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Omnibus Law Opportunities And Challenges Towards Entrepreneurs And Labor : Comparative Review

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Bismillahirrohmanirrohim

Assalamu'alaikum Wr. Wb.

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Wassalamu'alaikum Wr.Wb.

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LEGAL REVIEWOF LAW PROTECTION THEORY IMPLEMENTATION IN DISPUTE OF ADMINISTRATIVE COURT

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Abstract

Law Number 5 of 1986 established Administrative Court as an institution authorized to resolve administrative problems / disputes, implementation of Article 10 paragraph (2) of Law Number 4 of 2004 concerning Judicial Power. The importance of the existence of this Administrative Court is because its position is one of the main milestones in realizing a just and prosperous state. In Article 116 of Law Number 51 Year 2009 concerning the Second Amendment of Law Number 5 of 1986 concerning State Administrative Court will reduce the pessimism of the justice seekers community towards the existence of the State Administrative Court as an institution of control over the government as well as law protection for the people seeking justice.

Key word: Law Protection, Dispute of AdministrativeCourt.

A. INTRODUCTION

Article 1 subsection (3) In the Constitution of Act 1945that "*Indonesia is a law country*". Associated to the sentence above, the meaning of law country is inseparable from its pillar which is legal sovereignty. Besides, the founders of the state in forming the Indonesian state government have determined another pillar, namely populace sovereignty. Those things create communist integral combination between the legal sovereignty and the populace sovereignty. Afterwards, it is contradicted and strictly separated between the law state on the one hand and on power state on the other hand which can be transformed as in the form of dictatorship or other similar form, which is not desirable either implemented in this country.[1]

The existence of a country called law country is reflected in several things, which are usually said to be the features of law country (*rechtsstaat*) which commonly found in Constitution Act 1945, that are:[2]

1. The guarantee of human rights (and citizens);
2. The division of power within the state (*Scheiding van macht*);
3. The Government in fulfilling their duties and obligations should be based on law, written or

1. SjachranBasah, PerlindunganHukumTerhadapSikapTindakAdministrasi Negara, Alumni,Bandung,1992, h. 1
2. Sri Soemantri M, KemandirianKekuasaanKehakimanSebagaiPrasyarat Negara Hukum Indonesia, Makalah, Seminar "50Tahun KemandirianKekuasaanKehakimandiIndonesia", FHUGM,1995

unwritten;

4. The existence of independent judicial power, including the State Administrative Court.

The third feature, that is the implementation of duties and obligations of the government which must be based on law carries certain consequences, which in the law aspect, it is used as a rail foundation for the government in carrying out its duties and responsibilities, on the other aspect the same law can be used as a basis for judicial testing of government action. In addition the third element will create the fourth element, which is a test instrument to the actions of the government itself.

In the basic concepts of administrative law, the major elements of administrative law are known as the law regarding the power of government once associated with the law regarding community participation in the implementation of legal governance concerning legal of governmental organizations and the law regarding to legal protection for the people.[3]

Those three aspects above are related to one another, such as the function of administrative law (normative functions, instrumental function, and guarantee function) which are also interrelated to each other. Normative functions related to the normalization of governing power which is clearly related firmly to the instrumental function used by the government to use governing power, which in turn norms of government and government instruments used must guarantee legal protection for the people.[4]

The existence of government action should be based on applicable legal provisions as features / elements of a law country, and the existence of testing instruments toward government action itself, surely in turns need to provide protection for the people interest if the government's actions intersect or even collide with the interest of the people, so that the interests of the people do not necessarily have to be sacrificed in case of collisions as a result of government action.

In order to enforce the law and provide legal protection for the people towards the government action, it is necessary to have a state organ that was given the duty and authority to supervise the judicial assessment regarding to government actions that cause harm to the people interest. Oemar Seno Adji, by typing Fredrich Julius Stahl's thoughts on the rule of law formally stated that in principle and in general all actions concerning and detrimental to everyone or their rights can be monitored by the Court.

Thus it appears that the intended state organ as a specific supervisor of government actions is submitted to the court which in this case to the State Administrative Court. Friedrich Julius Stahl himself argued that the State Administrative Judicature (Administrative Court) is an absolute element of a law country.[5]

The existence of the Administrative Courtis associated with the State Government system according to the 1945 constitution reveals its urgency while still being aware that is still enough time to develop the law of material administration in Indonesia in order to create clean governance.

The establishment of Administrative Courts in Indonesia which is regulated in Law Number 5 of 1986 in conjunction with Law Number 9 of 2004 in conjunction with Law Number 51 of 2009 is an implementation provision of Article 10 subsection (1) of Law No. 14 of 1970 concerning Basic Provisions on

3. Philipus M. Hadjon, et.al, PengantarHukumAdministrasi Indonesia, Gadjah Mada University Press, Yogyakarta, 1994, h. 28.
4. Philipus M. Hadjon, FungsiNormatifHukumAdministrasiDalamMewujudkanPemerintah Yang Bersih, PidatoPenerimaanJabatan Guru Besar pada FakultasHukum UNAIR, Surabaya, 1990, h, 6.
5. KuntjoroPurbopranoto, BeberapaCatatanHukum tata Pemerintahan dan PeradilanAdministrasi Negara, Alumni, Bandung, 1978, h. 85.

Judicial Power. In the judicial aspects of the Administrative Court, the formal idea to form an Administration Court has been realized. The existence of the Administrative Court is an absolute prerequisite for an effort to achieve a clan and authoritative government (*clean governance*) as well as obeying the law. This also proves the existence of legal protection towards government actions that are not accordance with the principle of "*rechtematigheid van bestur*" that harms the interest of people.

B. PROBLEM STATEMENT

Based on the description above, then this paper focuses on the discussion concerns the existence of the Administrative Court in relation to the legal protection for the people, with the main issues:

1. How is legal protection system for the people in Indonesia after the establishment of the the Administrative Court?.
2. What kind of Legal Protection Theory is adopted in Indonesia?.

C. LITERATURE RIVIEW

In formulating the terms of legal protection for the people in this paper, the terms of "*of the government*" or "toward the government action" are not included, considering a few things:

1. The term of "*people*" already implies as opposed to the term "*government*", the term of people essentially means which being governed.
2. With the inclusion of "*of the government*" or "*toward the government action*" could give the impression that there is a confrontation between the people as parties who are ordered and the government who give the order. Those points of view are certainly contrary to the philosophy of life in our country, which looked at the people and the government as a partner in creating the ideals of state life.[6]

Theoretically, a country must be based on the law country theory which according to Friedrich Julius Stahl characterized, which is characterized by:

1) The Human Rights Guarantee;
2) The Distribution of Power;
3) The Legality;
4) The Judicial Administration,

With "*the government action*" as a central point (associated with legal protection for people), it can theoretically be distinguished into two types according to *Philip M Hadjon*, which are:

1. Preventive legal protection theory
2. Repressive legal protection theory

On preventive legal protection theory, the people are given the opportunity to raise an objections (*inspraak*) or thought before a government decision gets a definitive form. So this preventive protection could be used before a government decision is made. Thus, this preventive legal protection will encourage governments to be more careful to take or not taking a decision. Conversely, repressive legal protection is aimed at resolves disputes.

This last legal protection was used not at the time before the government issued a decision, but after the government decision was issued and the decision creates a disputes that needed a settlement.

6. Philipus M. Hadjon, PerlindunganBagi Rakyat diIndonesia, PT.Bina Ilmu, Surabaya,1987,h. 1-2.

D. RESEARCH METHODS

This study uses the type of normative research, using the approach of the Law (s*tatute approach*) and the conceptual approach (*conceptual approach*). This approach is used because the object of this study is a Juridical Review of the Application of Legal Protection Theory in State Administration Disputes in Law Number 5 of 1986 concerning State Administrative Court, jo. Law Number 9 Year 2004, jo. Law Number 51 Year 2009 along with other relevant laws and regulations, to be analyzed in line with existing legal concepts in general administrative law, are related to the practice of case resolution in District Courts and Administrative Courts.

The study was conducted with library research to obtain primary legal materials in the form of regulations and secondary legal materials. namely the relevant legal bibliography. Research is also conducted to examine the archives District Court and State Administrative Court regarding the issue of implementation (*execution*) of court decisions particularly efforts Forced to Board or the Administrative Officer who does not want to implement the Court judgment that has legally binding.

E. ANALYSIS AND DISCUSSION

Based on the division of the legal protection mentioned above, the means of legal protection can also be distinguished by its objectives into two, which are: 1). Preventive legal protection means (*aimed at preventing disputes*), and 2). Repressive legal protection means.

1). Preventive Legal Protection Means

This means of preventive legal protection in its development is lagging behind especially when compared with the repressive means of legal protection. As a comparison, in England, it used a premise that the issue of protecting the human rights of citizens should already reflected in the preparatory stages or before the issuance of government is decreed. Based on such those ideas, in England, it is recognized the existence of a public inquiry or in English term known as "*hearing*". Definition of a public inquiry or hearing is that the opinion of parties that would be subject to a decision must be heard by dependent/ independent party, this hearing procedures are generally arranged in a law 1958 and several subsequent laws were given since 1962.[7]

As the same system in England, In the United States also known to had a public inquiry procedure or "*hearing*". This procedure applies both to make its decisions that aimed for general as well as individual. For the decision of general nature, this public inquiry procedure is intended for people to participate in making general regulation. However this procedure can be ruled by "*administrative agency"* that concerned if it considers the use of this procedure is not necessary or practical, or even contrary to the public interest.

Such provision is allowed by law, but the conditions must be done carefully and explicitly specify the motive in the decision concerned. As for the decisions of the individual, then a series of procedures that includes the determination of a grace period to hold a public inquiry, notification, information to the public, the terms of the government's impartiality, the obligation to hear the statement of the parties, and so on. If the decision is in the form of granting or revoking a permit, then the obligation to hold a contradictory procedure is an absolute requirement.[8]

2). Repressive Legal Protection Means

7. Paulus EffendieLotulung,BeberapaSistemTentangKontrolSegiHukumTerhadapPemerintah, Edisi ke-2, PT. Citra Aditya, Bandung, 1993, h. 25.
8. Ibid, h.73

In European countries, especially those who use a " *civil law system* " there are two judicial instruments namely General and Administrative Courts. Conversely for countries that adhere to the "common law system" only known by the existence of one judicial organ which known as "ordinary court". Meanwhile for the Scandinavian countries, it has developed a legal protection institution for the people known as the "*Ombudsman* ".[9]

Judicature Administration in France organized by the judicial institutions below:[10]

1. Administrative Court (*Les teribunatie administrative*)
2. The Council of State (*Le council d'etat*)
3. Special Administrative Tribunal

In Indonesia, repressive means of legal protection for the people are known to have several foundations which can be grouped into:

1. The court within the Administrative Court (PTUN);
2. The court within the District Courts;
4. Government agencies which are the institutions administrative appeals.
3. Specific Agencies.[11]

The Administrative Court (Administration Judicature) has a prominent role which as a control or supervisory institution so that government actions continue move on the legal track, as well as the protector of the rights of citizens against abuses of authority or arbitrariness by government officials. The characteristics inherent in the supervision institution in the area of the State Administrative Judicature (administration judicature) are mainly:[12]

- *externa, b*ecause it was conducted by an agency or institution outside the government;
- *A priori*, as it is always done after a controlled actions occus
- *Legality* or control a legal aspect, because only assess from a legal aspect. Repressive legal protection that are on the government agency is an administrative appeals institution after the enactment of Law No. 5 of 1986 known and be part of the administration effort.

Based on the Constitution of Act 1945, Article 1 subsection (3) in Indonesia adheres to the low country theory, more specifically the law theory of *Friedrich Julius Stahl* in adoption, especially with the adoption of the existence of the State Administrative Judicature. The result of Administrative Judicature symposium organized by BPHN in 1976 states that the administration does not guarantee judicial process pure and objective, considering it still takes place in the arrangement of executive officials or the state administration. Therefore the administrative appeal is not become a real judicature yet. Besides the administrative appeal is required, the State Administration Judicature is needed to guarantee an objective judicial process.

The objectivity of supervision through administrative rechtspaak (*justice*) is expected to complement the supervision of administrative appeals. This is exactly what lies behind the establishment of the State Administrative Judicature as the realization of the ideals of the formation of a judicial administration which became independent outside the government organizations. However the question that arises after is whether the supervisory function of the State Administrative Judicature is able to effectively provide protection law

9. Ibid, h.5
10. Paulus EffendieLotulung, Op.Cit., h.19-21
11. RochmatSoemitro, MasalahPeradilanAdministrasiDalamHukumPajak, Disertasi, Cet.IV,Eresco, Bandung, 1976, h.44
12. Paulus EffendieLotulung, Op.Cit., h. xvii

(*law protection*) for the people toward government actions or in other words the judiciary can function to supervise government action is in accordance with legal regulations (*rechtnatige*),

From the description above, the presence and existence of the State Administration of justice for Indonesian which is actively implementing development, is truly an absolute necessity. Thus the purpose of development is to create public welfare, which are a just and prosperous society that can run well.

Theoretically, in Indonesia, the theory of repressive legal protection is dominant . Legal protection of repression relies on dispute resolution through the judiciary, while settlement outside the court has not been adequately used. In a sense, the theory of preventive legal protection which rests on prevention to prevent a state administration dispute has not been adequately carried out.

In Indonesia, there is no special arrangement regarding preventive means of legal protection. It might be due in addition to means of prevention is still relatively new (to Western countries), which led to legal literature administration in Indonesia has not discussed much about the issue, and in addition of thinking about the means of legal protection in 1964 which is more focused on the establishment of administrative tribunals as a repressive legal protection.[13]

The function of the State Administrative Judicature is to resolve disputes arising in the field of state administration, which can be seen in parts of the considerations letter d of Law Number 5 of 1986 which states:

That to resolve the dispute, it is required a Administrative Court that is able to dispense justice, truth, orderliness, and law enforcement, so as to provide shelter to the people, particularly in the relationship between the Agency or Official State Administration with the community.

In connection with the issue of Administration dispute and legal protection for the people, in the General Explanation of Law Number 5 of 1986 broadly stated that in accordance with its purpose, the dispute must be a dispute that arising in the area of State Administration between a person or legal entity with the State Administration Agency or Official as a result of the issuance of a State Administration decision which is considered to violate the rights of civil persons or legal entities. Thus, the Administrative Court is formed in the context of providing legal protection for justice seekers , who felt themselves disadvantaged due to a State Administration decision. However, in this relation, it is important to realize that besides individual rights, the community also has certain rights. This community right is obtained in the common interest of people who live in the community. Those interests are not always consistent, even sometimes it may clash with each other. To ensure the fairest resolution of the conflict between different interests, the principle of principles embodied in our country's philosophy, Pancasila.

Thus, the aspects of legal protection for the people contained in preamble and General Explanation of the Law Number 5 of 1986 above can be expressed as follows:

1. The legal protection in the field of State Administration is given to individuals or private legal entities subject to consequences of a State Administrative Decree ;
2. Legal protection through a judicial control mechanism by the Administrative Court is conducted at the time the State Administration Dispute occurs ;
3. The legal protection to people seeking justice must be done in considering a balance of two-dimensional interests that must be protected, which are:
   - Dimensions of individual interest;

13. Phlilipus M. Hadjon, PerlindunganHukumBagi Rakyat diIndonesia, Op.Cit., h. 4

- Dimensions of community interest (*the common interests of people living in the community*).

4. Legal protection for people against legal action of agencies or officials in State Administration in the scope of testing (*toetsing*) aspect of the legality of an administrative decision.

Thus after the establishment of the State Administrative Judicature, it proves that theory espoused Repressive Legal Protection and management of the State Administration dispute and legal protection system for the people of Indonesia, involve three channels, that are:

1. Through the AdministrativeCourt and Administrative Military Court (*especially for handling an administrative decision Military*) which both stand at the Supreme court, as regulated in Law Number 14 of 1970 jo. Act 35 of 1999;
2. Through the Districk Court, as provided in provisions in Article 134 or Article 160 HIR or article 160 RBg and the existence of jurisprudence of the Supreme Court which gave authority to the General Courts;
3. Through the Governing Council whose existence is based on the Law that governs them and not culminating in the Supreme Court.

F. CONCLUSIONS

The Administrative Court which is the implementation of judicial power in Indonesia does not have absolute authority which in general can carry out its function as the only form of justice that can be used as a means of legal protection for the people, because in reality the court is a special court that cannot adjudicate all dispute "governmental act", and limited authority is limited only to adjudicate a certain State Administration Dispute especially toward the State Administration Decree.

From the analysis it can be concluded that in Indonesia tend to be adhered to the theory of repressive legal protection that is characterized by the existence of administrative tribunals.

In the future, in addition to being adhered to by the Repressive Legal Protection Theory, a mechanism for the Preventive Legal Protection Theory was also developed. This is justified by making suggestions that require the issuance of State Administration Decrees to involve the broadest public participation.

G. REFERENCES

Arinanto, Satya, *Pembangunan Hukum dan Demokrasi*, Jakarta :Dasamedia, 1993.

Basah, Sjachran, *PerlindunganHukumTerhadapSikapTindakAdministrasi Negara*,Alumni, Bandung, 1992

Lotulung, Paulus Effendie, *BeberapaSistemtentangKontrolSegiHukumTerhadapPemerintah* : Seri PerbandinganHukumAdministrasi, CetakanPertama, Revisi. Bandung : PT. Citra Aditya Bakti, 1993

M. Hadjon, Philipus, *PerlindunganHukumBagi Rakyat di Indonesia*: SebuahStuditentangPrinsip-PrinsipnyaPenanganan oleh PengadilanDalamLingkungan Peradilan Admintrasi, Surabaya: Bina Ilmu,1987

----------, PengantarHukumAdministrasi Indonesia, Gadjah Mada University Press, Yogyakarta, 2005.

Purbopranoto, Kuntjoro, *BeberapaCatatanHukum Tata Pemerintahan dan PeradilanAdministrasi Negara*, Alumni, Bandung, 1978.

Soemantri, M Sri, *KemandirianKekuasaanKehakimanSebagaiPrasyarat Negara Hukum Indonesia*, Makalah, Seminar ”50 TahunKemandirianKekuasaanKehakiman di Indonesia”, FH-UGM, 1995.

Setiadi, Wicipto, *Hukum Acara Pengadilan Tata Usaha Negara*: SuatuPerbandingan, Jakarta :RajagrafindoPersada, 1995.

Indonesia. *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*. AmandemenKeempat.

_____ *Undang-UndangtentangKetentuan-KetentuanPokokKekuasaanKehakiman*, Undang - Undang Nomor 14 Tahun 1970, jo.Undang - Undang Nomor 35 Tahun 1999, Jo.Undang - Undang Nomor 48 Tahun 2009.

_____ *Undang-UndangtentangMahkamah Agung*, Undang-Undang Nomor 14 Tahun 1985, jo.Undang - Undang Nomor 5 Tahun 2004, jo.Undang - Undang Nomor 3 Tahun 2009.

_____ *Undang-UndangtentangPeradilan Tata Usaha Negara*, Undang - Undang Nomor 5 Tahun 1986, jo.Undang - Undang Nomor 9 Tahun 2004, jo.Undang - Undang Nomor 51 Tahun 2009.