

Implementation Suspension of State Administrative Decision by the State Administrative Court

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ABSTRACT

Based on the principle of presumption Rechmatiq / Praesumptio iustae causa that the decision of the State Administrative (KTUN) should be considered legal until there is a court decision stating the contrary, it is in order that the task of the government is viable in particular to provide protection, public services and welfare for people, but as a counterweight to provide legal protection to the interests of the plaintiff, the judge may issue a suspension in the implementation. Stipulation is a legal product that was originated from the requests (no dispute) but in this case there is a dispute over the State Administration, but the judge may issue a stipulation of the suspension.

Keywords: Suspension, state administrative, decisions

INTRODUCTION

The purpose of the State Administrative Court or Administrative Justice establishment, is intended as a means of legal protection (*rechtsbescherming*) for the people against the Government's actions in order to carry out government duties in accordance with the prevailing legislation (*wetmatigheid van bestuur*) and aligned with the general principles of good governance (*AUPB*) / *algemene beginselen van behoorlijk bestuur*.

Judging from the historical aspect, the purpose of establishing the State Administrative Court according to the Government Statement Before the Plenary Session of the House of Representatives of the Republic of Indonesia Concerning the Draft Law On State Administration, on April 29, 1906 which was delivered by the Minister of Justice Ismail Saleh, the State Administrative Court was held in order to give protection to the people,¹ (italics from author) the purpose is specified and reaffirmed in the Explanation of Public Law Number 5 of 1986 on the State Administrative Court at number 1 (one) paragraph 8 (eight).

A conclusion can be drawn from the aspects of philosophical, historical and juridical, that the purpose of the State Administrative Court establishment is in order to:

1. Provides protection for individual rights, and
2. Provides protection for the rights of the people.

Not merely the State Administrative Court provides protection to the rights of individual and community but against lawful Government's actions they must also be protected. The forms of legal protection of citizens and lawful government action according to Sjachran Basah are the protection of citizens given when the state administration acts cause harm to them. While the protection of the state administration itself is carried on their good and right behavior according to the law, both written and unwritten. The principle of an action should not harm others is derived from the principle of the Roman law which was later developed by philosopher Thomas Aquinas called the principle of "*neminem laudere*", from this principle then incurred the norm of Article 1365 and 1367 BW.

In the concept of philosophy of logic, if there is a consistent and harmonious relationship between the interests of individual rights and the rights of people with the interests of

government as the authority, it is said to have the same value with another (*ekwipollensi*), but if the interest with each other collides, then there is opposition relations (*kontraris*). Relations of opposition spawned conflict of interest.

Conflicts of interest between individual rights, the rights of the people and the Government as a ruler, in the view of the philosophy of law is possible to happen, since the law is derived from human consciousness. In the consciousness of the human itself there are three Tendenz or trends:

1. *Tendenz* of individualist;
2. *Tendenz* of collectivist;
3. *Tendenz* of system (order).

Providing protection to the people is the mandate of the Preamble (*Preambule*) of the Constitution of the Republic of Indonesia 1945 paragraph 4 (four) which states, ...to form a Government of Indonesia who protects all the people of Indonesia ...(*italics from the author*). The protection of the entire Indonesian nation not only from external threats, but also includes the unlawful action of agency or official of the State Administration which implicates to cause harm to the people.

Giving appreciation is very important to the implementation suspension of the Administrative Decisions as stated by Adrian B. Webner, according to the author can be understood, therefore:

1. The implementation suspension of the Administrative Decisions resulting the **action power** (*gelding*) against the decision of the State Administrative being sued suspended **provisionally** (*tijdelijk*);
2. The implementation suspension of the Administrative Decisions resulting law situation / condition (*rechtstoestand*) back to the state or position (*restitutio in integrum*) before the Administrative Decisions being disputed;
3. The implementation suspension of the Administrative Decisions provides limitation (*restricteren*) validity of Legal presumption (*praesumptio iustae causa / vermoeden van rechtmatigheid*).

However, as long as it has not been decided by the Court, the State Administrative Decisions should be taken according to the law.

And the process before the Administrative Court is intended to examine whether the allegation that the decision of the State Administrative being used as unlawful is reasonable or not. That's the basic law of the State Administrative events starting from the assumption that the decision of the State Administrative always in line with the law, then the procedural law of the State Administrative law is a legal means to negate these assumptions in concrete circumstances.

In the formulation of norms of Article 67 paragraph (4) of Law No. 5 of 1986 and the explanation of Article 67 letters a and b, there is a legal concept which is a requirement for the granting of the suspension proposal, but the concepts are open to be given meaning as:

1. The concept of an emergency;
2. The concept of loss, and
3. Public interest with regards to the development.

These concepts are open to be given meaning, because the Act itself does not give definition authentically in General Definition as well as in General Explanation and the Explanation of

the Section of the Act. *H. L. A. Hart said*, very often the use of a common term or even the technical terms, are quite "open" in the sense that there is no obstruction to extend the term to certain cases where there is only some of the features that usually come together.¹⁰ In facing legal concepts that are open, the role of the judge to do the interpretation is needed here.

Theoretically the provisions of Article 67 paragraph (2) existence governing the application for suspension of the State Administrative during the disputes in progress is a balancing of the provisions of paragraph (1) which governs the validity of the State Administrative Decision making the government is still able to perform the duties of government in particular to provide public services and provide protection and public welfare on the one hand.

In order to carry out its judicial functions (adjudicate) the court is armed with the legal instruments by the Act to be used in the framework of the process of dispute resolution, legal instruments, among others, may be the stipulation, the interlocutory decision, and the final decision (*einduitspraak /eindvonnis*). Each legal instrument used in the dispute resolution process has their own character or figure of laws.

According to Sudikno Mertokusumo in the process of lawsuit settlement, the judge verdict is not the only form to solve the case. Besides verdict there is still judge's endorsement. Similarly, in the Administrative Court in the context of the dispute resolution process, the form of legal instruments **stipulation** and **decision** are known and acceptable and obtain justification.

The difference between the decision and the stipulation is, the decision is a product of *eigenlijke rechtspraak of contentieuze jurisdictie* (real court or judicial power to hear disputes, solving disputes by judges), while stipulation is the product of *oneigenlijke rechtspraak of volontaire (voluntary court)*.¹³ In a real court (*contentieuze*) there are two disputing parties, the Plaintiff and Defendant, while in voluntarily court or not real (*volontaire*) there is just the applicant only. The nature of injunction/ dictum decision in the real court (*contentieuze*) can be *declaratory*, *constitutive* and *condemnatory*, whereas in voluntary or not real court (*volontaire*) it has *declaratory* nature.

Distinction between "real court" and "not real court" is caused by the judge acts in the voluntary court which is actually an administrative act, so the decision is a stipulation (Article 236 HIR, 272 Rbg). Sudikno Mertokusumo outlook is related to the Civil Procedure Code which has different character with the Procedural Law of State Administrative Court.

In addition to the problems mentioned above, the other problem of no less important is related to the way of law enforcement if the implementation suspension of the State Administrative Decision issued by the Administrative Court disobeyed by the Administrative Board or Officer.

Administrative Court with the main task, namely, to examine, decide and finalize the Administrative Disputes referred to in Article 47 of Law No. 51 Year 2009 on the Second Amendment to Law No. 5 of 1986 on the State Administrative Court. Completed derived from the word to complete meaning should be thoroughly completed and final not only just to examine and decide but until the implementation stage of the legal instruments product issued by the judiciary. Do not let any product of legal instruments of judicial institute that are floating (*floating*).

At the State Administrative Court the execution is not only related to the court decisions that have permanent legal force (*vonnis in kracht van gwmisjde*), but the execution is also connected to the suspension of the Administrative Decision, in countries with civil law legal system, the stipulation of implementation suspension of the Administrative Decisions such as

in the Netherlands known as *schorsing*, whereas in France known as *le sursis d'exécution des actes administratifs*.

At the level of the Law (wet) there is no normative juridical settings related to the execution of the Implementation suspension of the State Administrative decision in the Procedural Law of the State Administrative Court as stipulated in Law No. 5 of 1986 on the State Administrative Court, Shrimp No. 9 of 2004 concerning Amendment to Law No. 5 of 1986 on the State Administrative Court, and Law No. 51 Year 2012 on the Second Amendment to Law No. 5 of 1986 on the State Administrative Court.

The disorganizing of implementation suspension execution of the Administrative Decisions Act may be categorized as the state of silence law (*silentio of wet*) or can also be said to be a legal vacancy (*Ieemten in het recht*) regarding the mechanisms and legal remedies that can be done if the implementation suspension of state Administrative decisions are not complied with by the Board or Administrative Officer.

Implementation Suspension of State Administrative Decision by the State Administrative Court

In the practice of the State Administrative Court legal instruments used in suspending the implementation of the Administrative Decisions throughout the author's observation are all using the "STIPULATION", which is based on:

1. Circular Letter of the Supreme Court of the Republic of Indonesia Number 2 Year 1991 concerning the Guidelines of Some Provisions In the Law No.5 of 1986 regarding the State Administrative Court.
2. Guidelines of Supreme Court Number: 052/Td/TUN/III/1992 dated March 14, 1992 which was formulated in the Vocational Training of the Judge's Skill Improvement TUNII Court Judge in 1991.
3. Guidelines of Supreme Court Number: 222/Td.TUN/X/1993 defined in the Vocational Training Improvement of State Administrative Court Judges Phase II in 1992.
4. Guidelines of Supreme Court Number: 223/Td.TUN/X/1993 defined in the Skills Training Administrative Court Judge Force II Phase II in 1992.
5. Guidelines of Supreme Court Number: 224/Td.TUN/X/1993 formulated in Training of Strengthening Vocational State Administrative Court Judge Phase III Force II in 1993.
6. Circular Letter of Indonesian Supreme Court No.: 2 of 1991 On the Implementation of Article 67 of Law No. 1986 dated 30 April 2001.
7. Guideline No. 1 of 2005 on Implementation Suspension of Decision of TUN being sued (Article 67 of Law No. 5 of 1986) dated December 7, 2005
8. Technical Guidelines for Administration and Technical State Administrative Court Book II Edition, 2009.

Not on the basis of the provisions of the Law of the State Administrative Court as referred to in the Act No.5 of 1986, what is the ratio of using the legal instrument "STIPULATION" to suspend the decision of the State Administrative.

In the Supreme Court Circular No. 2 of 1991 figure VI. The Implementation Suspension of Administrative Decision determines;

1. Any action of a court procession set forth in the form of "Stipulation", except the

final decision should be headed "Verdict".

From here is the beginning of using legal instruments "Stipulation" to suspend the implementation of the State Administrative decision followed by Guidelines of another SEMARI up to the Administration Technical Guidelines and Procedural Technical of State Administrative Court Book II Edition, 2009.

Conditions at SEMA No.2 of 1991 figure VI. 1. Which excludes the use of "decision" only for the final verdict is contrary to the provisions of Article 113 paragraph (1) of Law No. 5 of 1986 on the State Administrative Court which clearly and unequivocally determine.

Based on the provisions of Article 113 paragraph (1) the verdict is divided into 2 (two), that is the final decision and not a final decision which is in the practice called interlocutory decision with the heading "DECISION", thereby the provision of SEMA No. 2 of 1991 number VI. 1 has denied the provision of Article 113 paragraph (1) of Law No. 5 of 1986 on the State Administrative Court.

In still other provisions in the Act No. 5 of 1986 on the State Administrative Court stated:

Article 67

1. The application referred to in subsection (2) may be brought together in a lawsuit and may be terminated in advance of the main dispute. (Author's italics).

With the phrase "may be terminated in advance" according to the author means to grant or deny the suspension request of the Administrative Decisions made by the legal instruments "INTERLOCUTORY DECISION" not by a legal instrument "STIPULATION". Besides the principle of preference law teaches us "*Lex superior derogat legi inferiori*" which means the higher Act controls or defeats lower legislation.

Execution or implementation of the court's decision is the end of all process of disputes series in any justice agencies. Unlike the decision execution of the implementation suspension of Administrative Decision is not the end of the whole process of dispute series but the nature is temporary not the end of the whole process of dispute series but the nature is temporary until there is court verdict obtained permanent legal force (*kracht van gewijsde*), even at any time the decision of implementation suspension of the State Administrative decisions can be revoked.

The law makers (*wetgever*) did not imagine that the Administrative Board or Officers will not carry out the decision of implementation suspension of the State Administrative decision, the ideal reflection is that the Administrative Board or Officer will always be obedient to implement the decision of the implementation suspension of the Administrative Decision, Author assumptions are based on reality in the Law of the State Administrative Court that does not organize the mechanism of decision execution on the implementation suspension of State Administrative decision.

The Indonesian Supreme Court as the highest court of the state judiciary in the four courts have issued instructions if Defendants fail to comply with the decision of implementation suspension of Administrative Decisions disputed namely:

1. Supreme Court Circular Letter No. 2 of 1991 figure VI. 4. determines: If there is a Suspension Stipulation not obeyed by the Defendant, then the provisions of Article 116 paragraph (4), (5) and (6) can be used to guide and to deliver the copies to: the head of the Supreme Court, Ministry of Justice of the Republic of Indonesia, Indonesian State Minister for Administrative Reform (Letter of Menpan No. B.471/4/1991 dated May 29, 1991 concerning the Implementation of

Administrative Decision).

2. Book II Administration Technical Manual and Technical Manual of State Administrative Court 2009 edition page 52 letter determines: Suspension Stipulation disobeyed by the defendant, casuistically can be applied in Article 116 of Law No. PERATUN has applied to decisions that have permanent legal force

The provisions of Article 116 of Law No. 5 of 1986 concerning the State Administrative Court had been amended two times, first by Law No. 9 of 2004 on the Amendment of the Act No. 5 of 1986 on the State Administrative Court and the last by Act No. 51 of 2009 on the Second Amendment to Law No. 5 of 1986 on the State Administrative Court.

Principles of execution (enforcement) adopted by the three Acts above are to be self-respect dependent on the desire of the State Administrative Agency or Officer who serves as the Defendant, means that the State Administrative the Agency or Officer is as executor for himself, while the function of Chairman of the Administrative Court in the case of the decision implementation of the Court's is merely to control as contemplated in Article 119 of Law No. 5 of 1986.

Article 116 of Law No. 5 of 1986 mentioned execution system adopted is a system of hierarchical position, while the execution system adopted by the Article 116 of Law No. 9 of 2004 on the Amendment of the Act No. 5 of 1986 on the State Administrative Court is the forceful measures system, with the enactment of Law No. 51 year 2009 on the Second Amendment to Law No. 5 of 1986 on the State Administrative Court system using a mixture of office hierarchy and impure forceful measures system.

Mechanism of office hierarchy in the era of Article 116 of Law No. 5 of 1986 is compatible with the system of government at that time in new order era with fully centralized system where the supervisor influence is very strong in stages. After the reformation period with the emergence of Act No. 22 of 1999 concerning Regional Government that no longer adhere to the centralized system but adopts autonomy system so that no hierarchy of positions between the Government of Regency / City and Provincial Government so that the use of the forced effort system is appropriate.

With the instructions given by the Supreme Court to apply the provisions of Article 116 of PERATUN casuistically if the defendant does not want to implement the decision of suspension of the Administrative Decision, it is necessary to see the mechanism provided in Article 116 of these in order to get the whole picture.

Article 116

1. A copy of the court decision that has gained legal force, sent to the parties by registered mail by the clerk of the local court by order of the Chief Judge who put him on trial in the first instance at the latest within 14 (fourteen) working days;
2. If after 60 (sixty) working days the court decisions that have permanent legal force referred to in paragraph (1) received the defendant did not carry out its obligations as stipulated in Article 97 paragraph (9) letter a the state administrative decision disputed cease to have any effect anymore;
3. In the case of the defendant must carry out the obligations as set forth in Article 97 paragraph (9) letters b and c, and then after 90 (ninety) working days apparently the obligation is not performed, the plaintiff appealed to the chief justice referred in paragraph (1), that the court ordered the defendant executes the court decision;

4. In the case of the defendant is not willing to carry out the court decisions that have permanent legal force, the officials concerned is subject to forceful measures in the form of compulsory payment and /or administrative sanctions;
5. The official, who does not execute the court decision referred to in paragraph (4) is announced in the local print media by the registrar, since the non-fulfillment of the provisions referred to in paragraph(3);
6. In addition to be announced in the local print media as described in paragraph (5), chairman of the court must submit it to the President as the highest authority to instruct the officials carrying out the decision of the court, and the house of representative to carry out oversight functions;
7. The provisions on the amount of money forced, kind of administrative sanctions, and procedures for the implementation of compulsory payments and or administrative sanctions stipulated by legislation.

Until now, the provisions referred to in Article 116 paragraph (7) have not been released, so that the effort cannot be forcibly applied, thus the pulling trigger cannot be implemented.

Delegates of legislation in Article 116 paragraph (7) is in blank forms, since the form of the legislation is not mentioned. In the Law on the Establishment of Regulation stated that if the delegation of legislation carried out, the form of legislation must be clear.

Noting that the execution mechanism set down in Article 116 of Law No. 51 Year 2009 concerning the Second Amendment to Law No. 5 of 1986 on the State Administrative Court according to the author cannot be applied in the suspension of the execution of the decision of the State Administrative Decisions if Defendants do not want to implement with the following reasons:

1. Grace period (time limit) of the stages is very longtime, while the implementation suspension of the Administrative Decisions is caused by urgency;
2. Execution in the Article 116 of the State Administrative Agency or Officer as Defendant is to do something active namely issuing the new State Administrative Decisions, while the implementation suspension of the State Administrative Decision required by the Administrative Agency or Officer is not to do something passive.

CONCLUSION

Based on the discussion of these problems it can be concluded as follows:

1. The implementation suspension of the Administrative Decisions resulting in action power(*geldig*) against the decision of the State Administrative being sued is suspended temporary (*tijdelijk*);
2. The implementation suspension of the Administrative Decisions resulting in law situation/state (*rechtstoestand*) back on the state or position (*restitutio in integrum*) before the Administrative Decisions being disputed;
3. The implementation suspension of the Administrative Decisions disallow (*restricteren*) Legal presumption validity (*praesumptio iustaecausa/vermoedenvanrechtmatigheid*).
4. Considering the influence caused by the decision of the implementation suspension of the State Administrative Decision, therefore in the judge legal considerations, legal reasons are required in philosophical, theoretical and juridical manner.

5. The reason of public interest is not necessary in the in Article 67 paragraph (4) letter b therefore since the beginning Administrative Decisions related to the public interest and not becoming the authority of the State Administrative Tribunal.

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