolition done by the regent is concluded as a breach of law regulation by the leader *(eenonrechtmatigeoverheidsdaad)*.

Equality principle shows that "the equal things should be treated the same, seen as one of the law principle which is very basic and rooted in the law awareness" (Philipus M. Hadjon *et.al*, **op.cit:** 271). So, the regent "may not discriminate between the same elements which will get the decree in the same condition" (A. D. Belinfante & H. Boerhanoedin Soetan Batoeah: 30).

The implementation of equality principle in this case is less relevant because between the building of Lindawati with the other buildings which is not demolished have different condition even though at that time, they disobey the local regulation Number 8 Year 1983 about a ban on buildings on the track of side of along the road in the region of regency of Gianyar. The other building is not demolished because that building has been existed before the regulation is made. So, the local regulation is not done before. It needs to bear in mind, if the law regulation retreats; it will create the uncertainty of law that can cause the restlessness of society. In relation with this, Lon Fuller states the requirements that should be concerned by the law maker. If the law regulation is known as a tool to lead a future behavior it is easily understood that the law cannot be done previously" (N. E. Algra*et.al.*, 1983: 124).

Material Austerity Principle

This principle requires the law composing by administrative functionary is done carefully to avoid the loss in the future for the society. It means that the loss for the society will "not reach the need to protect a right which should be done by declaring a relevant decree" (Indroharto, **op cit.**: 183). In a law practice, the principle implementation can be seen in a civil service arbitration tribunal, Jakarta Number 74/B/1994/PT.TUN-JKT. The main dispute is the decree is assumed disobeying the austerity principle because through this letter there is a violation of the building and land out of the guarantee so it causes the loss. To avoid the violation, it should be considered some indicators as follows (Jazim Hamidi, 1999: 155):

a. It is a must to make the proper content of decree with the real fact and aim;

b. Make a clear and transparent decree;

c. A decree should give a guarantee for law protection, as a decree withdrawal, decree correction, a new decree creating, and loss guarantee.

So, this principle implementation requires the decree made by administrative functionary will not make the loss for society.

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Balanced Principle

This principle requires a law penalty implemented properly in line with the violation. For example, an establishment of building that violates a border of road in one meter, then the part that will be demolished is only one meter. The penalty implementation is caused by administrative penalty which is intended for the violation not for the individual. Besides, this is only as a separator, called, restore to the previous one.

In the government, it is also named as government principle related to *rechmatig van bestuur* aspect which is "presumption principle *'rechmatig' (vermoeden van rechmatigheid, praesumptioiustae causa).* In this principle, each acts of the government is always assumed as *rechmatig*until cancellation" (Philipus M. Hadjon, 1992: 14). This principle is written in the law Number 5 Year 1986 about civil service arbitration tribunal since in article 67 section 1 this law says that "the lawsuit does not delay or impede the implementation of decree of administrative functionary as well as the action of the administrative functionary sued". In the case of demolition of Lindawati done by the regent of Gianyar, this principle implemented although she has taken the legal effort to defend her right such appeal and cassation but the building must be destroyed. This demolition is done based on the presumption principle *rechmatig* meaning that the letter of decree of demolition declared by the regent is still assumed *rechmatig* before there is a cancellation from the authorized official.

In a law practice, sometimes, there is an implementation of penalty cumulatively between criminal penalty and administrative penalty. Regarding this, it needs to be understood that the implementation *ne bis in idem* principle which means "one case has been decided should not be tried for the second time" (I. P. M Ranuhandoko, 1996: 408). Normatively, this principle is managed in article 76 section 1 the book of law. In this article, it is stated that "except in the case of judge's decision may still be repeated, *(herziening),* the people should not be prosecuted twice for acts by Indonesian judges against him has been judged by a decision that became fixed". So, in criminal law, in the same case, the individual may not be punished twice.

In connection with cumulative penalty meaning that the implementation of criminal penalty altogether with the administrative penalty, theoretically, there are two views. One side, Hazewinkel – Suringa stated that "if it has been penalized (afdoening) administratively, then prosecution under criminal law is impossible" (A. Hamzah, 1995: 94-95). Based on this view, in an external accumulation, it is applied for *ne bis in idem* principle meaning that in the same case, criminal penalty cannot be applied altogether with administrative penalty. On the other hand, Philipus M. Hadjon says that "there is no ban to implement administrative penalty with criminal penalty. In this case, *'ne bis in idem'* principle is not valid because between administrative and criminal penalty have different view both characteristic and purpose" (Philipus M. Hadjon, 1996: 2).

Based on the positive law, in an external cumulation, it is not applied *ne bis in idem* principle which means criminal penalty can be implemented altogether with the administrative penalty. For instance, in article 3 section 2 local regulation of Tabanan regency Number 7 Year 1995 about eradication of prostitution, it is stated that "besides criminal penalty mentioned in article 6 local regulation for company/legal entity which provides place of business as place of immoral action can be repealed its license or closed the business place". So, based on this article, company/business place which provides a place for immoral action will be closed. Besides, this place will be asked for criminal penalty based on article 6 sections 1 local regulation, that is, imprisonment for about 3 months or fine about Rp. 50.000 (fifty thousand rupiah).

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In a process of decision making by the judge of administrative court, the concerned principle will be mentioned (Paulus Effendie Lotulung, 1993: 39):

a. No one can be a judge in the case in which he/she involved within the case.

b. *Audi alteram partem* which means that the parties should be given a chance to hear the opinion or statement before given a verdict.

The first principle is used to ensure objectivity from the verdict meaning that based on this principle, it can be done investigating whether in a content of verdict, and there are interests either direct or indirectly from the official who declares the verdict. Then, the second principle, it emphasizes on providing a chance to each person to defend their right/interest before the verdict is made. The information given by an individual who will be got the verdict has an important meaning in order that the made verdict will not disobey the principle of prohibition of arbitrary action.

It is also well-known as *ergaomes* principle, that is, the decree of judge of administrative court has a power to bind each individual. It means that it does not only bind the parties who dispute as happen in the civil judge's ruling. In a law practice, it should be kept in mind that this principle is conflicted with the article 83 the law Number 5 Year 1986 about civil service arbitration tribunal because in that article, it is stated that:

"during investigation, each interest individual in the dispute of other party which is being investigated by the court, either on their own initiative by submitting application or on the judge's initiative, can be processed within state administrative dispute, and act as :

a. a party who defends the right or;

b. a member who joins with one of the parties who dispute

This law regulation provides a chance for the third party (the party which is not involved in the dispute) to do an intervention which is fit with the position of their interest either on their own initiative or the judge's initiative who adjudicates the dispute. Even though, in the civil service arbitration tribunal, who can be defendant based on the article 1 section 6 the law Number 5 Year 1986 about civil service arbitration tribunal is only agency or administrative functionary, because in the article mentioned that, the defendant is agency or administrative defendant who declares based on their authority, and whom can be sued by an individual or private legal entities". So, based on this article, the individual or private legal entities is impossible in the position as a defendant. Likewise, the impossibility of joining of the third party in the state administrative dispute because in the article 1 section 3 stated that the decree of state administration is "a written confirmation declared by administrative functionary consisting of criminal law of state administration based on the applicable law regulation which is concrete, individual and final arising from law of any person or private legal entities". The impossibility of joining of third party in the state administrative dispute is existed because this dispute needs a individual decree meaning that the decree of state administration is proposed to a person or a certain private legal entity as well as the particular address. So, in the law administrative practice based on *ergaomes* principle, not mentioned unknown intervention of third party because the state administrative dispute is also a dispute of public law so that the decree of civil service arbitration tribunal is valid for every individual.

CONCLUSION AND SUGGESTION

In the government management, the law principles, such as prohibition of authority abuse, the prohibition of arbitrary action, normatively have been managed in the positive law. The other

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law principles develop through jurisprudence and the decree of civil service arbitration tribunal. In a law practice, the implementation of law principles needs to be concerned both in the process of making and decision-formulation. It means that the made decree should be suitable with the rights or interests commonly developed in the entire social life.

This explanation is submitted by providing different suggestion with the common and abstract principles, then, the implementation needs to be done accurately so that there will not be any afield things from the law enforcement purpose, that is, realizing a justice.

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