LEGAL MALFUNCTIONS AND EFFORTS IN RECONSTRUCTING THE LEGAL SYSTEM SERVICE: A STATE ADMINISTRATIVE LAW PERSPECTIVE

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Abstract

Implementation of the state and its administration duties in a state of law recognizes written law in the constitution or the regulation as stated in the constitutional law. The constitutional law requires another law to implement technical issues, which is the state administrative law. This is a library re-search which aims to find out the malfunction of State Administrative Law as well as the attempt to reconstruct a solution for service law. To improve the given conditions, it requires reconstructing the legal system including legal structure, substance, and culture to change in the field of public service by restoring and providing service and to serve literally.

Keywords: state administrative law, malfunctions.

Abstrak

Pelaksanaan tugas pemerintah dan negara dalam negara hukum, ada aturan hukum yang ditulis dalam konstitusi atau aturan yang dikumpulkan dalam hukum konstitusi. Undang-undang konstitusi mensyaratkan undang-undang lain untuk mengimplementasikan masalah teknis, yang merupakan hukum administrasi negara. Penelitian ini merupakan metode pengumpulan data yang menggunakan penelitian kepustakaan *(library research*). Tujuan penelitian adalah untuk mengetahui kerusakan hukum administrasi negara dan attendts untuk merekonstruksi sistem keluar menuju hukum layanan. Hasil penelitian ini adalah untuk memperbaiki kondisi di atas, diperlukan merekonstruksi sistem hukum yaitu struktur, substansi, dan budaya. Itu diperlukan untuk berubah di bidang pelayanan publik dengan mengembalikan dan melayani layanan dan melayani untuk arti yang sebenarnya.

Kata kunci: hukum administrasi negara, malfungsi.

Introduction

Comprehension of law cannot be separated from populist understanding since, at the end, the law governs and limits the power of the state (government). Law is placed as the primary regulation in the implementation of statehood, government, and society, where the objectives of law itself, among others, is to organize a peaceful, just, and meaningful society. It means that the purpose of law is to manifest statehood, governmental and civic activities based on justice, peace, and usefulness or meaningfulness. In the state of law, the existence of law functions as an instrument in organizing the life of statehood, government, and society.[1] The implementation of the state and its administration duties in a law state recognizes law written in the constitution or the rules stated in the constitutional law. The constitutional law required another law to implementation technical issues namely a state administrative law.

According to Marcell Waline, the definetion of state administrative law is all rules governing the activities of state administration which is not legislatures or judicial authorities determine the extent and limits of the power either to the citizens or among the apparatus. All regulations are defined with the requirement how state administrative bodies obtain rights and impose obligations to citizens to fulfill general needs.[2] Given the state as a power

[1] Ridwan H.R, 2003, *Hukum Administrasi Negara*, Yogyakarta: UII Press, p. 25.

[2] Jawade Hafidz. "Malfungsi HAN dan Upaya Melakukan Rekonstrusi Sistem Hukum". *Jurnal Hukum*, Vol. 28 No. 2, December 2012, p. 841.

organization, state administrative law emerged as a guided instrument in executing the power of government and simultaneously as an instrument to oversee the governmental power. The existence of state administrative law arises because of the implementation of state power and government in a state law which demands the duties implementation of state, government and society on law. In the present time, the state of law which has state administrative law and apparatus is enormous as the state mandates the ruler to implement the interests and welfare of the people directly to optimize the state function.

In a welfare state, the task of the government in the implementation of the public interest is broad. Therefore, it is necessary to have the freedom to move in the state administration in accordance with the authority granted. In reality, the state administration in carrying out its duties sometimes exceeds the limits of authority set forth in the state administration law which causes a state administrative law malfunction. Various government implementation problems arise from malfunctions of state administrative law, for example in the case of the implementation of public services in the licensing sector to be convoluted, slow, expensive and depleted, which is a barrier to economic development.

During this time, state administrative law consists of various regulations aimed to implement government and administrative services to the public which tends to be used by certain parties for their own interests. The service is basically for public. This means that the real bureaucrats provided the best service to the community.[3] The law is made to regulate community. The community obeys the law unless punishment will be imposed. It is ineffective and tends trigger violation instead. The paradigm of law changes from the governing laws to the serving law from the people to law towards law to the people, and from the governing law to the motivating law.

From the description above, it is important to find out the Malfunctions and Efforts in Reconstruction of the Legal System Services in the perspective of State Administrative Law. This paper focuses on understanding Malfunctions and Efforts in Reconstruction of Legal System Services from the Viewpoint of State Administrative Law.

Discussion

Malfunctions and Efforts in Reconstruction of Legal System Services from the State Administrative Law Perspective

The state is a place for the nation to achieve the ideals or goals of the nation. Country goals are more important than the order in the country itself. No country has no purpose. Indonesia's state objectives are stated in the Preamble of the 1945 Constitution of the Republic of Indonesia in Paragraph Four, namely:

> "To form a State of the Republic of Indonesia that protects all the people of Indonesia and all of Indonesia's bloodshed, and to advance the welfare of the world, educate the lives of the nation, and to carry out world order, eternal peace, and social justice".
> "...to form an Indonesian state government that protects all Indonesians and all of Indonesia's bloodshed and to promote shared prosperity, to educate the nation's life, and to carry out the world order based on freedom, lasting peace and social justice ..."

In addition, the Elucidation of the Constitution 1945 of the State of the Republic of Indonesia stipulates: "The Indonesian state is based on law *(rechtstaat)*, not on the basis of mere power *(machtstaat*)". In that sentence it is clear that the Republic of Indonesia is a legal state that aims to realize general welfare, founded on Pancasila (state and welfare state law). Indonesia is a legal state that embraces the concept of a welfare state which aims to realize a state that embraces the concept of a welfare state. As a state law aimed at realizing general wel-

[3] Juniarso Ridwan dan Achmad Sodik Sudrajat, 2009, *Hukum Administrasi Negara dan Kebijakan Pelayanan Publik*, Bandung: Nuansa, p. 17-18

fare, every activity is oriented towards the objectives achieved based on the applicable law as a rule of activities of the state, government and people.

The state is demanded to play a further role and intervene with aspects of people's lives to achieve prosperity. To achieve the above objectives, the role of state administrators in real-izing services to the public has a strategic role.

The state as a tool is usually analogous to an ark that carries passengers to the welfare port (a just, safe and prosperous society). Just looking at the country with such roles and functions, it is said to have been explored. The state is a social institution organized by the community to fulfill vital needs, and as a social state, the state is not destined to meet the special needs of individuals and groups, but is intended to meet the needs of all people. To achieve the goals of the state, the government and authorities use the rules of the game based on truth, honesty and justice. Here it puts the importance of law for society or the state.

The law as a tool is a rule that prevents authorities from acting arbitrarily. Law is the limit of freedom between individuals and rulers in every interaction, until the law becomes a protection and guarantee of the creation of public peace. Without law, then chaos and arbitrariness arise. Vivian Bose said that law is the property of all humans (the rule of law is the inheritance of all humans). According to Sjachran, Wet, there are five functions of law in relation to community life which are as follows: *firstly*, directive, as a reference to form a society that is achieved in accordance with the purpose of life of the state; *secondly*, integrative, as the coach of national unity; *thirdly*, stable, as the keeper (including developmental outcomes) and keeper of harmony, and balance in the life of the state and society; *fourthly*, perfectness, as a perfection of the acts of state administration, as well as attitudes of citizens' acts in the life of the state and society; *fifthly*, corrective, both citizens and state administra-tion in pursuing justice.[4]

As a welfare state, the government's duty in implementing the public interest turns broader. Therefore, it is necessary to have the flexibility moved within the state administrative in accordance with given authority. Thus, the broader the function of state administrative in the welfare state, the broader the field of duty will be. Sunaryati Hartono states it is difficult to imagine a modern state currently without any state administrative law.

Based on the development of the tasks of government, especially in the teaching of the welfare of the state which is given broad authority to the state of administration including the authority in the field of legislation, the rule of law within, besides being made by the legislature, and also there are regulations that are made independently by the state administration.

State administrative law is used as an instrument for good governance. The implementation of government is more clear in state administrative law, because it appears a concrete relationship between the government and the community, the quality of government relations with this community is at least used as a measure of good governance.

The implementation of public services is one of the government's efforts to realize prosperity, because the purpose of the Indonesian state is stated in the Preamble to the 1945 Constitution and the functions of state administration. In other words, public service is one of the concepts to achieve what is expected by the people and country.

In state administrative law, the implementation of public services is an obligation of the government apparatus. This is based on the general definition contained in Attachment 3 of Decree Number 63/Kep/M.PAN/7/2003 of Paragraph I, point C: the term "Public Service" the fulfillment of the needs of people, community, government agencies and legal entities as well

[4] Yohanes Suhardin, "Peranan Hukum dalam Mewujudkan Kesejahteraan Masyarakat", *Jurnal Hukum Pro Justitia*, Vol. 15 No. 3, July 2007, p. 270.

as the implementation of the provisions of legislation".

The emphasis is on the status of civil servants from the government bureaucracy, whose job is to provide the best service to the people, not for themselves or their groups. If you believe that the laws and regulations that underlie the work/ service system of the government bureaucracy are oriented towards the interests of the people and social justice, and run non-discriminatory, transparent, objective, and firm, then gradually people follow this pattern.

The public at any time demands the quality of public services from bureaucrats, even though the demands are often not in line with what is expected because empirically the public services that have taken place so far still display traits, which are convoluted, slow, expensive, and tiring. Such tendencies occur because people are still positioned as "serving" rather than "served".

There are three main problems faced by government officials as research conducted by the National Law Commission, namely:[5] *firstly*, the low quality of public services held by some government apparatus or state administration carry out duties and functions. This condition occurs because within the framework of Indonesia's positive administrative law was currently regulated on minimum standards of service quality but the compliance with minimum standards of public services was still not manifested in the implementation of the tasks of the government apparatus;

Secondly, the long bureaucracy (red tape bureaucracy) and the overlapping of duties and authority induce to the implementation of public services long and through the convoluted process so the possibility of high cost economy, the occurrence of abuse of authority, corruption, collusion and nepotism, and discriminatory treatment. *Thirdly*, the lack of external control of the public (social control) on the implementation of public services as a result of the unclear standard and service procedures then complaints procedures of users of public services due to insufficient social pressure that forces the public service provider to improve their performance.

The previous studies by the National Law Commission show that legislation is prepared as an "umbrella regulation" in the field of public services nationwide and it is barely explicit to present provisions which establish public complaints, public complaints standards and procedures. Moreover, the implementation of government affairs in a country of law subject to the laws and regulations in accordance with the principles adopted in a state of law, that is the principle of legality. Since the legislation contains shortcomings and weaknesses, the existence of regulatory policy as a legal instrument of state administrative occupied an important position especially in the modern legal state. The interests of officials are often more dominant than the interests of the people. As a result, efforts to rationalize the public service system are always hindered by the interests of the officials.

A fact that not all policies taken by government officials to solve a particular problem are effective results in the ineffectiveness of implementing the purpose of issuance the policy. In fact, several policies fail to function. In such a case, the policy said that it is administrative malfunction. The implementation of good governance required accountability, transparency, openness, and law. The implementation of a clean governance demands the freedom of malpractices (maladministration) from the ethics of state administrative. These good governance principles are contained in Article 3 of Law Number 28 Year 1999 on the Implementation of Clean Country and Free from Corruption, Collusion, and Nepotism, that was: The principle of legal certainty is a principle within a state of law that prioritizes the basis of legislation, propriety, and justice in every state administration policy: *firstly*, the orderly principle of state execution is the principles on

[5] Septi Nur Wijayanti, "Hubungan Antara Pusat dan Daerah Dalam Negara Kesatuan Re-publik Indonesia Berdasarkan Undang-Undang Nomor 23 Tahun 2014". *Jurnal Media Hukum*. Vol. 23 No. 2, December 2016, p. 186.

which order, harmony, and balance in the control of the state executive are held; *secondly*, the principle of public interest is the principle of prioritized public welfare in an aspiring, accommodating, and selective manner.The principle of openness is principles that open themselves to the right of the people to obtain information that is true, honest and non-discriminatory concerning the implementation of the state by paying attention to the protection of private, state, and state privileges; *thirdly*, the principle of proportionality is the principle which prioritizes the balance between the rights and obligations of the state executive; *fourthly*, the principle of professionalism is principle that prioritizes ethics-based expertise and the provisions of applicable laws and regulations; *fifthly*, the principle of accountability is the principle that determines any activity and outcome of exercise activities of the state and accountable to the public or the people as the supreme sovereigns of the state is in accordance with the provisions of applicable legislation. These principle is an unwritten legal rule as a reflection of ethical norms of government which is observed and followed.

The principle is also understood as general principles which serve as the basis and procedure in the exercise of a proper government. Thus, the implementation of the government became better, polite, just, respectable, free from tyranny, violation of the rules, acts of abuse of authority and arbitrary acts. The purpose of public service to the public is to satisfy the community.

To achieve the satisfaction, the quality of service excellence is required reflected from:[6] transparency, services that are open, easy, and accessible to all parties in need and adequately provided and easily understood; *firstly*, accountability, in terms that services accounted for is in accordance with the provisions of legislation; *secondly*, conditional, services are appropriate to the condition and ability of the giver and the recipient of the service while maintaining the principles of efficiency and effectiveness; *thirdly*, participatory, services that encourage public participation in the implementation of public services by paying attention to aspirations, needs, and expectations of society; *fourthly*, equality of rights, services that do not discriminate seen from any aspect especially for tribe, race, religion, class, social status, and others.

The balance of rights and obligations, services that consider the aspects of justice between the giver and the recipient of public services.[7] Regarding the reconstruction of the legal system, the writer starts from Lawrence M. Friedman's concept of the three elements of the legal system, namely: *firstly*, the legal structure, the framework or sequence of the law itself; *secondly*, the real substance of law, rules, norms and patterns of human behavior in the legal system; *thirdly*, legal culture, human attitude toward law and legal system in which there are trust, value, thought, and hope.

In order to reconstruct the legal system for public service, it takes a synchronization among the three components of the legal system above. Attempts to harmonize the legal system related to the imbalance between different elements of the legal system, which was done by eliminating imbalances and adjusting to the different elements of the legal system.[8]

According to Afan Gaffar, the law is not in a state of vacuum but the entity which resides in an environment where the laws with the environment occurs interrelated. The law is also the product of various elements, such as politics, economics, social, culture, values, and religion. Therefore, many legal ecosystems depend on factors outside the law. Thus, the law was not something supreme. The existence of law because there are political, interests, economic, social, cultural, and others.

Thus, harmonization of the law was an attempt or processed to make restrictions on

[6] Simamora Janpatar. "Analisis Yuridis Terhadap Model Kewenangan Judicial review di Indonesia". *Jurnal Mimbar Hukum*. Vol. 25 No. 3, Oktober 2013, p.45.

[7] Simamora Janpatar. "Problem yuridis Keberadaan TAP MPR dalam Herarki Peraturan Perundang-Undangan Menurut Undang-Undang Nomor 12 Tahun 2011." *Jurnal Legislasi Indonesia*. Vol 10 No.3, September 2013, p. 31.

[8] Hikmawanto Juwana, Perspektif Hukum atas menmorandum of understanding Helsinki, Mahkamah Konstitusi, *Jurnal Konstitusi*. Vol. 2 No. 2. 2005, p. 36.

differences with the existence of irregularities and contrary to the law.[9] The law was formed on the basis of people's sovereignty, then the law exist to serve the people. The law is used only for the sake of a handful of people to fulfill their interests then returned to original state.

Laws serve the needs of society so that the law did not become obsolete because of the rapid development of society. The characteristics contained in this paradigm are: *first*, changes that tend to be followed by other systems conditionally; *second*, the lost of law behind the social change; *third*, rapid adaptation of the law to new condition; *fourth*, law as a function of dedication; law evolves in accordance with the events; *fifth*, it means the events are not preceded.[10] This paradigm is also called the legal paradigm of adjustment of needs. It implies that the law moved quickly to adjust to the developments that occur in society.[11]

Furthermore, social changes affect on legal changes which is not necessarily followed by the need directly in the form of legislation. However, the needs of the legal community were able to be followed in such a way to guarantee justice, legal certainty continue preserved.

Soerjono Soekanto argued that law enforcement situated in the factors that influence it. The factor has a neutral meaning, so the positive or negative impact situated in the substance or content of the factor. These factors are: *first*, legal factor. The law was easy to enforce if the rules or laws functions as a source of law support for the law enforcement. In particular, the legislation is in accordance with the need for the creation of public service. Then a law becomes a source of law and to be enforced by following the principles below: (a) law is not retroactive. It means the law is only applied to the event mentioned in the law, and occurs after the law in force; (b) law was made by a superior ruler and has a higher position; (c) special laws override general laws; (d) newly applicable law remove the previous law; (e) law is not contested.

Second, law enforcement factor. Government apparatus is one of the factors in the creation of improvement of public service. Because the government apparatus was an element worked in practice to provide services to the community. Hence, sociologically, government apparatus had a position or role in the creation of a maximum public service.

Third, facilities factors. The implementation of public services does not take place smoothly and orderly if without any supporting facilities. The facilities include educated human resources, good organization, adequate equipment, and sufficient finances. Unless, it was impossible for the purpose of public service achieved properly or in line with expectations. Although legal factors, law enforcement apparatus, and public legal awareness are well met, if they are not adequately provided, undoubtedly it will not materialize a good public service.[12]

Fourth, community factors. Basically, the implementation of the public service for the community, and therefore the people who need various services from the government as the ruler of the government. Society has an existence in service, because in the context of public service society come from the public (public), where the main purpose created the welfare of society as a whole.[13] Therefore, if viewed from a certain corner, then the community affects the creation of the implementation of good public services. That was, the public supports the public service improvement activities that were actualized through legal awareness.

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[9] See too Tedi Sudrajat, Et.Al., "Harmonization of regulation in water territorial management becoming a fair economic benefit distribution towards regional autonomy", *E3S Web Conf. 2nd Scientific Communication in Fisheries and Marine Sciences (SCiFiMaS 2018)*, Vol. 47, 2018, p. 1-6.

[10] Khumadi, "Pemisahan dan Pembagian Kekuasaan Dalam Konstitusi Perspektif Desentralisasi". *Jurnal Kebangsaan*, Vol. 6 No. 1, September 2012, p. 23.

[11] Muntoha, "Demokrasi dan Negara hukum". *Jurnal Hukum,* Vol. 16 No. 3, July 2009, p. 27.

[12] Sularno, M. "Upaya Pembentukan Hukum Positif di Indonesia". *Jurnal al-Mawarid,* Vol. 16 No. 2, December 2006, p. 211.

[13] Setiadi, Wicipto. "Pembangunan Hukum dalam Rangka Peningkatan Supremasi Hukum". *Jurnal Rechtsvinding*, Vol. I No. 1, April 2012, p. 1.

Fifth, cultural factors. Culture was almost the same factor as society. Viewed from the socio-cultural system, the Indonesian state itself has a plural society with many characteristics. The objectives in the implementation of public services are not generalized as they have different characteristics in each community in each region. Cultural factors in manifesting good service delivery basically include the values underlying the prevailing laws, the values were abstract conceptions of what is good, deent and bad.

The rapid change in the political system in Indonesia brings about the issue of law and public service becomes a central issue that requires the structure of the system, both the legal system, the state administration, and the more participatory public services.[14] Government tasks run by the government apparatus are more carried out in accordance with the wishes and their own way of thinking, changing to the conditions that allow the creation of bureaucratic climate and state apparatus that serve the people (public servant).

It is not difficult to realize if a strong *political will* from the government seen the apparatus of government as the executor of the country right now and approach increasingly faced to global complexity. This role is able to anticipate and accommodate all forms of change. This condition is possible because of the government apparatus in position as a formulator and policy maker, as the lead implementer of all laws and regulations.[15]

The governance implementation particularly the service to the public by the government apparatus goes well if there is a law or regulation that clearly regulates the existence and procedure of service. The clear and transparent procedures are important not only for the bureaucracy but also for the community as service users of the bureaucracy. Unless, bureaucracy did not work efficiently and effectively. On the other hand, clear rules also protect the public from the arbitrary acts of state administration.

Conclusion

Based on the explanation above, it can be concluded several things. The law of state administrative enables the administration of the state to perform functions and protect the state administrative of the state from committing wrongful acts on the law. However, in implementing the public interest, it takes the freedom in the state administrative in accordance with the given authority. In fact, the state administrative in performing the duties, sometimes exceeds the limits of authority set forth in the laws of state administrative so there was malfunctions of state administrative law. The implementation of public services was hampered by the interests of the state administrative who tends to prioritize the interests of state administrative rather than the public. To improve the conditions above, reconstructing the legal system, structure, substance, and legal culture is required.

Suggestion

Based on the discussion on malfunctions and efforts in reconstructing the legal system service from the perspective of State Administrative law, the writer provides suggestions as follows. To run governance in accordance with the prevailing laws and regulations, the government requires a code of ethics for state administration. Thus the state administration shall take action. Moreover, it also needs a public service that serve the public as they should be. In addition, harmonization of the three system components of the legal system is required.

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