THE MALFUNCTION OF JUDGEMENT POSTPONEMENT INSTITUTION (SCHORSING) IN THE STATE ADMINISTRATION COURT SYSTEM

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THE MALFUNCTION OF JUDGEMENT POSTPONEMENT INSTITUTION (*SCHORSING*) IN THE STATE ADMINISTRATION COURT SYSTEM

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ABSTRACT

The existence of the suspension in the state administration court system is the unification of human rights' protection seeking the justice and the social rights based on the common interests. The existence of this institution is guaranteed in Article 67 of the Administrative Court Act. However, there is a malfunction in providing protection to people who seek the justice since the lack regulation of this institution in the Administrative Court Act. Related to the malfunction because of this poor management, two problems arise: the lack of regulation concerning the clear standard of granting and refusing a delay request related to the judge's prudence, and a lack of procedural law execution completed by distinct coercion elements.

Keywords: Malfuction, Postponenent, Administratico, Court System

A. Introduction

As the development of *nachwakerstaat* state doctrine (the night watchman state) and the liberal law in the scientific state, there is an important role of administrative law to organize, arrange and manage the country to realize its goal. Administrative law revealed in a set of law that govern all things related to the state administration, includes all activities carried out by the state administration in performing its daily duties, like public services, implementation of development, economic activities, increasing the welfare and others, also carrying out the tasks ordered by the legislation. [1] Based on that statement, the state administrative law basically focuses on the power of government and its activities (*bestuur, Verwaltung*) and will eventually emerge as an instrument to supervise the use of the governmental power. [2]

In the state of law system, government action engaged with the principle of legality (*rechtmatigheid van bestuur*). This principle is one of the main principles in the state of law system governance, particularly in European law states it is known as *rechtmaat*. The basic principle of government legality actions is that the legality of a government action be based on the authority, a formal procedure and substance of the government actions. Based on this powers and procedures, there is a concept presumption of government action or principle of *praesumptio iustae causa* or *vermoeden van rechtmatigheid*. [3] It means that any government action should be based on the law unless it is determined as the contrary by a court decision or the officials concerned. By using this principle, a decision or factual action can still be carried out even though there are some legally problems, either related the administrative or the judiciary effort.

However, *praesumptio iustae causa* principle is not absolutely applicable. It is there to prevent the permanent loss which is irreparable as the result of government implementation, the Article 67 of Law No. 5 of 1986 provides legal steps for the plaintiff, in the form of application of postponement (*schorsing*). In this case, if the court regards this motive as a very urgent for the plaintiff and doesn't find any public interest elements in the development context, the court decides that execution of the dispute object will be postponed until the decision is binding.

The existence of the postponement authority comes with problems. The judges have substantial powers to delay a decision during the process. The use of judge's authority can broke legal certainty principle. The use of careless authority and too long postponement can make government run ineffectively. [4] On the other hand, there is no certain standard in granting and refusing a delay request associated with the element of prudence judge. [5] It is whether the standard only the presence of the urgency of the plaintiff and the unrelated decision with the public interest in the development. Of course, the consideration is not as simple as those reasons.

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[1] Safri Nugraha, et al, (2007). *Hukum Administrasi Negara*. Badan Penerbit FH UI. Jakarta. p. 3.
[2] Read Philipus M. Hadjon, et al *Op.Cit*, p. 5.
[3] Ibid, p. 22.
[4] Adriaan W Bedner, (2010). *Peradilan Tata Usaha Negara di Indonesia*. HUMA, Van Vollenhoven Institute dan KITLV, Jakarta, p. 153.
[5] Compared with Yos Johan Utama, (2006). *Peradilan Tata Usaha Negara sebagai Salah Satu Akses Warga Negara untuk Mendapatkan Keadilan Dalam Perkara Administrasi Negara*. Dissertation of Doctoral program of Ilmun Hukum Undip, Semarang, p. 280.

The other problem arises relating to the failure in implementing the delay determination. It is caused by the absence of systemic procedural law that specifically regulates the implementation of the determination of such delays. Lintong Oloan Siahaan stated that the decision of postponement execution in the state administration will be developed by itself and guided by the provisions of the law execution. [6] Lintong's statement is in line with the regulation of the Supreme Court as described in Book II of Technical Guidelines for Administrative and Technical State Administration Edition 2009. These guidelines provide instrumental rules that the determination of the delay which is not complied by the defendant, casuistically can be applied Article 116 of Act of PTUN as applied to decisions which have been legally binding.

In fact, this Supreme Court or a regulation is not easy to be applied. It is too difficult to analogize and implement the execution law in Article 116 of the Administrative Court Act to issue the determination of this delay. In many cases, it is common to ignore this postponement by the defendant with a lack of a legally binding decision. [7] Because of this ignorance, the former Deputy of Chief Administrative Rooms, Imam Subechi stated that to deny or grant the request delays, judge will consider first, whether the determination of such delays will be respected by the defendant or not. [8]

This statement certainly gives an indication that there are a systemic legal issues and the implementation of mechanisms for imposing the ban in state administrative courts. Based on this background, the writing will be more focus on the issues how the arrangements the *schorsing* institution in the Indonesian legal system and the failure occurred during the execution determination postponement of the decision.

B. The Legality Principle as State of Law and Its Relevance to the *Praesumptio Iustae Causa* principle

The notion of "State [illegible]d on Law", was already there and begins with Plato's writing about "*Nomoi*". [9] Then the concept began to grow rapidly since the late of 19th century and the early of 20th century. In Western Europe or Continental Europe, Immanuel Kant and Friedrich Julius Stahl called it as *rechtstaat*, whereas in Anglo-Saxon countries, A.V. Dicey called it as the rule of law. [10]

According to Friedrich Julius Stahl was cited by Oemar Seno Adji, in formulating elements of *rechtstaat* in the classical sense, there are some, the protection the human rights, separation or division of state power to secure the rights and human rights, the rule of the regulations and the judicial administration. [11] While elements of the 'rule of law' in the classical sense, as proposed by A.V. Dicey [12] Introduction to the Law of the Constitution' includes the supremacy of the law; the absence of arbitrary power, means that a person can only be punished if he/she break the law, [13] the same position in the face of the law (equality before the law). This statement applies both ordinary people and officials and the guarantee of human rights by law (in other countries by the constitution) and court decisions. [14]

In the modern idea of democracy, law has an important and central role. Idealized democracy must be placed within the law. Without law, democracy can go to the wrong direction, because the law can be interpreted unilaterally in the name of democracy. This democracy concept creates a law based on democracy or a constitutional democracy. In *rechtstaat democratische* system, it is required that the rule of law should be applied based on democracy agreed by all elements. Both "constitutional democracy" and "*democratische rechtstaat*" concepts have a similar mechanism substantially, and therefore in fact the two are heads o tail. On the one hand, state of law must be a democratic, and on the other hand, the democratic state must be based on law. [15]

Based on those constitutional state principles above, it can be conclude that the principle of legality is one of the principles that have always upheld by every country that declared itself as a legal state. The legality principle in administrative law often known as *begoesel van het wetmatigheid van bestuur or le principe de la le'galite de l'administration*. In code penal, the principle of legality is often known adage *nullum delictum nulla poena sine prevea lege poenale*, or any person should not be punished before criminal provisions governing the criminal act. The legality principle requires that all government action should be based on the legislation.

Wetmatigheid van bestuur principle or the rule of law based on the idea of developing the laws of classical or liberal country in the 19th century dominated by the nature of positivism and legisme ideology considers that the law is what is written in the law. But once, after applying substantive legal state in the twentieth century, the *wetmatigheid van bestuur* principle is developing into [illegible]*chtmatigheid van bestuur* principle, namely the principle of the rule of law. In this system of law, the law is [illegible] only seen as the text of the legislation in the formal sense, but also in the sense of material, both written and unwritten (eg, the general principles of good governance or the *algemene beginselen van behoorlyk bestuur*).

The basic principle of legality required their authority set out in the legislation in any government action. It means that the absence of basic authority under applicable legislation, the actions of government officials cannot influence or change the

[6] Lintong O. Siahaan, (2007). *Eksekusi Putusan di Peradilan Tata Usaha Negara, Sitem Peradilan dua Tingkat PTUN dan Putusan Perumdum*, Perum Percetakan Negara RI, Jakarta, p. 80.

[7] Ministes of Finance's Reasons in Zalmaini Case versus Minister of Finance. Look at Yos Johan Utama's justice, ...*Op Cit*, p. 281.

[8] Look at, Yos Johan UTAMA, *Ibid*.

[9] [illegible]no Wahjono, (1986). *Indonesia Negara Berdasarkan atas Hukum*, cetakan kedua, Ghalia, Jakarta, p.7.

[10] Miriam Budiarjo, (1997). [illegible]*sar-dasar Ilmu Politik*, Gramedia, Jakarta, p.57.

[11] Oemar Senoadji, (1966). *Seminar Ketatanegaraan Undang-Undang Dasar 1945*, Seruling Masa, Jakarta, p.24

[12] [illegible]an Budiarjo, *Op.Cit*, p. 58.

[13] Jimly Asshiddiqie, (2005). *Hukum Tata Negara dan Pilar-Pilar Demokrasi Serpihan Pemikiran Hukum, Media dan HAM*, konstitusi Press, Jakarta, p.243.

state or the legal position of their people. [11] As a democratic constitutional state, the main source of authority is the law as a legal product that has a legitimate parliamentary representation of the people. Including the authority of origin derived from the constitution. Through the representation of the people in parliament, the government has the legitimacy to carry out the authority under a special authority for actions in the field of public law. With the consent of the people through their elected representatives, then the government has the basic public authority which incidentally has been approved by the community.

In this case, countries that is represented by government as the organ has a dualistic characteristic (*twee perlow* or two heads) in legal actions: a legal act in the field of public and private law. As a public law actor (public actors), a government run the public power quantitatively as a ruler who is under the authority of the public. Meanwhile, as the actors of civil law (civil actor), the government do the civil legal actions, such as binding sale and purchase agreements, leasing, chartering in form of the legal entity (*rechtspersoon*) and under the civil law.

The existence of the legality principle in the administrative law has been formulated in Article 5 of Law No. 30 of 2[illegible] on Government Administration. [15] In the aforementioned article stated that the implementation of Government Administration based on: the principle of legality; the principle of protection of human rights; and the general principles of good governance. In the explanation of article asserted that the definition of "legality" is that the implementation of Government Administration put forward the legal basis of a decree and / or actions made by the Agency and / or Government officials.

The legality principle requires that every government act should be based on legislation, both the legislation as the basis of the Authority and legislation as the basis of establishing and/or makes decisions and/or actions.[16] Based on this, the scope of government actions legality includes authority, procedure and substance. [17] Powers and procedure is the basis for the formal legality, while the substance concerning the legality of the material. Non-fulfillment of these three aspects of government action causes defects juridical.[18]

In addition to the aspects of the legislation, the use of governmental authority should be based on the general principles of good governance. With the discretionary authority of the government (*vry bevoegheid*), the absence or vagueness of the legislation is legally not deter the agency and/or government official authorized to establish and/or make decisions and/or actions throughout provide public benefit and in accordance with good general principle. Thus, the ignorance of general principles of good governance in making decisions or other government actions will also have implications for the legal defects of the government action.

In our current administrative practices often found their security clause (*veiligheid clausule*), for example, the clause "if in the future there is a mistake in the decision letter, the letter of this decision will be revisited". This clause can actually harm the principle of legal certainty and the principle of legality. Without that clause, the officials are concerned based on *contrarius actus* principle can review the decision he made when there is a legally flawed.

According to Ma[illegible] relate to the compliance of legality of this administration principle will have consequential and bring forth the principle that for the sake of legal certainty, any decision taken must be true according to the law, therefore a decision to be implemented first before proven otherwise and declared by the judge as a decision against the law. [19] This principle is known as the right presumption, *praesumptio iustae causa*, or in Dutch administrative law known as *vermoeden van rechtmatigheid*. Related to this case anyway, Philip Hadjan stated that be based on formal legality principle, it creates *praesumptio iustae causa* principle. [20] *Praesumptio iustae causa* principle is a derivative of the legality of government principle in relation to the use of a public authority which is special.

Related to this right presumption Indroharto argues that a decision or action of administrative law is always legal and therefore can always be implemented immediately. In the Technical Manual of State Administration Court confirmed that one of the principles in the administrative courts is *praesumptio iustae causa* principle. This principle reveals that a state administration court decision should always be considered correct until proven otherwise. [21] Therefore it can be implemented anytime. Further Indroharto confirms that an administrative decision was considered to stand in line with a court decision or an authentic deed. Although the decision was sued, it does not impede the operation of these principles. [22]

By implementing those principles, the decision of the state administration which was sued in justice administration still considered to be true according to the law, before it is declared as the contrary by a court ruling. As the consequence, there is a

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[14] Indroharto, (2000). *Usaha Memahami UU PTUN: Buku I: Beberapa Pengertian Dasar HTUN*, Pustaka Sinar Harapan, Jakarta, p. 83.

[15] Republic of Indonesia's sheet of 2014 No. 292, additional sheet of Republic of Indonesia of 5601.

[16] Look at Article 9 paragraph (1) and (2) and (4) of Law No. 30 of 2004.

[17] Bandingkan dengan Philipus M Hadjon, Hukum Administrasi dan Good Governance, *Op.cit*. p. 22.

[18] Look at Article 64 of Law No. 30 of 2004.

[19] S.F. Marbun dan Ridwan, (2005). Tinjauan Umum Atas RUU Administrasi Pemerintahan, *(Paper)* presented on Laporan Seminar Indonesia-Jerman dengan Tema RUU Administrasi Pemerintahan, Kementerian Pendayagunaan Aparatur Negara, GTZ dan Hanns Seidel Foundation, Jakarta, p. 51.

[20] P.M. Hadjon, dkk. *Hukum Administrasi dan Tindak … Op.Cit. p.* 17.

[21] II Book Teknis Administrasi dan Teknis Peradilan TUN, MARI, Tahun 2009, Jakarta, p.87.

[22] Indroharto, (2001). *Usaha Memahami Undang-Undang Tentang Peradilan Tata Usaha Negara : Buku II*, Pustaka Sinar Harapan, Jakarta, p. 207-208.

lawsuit against the decision of the state administration in the courts of the state administration was not legally preclude implementation of the decision or official body of the state administration as well as the acts of the agency or state administrative official being sued. The applicability of the *rechtmatige* presumption is in line with the existence of the principle of general interest and the legal certainty in holding government. It will be difficult to government to do their tasks when every act of government that sued may result in cessation of the implementation of the decisions referred to government officials. It can cause the unfinished public interest and government cannot run the tasks properly.

Prior to the enactment of Law No. 30 of 2014 on Government Administration as a general rule of administrative law (*Algemene deel* law of Administrative general), there are a lot of important legislation in the administrative law resulted in the lack of standards regarding the term, principles and concepts in the administrative law field, including the absence of synchronization principles of administrative law. Philip Hadjan stated that an example of such discrepancies is associated with the legal *praesumptio iustae causa* principle. According Hadjon, most legislation by sector in the field of administrative law (*bijzonder deel* special administrative law) does not apply this principle. [25]

Praesumptio iustae causa principle have similar rule with other legal principles in the field of code penal system and state administration. In the justice system, this principle is known as the presumption of innocent principle or the presumption of innocence. The presumption of innocence is managed in Article 8 (1) of Law Number 48 Year 2009 regarding Judicial Power, which reads: "Every person suspected, arrested, detained, prosecuted, or appear before the court shall be presumed innocent until there a court ruling that declared his guilt and has obtained permanent legal force." in General explanation of the Book of the law of Criminal law point to 3 c also affirmed that." Every person suspected, arrested, detained, prosecuted and or confronted in the face of court , shall be presumed innocent until the court ruling that declared his guilt and permanent legal power. "

In the state judiciary system, especially in testing legislation also contained the *praesumptio iustae causa* principle which is better known as presumption of constitutionality. In Article 58 of the Law of the Constitutional Court stated: "The law is examined by the Constitutional Court remains in force, before there is a decision which states that the law contrary to the Constitution of the Republic of Indonesia Year 1945". Given this principle, any legislation on the judicial review at the Constitutional Court has always considered right according to the constitution before specified otherwise by the Constitutional Court decision.

As the effort to protect the citizen, applicability of the *rechtmatig* presumption under certain conditions limited by their schorsing institution/the postponement in the administrative courts. Dani Elpah stated that the existence of the postponement is a mix between the protection of individual rights of the people seeking justice with the right of a society based on shared interests. [24] This implementation limits (*restricteren*) the tightness of enforceability presumption (*praesumptio iustae causa*/*verwoorden van rechtmatigheid*) in administrative law. The purpose of this postponement of the decision is to provide guarantees for the plaintiff in order to avoid losses as a result of the implementation of the decision the object of dispute, as well as to provide guarantees for the implementation of the verdict for the plaintiff will not be in vain.

C. Setting *Schorsing* Institutions and Extent the Freedom Judge

As part of the legal principle of public administration (*algemeen deel*), the *praesumptio iustae causa* principle was firstly stated in Article 67 paragraph (1) of Law No. 5 of 1986, as follows: "The lawsuit does not delay or impede the implementation of the decision of the Board or Officer of Administration state as well as the actions Agency or official state Administration sued ". Behind this statement, this suggests that a decision of the state administration should always be considered to the law and workable. An administrative decision should always be considered as a correct until it is proven and disconnected otherwise.
This principle guarantees the certainty and legal protection to officials of the state administration in order to carry out the government tasks even though their attitudes and actions in question its validity by citizens who felt their interests harmed in court. This principle is a guarantee that the wheels of government and public services continue to run as expected without significant disruption, even if there is a lawsuit in it.

In Act No. 30 of 2014 on Government Administration, this principle contained in Article 75 paragraph (3), as follows:
(1) Citizens who are lose against the decisions and / or actions may submit to the Administrative Effort Tops Government officials or officials who assign and / or make decisions and / or actions.

(2) Administrative effort referred to in paragraph (1) shall consist of:
a. objection; and
b. appeal

(3) Administrative effort referred to in paragraph (2) does not delay the implementation of the decisions and / or actions, except:
a. otherwise specified in the legislation; and
b. causing greater losses.

With the enactment of this, generally the filing of administrative effort started by objection and appeal efforts cannot impede the passage or implementation of decisions and / or actions the agency or government official.

[23] Philipus M Hadjon, et al. *Hukum Administrasi dan Good*…*Op.Cit.* page. 17.
[24] Dani Elpah, (2011). *Penundaan Pelaksanaan Keputusan Tata Usaha Negara* (Paper). presented on Pelatihan Hakim Peradilan Tata Usaha Negara, Diklat Kumdil MA RI, Bogor, p. 3.

As part of the general administrative law, the Law of Government Administration does not regulate it in detail, any exceptions that may be the reason for delay in the implementation of the decisions and / or actions of official bodies or government administration. This suggests that the scope exclusion reasons for the delay can be further specified in the legislation in the field of administrative law more by sector, such as shrimp Tax Law, Environmental Law, Law Building, and so forth.
The provisions of Article 75 paragraph (3) b. the clause "cause greater losses", are still very vague. The provision does not specify *adressat norm*, meaning not classify a loss who it is, whether the applicant objected loss or damages public represented countries. Thus in the absence of explicit *adressat norm*, then it can only be interpreted broadly, the greater loss suffered by the applicant or the administrative effort by the administration official government itself.
Related to this delay mechanism, Article 65 of Law No. 30 of 2014 set as follows:
(1) The decision that has been set cannot be postponed, unless potential:
a. state losses;
b. environmental degradation; and / or
c. social conflict.

(2) Delays Decision referred to in paragraph (1) may be made by:
a. Government officials are set Decision; and / or
b. Topa officials.

(3) Delay Decision can be done by:
a. Government officials request relates; or
b. Court ruling.

In line with it, barring the presumption right through efforts to delay implementation of the decisions in state administrative court process, set out in Article 67 paragraph (2) till. paragraph (4) of Law No. 5 of 1986, as follows:
(1) The lawsuit ... and so on ...;
(2) The claimant may request that the implementation of an administrative decision is postponed for examination of State Administration dispute is running, until there is a court verdict obtained permanent legal force;
(3) The application referred to in paragraph (2) may be filed at the same time in a lawsuit and may be terminated in advance of the subject of dispute;
(4) Applications for postponement referred to in paragraph (2):
a. May be granted only where there is a very urgent situation which resulted in greatly harmed the interests of the claimant if the administrative decision which sued the state administrative court remains to be implemented;
b. Shall not be granted if the public interest in the context of development requires implementation.

Under these provisions, in certain circumstances the plaintiff may apply along the process, the implementation of administrative decision being sued was ordered to be delayed. The court will grant if only there is urgency and a decision being applied is not associated with a common interest in the development.

The objective of stating suspensions in the Administrative Court Act is to provide a guarantee for the plaintiff in order to avoid irreparable losses as a result of the implementation of the decision later, if later the court grant such claims and declare the decision void or invalid. In terms of that goal, the institution has a resemblance to institute confiscation (*conservatoir beslag*) in civil judicial, conducted to provide assurance so that the executions for the plaintiff will not be in vain. [25]

In the United States, the reason to postpone a decision, principally as same as in Indonesia, which is to prevent irreparable losses, if KTUN already implemented (irreparable injury). [26] Decision delay can only be requested from the court; both the case is being processed by the Agency, and the ongoing case in court. The difference of it in Indonesia can be seen from the initiative of filing the petition. In the United States, the decision of postponement may be requested by the plaintiff, but in certain cases can also be requested by the Agency. [27]

In France, the establishment of this suspension is called as *sursis a execution*. This decision is carried out after the judge brief decision (*juge de referees*) if only it is an urgent. [28] The main principle in making this decision is its urgency and later it will be difficult to recover.

Conceptually, the existence of the *schorsing* institution can be understood by the effects of salable power in it. Delay implementation of the decisions of state administration resulted in salable power (*geldig*) against the decision of the state administration sued stalled for a while (*tijdelijk*). Hence while this power stops, the existence of this *schorsing* create the legal state (*rechtstoestand*) back to the former state or position (*restitutio in integrum*) until there is a decision disputed by state administration. [29]

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[25] Lintong O. Siahaan, *Op.Cit*, p. 36.
[26] Gelhorn dan Byse's dalam Lintong Oloan Siahaan, Op cit. p. 36.
[27] John H. Reese dan Richard H Seamon dalam Lintong, *Ibid*., p. 37.
[28] Lintong O. Siahaan, *Ibid*.
[29] Compare with Asmuni, Penundaan Pelaksanaan Keputusan Tata Usaha Negara Oleh Pengadilan Tata Usaha Negara, *Paper* Assignment of Doctoral Program in Law Faculty, Universitas Brawijaya Malang, without year, page. 5.

Postponement request often done through the demolition, eviction, auctions, inauguration of office, land and issues related to the environment. Bedner noted, in the early operation of administrative court, this suspension request is often granted. [50] Related to this easily judge in granting the suspension, many critics emerged, both from academia and from the justices themselves. Adriaan Bedner found that at the beginning of the operation of the Administrative Court, almost all the judges did not show the prudence, and usually did not give a reason for their decision. Paul E. Lotulung, Former Deputy Chief who was still serving as a judge once criticized this tendency. Likewise, Former Vice Chairman of the Supreme Court, Ketut Surapatra criticize this tendency in determining the delay that is too easy. [51] In this case Indroharto criticized the judges were too generous in giving suspension without a clear standar - and the judges should be more careful to follow his advice as described in his book. [52]

According Indroharto, in processing the postponement request, the chairman or the judge should have the standard in determining whether the request will be granted or not. These standards include:

1. noted the interests implicated;
2. the perfect of application concerned;
3. plaintiffs attitude in determining the facts;
4. the urgent interest plaintiffs;
5. temporary assessment about the principal case. [53]

Nonetheless, Indroharto stated that the judge in assessing the postponement application is not depend on the basics of testing as referred to in Article 53 paragraph (2) of the Administrative Court, because it is used in the assess the subject of his case only, though in practice there will be a vote while the principal case about it. Indroharto also confirmed that if a lawsuit will not be unlikely to be accepted because of the dismissal reasons in Article 62 paragraph (1) of the Administrative Court, there is no need to assess more this request. [54]

Those criticism affects the judge's attitude in response the postponement petition. Besides, there is a little delays petition filed by a lawsuit, the percentage of granted is very small also. Indroharto stated that the prudence in response the postponement request is now heavily influenced. Despite the delay in examining the request, in accordance with Article 67 of Law Administrative Court, the judge did not associate postponement petition with the principal case, but in reality decide the suspension should pay attention to the basic aspects of the case.[55] Indroharto called it as "interim assessment of the subject matter". If the assessment of the request seems to be granted, the tendency is granted. [56] Means that before considering the request, it should also consider the formal aspects of his complaint, whether the subject of dispute manifestly authority Administrative Court, or the deadline for filing a lawsuit actually still possible Article 55 of the Law on Administrative Court. If that consideration is not included in the authority or the grace time, then granting the postponement request is useless.

Based on Article 67 paragraph (4) of the Administrative Court, the judge in examining the postponement request must consider the following matters:

a. There is a very urgent situation, namely if the losses that will be suffered by the claimant will be very unbalanced compared to the benefits for the interest to be protected by the implementation of the administrative decision or;
b. The implementation of Administrative Decree sued has nothing to do with the public interest of development.[57]

Toward the provisions of Article 67, there are at least three legal concepts that should be elaborated and considered by the judge in deciding the suspension request. The three legal concepts are: The concept of urgency; Concept of loss; and Public interest of development. On the other hand, what is meant by public interest itself is still very much open to be interpreted and debated. There are a lot of interpretations of what is meant the public interest, thus, there is no unity of views on this course. It certainly will have an impact on the judge's assessments regarding any legal action that belongs in the public interest category which eventually does not lead to a single and unified view.[58]

Several courses to note from the previous provisions of Article 67, associated with some policies which have been issued by the Supreme Court[59] are: *First*, the object of dispute must be the Decree of state administration (*beschikking*). *Second*, the

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[50] Adriaan Bedner, *Op.Cit.* p. 151. Source from his research from 1992-1995, from 55 requests, 33 granted, 5 ngranted and 13 undecided before claims cold drawn.

[51] Look at Adriaan Bedner, Ibid.

[52] Look at Indroharto, Op.cit. p. 214.

[53] Indroharto, Ibid. p. 211-214.

[54] Loc.cit.

[55] Interview with the state administrative judge on July 8th 2016. He argued that there is a well-known term among judges; "judge doesn't eat his words". Means that if the *schorsing* request is granted, the claims is also. It will be peculiar if the claims is not granted, it is same as eating his words. Though, judges realize that Article 67 of Law in state administration does not consider the subject matter.

[56] Look at Indroharto, Op.cit. Hlm. 213-214.

[57] Explanation of Article 67 of Law no. 5 year 1986.

[58] See the example of Lintong O. Siahaan's opinion, former president of high court of TUN Medan in his book: Execution of Decision…., Op.cit.p.52-66.

[59] Some of these circulated and guidelines are the Supreme Court of Republic Indonesia Number 2 year 1991, the guidelines of Supreme Court of Republic Indonesia number: 052/Td/TUN/III/1992 on March 14, 1992, the guidelines of Supreme Court of Republic Indonesia number 223/Td.TUN/X/1993, the guideline number 1 year 2005 about decision

suspension must be submitted by the plaintiff and not on the judge's initiative. *Third*, those suspended are the force of Decree of the state administration, here, the Supreme Court prohibits the suspension Decree of the implementation of Administrative Decree by just applying a part of it (partially).[40] *Fourth*, the factual action that becomes the content of yet unimplemented Decree, except, in carnistry related to the continous actions/implementations. *Fifth*, the suspension can be granted if the interest of the suffered plaintiff cannot or is hard to recover. *Sixth*, there are immediate circumstances or reasons that demand the court to immediately take a stand on the suspension request. *Seventh*, the suspension requested is not related to public interest of development. And *eighth*, the force of *schorsing* Decree binds up until the Decree of dispute matter is legally fixed. In addition, the suspension imposed must not be defined by conditional over a certain period of time, like two or three months.

According to Dani Elpah, after a court Decree is handed down, there are several possibilities as the consequence of the verdict. If the lawsuit is granted, in the legal considerations and verdict, a statement (*declear*) that a schorsing is strengthened or maintained is included. If the lawsuit is declared to be accepted or rejected, there are 2 (two) possibilities, which is repealed its own before the verdict read, or the revocation is included along with the final Decree.[41] Nonetheless, in certain cases where the interests of Plaintiff suffered by the implementation of Administrative Court Decree which is beign sued, the possibilities will be arrived just during the inspection process at the appeal level, thus, the high court of the state administration may issue the Decree of suspension.[42]

The existence of suspension effort for the implementation of state administration Decree is indeed on the one hand shows a very beneficial aspect of personal protection for a citizen. Nevertheless, the existence of this institution is vulnerable to be utilized to suppress the opposition by deliberately stalling time on the existing legal right or obligation. According to Menurut Yos Johan Utama, the existence of this suspension institution has also provided potential opportunities for the occurrence of bribery. Moreover, the system inside this suspension institution, many, tends to be based on perceptions or measures outside the system.[43]

Those concerns also shared by Lintong, stating that the terms for suspension imposition within the provision are very minimal, so as it is left to the judicial development. With the available vacancy, the judge is granted the widest possible freedom to determine his own requirements, which in many cases lead to confusion for the judge. The condition has also provided a chance to be abused when the judge is not resistant to temptation.[44]

Yos Johan Utama takes Imam Subechi statement as an example, who stated that sometimes a judge will consider first whether or not the Decree of suspension will be respected by the defendant.[45] It could be that a huge mass pressure becomes one of the reasons for not granting the suspension request.[46] In short, other than legal grounds, there are also non-legal aspects (e.g. sociological, psychological, and anthropological aspects), which in the practice have also become parts of consideration whether or not the suspension of Decree implementation by the court is made.

The case of suspension request filed by Agusrin Najamuddin, at that time the Governor of Bengkulu, can be an example of how this suspension institution can be used as a way to stalling time for the implementation of a Decree. After the Decree on his corruption case came out, the convicted Agusrin Najamudin filed for reconsideration and cancellation of the Decree Junaidi Hamsyah's appointment as the Governor of Bengkulu. Along with the lawsuit, a suspension request was also filed. On the same day, The Jakarta State Administrative Court also issued a Decree of the suspension, hence, the Governor inauguration, which was originally scheduled for the following day (May 15, 2012), was finally postponed based on the Radiogram from the Minister of Domestic Affairs No. 121.17/1869/SJ received by the Secretariat of House of Representatives of Bengkulu, Monday (14/5/2012), at 22.17 IWST.[47] The public was quite shocked in responding the inauguration cancellation.

Although the suspension Decree is likely to be careless, according to the writer, this case has given an adequate idea of how the suspension institution may be inhibiting the smooth of governance, regarding that the reason for the dismissal and appointment of a definitive governor has been based on the court Decree which has a permanent legal power and in the verdict, the Judge

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suspension of TUN sued (Article 67 of law number 5 year 1986) dated December 7, 2005, and technical guidelines for Administrative and Technical State Administration Book II Edition of 2009.

[40] Related to this, writer disagrees. This is in contrast with the view Indroharto which allows the granting some requests schorsing. According to the authors partial schorsing should be possible to be aligned with the interests of the claimant directly.

[41]Dani Elpah, Penundaan Pelaksanaan Keputusan Tata Usaha (paper), presented at the Justice Training Administrative Courts, Training Kundil MA RI, Megamendung 2011Dani Elpah, Penundaan Pelaksanaan Keputusan Tata Usaha Negara (makalah), disampaikan pada Pelatihan Hakim Peradilan Tata Usaha Negara, Diklat Kumdil MA RI, Megamendung, 2011.

[42] The Supreme Court, Second Manual Book..Op.cit. pp. 51

[43] Yos Johan Utama, Op.Cit. pp. 282.

[44] Lintong O. Siahaan, Op.cit. p.47.

[45] Ibid. p. 280-282.

[46] Interview with Judge Administrative Court on July 8, 2016.

[47] Read Kompas, *Pelantikan Junaidi Batal*, retrieved from: http://regional.kompas.com read/ 2012/05/16/ 02250156/ pelantikan.junaidi.batal. Read also Ditjen Bina Keuangan Daerah Kemdagri, *Tusrel Kembali Kelakar Pemerintah*, retrieved from : http://keuda.kemendagri.go.id/berita/detail/422-tusrel-kembali-kelahkan-pemerintah. Deputy coordinator of Indonesia Corruption Watch (ICW) Emerson Yuntho said the administrative court judges do not have the option for the anti-corruption agenda. This ruling would hamper the course of the process of local governance.

Court of Jakarta State Administrative had rejected the lawsuit.[49] In fact, in the course of examination, the Judge Court Suspension Decree No. 73/G/2012/PTUN.JKT, dated on May 14, 2012 has also been repealed on the same day as the final verdict by the Judge Court Decree No: 73/G/2012/PTUN-JKT, dated on November 29, 2012 on the Revocation of Suspension Decree of the Dispute Object.

Although not required by Article 67 of Administrative Court Act, the court should duly relate their arguments with the question, if the plaintiff is likely to win.[50] A balance between whether the plaintiff will win or not can be seen from the formal aspects of the suit (e.g. absolute authority, grace period, interest, etc), and also the temporary research on the subject matter. Surely, a consideration of the possibility for the plaintiff to win or not must not be included in the arguments of suspension Decree, for formally indeed, the consideration of a suspension request does not touch the subject matter. For the arguments are not included, it is not easy to find the judges motivation and attention on the questions, if the plaintiff has a legal interest to file a lawsuit and if the court has a jurisdiction to hear the case anyway. When a lawsuit is obvious will not be granted or will otherwise not be accepted, why then a suspension of Dispute Object Suspension Decree Revocation is imposed.

In the context of comparison, in the French administrative judicial system, in addition to the reasons for the urgency situations which are difficult to be restored when a Decree is made, a judge must also consider that the cased filed is serious and the pertinent Decree is likely to be cancelled in the final Decree.[51] Although it is not allowed to be written in the consideration for suspension, judges in French also consider about the chance of winning in the later Decree. At least, intuitively, a judge can at a glance figure out those chances.[52]

Citing the view from Bednar, a suspension institution and an imposition of suspension Decree are something that often causes controversy.[53] Therefore, the court must use its authority with full of prudence and caution. A too easy imposition of suspension and even sometimes beyond the boundaries may reduce the legitimacy of the suspension Decree imposition issued. It may an impact, the court authority is at stacke as a consequence of non-compliance phenomenon by officers/defendets against the court order.

The existence of a suspension institution (*schorsing*), the Decree of state court administrative should be elaborated and implemented very carefully to merely provide a balance quality between the public interest protection with an individual citizen interest. When, to protect the interest of an individual citizen will result in the displaced of public interest, the judge must give priority to the public interest and exclude the individual.[54]

D. System Failure in the Execution of the Decree of Decision Implementation Suspension

Eventhough it faces some resistances from the government and various reactions from media, the case of this request for the decision implementation suspension is classified as successful, since it is obeyed by both the government and the Ministry of Domestic Affairs to take a stand to cancel the inauguration of the definitive governor. Yet on the other hand, in the real filed, there are lots of decrees on decision implementation suspension that are not obeyed by the defendents. What was explained previously by Imam Soebechi in relation to the considerations of whether or not a decree is later executed, the writer assumes that it is intended more as an attitude of keeping the judiciary's dignity. The non-compliance of officials against the court order has created the court's dignity as an access of people to seek Justice can be deteriorated.

The compliance of government administrative officials in relation to the *schorsing* imposition becomes very important to be noticed. Corresponding to the properties of *schorsing* decree generally accepted (*erga omnes*), then the compliance on the decision implementation suspension is not only related to the officials named as defendants, but also to the other public administrative officials which have legal correlation with the publication of decision which is in *schors* cancelled. The State Administrative officials named as defendants must realize that the stand of defiance against the *schorsing* decree of the court can affect a very peculiar law for the implementation of government at a later day. Noncompliance of public administrative officials against court *shorsing* can create subsequent decisions which will be legally problematic.

Some cases of disobedience against the court decree on the suspension of decision can be exemplified in the following cases. In the cases of ratification of Golkar Party management (Abdurizal Bakri, et al. against the Ministry of Justice and Human Rights and Agung Laksono, et al)[55] and the case of ratification of United Development Party (Suryadharma Ali against the Ministry of

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[49] Read the Jakarta State Administrative Court Verict No: 73-G/2012/PTUN-JKT. Read on http://putusan.mahkamahagung.go.id/putusan/d1175236245633ea61137893fc8d032cf.

[50] Adriaan Bedner. Op.Cit. pp.154.

[51] JM. Auby translated by Lintong O. Siahaan, Op.Cit. pp. 37.

[52] It has been mentioned by the Judge Chief of *Conseil de Eta* in judges administrasion discession in INdonesia. SeeLintong O Siahaan, Ibid, p.48.

[53] Ibid.

[54] Supandi, (2010). *Ganti Rugi Akibat Tindakan Pejabat Pemerintah Dalam RUU Administrasi Pemerintahan Dan Prospek Peradilan Tata Usaha Negara*, dalam Sophia Hadyanto (editor) *Perudgasa Kebijakan Hukum Pasca Reformasi Dalam Rangka Ulah ke-80 Prof. Solly Lubis*, PT. Sofendia, Medan, p. 317-318.

[55] Case Number: 62 / G / 2015 / PTUN-JKT. Administrative Court in Jakarta. Determination of the suspension No. 62 / G / 2014 / PTUN-JKT April 1, 2015. Currently, the case is already legally binding with amar best Defendants

Justice and Human Rights (Romahurmuziy, et al)[55] in Jakarta State Administrative Court appears that the implementation suspension of the Decree of Ministry of Justice and Human Rights on the ratification of party management is not so ignored by the executive, both by the Ministry of Justice and Human Rights as the defendant and by other state institutions, here are the Election Commission and the Local Election Comission. It is of course different from the court order that calls for the decree of suspension that has been read by the Judge Court of Jakarta State Administrative Court as the bases for the Election Comission in the process of simultaneous local election in 2015.[56]

In response to the case, the Ministry of Justice and Human Rights stated that he would not execute the court decree and in an awaiting position for a further examination concerning on the subject matter of the lawsuit against the issued Decree of Minister and would not undertake any legal action after the issuance of the decree of the subject suspension No 62/G/2015/PTUN.[57] Meanwhile, the Election Comission itself as the most interested state institution in the rule of law of the political party management validity took a legal breakthrough and compromised way by issuing an Election Comission Rule No 12 Tahun 2015. The compromy was realized with the possibilities for the both sides within the disputed parties to nominate the same candidate together.[58]

The legal uncertainty in the execution of the suspension determination occurred because of legal vacuum execution. Administrative Court Act did not regulate how the implementation of this suspension. With the absence of execution law, the implementation handed over to the judicial practice to be guided by the provisions of the execution of a legally binding decision. Related to that case, in Book II of Technical guidelines for Administrative and Technical State Administrative Court issued by the Supreme Court of 2000 confirmed that, on the suspension which is not complied by the defendant, in casuistry, Article 116 in the Law on Administrative Court can be applied as it is applied to decisions that have legally binding.

Relating to the *beleid* of Supreme Court, the question of the possibilities in doing analogy toward those cases emerges. According to the writer those cases are difficult to be done because the character on suspension determination and dictum verdict that have permanent legal force is obviously deffierent. Consequently, if the provisions which specifically regulate the execution of the verdict applied to execution determination, it will malfunction. To streamline the execution decision of Article 116 of Law Administrative Court cannot walk properly until today, then how these provisions can be applied to the execution of a court suspension. Hence, a special arrangement of the execution suspension is needed to give legal certainty for the litigants.

Without the provision of forceful measures against the state administrative officials who are indifferent to the suspension decree, the mechanism of execution on the decision suspension currently tends to put emphasis more on the moral responsibility. The enforcement towards the court suspension decree is put more on *law awareness* of the public administrative officials. Therefore, well legal culture and government's bureaucrats inside the government organization itself are required. According to Philipus Hadjon, one of the obstacles and the success of decision implementation (including the decree of suspension) are determined by the existence of the arrogance of power of government officials.[59]

The uncooperative state administrative official to the delayed decision is a form of insult to the judicial power to the state administration. This disobedient attitude can be caused by several factors, one of the factors is the ineffectiveness of sanctions institutions[60], although it is set in the law, but still left as the unimplemented law. Besides, most of the state administration officials still think that state administrative is still guided by the spirit of win-lose, not within the framework of the rectification or correction to the actions of those who violate the law.[61]

Besides the arrogance of the state administration officials, the lack of trust from the officials of the state administration through the judiciary is also one of reasons why the defendant reluctant or even ignoring the court decision, either in suspension or in the verdict. Trust or distrust towards the judiciary can arise because some reasons, the factor of the quality of the argument or legal considerations stipulation or court order and the judicial corruption in the judiciary. The failure this institution at the level of the execution showed that this institution is not able to guarantee protection for citizens seeking justice.

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[55] Case Number: 217 / G / 2014 / PTUN-JKT. Administrative Court in Jakarta. Determination of the suspension in this case is the determination of No. 217 / G / 2014 / PTUN-JKT, on 6th of November 2014, Conceming Determination Dispute Delays Implementation object. Currently the case is already legally binding with amar beat Defendants.

[56] In consideration of its decision the judges stated as follows: Considering that in order to avoid any lack of stewardship of the DPP Golkar Party as a result of delayed and the cancellation of the decree disputed by the Court, the Court affirmed that the DPP Partai Golkar results of the National Conference of Pekanbaru by the Minister of Law and Human Rights No. , M.HH-21.AH.11.01 Year 2012 dated September 4, 2012 on the Ratification Composition Composition and Personnel Golkar Party Bhakti period from 2009 to 2015, led by Chairman Ir. H. Baknie and Idrus Marham as the Secretary General is in force, during the Stipulation No. 62 / G / 2015 / PTUN JKT dated 04.01.2015 was declared valid and enforceable and the case is not binding. See Decision No. 62 / G / 2015 / PTUN-JKT dated 05.18.2015.

[57] Tribunnews, *Sikapi Putusan PTUN, Menkumham Tunggu Pemeriksaan Lanjutan*, April 1st 2015, retrieved on http://www.tribunnews.com/nasional/2015/04/01/sikapi-putusan-ptun-menkumham-tunggu-pemeriksaan-lanjutan.

[58] See full description in Article 36, more specifically in paragraph (4) Commission Regulation No. 12 Year 2015 on the Amendment of General Elections Commission Regulation No. 9 of 2015 on Nominations Election of Governor and Vice Governor, Regent and Vice Regent, and / or the Mayor and Deputy Mayor

[59] Philipus Mandiri Hadjon. *Makalah Pembanding Penerapan Undang-Undang Nomor 5 Tahun 1986*, presented on Seminar Lokakarya Pelaksanaan Peradilan Tata Usaha Negara, Jakarta, 20 Januari 2001, p.1.

[60] Supandi, (2005). Kepatuhan Hukum Pejabat dalam Mentaati Putusan Pengadilan Tata Usaha Negara Medan. Doctoral Dissertation Legal Studies Program Graduate School of the University of North Sumatra.

[61] Ibid

E. Conclusion

The existence of the *schorsing*/ the delay implementation of the Decree of the state administration impose limits (*restrictoren*) the enactment of *praesumptio iustae causa* that is balance between public and individual interests. The provision of the postponement in the Administrative Court Act is to provide a guarantee for the plaintiff in order to avoid irreparable losses as a result of the implementation of the decision later.

The lack of institutional management in the Administrative Court Act causes the large authority to the judge to create the standard by him that may leads the confusion. Therefore the court should use this authority with prudence and caution. The easy and rash imposition of the suspension may reduce the legitimacy of the imposition of the determination of suspension issued.

Another obstacle faced by the postponement institution is the adequate execution. As the consequence, it is common that postponement decision ignored by officials of the state administration. This condition causes the postponement institution loss its legitimacy and cannot guarantee protection to the seeker of justice.

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THE MALFUNCTION OF JUDGEMENT POSTPONEMENT INSTITUTION (SCHORSING) IN THE STATE ADMINISTRATION COURT SYSTEM

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