



Concept and Implementation of Dwangsom as A Forced Execution of PTUN Decisions In Indonesia: Comparative Perspective in Thailand and The Netherlands

Zainatul Ilmiyah¹, Vina Septi Megita², Virga Dwi Efenedi³

¹UIN Sunan Ampel Surabaya (zainatul.ilmiyah@uinsby.ac.id)

²UIN Sunan Ampel Surabaya (veniseptimegita@gmail.com)

³Utrecht University (v.virgadwiefendi@students.uu.nl)

Abstract: The existence of provisions regarding Forced Money/Dwangsom in the implementation of PTUN Decisions provides legal certainty for the public to obtain their rights. However, in its implementation questions arise, how the concept of implementing dwangsom was implemented and where the source of funds used came from. So in practice very few courts apply forced money. Based on the results of normative research using statutory, historical, comparative and conceptual approaches, this research carried out an analysis of the concept and application of dwangsom in PTUN in Indonesia and provided a comparative picture of the regulation of forced money in several countries. In this research, it was found that the concept of dwangsom in the execution of PTUN decisions began to be regulated in article 116 of Law Number 51 of 2009. Based on a comparative analysis of the concept of dwangsom in Thailand and the Netherlands, it was found that the decision execution mechanism applies *mutatis mutandis* to the provisions of civil procedural law. The institution authorized to implement forced money is determined hierarchically by the officials above it. Even though the amount of the dwangsom money is not included in the *petitum*, the judge can carry out *rechterlijk* because basically the judge is bound by the principle of *ius curia novit*.

Keywords: Decision, PTUN, Dwangsom

1. INTRODUCTION

The constitutional life of the Indonesian nation cannot be separated from the law. On the other hand, the idea of a welfare state emerged amidst the development of the rule of law and democracy. In its development, the idea of a welfare state requires two important roles from the government and the people. For the ideal of establishing a clean and authoritative government to be realized, all state civil servants (bureaucrats) are obliged to implement the principles of good governance. Safri Nugraha et al., State Administrative Law, 198. State officials in exercising their authority are equipped with the principle of legality and the principle of *freis ermessen* or discretion. (Asyikin, 2019, p. 185) On the other hand, to carry out checks and balances mechanisms in government institutions, there is a state administrative court which was formed to carry out repressive supervision of the actions of government officials that have legal consequences. People have access to fight for their rights if they feel that their rights have been violated by state administrative decisions. Court decisions are norms aimed at concrete events which are called specific norms. (Fachruddin, 2004, p. 231) This means that the government's decision has permanent and binding legal force where the decision must be implemented by the parties.

The execution of decisions of the State Administrative Court by state administrative officials is a responsibility inherent in their authority. This is because in the use of government authority, in line with one of the principles in the rule of law "geen



bevoegdheid zonder verantwoordelijkheid or there is no authority without responsibility."(HR, 2007, p. 108)However, in practice there are still many cases of state administration officials who lose in trials and do not implement PTUN decisions. In Law Number 51 of 2009 concerning State Administrative Courts, an instrument for executing PTUN decisions has been accommodated, which is more specifically expressed in article 116. If the defendant does not carry out an inkracht court decision, the state administrative official will be subject to a forced money instrument or dwangsom. and administrative sanctions.(Law, 2009)However, in practice the question arises as to which institution has the authority to implement the dwangsom mechanism, how much must be paid by the defendant, the further problem is whether the forced money comes from the personal funds of the official concerned or the institution that issued the decision. and what is the mechanism for implementing forced money payments?

Based on the explanation above, in this article an analysis will be carried out regarding the Concept and Application of Dwangsom as an Effort to Force the Execution of PTUN Decisions in Indonesia: A Comparative Perspective in Thailand and the Netherlands

2. Research methods

Using normative juridical research methods, this article specifically discusses the concept and application of dwangsom by the State Administrative Court (PTUN) in Indonesia. The approach used in this paper is a comparative, conceptual and statutory approach. Through primary, secondary and tertiary legal materials, data was obtained regarding the concept of dwangsom in legal dynamics in Indonesia, the concept of dwangsom in Thailand and the Netherlands, and comparative analysis.

3. FINDINGS

3.1 History of Dwangsom Regulations in Law in Indonesia

In Indonesia, the history of the emergence of the dwangsom concept begins with the instrument for executing civil court decisions. Indonesia enforces provisions regarding dwangsom based on the Dutch Rv. On April 11 1932 the Dutch government submitted a draft law regarding the confiscation of movable property in the hands of third parties, hostages/gijzeling and forced money/dwangsom. And specifically regarding the institution of forced money, the Dutch government is based on the vision of the Limburg Committee that forced money as a means of execution must be strictly separated from compensation, which in French law deviates from French jurisprudence.(Mulyadi, 2001)Even though there was debate regarding the difference between dwangsom and compensation, finally this regulation regarding dwangsom was promulgated by the Dutch minister of justice, Mr. J Donner on December 29, 1932 in Stb. No. 676, namely the Brv provisions plus articles 611a and 611b. These two articles were then included in the Brv which applies in Indonesia, namely Stb. 1938 No. 360 which was previously known as Articles 606a and 606b.(Tumpa, 1992, p. 4)

In the concept of state administrative law, the term dwangsom is not yet known in Law Number 5 of 1986. The execution of decisions only uses a hierarchical tiered warning mechanism or what is usually called floating form. Implementation of PTUN Decisions by State Administrative Bodies/Officials by carrying out hierarchical warnings (floating form) as regulated in Article 116 of Law Number 5 of 1986, apparently has not been effective in forcing TUN Officials to implement the Decisions of State Administrative Court

Judges.(Abdullah, nd) The emergence of provisions regarding dwangsom began in Law Number 9 of 2004, and was updated in Law Number 51 of 2009.

3.2 The concept of dwangsom in Law Number 51 of 2009 concerning State Administrative Courts and the Government Administration Law

In the existence of administrative courts in Indonesia, the concept of dwangsom began to exist when Law Number 9 of 2004 was enacted, which was then amended to Law Number 51 of 2009 concerning State Administrative Courts. The specific dwangsom regulations are contained in article 116 which discusses the procedures for carrying out the execution of state administrative court decisions.

The concept of dwangsom in the administrative law regime in Indonesia can be concluded that only decisions that are condemnatory in nature can be made dwangsom.(Fachruddin, 2004)So it can be concluded that the concept of dwangsom in the administrative law provisions applicable in Indonesia is accessory and additional. If the judge has given a decision to a state administrative official to revoke the KTUN and issue a new KTUN, and the official concerned does not carry it out, dwangsom can be applied. If the relevant official voluntarily implements the court decision then the dwangsom will automatically be invalid.(Tumpa, 2010, p. 18)

Meanwhile, the concept of dwangsom in Law Number 30 of 2014 concerning Government Administration is included in the classification of sanctions for government actions. The definition of forced money in this provision is an amount of money deposited as collateral for decisions and/or actions to be implemented so that when the decision and/or action has been implemented the forced money is returned to the relevant government official.Law, "Law Number 30 of 2014 concerning Government Administration" (Jakarta, 2014), Article 81 paragraph (2) letter a.The dwangsom provisions are further clarified in Government Regulation Number 48 of 2016 concerning Procedures for Imposing Administrative Sanctions on Government Officials.

This regulation stipulates that the official who has the authority to impose administrative sanctions for committing administrative violations is a higher official, in other words his authority is carried out in a specific hierarchical manner as regulated in article 12 of Government Regulation Number 48 of 2016. However, there are still provisions regarding the amount of dwangsom that must be paid is not regulated in this regulation including the source of funds used in dwangsom payments.

3.3 Concept and Application of Dwangsom in Thai and Dutch Law

Thailand is a constitutional monarchy that adheres to a civil law system. In carrying out the execution of decisions on administrative cases, the court has several authorities which are accommodated in article 72 of the Act on Establishment of Administrative Courts and Administrative Court Procedure, BE 2542 of 1999. In this provision the judge can order the revocation of a decision or withhold an action in whole or in part that is issued by an administrative agency or state official who has committed an unlawful act.(Act on Establishment of Administrative Courts and Administrative Court Procedure, be 2542 of 1999, 1999, sec. 72(1))Order the head of the administrative agency or state administrator concerned to carry out the task within the time determined by the State Administrative Court, in the case filed where it is alleged that the administrative agency or state administrator neglected their duties or carried out their duties with an unreasonable delay.(Act on Establishment of Administrative Courts and Administrative Court Procedure, be 2542 of 1999, 1999)In Thailand's administrative courts, there is a



mechanism for warnings and sanctions for defendants who do not comply with trials. In an examination conducted by a rapporteur judge, and in the event that the accused official does not heed the rapporteur judge's order or does not comply within the specified time, then the court can take action:

- a. Report the matter to his superiors or to the Prime Minister for correction, or
- b. Imposing coercion or imposing disciplinary action, or
- c. Without examination, the court sentenced him to prison on the grounds of contempt of court.(Maulana, nd)

Decisions regarding the annulment of official decisions must be published in the state gazette (Goverment Gazette). If the court decision concerns an order to do or not to do an act, then the court can execute it using the Civil Procedure Law *mutatis mutandis*.(Act on Establishment of Administrative Courts and Administrative Court Procedure, be 2542 of 1999, 1999)So that the *dwangsom* applied in cases of Thai State Administrative Court Decisions follows the provisions of the Civil Procedure Code.

Meanwhile in the Netherlands the concept of *dwangsom* is known as *astreinte*. The provisions regarding forced money (*dwangsom*) are regulated in articles 5.32 to 5.36 *Algemene Wet Bestuurrecht (Awb)* or in English known as the General Administrative Law Act (GALA) which basically explains that If the government does not implement decisions that are its obligations, it can be subject to *astreinte*. The longer the decision of the administrative justice body is not implemented, the greater the burden of forced money that must be borne by TUN officials. *Astreinte* is paid to government agencies that are authorized to manage *astreinte*.(General Administrative Law Act/*Algemene Wet Bestuursrecht*, nd, sec. 5(34) b.2)The obligation to pay *astreinte* remains in effect as long as the execution of the decision has not been carried out.(General Administrative Law Act/*Algemene Wet Bestuursrecht*, nd)

In the practice of state administrative justice, *astreinte* can also be used by judges if State Administrative Officials do not carry out decisions ordered by the judge. This is also regulated in article 8.72 *Algemene Wet Bestuurrecht (Awb)* or General Administrative Law Act (GALA). This provision states that *astreinte* payments must be paid by a legal entity appointed by the court to a party appointed by the court. The procedure for implementing *astreinte* in the execution of a judge's decision applies *mutatis mutandis* as in articles 611a to 611i of the Code of Civil Procedure or the Code of Civil Procedure which applies in the Netherlands.(General Administrative Law Act/*Algemene Wet Bestuursrecht*, nd)

3.4 Analysis of the Application of *Dwangsom* as an Effort to Force the Execution of PTUN Decisions in Indonesia

The specific mechanisms and provisions for executing decisions of the State Administrative Court are contained in article 116 of the PTUN Law. For decisions of the condemnatoir type, if the defendant government official does not carry out the court's order to implement the decision, he or she may be subject to coercive measures in the form of forced money and other administrative sanctions.(Undang-Undang, 2014) Provisions for implementing sanctions against government officials who are negligent in not carrying out state administrative court decisions contained in the Government Administration Law provide more varied options, not only coercive measures in the form of payment of forced money or compensation, but the official concerned can be subject to temporary dismissal from office. .



Even though the PTUN Law does not specify who has the authority to implement the forced money mechanism for government officials who are defendants, Government Regulation Number 48 of 2016 stipulates that the officials who have the authority to carry out administrative sanctions are based on hierarchical positions, namely the superior officials of the defendant. Government Regulation, "Government Regulation Number 48 of 2016 concerning Government Regulations Concerning Procedures for Imposing Administrative Sanctions on Government Officials," article 18.

Furthermore, to answer the issue of the burden of payment of forced money (dwangsom) in the execution of PTUN cases, there is a theory of responsibility according to Kranenburg and Vesting, namely: Yovita Christian Assikin et al., "Responsibility of Land Deed Officials Regarding the Cancellation of Sale and Purchase Deeds in View of Applicable Legislation," *Acta Diurnal: Journal of Notarial Law, Unpad Faculty of Law, Vol 3 (2019): 89.*

First: *Fautes Personelles* theory, this theory explains that responsibility for losses to third parties is borne by the official whose actions have caused the loss. According to this theory, the burden of responsibility is directed at humans as individuals;

Second: *Fautes de Service* Theory, namely a theory which states that losses to third parties are borne by the agency or official institution concerned.

Meanwhile, Supandi is of the opinion that if an official works to carry out state duties, and in the course of these duties causes harm to people or society, as long as the duties are carried out in procedures justified by law, then the payment for such losses can be borne by the state. This error is classified as an official error. Ujang Abdullah, "Implementation of Forced Legal Measures in the Form of Forced Money Payments in State Administrative Courts." It would be different if the loss was due to disobeying the judge's *inkracht* decision, then it could be equated with disobeying the law. Therefore, the risk of non-compliance with the law cannot be borne by state finances, but must be borne personally by the person in office. This theory is in line with the 'error' theory which was developed from the jurisprudence of the *Council d'Etat* which essentially differentiates between errors service (*Faute de Serve*) and personal mistakes (*Faute Personnelle*). Ujang Abdullah, "*Implementation of Forced Legal Measures...*", 6.

In the custom of filing a lawsuit, the plaintiff often includes a demand for payment of forced money or *dwangsom* in the *petitum* of the lawsuit along with the amount of *dwangsom* that must be paid. Even though the lawsuit *petitum* does not include claims regarding *dwangsom*, the judge can determine the amount of forced money that must be paid by the government official concerned. This is related to the principle of *Ius Curia Novit*. In determining the decision on the amount of forced money that must be paid, the judge can explore the legal values that exist in society and previous decisions without abandoning justice. Forced money requires the ability of the sanction recipient to carry out orders. In this case, if the recipient of the sanction is not the party who has the power to carry out the repair/recovery order. Andri Gunawan Wibisana, "On Tails That Are No Longer Poisonous: Conceptual Criticism of Administrative Sanctions in Environmental Law in Indonesia," *Indonesian Environmental Law Journal* 6, no. 1 (2019): 54 <https://docplayer.info/71504638-Tiga-tahun-direktorat-jenderal->

In contrast to the provisions on the concept of executing decisions and *dwangsom* in Indonesia, in Thailand and the Netherlands the use of *dwangsom* applies widely. And in the execution of administrative court decisions, legal regulations in Thailand apply *mutatis mutandis* to civil procedural law. So that the process of implementing *dwangsom* also applies to the implementation of civil procedural law. While the implementation of



PTUN decisions, especially in the implementation of *dwangsom*, there is still a legal vacuum, this does not mean that this concept is ignored. Judges as law enforcers can carry out *Rechtvending* in the implementation of *dwangsom*.

4. CONCLUSION

In administrative law, the concept of *dwangsom* is contained in Law Number 51 of 2009 concerning PTUN on the mechanism for executing court decisions. After the enactment of the Government Administration Law, the concept of *dwangsom* was used to provide moderate sanctions for the actions of government officials who violated them. However, there are no definite legal provisions for the implementation and mechanism of *dwangsom*.

In Thailand and the Netherlands, the decision execution mechanism applies *mutatis mutandis* in civil procedural law. The concept of *dwangsom* payments in these two countries is imposed by the courts on administrative institutions as long as they carry out their authority. The mechanism for implementing *dwangsom* in Indonesian PTUN decisions only applies to decisions that are condemnatory in nature. The institution authorized to implement forced money based on court decisions is determined hierarchically by the officials above it. Regarding the amount of *dwangsom* money, even if the plaintiff does not include it in the *petitum*, the judge can carry out *rechtvinding* because basically the judge is bound by the principle of *ius curia novit*.

BIBLIOGRAPHY

- Abdullah, U. (n.d.). *Penerapan Upaya Hukum Paksa Berupa Pembayaran Uang Paksa Di Pengadilan Tata Usaha Negara*.
- Assikin, Y. C., Abubakar, L., & Lubis, N. A. (2019). Pertanggungjawaban Pejabat Pembuat Akta Tanah Berkaitan dengan Dibatalkannya Akta Jual Beli Ditinjau dari Peraturan Perundang-Undangan yang Berlaku. *Acta Diurnal : Jurnal Ilmu Hukum Kenotariatan Fakultas Hukum Unpad*, 3, 80–97.
- Asyikin, N. (2019). Freies Ermessen Sebagai Tindakan atau Keputusan Pemerintah Ditinjau dari Pengujiannya. *Diverdi Jurnal Hukum*, 5(2).
- Fachruddin, I. (2004). *Pengawasan Peradilan Administrasi Terhadap Tindakan Pemerintahan*. PT Alumni.
- General Administrative Law Act/*Algemene wet bestuursrecht*.
- Act on Establishment of Administrative Courts and Administrative Court Procedure, b.e. 2542 tahun 1999, Pub. L. No. 2542, 1 (1999).
- Gunawan Wibisana, A. (2019). Tentang Ekor yang Tak Lagi Beracun: Kritik Konseptual atas Sanksi Administratif dalam Hukum Lingkungan di Indonesia. *Jurnal Hukum Lingkungan Indonesia*, 6(1), 41–71.
- HR, R. (2007). *Hukum Administrasi Negara*. PT Raja Grafindo Persada.
- Maulana, A. (n.d.). *Perbandingan Mekanisme Pelaksanaan Putusan Peradilan Administrasi di Indonesia dengan di Thailand*. Pascasarjana Fakultas Hukum Universitas Indonesia.



- Mulyadi, L. (2001). *Tuntutan Uang Paksa (Dwangsom) dalam Teori dan Praktek*. Djambatan.
- Nugraha, S., Hayati, T., Erliyana, A., Mamudji, S., Yunus, S. P., Nursadi, H., Sunarti, E. S., & Simatupang, D. P. (2005). *Hukum Administrasi Negara*. Badan Penerbit Fakultas Hukum UI.
- Pemerintah, P. (2016). *Peraturan Pemerintah Nomor 48 Tahun 2016 Tentang Peraturan Pemerintah Tentang Tata Cara Pengenaan Sanksi Administratif Kepada Pejabat Pemerintahan*.
- Tumpa, H. A. (1992). *Uang paksa (Dwangsom)*. Mahkamah Agung RI.
- Tumpa, H. A. (2010). *Memahami Eksistensi Uang Paksa (Dwangsom) dan Eksistensinya di Indonesia*. Kencana.
- Undang-Undang. (2009). *Undang-Undang Nomor 51 Tahun 2009 Tentang Perubahan Kedua Atas Undang-Undang Nomor 5 Tahun 1986*.
- Undang-Undang. (2014). *Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan*.