

# The Implication of Legal Ambiguity on Legal Protection Arrangement of Governmental Employees toward the Work Agreement Based on the Legislation

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## Abstract

The Law No. 5 of 2014 on the Civil State Apparatus has accommodated the existence of Governmental Employees in the Work Agreement (PPPK) as stated in Act 6 stating that ASN Officers consist of PNS and PPPK. However, the PPPK arrangement in this law seems to be obscure especially related to the legal protection of PPPK in the implementation of local government. Therefore, the writer is interested to conduct research on what is the legal implication of ambiguity in legal protection arrangement toward Governmental Employees and Work Agreement applied in implementing the local government?

The Research uses normative legal study, using philosophical, legislative, historic and conceptual approaches. The data collecting technique on legal material is obtained by literary study using Snowball Technique and Prescriptive Analysis Technique.

The Legal Implication of arrangement ambiguity of legal protection on the Governmental Employees toward the Work Agreement used in implementing local government covers: 1) the Implication on the Position of PPPK, 2) the Implication on the Authority of PPPK, 3) the Implication on the Dispute Resolution.

Key terms: PPPK, Legal Implication, Legal Protection and Local Government

## A. INTRODUCTION

The Replacement of the Statute No. 43 of 1999 on the Change of the Statute No. 8 in of 1974 on the Points of Personnel became the Statute No. 5 of 2014 on Civil State Apparatus (then known as The Statute No. 5 of 2014), has brought big change in the Indonesian staffing system. In the prior statute, the staffing management focused more on right and duty of officer individually was replaced with the management of strategic human resources development in the new statute.

In the Statute No. 5 of 2014, government is not *single track* in recruitment the personnel but *double track*. Meaning, the society has freedom to choose to be Civil Officers (PNS) or PPPK. It happens because this statute has arranged the existence of PPPK (Governmental Employees and Work Agreement) as part of ASN, officers stated in Act 6 of Statute No. 5 of 2014 that “The ASN Employees consist of : a. PNS; and b. PPPK.

The arrangement of PPPK is a new thing in the Statute of Staffing in Indonesia. It shows that there is different purpose between statute maker of the Statute No. 5 of 2014 and the prior maker of the Staffing Statute. According to Nanang Samodra KA from Democrat Party in the Minutes of Meeting on 18 May 2011, he illustrated the prior life of staffing like the life of an elephant.

“A baby elephant born and from beginning was tied using chain and able to move in that circle only, when got big and strong, it should be able to revoke the stake and free. However, because it was familiar chained from the baby and moved around, it felt conform and had no willing to get lost from the border where it did from the baby<sup>5</sup>.”

Nanang Samodra KA based on the illustration wants to reveal that if the personnel arrangement stayed the same as previously, thus, our staffing would be like the elephant. Therefore, he persuades us to think *out of the box*. The staffing arrangement in the previous statute should be revised using revolutionary mindset, thus the appearance in the future staffing statute would be completely different from the previous one, hoping that ASN Employees become more professional. Other country used as comparison is Malaysia, where the Malaysian officers are not only state personnel but they also private officers<sup>6</sup>.

Based on the fact above, the existence of PPPK in the Statute No. 5 of 2014 becomes one of renewal in staffing arrangement in Indonesia, in order to create civil state apparatus who have “integrity, professionalism, neutrality and freedom from political intervention, clean from practices of corruption, collusion and nepotism, and finally able to conduct public service for the society and able to do their role as adhesive element of national unity and integrity based on Pancasila and the Constitution of Indonesian Republic of 1945”, as stated in base of

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<sup>5</sup> The Minutes of Meeting Session by Working Committee of Commission II DPR RI on Statute Plan of Civic State Apparatus, on 18 Mei 2011

<sup>6</sup> *Ibid*

Statute No. 5 of 2014.

The use of Employees toward Work Agreement in implementing the government actually has appeared before issuing the Statute No. 5 of 2014. Many locals have employed Employees using Work Agreement in implementing local government. However, the existence is not arranged in the Staffing Statute and other legislations, thus, in practice many problems appear, especially in it legal protection.

The Statute No. 5 of 2014 has accommodated the usage of PPPK in conducting the government. There are some reasons used as base of consideration by the government to conduct recruitment of PPPK as stated in The Statute No. 5 of 2014. The reasons appear in Academic Essay of Statute Plan on Civil State Apparatus, as explained as follow:

*First*; spirit “to develop state apparatus that are professional, free from political intervention, clean from KKN, have high integrity and ability and high performance<sup>1</sup>.” In order to gain all the things above, it needs employees who are independent and free from any interventions.

*Second*; in developing future government, it needs election of governmental apparatus function, or management function of state governmental policy and function of basic public service. In the Academic Essay of Statute Plan on Civil State Apparatus, the implementation of management function of state governmental policy is conducted by PNS whereas the implementation of function of basic public service is conducted by PPPK.

*Third*; to be more flexible of ASN structure that there always appropriate to dynamic of society, state and nation development, PPPK (contract *government employees*) become a choice, by implementing standard and norm of evaluation like in Private Company. The implementation of this system makes the government has no bond to the officers lives that should be carried all the life such as PNS.

*Fourth*; the officer’s management system applied in the Statute No. 5 of 2014 is “the personnel management system based position as the replacement of career based personal management system<sup>2</sup>.” This system gives chance toward personnel recruitment using system of work agreement such as PPPK, because its placement and retirement will be flexible related to the available position.

However, the change of staffing bureaucracy considered better is not followed by better arrangement in the Statute No. 5 of 2014. The legal protection arrangement PPPK in this Statute seems to be vague. The vague legal principle is legal or norm principle which there is no or less certainty in its formula thus multi definition appears, meaning that each person or legal subject can interpret differently toward the related norm. If each person or legal subject has interpreted differently toward a norm, there will be problem in implementing the law.

The vague norm in regulation is normal, for the regulation is made by human who considers having many weaknesses. Paul Scholten stated “the statute is not always clear, it is impossible to give solution to 1001 problems given to the law. It is a dream of the law makers that he has arranged completely all the problems given to them<sup>3</sup>.” However, whatever the reason, vague norm results in legal uncertainty, in the end; it creates legal uncertainty and non-achievement.

Based on the fact above, the problem formulation in this study refers to what is the legal implication of ambiguity in legal protection arrangement toward Governmental Officers and Work Agreement applied in implementing the local government?

## **B. Research Purpose**

This study purposes to comprehend and find out the legal implication of uncertainty in arrangement legal protection of the Governmental Officers and the Work Agreement applied in implementing local government.

## **C. Research Methodology**

This research is Normative Legal Research, where the problem lies on its legal norm level. The research approach uses Philosophical, Historical, Statute, and Conceptual approaches. The Primary Legal Material covers the Indonesian Constitution 1945, the Statute No. 12 of 2011, the Statute No. 5 of 2014, the Academic Paper of Statute Plan on Civil State Apparatus, Meeting Minutes of Discussion Statute Plan ASN, code of Civic Law, and work agreement between governmental official and PPPK. The Data Collecting technique is Literary Study using Snowball technique. The technique of Legal Material Analysis is perspective that analyzes collected legal materials by connecting them to the legal purpose, justice values, validity of legal regulation, legal concepts and norms, thus it results in what the law is and how the norm should be.

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<sup>1</sup> The Academic Paper of Regulation Plant on Civil State Apparatus , p. 2

<sup>2</sup> The Academic Paper of Regulation Plant on Civil State Apparatus , p. 7

<sup>3</sup> Paul Scholten, *Penuntun dalam Mempelajari Hukum Perdata Belanda*, (Yogyakarta: Gadjah Mada University Press, 1993) hlm 3

## D. Discussion

The Legal Implication regards as legal effect resulted from uncertain regulation stated in the statute. In the context of legal protection toward PPPK, it appears vague norm in the Statute No. 5 of 2014. This Vague Norm is imperfection norm. Jeremy Bentham states that imperfection norm can result from several factors, such as:

- a. The first level of imperfection covers: having two meaning or ambiguity, *vagueness*, and overly broad sense.
- b. The second level of imperfection covers: language imprecision, imprecision on significance of something, confusing, incorrect use of punctuation, irregularity<sup>1</sup>.”

The available regulation should be perfect without any disablements that it gives legal certainty and can be applied well, thus the society can obey with self-awareness. The Legal Certainty becomes important thing in formulating regulation, because it gives justice for the society. Uncertain norm is easily misused and results in despotism that society justice becomes the victim.

More often, the law formulation having purpose to arrange society life and resolve conflict in the society creates new conflict or problem in social life. Satjipto Rahardjo states “the statute created as means of solving conflict in the same time results in new conflicts. When issued to obtain compliment, however, it results in conflict in the society. Thus, the statute itself keeps potential of conflict<sup>2</sup>.”

It is undeniable that law is political product born from various interests, such as: politic, economy, social, culture, value, and religion. Therefore, the legal area is not sterile and unfroze value but it depends on several factors outside the law. In formulating law, the ruling elites has significant role that its legal orientation considers to be elitist, protective and defensive to their interests. Other characteristic is product resulted has multi-understandings, thus in its implementation, it needs interpretation and it often comes from the rulers<sup>3</sup>. The opinion describes that when the legal politic in formulating regulation is full of different interest’s even more contradictive one and another, the result would be uncertain regulation product. This regulation product finally reveals in society where there is no legal certainty.

According to Bagir Manan, a good product of regulation should fulfill several elements, such as:

- “1. Its formulation is systematic, with simple and standard language
2. As principle, it has ability to obtain efficiency and effectiveness in form of regularity and justice
3. As social symptom, it refers to views of life manifestation, legal consciousness, and sense of social justice
4. As legal subsystem, it describes a regular system series of available legal systems<sup>4</sup>.”

In the context of legal protection toward PPPK, the problem appears in normative law such as Vague Norm or Vagueness of Norm in regulation related to the legal protection of PPPK in conducting the local government. This Vagueness of Norm gives legal implications toward existence of PPPK in conducting the local government. The legal implications are:

### 1. The Legal Implication toward the Position of PPPK

PPPK, according to the writer, consists of 2 (two), namely Officers with Work Agreement before and after the statute No. 5 of 2014 being issued. Therefore, its legal implication toward PPPK position covers into 2 (two), as follows:

- a. The legal implication toward Officers position with work agreement before the statute No. 5 of 2014 being issued.
- b. As stated in background, employees and work agreement has already existed before the government issues and approves the statute No. 5 of 2014 known as Contract employees.

In Act 7 verse (2) of the Statute No. 5 of 2014, it states that PPPK is “ASN Officers appointed as employees using work agreement by staff Development Officer based on the needs of Governmental Institution and the Regulation.” Meaning, PPPK in the statute is employee appointed using work agreement by the Staff Development Officer and considers being ASN employees. Therefore, Employee with Work Agreement before the statute No. 5 of 2014 being issued is not recognized by this Statute, because he or she is appointed by Staff Development Officer and not ASN employees.

The Statute does not decide the status of employee with Work Agreement before the statute No. 5 of 2014 being issued, whereas they have existed and worked in governmental institution, with many in number. Then, what about their future fate and the governmental responsibility to protect employees’ job is questionable.

<sup>1</sup> Wasis Susetio, *Pergeseran Politik Hukum Penguasaan Negara dalam Undang-Undang Minyak dan Gas Bumi Berbasis Kemakmuran Rakyat*, Desertasi, (Malang, Universitas Brawijaya, 2014), hlm 289-290

<sup>2</sup> Satjipto Rahardjo, *Penyusun Undang-Undang yang Demokratis*, Makalah dalam Kongres Asosiasi Hukum Indonesia, (Semarang, Fakultas Hukum Undip, 15-16 April 1998), hlm 3

<sup>3</sup> H. Juniarso Ridwan dan Achmad Sodik Sudrajat, *Hukum Administrasi Negara dan Kebijakan Layanan Publik*, (Bandung: Nuansa Cendekia, 2014), hlm 217

<sup>4</sup> Bagir Manan dan Kuntana Magnar, *Beberapa Masalah Hukum Tata Negara*, (Bandung: Alumni, 1997), hlm 260-261

In the constitution, it clearly explains that state duty is to guarantee good job and life for the citizen. If in the institution, the government has no power to give protection guarantee of the citizen's job, to whom the citizen in this case employee of work agreement asks for protection about their future work.

Based on legal state context, it states that any deed or action commits and will commit by government should be based on the law or regulation applied, including giving legal protection to governmental employees. Because it is stated in regulation, the government will not able to conduct legal action to give legal protection toward employees with work agreement before the statute No. 5 of 2014 being issued.

It of course results in legal implication toward the existence of employees with work agreement before the statute No. 5 of 2014 being issued. The legal implication is explained as follow:

1. The employees with Work Agreement existed and applied in implementing local government before the Statute No. 5 of 2014 issued has no clear of legal base. While staffing regulation has never discussed on employee with work agreement or the same kind, the Statute No. 5 of 2014 does not discuss on status and the future of them either.
2. The Governmental Regulation No. 48 of 2005 in Act 8 actually has forbidden recruitment honorary employees or other. The honorary employees or other include "assistant teacher, honorary teacher, wiyata bhakti teacher, honorary employees, contract employees, outsourcing employees and other kinds of employees", as stated in Regulation No. 48 of 2005. Contract employees are employees who work in governmental institution and appointed using work agreement, including employees forbidden appointed based on the regulation. Therefore, recruitment of Employees with Work Agreement to be employed in governmental institution considers contradicting and violating Act 8 of Governmental Regulation No. 48 of 2005.
3. The legal certainty toward legal protection in line with working continuity for them is unclear. If the employees' work contract can be continued by government or ended after the work contract finishes, it becomes big question for the employees. If the government does not continue their contract or fire them after their contract ends, the government will fire hundreds or even thousands of employees who work in the institution. Its social effect refers to much unemployment because of the governmental action. Then, the duty of government to give jobs and better life for its citizen does not work well.
- c. Legal implication toward position of PPPK after the Statute No.5 of 2014 issued.

In the Statute No. 5 of 2014, it has discussed on PPPK position, however as explained before, the arrangement of legal protection PPPK in the statute is vague, thus it results in legal implication toward PPPK position as follow:

1. Inconsistency in Act 98 verse (1) the Statute No. 5 of 2014 on appointment PPPK candidate Decision of Staff Development Officer, using PPPK recruitment based on work agreement.
2. Appointment of PPPK with certain duration minimum 1 year implies toward continuity of employees position as governmental employees.
3. Appointment of PPPK with duration minimum 1 year gives chance for the governmental officer to do injustice behavior toward PPPK.

## **2. The Law Implication toward the Authority of PPPK**

In appointment of PPPK using work agreement system in governmental institution, this authority becomes significant topic to discuss. It results from ambiguity on whether PPPK is public employees, meaning that it can receive authority or task delegation from higher officer or institution (correlation of superior and subordinates). Perhaps, PPPK considers as the third party working job as stated in its work agreement. Thus, it is not easy to delegate authority or task to PPPK outside the contract.

The legal implication on PPPK authority covers 2 things:

1. The legal basic on the authority given to PPPK in the Statute No. 5 of 2014 is vague.

In the Statute No. 5 of 2014, it unclearly states on authority of PPPK. Act 9 verse (1) the Statute No. 5 of 2014 states that "ASN employees conduct policy decided by chief of governmental institution." Act 10 of the Statute No. 5 of 2014 discusses on ASN function<sup>1</sup> and Act 11 talks about tasks of ASN<sup>2</sup>. PPPK as part of ASN employees, that its function and task are stated in Act 10 and 11 of the Statute No. 5 of 2014.

Out of three functions, the first one, to conduct public policy, becomes the writer's consideration in line with PPPK position as governmental employees with work agreement. Compared with PNS, PPPK has many

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<sup>1</sup> Act 10 the Statute No. 5 of 2014 states that ASN employees has function as:

- a. Executor of public policy;
- b. Public servant; and
- c. Adhesive and unifying country.

<sup>2</sup> Act 11 the Statute No. 5 of 2014 states ASN employees have to:

- a. Conduct public policy made by Staff Development Officer based on the regulation;
- b. Give public service professionally and qualified; and
- c. Keep unity and integrity of Indonesian Republic

differences. PNS recruited with Decree or in area of public legal of course has no problem in conducting the three functions as stated in Act 10 of the Statute No. 5 of 2014. However, PPPK based on work agreement or in area of civil Law faces some obstacles in conducting its function as executor of public policy.

The obstacles probably faced by PPPK in conducting function as executor of public policy include:

1. In conduct public policy, the employees do public legal actions. The actions are command or forbid the society to do or not to do something. These actions mean widely to general or public interests. Based on the controversy in meeting minutes, PPPK is focused on certain jobs or very operationally technical and in certain period of time<sup>1</sup>.
2. In conducting public policy, it possible appears problem or contradiction with society related to public actions, how its resolution mechanism and sanction are given to PPPK.
2. the overlapping authority appears between PPPK and PNS because there is no classification authority between them in the Statute No. 5 of 2014. It happens because function, task, and role arranged in Chapter IV of the Statute No. 5 of 2014 relates to function, task, and role ASN where PNS and PPPK discuss. In other hand, mechanism of PNS and PPPK appointment is different; PNS refers to Public Law that its appointment based on Decree, while PPPK refers to Civil Law that its appointment based on Paper of Work Agreement. .

### 3. The Law Implication toward Dispute Resolution

The dispute resolution discussed in the Statute No. 5 of 2014 as stated in Act 129 is:

“(1) the dispute of ASN employees is resolved using administrative effort.

(2) The administrative effort states in verse (1) include administrative objection and appeal.

(3) The objection stated in verse (2) is applied written using reasons of objection given to Officer who has authority to punish and its copy given to the same Officer.

(4) Administrative appeal in verse (2) is given to consideration board of ASN.

(5) Board of ASN in verse (2) and (4) are discussed in Governmental Regulation.”

In the Statute No. 5 of 2014, it only discusses dispute resolution of ASN employees through Administrative Effort, and does not talk about Court Means. Based on debate of formulating the Statute No. 5 of 2014 in Working Committee Meeting on Statute Plant toward Civil State Apparatus in December 13 2013, it agreed that dispute resolution of Civil State Apparatus would be solved through administrative effort, that were administrative objection and appeal<sup>2</sup>. The reason revealed in the meeting states that resolution through court way costs a lot of money and may result in negative image for Administrative Officer which decision sued in Administrative Court (PTUN)<sup>3</sup>.

According to the researcher, consideration of not follow court way in solving problem ASN should related not only on expensive cost and keeping the image of Administrative Officer, but also other aspects such as objectivity in solving the dispute by governmental officer, sense of employees justice for example in their effort they do not get justice and others. Thus, this regulation results in big legal consequence.

The legal implication of regulation in dispute resolution for ASN especially PPPK if it happens dispute with Governmental Officer, describes as follow:

1. The confusion in applying law results from Act 129 of the Statute No. 5 of 2014 that only discusses dispute resolution by administrative way, while the Statute No. 30 of 2014 and the Statute No 5 of 1986 juncto The Statute No. 9 of 2004 juncto The Statute No. 51 of 2009 states that Administrative dispute resolution including staffing dispute can solve by administrative and court ways. The administrative way in the Statute No. 5 of 2014 has different mechanism compared with the same way based on the Statute No. 5 of 1986.
2. Disputed employees will find difficulty to get fair and objective resolution if its dispute resolution gets from administrative way only, where the responsible institution is governmental institution and the defendant is the governmental official.
3. In line with PPPK, the Statute No 5 Year 2014 does not give explanation on Paper of Work Agreement as legal basic of working relation between governmental officer and PPPK, whether it can be object of suit in ASN dispute or not. Whereas in Act 2 part a of the Statute No. 9 of 2004, it states that the Decision of State Administrative considered as action of civil law is not included as definition of State Administrative Decision according to the regulation.
4. This arrangement does not give legal certainty for legal protection of ASN employees especially PPPK in line with dispute between governmental officer and ASN employees.

<sup>1</sup> Risalah Sidang Rapat Panitia Kerja Komisi II DPR RI Rancangan Undang-Undang tentang Aparatur Sipil Negara, tanggal 2 Pebruari 2012

<sup>2</sup> Risalah Sidang Rapat Panitia Kerja Rancangan Undang-Undang tentang Aparatur Sipil Negara (Bidang Pemerintahan dalam Negeri, Otonomi Daerah, Aparatur Negara dan Reformasi Birokrasi, Kepemiluan, Pertanahan dan Reforma Agraria), tanggal 13 Desember 2013

<sup>3</sup> *Ibid*

## E. Summary

The Legal implication of uncertainty in legal protection arrangement for Governmental Employees with Work Agreement employed in local government refers to:

### a. Imply to position of PPPK

1. The legal implication toward Employees Position with Work Agreement applied in local government before the Statute No 5 of 2014 are:
  - The existence of PPPK has no clear legal basic.
  - The appointment of PPPK to work in governmental institution is against and violates Act 8 Governmental Regulation No. 48 of 2005 that forbid appointment Honorary Labor or any kind of them, including Employees with Work Agreement.
  - The legal certainty toward legal protection related to working continuity becomes unclear.
2. The legal implications toward Position of PPPK after the Statute No. 5 of 2014 are:
  - The inconsistency of Act 98 verse (1) the Statute No. 5 of 2014 on appointment of PPPK candidate with Decision of Staff Development Officer and PPPK appointment based on work agreement.
  - Appointment of PPPK with duration minimum 1 year implies to continuity of employees position as governmental employees and gives chance for the governmental officer to do injustice action to PPPK.

### b. Imply to Authority of PPPK, the legal implication includes:

1. The legal basic on authority given to PPPK in the Statute No. 5 of 2014 is vague.
2. It may cause overlapping authority between PPPK and PNS, because there is no classification of authority between PPPK and PNS the Statute No. 5 of 2014.

### c. Imply to Dispute Resolution

The arrangement of dispute resolution in Act 129 of the Statute No. 5 of 2014 may result in problem in its legal practice, such as:

1. Resulting in confusion in legal application.
2. PPPK finds difficulty in solving the dispute in justice and objective ways.
3. The Statute No. 5 of 2014 does not explain if the Paper of Work Agreement as the basic of work relation between governmental officer and PPPK can be object of suit in ASN dispute or not.

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- Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara (Lembaran Negara Republik Indonesia Tahun 1986 Nomor 77, Tambahan Lembaran Negara Republik Indonesia Nomor 3344), sebagaimana diubah dengan Undang-Undang Nomor 9 Tahun 2004 tentang Perubahan atas Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara ( Lembaran Negara Republik Indonesia Tahun 2004 Nomor 35) dan diubah lagi dengan Undang-Undang Nomor 51 Tahun 2009 tentang Perubahan Kedua atas Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara (Lembaran Negara Republik Indonesia Tahun 2009 Nomor 160, Tambahan Lembaran Negara Republik Indonesia Nomor 5079)
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