

Unlawful Administrative Act: Indonesian Administrative Law Perspective

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ABSTRACT

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This study aims to analyze and examine the meaning of unlawful acts by government officials and the authority of state administrative courts in dealing with cases related to unlawful acts by government officials. This study was normative legal research using a statutory approach and a conceptual approach. The primary legal materials uses in this study including Indonesian Civil Code (Burgerlijk Wetboek), Supreme Court Regulation (hereinafter PERMA) Number 2 of 2019 concerning Guidelines For Dispute Settlement Of Government Actions and Authority to Hearing unlawful Acts by a Government Board and Government Officer (onrechtmatige overheidsdaad) and Law No. 51 of 2009 concerning the second amendment to Law Number 5 of 1986 concerning State Administrative Court to analyses substance related to the meaning of unlawful acts by government officials and the authority of state administrative courts in dealing with cases related to unlawful acts by government officials in accordance with prevailing law. The conceptual approach taken from the meaning of onrechmatigedaad in Burgerlijk Wetboek. This study indicated that the dispute settlement on the unlawful act by the government official mentioned on the Supreme Court regulation (hereinafter PERMA) Number 2 of 2019 including dispute settlement process, which shall be file through state administrative court. Which stipulates that the authority to hearing the disputes of unlawful acts by the government board or the government officials can be resolved through the state administrative judiciary.

1. INTRODUCTION

Power as a manifestation of authority in the rule of law has always debatable. As well as the power of government administration affair by the state official often led to the dissatisfaction and caused to the conflict between the state official and the community. Sovereignty of the state which is known as “the absolute authority to enact and enforce its law with respect to all persons, property, and events within its territory”. The theory of Sovereignty in a state that upholds the notion of democracy in the world places the

choice that the sovereignty of the people is the most appropriate to the life of the state, since the power of the government official can be controlled by the people, thus providing a space for the existence of democracy. Lord Action emphasize that is "Power tends to corrupt, and absolute power corrupts absolutely".¹

Indonesia is a unitary state based on the rule of law, this is stipulated in Article 1 paragraph (3) of "The 1945 Constitution of the Republic of Indonesia (hereinafter UUD 1945)."² The statement of State recognition of the law stipulated in the UUD 1945 provides clarity and legal certainty that the State upholds the supremacy of the law, equality in the field of law and law enforcement without contradicting the law. In general, Indonesian law has to meet the following characteristics:³

- a. Guarantee of protection of human rights;
- b. The existence of judicial power or an independent judiciary;
- c. The government and citizens conduct shall be in accordance on the law.

Government in the state based on the rule of law must adhere to the principle of legality that the government will regulate all the power based on the law to uphold truth and justice. On the other hand, a citizen is also obligated to perform acts based on the law. Formally, the position between the government and the citizen is stated in Article 27 paragraph (1) which affirms: "All citizens shall be equal before the law and the government and shall be required to respect the law and the government, with no exceptions".

Refer to the principle of equality before the law, *Pancasila* recognize the position of government and society has an equal treatment under the law. The recognition of *Pancasila* as the legal basis of the Republic of Indonesia was affirmed at the University of Indonesia symposium in 1966 which affirmed as follows:

"The Republic of Indonesia is a legal state based on Pancasila. Pancasila as the basis of the state that reflects the soul of the Indonesian nation, must uphold all the rules of law and its implementation. In Indonesia where Pancasila philosophy is so pervasive that our country can be called Pancasila state, the principle of kinship is starting point for people's lives".

Sri Soemantri emphasize that the legal state based on Pancasila must meet the following conditions:⁴

- a. Recognition of the guarantee of human rights and citizens;

¹ Chandranegara et al., "Managing Power Sharing of the State on Islamic Modern Society: A Case Study of Indonesia," *Al-Azhar Indonesia Seri Humaniora* 5, no. 1 (2019): 39–47.

² Janpatar Simamora, "Tafsir Makna Negara Hukum Dalam Perspektif Undang-Undang Dasar Negara Republik Indonesia Tahun 1945," *Jurnal Dinamika Hukum* 14, no. 3 (2014): 547–61.

³ Zulkarnain Ridlwan, "Negara Hukum Indonesia Kebalikan Nachtwachterstaat," *Fiat Justisia: Jurnal Ilmu Hukum* 5, no. 2 (2011).

⁴ Tengku Erwinsyahbana and Tengku Rizq Frisky Syahbana, "Perspektif Negara Hukum Indonesia Berdasarkan Pancasila" (INA-Rxiv, 2018), <https://doi.org/10.31227/osf.io/cwev7>.

- b. The separation of power;
- c. Whereas in carrying out its duties and obligations the government must always be based on the applicable law, whether written or unwritten;
- d. The existence of judicial powers that exercise independent power, it implies that regardless of the power of the government is special for the Supreme Court must also be independent of other influences.

Over the public administration affairs often against and caused the problem between the government institution and aslo the community.⁵ File the case to the court is often choose to address the conflict and justice, it is in accordance with article 10 paragraph (1) of Law Number 14 of 1970 on Indonesia Judicial power. Which, consist of four Judiciary branches namely:

- a. General Court;
- b. Military Court;
- c. Religious Court;
- d. State Administrative Court”

Furthermore, the State Administrative Court, which is recognized above, is very necessary to resolve all problems or disputes that arise between the government and the community related to public policy made by the government according to Law Number 5 of 1986 on State Administrative Court which has been amended Law No. Number 9 of 2004, and the last amendment is Law No. 51 of 2009 concerning the second amendment to Law Number 5 of 1986 concerning State Administrative Court.

This study aimed to analyze and examine the meaning of unlawful acts by government officials and the authority of state administrative courts in dealing with cases related to unlawful acts by government officials. To realize the purpose of this study, the substance related to the definition of unlawful acts committed by government officials and the authority of state administrative courts will be presented in handling cases related to unlawful acts by government officials in accordance with prevailing law.

Previous research was conducted by Enrico Simanjuntak in 2019 who studied about “Restatement *Tentang Yurisdiksi Peradilan Mengadili Perbuatan Melawan Hukum Pemerintah*”.⁶ This study focuses on the history of government legal accountability, the problems of civil law as a means of legal control over the government, and the authority of the State Administrative Court in adjudicating acts against the government's law. In 2018, Syukron Salam studied about “*Perkembangan Doktrin Perbuatan Melawan Hukum*

⁵ Utrecht, *Pengantar Hukum Administrasi Negara Indoensia* (Makassar: Fakultas Hukum dan Pengetahuan Masyarakat, 1997).

⁶ Enrico Parulian Simanjuntak, “Restatement Tentang Yuridiksi Peradilan Mengadili Perbuatan Melawan Hukum Pemerintah (Restatement on Judicial Jurisdiction in Administrative Tort),” *Masalah-Masalah Hukum* 48, no. 1 (2019): 32, <https://doi.org/10.14710/mmh.48.1.2019.32-48>.

Penguasa".⁷ This study examines the development of the doctrine of unlawful acts by government officials and the competence of the Court in deciding cases of unlawful acts committed by government officials. Dealing with the explanation above, it can be seen that there are similarities in terms of topics, namely, they both discuss legal actions against government officials, but the topics of study are different. While, this study focuses on the types of government policies that can be used as objects of dispute in the State Administrative Court.

2. RESEARCH METHOD

This study was normative legal research using a statutory approach and a conceptual approach. Referring to the thoughts of Peter Mahmud Marzuki, normative research is carried out to find out the solution for legal problems that occur and are faced by exploring legal rules, legal principles, or legal doctrines.⁸ The primary legal materials uses in this study including Indonesian Civil Code (*Burgerlijk Wetboek*), Law No. 30 of 2014 on Government Administration Law, Supreme Court Regulation (hereinafter PERMA) Number 2 of 2019 concerning Guidelines For Dispute Settlement Of Government Actions and Authority to Hearing Unlawful Acts by a Government Board and Government Officer (*onrechtmatige overheidsdaad*) and Law No. 51 of 2009 concerning the second amendment to Law Number 5 of 1986 concerning State Administrative Court to analyses substance related to the meaning of unlawful acts by government officials and the authority of state administrative courts in dealing with cases related to unlawful acts by government officials in accordance with prevailing law. The conceptual approach taken from the meaning of *onrechmatigedaad* in *Burgerlijk Wetboek*

3. RESULT AND DISCUSSION

3.1. Definition of Unlawful Administrative Act

An unlawful administrative act is closely related to acts against the law in which it is undertaken by government officials, which is also related to a violation of a person's rights. In the context of unlawful acts, it is understood as "an authority given by law to a person by closing others on that right".⁹

The term of unlawful act is taken from the term "*onrechmatigedaad*" in Dutch which is understood in a narrow sense as regulated in Article 1365 of the Civil Code of Indonesia (*hereinafter* Civil Code). Referring to Unlawful Acts as stipulated in Article

⁷ Syukron Salam, "Perkembangan Doktrin Perbuatan Melawan Hukum Penguasa," *Jurnal Nurani Hukum* 1, no. 1 (2018).

⁸ M; Fajar and Y Achmad, *Dualisme Penelitian Hukum Normatif & Empiris* (Yogyakarta: Pustaka Pelajar, 2013).

⁹ Salam, "Perkembangan Doktrin Perbuatan Melawan Hukum Penguasa."

1365 of the Civil Code, that: “A party who commits an unlawful act which causes damage to another party shall be obliged to compensate”.

Referring to the provisions as stipulated in Article 1365 of the Civil Code, it can be understood that there are several elements related to Unlawful Acts. These elements include:¹⁰

- a. There is an act;
- b. It is against the law;
- c. There is a mistake on the part of the perpetrator;
- d. Loss for victims; and
- e. There is a causal connection between deeds.

Unlawful acts committed by the government board and government officials have a close relationship with the decisions issued by the Government, including the State Administrative Decrees (hereinafter KTUN). Referring to the provisions in Article 87 of Law No. 30 of 2014 on Government Administration Law is regulated regarding the expansion of the meaning of state administrative decisions. The provisions of Article 87 of the Government Administration Law are determined that KTUN is also defined as:

- a. Written determination that also includes factual action;
- b. Decisions of state administrative bodies and/or officials in the executive, legislative, judiciary, and other state organizers;
- c. Based on the provisions of the prevailing laws and regulations;
- d. Final in a broader sense;
- e. Decisions that have the potential to cause legal repercussion; and/or
- f. Decisions that apply to citizens.

Unlawful Acts by government board and government officials is regulated through the provisions of Article 1 number 4 Perma No. 2 of 2019, it is determined that:

“Dispute of Unlawful Acts by government board and Government Officials (Onrechtmatige Overheidsdaad) is a dispute in which contains a claim to declare invalid and limit the actions of Government Officials, or does not have binding legal force along with compensation in accordance with the provisions of the legislation”.

Moreover, Article 2 paragraph (1) Perma No. 2 of 2019 also determined that “The case of unlawful acts by the government board and Government Officials (*Onrechtmatige Overheidsdaad*) is the authority of the state administrative judiciary”. This provision

¹⁰ Harumi Chandraesmi and Pranoto Pranoto, “Kajian Mengenai Gugatan Melawan Hukum Terhadap Sengketa Wanprestasi,” *Privat Law* 5, no. 1 (2017): 164747.

affirms the authority of the state administrative judiciary as an institution in charge of resolving cases of unlawful acts by the government board and Government Officials.¹¹

Based on the abovementioned, indicated that the regulation on unlawful acts by government board and government officials has been regulated through Perma No. 2 of 2019. The dispute resolution given to the state administrative judiciary as an essential role in examining and adjudicating the actions of the government and the validity of *KTUN*.

3.2. The Authority of the State Administrative Court in Dealing with Cases Related to Unlawful Acts by Government Officials

Based on Article 47 of Law No. 5 of 1986 concerning State Administrative Court, it is stated that “the court has the duty and authority to examine, decide, and resolve state administrative disputes”.¹² State Administrative Court is able to examine the state administrative dispute arising in the field of state administration between a person or a civil legal entity with a state administrative body or official both in the center government and regional government as a result of the issuance of state administrative decisions.

Referring to the provisions of Article 1 number 10 of Law No. 51 of 2009 concerning the second amendment to Law No. 5 of 1986 concerning State Administrative Court determined the understanding of the State Administrative Decision. A state administrative decision is “a written determination issued by a state administrative body or official containing the actions of state administrative law based on applicable laws and regulations, which are concrete, individual, and final, which cause legal consequences for a person or civil legal entity”.¹³

Unlawful state administrative decisions that can be sued in the State Administrative Court must be conditional as follows:¹⁴

- a. Written, regarding the determination of written meaning is not limited to the understanding of the formal form of the decision issued by government board or state administrative officials, but is sufficient in the form of writing so that a memo or written memorandum is considered sufficient to meet the written requirements of the decision of the state entity or business if it can be recognized by: The entity or state administrative officials who issued, the purpose and content of the writing that causes

¹¹ Kadek Agus Sudiarawan, I. Gusti Ngurah Wairocana, and Bagus Hermanto, “Are There Obstacles after the Administrative Court Absolute Competence Extension of Indonesia?,” *Varia Justicia* 16, no. 2 (2020): 156–69, <https://doi.org/10.14710/mmh.43.3.2014.363-371.2>.

¹² Maftuh Effendi, “Peradilan Tata Usaha Negara Indonesia Suatu Pemikiran Ke Arah Perluasan Kompetensi Pasca Amandemen Kedua Undang-Undang Peradilan Tata Usaha Negara,” *Jurnal Hukum Dan Peradilan* 3, no. 1 (2018): 25–36.

¹³ Dola Riza, “Keputusan Tata Usaha Negara Menurut Undang-Undang Peradilan Tata Usaha Negara Dan Undang-Undang Administrasi Pemerintahan,” *Jurnal Bina Mulia Hukum* 3, no. 1 (2018): 85–102.

¹⁴ Dola Riza, “Hakikat KTUN Menurut Undang-Undang Peradilan Tata Usaha Negara Vs Undang-Undang Administrasi Pemerintahan,” *Soumatara Law Review* 2, no. 2 (2019): 207–20.

the rights and obligations, and the intended party of the writing that is individual and concrete;

- b. Concrete, it implies that the object decided in the administrative decisions of a particular tangible state or can be determined;
- c. Individual, relates to decisions are not abstract, not directed to the public;
- d. Final, it implies that definitive and therefore can cause legal consequences or provisions that no longer require approval from superior officials”.

Based on the provisions of Article 2 of Law No. 5 of 1986, jo. No. 9 of 2004, it stated that several decisions can't be sued in the State Administrative Court, namely:

- a. State administrative decisions that are civil legal acts, among other things decisions between government officials and individuals/civil legal entities based on the provisions of civil law;
- b. State administrative decisions that are general regulations, namely regulations that contain legal norms that bind everyone contained in laws, government regulations, local regulations and others;
- c. State administrative decisions that still require approval / not final, meaning that state administrative decisions still require the approval of superior officials and other officials to be applicable;
- d. State administrative decisions are issued based on the provisions of the Criminal Procedural Law or other laws and regulations that are criminal law, meaning decisions based on Criminal Code Procedure such as Arrest warrants issued by investigators/prosecutors, seizure warrants issued by investigators and others
- e. State administrative decisions are issued based on the results of examination from the judiciary, meaning decisions determined by the Court on the seizure permit, the determination of confiscation, the issuance of certificates by the National Land Agency based on civil decisions that have a permanent legal force, and the dismissal of notaries by the Minister of Justice of the Republic of Indonesia based on the decision of the chairman of the District Court;
- f. The decision of the state administration concerning the administration of the Armed Forces of the Republic of Indonesia, meaning the decision set in the military environment;
- g. Decision of the election committee, both in the centre and in the region regarding the election results, namely the decision of the Election Committee contained, at the Central, Provincial and District / City levels.

Therefore, the provisions contained in the state administrative decisions but are declared not to be included in the judicial authority of the State Administrative Court as stated above are sued outside the State Administrative Court. Lawsuits in the State Administrative Court result from the issuance of state administrative decisions that harm

the interests of persons or civil legal entities. The reasons that can be used to sue the state administrative decision are:¹⁵

- a. State administrative decisions are contrary to applicable laws and regulations; this decision is contrary to the:
 - a) provisions in the legislation that are procedural/formal;
 - b) State administrative decisions contradict material/substantial laws and regulations;
 - c) The state administration's decision is contrary to the unauthorized issued decisions in terms of it is not authorized due to the content, because it exceeds the limits of authority and arena over time.
- b. Abuse of authority; is an act of state administration that in issuing state administrative decisions using other purposes and objectives therefore, it is different from the granting of original authority;
- c. Arbitrary, is an act of state administration that in making decisions / not after all considerations should come to the prohibition of doing deeds but the fact that the act is done;
- d. The general principles of good government, the principles, and the determination of good government are a set of basic provisions that a good government organizer must meet. This is necessary since it is part of the positive law that applies and affects the interpretation/application of statutory provisions. The general principles of good governance, according to Solly Lubis consist of:
 - a) Principle of certainty;
 - b) Principle of balance;
 - c) Principles of commonality;
 - d) The principle of carefulness;
 - e) Motivational principles;
 - f) The principle of not abusing authority;
 - g) Reasonable game principles;
 - h) Basic fairness and fairness;
 - i) The principle of reasonable expectations;
 - j) The basis of null and void decision;
 - k) Basic protection on the view of life.

A decision made by a state administrative official can be a valid and invalid decision (violating/abusing authority). Valid decisions must meet several requirements, namely:¹⁶

¹⁵Doni Cahyono, "Perlindungan Hukum Bagi Pegawai Pada Instansi Pemerintah Dengan Sistem Perjanjian Kerja Outsourcing," *Mimbar Keadilan*, 2015, 278172.

¹⁶Syofyan Hadi and Tomy Michael, "Prinsip Keabsahan (Rechtmatigheid) Dalam Penetapan Keputusan Tata Usaha Negara," *Jurnal Cita Hukum* 5, no. 2 (2017).

- a. Decisions must be undertaken by authorized organizations or state administrative bodies/officials;
- b. Decisions must be arranged in a form and must be procedural;
- c. The decision should not contain juridical deficiencies;
- d. Content and purpose must be in accordance with the content and objectives of the basic rules.

Based on Article 1 number 4 of Law No. 14 of 2002 concerning Tax Court, the decision is “a written determination in the field of taxation issued by authorized officials based on the provisions of tax laws and regulations in the context of implementing the tax collection laws by force letter”. Tax decisions become objects in tax disputes that can be appealed or filed with the Tax Court. Tax decisions are issued by authorized officials based on laws and regulations including: Director General of Taxation, Director General of Customs and Excise, Governor, Regent/the mayor, or the officially appointed to implement tax laws and regulations.¹⁷

Taxes are all types of taxes collected by the central government, including customs duties and excise duties, and taxes collected by local governments based on applicable laws and regulations. Based on Article 31 paragraph (1) of Law No. 14 of 2002 concerning Tax Court, which has the duty and authority to examine, decide tax disputes.¹⁸ Hence, the authority of the Tax Court is specific to tax disputes. The nature of the tax Court decision is final and has a fixed legal force, and the parties may file a re-injunction of the decision of the Tax Court in the Supreme Court.¹⁹ The specificity of the tax court can be seen from the proceedings, namely:

- a. Judges in tax Courts consist of special judges, namely legal scholars and other scholars who have tax expertise;
- b. The dispute is for merely tax;
- c. The tax court ruling in the form of determination of the amount of tax payable that must be;
- d. Tax courts have their procedural laws.

Based on Law No. 17 of 2006 concerning amendments to Law No. 10 of 1995 concerning Customs, referred to as Customs, is “everything related to control the over flow of goods in or out of customs area and collection of import duty and export duty”. What is meant by import duty is a levy based on statutory regulations implemented by

¹⁷Budi Ispriyarso, “Upaya Hukum Dalam Sengketa Pajak,” *Administrative Law & Governance Journal* 1, no. 1 (2018): 9–14.

¹⁸ Trivena G M Tumbel, “Penyelesaian Sengketa Pajak Melalui Undang-Undang Nomor 14 Tahun 2002 Tentang Pengadilan Pajak,” *Lex Et Societatis* 5, no. 7 (2017): 5–13.

¹⁹ Maria Emelia Retno, “Kontradiksi Antara Wajib Pajak Mendapatkan Keadilan Dengan Keberadaan UU Nomor 14 Tahun 2002 Tentang Pengadilan Pajak,” *Jurnal Hukum Pro Justitia* 25, no. 3 (2007).

the government with the functions of: guaranteeing, protecting Natural Resources, anticipating price increases and maintaining stability.

Therefore, the dispute that occurs between customs officials and the public certainly become the domain of the Tax Court in its handling due to there are contributions called the tax in Customs, even it is explained that the official who issues a decision in the field of customs has issues with the community, it must be tried in the tax court. The authority of the Tax Court in resolving customs objections/disputes is based on the laws of the Tax Court; it is also no less important than tax disputes are not the domain of the State Administrative Court, because this institution does not adjudicate decisions of a general nature that have been regulated by the law, namely the Tax Court Law.

4. CONCLUSION

Based on the above mentioned, it can be known that the regulation on legal acts by government officials has been regulated through the PERMA Number 2 of 2019 which stipulates that the authority to adjudicate for disputes of unlawful acts by the government board and government officials can be resolved through the state administrative judiciary. Tax including custom became the domain of administrative law. However, in the dispute settlement process, the parties shall file the lawsuit to the tax court. Customs' objective is to collect money, which is identical to the nature of taxes. The object of Customs is the contribution of money that is the same as the nature of taxes, thus, collecting dues from the community is very necessary to make special arrangements, since the tax collection become the high state revenue.

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