

PHILOSOPHICAL VALIDITY, THEORETICAL, NORMATIVE AND EMPIRICAL PARADIGM OF GENERAL PRINCIPLES OF GOOD GOVERNANCE (AUPB) AS A REVIEW OF PRESIDENTIAL IMPEACHMENT

Nadir¹, Sudarsono², Jazim Hamidi³, Muchamad Ali Safaat⁴

¹Doctoral Candidate at Law Faculty of Brawijaya University

²Professor of Administrative Law at Law Faculty of Brawijaya University

³Lecturer of Constitutional Law at Law Faculty of Brawijaya University

⁴Lecturer of Constitutional Law at Law Faculty of Brawijaya University

Email: mh_dira@yahoo.co.id

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ABSTRACT

Philosophical validity showed of the Principles of Good Governance (AUPB) as A review to Presidential impeachment, is a principle of AUPB that contains ethical normative values used as the foundation of good governance, clean and respectable, moreover to complement the shortcomings and ambiguities in law. Technically, the application of AUPB by the judges of the Constitutional Court (MK-RI) can be approached through induction and deduction legal reasoning. The method of implementing AUPB by the judges of the Constitutional Court (MK-RI) is accomplished by deductive at first, meaning that the special rules is focused more to the certain field of law, then these are deducted based on its basic rules and deducted again into the rules of substantive, and deducted again into the rules of cases. After that, it starts to applicate the rules of case based on the concrete case by the judge. This paper seeks to analyze whether AUPB can be used as the basis for Presidential Impeachment in his tenure.

This paper argues that empirically AUPB is valid, it can be seen from the cases of impeachment against the President of the United States William Jefferson Clinton, on suspicion of "abominably act" (*misdemeanors*). Additionally, AUPB empirically has been tested through jurisprudence since *Amtenarenwet* 1929 officially applied on March 1, 1933. *Centrale Raad van Beroep*, in his verdict on June 22, 1933, and the jurisprudence verdict of Hoge Raad on November 13, 1936, and the jurisprudence verdict of Hoge Raad 1919. While the normative validity is based on the leading legal doctrine, unfortunately, that AUPB is positioned as the unwritten laws that must be obeyed by the government, and AUPB considered as a part of positive law.

Keywords: *Validity, Philosophical, theoretical, Principles of Good Governance, Presidential Impeachment*

I. INTRODUCTION

The early introduction and development of the Principles of Good Governance (AUPB) in the Netherlands can be traced through two (2) ways, scientific and practical arena. In both ways, sometimes AUPB development is full of upheaval, grief, uncertainty and profound silence and blindness through times, so that eventually the development of AUPB entered into period of fertile and gains recognition.¹

In the practical region, the initial introduction and development of AUPB can be tracked through jurisprudence and legislation as well as governance, so there must be a relationship between AUPB developments and those triple arena.²In jurisprudence, the initial introduction of AUPB starts from the shocking steps of the judges of civil servants and their first signs of civilian judges. The jurisprudence of the judges of civil servants started since *Amtenarenwet* coming into force on 1 March 1929. *Centrale Raad van Beroep*, in his verdict on June 22, 1933 regarding the affairs of state employees, said that he would not limit themselves to a lawsuit filed on the basis of the unwritten law and therefore the government should bound to the principles of common law. Thus, the

¹S.F. Marbun, *Asas-Asas Umum Pemerintahan Yang Layak*, (Yogyakarta: FH-UII Press, 2014), 94
²*Ibid.* 96

decision *Centrale Raad van Beroep* provides new hope for the possibility of eligibility of principles in unwritten laws that had been inventoried by Boasson and Leydesdorff, though it is only limited to the principle of prohibition to act retroactively based on the position that has been set by law.³

In jurisprudence made by civilian judges, the early introduction of AUPB found since the decision of the *Hoge Raad* 13 November 1936 in the case of detention. *Hoge Raad* in his verdicts shows clearly a violation of the norms of unwritten law in carrying or using public legal authority that is considered incompatible with the legal definition in Article 1401 BW.⁴

Then the subsequent development is marked by the birth of thought from *Algemene Beginselen van Behoorlijk Bestuur* proposed by the Commission de Monchy in Netherlands in 1946 and in 1950, Commission De Monchy reports its findings on "*verhoogde rechtsbescherming*" named *Algemene Beginselen van Behoorlijk Bestuur* in the opinion of the author closely associated with the idea of birth state of law at the beginning of the 19th century which is a necessity for the actions of the arbitrariness

³*Ibid.*

⁴*Ibid.*

of the King as head of state to oppose absolute power which gave birth to the State power which has oppressed people.

In 1952 the development of AUPB was refined by Samkalden and Wiarda in their advisers. Wiarda began to formulate the criteria (division) AUPB as material principal and formal principal. The principles that are material are principles that relate to the content of the decision, while the formal principles are principles relating to the preparation, formation and motivation of a decision.⁵

The application of Principles of Good Governance hereinafter abbreviated as (AUPB)⁶ is suited as the review of Presidential impeachment in his tenure since in the state system of Indonesia it has never been done or used, even in the few countries in the world also has not been used as the basis of the review of Presidential impeachment or high-ranking officials of the country. Though, the existence of AUPB is very important (urgent) in governance.

The Paradigm of implementation of the Principles of Good Governance (AUPB) as the review of Presidential impeachment in his tenure is critical (urgent). It is intended to assess the freedom of action of President so the President would not disobey the AUPB, because philosophically AUPB is a group of principles which contain the values of ethics-normative used as the foundation of good governance, clean⁷ and respectable, moreover philosophically it can complement the possible shortcomings and ambiguities in the law. This study was conducted to answer the legal issues, namely: whether AUPB can be used as the basis for Presidential Impeachment in his tenure.

In writer's opinion, the absence of AUPB as a tool of Presidential impeachment in his term, is a form of *incompletely of norm* that must be solved through research to contribute to a new thinking in establishing the paradigm of the Presidential impeachment of Indonesia

⁵ Ibid. 98

⁶ Vide Article 1 point 17 of Law No. 30 of 2014 on Government Administration using the terminology "*General Principles of Good Governance*", hereinafter called "*AUPB*" and not the terminology *AAUPB* are principles used as a reference for the use of Authority for Government Officials in issuing Decision and / or actions in governance.

⁷ In order to establish good governance, it requires at least a few things, namely: (1) it is important to be consistent and obey the norm for the government administration from the central to local officials. (2) it requires a strong commitment

to stop inappropriate acts beyond the authority set out by UUD as well as outside the UUD. (3) it needs necessary awareness in building the nation to prosperity together with all elements of the nation and the mastery of science and technology as well as the vision and mission of Indonesia's independence set out in the preamble of UUD Indonesia of 1945. (4) The President / vice President must avoid any inappropriate and not feasible act as a government administrator, including upholding the values of ethics contained and implied in AUPB, because the today's nation problem lies in the moral or ethical.

inthefuture, because it raises the problematics, such as philosophical, normative, theoretical, political and social problems.

It causes by the determination of the formulation of legal norms Article 7A changes the phase 3 UUD 1945 of Republic of Indonesia does not reflect the spirit of the values contained in the General Principles of Good Governance (AUPB) which has taught the values of ethics-normative.

II. LEGAL MATERIALS AND METHODS

This research method is a study of *legal research*. The method aims to find the principle or the doctrine of positive law. This type of research is commonly known as dogmatic study or generally known as the *doctrinal research*.⁸ Selection of this type of research is corresponded to the legal issues, that is the law drafted in the form of legislation designed, built and enacted by the competent institutions, so the unwritten laws that are always evolving into the development of human civilization in accordance with principles which have universal values.

⁸Soetandyo Wignjosoebroto, *Penelitian Hukum: Sebuah Tipologi*, Masyarakat Indonesia Magazine first year No. 2 1974.

The approach used in this research is theoretic approach, statute approach, conceptual approach, historical approach, comparative approach, and philosophical approach. The types and sources of legal materials, such as primary legal materials, secondary, and tertiary. While the method of collecting legal materials is identifying and / or browsing relevant legislation, and then analyzing the data using an instrument theory, construction method and the amendment method and the results are presented in the form of an analytic descriptive or prescriptive analytics. Therefore, the philosophical validity, theoretical, normative and empirical paradigm of AUPB is used as a review of the following the Presidential impeachment.

III. RESULT AND DISCUSSION

1. Philosophical validity and Theoretical Paradigm of Principles of Good Governance (AUPB) As Platform to Review Presidential Impeachment

The President as head of state and government has broad authority and freedom to act and commit an act of law (*rechtshandeling*) as *vrije beleidsregel* that

was born from the principle of discretionary / *Freies ermessen*, or an action which is in contrast to the values of AUPB. Broad authority and freedom of action can not be used indefinitely, even as a logical consequence of welfare state understanding, because one of the purposes of freedom of action is to complement the legal vacuum, but it must not contradict with laws and regulations and in accordance with AUPB. If the actions of President is in contrary to AUPB, then the President (*vrije beleidsregel*), or action in the form of behavioral attitudes that contradict to the values of AUPB would be tested with AUPB and the President can be impeached from his tenure. The legitimacy of government's actions based on SF. Marbun, measured regarding to the authority set out in the legislation.

According to Sudarsono, the abuse of power, including the power (*detournement de pouvoir*) and acts of arbitrary (*willekeur / abuse de pouvoir*) is a phenomenon that has long time existed, also reminding on the importance of control over the use of *authority* itself, moreover with the presumption of validity (*vermoden van rechtmatigheid = praesumptio iustae causa*), which requires us to consider the valid act of government before any decisions or rulings that confronts it as in

contrary. This principle according to Sudarsono, can encourage a person to abuse their authority or acting arbitrarily, if controls on the use of authority itself is weakened or reduced.

In Indonesia, the control over the use of government's authority has been existed since long time ago, whether it is the *built-in control*, or external control; preventive control (*a priori control*) or the repressive control (*a posteriori control*); juridical control, political control, social control and another control which one of them is manifested in the State's administrative courts.⁹

Despite the existence of General Principles of Good Governance (AUPB) in Indonesia has not gotten a place in the UUD of Republic Indonesia 1945 juridically yet, but it can be qualified by one of the legal reasons about the Presidential impeachment, *abominably*. The reasons of misconduct as the reason for the Presidential impeachment can be interpreted as diverse as: blasphemy, fornication, adultery, gambling and betrayal of the public trust.

According to Sjachran Basah, if AUPB going to be used as a review for judges of administration (constitutional judges in the Presidential impeachment,

⁹Ibid, 2

cursive writer), must first be selected and adjusted to the values of Pancasila and the UUD of 1945 to be developed, that realization can be seen from the verdicts (which will become jurisprudence) of the Supreme Court as the highest institution of justice.¹⁰

Sjachran Basah also asserted, there should be a screening of the AUPB to conform with the values of Pancasila and the UUD 1945, when these principles will be applied to run in the Indonesian government.¹¹

There are some General Principles of Good Governance (AUPB) referred to Presidential impeachment that are not suitable to be implemented, but some of the principles based on identification or selection results from writers were very heavy and massive like these following principles:

1. The principle of prohibition to abuse the authority
2. The principle of prohibition of arbitrary action
3. The principle of Legal Certainty
4. The principle Welfare / Happiness
5. The principle of Unity and Integrity

¹⁰ Sjachran Basah, *Eksistensi dan Tolak Ukur Badan Peradilan Administrasi Negara*, (Bandung: Alumni, 1985), 257.

6. Principle of Protection of Life Protection
7. Principle of Honesty
8. The principle of Shame (Al-haya ')
9. Principle of Faith
10. Ethical Principles

Although it has not been accepted in a formal juridical of UUD 1945 yet, but the General Principles of Good Governance (AUPB) can be used as a review to Presidential impeachment in his tenure by the Constitutional Court (MK-RI). Why it is so, because the judges of the Constitutional Court does not sufficiently guided by the provisions of any written laws in the Article 7A UUD 1945 of Republic Indonesia as a legal reason of the Presidential impeachment, but it needs to see the un-written law, Article 5 jo. 10 of Undang-undang Number 48 Year 2009 concerning Judicial Authority, asserted:

"Judge and judges of constitution shall explore, and understand the values of law and justice in the society"

"The court is not allowed to refuse to examine, hear and decide a case that is proposed with the reason that the law does not exist or is less obvious, but obligated to examine and judge it"

¹¹ Ibid, 256.

Epistemologically, provisions of Article Article 5 (1) jo. Article 10 paragraph (1) Undang-undang Number Number 48 Year 2009 concerning Judicial Authority, shows the freedom for the judges of the Constitutional Court (MK-RI), and became the basis for the use of AUPB as a review to examine the government's actions that are in contrary to AUPB in the perspective of the Presidential impeachment, besides to a written legal norms set out in Article 7A UUD of Republic Indonesia 1945.

According to Sudarsono, that epistemology is a way to get the right knowledge, so examining in depth all the business processes involved in gaining knowledge.¹²The Purpose of this paper is how to obtain AUPB as a review to impeach President through a deep process so it would be obtained a perfect AUPB.

In addition, Article 5 paragraph (1) (means the judges are obliged to explore the values and laws that exist in society) implicitly becomes the basis for the judge of Constitutional Court (MK-RI) to develop the AUPB contained in Pancasila as abstraction of social reality of Indonesian society. Therefore, through jurisprudence of Constitutional Court

¹²I Dewa Gede Atmadja, Sudarsono, dkk, *Filsafat Ilmu: dari Pohon Pengetahuan Sampai Karakter Keilmuan Ilmu Hukum*, (Malang: Madani, 2014), 37

(MK-RI), Indonesian version of AUPB can be formed as the foundation of Indonesian Presidential impeachment review, as the identification result of AUPB by the author in the beginning.

Even in the United States, in its development, law does not necessarily mean a positive law issued by the legitimate authority in the form of written rules, instead a relationship patterns that have constantly and continuously performed in society and accepted as something that has to be done is actually the law. Thus, law comes from regularities which come from facts or associations of the society itself (including AUPB in Indonesian context). It is this conception of idea that underlies the birth of *legal realism* pioneered by Oliver W. Holmes with his idea of *the life of law is not logic but experience*.¹³

According to *legal realism*, the role of the judge is very important in deciding the case; he should not only rely on the positive law only, but also have to find the (real) law in the life of the society to be used as foundation of the decision. It is this *legal realism* which then becomes the foundation of sociological jurisprudence study that conceptualizes the law as a form

¹³ FX. Adji Samekto, *Justice Not For All: Kritik Terhadap Hukum Modern Dalam Perspektif Studi Hukum Kritis*, cetakan ke satu, (Yogyakarta: Genta Press, 2008), 23-24.

of patterned, constant, continuous and accepted regularities as a necessity that must be done because it provides benefits for the life.¹⁴

The affirmation of Article 5 jo. Article 10 mentioned above, it is possible that someday the AUPB will have an important/urgent position in Presidential impeachment in Indonesia in the future, therefore, the existence of AUPB needs to be established through recognition in a written norm in Constitution of Republic of Indonesia Year 1945 that is formed by legislators, or can be through jurisprudence of Constitutional Court (MK-RI), in order to build the national legal system of Indonesia.

Stabilization (*construction*) of the principle of law (including AUPB) can function as:¹⁵

1. As a bond between various norms of the law, which will ensure the integration of rules in a system bond?
2. Ensuring the rule of law to be established and implemented according to the purposes of the law

(justice and rule of law), such as accuracy is for certainty.

3. Ensuring the implementation flexibility of the rule of law in a concrete situation.

Implementation of the Principles of Good Governance (AUPB) as the foundation of impeachment review by the judges of Constitutional Court (MK-RI) is very appropriate, although there is no explicit legal basis, however the paradigm of AUPB implementation as the foundation of impeachment review in its office terms philosophically is to fill the incompleteness, vagueness and emptiness of legal norm in Constitution of Republic of Indonesia Year 1945. That, in addition to observe the provisions of Article 5 jo. 10 of Law of Republic of Indonesia Number 48 Year 2009 regarding the Judicial Power, it is essential to examine and judge the Presidential impeachment and/or vice President in his office term.

In this regard, Achmad Ali mentioned that what resolve disputes are not rule of law contained in the law, customs, treaties, jurisprudence, doctrine or law of religion. Instead, what resolve disputes are “rule of

¹⁴ Ibid, p. 24-25.

¹⁵ Bagir Manan, ‘*Penelitian Terapan Di Bidang Hukum*’, (Paper presented in Lokakarya Peranan Naskah Akademik Dalam Penyusunan Perundang-Undangan, held by BPHN, Jakarta, 9-11 November 1993), Jazim Hamidi, *Penerapan*

Asas-Asas Umum Penyelenggaraan Pemerintahan Yang Layak (AAUPL) di Lingkungan Peradilan Administrasi Indonesia, (Bandung: Citra Aditya Bakti, 1999), 181.

law which is born of the assessment of the judges.”¹⁶

Governments in taking action have to pay attention to the Principles of Good Governance (AUPB) as the foundation of action to avoid contradictin with it, because the Principles of Good Governance (AUPB) formed on the foundation of protection effort for the people as a parameter of action and principles in which should be done by the government, so that the government take action in accordance with the philosophical parameters outlined in AUPB.

Constitution of Republic of Indonesia Year 1945 Article 7A as a reason for presidential impeachment is not sufficient to provide answers for the complexitiy of government actions that require more material and formal legality when the rule of law as stipulated in the Law as the constitution of the country is unable to answer the legal, social, and political problems that arise because of the government actions which leads to violation of AUPB.

In such conditions, the Principles of Good Governance (AUPB) must be used as

solution as a guide and reference rules to review the President action, because of the extensive authority,so that AUPB can be used as foundation of presidential impeachment review in his office term.

According to Philipus M. Hadjon, the implementation of legal principles (including AUPB) by the administrative judge (*by constitutional judges*) in court technically can be approached by 2 (two) ways, they are: through induction and deduction legal reasoning.¹⁷

According to Sudarsono, induction method is a method that concludes the statements of observation results (specific) summarized from a more general statements or from observation of people to universal statement, this induction method was born from the empiricism way of thinking.¹⁸

While deduction method is a method of inference which processed from a continuous, logical statements, which illustrate general arguments then a conclusion specifically drawn, this induction method was born from the rationalism way of thinking.¹⁹

¹⁶ Achmad Ali,*Menguak Tabir Hukum: Suatu Kajian Filosofis dan Sosiologis*, cetakan-pertama, (Jakarta: Chandra Pratama, 1996), 141.

¹⁷ Philipus M. Hadjon, ‘Pengkajian Ilmu Hukum Dogmatik (Normatif)’, ‘, No. 6 Tahun IX November –Desember 1994, *Yuridika* , 12-14

¹⁸I Dewa Gede Atmadja, Sudarsono, dkk, *Filsafat Ilmu: dari Pohon Pengetahuan Sampai Karakter Keilmuan Ilmu Hukum*, (Malang: Madani, 2014), 38

¹⁹ Ibid, 38

In induction method, the first step taken by the judge in handling the dispute is to formulate facts, look for a causal relationship and predicting the probability. This was followed by deduction method, in which the first step is to gather the facts. After the facts are successfully formulated, law implementation effort is performed (legal principles).

The main steps in law implementation are identifying the rule of law. The results of this step will be found in various legal conditions, such as:

1. The existence of legal vacuum (legislation vacuum). If this happens, then the judge will be adhering to principle of "*ius curia novit*", the judge is obliged to explore legal values that live in the society. This effort is often referred to legal discovery method (*rechtsvinding*).
2. There will be a condition of antinomy (conflict of legal norms). The solution is principle implementation of "*lex posterior derogat legi priori*", principle of "*lex specialis derogate legi generali*", principle of "*lex superior derogat legi inferior*".
3. In facing vague legal norms, the judge adhering to the legal ratio contained in the rule of law, and

then set the correct interpretation methods.

4. In the event of incomplete legal norms, then the solution is to use an amendment method (italics author)

The process of implementing the law (including AUPB, italic writer) in the finalization process of Presidential impeachment in Constitutional Court, at least go through eight stages as follows:

1. The first stage is request of filing Presidential impeachment by the Parliament to the Assembly, but first the request is submitted to the Constitutional Court for examination, trial, and decide the opinion of Parliament that the President has violated the law or in accordance with Article 7A Constitution of Republic of Indonesia Year 1945.
2. The second stage is the stage of file examination. Once the application file submitted by the Parliament to the Constitutional Court, then completeness examination of the file is performed, if the requirement is declared complete, then cases register is performed for scheduling of the trial, and a notice to the applicant in this case the Parliament.

3. The third stage is collecting facts. Once the file assessment process is completed, then the next stage is the stage of legal facts examination. In this position the judge of Constitutional Court perform a selection for the whole event and to prove with the evidence submitted by the applicant to ascertain the truth. This stage in the civil procedure law is called constatized stage. According to Sudikno, constatized means to see or acknowledge, justify the occurrence of events submitted to, or methodologically according to Jazim Hamidi, is included within the framework of inductive approach.
4. The fourth stage, the stage of legal identification, at this stage the judge of Constitutional Court evaluate the legal facts or legal events that have constatized to determine how the application of the law (including the application of AUPB) for that event. This stage in the civil procedure law called qualifying. According to Sudikno, qualifying means finding outthelegal means to events that have beenconstatized, or methodologically according to

Jazim Hamidi is included in deductive steps.

For the first step, the judge identifies the rule of law and performs interpretation of the rule of law that can be applied in concrete events. Here the judge may apply the unwritten rule of law in the form of AUPB to test the validity of government action, whether there has been a disagreement with AUPB or not, in addition to the violation of law that has been provided in Article 7A Constitution of Republic of Indonesia Year 1945 as written legal norms. The results of law identification become an important part in the consideration of the judge in deciding this problem of Presidential impeachment.

5. The fifth stage is the stage of determination (application of AUPB). After the judge discover the main case disputed with examination and evidence presented as well as the facts of the law in court, and provide legal opinions on the application of AUPB, then at this stage, the judge determine whether the government's actions are contrary to AUPB or not, and which

principle is being violated, so that the President may be impeached from his office. This stage in the civil procedure law called constituted. According Sudikno, constituted means giving its constitution, set the relevant law to the one concerned, provide justice.

6. The sixth stage is the stage of the decision. After the judge set the law (determination of AUPB) against the government's actions that are contrary to AUPB, then the next step is the judge's ruling on the government's actions which are contrary to AUPB stated in the form of decision of the judge of Constitutional Court read in an open session to public.
7. The seventh stage is the stage of submission of the decision of Constitutional Court. After the judge set in the decision that was read in open session to the public for action that violate/contrary to the AUPB, then the next step is the Parliament held a plenary session of Parliament to forward the proposal for Presidential impeachment to the Assembly.
8. The eighth stage is the stage of the decision of the Presidential impeachment. The result of the

plenary session of the Parliament submitted to the Assembly, and the Assembly held a hearing to decide the proposal for impeachment within 30 days from when the Assembly accept the proposal. Assembly decision on the proposal for Presidential impeachment conducted in a plenary meeting of the Assembly that attended by at least 2/3 of the members present at the meeting, after the President delivered an explanation.

AUPB implementation methods in the process of Presidential impeachment is first done in deductive, meaning that the special principle is devoted to the legal field concerned, then the basic rules are deducted of the law concerned. Then, it is deducted again to its substantive rules, and deducted again to the law of the case. After that, the implementation of law of the case in concrete case is implemented by the judge. Thus, to be able to apply the AUPB in concrete case, long and winding distances are stretched that have to be taken by the judge.

Paradigm of AUPB implementation as the foundation of Presidential impeachment review in Indonesia is a new paradigm in the repertoire of Indonesian Constitutional Law, because, according to John J.O.I. Ihalauw, any theory or model is

constructed on the basis of particular paradigm. Paradigm is a set of assumptions, expressed or implied that become the basis for scientific ideas. Assumptions needed to be made because human capacity is very limited to be able to reap the complex and dynamic reality.²⁰

Basing on the above argument, then the AUPB philosophically is valid as the foundation of Presidential impeachment review in his office term because AUPB is a principle that contains normative ethics value which is used as the foundation of good, clean, and respectable governance, to complete the lacking and vagueness of legal norms. Moreover, the nature of the judges of Constitutional Court (MK-RI) is *kholifah fil'ardi* as the representative of God on earth to uphold the law and justice. When there is a vacuum of law against concrete events, then the judge is not allowed to reject the case because the law does not exist, so he shall explore, follow and understand the values of law and justice that live in the society. Essentially, the judge must become a *mujtahid* and become *mujaddid*/reformer in constructing the AUPB as the foundation of Presidential impeachment review.

The theoretical validity of AUPB is positioned as a basis of Presidential Impeachment is presented as follows:

1. The nature of the judges of the Constitutional Court (MK-RI) (*ius curia Novit*) as a verdict maker to perform legal discovery (*rechtsvinding*), as well as the creator of law, whether by statute, common law, jurisprudence, treaties and doctrines.
2. The President has broad authority and freedom of action to determine policies called *vrije beleidsregel* used for the purposes of general interest (*religius science welfare state* understanding), and does not intended for personal or group interests. Broad authority and freedom of action that cannot be used indefinitely, because one of the purpose of freedom and action is to complement the legal vacuum (*vacuum of norm*), but it must not contradict to laws and regulations and in accordance with AUPB. The validity of the president's actions, measured according to the authority set out by the legislation. If it is in contrary to AUPB, then

²⁰ John J.O.I. Ihalauw, *Konstruksi Teori: Komponen dan Proses*, (Jakarta: Grasindo, 2008), 144

the actions of the President (*vrije beleidsregel*) should be examined with AUPB and the President can be impeached from his tenure.

Espousing the approach of AUPB as the basis for the Presidential impeachment, according to Mochtar Kususmaatmadja, the stabilization of the general principles of law including (AUPB development as the review of Presidential impeachment, cursive writers) can be done in two (2) ways:²¹

1. It can be established in order to create national law through the process of legislation. It is used for things that are general.
2. In the implementation stage, the principles of law (including AUPB as the basis of review for conducting Presidential impeachment, cursive writer) can be established through jurisprudence (court decisions) (judgment of the Supreme Court, including the Constitutional Court (MK-RI, cursive writer) as the first door to examine the case of the Presidential impeachment, has special position and role, (as it will be a guideline for the House of

Representatives, cursive writer), so it should be really a good decision and not beyond reproach. the decision (of the Supreme Court, including the Constitutional Court (MK- RI, cursive writers) should be clear and not confusing. This jurisprudence line is used for things that are specific and sensitive.

2. Empirical Validity and Normative Paradigm of Gneral Principles of Good Governance (AUPB) As a Review to Perform Presidential Impeachment

Empirically AUPB as the basis of review to Presidential *impeachment* has been valid, it can be seen on one of the facts of impeachment against the President of the United States William Jefferson Clinton, in which the case is popularly called as the sexual abuse scandal that carried Bill Clinton to an intern in the White House which was surfaced in 1998. Initially Clinton faced the charges of committing immoral acts to Monica Lewinsky. Clinton denies 'unnatural relations' with employees.²²

²¹Mochtar Kususmaatmadja, *Konsep- Konsep Hukum Dalam Pembangunan*, edisi pertama cetakan ke-2, (Bandung: Alumni, 2006), 199.

²²The explanation was quoted from Laporan Penelitian "*Mekanisme Impeachment dan Hukum*

Acara Mahkamah Konstitusi", in relation toConstitutional Court of Republic Indonesia with Konrad Adenauer Stiftung, Jakarta, 2005,in <http://www.mahkamahkonstitusi.go.id/public/co>

However, during the process of investigations conducted by the *House Judiciary Committee* and assisted by *independent counsel Kenneth Starr*, the charge switched to the alleged commission of blocking or inhibiting the process of investigation by lying under oath. Then on August 17, 1998, Clinton finally rectify his own statement to acknowledge his actions through national television station.²³

Clinton's acts was judged by the *House Judiciary Committee*, as the act of lying under oath and then categorized as a "disgraceful act" (misdemeanors) as mentioned in Article 2 (4) of the US Constitution. In this process, Clinton survived the impeachment he won the voting in parliament. The disgraceful act as the reason for impeachment of the President can be interpreted in various ways, in perspective terminology of violating of criminal law, civil, administrative, and can be interpreted from the perspective of terminology of violating the ethics, and religion.

In the case of United States President, William Jefferson Clinton, in the opinion of the writer it is an act of ethical violations that are clearly degrading the President in his capacity as head of state and government, because he had an affair

ntent/infoumum/penelitian/pdf/KI_Impeachment.pdf, accessed 10 September 2016.

with another woman in the case of "immorality", so in the context of Indonesian, it can be qualified as AUPB violation, that is the principles of ethics in public view and disobeying the constitution as a qualifying form of the "disgraceful act" (misdemeanors).

The formulation of legal norms of "profesional misconduct" as the reason for the legal dismissal of the President in his tenure were interpreted as a reflection of actions degrading the President in the perspective of supervision. It conducts an act relating to governmental actions or the actions of government as government administrators such as: discretion / *Freies ermesen* whicg produces *vrije beleidsregel*, so that the legal reasons "misconduct act" as an act of degrading can be classified into AUPB, so it can be used as a review to impeach President from his tenure.

Legal reasons of "abominably act" as an act of degrading President academically still poses multiple interpretations as described above in the writer's interpretation, especially in the perspective of ethics supervision (*control of the ethic*) to the President as the organizers and the government.

²³Ibid.

If the ethical-moral is enforced and upheld as well as taking it precedence over the norm of law, then the rule of law will be followed. Ethics enforcement should be higher than the norm of law, because if the ethics is better, the other will be good too, but the problem happened in Indonesia since the norm of law is not brought closer to the ethical-moral even far from the moral, so that there is a "*legal norms without meaning*"

UUD 1945 of Republic Indonesia is supposed to set the reasons carefully for the Presidential impeachment under Article 7A RI UUD 1945 of Republic Indonesia so it would no cause any ambiguity and rising to the multiple interpretations.

This is caused by all the president's actions that may constitute into degrading the President and it may also be associated with the formulation of legal norms of abominably act as the reason for impeach the President from his tenure wich is assessed suitable for AUPB, so that it can impeach President from his tenure.

In addition to the above case, empirically AUPB has been tested from the beginning, starting from the steps of the judges of civil servants and their first signs of civilian judges. The jurisprudence of the judges of civil servants started from *Amtenarenwet* 1933 that coming into force on March 1, 1933. *Centrale Raad van*

beroep, in his decision on June 22, 1933 regarding the affairs of state employees, said that he was not going to limit themselves to a lawsuit filed on the basis of the unwritten law, therefore the government should bound to the principles of common law. Thus, the decision of *Centrale Raad van beroep* provide new hope for the possibility to perform eligibility principles of unwritten laws that has been inventoried by Boasson and Leydesdorff, eventhough it is only limited to the principle of prohibition to act retroactively to the position that has been set by law.

In jurisprudence made by civilian judges, the early introduction of AUPB found since the decision of the *Hoge Raad* 13 November 1936 in the case of detention. *Hoge Raad* in his decision shows clearly a violation of the norms of unwritten law in carrying or using public legal authority and it is considered incompatible with the legal definition in Article 1401 BW.

In the normative validity shows that AUPB can be used as the basis for reviewing the Presidential impeachment from his tenure:

1. Regarding to the legal doctrine suggested by eminent jurists, the General Principles of Good Governance (AUPB) placed as norms of unwritten laws that must be obeyed

and respected by the government. It is derived from the values of Pancasila philosophy as an abstraction of reality of Indonesian nation before forming the State.

The General Principles of Public Pemerinthan Good (AUPB) is known as the *Algemene Beginselen van Behoorlijk Bestuur* and seen as the unwritten laws that must be obeyed by the government, before revoked dan reset in the *Administrative Rechtspraak Overheidbeschikkingen* that is abbreviated to Wet AROB, This is actually a government decree in administrative law by judicial authorities which has to deal with the general legal consciousness as it is prevailing principle of good governance..

According to Philip M. Hadjon, The General Principles of Good Governance (AUPB) can be regarded as rules of law which is not written, especially for making KTUN (public administrative decision) on matters of government wisdom. This fundamental must no have contradiction between unwritten

AUPB with the written law, and AUPB formulated as a principle.²⁴

Then AUPB has been accepted that AUPB should be considered as an unwritten norm of law and it has to be obeyed by the government. AUPB can also be called that the unwritten general principles of law, where for certain circumstances can be applied.²⁵ Therefore, AUPB role complements the drawback and the vagueness of legal norms in the implementation of good governance and clean as well as authoritative, although it is very difficult to build good and clean governance.

2. Based on the various laws and regulations, in fact AUPB in Indonesia incarnate in various legislations even though his name remained principle, others of AUPB still being as principles and not yet abstracted in the human soul

The legal consequences arising on the basis of AUPB formulation as the review of Presidential impeachment in Indonesia, namely:

1. Building the control function of legislative towards the President

²⁴Philipus, M. Hadjon et.al, *Pengantar Hukum Administrasi Indonesia, cetakan kesebelas,*

(Yogyakarta: Gajah Mada University Press , 2011), 268.

²⁵ Ibid. 270.

since he has capacity as head of state and government.

2. Building a checks and balances system of government in order to create mutual effort to monitor and control each other.
3. Creating a clean and respectable government in the administration of state government.
4. Establishing legislation which has important implications for the livelihood of the community and nations.
5. Maintaining the constitutionality of acts of the President in order to prevent the president acts beyond the constitution (*the unconstitutionality of government's action*).
6. Maintaining the establishment of an effective government for the sake of the stability of the Unitary of Republic of Indonesia.
7. Maintaining public trust as the owner and holder of sovereignty, because the president is elected directly by the people.

The legal implications for the implementation of General Principles of Good Governance (AUPB) as the review

for the impeachment of President stated as follows:

1. The juridical implications posed is General Principles of Good Governance (AUPB) can be used as a source of reference and rules guiding to impeach the President in his tenure for the acts or good deeds in the form of behavior or attitude which is filled into *vrije beleidsregel* as the product of *descretion / Nach Freiesermessen* or from *Beoordeling vrijheid* that are massive and substantive, it violates the principle of legal certainty, the principle of welfare, the principle of unity, the principle of the protection of life, the principles of honesty, principle of shame (*al-haya* '), the principle of trust, and the principles of ethical as AUPB ,
2. The values contained in the General Principles of Good Governance (AUPB) can be used as a source of reference and a guiding rule for the House of Assembly and the Constitutional Court (MK-RI) to take a stand to impeach the President from his tenure based on the proposal from the House of Representatives.
3. The values contained in the General Principles of Good Governance (AUPB) can be qualified as a

material of legal source (source of legal discovery, a source in which the law was formed), while General Principles of Good Governance (AUPB) has not been accommodated in the UUD 1945 of Republic of Indonesia as a review to Presidential impeachment.

4. The application of the General Principles Paradigm of Good Governance (AUPB) as as the review for Presidential impeachment, in his term, implicates the government to act honestly, so that the action will not harm the will of the people in general and Indonesia in particular.
5. The General Principles Paradigm of Good Governance (AUPB) as a review to impeach Presidet from his tenure implicate the expanded functionality of the control DPR-MPR against the executive organ (the President) and creation of the principles of honesty, and austerity act in governance and presidensiel system of Indonesia.
6. The existence of General Principles of Good Governance (AUPB) as the review to the Presidential impeachment from his tenure is a new findings in this study, so it must be made known to the Assembly for further action in the structuring of

amendment of Article 7A RI UUD 1945 of Republic Indonesia, in order to get a formal judicial position, or through a provision of the Constitutional Court.

7. In his capacity as a principle, The General Principles of Good Governance (AUPB) can be classified and qualified as a source of substantive law, while its position in the legislation is being formalized, then it is placed as a formal source of law, the General Principles of Good Governance (AUPB) should essentially be used as a review to impeach President from his tenure.

IV. CONCLUSION AND SUGGESTION

Philosophically AUPB is valid to serve as the review to impeach President because the nature of AUPB as principle contains the values that form the basis of normative ethical-foundation of good governance, clean and respectable, to complement the shortcomings and ambiguities in the rule of law. In addition, in its application based on the nature of judges (the Constitutional Court (MK-RI) is represented as *kholifah fil'ardi* as the representative of God on earth to uphold law and justice, and the nature, the judge must be a *mujtahid* and become *mujaddid* / reformer in constructing AUPB as grounding review to the Presidential

impeachment. Theoretically AUPB is valid, because the nature of the judges of the Constitutional Court (MK-RI) *ius curia Novit* as a verdict maker performs legal discovery (*rechtsvinding*), in assessing the freedom of action that exist on the President in the form *vrije beleidsregel* or attitude which conducted in contrary to the AUPB.

Empirically AUPB as the review is already valid to impeach the President, it can be seen on the legal facts impeachment case against the President of the United States William Jefferson Clinton, because of his "abominably act" (*misdemeanors*). In addition to the above case, empirically AUPB has been tested from the initial introduction through the jurisprudence of the judges of civil servants starting from the entry into force of *Amttenarenwet* 1933 on 1 March 1929. *Centrale Raad van Beroep*, in its decision June 22, 1933, and the decision of the *Hoge Raad* jurisprudence November 13, 1936 in the cases of detention. While the normative validity is based on the leading *legal doctrine*, that is seen as the unwritten AUPB laws that must be obeyed by the government and AUPB considered as a part of the positive law, as well as a guide for government officials in making policy. In addition, based on various legislation, in Indonesia AUPB incarnates in various

legislations even though his name is still remained principle.

The suggestion proposed in this study the researcher found the urgent of general principles of good governance as a review, namely: To recognise the Principles of Good Governance as the basis for the impeachment review of President on his rule, it is recommended to make change for the fifth stage of the RI State Constitution of 1945.

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