

## THE INFRINGEMENT LAWSUIT AGAINST THE GENERAL PRINCIPLES OF GOOD GOVERNANCE THROUGH ADMINISTRATIVE COURT OF YOGYAKARTA

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### ABSTRACT

*This paper is aimed to (1) identify the cases of lawsuit against the general principles of good governance through the State Administrative Court of Yogyakarta (PTUN) from 2005 to 2010; (2) identify the reasons of plaintiff to sue in PTUN Yogyakarta; (3) describe and analyze an assessment basis used by the judge of PTUN Yogyakarta in favor of the plaintiff. The discussion is presented based on a research on law by taking a judge as a research subject and a court clerk who knows well about the problems of infringement against general principles of good governance. The data were collected by documenting the infringement letter proposed by plaintiff and judge verdicts which have a definite force of law and by interviewing the research subject. The findings of the research show that: (1) the largest infringement is an employment dispute, issuing the certificate of land including the Sultan Ground land and the dispute related to permissions, 2) the reasons of plaintiff in proposing his lawsuit, instead of violating the law, an object also violates the general principles of good governance, especially the principles of: legal certainty, arbitrariness, proportionality, accountability, accuracy, professionalism, fairness, orderly organizing the countries, openness, and prudence, 3) the basic tests used by judges in meting out the verdict still refers to the provisions of the General principles of good governance which has been stipulated in the statue law, although based on a description from the subject of the research, the State Administrative Court judges in meting out the court does not bind to the provisions and written law because general principles of good governance based on the theory are actually part of the unwritten legal norms.*

**Keywords:** *infringement, lawsuit, general principles of good governance, state administrative court.*

### INTRODUCTION

The following article discusses the infringement lawsuit against the general principles of good governance through the State Administrative Court of Yogyakarta. The discussion is divided into several parts, namely introduction, discussion, conclusion and recommendations. The introduction discusses the background of the problem and research objectives. The discussion explains: the state administrative Court of Yogyakarta, the identification of cases of state administrative dispute sued through the Administrative Court of Yogyakarta from 2005 to 2010; the identification of the reasons used by the plaintiffs to file a lawsuit in the State Administrative Court of Yogyakarta, as well as the identification and analysis toward the assessment basis used by the judges to pass a decision toward the lawsuit of the plaintiffs. The last parts of this article are conclusion and recommendation. The conclusion proposes three summaries related to the cases of infringement against the general principles of good governance sued through the State Administrative Court, the reasons used by the plaintiffs to file a lawsuit to the court, and the assessment basis used by the judges to pass a decision related to the infringement against the general principles of good governance.

This study was written based on the rationale that in a country which follows the understand of Welfare State, the state apparatus has broad duties and functions are very broad. This is because they have a duty to achieve the welfare their citizen. This condition is found either in Indonesia or other countries. Within a certain limit (how small, simple and authoritarian a certain country is), there isn't a country which doesn't involve as a part of the country. To avoid the possibility of power abuse which can give a bad impact to the citizens, it is necessary to establish laws governing the provision of guarantees and protections for citizens (society) in case the state apparatus perform an action which acts gives a bad affect the citizens and the protection of the state apparatus itself. These legal rules are often known as the law of the state administration.

Public administration law recognizes unwritten law principles, that is, the general principles of good governance. Those principles must be considered by state officials in performing their duties and obligations. Since the fall of the New Order in Indonesia, those principles of law are widely unwritten into written law. Three examples of writing unwritten law principles into written law in Indonesia are: 1) Article 3, Act No. 28 year 1999 about The Implementation of Free and Clean State from Collusion, Corruption and Nepotism on the general principles of organizing the state, which include the principle of: legal certainty; orderly organizing the state; public interest, openness; proportionality; professionalism, and accountability; 2) The provision of Article 20 paragraph (1) Act No. 32 year 2004 concerning the principles of local government in organizing the state,

including the principles of: legal certainty, orderly organizing the state, public interest, transparency, proportionality, professionalism, accountability, efficiency, and effectiveness; 3) the provision of Article 4 of Act No. 25 year 2009 about Public Service which govern the principles in organizing public services, which include the principles of: public interest, legal certainty, equal rights, the balance of rights and obligations, professionalism, participation, equality of treatment / no discrimination, transparency, accountability, facilities and special treatment for vulnerable groups, timeliness, and accuracy, convenience and affordability.

General principles of good governance should be used as the benchmark for state officials in performing their duties. If state officials in carrying out their duties violates the principles of good governance, especially the general principles of government stipulated in the Law concerning the implementation of the clean and free state from corruption, collusion and nepotism, which is used as a basis to sue state officials in the state administration disputes, they may be sued in the courts.

The research which becomes the reference to write this paper is aimed at: (1) identifying cases of administrative dispute lawsuit against violations of the general principles of good governance proposed by the Administrative Court of Yogyakarta from 2005 to 2010. (2) identifying the reasons used by the plaintiffs in a lawsuit filed by the Administrative Court of Yogyakarta. (3) describing and analyzing a test basis used by the judges of Yogyakarta State Administrative Court in favor of the plaintiff. The subject of research is one of the judges and court clerks who know all things related to research and handle infringement cases against the general principles of good governance. The legal materials were collected through documentation and interviews. The techniques of analyzing legal materials are reduction, categorization and unitization data. The research was conducted in the beginning of July until the end of August 2011.

The research was started with an inventory of infringement lawsuit cases against the general principles of good governance and the decisions of judges in the State Administrative Court of Yogyakarta filed from 2005 to 2010. This range of time was taken because before the stipulation of Act No. 9 year 2004, the general principles of good governance cannot be used as a basis / ground to file a lawsuit to the State Administrative Court. With regard to this, the collection of lawsuit cases which are selected as the research sample is based on the provisions of Article 53 paragraph 2 of Act No. 9 year 2004 concerning Amendment to Law Number 5 of 1986 which regulates basic governance disputes lawsuit against state enterprises.

The next activity is identification and analysis of violations against the general principles of good governance sued through the Administrative Court of Yogyakarta. This activity covers identification of lawsuit cases which are granted and denied by the Administrative Court judges of Yogyakarta. Then, some samples were taken randomly to describe the reasons used by the plaintiff to file a lawsuit in court. It also describes the reasons of the judge in granting and refusing infringement lawsuit against principles of good governance. Having obtained legal materials through documentation, interviews were conducted with judges and court clerks to cross check the data.

## DISCUSSION

### The State Administrative Court of Yogyakarta

One of the Indonesia's courts is the State Administrative Court. This court is in charge of settling disputes between the society and state officials issuing public administration decision which may harm a person or civil legal entity since they do not obey the general principles of good governance. This court has been established in Indonesia since 1991, five years after the enactment of Act No. 5 year 1986 about the administrative courts. At this time the law has undergone many changes. The scope of administrative courts consists of three levels namely PTUN which is the first level court, High Administrative Court which is the second level court, and Supreme Court which is the last level. These courts resolve disputes that arise in the State Administrative between a person or civil legal entity or officials with the State Administration both within the central and local levels, including employment disputes. The object of dispute is the Administrative decision (Marbun, 2003: 109).

The State Administrative Court of Yogyakarta is one of the first level state administrative courts in Yogyakarta Special Province (DIY). This court is the only state administrative courts of the first level in DIY. Therefore, if there is a person or civil legal entity who thinks that their interests were harmed due to the issuing of a decision or not requested by the person or civil legal entity on the bureaucrat within the area of DIY and its surroundings, they can file the lawsuit to the State Administrative Court of Yogyakarta.

The State Administrative Court of Yogyakarta was established referring to the Decree of the President of the Republic of Indonesia No. 02 dated on January 29, 1997, in conjunction with the establishment of the State Administrative Court in Banda Aceh, Pekanbaru, Jambi, Bengkulu Palangkaraya, Palu, Kendari, and Mataram. This court is the first level court and court of appeals (second level court) belongs to the territory of the State Administrative High Court of Surabaya. Formerly, The State Administrative Court of Yogyakarta juridically belongs to the territory of the State Administrative court of Semarang.

The State Administrative Court of Yogyakarta solves the dispute of the state administration between a person or civil legal entity and the body or the Administrative officer. Administrative dispute is a dispute that arises in the field of state administration between a person or civil legal entity and the body or the Administrative officer, both at central and local levels as a result of whether the administrative state decision is issued or not including employment disputes based on the official law.

Five years after the enactment of Act No.9 of 2004 about the Amendment of Act No. 5 of 1986 about the Administrative Court that incorporate the principles of good governance as the basis / rationale which can be used by a plaintiff to file a lawsuit to administrative courts, there are many lawsuits against the actions performed by the bureaucrats which are based on the law.

Therefore, it is necessary to identify the plaintiff's lawsuit which is filed through PTUN Yogyakarta. This must be done since the administrative court is one of the media for people to seek justice due to the actions performed by the bureaucrat that harm them.

#### **The State Administrative Dispute Cases Sued Through The State Administrative Court of Yogyakarta from 2005 to 2010**

The results show that the most infringement lawsuit against the general principles of good governance through the State Administrative Court of Yogyakarta are cases related to employment disputes, followed by land disputes mainly related to the issuance of certificate of land, including *Sultan Ground* both in the city of Yogyakarta, Sleman, Kulonprogo and Bantul regencies as well as disputes related to licensing. Here is an overview of the dispute lawsuit administrative cases filed from 2005 to 2010.

There were 14 cases of lawsuit within the State Administrative Court of Yogyakarta in 2005. However, the cases were revoked, denied and granted by the judge. There were three cases in 2005 which have been filed in the previous year. These cases were related to land, employment, labor, licensing, auctions and disputes of village official's election cases. All the cases were completed in the same year and one case was revoked by the plaintiff.

In 2006, most of the cases are related to land (6 cases), and personnel disputes (4 cases). All the cases were not the remaining cases from the previous year because all cases occurred in 2005 have been completed. In 2006 there were three remaining cases which were then continued in 2007.

There were eleven cases filed to the State Administrative Court of Yogyakarta in 2007 and three of those cases are the remaining cases from 2006. Most of the administration disputes cases are the infringement lawsuit against the general principles of good governance which are related to the employment disputes (4 cases), land (2 cases), auction, licensing, and other cases. There isn't any unresolved case. This means that all the cases have been solved by the judge in the same year or revoked by the plaintiff and the case was not filed to the court.

In 2008, there are 13 cases of administrative dispute against the infringement of good governance general principles filed to The State Administrative court of Yogyakarta. Five of those cases were successfully solved by the judges, and 8 cases were continued in the next year. Among the cases of infringement against the general principles of good governance were employment (4 cases), land (2 cases), license, auction, and other cases.

In 2009, there were five cases of infringement against the general principles of good governance filed by the plaintiffs through The State Administrative court of Yogyakarta. Among those cases were related to employment, land, and official village disputes. In this year, there were 8 remaining cases from 2008 which has not been resolved.

In 2010, there were many cases of infringement against the principles of good governance filed through The State Administrative court of Yogyakarta. Among them were cases of disputes related to employment, land, and other cases. There were two remaining cases from the previous year among the cases of infringement against the principles of good governance filed to The State Administrative court of Yogyakarta in 2010. In this year, there were 12 cases of the administrative's lawsuit which have been resolved by the judge.

Most of the cases which were widely performed by the plaintiff from 2005 to 2010 were related to land disputes. This include the cases of issuing land certificate such as right of use over land or right to build land certificate over the lands of Yogyakarta Palace which are commonly known as *Sultan Ground*. With regard to the employment dispute cases, a plaintiff's lawsuit were varied such as the dismissal of the civil servants as well as cases related to disputes of villages like dissatisfaction of plaintiff against the election of the village officials. Whereas, lawsuit licensing cases were related to business licensing.

#### **The Reasons used by the Plaintiff for filing the Lawsuits to The State Administrative of Yogyakarta**

In reference to the article 53 paragraph 2, Act No. 9 of 2004 concerning The Amendment of the Act no. 5 of 1986 about the State Administrative Court and its explanation, it is stated that the reasons to file a lawsuit to the administrative courts which are also a test basis by used the judge are as follows:

- a. Administrative decisions which are sued contradict with the official law;
- b. The decisions which are sued contradict with the general principles of good governance.

The explanation of article 53 paragraph (2) states that the general principles of good government include the principles of: legal certainty; orderly administrating the State; openness; proportionality; professionalism, and accountability as stipulated in Act No. 28 of 1999 about the implementation State which is clean and free from corruption, collusion and nepotism.

In general, the reasons used by the plaintiffs in filing their lawsuit to the court are based on the lawsuit documents proposed by the plaintiffs, that is, breaking the official law and the decision which is sued (object of conflict). Moreover, the plaintiff states that the reason may be breaking the principles of good governance, especially the principles which are stated in Article 3 of Law No. 28 year 1999 about the implementation state which is clean and free from corruption, collusion and nepotism. The principles include: legal certainty; orderly administrating the state; public interest; openness; proportionality; professionalism, and accountability. The reasons for the plaintiffs in filing a lawsuit to the court refers to the provisions of Article 53 paragraph 2 of Act No. 9 year 2004. It can be seen from the cases of lawsuits filed between the years 2005-2010. However, some documents show that there are several reasons of the plaintiffs in filing the lawsuit which do not refer to the general principles of good

governance as stated in Article 3 of Act No. 28 of 1999. This can be justified since the actual principles of good governance are the statutory law principles that must be obeyed by the bureaucrats in performing his duties as the law enforcement officials.

With regard to this, Muin Fahmal (2006: 7-8) states that the concept of the general principles of good governance emerged in the Dutch Parliament in April 1950 and explained by the Commission *De Monchy*. According *De Monchy*, it is necessary to protect the citizen (*burger*) from the administrative actions of the state although those action is in accordance with the law. *Monchy* explains that the state officials should not only rely on the normative law to to embody clean governance. They should also follow the guidance of the general principles of good governance to increase legal protection for the citizens.

In Netherlands, the Committee of *De Monchy* has made a report on the general principles of good government which was known as *Algemene Beginselen van Behoorlijk bestuur* (ABBB) in 1950. This provision can be used as a basis to propose an appeals against the decisions taken by government agencies. Thus, the general principles of good governance can be used as the basis for an appeal and or basic testing toward a state administrative decision. The Bureaucrat in carrying out their duties and functions, especially in the implementation of *freies ermessen* principle must always consider the general principles of good governance, although these principles are norms and statutory law.

Furthermore, Muin Fahmal (2006: 7) states that the findings of *De Monchy* were developed by experts of administrative law in several countries, including Indonesia which is implemented by the judges as the rules in canceling the administrative decision. In Indonesia, the idea of *De Monchy* was recognized and accepted under the 1945 law in Indonesia. The recognition and acceptance were intended as a means to achieve good governance, as stipulated on the Act 28 of 1999 about the Implementation State which is Clean and Free of Corruption, Collusion and Nepotism. Safri Nugraha et al (2007: 66-68) states that the general principles of good governance in the Indonesia literature were originally a written norm within the public administration norm which referred to Dutch administrative law. This principle became popular in Indonesia in the early 1953 through the writing of GA van Poelje, although it doesn't not get attention from the experts in the field of State Administrative Law in Indonesia. Twenty-five years later when upgrading the advanced Administrative Law/Law of Governance in 1978, Crince de Roy summarizes eleven points about the general principles of good governance, namely the principles of: legal certainty, balance, equality decisions, performing careful action, prohibition of mixing up the authority, honesty in acting, prohibition of performing unfair or arbitrarily action, responding to normal expectations, negating the result of the cancelled decision, and the protection of life views.

The general principles of good governance need to be considered by the bureaucracy in carrying out their duties and functions. This is because the principles of freedom to act (*Freies ermessen*) of the bureaucrat can deviate from the official law which may harm the citizens. Thus, the need of legal protection is fundamentally necessary. Legal protection is not only necessary for citizens from the actions of state administrative tools/ bureaucrats who may harm them, but also it is necessary for the state administration tools /bureaucrats in performing their duties. Sjachran Basah (1992: 7-8) explains that the protection of citizens is given when the action performed by the state administration officials harm the citizen. Meanwhile, the protection to the public administration official itself is conducted toward their actions whether or not they perform an action based on the official law either written or unwritten. In other words, do attitude is good and right according to the law, either written or unwritten law, in other words, protecting the public administration officials from performing something wrong according to the law.

To improve the legal protections for citizens, the state administration tools / bureaucrats need legal instruments as the basis. In this case, the law consists of written law which is developed from the official law and written law. In unwritten law, the general principles of good governance play a very vital role. Referring to this principle, it is possible that there will be no abuse of power known as *detournement de pouvoir*.

### **The Reasons of the Administrative Court Judge in Making Decision**

The infringement against the principles of good governance performed by the state administration tool in making and issuing a public administration decision under the provisions of Article 53 paragraph 2 of State Administrative Court Law can be used as an excuse to file a lawsuit to the State Administrative Court (R. Wiyono, 2005: 76 -77). Instead of being used as a reason to file a lawsuit to the State Administrative Court, it can also be used as a basis of testing by the judges toward the actions performed by the state administration tools. The lawsuit related to the infringement against the general principles of good governance is usually associated with the principles of freedom to act possessed by the state administration tools which are often known as *Freies Ermessen* (principle of the freedom to act based on their own initiative). This principle can possibly be used to resolve important problems in which there is no clear rule or authority to solve. That must be accounted for legally and morally (SF Marbun: 138-139).

Based on the information from judges which become the research subjects, the judges are not strictly obliged to refer to the official law in making a decision because the general principles of good governance are unwritten law. However, in reference to the documents of judges' decision within The State Administrative Court of Yogyakarta from 2005 to 2010, the judges in the State Administrative Court of Yogyakarta still refer the principles of good governance as stated in Article 53 paragraph 2 of Act No. 9 year 2004 and its explanation referring to the provisions of the State administration principles which is clean and free from corruption, collusion and nepotism. This possibility could have been done by other judges within the State Administrative Court in Indonesia since there are many judges that follow the legism and positivism. They assume that the law only consists of written law. This condition is also supported by the fact that Indonesia is a Dutch colony that follows the principles of the European Continental law / Civil Law that prioritize written law.

In addition, if the basis of the judge's decision still refers to the Article 53 paragraph 2 of Law No 9 of 2004 and Article 3 of Act No. 28 of 1999 about The Implementation of Free and Clean State from Collusion, it can be accepted because those articles are the basis or reason that can be used by the plaintiff to file a complaint to the administrative Court and the basis for the assessment by the judges to make a decision whether the administrative decision of the bureaucrats sued by (object of disputes) break the law or not. In reference to the writer's opinion, the action performed by the judge which only refer to the official or written law in making decisions is wrong based Public administration law considering that a judge should not only be "the speaker of law". They should also pay attention to the justice in making a decision. With regard to this, the judges need to pay attention to both written and unwritten law which grows in the society. This is because general principles of good governance are unwritten law that must be considered by state organizers in carrying out their duties.

## CONCLUSION

In reference to the explanation of above, the conclusions are as follows:

- a. Most of the cases of infringement lawsuit against the general principles of good governance filed through the State Administrative court of Yogyakarta from 2005 to 2010 are related to employment disputes and land disputes especially the cases of issuing the certificate of land including *Sultan Ground*;
- b. The reasons used by the plaintiffs to file the lawsuit still refer to the written law as stated in the Article 53 paragraph 2 of State Administrative Court Law and Article 3 of the Act No. 28 year 1999 on the implementation of the state which is clean and free from collusion, corruption and nepotism, although judges are not strictly obliged to refer to the Article 3 this law;
- c. The reasons of the judges in making decisions regarding the infringement against the general principles of good governance by the plaintiffs generally refer to the Article 53 paragraph 2 of State Administrative Court Law and its explanation.

## RECOMMENDATIONS

On this occasion, the writers propose the following recommendations:

- a. The plaintiffs which are usually represented by legal counsel in filing the lawsuit to the administrative court within the case of breaking the general principles of good governance do not only refer to the official or written law considering there are many principles of good governance which are not stated in the written law because the general principles of good governance are unwritten law which grow in the society;
- b. The judge within the State Administrative Tribunal including the judge of the State Administrative Court of Yogyakarta should follow the principles of unwritten law which grow in the society based on the values which exist in the society and refer to the values of Pancasila as the basic philosophy of the Indonesian country. It is necessary to remember that the judge should not only be "the speaker of law" but also have to make decisions that reflect the justice of the society.

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