

# *Judicial Activism Resolving Administrative Disputes in Indonesia*

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***Abstract***-Judicial activism is very important to be used and applied by a judge of the administrative justice in resolving state administrative disputes. This research aimed to identify and analyze the importance of judicial activism in the dispute resolution process of the state administrative. The method used is a doctrinal research. Judicial activism is used by the judge of the administrative court because there are characteristics in a dispute over state administrative: (i) the duties and authority of the judges to examine, decide and resolve disputes of state administration; (ii) active principle of the judge in dispute resolution process, (iii) judges look for the material truth (iv) the judge's decision will be binding for the public.

***Keywords***-Judicial Activism, Administrative Dispute

## I. INTRODUCTION

The presence of the Administrative Court is essential in order to provide protection against individual interests and to uphold and protect human rights [1]. Legal protection efforts conducted by the administrative court must be understood in one frame of a balanced thinking, means that protection for citizens against government action should be seen always in the framework greater interest. Government has a major task of serving society at large, the partial nature of legal protection given when it is not in conflict with the interests of legal protection for greater citizens. Administrative court should be able to accommodate the aspirations of both sides [2].

The functions of administrative court are enforce administrative law and control the exercise of the powers of government to make administrative regulations [3]. The second function is one characteristic of administrative court because justice is not always owned by the public especially religious courts and military courts. Only the court has the right to test which would have a second function, if the court does not only have the function of law enforcement to enforce the law. In addition to the two functions of the administrative court, the presence of the administration courts to maintain a balance between individual rights with community rights or public interest.

The functions of administrative court, as mentioned above, judge of administrative court is charged to do judicial activism. Judicial activism is carried out by the

judge of administrative court through legal discovery method in order to realize justice for the people.

## II. RESEARCH METHOD

The research is a legal doctrinal research or legal normative research. In normative concept, law is a good norm which is identified as a must be realized-justice or a norm which has been manifested as an explicit order and clearly formulated positively. The data are collected through literature study to obtain data in the form of documents and writing by searching the legislation, scientific literatures, and the judge's decision of the administrative court. The research uses the main sources of the secondary data or literature materials. The secondary data include the primary, secondary, and tertiary legal materials. The data are secondary data which are then analysed through deductive logic.

## III. FINDINGS AND DISCUSSION

### *1. Tasks of Judge to examine, decide and resolve disputes of state administrative*

Administrative court set up to resolve disputes between the government and citizens of the disputes which arise as a result and the actions of government which break rights of its citizens. The purpose of the establishment of the administrative court : (i) to provide protection for the rights of the people that comes from individual rights. (ii) protection of the rights of people based on the mutual interests of individuals living in the community.

Judge of Administrative Court has duty and authority to examine, decide, and resolve disputes of state administrative. When compared with the duties and authorities of criminal or civil judge, the Administrative Court judge has duties and special authority that is resolve disputes of state administrative. Judicial activism is necessary because of the duties and authority of judge of Administrative Court not only investigate and decide, but also resolve disputes of state administrative.

The understanding of judicial activism can be seen in Black's Law Dictionary, judicial activism as a philosophy of judicial decision-making whereby judges allow their personal views about public policy among other factors to guide their decisions...Judicial

activism describes judicial rulings suspected of being based on personal or political considerations rather than an existing law. It is sometimes used as an antonym of judicial restraint.

In examining, deciding and resolving the disputes over the state administrative, the judge may find some alternative conditions of the rule of law so we need a special method in the analysis, called the discovery of the law. Law discovery is the process of law-making by judges who are given the task of applying to those concrete law events. In other words, the process of concrete or individualize common law rule to remember a certain concrete events [4].

The discovery of law which is in line with the notion of judicial activism in the process of resolving dispute of state administrative is a progressive discovery of the law [5]. There are three characteristics of the discovery of progressive law : (i) the discovery of the law that is visionary by looking at the legal issues for the long-term interests ahead by looking at case by case. (ii) the legal discovery bold in making a breakthrough "rule breaking" by looking at the dynamics of society, but remain guided by the law, the truth and fairness and impartiality and the state of the nation and country. (iii) legal discovery which could bring the nation out of the slump and social instability [6].

The discovery of progressive law becomes important due to the application of an abstract concept into legal formulations and further how the application of the public often cause problems, especially issues related to justice because the law is a symbolic meaning which needs further interpretation. This is because the issue of justice formulated depending on which side people see it. As exemplified, justice in family would not be the same as the problems in the field of criminal justice, constitutional field and so on, so that the face of justice is dimensional [7].

Law enforcement which is realized by the judge of state administrative court is social justice. Problems in social justice do not escape from a review of state science and law theory (state law in the material sense) which is known as a welfare state. As understood by the welfare state, the state not only as a security guard and order or just ensure the survival of the individual or society but the state has the responsibility and obligation to realize prosperity and social justice for all people.

The meaning of justice contains a universal moral value which is rights and basic human needs throughout the world. The moral values of justice become ideals of every nation in which there are the interests of various groups. Therefore, justice becomes an agreement among the various elements of society who want to live in just and prosperous nation. Likewise with the Indonesian nation has been listed in the fifth principle of Pancasila, social justice for all Indonesian people. It has become a

pledge of the entire Indonesian nation and the ideals of the entire Indonesian nation. Justice to be realized by the Administrative Court judge is social justice based on Pancasila. The decision of the Administrative court should be able to realize social justice is not just a normative justice moreover purely procedural fairness.

The meaning of social justice as described above is important because Administrative court in developing countries has the task that much heavier than settled country because it must be able to maintain the harmonious balance and harmony between protection of the public interest and public service with the protection of individual interests. In other words interest concerning the development of people's lives and the public interest should not be hampered by the interests of the individual. On the contrary, any individual rights should not be violated arbitrarily with the pretext of public interest and development.

Judicial supervision function of state administrative in law system is based on Pancasila as the moral basis for the rule of law Indonesia, it should be able to achieve social justice which raises a balance between individual interest and the public interest. Although these two terms as if face to face between individual interest and the public interest, but not always the possibility it was not consistent. The existence of the state and state administrator does not negate one of them but rather to find a balance between these two poles without having to negate one or another.

## *2. Role of judge in Administration Court is active*

Judge of state administrative court is active in leading the proceedings. Form of application of active principle of the judge is seen in Article 107 of Law Number 5 of 1986 concerning Administrative Court which stated that the judge determines what is to be proved, the burden of proof along with assessment of proof and for the validity of proof required at least two items of evidence by the judge's conviction , In the explanation of Article 107 is said to be that different from the legal system proof in the Civil Procedural Law, it is with regard something that happens in the examination without relying on facts and matters raised by the parties, the judge of state administration court can define: (i) what should be proved (ii) who should be burdened with the proof, what must be proven by plaintiffs and that what needs to be proved by the judges themselves (iii) any evidence that is preferred for use in verification (iv) evidence of the strength of evidence that has been submitted.

The emergence of an active role of judges based on considerations such as the decision of the state administration of the disputed part of the positive law must comply with the rule of law and disputes are in public law area. The judges' role of the Administration Court also intends to compensate for the unbalanced

position of the plaintiff by the defendant, where the defendant is much stronger position than the position of plaintiff in the form of financial facilities and capabilities and knowledge. In inspection process that began preliminary examination, the judge is obliged to play an active role to check and equip with the necessary data. Even if the plaintiff has difficulty to obtain data or information required, the judge may ask for an explanation to the entity or state administrative official.

The application of the principles of activity of judges has made judges should play an active role since the beginning of consultative meeting and examination preparation as part of the preliminary examination, the implementation of the trial, the verdict and the execution of court decisions. In a preliminary investigation, state administrative judge assesses the feasibility of the lawsuit as a point of commencement of the examination in the trial in the Administrative Court. While in the trial, the judge of state administration court has a role to direct the trial and the evidentiary hearings and through the principle of free evidence, the judge construct structures evidentiary process implemented in order to be directed to realize the material truth [8]

In the development of society, the principle of active judges should be understood broadly, to provide substantially proportional justice. The judge must consider the moral factor, ethics, customs and other non-legal factors to make it happen. Among the principles of active judges and substantial justice there are important linkages and should be understood as a way of thinking that is progressive.

In practice the role of an active judge, it raises consequences of judges can make improvements to the object of the dispute by way of equipping the object of dispute presented by the parties. Risk furthest from the actions of judges perform "*ultra petita*" is a judge can lead and do action of "*reformatio in peius*", where the judge will take the litigan to a situation that harms the interests of the plaintiff as compared with the state of the plaintiff before filing a lawsuit. Although the judge is authorized to perform "*ultra petita*", but its use must be sought as much as possible, especially the use of "*ultra petita*" that leads to "*reformatio in peius*". Therefore, the use of "*ultra petita*", the judge of State Court only limited to fix fact that not diverted plaintiff and add unsolicited plaintiff.

The use of "*ultra petita*" can be seen in Decision Number 291G/2010/Semarang Administrative Court. Plaintiff has been honorably discharged by Defendant (Director of Rural Bank Loan, Bank District of Demak, Demak regency City) from his position as Head of Service of Rural Bank Loan, Bank District of Demak, Demak regency City. After the principal checked his case, according to the judges, the Plaintiff should not be dismissed with respect but dishonorably discharged

because according to the legislation in force, honorable discharge can only be done in the case of Plaintiffdie, after reached the age and years of service for retirement to get health retirement proven by a team of medical examiners certificate, the request itself or downsizing. In such cases, the plaintiff did not meet the criteria for honorably discharged as is mentioned above it has been proven to perform actions that can be categorized as the practice of banks in banks, financial abuse and authority detrimental Rural Bank Credit Bank District of Demak both materially and immaterially.

### 3. *Judge finds truth material*

The establishment of institutions of the Administrative Court can be regarded as legal changes, characterized by responsiveness to accommodate the interests of citizens because of the function of the Administrative Court is to ensure the implementation of Administrative Law. The primary purpose of administrative law, therefore, is to keep the power of government within their legal bounds, so as to protect the citizen against their abuse".

Administrative Court judge in the trial process executing judicial activism in order to find the material truth is not just the formal truth. The emergence of an active role of the judge in the trial process as described above, because the judges burdened with the duty to seek the material truth. Judge himself does examination, the judge who administers, and weigh about the course of the process. It is different from the civil law where the burden of proof is put to the plaintiffs. In the process of the State Administration, it can be said it is not applicable to the autonomy of the disputing parties. Administrative judges are not to be passive as a civil judge, who is bound to various restrictions in adjudicating civil cases. On the other hand the attitude of criminal judges and judges of the State Administrative having full freedom based on the evidence of the truth of belief legitimate legal events that occurred.

In the following, writer will take the example of a case in which the Administrative Court judges carry out judicial activism in order to find the material truth is not just a formal truth, namely Decision Number 78/G/2013 /Semarang Administrative Court. The Plaintiff has filed a Registration for head candidate of Karangrowo Village, Undaan District, Kudus District by submitting application files that have been adapted to the requirements as applicants. On October 8, 2013 Plaintiff completed lack of requirements in the form of a Certificate of Village Head/Acting Head of Village Karangrowo Number 147/745/07.29.10/2013 dated October 8, 2013 certifying that the person concerned actually has been registered as a resident in the village Karangrowo for 2 (two) years or more with uninterrupted.

Based on administrative data registration, the plaintiff has completed administratively as the Minutes of the

handover file research administrative requirements head candidate of village Karangrowo, District of Undaan, Kudus issued by the Election Committee Village Head (P2KD) Village Karangrowo District of Undaan, Kudus Regency dated 2 November 2013. However, on November 2, 2013 the Defendant has issued Decision Village Consultative Body Karangrowo Undaan District of Kudus Regency Number 04/BPD.KRRW/XI/2013 on Stipulation Candidates Karangrowo Village Head, District Undaan, Kudus Regency dated 2 November 2013 contents established that the head candidate of Karangrowo village set to be head candidate for Karangrowo village, District of Kudus by two people except the Plaintiff.

Plaintiff has been recorded in the voters list on some democratic party with the name Nurkholis Subandi among other things: (i) Election of Karangrowo Village Head District of Undaan Kudus in 2001 and 2007 (ii) Election of legislative in 1999, 2004 and 2009. (iii) Regional Head Election (election of Java governor and Regent of Kudus) in 2008.

That in 2012 the plaintiff initially named Nurkholis Subandi renamed Bambang Subandi. Therefore, the Plaintiff either with names Nirkholis Subandi and Bambang Subandi is the same and has been domiciled and registered as a resident of the village of Karangrowo, Undaan, Kudus from 1996 until now uninterrupted.

4. *The judge's decision will be binding for the public*

Administrative Court is an important pillar in the embodiment of the principles of state law that gives protection for human rights from arbitrary actions of the authorities. Administrative Court is an institution that aims to provide legal shelter and legal certainty, both for the people and for the state administrative in the sense of preservation of the balance of interests of the community and individual interests. The presence of the Administrative Court exercising oversight of the actions of the state administrative of government officials, should be able to realize justice is the essence of the purpose of the law. Even in the legal system of Indonesia should transform the basic values of Pancasila. The decision of the administrative court should be able to achieve social justice is not just a normative justice, let alone a mere procedural fairness.

Realization of social justice requires that at least two aspects (i) it might provide them with a certain level of material goods. (ii) it might promote a certain level of goodness of life for them [9]. The function of the administrative court supervision in the legal system is based on Pancasila as a moral basis for the rule of law Indonesia, it should be able to achieve social justice which rises to a balance between personal interests and the interests of together. Legal carries out the expressive and instrumental function. The law is said to carry the expressive functions express the views of life, cultural

values and justice. The law also carry instrumental function of the means to create and maintain order, stability and predictability, a means to preserve cultural values and justice, education and community service and community renewal means (pushing, connecting and directing changes in society).

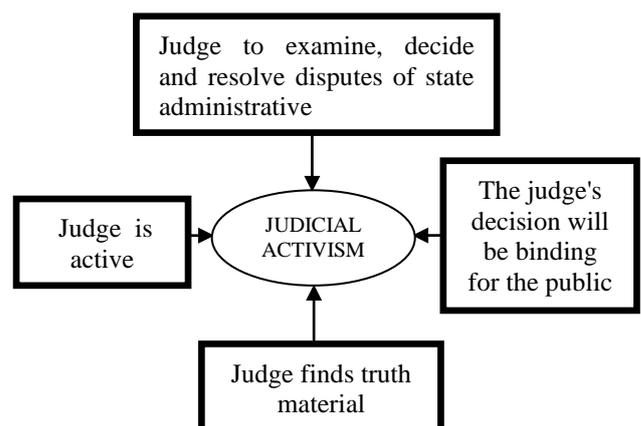
There are three requirements that must be met for the rule of law including the field of administrative law is fair or equitable : (i) law enforcement is fair and equitable will be achieved when the law will be enforced and the laws that govern the ways law enforcement is right and fair. A rule of law will be true and fair when made with correct manner and in accordance with the payload material legal awareness and give as much as benefit the interests of those to individual and society at large in general. (ii) the perpetrators of law enforcement as a key law enforcement is fair and equitable [3].

In the hands of the perpetrators of law enforcement, the rule of law that is abstract becomes concrete, apply to law and justice seekers. Third, the social environment as the applicable law. It determines the state of law enforcement and it is greatly influenced by the realities of social, economic, political and cultural [10].

The judge's decision will be binding for the public, that is not solely applicable to the plaintiffs. The judge's decision will be binding for the public and not only binding on the disputing parties. This is because the dispute is a state administrative disputes in the field of public law, the verdict of Administrative Court will lead to common binding and binding consequences of disputes that may contain equation in the future. For when a legislation declared invalid by a judge, as opposed to legislation that is higher, meaning the decision of the legislations result be cancelled and invalid to bind any person [5].

One positive aspect of The judge's decision will be binding for the public is legal certainty regarding the status of legislation on administrative acts are declared invalid. While the negative side means the judge is no longer has function to establish the legal “judicial function” but has evolved to perform also the function of the legal form the legislative function [1].

FIGURE 1. JUDICIAL ACTIVISM JUDICIAL ACTIVISM RESOLVING ADMINISTRATIVE DISPUTES



#### IV. CONCLUSION

Judges of Administrative Court implement state judicial activism because there are specifically in resolving the disputes of State Administrative : (i) the duty and authority the administrative court judge to examine, to decide and to resolve the disputes of state administrative. (ii) principles of active judges in the process of resolving disputes of state administrative. (iii) judges seek the truth material (iv) the judge's decision will be binding for the public.

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