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The Development of State Administrative Law through the Empowerment of Jurisprudence of the State Administrative Court Decision

Teguh Satya Bhakti[1]
Prof. Dr. R. Benny Riyanto, S.H.,MHum.,C.N[2]
Prof. Erlyn Indarti, S.H., M.A., Ph.D[3]
[1]PDIH student of Diponegoro Unviersity.
[2] Promoter.
[3]Co Promoter

1. INTRODUCTION

National Law Development is one of the subsystems of National Development with the objective of manifesting one National Legal System. National Law Development strategy juridically refers to Law Number 17 Year 2007 concerning National Long-Term Development Plan 2005-2025. In the Chapter II Letter G the Appendix of Law it is described that the effort of manifesting National Legal System in the reform era continued to be implemented covering: (1) The development of legal substance; (2) The enhancement of more effective legal structure; and (3) Improving the involvement of component society with high level of legal awareness to support the aspiring National Legal System Development.

The development of legal substance, in the appendix of Presidential Regulation of the Republic of Indonesia Number 7 Year 2005, Section III Chapter 14 concerning The Establishment of Clean and Good Governance, covering; (1) Process of composing and deciding various Legislative Regulations; and (2) Empowering various court decisions with permanent legal force to be the source of law. The provision shows that National Long-Term Development Plan 2005-2015 inhibits legal reform, especially in the form of legal material reform.

Soetandyo Wignjosoebroto differentiates legal reform in its own meaning and legal reform in law reform meaning as follows:

1. Legal reform must literally be interpreted as reform in the legislation system in and of itself. The term legal derived from the word which means "constitution" alias "legal material specifically formed to be the regulations which have been confirmed/designated as applicable law formally". Legal is commonly called *ius constitutum* or positive law because of its clear and definite form of formula. In such concept, legal reform will be held as legislative activity that generally only involving the politician' opinions and/or to the extent of the elite professional' opinions with lobbying access.
2. Law reform can be interpreted as reform through judicial process. Here, legal is interpreted as law (to replace the Latin term *ius*) and should not be narrowly defined as legislation (alias *ius constitutum*), which can be used as a tool of social engineering according to legal theory library effected by judicial processes (as intended by Roscoe Pond.

Referring to Soetandyo Wignjosoebroto's opinion, Law reform consists of two parts which are legal reform done through legislation system reform, and legal reform in the law reform meaning done through juridical process.

Legal reform in National Long-Term Development Plan (RPJP Nasional) 2005-2025 is Legal reform in its own meaning in the legislation system (legal reform). Legal substance reform in this context, especially written law, done through the mechanism of national law establishment as stipulated by Law Number 12 Year 2011 Concerning Establishment of Laws and Regulations. Laws and regulations establishment process manifested through definite and standardized method which binds all authorized agencies to enact regulations and to improve coordination and efficiency of the process of the establishment of laws and regulations.

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In accordance with the general belief that laws (written law) are never complete, clear and thorough to govern society life, to be left behind from the society development. To follow such development, laws should be improved in order to remain actual and up to date. The improvement and development of legislative regulations could be implemented through judicial with judgement (jurisprudence). In other words, jurisprudence intended to be the development of the law itself in fulfilling the legal needs of justice seeker. Concretely, judge's duty in this jurisprudence process is to be the performer factor of law vacancy when law is no longer governing or outdated.

Legal reform through judgement is called legal reform in the law reform meaning. Law substance reform in this context, especially unwritten law, done through the mechanism of finding law as stipulated by provision of Article 5 paragraph (1) Law Number 48 Year 2009 Concerning Judicial Authority, giving authority to judge and constitutional judge to explore, follow, and understand the value of law and sense of justice that live in society against unregulated issues and problems, meaning that there is no regulation or no clear formulation of law in the written law.

According to Satjipto Rahardjo, the prospect of a court in creating legal reform can be seen through several aspects relating to how court agency works. First, a reform is a process manifested in the form of demand, exigencies, and needs that come from the society where they demand it to be settled by the court. Secondly, everything related to how the court works, such as working procedure, judges and the ideology they use as framework of reference. The judges' education background and their association with the developing thoughts, positioning themselves far ahead of the society they need to serve.

2. PROBLEM

In connection with description above, the issue raised in this paper is how the process of empowerment of jurisprudence of the State Administrative Court Decision can contribute to the Development of State Administrative Law?

3. DISCUSSION

One of the national development agendas is to create clean and good governance. This agenda is an effort to manifest good governance, such as: openness, accountability, effectiveness, and efficiency, respecting supremacy act of law, and opening the participation of the society in order to guarantee the efficiency, harmony and integrity of the duty and function of the implementation of government and development.

The issue in realizing good governance as stipulated in Presidential Regulation of the Republic of Indonesia Number 7 Year 2005, Section III Chapter 14 concerning The Establishment of Clean and Good Governance is Bureaucratic Reform that has not worked according to the society needs. This is related to the high complexity of the problem in finding the improvement for solution. Similarly, high level of abuse of authority, the number of Corruption, Collusion and Nepotism practice, and weak supervision on the performance of state apparatuses are the reflection of bureaucratic performance condition that still far from our expectations.

The amount of bureaucratic problems mentioned above have not been completely resolved either from the internal or external aspect. From internal aspect, various factors such as democracy, decentralization and internal bureaucracy itself, can affect the level complexity of the problem and the effort in finding solution in the future. While from external aspect, globalization factor and the revolution of information technology will strongly affect the search of policy alternatives in the state apparatus.

In the effort of achieving the development objective of the state administration in order to manifest Clean and Good Governance, on 17 of October 2014, President and House of Representatives decided to stipulate Law Number 30 Year 2014 concerning Government Administration (hereinafter referred to as Government Administration (UUAP)), which functions as: (i) improving the quality of government administration; (ii) foundation of the improvement of good governance and (ii) an effort to lower Corruption, Collusion and Nepotism practice.

Government Administration (UUAP) actualizes the constitution norm relationship between the state and society. Government Administration Arrangement in this Legislation is an important instrument from a democratic nation of laws, where the Decision and/or Action stipulated and/or conducted by Government Agencies and/or Officials or other governance covering these agencies outside the executive, judicative, and legislature that execute governmental function enabling it to be tested through a Court. This is the ideal value

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from a nation of laws. The implementation of state authority should take side on the citizen and not the other way around.

Administrative Court (hereinafter referred to as State Administrative Court (PTUN)) is one of judicial agencies in Indonesia established under the Law Number 5 Year 1986 Concerning Administrative Court. Under the Laws and Regulations, State Administrative Court (PTUN) shall be given the task and authority to examine, decide and settle administrative dispute between parties or civil legal entities with administrative agencies or officials, either in central or regional level, as a result of the issuance of the state administrative decision, including personnel dispute under the applicable laws and regulations.

Throughout the practice of administering the judicial authority by State Administrative Court (PTUN) in Indonesia, there are several shortcomings in Law Number 5 Year 1986, either in its formal or material law. Thus, encouraging the establishment of the amendment of Law Number 5 Year 1986 twice in total, the first amendment is Law Number 9 Year 2004 and the second amendment is Law Number 51 Year 2009. The conceptual framework in these three Laws and Regulations contains general regulations covering:

- Formal administrative law (procedure of formal law) in State Administrative Court (PTUN) regulated in provision Article 53 to 119;
- Articles regulating competence (jurisdiction authority) and organizational structure of civil of State Administration (TUN) Judicial agency; and
- Articles which contain only a handful of law material of State Administrative Law (hereinafter referred to as HAN).

The provision of governance in the Government Administration (UUAP), other than functioning as general arrangement concerning activities from government entities and/or officials which have not been regulated expressly in laws and regulations specifically designed for such matter, Government Administration (UUAP) is also material law from Laws Concerning State Administrative Court of formal law in State Administrative law enforcement. Therefore, through the legalization of the Government Administration (UUAP), State Administrative Law (HAN) in Indonesia is now complete. Either for material or formal State Administrative Law (HAN). Thus, in general it can be said that Government Administration (UUAP) is the umbrella act for governance system in Indonesia. Reviewing from policy and political aspect of laws, the provision of Government Administration (UUAP) is a legislation with the nature of "*Conditio sureguad non*" for nation of laws, especially in administering the governance.

The aforementioned is in line with the Final Report of Legal Development Planning Result conducted by Agency for National Legal Development Department of Law and Fundamental Human Right of the Republic of Indonesia (HAM RI) especially Workgroup in the State Administrative Law Field, they stated that executing the bureaucracy reform can be started by nurturing and developing opinions regarding the needs of conceptualizing, positioning, and revitalizing the position of State Administrative Law (HAN) in the governance, especially in the good governance. Good governance is a government based on the law as one of good alternatives in state administrative. State Administrative Law (HAN) is the instrument for good governance, it is the concretization of relationship between the government and citizen.

Since its operation on 14th of January Year 1991 through the Presidential Decree of Republic of Indonesia Number 52 Year 1990 Concerning the Establishment of State Administration (TUN) Court in Jakarta, Medan, Palembang, Surabaya and Ujung Pandang, and Government Regulations of Republic of Indonesia Number 7 Year 1991 Concerning the Provision of Law Number 5 Year 1986 Regarding State Administrative Court, State Administrative Court (PTUN) has dealt with a lot of cases resulting in judge decisions qualified as jurisprudence. It has covered the vacancy of State Administrative Law (HAN) regulated by laws relating to both substantial and formal/procedural aspects in its judicial process.

In connection with this matter, at least there are several reasons why the empowerment of Jurisprudence of the State Administrative Court Decision to contribute to the Development of State Administrative Law, namely as follows:

First, State Administrative Law (HAN) is a dynamic law, either in normative sense or activity understanding. Nowadays, State Administrative Law (HAN) has gone through several developments theoretically and practically. This development is based on various advancements in existing sectors such as economic, political, trading, government, and others. The dynamic of these sectors can influence the meaning and scope of the State Administrative Law (HAN) material, indicating that State Administrative Law (HAN) is not only a regulation that regulates the government but also regulates several matters outside its traditional

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scope. The dynamic of State Administrative Law (HAN) is the reflection of the growth and development of various matters happening in the society, business or government of a country. This dynamic could happen through the implementation of rule of law, judge's decision, and various habits of a country. In connection with this matter, the dynamic of State Administrative Law (HAN) manifested through court decision with permanent legal force of jurisprudence.

Secondly, seeing from the State Administrative Law (HAN) point of view, the position and function of jurisprudence is increasingly viewed as important aspect in the development of State Administrative Law (HAN) itself, we can all see it in practice where several countries with Civil Law system (Continental Europe) comparing with countries adopting Common Law system (Anglo Saxon). France is one of the countries with Civil Law system, it is a prominent example where jurisprudence establishes and develops *Droit Administratif* (State Administrative Law/HAN) to achieve its present existence. Meanwhile countries with Common Law system such as United Kingdom and several other countries, utilizing judge made law as the source of law that can be used to establish *Administrative Law* at the present time where it's seen as a prominent matter because there is no codification in this legal system.

Third, the existence of jurisprudence in relation to State Administrative Law (HAN) in Indonesia, covering both (1) jurisprudence of the Administrative Court (HAN) and (2) the jurisprudence of the general judicature (civil), as long as relating to claim in a case concerning Unlawful Act by Government (authority) based on article 1356 of the Civil Law Code (KUH Perdata), in essence that both type of the jurisprudences in its development will give variation in the future growth of State Administrative Law (HAN) in Indonesia.

Based on the data of the State Administrative Court decision published by Supreme Court from 1992 to 2015, the total jurisprudence of State Administrative Court produced by Supreme Court (MA) for 1992-2015 period is 56 (fifty six) jurisprudences. From 56 (fifty six) jurisprudences, there are 6 (six) jurisprudences relating to formal/procedural aspect or law of procedure of State Administration (TUN) court, and 50 (fifty) jurisprudences relating to substance aspect. This number will increase after the implementation of Government Administration (UUAP) by State Administrative Court (PTUN), considering that Government Administration (UUAP) has expanded the State Administrative Court (PTUN) authority in examining, deciding, and settling dispute of the state administration in Indonesia, whether relating to formal/procedural aspect, law of procedure, or substantial aspect of judicial process. The expanding authority of State Administrative Court (PTUN) covering: (1) The existence of Object Of Dispute Expansion; (2) The expansion of Defendant Subject, (3) The Period of Time to Submit Lawsuit and or Application, (4) Basis of claim (posita) in Submitting Lawsuit, (5) Concerning the plea of damages (petitum) and or Application.

As court appeal, Supreme Court has the authority to conduct the supervision of judicial entities in upholding law in Indonesia. The Supreme Court (MA) supervision is basically aimed at maintaining the unity of law, either through the supervision of the implementation of law in subordinate court, or through the interpretation of law which equally applied throughout the territory of Indonesia. Unity of law is one of Supreme Court's function to demand Supreme Court (MA) to supervise the implementation and interpretation of law by subordinate court through decision on appeal.

The Supreme Court (MA) effort in keeping the unity of law, based on Decree of the Chairman of the Supreme Court Number 142/KMA/SK/IX/2011, Supreme Court (MA) has started to apply system of rooms in procedures for handling claims. The application of system of rooms where Supreme Court justices are grouped according to similar or same skills so that the handling claims in Supreme Court (MA) will be executed by competent Judge in accordance with the type of case. It is expected that the decision taken or given by the Judge will reflect a true, fair and quality of law enforcement.

With regard to the collection of jurisprudence, in 1972 Supreme Court (MA) had issued Circular Letter of Supreme Court Number 2 Year 1972 Concerning the Collection of Jurisprudence, showed to all of Head of High Courts and Head of District Courts in Indonesia, which substantially contained: (1) The Collection of Jurisprudence can only be done by Supreme Court (MA), neither private nor Government entities can execute this Collection of Jurisprudence. Unless this has already been previously discussed, (2) Under the Supreme Court (MA) Act executing *eenheid in de recht-spraak,* therefore Supreme Court (MA) is the only constitutional institution responsible for executing the collection of jurisprudence which is *richt-lijn* that should be obey by the Judge in discretion to decide lawsuit, (3) *Richt-lijn* cases, especially cases in which appeal has been upheld by law either by adjudicating itself or refusing the appeal, (4) Cases with permanent force without appeal do not have *richt-lijn* by nature, (5) Thus if there are other parties who execute the

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collection of Jurisprudence either concerning decision through appeal or concerning High Court and District Court decisions with permanent force without appeal, then it will disturb *eenheid in de recht.-spraak*.

According to the opinion of the authors, seeing from the issuance year of 19th of May 1972, Circular Letter of Supreme Court (MA) Republic of Indonesia Number 02 Concerning the Collection of Jurisprudence was influenced by Mochtar Kusumaatmadja's opinion regarding to the development of law in Indonesia in 1970s. His opinion revealing the use of legal term as a means of social engineering, it was used to justify against the development program in the New Order regime. It was known as Theory of Development Law. According to Mochtar, law has two functions, namely a means of public order (ensuring the order and certainty) and a means of community change. In relation to these roles, law can serve as a tool for social change. In this case, the significance role of law is to execute the change regularly or orderly.

According to Mochtar, the use of law as a social engineering is top down by nature and not bottom up which means that all of the law making and policy should come from the government. This is in accordance with what Supreme Court (MA) had already done by Circular Letter Number 02 Year 1972 stating that only Supreme Court (MA) of the Republic of Indonesia authorized to collect jurisprudence.

Law as social engineering comes from the term "Law as a tool of social engineering" in Roscoe Pound's teaching. This teaching is based on the paradigm accepted by law sociologists at that time, they agreed that law is a social control managed by a country. According to Pond, the real law is the practicable one. Law is not only the one written in the act but also the one that executed by law enforcement officers and or anyone who executes the function of law enforcement with its legal concept. Law can play a role as a means of community change. Pound wanted to change it from law in book to law in action.

In relation to the National Law development in the State Administrative Law (HAN) through jurisprudence of the State Administrative Court, Supreme Court (MA) has done the following measures: (1) The selection of judge decisions of the State Administrative Court (PTUN) called jurisprudence, (2) Publication and Annotation of Jurisprudence of the State Administrative Court (PTUN), and (3) The development of Organization and Management Human Resources of Jurisprudence of the State Administrative Court (PTUN).

The judge decision can be referred to as jurisprudence if complying with the following elements: (1) The jurisdiction of decision on a case when there is no clear regulations; (2) The decision should be permanent; (3) Have been repeatedly ruled upon the same decision on the same case; (4) Complying with sense of justice; (5) The decision is justified by the Supreme Court; and (6) Containing *dicta* and *rasio decidendi*.

In order to disseminate the decision of Supreme Court (MA), especially those that have been made into jurisprudence, courts and society, Supreme Court (MA) has been publishing (in the form of book) a series of Supreme Court (MA) verdicts. The issuance of Supreme Court (MA) verdicts is conducted by Directorate of Law and Justice (Ditkumdil) and Research and Development Centre (Puslitbang) of Supreme Court (MA).

4. CONCLUSION

The Development Process of The Judge Decision of the State Administrative Court (PTUN) into Jurisprudence started from the application of law in settling the dispute of State Administrative Court (PTUN) by the judge, starting from arbitration proceedings to the decision making. This process goes through three stages, namely: (1) Fact Finding Stage, (2) Law Identification Stage, and (3) Law Formulation Stage and General Principles of Good Governance (AUPB).

The legal consideration in The Judge Decision of the State Administrative Court (PTUN) has long-term dimension and implication against the development of Indonesia State Administrative Law (HAN), beyond the legal consideration and decision of the disputing parties (individual or civil legal entities and State Administration (TUN) entities or officials). Therefore, the judge is required to have the ability to think professionally to improve the quality of the considerations and decisions, by observing the situation in the society that should be adapted with general principles of the state administrative law and general principles of court event of the state of administrative law. Through its verdict, it is expected that the decision will be the source of knowledge and law (jurisprudence).

Although the law enforcement system is not based on the precedent system, the judge of the State Administrative Court (PTUN) or subordinate court are responsible to obey Supreme Court (MA) with every effort. In addition, judges are obligated to give good and correct legal considerations in its verdict, both in

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terms of law or jurisprudence by considering the higher judge decision and/or previous judge's decision. If the judge wishes to deviate from jurisprudence, the relevant judge is obligated to give his reason and the legal consideration of the difference of facts in the case he is facing compared to the facts in the previous cases.

At theoretical level, inventory of court decisions which fulfils the element of jurisprudence executed jointly by Supreme Court (MA), High Courts and Subordinate Courts is needed in order to execute the empowerment of jurisprudence of the State Administrative Court in the Development of National Administrative Law. Thus, legal certainty and the legal unification effort can also be manifested by judiciaries. For practical implication, the Empowerment of Jurisprudence of the State Administrative Court effort can be executed by jurisprudence publication. This publication is not only for the judges but also for the public, being the source of discussion for professors and lecturers in all legal field.

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