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The Significance of Good Constitution for Resulting Good Governance and Clean Government¹

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Abstract

The existence of a Constitution in a State is a Social Contract for establishment of a State, therefore in preparation of the formulation or establishment of the State in the world started by a cooperation that is contemplated into a Constitution of the State. The formulation or establishment of State of Republic Indonesia was commenced by proclaiming the Indonesia independent day on 17th of August 1945, which was followed by the stipulation of the Constitution of Republic Indonesia on 18th of August 1945. The 1945 Constitution as the noble and glorious agreement made by the founding father with expectation in order to give welfare and justice to Indonesian people. The result of this research If a Constitution in a State is well prepared and formulated base on agreement of values and good intention as well, therefore, it can be ascertained to produce a good governance and clean government as well.

Keywords: Constitution; Social Agreement; Good Governance and Clean Government.

Abstrak

Keberadaan sebuah konstitusi dalam suatu negara merupakan kontrak sosial untuk lahirnya suatu negara, sehingga dalam praktek lahir atau berdirinya suatu negara di dunia dimulai dengan adanya kesepakatan yang dituangkan ke dalam Konstitusi Negara. Lahir dan berdirinya negara Republik Indonesia diawali dengan proklamasi kemerdekaan pada tanggal 17 Agustus 1945 yang diikuti dengan penetapan Undang-Undang Dasar pada tanggal 18 Agustus 1945. Undang-undang Dasar 1945 sebagai kesepakatan yang luhur dan agung dari para pendiri bangsa, dengan harapan agar konstitusi mampu memberikan kesejahteraan serta keadilan kepada rakyat Indonesia. Hasil dari penelitian ini bahwa jika suatu konstitusi di dalam suatu negara dipersiapkan, dirumuskan dengan landasan kesepakatan nilai-nilai dan tujuan yang baik yang baik sebagai sebuah konstitusi, dipastikan akan menghasilkan suatu tata kelola pemerintahan yang baik serta pemerintahan yang bersih.


Kata Kunci : Konstitusi; Kesepakatan Sosial; Tata Kelola Pemerintahan dan Pemerintah Bersih.

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Introduction

The establishment of sovereign states after the Second World War by being declared of *de-colonialization* program, which was followed by the agreement of the 1945 United Nations Charter, by the United States, Russia, the United Kingdom, China and France, had triggered the establishment of other sovereign states including the State of Republic of Indonesia. An establishment of new country is an agreement between the components of the nation's society in its territory. This agreement can be interpreted as a social contract as stated by Socrates, a Greek philosopher, that the birth of a sovereign state is a social

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contract of the people and the nation existing in that region (Siahaan, 2017). In the concept of natural law as an ism that holds the principles of universality of law based on among them the principles of law, one of the public legal principles relating to agreements that is called as "*pacta sun servanda*" that is a legal principle that state "everything that has been agreed by the parties shall be a law for the creators (Darji Darmodiharjo and Sidharta, 2006)",

In reality, the countries that have agreed to establish a sovereign state after the Second World War, the agreements are made and placed in a basic agreement named "Constitution". The Constitution is a basic law in which it contains the basic frame works of a country that will be established and then made into law in organizing the nation and state. Basic law is interpreted as the highest legal source that can be used as a reference for other laws that will be issued in the context of the running of a country. In reality the "Constitution Countries" are established based on written agreements but there are also unwritten agreements based on good habits that have been maintained for a long time in the region and are considered as law by the community. (Fauzan, 2008). Such as those adopted by the United Kingdom and several other commonwealth member countries. As A.V. Dicey said that "The States Law of United Kingdom (England) consists of two parts, namely: (a) The Law of Constitution which includes: (i) historical documents such as Magna Charta in 1215; (ii) The Statute of the Parliament; (iii) Judicial Decision; and (iv) Principles and rule of common law, and (b) The Convention of the Constitution includes: (i) Habits; (ii) Traditions; (iii) Customs and (iv) Practices and usage" (Asshiddiqie, 2009).

In other point of view, John Locke said that prior to the formation of society, therefore under the natural conditions with natural laws that govern all people to subject to that laws, all were born free and equal. Consequently, no one can harm any other person, and no one can snatch other free human property. After the formation of civil society, therefore the community is strengthened by the application of positive law that can be reinforced by the legal apparatus, because according to John Locke the purpose of humans entering civil society is to enjoy their life and property rights with the security guarantees provided by civil society or legislative power which is the highest power of the community (*commonwealth*) (Asshiddiqie, 2009).

Observing the formation of the Constitution and how crucial a Constitution for a country is. It can also be observed at the history of its development, especially in the history of the development of Islamic law that occurred in the 622 *Messiah*, where we can see how the *Prophet Muhammad* agreed to resolve disputes between the *Arab* communities that happened at that time. Which disputes occurred between the *Anshor* (helper), the *Muhajirins* (migrants), the *Quraysh* and other minority components such as *Jews* and *Christians*. These agreements were then set forth in the Medina agreement called "*Madinah Charter*". In this Charter showed how the Prophet Muhammad as head of state always tried to solve every problem by dialogue with various groups to find a good solution. The Medina Charter was the basic guideline for the birth of the state of Medina which was begun with the agreement of *Al-Aqobah I* in 620 *Messiah* and *Al-Aqobah II* in

621 *Messiah*, previously the area was in the City of *Yathrib (Medina)* which later developed during the *Rashidin Caliphate*. The Constitution of Medina has been the constitution of the state of Medina which mainly regulates the obligations and rights of its citizens (Azhari, 2007). That has shown so far the importance of the constitution the existence of the state.

How to build an Indonesian constitution? Indonesia, as a sovereign country, certainly has its own constitutional history. The Indonesian constitution must certainly be linked to the Indonesian state both as a subject and as a nature. As a subject, we must examine who 'the figure' named Indonesia is, that will become the house of this constitution, while as nature, we must examine the special characters in the Indonesian environment that must be considered in the constitution. In summary, before making the Indonesian constitution, we must first understand who the Indonesian nation is, and in what environment the nation lives. To understand this, it cannot be other than that people must first understand the history of the formation of Indonesia as a nation. This is because the Indonesian people live in their own historical habitat (Harjono, 2008).

The State of the Republic of Indonesia is a sovereign country that born of mutual agreement from all components of the Indonesian nation, which began with the proclamation of Indonesian independence on 17th of August 1945, continued by the formulation of the 1945 Constitution by the Preparatory Committee for Indonesian Independence (*Panitia Persiapan Kemerdekaan Indonesia*) abbreviated into PPKI that was stipulated on 18th of August 1945 as a formal document that is a result of nation effort an establishing the state (Tamrin, 2016). At that time, there was a change in the form of the Unitary State of Republic of Indonesia to become a United State of Indonesia at the insistence of the Dutch colonial at the Round Table Conference in Den Haag with the formulation of the Constitution of the Republic Federation of Indonesia in 1949 which was set on 27th of December 1949. The uproar that occurred in the community who wished to return to the Unitary State of the Republic of Indonesia as a result of the demands of separating the state by separatism, the 1950 Provisional Constitution that was formulated in the year of 17th of August 1950. However, the determination of The Provisional Constitution in 1950 was unable to provide certainty for the establishment of the Republic of Indonesia, on the contrary some regions in various regions wished to separate themselves such as the Republic of South Maluku movement, *Kahar Muzhakar* movement in South East Sulawesi, *Daarul Islam of Indonesia*, *Westerling* genocide in South Sulawesi, *Permesta* movement in East Indonesia, has caused a nation's divisions which are increasingly worrying coupled with the failure of the Central Indonesian National Committee to formulate and establish a Constitution, so triggered by such condition the President stated to back to the 1945 Constitution pre arranged on 18th of August 1945, which was re-stipulated on 5th of July 1959 (Indrayana, 2007).

As time goes by, after the 1945 Constitution had been enacted for approximately 32 years by the authority of the order with various problems that arose both problems in terms of good and weakness, until finally there was a wave of demands for reform in

various fields including demands for the improvement of the 1945 Constitution. In connection with this case, the 1945 Constitution was finally amended several times, namely: the first (1st) amendment stipulated on 19th of October 1999, the second (2nd) amendment stipulated on 18th of August 2000, the third (3rd) amendment stipulated on 9th of November 2001 and the fourth (4th) amendment stipulated on 10th of August 2002. (Darusman, 2013). The amendments are intended in order that the 1945 Constitution shall be able to guarantee the best protection to all people in accordance with the purpose and ideals of the proclamation. One of the results of a very important changes, especially in the area of judicial power, was the formation of a guardian institution of the constitution namely the Constitutional Court of the Republic of Indonesia in addition to the Supreme Court of the Republic of Indonesia and the Judicial Commission of the Republic of Indonesia, as stipulated in Article 24 of the 1945 Constitution (Wijaya, 2014).

According to Jimly Asshiddiqie, the amendment of Constitution has also modified the very significant things they are in the principle of sovereignty in Indonesia after being carried out the 1945 Constitution, from the supremacy of the Peoples' Consultative Assembly, to the supremacy of the 1945 Constitution. That the administration of the state is no longer under the control of the MPR Decree, which during the new order was an accomplice of the new order government. After the amendment to the 1945 Constitution, explicitly stated that, sovereignty is in the hands of the people that is fully implemented according to the Constitution (Warijati, 2012). The State of Indonesia as a country whose followers of democracy is the highest authority is the people. In a constitutional system based on the Constitution, the exercise of people's sovereignty is channeled and organized according to the constitution stipulated in law and constitution. From the description above it is clear that the principle of popular sovereignty means that it is very close to democracy that gives people room to get involved in government. (Ramadhanil, 2013).

One of the duties of supervision of the Constitutional Court in the field of law enforcement is to examine the Law against the 1945 Constitution, as stipulated in Article 24C paragraph (1) that "The Constitutional Court has the authority to adjudicate at the first and last level whose decisions are final to review the law against the Constitution, decides any disputes of the authority of state institutions whose authority is granted by the Constitution, decides the dissolution of political parties, and decides any disputes as a result of general elections". This authority is of course in order that the Constitutional Court is expected to be able to supervise every rule or legal norm that is deemed by the public in contravention of the 1945 Constitution. (Darusman, 2018)

When the 1945 Constitution assigns the Constitutional Court as the highest interpreter of the constitution, especially in relation to the constitutionality review of the constitution. Will the Constitutional Court interpret the constitutionality of a law based on the formulation of the article text based on the paradigm of legal positivism? Alternatively, the Constitutional Court interpreting the law based on the spirit of social justice and substantive justice, which makes the text not as the center but the sideline (Ali, 2010). In one sense, judicial review or constitutional review refers to "the invalidation of

laws enacted by the normal or regular legislative process, because they are in conflict with some superior law, typically a constitution or treaty – highest law judicial review. (Hertogh Et.Al, 2005).

By observing the results of the implementation of Reviewing the Laws (PUU) against the 1945 Constitution in the history of the existence of the Constitutional Court of the Republic of Indonesia from 2003 to 2018, it is as follows:

Table 1. Number of Applications of Review: 1.199

a.	Rejected	420
b.	Unable to be accepted	375
c.	Unauthorized	9
d.	Fallen through	21
e.	Revoked	115
f.	Granted	259

Source : *Constitutional Court Magazine Number : 143 Edition of January 2018*

The above-mentioned data shows that the state and the Indonesian government made every effort so that the 1945 Constitution is able to provide legal certainty so as to create a sense of justice in society and the nation as a whole. Wherein, it is carried out in order that every citizen who feels aggrieved by the existence of a provision of the law, citizens and the public can apply judicial review against the Constitution in the Constitutional Court, of course it is intended in order that every statutory provisions made by the institution the legislature can not only provide certainty and a sense of justice, it must also be able to provide the maximum benefit and welfare to the community. Even on the other hand the community has an active role in overseeing every legislation and of course the state apparatus are also always careful in carrying out their duties and functions as public servants (Dewi, 2016).

To guarantee the creation of legal certainty in providing a sense of fairness to the community as a whole as well as to the community in particular, for example providing a sense of fairness especially to indigenous peoples even though the state has provided a guarantee as mandated in the provisions of the 1945 Constitution Article 18 B Paragraph (2) which states "the State recognizes and respects the customary law community units along with their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as stipulated in the law" (Wantu, 2012). The real implementation of the protection can be seen in the judicial review of Law No. 41/1999 concerning Forestry, where in the provision contemplated articles which are very detrimental to indigenous society namely Article 1 number 6 and Article 5, a judicial review has been submitted to the Court The Republic of Indonesia's Constitution by the Alliance of Indigenous Society of the Archipelago / Aliansi Masyarakat Adat Nusantara (AMAN) and with the Indonesian Constitutional Court granted the request through the Constitutional Court Decision Number: 35/PUU-IX/2012. This is a clear evidence that the State and Government of Indonesia are serious about creating a good and clean government (Wiyono, 2019).

A good constitution is a constitution that is able to provide a guarantee of protection to provide legal certainty in order to create a sense of justice and prosperity for its people (Siahaan, 2017). In order to achieve a good constitution other than to be formulated with a good formulation mechanism, it also needs to be supported by a good State and Government. Therefore, the State and the Government of the Republic of Indonesia in relation to the period of the period which have attempted to try to ensure that the Constitution runs well in accordance with the ideals of the founding fathers of the nation. One thing is a major concern for how the Indonesian government is able to implement good governance. By referring to the United Nations International Institution Convention such as The United Nation Development Program (UNDP) which has provided a foundation for the Principles of Good Governance, the Indonesian government finally ratified and incorporated it into legislation, especially in the field of government. UNDP has further underlined the following features of good governance: (i) Political accountability and legitimacy; (ii) A free and fair judiciary; (iii) Accountability of bureaucracy; (iv) Freedom of information and expression; (v) Ineffective and efficient public sector management and cooperation with organizational civil society (Ali, 2019).

Then in another view of the good governance principles, the recent worldwide governance has shown that indicators of promotion of good governance: (i) Accountability and Transparency (ii) Free from violence and stability in political systems (iii) Effectiveness of governmental policy (iv) Elimination of corruption (v) Quality of governance (vi) Establish the rule of law (Ali, 2019). In the practice of companies and business this principles also mentioned as Good Corporate Governance (GCG) which content of : (i) Principle of independency (ii) Principle of transparency (iii) Principle of accountability (iv) Principle of responsibility and (v) Principle of fairness (Yusmad, 2013).

The Republic of Indonesia is also a country that has an interest in how important the construction of good governance and clean government in various fields of state institutions can run well, as mandated by the 1945 Constitution. It is indicated by the publication of laws and regulations as a supporting instrument in its implementation. Therefore, by paying attention to the description, it is very important to understand and how we can ensure a constitution that is well formulated and made by taking into account the values that live in society and being able to summarize the ideals of a better national life. Therefore the 1945 Constitution which has been struggled with difficulty must be implemented purely and consequently by the state administrators in this case the government, so that everything aspired by the founders of the nation shall be able to provide a just life for the society and people of Indonesia (Marzuki, 2016).

Research Problems

There are two problems investigated in this study. *First*, have the founders of the nation formulated the 1945 Constitution as a good and ideal constitution that expectedly is able to provide a sense of justice and prosperity to its people? *Second*, how are the efforts of the state and government so that the 1945 Constitution can be carried out as well as

possible as aspired by the founders of the nation, so that it will produce good governance and clean government?

Research Method

The research method is basically a scientific way to get data with specific purposes and uses. Based on this there are four keywords that need attention: scientific method, data, purpose and utility. The scientific way means that research activities are based on scientific features, namely rational, empirical and systematic. Rational means that research activities carried out in ways that make sense, so that it is affordable by human reasoning. Empirical means the ways that are done can be observed by the human senses, so that others can observe and know the methods used (distinguish unscientific ways, for example looking for lost money, or provocateurs, or prisoners who escape through normal people). Systematic means, the process used in the study uses certain steps that are logical (Sugiyono, 2011).

Model of research is a model with a qualitative approach, namely the method of research in social sciences that collects analysis of data in the form of words (oral and written) and human actions and researchers do not try to quantify or quantify the qualitative data obtained and thus not analysis the numbers. However, even if there are numbers in the study, quantitative figures are not primary data in their research, in terms of quantitative data they are limited to being used as supporting arguments, interpretations or research reports. The specification of research used is juridical or normative. Juridical or normative, means that in this study more in depth the law and legislation relating to Indonesian state administration and implementation of government. (Afrizal, 2014).

The approach of research used is the Statute Approach, Historical Approach and Conceptual Approach. The Statute of Approach is intended to be a legal approach related to research. Unless research is within the scope of customary law, research in the level of legal dogmatic or research for the purposes of legal practice cannot be released from the legal approach. Historical approach is carried out in the framework of tracking the history of legal institutions from time to time. This approach is very helpful for researchers to understand researchers from the rule of law from time to time. While the conceptual approach is done when researchers do not move from the existing legal regulations. This was done indeed because there was no or no legal rule for the problem at hand (Marzuki, 2011). Data of research used are primary data and secondary data. Primary data is data taken directly from the resource person in the form of interviews with experts in the field of constitutional law and experts in the field of history of the development of the country of Indonesia. Secondary data is data in the form of primary legal materials such as related legislation, secondary legal materials such as expert opinions obtained through reference to books, and tertiary legal materials such as information obtained from journals, the internet and others (Marzuki, 2011).

Discussion

The Formulation of Good Constitution in Correlation with 1945 Constitution

The Constitution is the highest source of law in the state laws hierarchy, which must be able to provide development of national legal products. The law development is an effort to renew the previous and irrelevant ones. The renewal means to replace the old law with the new one. In this case, the law development has the same interpretation. Meanwhile, the national law is based on the constitution and Pancasila as the national principle, or the law created by the ideals sense and engineering of Indonesia nations (Hamzani, 2018). The constitution is one of the most important legal sources in the existence of a country. In the Oxford Dictionary of Law Constitution is "the rules and practices that determine the composition and functions of the organs of the central and local government in a state and regulate the relationship between individual and the state". Hans Kelsen stated that: "Consequently, any act or fact the result of which is positive law ... be it legislation or custom... is not true the creation of law but a declaratory statement (constitution) or more evidence of the rule of law previously created by social solidarity" (Asshiddiqie, 2009). In case of understanding the constitution, there are two groups that have different views between one and the other. One party views that the Constitution is the same as the Constitutions, while on the other hand it views that the Constitution is different from the Constitution. Such differences of opinion are caused by different perspectives, just as people perceive the notions and nature of the law. One side views the Constitution from the perspective of juridical normative funds, the other side views the Constitution from the perspective of empirical sociology (Handoyo, 2009), A. Mukthie Fajar explains that the constitution in the narrow sense (the narrow meaning of constitution) is the written constitution which is known in Indonesia with the 1945 Constitution. The term a written constitution is distinguished from the "a documentary constitution" (*Maarseveen and Tang*) that: (a) written constitution can be defined as the sum total of all status, regulation and recorded customs which establish organization, working and powers of a state; (b) a documentary constitution is to be defined as the constitution of a specific document which is called the constitution (Fajar, 2008).

In a constitution, it basically regulates the concept of the rule of law as a guarantee of certainty to provide the best protection to the people in that country. A country can be regarded as a legal state, if the law supremacy is used as the basis for the administration of the state including maintaining and protecting the rights of its citizens. Immanuel Kant mentioned the characteristics of the rule of law, namely: (i) Protection of Human Rights, (ii) Separation of Power, (iii) Legality of Law, and (iv) Justice of Administration. A.V. Dicey mentions the characteristics of rule of law state, namely: (i) supremacy of law, (ii) equality before the law, and (iii) the constitution based on individual rights. While John Locke mentions the characteristics of the rule of law state are: (i) the constitution based on individual rights, (ii) the existence of a body that can resolve disputes that arise between

the government (*vertical dispute*) or fellow members of the community (*horizontal dispute*), and (iii) The existence of the rule of law is reflected in the existence of substantive law (law on paper) and legal consistency by judicial bodies/*law in action* (Tutik, 2008).

The rule of law is also intended to provide welfare to its people, because the creation of legal certainty is expected to be able to provide a sense of justice which will ultimately provide happiness. Jeremy Bentham explained the importance of a welfare state, in which the law as the order of living together must be directed to support the "king of like", and curb the "king of sorrow". In other words, the law must be based on benefits for human happiness (utilities). But how can the law be truly functional to support happiness? Creating maximum freedom for individuals to be able to pursue what is good for them. The most effective way is to maintain individual security. Only with security and freedom that is sufficiently guaranteed, can the individual achieve maximum happiness (Effendy, 2014).

The rule of law also provides certainty to the community to obtain justice as provided by the founders of the nation and formulated in the Constitution. Aristotle divided the notion of justice into two parts, namely: "distributive justice" is justice that is in accordance to the level of achievement of each person. For example: Honor, Allowances, Wealth, Other items that can be obtained in the community, and "cumulative justice" is justice that gives as much to each person without distinguishing the level of achievement related to the exchange of goods and services. While Roscoe Pound (Effendy, 2014) argues, that justice is: something that must be seen in the concrete results and can be granted to the community. The results obtained should be greatly satisfying human needs as much as possible by sacrificing at least (utilitarianism).

The implementation of a good constitution can only be implemented if management supports it by infrastructure and good infrastructure, including the management of good governance. Among the authors of state administrative law in Indonesia there are differences in the translation of the *algemene beginselen* and *behoorlijk bestuur*, especially concerning the words *beginningelen* and *behoorlijk*. There are those who translate the *beginningelen* word into principles, fundamentals and principles. Meanwhile, the word *behoorlijkis* translated with the best, the good, the decent and the appropriate. With this translation, the *beginningelen* van department behaved into principles, foundations, or general principles of good or preferable governance (Baital, 2014).

Francois Venter noted that the basic characteristic of a modern constitutional state is the existence of a written constitution that has high legal value. Essentially the constitution is a very important source of constitutional law. From these sources, the constitutional law is the basis of the law compared to other fields. Philipus M. Hadjon quoted the opinion of John Alder in his book "General Principles of Constitutional and Administrative Law" and also the relations between the various governments of a given country and also the relations between the different part of government and the people of the country. Referring to the aforementioned opinion, it appears that the importance of the constitution for the building of a state's constitution. Because it is the basis for the

foundation and direction, to which the country will be brought, especially in realizing good governance (Tinambunan, 2019). In the practice of countries that apply the democratic system of *Rechtstaat* concept and Rule of Law, it can only be implemented if both concepts are described in the constitution.

In the reference to constitutional law, the constitution is divided and classified: (a) Absolute constitution, where (i) the constitution is considered a real organizational unity which covers all legal structures and all existing organizations within the state, (ii) constitution as a form of state in the overall sense (*sein ganzheit*). The shape of the state can be a system of democracy or monarchy. Joint democracy is identity while monarchy is representation, and (iii) constitution as an integration factor. This factor of integration is abstract and functional; abstract is meant that there are symbols of nationality while functional is meant that the constitution has a duty to unite the nation and state. In addition, there are also: (b) the ideal constitution, called the ideal constitution because it is the ideal of the liberal bourgeoisie at that time, namely as a guarantee for the people so that their human rights are protected. This ideal was born after the French revolution that became a demand of the group so that the authorities did not act arbitrarily against the people (Tutik, 2008). As it can be seen in the history of legal philosophy that the birth of the concept of the rule of law was an individual resistance movement pioneered by Immanuel Kant, who had so far not been treated unfairly by the authorities at that time.

As an ideal (ideal) constitution, the constitution must be well formulated and set correctly, but it must also regulate the rights and obligations of the state and citizens comprehensively. These things can be implemented where at least there are provisions governing: (a) State philosophical foundation; (b) Juridical foundation of the state as a legal state (*rechtstaat*); (c) Political foundation of the state with separation of power and state institutional structure. The state's philosophical foundation can be interpreted that the constitution has stipulated the fundamental norms of the country that consists of noble values of the nation that have been agreed upon by all components of the nation as a way of life (Konradus, 2016). Therefore, a good constitution should also be able to provide an interpretation of the legislation under it so that the existing legal rules are not mixed with non-juridical aspects as affirmed by Austin and Kelsen. The interpretation is one method of legal discovery that provides an explanation about text of the law so that the scope of the rules can be determined. In interpreting the law of a statutory regulation that is considered incomplete or unclear, a legal expert must not act arbitrarily (Ulya, 2015).

In the historical perspective, Indonesian people have applied the concept of the rule of law (*rechtstaat*) in which one of the characteristics is the existence of recognition and protection of human rights. The concept referred to, it is still be held firmly by the Indonesian people, even though the 1945 Constitution is no longer uses the term "*rechtstaat*" (Simamora, 2013). The concept of the rule of law that was once suggested to adhere to "*rechtstaat*" is now neutralized as a mere rule of law, without the fraction of the *rechtstaat* behind it, which is placed in brackets. Therefore, Indonesian legal politics

regarding the conception of the Indonesian legal state embraces good elements in the *rechtstaat* and rule of law and even the other legal systems at once (Wiyanto, 2013).

The juridical foundation of the state as a legal state (*rechstaat*) following Julius Stahl opinion can be interpreted that the constitution guarantees at least: (a) human rights protection; (b) due process of law; (c) equality before the law; (d) impartially of judiciary; and (f) judiciary of administration. While the political foundation of the state can be interpreted that the constitution guarantees the separation of power and limitation of power, so that the people can play an active role in building the country together (Winoto, 2018). The concept of the rule of law, either *rechtstaat* that developed in Continental Europe which rests on the civil law system with its figure Immanuel Kant, or the concept of the rule of law which rests on the commons law system with its figure A.V. Dicey in its development has emerged a reaction to the philosophy of "*laissez faire*" which is a view that says that a good government is a government that is less likely to govern, this is very relevant to the concept of the state as a night watchman "*nachtwachersstaat*". This reaction is manifested by the rise of the welfare state namely: The concept of a government in which a country plays a key role in the protection and promotion of the economic and social welfare of its citizens (Dewi, 2016).

The Constitution is the highest source of basic law that shall be used as a reference for the laws and regulations below it in order to make all legal products become good. Lawrence M. Friedman said that a legal system in actual operation is a complex organism in which structure, substance and culture interact. (a) Structure is the institution created by the legal system with various functions in supporting the operation of the system; (b) Substance is the output of the legal system, in the form of regulations, decisions used by regulators or regulators; and (c) Culture consists of values and attitudes that influence the operation of the law, can be positive or negative (Candrakirana, 2016).

The constitution also as the highest legal source must provide reinforcement against the laws and regulations below it and the legislation below it may not conflict with the laws and regulations on which the constitution is mainly (*lex superiore derogat legi priore*). This mechanism in constitutional practice is called judicial review and constitutional review. Judicial review and constitutional review are the thoughts of Hans Kelsen with "*Grundnorm Theory*" and Hans Nawiasky with "*Hierarchy of Law*". Judicial review and constitutional review have been implemented in several countries in the world, especially in Europe and America. In Indonesia, when viewed from the history of Indonesian constitution, it only regulates judicial review as regulated in Article 156 Constitution of Republic of Federation Indonesia 1949, Article 130 Paragraph (2) Provision Constitution 1950 of Republic of Indonesia, Law Number: 19 of 1964, Law No. 14 of 1970, and Law No. 35 of 1999 concerning Judicial Power, where the Supreme Court can conduct statutory testing under the Act (Satia, 2019). And after the amendment to the 1945 Judicial Review and Constitutional Review are strictly regulated in it, as stipulated in Article 24 A Paragraph (1) states that the Judicial Review process is the authority of Supreme Court and in Article

24 C Paragraph (1) The Constitutional Review is the authority of the Constitutional Court (Wijaya, 2014).

Searching the history of Indonesian state administration, there are 4 (four) types of Constitution that have been valid, namely: (1) the 1945 Constitution (UUD-1945) which was applied between (BPUPKI and Jakarta Charter) on 17th August 1945 to 27th of December 1949; (2) Constitution of Republic of The United States of Indonesia (KRIS-1949) which took effect on 27th of December 1949 until 17th of August 1950; (3) Provisional Constitution 1950 (UUDS-1950) which took effect on 17th of August 1950 up to 5th of July 1959; and (4) the 1945 Constitution (UUD-1945) after the issuance of the Presidential Decree of 5th of July 1959 and is valid up to now (Wijaya, 2014). The validity of the 1945 Constitution up to 4 (four) times, actually if it is seen empirically this is done because of how the founders of the nation have a desire that the Republic of Indonesia has a constitution whose ideas as aspired and become a dream for the people of Indonesia in order to be fair and prosperous. Therefore, these efforts continued after the reform wave with the amendments to the 1945 Constitution which the first amendment was set on 19th of October 1999, the second amendment was set on 18th of August 2000, the third amendment was set on 9th of November 2001 and the 4th amendment was set on 10th of August 2002 (Minutes Amendment of Constitution, 2000).

The amendment of the 1945 Constitution made major change in adoption of provisions concerning constitutional rights. The protection of these rights is the Court task. Every government policy should not violate any citizens rights. In many cases, provisions on the protection of constitutional rights do not require any exceptional exegesis. Yet, few example also exist where the Court needs to find the meaning of “discrimination” and referring it to the international legal instruments (Bisariyadi, 2018). After amendment of the 1945 Constitution, was established the Constitutional Court. The existence of Constitutional Court becomes one of Indonesia constitutional law discources. Furthermore, the 1945 Constitution provide authority to Constitutional Court to become constitutional guide. Constitutional Court has an authority to testify the politic product which is law from the House of Representative (DPR) that considered against 1945 Constitution (Madjid, 2018).

The authority in the most conducted authority by Constitutional Court. This is also one of another formulation to becoming the 1945 Constitution as a good Constitution. In the others side to creat a good and clean government base on mandate from the constitution, one of which is the implementation of a clean court function (judicial institution). In practice, such as the application of e-court as an effort to eliminate the practice of corruption in the court. As the research of M Iqbal, et al, 2019 which in its conclusion states, “The functionalization of e-court is considered not optimal since many justice seekers do not know the existence and usefulness of the system. It is expected that the e-court system will support the establishment of the principle of quick, simple and low cost justice in the administrative management of cases” (Iqbal, 2019).

There are several consequences that have to be upheld by the next generation of

this nation concerning the decisions taken by the Founding Father. The first is a decision determining that Indonesia is a country of law (*rechtstaat*) as started in Article 1 paragraph (3) of 1945 Constitution. This decision carries wide consequences in the life of the nation, more specially in the ordinance of law. Structuring and implementation of state and government should not be separated from the basic law (constitution) and other mutually agreed rules, so the violation or deviation from established rules is something intolerable. The second is the determination and the recognition that all people have the rights to be treated equality before the law (equality before the law) as listed in Article 27 paragraph (1) of 1945 Constitution. This stipulation give responsibility to the state to ensure equality before the law for all people, not just in the abstract sence, but in the practical terms in the form of equal treatment, particularly in juducial proceeding regardless of socio-economic status, political, and group or ethnic. Third, is related to the ideals of founders to bring this country in to a just and prosperous state as stated in the opening of the 1945 Constitution. (Raharjo, 2016).

The Effort of State and Government to Implement Good Governance and Clean Government

In other references the implementation of governance is implemented by Good Corporate Governance (GCG) which is definitively a system that regulates and controls companies that create added value for all shareholders. There are two things that are emphasized in this concept, first, the importance of the right of shareholders to obtain information correctly and timely at the time and, second, the company's obligation to disclose accurately, timely, transparently all information on company performance, ownership, and shareholders. There are four main components required in the concept of Good Corporate Governance, namely fairness, transparency, accountability, and responsibility. These four components are important because the consistent application of Good Corporate Governance principles can improve the quality of financial statements and can also be a barrier to performance engineering activities that result in financial statements not reflecting the fundamental value of the company (Halimatussadiyah, 2014).

Along with the development of general principles of good governance, G.H. Addink adds principles that have touched on human rights. It must be realized that the two meanings of the general principles of good governance and human rights are closely interrelated and interact with each other with other principles such as transparency and participation and so forth. As explained by Addink : “Both groups of norms for the government (human rights norms and good governance norms) can only be realized by each others : human rights needs good governance and good governance need human rights. So in means that there is in interaction between these two types of norms and even several of these means are the same. Forexample, the transparancy and the participation principles, which are principles of good governance can be found in several international human rights treaties” (Haris, 2015).

Another opinion explained that, good governance and human rights are mutually reinforcing. Human rights principles provide a set of values to guide the work of government and others political and social actors. They also provide a set of performance standards against which these actors can be held accountable. Moreover, human rights principles inform the content of good governance efforts: they may inform the development of legislative frameworks, policies, programmes, budgetary allocations and other measures. However, without good governance, human rights can be respected and protected in a sustainable manner. The implementation of human rights relies on a conducive and enabling environment. This includes appropriate legal frameworks and institution as well as political, managerial and administrative processes responsible for responding to the rights and needs of the population (Prasojo, 20008).

In the year 1997, United Nations Development Program (UNDP) has formulated 9 (nine) principles which must be enforced to implement the good governance (KPK, 2008):

1. Participations. Every person or community member, male or female has the same voting rights in the decision making process, both directly and through representative institutions, according to their respective interests and aspirations.
2. The rule of law. The regulatory framework and legislation must be fair, enforced and fully complied with, especially the legal rules on human rights.
3. Transparency. Transparency must be developed in the context of freedom of information flow.
4. Responsiveness. Each institution and its process is directed at efforts to serve various stakeholders.
5. Consensus Orientation. A good government will act as an arbiter for different interests to reach consensus or the best opportunity for the interests of each party and if possible can also be applied to various policies and procedures that will be determined by the government.
6. Equity. A good government will provide opportunities for men and women in their efforts to improve and develop their quality of life.
7. Effectiveness & Efficiency. Every activity and institutional process is directed to produce something that is in accordance with the needs through the use of quality of life.
8. Accountability. Decision makers in public, private and civil society sector organizations have responsibilities to the general public as well as to owners.
9. Strategic Visions. Leaders and the public have a broad and long-term perspective on good governance and human development along with the perceived need for such development.

United Nations Development Program (UNDP) in the document policy on the title "Governance for Sustainable Human Development" (1977) defined governance as follow "Governance is the exercise of economic, political, and administrative authority to manage a country's affairs at all levels and means by which states promote social cohesion, integration, and ensure the well being of their population". Thereafter conceptually the

word good in terms of good governance contains two understandings; First, the values that uphold the desires/ wishes of the people, and the values that can improve the people's ability to achieve national goals (independence), sustainable development and social justice. Second, the functional aspects of government that are effective and efficient in carrying out their duties to achieve these goals. (Sedarmayanti, 2012). In the others meaning government are : (1). The structure of principles and rules determining how the state or organization is regulated, (2). The sovereign power in a nation or state, (3). An organization through which a body of people exercises political authority, the machinery by which sovereign power is expressed. (Maryam, 2016).

Through the concept of the rule of law it can be seen that the need for a state is governed by a constitution that guarantees independence for its citizens, and provides protection from arbitrariness. Therefore, for the law to be obeyed by the community, the law must be made correct and properly enforced. The constitution becomes the basic norm that protects the rights of citizens, these basic norms become the basis for the government in forming other government policies. Sometimes, these government policies are contrary to basic norms so that it harms the human rights of citizens. This is where then there is a need for control or supervision from the citizens so that the law made and enforced by the state administrators in this case the government does not cause arbitrary actions or even harm citizens (Prabowo, 2010). The state can be likened to a large organization. In an organization, the supervision system plays an important role to ensure that everything runs according to the mandate, vision, mission, goals and objectives of the organization. In terms of accountability, the monitoring system will ensure and provide information about the impact of a policy made by the organization. The state, as an organization, also needs oversight of the policies made by the State organ of organizing (Nasir, 2017).

The amendments to the 1945 Constitution mentioned above if related to the ideal constitutional concept among the most important things as mention a General Secretary of Assembly of People's Representation Publisher, are:

1. Affirmation of the non-change of the preamble of the 1945 Constitution, because in the preamble of the 1945 Constitution there are fundamental state norms which consist of noble values of the nation that have become a noble agreement as the glue of the Unitary State of the Republic of Indonesia, namely Pancasila.
2. Affirmation of the concept of the rule of law (*rechstaat*) as previously stipulated in the explanation of the 1945 Constitution (original text) which states that "Indonesia is based on law (*rechstaat*), not based on mere power (*machstaat*), has been changed and affirmed in Article 1 Paragraph (3) of the 1945 Constitution (after the amendment) which reads "The State of Indonesia is a legal state".
3. Affirmation of the existence of separation of power and limitation of power can be seen in changes in the provisions of legislative power, executive power and judicial power. Such as :

- a. Changes in the field of legislative power concerning the power of the House of Representatives as regulated in Article 5 Paragraph (1) of the 1945 Constitution which reads "The President holds the power to form laws with the approval of the House of Representatives amended in Article 20 Paragraph (1) which reads "The House of Representatives holds the power to form a law.
- b. Changes in the field of executive power concerning the powers of the President and Vice President stipulated in Article 6 Paragraph (2) of the 1945 Constitution which reads "The President and Vice President are elected by the People's Consultative Assembly" amended in Article 6A Paragraph (1) which reads "The President and Deputy President are elected in one pair directly by the people.
- c. Changes in the field of judicial power concerning judicial power stipulated in Article 24 Paragraph (1) which reads "Judicial power is carried out by a Supreme Court and others according to the law, the judicial body is amended in Article 24 Paragraph (2) which reads "Judicial power is carried out by a Supreme Court and a judicial body under it in the general court environment, religious court environment, military court environment, state administrative court environment and by a Constitutional Court.

The affirmation of the importance of applying the concept of the rule of law, the concept of separation and limitation of power and the concept of an independent judiciary without any interference from any others power as above, are intended so that the state and the government are particularly able to carry out their duties by observing the principles of proper governance (Rifai, 2004). It is intended that the Unitary State of the Republic of Indonesia can guarantee the implementation of the rule of law as mentioned in Article 1 Paragraph (3) of the 1945 Constitution, where the state guarantees the implementation of good and clean governance for the creation of justice and prosperity for all people of Indonesia. Likewise, these principles are used in the implementation of regional autonomy, where the central government can hand over some of the affairs to five organizational areas such as: (i) vertical agencies; (ii) administrative area; (iii) semi-autonomous organizations; (iv) autonomous regions; and (v) non-governmental organizations (Nurcholis, 2014).

The intended effort can be seen from the statutory provisions that regulate it, for example: in Article 3 of Law Number: 28 of 1999 concerning State Administrators that Are Clean and Free from Collusion, Corruption and Nepotism (KKN), then in Article 20 of Act Number 32 of 2004 concerning Regional Government, and in Article 58 of Law Number 23 Year 2014 concerning Regional Government, which states the principles of good governance, namely as follow:

- (a) Principle of legal certainty is the principle in a state law that prioritizes the basis of the provisions of legislation and justice in every policy of the state administrator.
- (b) Principle of orderly state administrators is the principle that form the basis of order, harmony and balance in the control of state administrators.

- (c) Principle of public interest is the principle that prioritizes public welfare in an aspirational, accommodative, and selective manner.
- (d) Principle of openness is the principle that opens itself to the right of the community to obtain information that is true, honest and non-discriminatory about the administration of the state while paying attention to the protection of personal rights, groups and state secrets.
- (e) Principle of proportionality is the principle that prioritizes a balance between the rights and obligations of state administrators.
- (f) Principle of professionalism is the principle that prioritizes expertise based on a code of ethics and statutory provisions.
- (g) Principle of accountability is the principle that determines that every activity and end result of the activities of state administrators must be accountable to the public or the people as the highest holder of state sovereignty in accordance with statutory provisions.
- (h) Principle of efficiency is the principle oriented to minimizing the use of resources in the administration of the state to achieve the best work results.
- (i) Principle of effectiveness is the principle that is oriented towards an effective and efficient function, and
- (j) Principle of justice is every action in the administration of the state must reflect proportional justice for every citizen.

From the description above, the most important is the need for law enforcement from the state apparatus, so that the implementation of good governance can run well. According to Soerjono Soekanto, in assessing the effectiveness of a law in the community, it can be seen from the factors that influence the operation of the law or law enforcement, namely: (i) law or legislation; (ii) law enforcers, those who form and apply the law; (iii) facilities or facilities that support law enforcement; (iv) community legal awareness, i.e. the environment in which the law applies or is applied; and (v) culture, which is as a result of work, creation and taste based on human initiative in the association of life (Prasetyo, 2014).

In order to support the implementation of good governance principles, government also has been declaring the Law No: 39 of 2008 concerning the State Ministries, and even formed a special ministry that manages it, namely the Ministry of State Apparatus Empowerment and Bureaucratic Reform (MenPAN-RB). Other efforts have also been made by the government with the enactment of Law 25 of 2009 concerning the Public Services. Which states that "public services are activities or series of activities in the framework of fulfilling service requirements in accordance with statutory regulations for every citizen and resident of goods, services, and/or administrative services provided by public service providers" (Dewi, 2014).

In Article 4 of Law Number 25 of 2009 concerning the Public Services, also mention the principles of public services are as follows:

- (a) The principle of public interest;

- (b) The Principle of Legal Certainty;
- (c) The principle of equal rights;
- (d) The principle of balancing rights and obligations;
- (e) The principle of professionalism;
- (f) The principle of Participatory;
- (g) The principle of equality of treatment / non-discriminative;
- (h) The principle of openness;
- (i) The principle of accountability;
- (j) The principle of facilities and special treatment for vulnerable groups.

The principles mentioned above are also one of the efforts of the government so that services to the community can run as well as expected and of course, the final goal is that the community obtain good, fast and efficient services so that people's welfare will soon be realized. In addition, in the implementation of each government organization unit at the central and regional levels, regulations have been issued regarding how the importance of Good Corporate Governance is carried out in the organizational units (Luti, 2012).

Conclusion

The constitution of a country is essentially a joint agreement in building a life together in a country. The agreement that is based on the noble values that have been fought together. Although in theory, there is an ideal constitution that becomes a common dream but its implementation is impossible to be implemented perfectly, this is because in formulating a constitution in practice there are political conflicts, even though it can be mutually agreed upon. The 1945 Constitution, taking into account the historical process of formulation, the implementation including the changes expected by the founding fathers of the nation, including by the nation's successors will be a good and ideal basic law, even though in practice there are challenges and obstacles that are non-juridical. Government has seriously effort to becoming as a good governance and clean government, even not succesfully yet.

Suggestions

The Constitution is a formulation of a noble and glorious agreement; therefore, something noble and glorious is not always contained in written laws, but can only live and develop in the habits of society. The constitution is a formulation of a noble and glorious agreement; therefore, it does not only contain a guarantee of the creation of legal justice but also the guarantee of the creation of social justice, including the 1945 Constitution.

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