

LAW POLITIC OF ADMINISTRATIVE COURT JUDICATURE IN INDONESIA

The existence of the State Administrative Court in Indonesia began with Law Number 5 1986 concerning State Administrative Courts (hereinafter referred to as the TUN Judiciary). In the dynamics of the state administration which continued to experience development, especially after the amendment to the 1945 Constitution of the Republic of Indonesia, brought important changes to the implementation of judicial power.

In line with Lon Fuller's opinion in Principles of Legality that "A system must not contain rules that contradict each other", then the stipulation of Law Number 4 of 2004 concerning Judicial Power (Law Number 48 of 2009) has consequences on Law Number 5 of 1986 concerning State Administrative Courts. Considering the Judicial Power as stipulated in the 1945 Constitution of the Republic of Indonesia includes General Courts, Religious Courts, Military Courts and Administrative Courts under one roof, namely the Supreme Court. So that synchronization of the justice system including the TUN Judiciary is needed. Therefore, Law Number 9 of 2004 concerning the Amendment to Law Number 5 of 1986 concerning TUN Judiciary was enacted.

The principle change contained in Law No. 9 of 2004, was the abolition of dualism in the judicial power, becoming a roof under the authority of the Supreme Court. These changes are in the framework of applying neutral justice principles in the system of State Administrative Courts in Indonesia. Besides the changes in Law Number 9 of 2004 concerning Amendments to Law Number 5 of 1986 concerning TUN Judiciary as stated in the Explanation of the Law, among others are the requirements to become a Judge in a court in the TUN Judiciary, the appointment deadline and dismissal of Judges, procedures for appointment and dismissal of Judges, elimination of provisions of procedural law governing the entry of

International Journal of Law Recontruction Volume III, Issue 1, March 2019 51 third parties in a dispute and the existence of sanctions against officials who do not carry out court decisions that have permanent legal force.

In 2009 the second change was made to Law Number 8 of 1986, namely through the enactment of Law Number 51 of 2009 concerning the Second Amendment to Law Number 5 of 1986 concerning TUN Justice. The Second Amendment to Law No. 5 of 1986 concerning the TUN Judiciary is basically to realize the implementation of an independent Judicial Power and a clean and authoritative judiciary, which is carried out through an integrated justice system (Law Number 51 of 2009). Some important changes regarding the TUN justice as stipulated in Law Number 9 of 2004 and Law Number 51 of 2009 concerning the Second Amendment to Law Number 5 Year 1986 concerning the TUN Judiciary will be discussed further in the following description:

1. Removing dualism in judicial power, becoming a roof under the authority of the Supreme Court

One of the principle changes to Law Number 9 of 2004 is regarding the administration of judicial power. The change was intended as an effort to strengthen the principle of an independent judicial power and be free from the influence of other powers to conduct justice to uphold law and justice. As one of the elements of rechtsstaat as formulated by F.J. Stahl is a separation or division of power to guarantee human rights. Separation or division of power includes the separation of executive, legislative and judicial powers. So to maintain the independence and freedom of the judiciary in carrying out its functions and roles, separation from executive power is a matter of principle.

The development of the organization, administration and finance of the court by the Ministry of Justice is deemed no longer in line with the spirit of the constitution. Technical and organizational development and finance should be carried out under one roof, namely by the Supreme Court. Then through Act No. 9 of 2004 the elimination of dualism is carried out in the

judicial power, into one roof, which is under the sole roof of the Supreme Court.

As stated in Article 7 Number 9 2004, "The technical guidance of the judiciary, organization, administration and finance of the Court is carried out by the Supreme Court". The provisions in Article 7 Number 9 of 2004 put an end to the dualism of the holding of judicial power, which was originally carried out by the Minister of Justice and the Supreme Court. This provision is certainly in line with the principle of neutral justice. The task of supervising and appointing and dismissing judges which were originally the authority of the Minister of Justice, turned into the duties of the Supreme Court. Thus it is expected to be able to realize an independent and free TUN Judiciary as mandated by the 1945 Constitution of the Republic of Indonesia.

2. Appoitment and dissmisaal of judges

a. Tightening the conditions to become a Judge in the TUN Judicial environment

The requirements for being able to become a TUN Judge are regulated in Article 14 verse (1). The requirement to become a Judge in the TUN Judiciary environment is increasingly tightened. In Article 14 verse (1) of Law Number 51 of 2009 it is stated that to be appointed as a Judge of the State Administrative Court must be a Bachelor of Law and pass the Judge's education. This is different from the provisions of the previous Law, which does not absolutely require the educational competence of prospective Judges. It is expected that 52 International Journal of Law Recontruction Volume III, Issue 1, March 2019 with the education competency Judges who come from the Faculty of Law, will later be able to have capability in the field of Law, considering the duties of the Judges of TUN are relatively heavier. In the TUN Judiciary the principle of the active Judge is known, where the Judge is entrusted with the task of finding the material truth about the dispute that he examined. So that the mastery of Judges in the field of Law is an

important matter Besides educational competency requirements, another important thing required by Law Number 51 of 2009 is that it has never been sentenced to prison for committing a crime based on a court decision that has obtained permanent legal force. In addition to competence in the field of Law, a prospective Judge must also have a good trace partner. With the increasingly stringent requirements in the appointment of Judges in the TUN Judiciary environment, it is expected to produce competent Judges so that they can provide justice for the people in dispute in the Administrative Court

- b. Judge Dismissal In addition to the renewal of regulations regarding the appointment of Judges, in Law Number 9 2004 and Law Number 51 2009 also made improvements regarding dismissal of Judges in the TUN Judicial environment. Some changes regarding dismissal of Judges in the TUN environment include: 1) The change in retirement age for Judges; 2) The change in reasons for termination not respectfully Judges are increasingly clarified; 3) Dismissal of the Chairperson or Deputy Chairperson of the Court from his position because at his own request in writing is not automatically terminated as a Judge (Article 21 of Law Number 51 2009). This is different from the provisions in Law Number 5 1986 that a Judge dismissed from his position does not automatically terminated as a civil servant; 4) Chairperson, Deputy Chairperson and Court Judge whose position is by the Chair of the Supreme Court (Article 22 paragraph (1)). Whereas in Law Number 5 1986, a temporary dismissal is carried out by the President as the Head of State at the suggestion of the Minister of Justice based on the approval of the Chief Justice of the Supreme Court. This of course can affect the independence and freedom of the Judge.

3. Supervision of Judges in the TUN Judicial environment;

There have been changes in the supervision of the Judge. Initially supervision of Judges in the TUN Judiciary was carried out by the Minister of Justice as stipulated.

in Article 13 verse (1), "Guidance and general supervision of Judges as civil servants was carried out by the Minister of Justice". Supervision of Judges by the Minister of Justice, which is part of Executive Power, is of course contrary to the principle of neutral justice because it can threaten the freedom of Judges as organizers of judicial power. Based on this, then in Law Number 9 of 2004 there was a change in the guidance of Judges in the TUN Judicial environment. In Article 13 verse (1) of Law Number 9 2004, it is stated that "General guidance and supervision of Judges is carried out by the Supreme Court". In the article, the Judge is not only supervised as a civil servant, but his full capacity as a Judge. The supervision was carried out by the Chair of the Supreme Court, as the International Journal of Law Recontruction Volume III, Issue 1, March 2019 53 highest judicial power holder. This of course has been in line with the mandate of the constitution, in the framework of forming a free and independent judiciary. The provisions regarding supervision of Judges in the TUN Judicial Environment have changed again in Law Number 51 2009. In Law Number 51 of 2009, there is an additional new article, Article 13 A, which states that internal supervision of judges' conduct is carried out Supreme Court. In addition to Supervision as referred to in paragraph (1), to maintain and uphold the honor, nobility, dignity and behavior of judges, external supervision of the conduct of judges is carried out by the Judicial Commission.

The provisions in Article 13 A of Law Number 51 2009 improve the regulation regarding supervision of Judges. Supervision is divided into internal supervision and external supervision. Internal supervision is carried out comprehensively by the Supreme Court (no longer mentioning the position of "Chief Justice of the Supreme Court"). Whereas external supervision is carried out by the Judicial Commission. This is in

accordance with the duties of the Judicial Commission as stipulated in Article 20 of Law Number 22 Year 2004 concerning the Judicial Commission, that "In exercising the authority as referred to in Article 13 verse B the Judicial Commission has the duty" to supervise the conduct of Judges in order to uphold honor nobility and guarding the behavior of Judges ".

4. Reason of Claim Submission

In Article 53 verse (1) of Law Number 9 of 2004, it is stated that, "A person or body of civil law who feels that his interests are harmed by a State Administrative Decision can submit a written claim to the competent Court which demands that the State Administrative Decree disputed was declared null and void, with or without a claim for compensation and / or rehabilitation. While the basis for filing a lawsuit is regulated in Article 53 verse (2), where there are quite basic differences in Law Number 5 Year 1986 and Law Number 9 of 2004.

According to the provisions of Law Number 5 of 1986, the basis or reason for filing a lawsuit against a decision issued by a TUN body or official, because the TUN decision is contrary to the applicable Laws and Regulations, either procedural or formal and material or substantial, or because it was issued by the Agency or TUN Officer who is not authorized, issued on the basis of abuse of authority and issued on the basis of arbitrary acts.

In Law Number 9 2004, the basis or reason for the claim against the TUN decision is that the KTUN contradicts the applicable Laws and Regulations, as stipulated in Law Number 5 Year 1986 and KTUN contradict general principles of good governance. The principle is not a norm that is easily measured in its implementation. Clarity of the authority to examine the types of disputes will facilitate the Judge examining and adjudicating the TUN dispute submitted by the Plaintiff (the people). And will provide convenience for the people in measuring the actions of administrative officials who are indicated to harm the interests of the people. This is in accordance to one of the points in the Principles of legality

that, "Regulations must be arranged in an understandable formula". So that it will provide clarity and narrow the multi-interpretation in its application.

5. Bailiff

There is something new in Law Number 9 of 2004, which is a regulation concerning bailiffs in the TUN Court, as stated in Article 39 verse A that, "In each State Administrative Court a bailiff is stipulated". The court bailiff was appointed by the Supreme Court with the following conditions as Indonesian citizens, fearing the Almighty God, loyal to Pancasila and the 1945 Constitution of the Republic of Indonesia, having a high school certificate (amendment to Law Number 51 of 2009), having the shortest experience of 3 (three) years as a substitute bailiff and capable spiritually and physically to carry out duties and obligations.

Provisions regarding the bailiff are regulated in Article 39 A - 39 E of Law Number 9 2004. However, in the Act it has not been clearly stated the duties and authority of the surrogate and bailiff, as well as in Law Number 51 2009.

6. Regulations concerning special courts and ad hoc judges; In Law Number 9 of 2004, there are new provisions regarding special courts. In Article 9 A of Law Number 9 of 2004 it is stated that, "In the State Administrative Courts, specialization can be carried out regulated by Law. The specialization referred to in Article 9 A, is in the form of differentiation or specialization in the State Administrative Court, for example the Tax Court. Provisions regarding the Special Court were revised again in Law Number 51 2009, that in special courts ad hoc judges can be appointed to examine, hear and decide cases that require expertise and experience in certain fields and within a certain period of time.

7. Transparency implementation of decisions; In the TUN Judiciary there is one principle adopted from Administrative Law, namely the principle of *Prae Sumptio Ius Causa*, namely Keputusan Tata Uasaha Negara (KTUN), a State Administrative Decree, which is considered valid until there is a cancellation from

the Court. Thus, the implementation of the Administrative Court Decision is an important key in a TUN dispute for justice seekers. Provisions regarding the implementation of decisions are stipulated in Article 116 of Law Number 5 Year 1986 (and their amendments). The legal conditions in Indonesia that often do not comply with the decisions of the State Administrative Court are different from the conditions of other countries which tend to be well established in the practice of their rule of law. In a comparative study between Administrative Courts in France, the Netherlands, Belgium and Luxembourg (Conseil D'Etat), Germany (Bundesverwaltungsgericht), Greece (Symvoulion Epikratias), Italy (Consiglio di Stato), Spain (Tribunal Supremo), Switzerland (Federal Tribunal) and the European Union Court of Justice, Frank Esparraga got one conclusion that the implementation of the Administrative Court Decision in these countries did not experience significant obstacles, because in general the public authorities carried out the Court Decision "... however, it can be said that in the countries examined, public authorities generally apply the decisions of the courts"([http://www.ptunpalu.go.id/index.php?option=com_content&view=category &id=1&Itemid=341](http://www.ptunpalu.go.id/index.php?option=com_content&view=category&id=1&Itemid=341)). The adherence of the PTUN Judge's decision by the defendant, in this case the State officials, gave rise to a new execution institution in Law Number 9 of 2004 and Law Number 51 2009, namely forced money and administrative sanctions. In addition, sanctions in the form of announcements in printed media were also applied to officials who were reluctant to comply with the verdict. International Journal of Law Recontruction Volume III, Issue 1, March 2019 55 The process of implementing TUN Judicial decisions, through Law Number 9 of 2004 and Law Number 51 2009, shows the use of fixed execution systems, namely executions whose implementation can be enforced by the Court through the means of enforcement stipulated in the Laws and Regulations (<http://ar1fmaulana.blog.uns.ac.id/2011/11/09/perbandinganmekanismepelimpleme nt-putusan-peradilan-administrasi-antara-indonesia-dengan-dithailand/>). This is different from the execution of the TUN Judicial verdict carried out in Law No. 5 of 1986 which is more influenced by the principle of self respect / self obedience and the floating execution system, namely the authority to carry out Court Decisions that have permanent legal force, fully handed over to the agency or

official authorities without the authority of the TUN Courts to impose sanctions. In the implementation level it turns out that the two institutions have many problems, namely the absence of legal products governing the procedures and mechanisms for paying forced or administrative sanctions, on whom the forced money is charged, whether on the personal finances of officials or the state administration officials and sanctions what administration will be handed down to the defendant who is reluctant to implement the decision (<http://m.hukumonline.com/berita/baca/hol211227>). Related to the sanctions for payment of forced money and administrative sanctions, we can learn from the implementation of the Decision of the Thai Administrative Court. If the Court's decision concerns the obligation to pay a sum of money or delivery of goods, the Court can execute the assets concerned. This is in accordance with the Theory of Fautes Personelles, namely the theory which states that losses to third parties are charged to officials who because their actions cause harm (http://www.ptun.palembang.go.id/upload_data/penerapan%20usaha%20hukum%20paksa.pdf). Whereas if the Court Decision involves an order to do or not commit an act, then the Court can carry out the execution using the Civil Procedure Code *mutatis mutandis*. The clarity of the regulation regarding the implementation of the Court's Decision in the Administrative Court of Thailand will certainly provide legal guarantees or protection for the justice seekers, because practically the absence of regulations regarding the procedures for enforcing these efforts has not yet been implemented, resulting in a TUN Court Decision that has permanent legal force and the TUN Court's decision will still be a "Macan Ompong".

8. Transparency of case costs;

In justice system, known a principles, namely the principle of fast, simple and low cost justice. In order to cover this principle, a new arrangement was made in Law Number 51 of 2009 concerning the transparency of case costs, namely Article 144 A - 144 B. In Article 144 A paragraph (1) it is stated that, "In carrying out the duties of the Judiciary, Administrative Courts The state can withdraw court fees ". Case costs include the administrative costs and costs of completing

the case. In the event that the plaintiff is unable to pay the court fees, then the State that bears it, as stipulated in Article 144 C paragraph (2), "The State shall bear the costs of cases for incompetent justice seekers". In order for transparency, the withdrawal of case fees must be accompanied by a valid proof of payment. Officials in the TUN Judiciary are prohibited from withdrawing fees other than the courtesy fee and the cost of the settlement 56 International Journal of Law Reconstruction Volume III, Issue 1, March 2019 process. If there are officials who are proven to violate these provisions, sanctions can be imposed in the form of a non-respectful dismissal. Transparency in the implementation of public services is an important matter. Enforcement of transparency in withdrawing court fees is done so that the administration of the Judiciary can be cleared of KKN.

9. Legal assistance.

In order to provide protection for people seeking justice in litigation at the Administrative Court, each person who is litigated is given the right to obtain legal assistance (Article 144 C verse (1) of Law Number 51 2009). Law No. 51 of 2009 mandates the establishment of Legal Aid Posts, Pos Bantuan Hukum (POSBAKUM) in each State Administrative Court for incapable justice seekers. Legal assistance is provided free of charge from the first court level to the execution of the verdict. D. CLOSING 1. CONCLUSION Indonesia is a law country, so that the existence of a State Administrative Court is a necessity in order to protect the rights of citizens from the actions of the Government. The history of the existence of the State Administrative Court in Indonesia began with the enactment of Law Number 1986 concerning the State Administrative Court. Along with the development of the constitutional system in Indonesia, it is reasonable to make changes to Law Number 5 of 1986. This is done in the context of synchronizing the legal system regarding judicial power in Indonesia. The main changes in Law Number 9 of 2004 concerning Amendments to Law Number 5 of 1986 concerning Judiciary and Law Number 51 of 2009 concerning the Second Amendment to Law Number 5 of 1986 concerning TUN Courts are as follows: dualism in the judicial power, being one roof under the authority of the Supreme Court, tightened requirements to be a Judge, and clearer arrangements regarding

dismissal of Judges, supervision of Judges in the TUN Judicial environment conducted internally by the Supreme Court and external supervision by the Judicial Commission, reason or the basis for filing a claim, namely the TUN Decree that is contrary to the Laws and the general principles of good governance, the existence of a bailiff, the existence of a special Court and ad hoc Judges, transparency of decisions and the existence of forced efforts (payment of forced money and administrative sanctions) if the TUN Decision has power Law is still not implemented, transparency in case costs and the existence of Legal Aid for justice seekers.

2. RECOMMENDATION OR SUGGESTION The existence of Law No. 9 2004 and Law No. 51 2009 further improved the existence of Law No. 5 1986. However, there are still some ambiguities in the specific arrangements regarding the existence of bailiffs, the basis of claims and the implementation of forced efforts (forced money and administrative sanctions). Related to this, the author gives the following suggestions: It should be arranged in more detail about the duties, obligations and authority of the bailiff in the TUN Court. This is also related to the role of bailiffs in implementing administrative efforts, namely in the form of payment of forced money. International Journal of Law Recontruction Volume III, Issue 1, March 2019 57 a. Related with the basis or reason for a lawsuit in the TUN Court, because of the TUN Decision that is contrary to the Laws and the general principles of good governance. The basis or reason for the TUN lawsuit should be more detailed and formulated in a clearer formula, so as not to cause various interpretations. b. There is still a regulatory vacuum regarding the implementation of forced efforts, both for forced payments and administrative sanctions. Regarding the payment of forced money, according to the authors the execution can be carried out on the assets of the officials concerned.

POLITIK HUKUM PERADILAN TATA USAHA NEGARA

DI INDONESIA

Keberadaan Pengadilan Tata Usaha Negara di Indonesia dimulai dengan Undang-Undang Nomor 5 1986 tentang Peradilan Tata Usaha Negara (selanjutnya disebut TUN Pengadilan). Dalam dinamika ketatanegaraan yang terus mengalami pembangunan, khususnya pasca amandemen UUD 1945 Indonesia, membawa perubahan penting pada pelaksanaan kekuasaan kehakiman.

Sejalan dengan pendapat Lon Fuller dalam Principles of Legality bahwa "Sistem tidak boleh mengandung aturan yang saling bertentangan ", demikian ketentuan Undang-Undang Nomor 4 Tahun 2004 Tentang Kekuasaan Kehakiman (UU Nomor 48 Tahun 2009) bermuara pada UU Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara. Mempertimbangkan Kekuatan Kehakiman sebagai yang diatur dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 meliputi Pengadilan Negeri, Pengadilan Agama, Pengadilan Militer dan Pengadilan Tata Usaha berada dalam satu atap yaitu Mahkamah Agung Pengadilan. Sehingga diperlukan sinkronisasi sistem peradilan termasuk Peradilan TUN.

Oleh karena itu, Law Nomor 9 Tahun 2004 tentang Perubahan Atas Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan TUN adalah diberlakukan. Perubahan prinsip yang termaktub dalam Undang-Undang Nomor 9 Tahun 2004, adalah penghapusan dualisme dalam peradilan kekuasaan, menjadi atap di bawah kewenangan Mahkamah Agung. Perubahan ini dalam rangka menerapkan prinsip keadilan netral dalam sistem Peradilan Tata Usaha Negara di Indonesia. Disamping perubahan Undang-Undang Nomor 9 Tahun 2004 tentang Perubahan Atas Undang-Undang Nomor 5 Tahun 1986 tentang TUN Kehakiman sebagaimana tertuang dalam Penjelasan Undang-Undang, antara lain syarat menjadi Hakim di Pengadilan di Pengadilan TUN, batas waktu pengangkatan dan pemberhentian Hakim, tata cara pengangkatan dan pemberhentian Hakim, penghapusan ketentuan hukum acara yang mengatur masuknya Hakim pihak ketiga dalam sengketa dan adanya sanksi terhadap

pejabat yang tidak menjalankan pengadilan keputusan yang memiliki kekuatan hukum tetap.

Pada tahun 2009 dilakukan perubahan kedua atas Undang-Undang Nomor 8 Tahun 1986, yaitu melalui diundangkannya UU No. Undang-Undang Nomor 51 Tahun 2009 tentang Perubahan Kedua Atas Undang-Undang Nomor 5 Tahun 1986 tentang TUN Keadilan. Perubahan Kedua atas Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan TUN pada dasarnya untuk mewujudkan pelaksanaan Kekuasaan Kehakiman yang independen dan peradilan yang bersih dan berwibawadilakukan melalui sistem peradilan yang terintegrasi (Undang-Undang Nomor 51 Tahun 2009). Beberapa perubahan penting tentang peradilan TUN sebagaimana diatur dalam Undang-Undang Nomor 9 Tahun 2004 dan Undang-Undang Nomor 51 Tahun 2009 tentang Perubahan Kedua atas Undang-Undang Nomor 5 Tahun 1986 tentang TUN Peradilan akan dibahas lebih lanjut dalam uraian berikut:

1. Menghapus dualisme dalam kekuasaan kehakiman, menjadi atap di bawah otoritas dari Mahkamah Agung. Salah satu prinsip perubahan Undang-Undang Nomor 9 Tahun 2004 adalah tentang administrasi kekuasaan kehakiman. Perubahan itu dimaksudkan sebagai upaya penguatan prinsip kekuasaan kehakiman yang independen dan bebas dari pengaruh kekuasaan lain untuk melakukan keadilan untuk menegakkan hukum dan keadilan. Sebagai salah satu elemen *rechtsstaat* yang dirumuskan oleh F.J. Stahl adalah pemisahan atau pembagian kekuasaan kepada menjamin hak asasi manusia. Pemisahan atau pembagian kekuasaan termasuk pemisahan kekuasaan eksekutif, legislatif dan yudikatif. Jadi untuk menjaga kemandirian dan kebebasan peradilan dalam menjalankan fungsi dan perannya, terpisah dari kekuasaan eksekutif adalah masalah prinsip.

Perkembangan organisasi, administrasi dan keuangan pengadilan oleh Kementerian Kehakiman dinilai sudah tidak sejalan lagi dengan semangat konstitusi. Pengembangan dan keuangan teknis dan organisasi harus dilakukan di bawah satu atap, yaitu oleh Mahkamah Agung. Kemudian melalui UU No 9

tahun 2004 penghapusan dualisme dilakukan dalam kekuasaan kehakiman, menjadi satu atap, yang berada di bawah satu atap Mahkamah Agung.

Sebagaimana tertuang dalam Pasal 7 Nomor 9 2004, “Pedoman Teknis peradilan, organisasi, administrasi dan keuangan Pengadilan dilakukan oleh Mahkamah Agung”. Ketentuan dalam Pasal 7 Nomor 9 Tahun 2004 mengakhiri dualisme penyelenggaraan kekuasaan kehakiman yang semula dilakukan oleh Menteri Kehakiman dan Mahkamah Agung. Ketentuan ini tentunya sejalan dengan ketentuan prinsip keadilan netral. Tugas mengawasi dan mengangkat serta memberhentikan hakim yang semula kewenangan Menteri Kehakiman berubah menjadi hakim agung tugas Mahkamah Agung. Dengan demikian diharapkan mampu mewujudkan sebuah Peradilan TUN yang mandiri dan bebas sebagaimana diamanatkan oleh UUD 1945 Republik Indonesia.

2. Pengawasan Kehakiman dalam Lingkungan Yudisial TUN

a. Memperketat syarat untuk menjadi Hakim di lingkungan Pengadilan TUN I

Syarat menjadi Hakim TUN diatur dalam Pasal 14 ayat (1). Persyaratan menjadi Hakim di Peradilan TUN lingkungan semakin diperketat. Dalam Pasal 14 ayat (1) Undang-Undang Nomor 51 tahun 2009 ditetapkan sebagai Hakim Tata Usaha Negara Pengadilan harus Sarjana Hukum dan lulus pendidikan Hakim. Ini adalah berbeda dengan ketentuan UU sebelumnya yang tidak mutlak membutuhkan kompetensi pendidikan calon Juri. Diharapkan dengan kompetensi pendidikan Juri yang berasal dari Fakultas Hukum akan nantinya mampu memiliki kapabilitas di bidang Hukum, mengingat tugas-tugasnya Juri TUN relatif lebih berat. Dalam Peradilan TUN prinsip diketahui Judge yang aktif, dimana Judge tersebut disertai tugas untuk menemukan kebenaran materiil tentang sengketa yang dia periksa. Sehingga penguasaan Hakim di bidang Hukum merupakan hal yang penting.

Selain persyaratan kompetensi pendidikan, hal penting lainnya disyaratkan Undang-Undang Nomor 51 Tahun 2009 adalah tidak pernah dihukum penjara

karena melakukan tindak pidana berdasarkan putusan pengadilan yang telah diperoleh kekuatan hukum tetap. Selain kompetensi di bidang Hukum, seorang calon juri juga harus memiliki rekaman jejak yang baik. Dengan semakin banyaknya persyaratan ketat dalam pengangkatan Hakim di Pengadilan TUN lingkungan, diharapkan menghasilkan Juri yang kompeten sehingga mampu

memberikan keadilan bagi orang-orang yang bersengketa di PTUN

b. Pemberhentian Hakim

Selain pembaruan peraturan tentang pengangkatan Hakim, dalam UU Nomor 9 2004 dan UU Nomor 51 2009 juga dibuat perbaikan terkait pemberhentian Hakim di lingkungan Peradilan TUN.

Beberapa perubahan terkait pemberhentian Hakim di lingkungan TUN antara lain:

1) Perubahan usia pensiun bagi Hakim;

2) Perubahan alasan penghentian tidak menghormati Hakim

semakin diklarifikasi;

3) Pemberhentian Ketua atau Wakil Ketua Pengadilan dari jabatannya

posisi karena atas permintaan sendiri secara tertulis tidak otomatis diberhentikan sebagai Hakim (Pasal 21 Undang-Undang Nomor 51 2009). Ini adalah berbeda dengan ketentuan dalam Undang-Undang Nomor 5 1986 bahwa Hakim diberhentikan dari jabatannya tidak otomatis diberhentikan sebagai Pegawai Negeri Sipil;

4) Ketua, Wakil Ketua dan Hakim Pengadilan yang dijabat oleh Ketua Mahkamah Agung (Pasal 22 ayat (1)). Sedangkan di Hukum Nomor 5 1986, Pemberhentian sementara dilakukan oleh Presiden sebagai Kepala Negara atas usul Menteri Kehakiman berdasarkan persetujuan dari Ketua Mahkamah Agung. Ini tentu saja bisa mempengaruhi kemerdekaan dan kebebasan Hakim.

3. Pengawasan Hakim di lingkungan Peradilan TUN;

Ada perubahan dalam pengawasan Hakim. Awalnya pengawasan Hakim dalam Peradilan TUN dilakukan oleh Menteri Kehakiman sebagai yang diatur dalam Pasal 13 ayat (1), "Pembinaan dan pengawasan umum Hakim sebagaimana PNS dilakukan oleh Menteri Kehakiman ". Pengawasan Hakim oleh Menteri Kehakiman, yang merupakan bagian dari Kekuasaan Eksekutif, tentu saja bertentangan dengan asas keadilan netral karena dapat mengancam kebebasan Hakim sebagai penyelenggara kekuasaan kehakiman. Berdasarkan hal tersebut, maka dalam Undang-Undang Nomor 9 Tahun 2004 ada Perubahan Pembinaan Hakim di Lingkungan Peradilan TUN. Dalam Pasal 13 ayat (1) Undang-Undang Nomor 9 Tahun 2004 disebutkan bahwa "Umum pembinaan dan pengawasan Hakim dilakukan oleh Mahkamah Agung ". Dalam Pasalnya, Hakim tidak hanya disupervisi sebagai Pegawai Negeri Sipil, tetapi kapasitas penuh sebagai seorang Hakim. Pengawasan dilakukan oleh Ketua Mahkamah Agung selaku Ketua Mahkamah Agung RI kekuasaan kehakiman tertinggi. Hal ini tentunya sejalan dengan amanah konstitusi, dalam rangka membentuk peradilan yang bebas dan mandiri Ketentuan mengenai pengawasan Hakim dalam lingkup Peradilan TUN kembali berubah dalam UU Nomor 51 Tahun 2009. Dalam UU Nomor 51 Tahun 2009, ada tambahan pasal baru, Pasal 13 A, yang menyebutkan internal itu pengawasan perilaku hakim dilakukan Mahkamah Agung. Sebagai tambahannya Pengawasan sebagaimana dimaksud pada ayat (1), untuk menjaga dan menjunjung tinggi kehormatan bangsawan, martabat dan perilaku hakim, pengawasan eksternal dari perilaku hakim dilakukan oleh Komisi Yudisial.

Ketentuan Pasal 13 A Undang-Undang Nomor 51 Tahun 2009 menyempurnakan regulasi tersebut tentang pengawasan hakim. Pengawasan dibagi menjadi pengawasan internal dan pengawasan eksternal. Pengawasan internal dilakukan secara komprehensif oleh Mahkamah Agung (tidak lagi menyebut posisi "Ketua Mahkamah Agung Pengadilan "). Bahwa pengawasan

eksternal dilakukan oleh Komisi Yudisial. Ini sesuai dengan tugas Komisi Yudisial sebagaimana dimaksud dalam Pasal 20

Undang-Undang Nomor 22 Tahun 2004 tentang Komisi Yudial, yang "Dalam melaksanakan kewenangan sebagaimana dimaksud dalam Pasal 13 ayat B, Komisi Yudisial memiliki kewenangan tugas "mengawasi tingkah laku Hakim dalam rangka menjunjung tinggi kehormatan dan kebangsawanan menjaga tingkah laku Hakim ".

4. Alasan Pengajuan Klaim

Dalam Pasal 53 ayat (1) Undang-Undang Nomor 9 Tahun 2004 disebutkan bahwa, "Seseorang atau badan hukum perdata yang merasa dirugikan kepentingannya oleh Penyelenggara Negara Putusan dapat mengajukan tuntutan tertulis ke Pengadilan yang kompeten yang menuntut agar SK Tata Usaha Negara yang dipersengketakan dinyatakan tidak berlaku dan tidak berlaku, dengan atau tanpa sebuah klaim untuk kompensasi dan / atau rehabilitasi. Sedangkan dasar pengajuan gugatan adalah diatur dalam Pasal 53 ayat (2), di mana terdapat perbedaan yang cukup mendasar dalam UU Nomor 5 Tahun 1986 dan Undang-Undang Nomor 9 Tahun 2004.

Menurut ketentuan Undang-Undang Nomor 5 Tahun 1986, dasar atau alasannya mengajukan gugatan terhadap keputusan yang dikeluarkan oleh badan atau pejabat TUN, karena TUN keputusan tersebut bertentangan dengan Peraturan Perundang-undangan yang berlaku, baik prosedural maupun formal dan material atau substansial, atau karena dikeluarkan oleh Agency atau TUN Pejabat yang tidak berwenang, dikeluarkan atas dasar penyalahgunaan kewenangan dan dikeluarkan atas dasar tindakan sewenang-wenang.

Dalam Undang-undang Nomor 9 2004, dasar atau alasan guatan terhadap TUN keputusan bahwa KTUN bertentangan dengan Peraturan Perundang-undangan yang berlaku, sebagaimana diatur dalam Undang-Undang Nomor 5 Tahun 1986 dan KTUN bertentangan dengan asas umum pemerintahan yang bagus. Prinsip bukanlah norma yang mudah diukur di dalamnya penerapan.

Kejelasan kewenangan untuk memeriksa jenis-jenis sengketa akan memfasilitasi Hakim yang memeriksa dan mengadili sengketa TUN yang diajukan oleh

Penggugat (rakyat). Dan akan memberikan kemudahan bagi masyarakat dalam mengukur tindakan pejabat administrasi yang terindikasi merugikan kepentingan orang-orang. Hal ini sesuai dengan salah satu poin dalam Asas legalitas bahwa, "Peraturan harus diatur dalam formula yang bisa dimengerti". Sehingga itu akan memberikan kejelasan dan mempersempit multitafsir dalam penerapannya.

5. Petugas pengadilan

Ada yang baru dalam Undang-Undang Nomor 9 Tahun 2004, yaitu peraturan tentang juru sita di Pengadilan TUN, sebagaimana dimaksud dalam Pasal 39 ayat A bahwa, "Di masing-masing Pengadilan Tata Usaha Negara ditetapkan seorang juru sita ". Juru sita pengadilan ditunjuk oleh Mahkamah Agung dengan syarat sebagai Warga Negara Indonesia, takut akan hal tersebut Tuhan Yang Maha Esa, setia pada Pancasila dan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Indonesia, memiliki ijazah sekolah menengah atas (amandemen Undang-Undang Nomor 51 Tahun 2009), memiliki pengalaman paling singkat 3 (tiga) tahun sebagai juru sita pengganti dan cakap lahir batin untuk melaksanakan tugas dan kewajiban.

Ketentuan mengenai juru sita diatur dalam Pasal 39 A - 39 E UU Angka 9 2004. Namun dalam UU tersebut belum disebutkan secara jelas tugas dan tugasnya kewenangan surrogate dan bailiff, serta UU Nomor 51 2009.

6. Ketentuan tentang pengadilan khusus dan hakim ad hoc;

Dalam Undang-Undang Nomor 9 Tahun 2004, terdapat ketentuan baru tentang pengadilan khusus. Dalam Pasal 9 A Undang-Undang Nomor 9 Tahun 2004 disebutkan bahwa, "Dalam Tata Usaha Negara Pengadilan, peminatan bisa dilakukan diatur dengan UU. Spesialisasi sebagaimana dimaksud dalam Pasal 9 A, berupa pembedaan atau peminatan pada Pengadilan Tata Usaha Negara,

misalnya Pengadilan Pajak. Ketentuan tentang Peradilan Istimewa direvisi kembali dalam Undang-Undang Nomor 51 Tahun 2009, yaitu peradilan khusus ad

hakim hoc dapat ditunjuk untuk memeriksa, mengadili dan memutuskan kasus yang membutuhkan keahlian dan pengalaman di bidang tertentu dan dalam kurun waktu tertentu.

7. Transparansi pelaksanaan keputusan;

Dalam Peradilan TUN terdapat satu asas yang dianut dari Hukum Tata Usaha, yaitu asas *Prae Sumptio Ius Causa*, yaitu Keputusan Tata Usaha Negara (KTUN), Keputusan Tata Usaha Negara, yang dianggap berlaku sampai ada adalah pembatalan dari Pengadilan. Dengan demikian, pelaksanaan PTUN Keputusan merupakan kunci penting dalam sengketa TUN bagi pencari keadilan. Ketentuan mengenai pelaksanaan keputusan diatur dalam Pasal 116 UU Nomor 5 Tahun 1986 (beserta perubahannya).

Kondisi hukum di Indonesia yang seringkali tidak sesuai dengan keputusan kondisi Pengadilan Tata Usaha Negara berbeda dengan kondisi negara lain yang cenderung mapan dalam praktik supremasi hukum mereka. Di sebuah studi banding antara Pengadilan Administratif di Prancis, Belanda, Belgia dan Luksemburg (*Conseil D'Etat*), Jerman (*Bundesverwaltungsgericht*), Yunani (*Symvoulion Epikratias*), Italia (*Consiglio di Stato*), Spanyol (*Tribunal Supremo*), Swiss (*Federal Tribunal*) dan Pengadilan Uni Eropa, Frank Esparraga mendapat satu kesimpulan bahwa pelaksanaan PTUN Keputusan di negara-negara tersebut tidak mengalami kendala berarti, karena dalam umum otoritas publik melaksanakan Keputusan Pengadilan "... bagaimanapun, itu bisa mengatakan bahwa di negara-negara yang diperiksa, otoritas publik umumnya menerapkan keputusan dari pengadilan "([http://www.ptunpalu.go.id/index.php?option=com_content&view=category&id=1 & Itemid = 341](http://www.ptunpalu.go.id/index.php?option=com_content&view=category&id=1&Itemid=341)). Kepatuhan terhadap putusan Hakim PTUN oleh tergugat dalam kasus ini

Para pejabat negara, melahirkan lembaga eksekusi baru dalam UU Nomor 9 Tahun 2004 dan Undang-Undang Nomor 51 2009, yaitu uang paksa dan sanksi administrasi. Selain itu, sanksi berupa pengumuman di media cetak juga diberlakukan kepada pejabat yang enggan mematuhi putusan. Proses pelaksanaan putusan Peradilan TUN, melalui Undang-Undang Nomor 9 tahun 2004 dan Undang-Undang Nomor 51 2009, menunjukkan penggunaan sistem eksekusi tetap, yaitu eksekusi yang pelaksanaannya dapat ditegakkan oleh Pengadilan melalui sarana penegakan hukum yang diatur dalam Peraturan Perundang-undangan

(<http://ar1fmaulana.blog.ums.ac.id/2011/11/09/perbandinganmekanismeimplementasi-putusan-peradilan-administrasi-antara-indonesia-dengan-thailand/>). Ini adalah berbeda dengan eksekusi putusan Peradilan TUN yang dilakukan dalam UU No.5 Tahun1986 yang lebih dipengaruhi oleh prinsip harga diri / self obedience dan sistem eksekusi mengambang, yaitu kewenangan menjalankan Putusan Pengadilan itu memiliki kekuatan hukum tetap, sepenuhnya diserahkan kepada instansi atau otoritas resmi tanpa kewenangan Pengadilan TUN untuk menjatuhkan sanksi.

Pada tataran implementasi ternyata kedua institusi tersebut memiliki banyak permasalahan yaitu tidak adanya produk hukum yang mengatur tata cara dan mekanisme pembayaran sanksi paksa atau sanksi administratif, kepada siapa dipaksa uang dibebankan, baik atas keuangan pribadi para pejabat atau negara pejabat administrasi dan memberikan sanksi administrasi yang akan dijatuhkan tergugat yang enggan menjalankan putusan (<http://m.hukumonline.com/berita/baca/hol211227>).

Terkait sanksi pembayaran uang paksa dan administrasi sanksi, kita bisa belajar dari penerapan Keputusan Thailand Pengadilan Tata Usaha. Jika keputusan Pengadilan menyangkut kewajiban membayar sejumlah uang atau pengiriman barang, Pengadilan dapat mengeksekusi aset yang bersangkutan. Ini masuk sesuai dengan Theory of Faults Personnelles, yaitu teori yang menyatakan

Bahwa kerugian pihak ketiga dibebankan kepada pejabat yang karena perbuatannya

causeharm

(http://www.ptun.palembang.go.id/upload_data/penerapan%20usaha%20hukum%20paksa.pdf).

Sedangkan jika Putusan Pengadilan melibatkan perintah untuk dilakukan atau tidak melakukan suatu perbuatan, maka Pengadilan dapat melaksanakan eksekusi dengan menggunakan Hukum Acara Perdata Kode mutatis mutandis. Kejelasan regulasi tentang implementasi MK Keputusan di Pengadilan Administratif Thailand pasti akan memberikan hukum jaminan atau perlindungan bagi para pencari keadilan, karena praktis tidak adanya peraturan tentang prosedur untuk menegakkan upaya ini belum ada dilaksanakan, menghasilkan Putusan Pengadilan TUN yang mempunyai kekuatan hukum tetap dan Keputusan Pengadilan TUN akan tetap menjadi "Macan Ompong".

8. Transparansi biaya perkara;

Dalam sistem peradilan dikenal suatu asas, yaitu asas cepat, sederhana dan keadilan biaya rendah. Untuk menutupi prinsip ini, pengaturan baru dibuat Undang-Undang Nomor 51 Tahun 2009 tentang Transparansi Biaya Perkara yaitu Pasal 144 A - 144 B. Dalam Pasal 144 A ayat (1) disebutkan bahwa, "Dalam melaksanakan tugas Kehakiman, Pengadilan Administratif Negara dapat menarik biaya pengadilan ". Biaya perkara termasuk biaya administrasi dan biaya penyelesaian perkara. Dalam hal penggugat tidak mampu membayar biaya perkara, maka Negara yang menanggungnya, sebagaimana diatur dalam Pasal 144 C ayat (2), "Negara menanggung biaya perkara untuk pencari keadilan yang tidak kompeten ".

Untuk transparansi, pencabutan biaya perkara harus disertai dengan bukti pembayaran yang sah. Pejabat di Peradilan TUN dilarang biaya penarikan selain biaya kehormatan dan biaya penyelesaian proses. Jika ada pejabat yang terbukti melanggar ketentuan tersebut, sanksi dapat dijatuhkan dalam bentuk pemberhentian yang tidak hormat. Transparansi di pelaksanaan pelayanan publik merupakan hal yang penting. Penegakan Transparansi pencairan biaya perkara dilakukan agar administrasi persidangan Peradilan dapat dibersihkan dari KKN.

9. Bantuan hukum.

Untuk memberikan perlindungan bagi orang-orang yang mencari keadilan dalam litigasi di PTUN, setiap orang yang berperkara diberi hak untuk memperoleh hukum bantuan (Pasal 144 C ayat (1) Undang-Undang Nomor 51 2009). Undang-Undang Nomor 51 Tahun 2009 mengamanatkan pendirian Pos Bantuan Hukum (POSBAKUM) di setiap Pengadilan Tata Usaha Negara untuk pencari keadilan yang tidak mampu. Bantuan hukum diberikan secara cuma-cuma dari tingkat pengadilan pertama hingga pelaksanaan putusan.