

Philosophical Implications of Ex-Tunc and Ex-Nunc Testing in State Administration Disputes

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ABSTRACT

The constitution in all countries can almost be said to have reflected the division of legislative, executive, and judicial powers. The idea of separation of powers is the idea of Montesquieu which teaches the importance of the separation of powers in a country. The State Administrative Court as one of the judicial powers (judicative) has the authority to test the validity of the State Administration Decree which is the object of the dispute can be tested ex-tunc or ex-nunc. Ex-tunc or ex-nunc testing is conducted before the judge gives the verdict. This research is a doctrinal research with a philosophical approach. The method used is qualitative. The first problem that arises is how the judge's considerations to apply ex tunc or ex nunc testing. The second problem, how philosophical implications with the implementation of ex tunc or ex nunc testing. The first objective of the study was to analyze the judges' considerations of applying ex tunc or ex nunc tests. The second objective is to analyze the philosophical implications of ex tunc or ex nunc testing. The results revealed that ex tunc testing meant that testing began from the preparations for the formation, the formation process until the issuance of the State Administration Decree. In other words ex tunc testing is retroactive. Ex nunc testing is done by taking into account the things that are happening right now by the passage of time the decision has been implemented and there have been changes both changes in regulations, conditions and government policies relating to the contents of the State Administrative Decision being sued. The philosophical implication is to realize justice through a state administration court decision.

Keywords: *philosophical implications, ex-tunc, ex-nunc*

1. INTRODUCTION

The Supreme Court is the executing body of judicial power in the State of Indonesia, as stated by the provisions of Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia "Judicial power is an independent power exercised by the Supreme Court and the judicial bodies under it in the general court environment, religious court environment, military court environment, and state administrative court environment" [1].

The state administrative court environment consists of the state administrative court and the state administrative high court, which are legally declared by the provisions of Article 8 of Law Number 5 of 1986 concerning State Administrative Court. The judiciary consists of [2]:

- a. State Administrative Court, which is a court of first instance;
- b. State Administrative High Court, which is an appellate court.

The competence of the state administrative court is limited by absolute competency and relative competence, so for judges of the state administrative court and judges in other judicial environments competence is a matter of great concern in the trial process. The other side that is of concern to the state administration court judge in the trial process is the subject and

object of the state administration dispute. The subjects of state administrative disputes consist of the plaintiff and the defendant. The plaintiff is a person or legal entity while the defendant is a state administrative body or official. The object of a state administration dispute is a state administration decision issued by an authorized state administrative body or official. The plaintiff feels that his interests have been impaired by the issuance of the state administrative decision [3].

With the issuance of a state administration decision that is considered to be detrimental to the interests of the plaintiff, Law Number 5 of 1986 concerning State Administrative Court and its amendments provide the plaintiff with an opportunity to file a claim with the state administration court.

Case investigation before the hearing will be conducted to test the administrative decisions of the sued state. Testing of state administrative decisions sued whether to be conducted ex tunc or ex nunc is the judge's authority in accordance with applicable regulations. This background for the writer raises two problems. First, how is the legal consideration for implementing ex tunc or ex nunc testing. The second problem, how philosophical implications with the implementation of ex tunc or ex nunc testing.

2. BACKGROUND

The research method used is qualitative philosophical approach. Qualitative research involves the use and collection of various empirical materials, including case studies, interviews. This is consistent with the characteristics of the qualitative method that makes researchers as key instruments, so that researchers collect data including conducting interviews [6] with Judges of the Jakarta State Administrative Court.

Ex tunc and ex nunc tests are known in the State Administrative Court Procedure Law which is a method of examining or testing a state administration dispute. Ex tunc testing is retroactive, meaning testing of state administrative decisions in the State Administrative Court starts from the preparation for the establishment, process until the issuance of state administrative decisions. Ex nunc testing applies after or in the future it means that the test is related to the consequences of what will arise from the issuance of a state administration decision. Ex tunc or ex nunc test results are written in the legal consideration of a court decision.

Legal considerations are an important part of court decisions, because legal considerations are arguments or reasons used by judges as judges' considerations before deciding a case. Legal considerations contain analysis, arguments, opinions, legal conclusions from the judge who examined the case⁴. Analysis is carried out on the subject matter based on the evidentiary law, with several measuring instruments, namely: does the evidence submitted by the plaintiff and the defendant meet the formal and material requirements; evidence of which party reaches the minimum level of proof; the arguments of any lawsuit and the arguments of whatever rebuttal is proven; the strength of proof of evidence submitted by the parties.

The application of ex nunc testing can be considered in the Decree of the Jakarta State Administrative Court No. 228 / B / 2016 / PT.TUN.JKT whose legal considerations do not agree with the legal considerations of the Jakarta State Administrative Court which applies ex tunc testing. Legal considerations of the decision of the Jakarta State Administrative High Court Number 228 / B / 2016 / PT.TUN.JKT: Whereas the next problem is if the aforementioned conditions the Court accepts the lawsuit submitted and tests the validity of the a quo State Administration Decree with the laws and regulations. invitation and with conditions at the time the decision was issued or tested ex-tunc, while over time the decision has been implemented and there have been changes both changes in regulations, conditions and government policies regarding the contents of the State Administrative Decision sued, then canceling it will raises new problems, because it will definitely be difficult to repair or restore the physical conditions that have already changed to their original state before the State Administrative Decree is implemented. That the impact would actually be detrimental to the government and legally the execution of the cancellation would not be possible.

Decision of the Supreme Court Number 92 K / TUN / LH / 2017 in one of its legal considerations states that in the deliberations of the Panel of Judges there are dissenting opinions related to ex-tunc testing of the object of the dispute: "That against the consideration of the High Administrative Court of the State Administration Jakarta, which basically states the cancellation of the decision by ex-tunc testing and the decision has changed the situation and policy, will lead to new problems, because it is difficult to return to its original state. The consequences of the decision remain valid and the losses incurred are compensated". The following table explains the differences in testing by ex tunc and ex nunc.

Testing	Legal Consideration	Case Number
Ex tunc (retroactive)	<ul style="list-style-type: none"> ❖ retroactively, meaning: ❖ Examination or testing of state administrative decisions that are the object of the dispute by referring to the laws and regulations as well as the conditions at the time the decision was issued. ❖ or the examination of the state administrative decision which is the object of the dispute starts from the preparation until the issuance of the state administrative decision. ❖ As a result of the law the disputed state administration decision was declared null and void. 	Decision of the Jakarta State Administrative Court Number: 193/G/LH/2015 /PTUN-JKT
Ex nunc (prospective)	<ul style="list-style-type: none"> ➢ Valid after or in the future, meaning: ➢ An examination or examination of the state administrative decision which is the object of the dispute is related to the consequences of what will arise from the issuance of the state administrative decision. ➢ Applied after the existence of Article 87 of Law Number 30 Year 2014 concerning Government Administration. ➢ As a result of the law the disputed state administration decision was declared null and void. 	Jakarta State Administrative High Court Decision Number: 228/B/2016/PT. TUN.JKT

The philosophical implication or involvement with the implementation of ex tunc and ex nunc testing is to realize justice through the decision of the state administration court. The justice that must be given by the judge in his decision is substantive or procedural justice. Judges when evaluating or testing a lawsuit must be based on the situation when the state administrative decision sued (ex tunc) must also pay attention to changes in circumstances that have occurred (ex nunc) or the judge must not deny the reality of changes that happened.

Therefore there is a sharp difference between the assessment of the lawsuit and the dictum which is then the final verdict [4]. The basic assumption of substantive justice is justice related to the content of judges' decisions in examining, adjudicating and deciding a case that must be made based on considerations of rationality, honesty, objectivity, impartiality, without discrimination, and based on conscience (judge's conviction). The results of the measurement of substantive justice are if the measurement results are positive, then they are considered to meet substantive justice, conversely if the measurement results are negative then there is no substantive justice [5]. The basic assumption of procedural justice is justice bound by the protection of the legal rights of the parties concerned in each stage of the proceedings in court. The results of the measurement of substantive justice are if the measurement results are positive, then it is considered to meet procedural fairness, conversely if the measurement results are negative then there is no procedural fairness [6] [7].

[7] John W Creswell. (2016). *Research Design*. Yogyakarta: Pustaka Pelajar.

3. CONCLUSION

Examined by tunc and ex nunc are known in the procedural law of the State administrative court which is a method of examination or testing of a state administration dispute. Ex tunc testing is retroactive, meaning testing of state administrative decisions in the State Administrative Court starts from the preparation for the establishment, process until the issuance of state administrative decisions. Ex nunc testing applies after or in the future it means that the test is related to the consequences of what will arise from the issuance of a state administration decision.

Philosophical implications with the implementation of ex tunc or ex nunc testing on state administrative decisions that are the object of the dispute is to provide justice for the parties through the judge's decision. Justice in question is substantive and procedural justice.

ACKNOWLEDGMENT

The authors would like to thank the Faculty of Law of the Islamic University of Jakarta which has supported morally and materially by sponsoring the conference and writing this paper.

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