

## CONCEPT OF THE LAW OF TIMOR-LESTE

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### ABSTRACT

*The regulatory authority stipulated the establishment of the State of Law in Timor-Leste, is constitutionally under the Constitution only set the key things that are abstract, while things that are more concrete set in the form of the Act. However, based on the Constitution of the setting material different payloads in the Constitution, because the regulation concerning the substance of the general nature of abstract and general nature Concrete has been specified in the constitution. Consequently, in its application, directly apply the Constitution. Therefore matters relating to the public interest have been set directly in the Constitution. While the national parliament and form a government only Constitutional provisions material is abstract general (principal), to form the underlying Act, to implement the Constitution.*

**Keywords:** Constitution, Principal, Parliament, State of Law in Timor-Leste

### BACKGROUND

In studying and understanding the law of the State it is necessary to distinguish between the State and the Nation. Nation is a collection of people who are bound for the unity of language and certain regions on earth. Thus the people of Timor-Leste is a group of people who have the same interests and assert itself as a nation, and proceeding in a region .. While the state is a partnership that carry a government through a binding legal community with the power to social order. In a country need a rule to limit the authority of the leaders in order not to act arbitrarily against people. The rules are called laws. The concept of the rule of law there are two concepts of the Continental European (rechtstaat) and the Anglo Saxon concept (Rule of Law). In Timor-Leste embraced the concept of the Continental European (rechtstaat) which is inherited from the Dutch colonial. The term law in Timor-Leste is often translated rechtstaat or Rule Of Law. Rechtstaat idea gaining in popularity the seventeenth century as a result of the development of the social and political situation of Europe is dominated by understand absolutism rechtstaat developed by Immanuel Kant (1724-1804) and Friedrich Julius Stahl. While understanding Rule Of Law became known after Albert Venn Dicey in 1885. And published the book *Introduction to the Study Of The Law Of the Constitution*. Understand the Rule Of Law is based on Anglo-Saxon law system. Or Common Law System. In a country the fundamental concept determine basic foundation of the State itself. Timor-Leste as a country's laws (rechtstaat or Rule of Law).

This is reflected in the Constitution Article 1 (1) Democratic Republic of Timor-Leste is a country that is democratic, sovereign, independent and united, by force of law, the will of the People and the respect for human dignity". In addition Article 2 paragraph (1) Sovereignty is in the hands of the People, which will be used in the manner and in the form prescribed in the Constitution. consequence that Timor-Leste is the law states that the highest authority in the country is legal.

## Thought History of the State of Law

The idea of a state of law has been developed by philosophers of Ancient Greece. Thought the state law is a modern idea that multi-perspective and always current. At the time of the Ancient Greeks thought about the state of law developed by Plato (429-374 BC) and Aristotle (384-322 SM0. The concept of a constitutional state according to Aristotle is a country that stands above the law to ensure justice for its citizens. In the Middle Ages the idea of the state of law born as a struggle against the absolute power of the king. the term was derived legal state of the nineteenth century, but the idea of a state of law is growing in the seventeenth century. the idea was to grow in the UK and is the backdrop of the 1688 Revolution Sofya M. the idea was lead as a reaction against the absolute monarchy, and formulated in the charter of the famous "Hill of right 1689 (Great Britain)" which contains the rights and freedoms of citizens and regulation in lieu of the king in the modern era Inggris. the law state concept dominated the Continental European system and Anglo Saxon. the concept of a constitutional state in continental Europe is used by using the German term is "rechtstaat" among other things Immanuel Kant, Paul Labane, Julios Stahl, Fichte, and so on. While the Anglo-American tradition of law state concept was developed with the concept of the Rule Of Law pioneered by AV Dicey. Besides the concept of a constitutional state is also associated with the term nomocracy (Nomocratie) means in the organization of state power is the law. Immanuel Kant provides an overview of the state of law as a night watchman state task means simply keeping course, the rights of the people should not be harassed or violated, regarding prosperity or welfare people of the state should not interfere.

According to Immanuel Kant, there are two principal who continue to be inspired the development of the principles of a constitutional state is the limitation of power by rulers and protection of human rights Meanwhile, according to Friedrich Julius Stahl that elements of state law that needs to be protected, namely the protection of human rights.

## Understanding the State of Law

In modern times, the concept of the State of Law in Continental Europe developed among others by Immanuel Kant, Paul Laband, Julius Stahl, Fichte, and others by using the term German, namely "*rechtsstaat*". While the Anglo-American tradition, the concept of rule of law developed on the pioneering AV Dicey called "*The Rule of Law*". According to Julius Stahl, the concept of the State of Law which he called by the term '*rechtsstaat*' include four essential elements, namely:

1. Protection of human rights.
2. Power sharing.
3. Government based on law.
4. State judicial administration.

State law is a translation of the term *Rechtstaat* or the *Rule of Law*. *Rule of Law* itself can be regarded as forms of juridical formulation of ideas constitutionalism. In a simple sense of the rule of law as interpreted by Thomas Paine as no one is above the law and punish the ruling. Therefore, the constitution and the state (laws) are the two institutions that are not separated. In a simple question of law state is a state that management power based on the rule of law. In which the state and other agencies in implementing any action should be guided by the law and can be justified by the law. In a state of law, the power to run the government based on the rule of law (rule of law) and aims to organize legal order. (Mustafa Kamal Pasha 2003). State based on law as the law is the highest (*supreme*) so that no term rule of law. The rule of law must not ignore the three basic laws, namely justice, expediency and certainty. Therefore state in fulfilling the law must pay attention to three issues. Thus the law is not just a mere

formality or procedure of power. If the state under the laws of the government of the country should be based on a constitution or the constitution as the basis of governance. The state constitution is a means of unifying the nation. Relationships between citizens and the state, the relationship between countries institutions and the performance of each of the elements of power that are in the system rules agreed and upheld.

### **The characteristics of the State of Law**

State laws that emerged in the 19th century is a country of a formal law or the law of States in the strict sense. In the previous description has stated that the state law is a translation of the term *Rechtsstaat* or the *Rule of Law*. The term *Rechtsstaat* given by experts of the Continental European law being the term *Rule of Law* by legal experts Anglo Saxon. Friedrich Julius Stahl among Continental European legal experts give *Rechtsstaat* characteristics as follows: a) Human rights, b) Separation or division of powers to guarantee fundamental human rights commonly known as triad politics, c) Government based on rules, d) Justice administration in the dispute.

The AV Dicey of the Anglo-Saxon legal experts give the characteristics of *the Rule of Law* as follows: a) The rule of law, in the sense that there should be no arbitrariness so that a person can only be punished if they break the law, b) An equal footing before the law, either for ordinary people as well as for officials, c) Ensuring human rights in legislation or court decisions.

The characteristics *rechtstaat* or *Rule of Law* over the country are still influenced by the concept of a formal law or state law in the strict sense. From the characterization above shows that the role of the government is only a little, because there is the argument that the "government is a bit of good government". In addition to formulation characteristics legal state as above, there are various opinions on the characteristics of a state of law raised by the experts. According to Montesquieu, the country's most well is a state of law, for in the constitution in many countries contained three main core, ie a) protection of human rights, b) Enactment of a constitutional state, and c) Limit the power and authority of the state organs.

Mustafa Kamal Pasha (2003) stated that there are three characteristics legal state, namely: a) Recognition and protection of human rights, b) Free judiciary from the influence of other powers and impartially, c) Legality in the sense of the law in all its forms.

Sudargo Gautama suggests three traits or elements of state law, namely: a) There is a limitation of state power against individuals, meaning the state can not act arbitrarily. State action is restricted by law, the individual has the right to the state or the people have the right to authority, b) Principle of Legality Every state action must be based on laws that have been held first that must be adhered to government or its institutions., c) Separation of Powers. In order rights were actually protected is the separation of powers which is the body that makes laws, implement and adjudicate must be separated from each other is not in the hand.

### **Principles of State Law**

According to Asshiddiqie twelve important features of state law are: the rule of law, equality under the law, the principle of legality, limitation of power, the executive organ of an independent, free and impartial judiciary. administrative courts, state judiciary, protection of human rights, democratic, means to realize the goal of the state, and transparency and social control. Interest State of Law As we all know that the issue of state law in fact none other than the question of power. There are two centers of power. On the one hand there are countries with the powers that be an absolute requirement to be able to govern. On the other hand the governed appeared reluctant to let go of all its power. We witnessed that when the authorities in one country only aims to obtain maximum power regardless of the freedom of

his people, then fled the state law. Thus it is evident how important the goal of a country in relation to our problem. According to Van Apeldoorn purpose of law is to regulate order in a peaceful and fair society. Peace among men is maintained by law to protect the interests of certain human beings, honor, freedom, life, property and so on are disadvantageous. The interests of the individual and the interests of the human race is always at odds with each other. Conflicts of interest are always cause dissension. Even wars between everyone against everyone, if the law does not act as an intermediary to maintain peace. Legal maintain peace by weighing the conflicting interests carefully and hold the balance of them because the law can only reach the goal (set in a peaceful social life) if he was heading fair rules. That is, the regulations contain a balance between the interests protected so that everyone obtain as much as possible is a part. According Montesquieu, the country's most well is a state of law, for in the constitution in many countries has three main core, namely: i) protection of human rights, ii) Enactment of a constitutional state, iii) Limit the power and authority of the state organs.

Besides, one objective of the law is to get the highest legal certainty (*rechtzekerheid*). Legal certainty becomes increasingly considered crucial when it comes to the teaching of the state based on law. Knowledge has become a classic in the science of law that the written law is seen as more legal certainty compared to the unwritten law (customary law).

### **The concept of State of Law Timor Leste (*Democratische Rechtsstaat*)**

In the concept of Rule of Law "rechtsstaat" the idealized that should be the commander in the dynamics of national life is the law and in accordance with the Constitution of RDTL in article 1, paragraph (1) and Article 2, paragraph (1) and (2). It is as one of the concepts of Supremacy of law. Which upholds the sovereignty as the only supreme power in accordance with the legal adage of terminology known as "Salus Publica Suprema Lex Isto" which indicates that the interests of the people is the highest law. Thus, the conception of the State of Law or that were previously only contained in the explanations that have been formulated in the article as the concept of the State of Law Timor-Leste or referred to as the state philosophy of "Estado de *Direito Demokratiko*". Based on the Constitution, the concept of the State Law East Timor also have goals and ideals of the Nation as well have been written in article 6 of the Constitution of the purposes of the state "*Objectivo do Estado*". Therefore, the concept of Timor-Leste's State of Law is the law of the State Law Mix (Combined *rechtsstaat* legal concepts with the concept of the rule of law). The idea of a State of Law was built to develop the law itself as a system that is functional and fair, developed by managing super-structure and infra-structure of political institutions, economic and social and orderly, and nurtured by building cultural and legal awareness of rational and impersonal in the life of society, nation and state. Understood State laws cannot be separated from pahan populist because in the end, the laws that regulate and restrict the power of the State or the government interpreted as a law made on the basis or principles of power or sovereignty. Thus the close understanding of law and democratic country so that there is a democratic constitutional state designation or democratische rechtsstaat. In connection with the democratic rule of law, according to John Usfunan; Government put forward the five elements of constitutional law, namely:

- i. The principle of legality; State bow the Constitution and the Law
- ii. Human rights; East Timor is a democratic country, Sovereign, Independent and united by law, the will of the people and the respect for human dignity. As stipulated in Article 2 of the Constitution of 2002
- iii. Regulatory oversight; Governments perform their functions under the provisions of the general and not made arbitrarily override the convention and the constitution.

- iv. The division of power-authority; The government implemented a constitutional means government by the will of the people.
- v. Democracy; Community participation in the development process of the nation and the State.

It may be concluded that, state law is essentially a country that refuses to relinquish power without control. In other words, the State authority must by law organize fair and democratic. In connection with the concept nomocracy who came from the word nomoch and create words nomocracy can be compared with demos and create in democracy or rule entirely of the people imagined as a determining factor in the administration of power is the norm or law hence the term nomocracy closely related to the sovereignty of the law of Timor-Leste. Thus said nomokrasi be in line with the principle of rule of law developed by Frederich Julius Stahl, this can be attributed to the principle rechtstaat on continental European territories Civil law including the four essential elements, namely: a) Protection of human rights., b) Division or separation of powers, c) The government based on law, d) Administrative courts.

While in the area Anglo sexon Command law, came the concept of rule of law (rule of law) of AV Dicey, with elements as follows: a) The supremacy of the rule of law (supremacy of law), b) Position the same in the face of law (equality before the law), c) Ensuring human rights by the Constitution and judicial decisions.

Democratic Republic of Timor-Leste is a democratic state of law to regulate, binding, limiting the power of government and determines the position of sovereignty that democratic institutions and society as a means of control in the government system. Restrictions agencies that in validation authority and legitimacy by the Constitution in order to keep the non-occurrence of a dispute or conflict and are barred from interfering intervention in the activities of other organs thus Independent each branch of power can be guaranteed by the principle of checks and balances. In accordance with the supremacy of law, that any government action should be subject to the laws and the Constitution. It thus to uphold the principle of legality and the principle of legal certainty and social justice for all the people of Timor-Leste. Each power must have had a tendency to develop into arbitrary, as stated by Lord Acton: "Power tends to corrupt, and absolute power corrupts absolutely". Therefore, power should be restricted by way of separating power into branches that are checks and balances in the equal and positions offset each other and control each other, the limitation of State power and organs of the State, by applying the principle of division of power so power is not centralized and concentrated in one organ or one hand the possibility of the authorities' actions power. according by John Locke in creation Two Treaties of Government, State power divided into three kinds, namely: a) Make Law (Legislative Power), b) plan Act (Executive power), c) The power to conduct diplomatic relations with other countries (Federative power).

In the book *L' spirit des Lois* (1748) Montesquieu distinguishes three kinds of power, namely: a) Making power Act (Legislative Power), b) Power to implement the Act (Executive Power), c) Power to punish (Judicial power).

Based on the above two experts mentioned above, if traced according to the provisions of the Constitution of 2002 which regulates the State agency under the provisions of Article 67 that, bodies composed of State sovereignty; President of the Republic, the national parliament, government and judiciary. Each institution of sovereignty in carrying out its functions should be based on the principle of the principle of separation of powers as provided in article 69 the Constitution of East Timor in 2002.

## Concept of Law State of Timor-Leste

At the opening of the Constitution of Timor-Leste on the part of paragraph five and six states that, it is necessary to build a democratic culture and institutions, according to a State of Law, where respect for the Constitution and for the institutions democratically elected, is the foundation that cannot be questioned, By interpreting the deep feelings, ideals and belief in God of the people of Timor-Leste; Solemnly reaffirming its determination to combat all forms of tyranny, oppression, domination and segregation of social, cultural and religious, to defend national independence, respect and ensure the rights of man and the rights of citizens, to ensure the principle of separation of powers in the arrangement of the state, and to establish rules that fundamental core of multi-party democracy, with the aim of building a just and prosperous nation and developing a united and friendly society. Furthermore, Article 1 (1) of the Constitution states that, the Democratic Republic of Timor-Leste is a country that is democratic, sovereign, independent and united, by force of law, the will of the People and the respect for human dignity. The rule of law are constantly evolving according to the changing times. Advances in science and technology and the complexity of people's lives in the global era, demanding development of the principles of a constitutional state. State law states that the organization is a government based on the rule of law, and therefore governments and other institutions in implementation actions must be guided by the law and be held legally responsible. The development of a state of law in the modern era is influenced by the concept of European Continental called "rechtstaat and Anglo Saxon called Rule Of Law" Continental Europe (rechtstaat), legal system rechtstaat is a legal system with the characteristics of their various legal provisions are codified (compiled) systematically interpreted further by judges in its application. Nearly 60% of Indonesia adheres to this system. Rechtstaat concept rests on the principle of legality within the framework of the rule of law that is written and emphasize certainty. Approach emphasized is justice based on the law in the broadest sense. Rechtstaat developments in Continental Europe according F.J. Stahl includes four things Protection of human rights: a) Power sharing, b) Government under the Act, c) Administrative Courts.

### Anglo Saxon (Rule of Law)

Rule of Law grows and develops first in the country that "the Common Law System" such as Britain and the United States. To embody the two countries as the realization of equality of rights, obligations and degrees in a state before the law. System Rule Of Law is a system that is based on jurisprudence is that the decisions of the previous judge on which to base the next judge's decision. The concept of rule of law led by Albert Venn Dicey has three important characteristics combined with the concept of rule of law FJ Stahl:

1. Supremacy Of Law means that which has the highest authority in a country is the law.
2. Equality Before The Law means equality in position for all the good citizen as individuals well in qualifying as State officials.
3. Dive Process Of Law means that all government action must be based on legislation that is valid and in writing.
4. Rechtsstaat concept was born as opposed to the revolutionary nature of absolutism that while Rule Of Law evolved evolutionary system is based on Common Law.

On the basis of the characteristics of State laws proposed by Albert Venn Dicey has three characteristics essential coupled with the concept of rule of law FJ Stahl, when linked with the concept of rule of law in Timor-Leste traits Countries Timorese law is based on the Constitution as follows:

### **Supremacy of Law**

Supremacy of law (rule of law) in accordance with the provisions of Article 2 (1 and 2) which states that, 1) Sovereignty is in the hands of the People, which will be used in the manner and in the form prescribed in the Constitution. And 2) the State subject to the Constitution and the law.

### **Equality before the Law**

According to the provisions of Article 16 (Universality and Equality); Paragraph (1) All citizens are equal before the law, have the same rights and are subject to the same obligations. And Paragraph (2) No one shall be subjected to discrimination on grounds of color, race, marital status, gender, ethnic origin, language, social or economic standing, political beliefs or ideology, religion, education, physical or mental state. Furthermore, according to the provisions of Article 17 (Equality between Women and Men), People women and men have the same rights and obligations in all areas of family life, cultural, social, economic and political.

### **Protection of Human Rights**

According to the provisions of Article 29 (Right to Life) of paragraph (1) Human life can not be denied. And (2) The State recognizes and guarantees the right to life. Paragraph (3) There will be no death penalty in the Democratic Republic of Timor-Leste. Furthermore, the provisions of Article 30 (Right to Freedom, Security and Integrity) of paragraph (1) Everyone has the right to liberty, security and integrity. (2) No one shall be arrested or detained, except under the terms of which are clearly established by the applicable legislation, and the warrant of arrest or detention should always be submitted to the competent judge for consideration, within legal deadlines. Paragraph (3) Every citizen deprived of their liberty shall be informed promptly, clearly and precisely, about the reasons for the arrest or detention of himself and of his rights, and allowed to contact a lawyer, directly or through a family member or a person who believe. and (4) No one may be tortured, subjected to cruel, inhuman or degrading.

### **The Separation or Division of Powers**

According to the provisions of Article 67 (Organs of Sovereignty) The organs of sovereignty shall comprise the President of the Republic, the National Parliament, the Government and the Courts. Then Article 68 (contradiction) of paragraph (1) that the President of the Republic, President of the National Parliament, Chief Justice, President of the High Administrative, Tax and Audit Court, Attorney General and members of the Government should not be concurrently two positions. And (2) that, the Act will define contradictions others. Further institution sovereignty of that State in carrying out its functions referred to under Article 69 (Principle of Separation of Powers), which states that institutions of state sovereignty, in relation to one another and in the exercise of its functions, must follow the principle of separation of powers and interdependence set out in the Constitution.

The Court of Public Administration under the provisions of Article 129 (High Administrative, Tax and Audit)

Of the five characteristics of State laws specified in the Constitution DRTL suggest that the State of Timor-Leste is a State of Law mixture (Mix Law) between Rechtssaat and the rule of law. It thus due to the characteristics of State law adopted by both the concept of rule of law formulated in the Constitution of 2002. As the above description. Institutions of sovereignty of the Democratic Republic of Timor-Leste, distributed into four sections or often referred to by the institutions of sovereignty as it has been codified in article 67 of the Constitution of the bodies of sovereignty "*Orgaun Soberania nian*" consisting of; President,

National Parliament, the Government and the Courts. As described on the previous page. Furthermore, in the description as follows:

Article 74 President of the Republic is the head of state and the symbol guarantor of national independence and unity of the country as well as the smooth functioning of democratic institutions. President of the Republic is the supreme commander of the armed forces. Thus, the institution of sovereignty Presidency is an institution that is very important in Timor-Leste therefore be seen in article provide an opportunity for the institution of sovereignty presidency to take decisions or carry out their duties and authority in accordance with the Constitution. According to the provisions of Article 92 of the National Parliament is the organ of sovereignty of the Democratic Republic of East Timor that represents all Timorese citizens and is vested with legislative drafting legislation, supervision and taking political decisions and controlling the institutions of sovereignty, such as the President, the government and court so that the State Government is called Check and Balance. Furthermore, in Article 103 which gives the definition of the terms of, the Government of the State power institution that aims to run the Act and is responsible for the direction and implementation of public policies and the State is the highest general government agencies. To implement the programs of work of a government then the government would have programs that are essential for improving society and the state in many respects. In connection with the definition of government then, in article 118 of the Court, an institution power State aims to interpret the Act as well as the authority to uphold justice for the people. In carrying out its functions, the court entitled to the assistance of other authorities of. The court's ruling is binding and is above any other ruling authorities. Therefore clear and detailed explanation of RDTL is a democratic legal state "democratische rechtsstaat" by the Constitution of 2002. On the basis of the authority under the constitution of East Timor in 2002, showed that the State of Timor-Leste in carrying out the functions of authority is based on the principle of division of powers is not separation power (the principle of division of powers is not the principle of separation of powers). This is based on the phrase "mutual dependence and interdependence between one institution against another institution. Furthermore, Article 96 of parliament national allow the government to submit a draft law to the Government based on the substance set out in paragraph (1) of Article 96, in addition to Article 97 of the Initiative Act comes of the fractions in the seat of Parliament, Members of Parliament and government. Furthermore, Article 115 paragraph (3) exclusively government makes the rules governing the procedures of governance, both directly and indirectly. Thus that, the agency that serves shaping legislation in the country of Timor-Leste consists of two institution countries, namely the legislature and the executive. Both institutions each have the authority to establish attribution basis Act.

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