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Judicial control over government's abuse of authority through administrative and corruption law

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ABSTRACT

Law Number 30 of 2014 concerning Government Administration, prohibits abuse of authority by government agencies/officials both central and regional, but in practice there are often acts of abuse of authority of Government Agencies/Officials. This paper describes how Judicial Control over abuse of authority through government administrative legal means and Corruption Criminal Acts which, in practice, cause controversy in the enforcement of corruption crimes, especially by Government Officials and State Civil Apparatus. The legal approach to the above problems is carried out by normatively analyzing the laws and regulations governing the prohibition of abuse of power according to Government Administration Law and the Sociology approach according to the practice and / or decision of the Court in the enforcement of corruption crimes committed by organs / bodies of Government officials or State Civil Apparatus. From the results of the study of these problems in the paper, it can be concluded that abuse of authority in government administration is a form of preventive restriction. Meanwhile, abusing authority in the Criminal Law is a form of repressive action. Abuse of authority stipulated in Article 20 of the UUAP is interpreted as an administrative error committed by government agencies/officials, but if there are legal consequences in the form of state financial losses, it is qualified as a criminal act of corruption.

Keywords:

judicial control government abuse of power and administrative corruption lawss

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INTRODUCTION

The use of authority of government bodies/officials is very important in relation to law enforcement and justice in an administrative perspective to make the law for a state (Mustapa et al., 2022; Suhartono & Salam, 2021), including providing preventive and repressive legal protection for government bodies/officials including for the people in the implementation of government. Hence, law and justice must really be felt by the people seeking justice in a democratic legal state. On the other hand, law enforcement and justice are carried out based on judicial power through judicial institutions (Nasution, 2020; Ridlwan & Firmansyah, 2020). In this case, the State Administrative Court and the Corruption Criminal Court at the General Court. The misuse of authority by government agencies without judicial oversight can lead to unlawful and arbitrary actions (Hidayat et al., 2020; Sunstein & Vermeule, 2020), violating government administration law and criminal law (Ariman et al., 2021; Barkow, 2006), causing controversy in law enforcement through judicial means.

In relation to the above, legal issues examined in this paper systematically. First, abuse of authority of government agencies/officials in the concept of administrative law. Second, the act of abusing authority by government agencies/officials in the realm of criminal law in the perspective of the Law on Corruption and third how idial the parameters to be used, these three things become a sub-subject of study in this discussion.

The parameters of the presence or absence of abuse of authority in the form of "*detournement de pouvoir*" and "arbitrary" (Kennedy, 2019; Saragih et al., 2023), as referred to Article 17 (1) of the Government Administration Law (AP Law, *Hukum Administrasi Pemerintah*). the prohibition of abuse of authority as referred to in Article 17 (1) includes a). prohibition of exceeding authority, b). prohibition of mixing authority and or, c). prohibition of arbitrary acts. Legal parameters in assessing the validity of a decision/action of a government official against the prohibition of abuse of authority of government bodies/officials categorized as exceeding the authority as referred to in Article 17 (2) letter a of the AP Law above, namely a) if it exceeds the term of office or

the time limit for the validity of the authority, b) exceeds the limit of the area of enactment of authority, and or c) "contrary to the provisions of laws and regulations" (Article 18 paragraph (1) of the AP Law), this third parameter is no longer valid since the promulgation of the Job Creation Law.

Benchmark or parameter is the presence or absence of abuse of authority for government bodies/officials who use their authority (Saragih et al., 2023). In reference to state administrative law theory always uses parameters (*rechtmatigheid*), namely the regulation of statutory law, namely whether the authority is exercised according to its purpose which is the basis for granting authority in a particular law, whether the use of authority is used in accordance with requirements and procedures that has been determined, and whether the substance of the actions of government bodies/officials in exercising their authority is appropriate or not in accordance with the purpose of the basic regulations.

Meanwhile, the presence or absence of arbitrary government bodies/officials born of free authority (*detournement de pouvoir or freis Ermessen*) to carry out policies in overcoming problems as much as possible on something that has no basic regulations by determining an act or decision for the benefit of duties as referred to in Law No. 11 of 2020 concerning Job Creation, including changing the provisions of Article 24 of the AP Law which regulate the prerequisites for the use of Discretion by Government Officials to carry out policies, thus the use of discretion referred to in the Job Creation Law can be assessed from the aspect of "doelmatigheid" and not *"rechtmatigheid*". The *detournement de pouvoir* of government bodies/officials carried out within the framework of the limits of the General Principles of Good Government *(Algemene Beginselen van Behoorlijk Bestuur*) so that its nature becomes *Overheidsbeleid* is a *domein* of the State Administration Law and does not constitute jurisdiction of the meaning of abusing authority (species) or unlawful dimension (genus) in criminal law, especially against corruption.

Local Government Administration According to Law of the Republic of Indonesia No. 23 of 2014 concerning Regional Government is very important in relation to Law N0.30 of 2014 concerning Government Administration Jo Law of the Republic of Indonesia No. 31 of 1999 Jo Law of the Republic of Indonesia No. 20 of 2001 concerning the Eradication of Criminal Acts of Corruption because in the Local Government Law, local governments as government agencies/officials cannot be separated from the use of government authority in relation to the Administration law Governments that prohibit abuse of authority by government agencies/officials both central and regional, but in practice there are often acts of abuse of authority of Government Bodies/Officials. Therefore, this paper outlines the abuse of authority through means of government administrative law and Corruption Criminal Acts which in practice often cause controversy in the enforcement of corruption crimes.

METHOD

Based on the formulation of the problem problem and the purpose of the study, the researcher used the normative legal research method. The researcher examined secondary data in the form of legal materials, both special and general, relevant to the topic from documents like books, journals, etc. In this case, normative legal research examined positive legal norms in the form of laws and regulations related to the amount of state losses with the severity of the crime in corruption crimes.

RESULTS AND DISCUSSION

Abuse of Authority in Administrative Law

The abuse of "authority" in the concept of State Administrative Law is always paralleled with the concept of *de'tornement de pouvoir*. In *Verklarend Woordenboek Openbaar Bestuur* it is formulated that the use of authority is not as it should be. In this case the official uses his authority for other purposes that deviate from the purpose that has been given to that authority. Thus the official violated the principle of speciality (the principle of purpose).

In measuring whether there has been an abuse of authority, it must be factually proven that the official has used his authority for other purposes. The occurrence of abuse of authority is not due to negligence. Abuse of authority is done consciously, that is, diverting the purpose that has been given to that authority. The transfer of goals is based on personal interests, either for the benefit of oneself or for others.

Abuse of authority in government actions carries the implication of authority or governmental power, not only as a bound authority, but also a free power (*vrij bestuur, Freies Ermessen, detournement de pouvoir*). According to Ten Berge, as quoted by Philipus M. Hadjon, authority or free power includes freedom of policy and freedom of judgment.

Philipus M. Hadjon (1994) states to facilitate the understanding of free authority or *detournement de pouvoir* by viewing room its scope. Free authority or *detournement de pouvoir* includes; The authority to decide for themselves, and the authority to interpret disguised norms (*vage normen*). The free power (*vrij bestuur*) of the "*wetmatigheid*" principle is inadequate. Free power here is not meant to be infinite, but remains within the corridors of the law rechtmatigheid), at least to the written law or legal principles.

Abuse of Authority Parameters

The basic issues that become challenges in law enforcement, both in aspects of administrative law and criminal law, both have their own characteristics differences between each other, each has principles that become the foundation or basis for the application of law for both types of law.

One such challenge looks real and complex, when related to the birth of Law of the Republic of Indonesia Number 11 of 2020 concerning Job Creation, namely Article 175 has changed the provisions of Article 24 Law of the Republic of Indonesia Number 30 of 2014 concerning Government Administration (AP Law) which regulates the requirements for the use of discretion by Government Officials, so that now the use of dysrrhea, inter alia must be in accordance with the purpose of discretion as referred to in Article 22 (2) AP Law, namely, launching the administration of government, filling the void law, providing legal certainty and overcoming government stagnation in certain circumstances (urgent) for the benefit and public interest.

The purpose of this discretion is a consequence of government administrative interference which is not only based on legislation, but also based on the initiative of government officials through free authority (freis Ermessen).7 The existence of free authority to carry out policy actions both in the form of decisions and actions of administrative officials through free authority (*freis Ermessen*) is then what raises concerns and opens up opportunities for conflict (conflict) of interest, either in the form of *Onrechmatig overheidsdaad* (unlawful government acts, either in the form of *detournement de pouvoir* (abuse of authority), or in the form of *daad van wilekeur* (arbitrary acts).

From the conflict of arrangements mentioned above, the provisions of Article 22 (2) of the AP Law regulate the purpose of using discretion, while Article 24 of the AP Law regulates the terms of use of discretion between others which originally did not conflict with the provisions of laws and regulations, but because Article 24 letter b of the AP Law has been deleted with the enactment of the Job Creation Law. So that it can separate legal issues.

The conflict of regulation on these two matters is a challenge, because it is increasingly unclear for judicial institutions, especially the State Administrative Court, in terms of testing the validity of the use of discretion whether it meets the requirements, namely not contrary to the provisions of laws and regulations, within the parameters of the presence or absence of authority, how the authority is used, whether it is in accordance with the requirements and procedures specified in the laws and regulations or not.

To ensure whether there is any abuse of authority from the act of using authority by government bodies/officials, and not for the terms of discretionary use, because according to government administrative law references, the use of authority to determine the presence or absence of abuse of authority from bodies/officials, must be tested by the provisions of laws and regulations and the use of *detournement de pouvoir* must be tested by referring to the principles of good governance law (AUPB). To determine whether the use of discretion is appropriate for its purpose or not, the provisions of Article 22 of the Government Administration Law are used.

To measure abuse of authority using the following parameters:

1) The element of abuse of authority is considered whether there is a violation of the written basic rules or principles of propriety that live in this society and country. The criteria and parameters are alternative.
2) The principle of propriety in order to implement a policy or zorgvuldigheid is determined if there is no basic regulation or this principle of propriety is applied if there is a basic regulation, while the basic (written) rule in fact cannot be applied to certain conditions and circumstances that are urgent in nature.

Abuse of authority in administrative law can be interpreted in 3 (three) forms, namely:

1) Abuse of authority to commit acts contrary to the public interest to benefit personal, group or group interests;
2) Abuse of authority in the sense that the official's actions are properly proposed in the public interest, but deviate from what purpose the authority is conferred by laws or other regulations;
3) Abuse of authority in the sense of abusing procedures that should have been used to achieve a certain goal, but have used other procedures to be carried out.

Parameters of abuse of authority in the type of authority are bound by using laws and regulations (written rules), or using the parameters of the principle of legality; While in *detournement de pouvoir* the parameters of abuse of authority use the general principles of good governance, because the principle of "*wetmatigheid*" is inadequate.

Parameter abuse of authority in the type of bound authority is the principle of legality (the purpose of which has been stipulated in laws and regulations); While the type of *detournement de pouvoir* uses the parameters of the general principles of good governance, because the principle of "*wetmatigheid*" is inadequate. In practice there is often a confusion between abuse of authority and procedural defects as if the procedural defect is inherently synonymous with abuse of authority.

To assess whether there is abuse of authority, it must be distinguished first whether the authority is included in the classification of bound authority or free authority. In the category of authority is bound to assess the presence or absence of abuse of authority using the basic parameters of legality or wetmatigheid van bestuur), while in the category of *detournement de pouvoir* power) parameters used are General Principles of Good Governance, because wetmatigheid principles are inadequate.

The principle of legality is the basis of legitimacy for the government to act in achieving a certain goal. The granting of authority to the government is given by means of laws and regulations. Abuse of authority occurs if government actions deviate from the objectives specified in the law, this is known as the principle of speciality (*specialisliteitsbeginsel*).

With regard to abusing authority or not against the principle of legality, the first argument states laws and regulations in a broad sense, used as a basis for proving abuse of authority. In Article 21 of the AP Law, the regulation for proving abuse of authority is regulated by the mechanism must go through testing to the PTUN first, before proceeding to the Tipikor Court.

Supervision of abuse of authority is carried out by the Government Internal Supervision Apparatus (APIP), a follow-up to APIP supervision in the form of administrative improvements and can be completed administratively. Meanwhile, in the Tipikor Law, abusing authority has fulfilled the elements of unlawful acts regulated in the Tipikor Law, so that the resolution does not need to be taken administrative efforts first but directly to criminal responsibility in accordance with the Criminal Code and Criminal Procedure Code.

Abuse of Authority in Relation to AUPB

Asas Spesialitas (Speciality Principle)

In the concept of administrative law, every grant of authority to an agency or to a state administrative official is always accompanied by a "purpose and purpose" the granting of that authority, so that the exercise of that authority must be in accordance with the "purpose" and the intent" to grant that authority. In the event that the use of such authority is not in accordance with the "purpose and intent" of granting the authority, it has committed abuse of authority (degournement de pouvoir).

The parameter of "purpose and intent" of authorization in determining the occurrence of abuse of authority is known as principle of specialization (*specialialiteitsbeginsel*). This principle was developed by Mariette Kobussen in her book *De Vrijheid Van De Overheid*. This principle of speciality is a principle upon which the authority of government to act with regard to an objective. Any government authority (*bestuurs bevoegdheid*) is governed by laws and regulations with a certain definite purpose. From the point of administrative law, the specialialiteitsbeginsel is expressed as a series of regulations relating to certain public interests.

The Principle of Speciality in Relation to the Principle of Legality

The principle of legality is the basis for the government to act in achieving certain goals. The granting of authority to the government is given by means of laws and regulations. In the principle of legality does not take into account the specificity (purpose) of certain authorities in issuing decisions. The specificity of granting and the purpose of granting authority can be seen in each statutory regulation. There can be several laws and regulations contradicting each other, in such situations the principle of legality loses its meaning. Being the principle of legality is no longer appropriate to be used as a parameter to measure the occurrence of abuse of authority.

Discreationary power can occur because laws and regulations do not regulate government authority at all or it can happen that laws and regulations contain vague norms (*vage norms*) in granting authority. The first thing usually happens in relation to urgent situations and it is very necessary to immediately take a policy or decision, but the legal basis for action does not exist, even though in fact the government must not stop like it for a second, because the nature of government is continuous.

Regarding the parameters of abuse of authority in *detournement de pouvoir* (*beleidsvrijheid*, *detournement de pouvoir*, *Freies Ermessen*) the parameter used is the principle of speciality, which basically contains the purpose for which an authority is given. The occurrence of abuse of authority if the use of authority deviates from the purpose.

Basics of Arbitrary Prohibition

Amendments to Article 53 paragraph (2) of Law Number 5 of 1986 General principles of good governance have normatively become reasons for filing a lawsuit regarding the validity of a state administrative decision, unfortunately the Explanation to Article 53 paragraph (2) designates the principles contained in Law Number 28 of 1999 as General Principles of Good Governance.

The General Principles of State Administration in Article 3 of Law Number 28 of 1999 include: The Principle of Legal Certainty; Principles of Orderly State Administration; Public Interest Principles; The

principle of openness; The principle of proportionality. "The challenged State Administrative Decision is contrary to the general principles of good governance" and in its explanation it states: "What is meant by the general principles of good governance includes the principles of legal certainty, orderly state administration, openness, proportionality, professionalism and accountability. It must be measured whether the challenged State Administrative Decree is an act of government administrative law.

Misusing "Authority" in Criminal Law

The act of abusing authority by government bodies/officials in the realm of criminal law in the perspective of the Criminal Law does not find any parameters, but in interpreting the provisions of Article 3 of the Tipikor Law, it regulates the prohibition of abusing authority, namely that "Everyone with the aim of directing himself or another person or a corporation, abuses the authority, opportunity or means available to him because of a position or position that can harm state finances or state economy, punishable with imprisonment for life or imprisonment for a minimum of 1 (one) year and a maximum and a maximum of 20 (twenty) years and or a fine of at least Rp.50,000,000,00 (fifty million Rupiah) and a maximum of R.1,000,000,000,- (one billion Rupiah).

The element of abusing authority regulated by the Corruption Law has the potential to occur or be carried out by government administrators related to certain positions or positions. The parameters used for the act of "the element of abusing authority must have a causal relationship with arising from "harm to state finances" or "state economy"12 Thus, the existence of state financial losses is the result of abusing authority that gives birth to an unlawful act in the general sense (genus) and abusing the authority (species) of unlawful acts.

In line with the birth of Law of the Republic of Indonesia Number 30 of 2014 concerning Government Administration, the regulation of elements that can harm state finances or the state economy caused by acts of abuse of authority is no longer purely seen through but also through an administrative law approach, but also through the act of abusing authority by government bodies/officials in the realm of criminal law in the perspective of the Law on Corruption there are no parameters, however, in interpreting the provisions of Article 3 of the Law on Tipikor, it stipulates the prohibition of abusing authority, namely that "Any person with the aim of directing himself or another person or a corporation, abusing the authority, opportunity or means available to him because of a position or position that can harm state finances or the country's economy, shall be punished with imprisonment for life or imprisonment for a minimum of 1 (one) year and a maximum and a maximum of 20 (twenty) years and or a fine of at least Rp.50.000.000,00 (fifty million Rupiah) and a maximum of R.1.000.000.000,- (one billion Rupiah).

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In line with the birth of Law Number 30 of 2014 concerning Government Administration, the regulation of elements that can harm state finances or the state economy caused by abuse of authority is no longer purely seen through a criminal law approach, but also through an administrative law approach.14 There are often errors in applying the law regarding the Public Prosecutor's Indictment which always views that in the event of state losses or losses The country's economy, then the provisions of the legislation to eradicate criminal acts of corruption apply, even though according to the law not all actions that have the potential or can cause state losses are corruption. Thus, normatively, there is no comprehensive explanation for abusing authority in the Tipikor Law. This is due to limitations in understanding the meaning of abusing authority in criminal law from the perspective of the Tipikor Law. But in practice, the resolution of corruption cases does not create an obstacle because in legal science, sociological auxiliary legal science is known with an administrative law approach by adopting parameters of abuse of authority according to administrative law and Law of the Republic of Indonesia Number 30 of 2014 concerning Government Administration.

Thus, normatively, there is no comprehensive explanation for abusing authority in the Tipikor Law. This is due to limitations in understanding the meaning of abusing authority in eradicating corruption from the perspective of the Tipikor Law. But in practice, the resolution of corruption cases does not create an obstacle because in legal science, sociological auxiliary legal science is known with an administrative law approach by adopting parameters of abuse of authority according to the theory of administrative law and according to Law of the Republic of Indonesia Number 30 of 2014 concerning Government Administration.

The use of criminal legal means in the act of "abusing authority" from the perspective of corruption is not in the understanding of "policy", but rather the problem of the relationship between authority and policy. Authority Public officials related to policy, both bound authority and free authority, do not become the realm of the Criminal Law so that cases of corruption that recently, it often occurs in Indonesia (Ministers, Governors, Regents/Mayors, Members of the DPR/DPRD, etc.) related to allegations of abuse of authority and unlawful acts create the impression of a "criminalization of policy".

The perpetrator of the corruption crime in question must hold a "position or position". Because only individuals can hold a "position or position", according to the author, the corruption crime contained in Article 3 of the Corruption Law, can only be committed by "natural persons", while corporations "cannot" carry out these corruption crimes.

Article 3 of the Corruption Law as mentioned, several elements will be found, namely: (1) benefiting oneself or another person or a corporation; (2) abuse of authority, opportunity or means available because of position or position; (3) detrimental to state finances or the country's economy.

Ad. (1). Benefit oneself or others or a corporation

The legal considerations include stating that the element of "benefiting oneself or another person or an entity" is sufficiently judged from the reality that occurs or is connected with the behavior of the defendant in accordance with the authority he has, because of his position or position.

The definition of what is meant by "abusing authority, opportunity or means that exist because of the position or position" is to use the authority, opportunity, or means attached to the position or position held or occupied by the perpetrator of corruption for purposes other than the purpose of granting the authority, opportunity, or means.

Ad. (2). Misuse the Authority of Existing Opportunities or Facilities, because of Degree or Position

1) By abusing the authority in the position or position of the perpetrators of corruption crimes.
2) By abusing the opportunities that exist in the position or position of the perpetrators of corruption crimes.
3) By using existing facilities in the position or position of the perpetrators of corruption crimes.

Ad. (3). May harm State Finance or State Economy

The word "may" as contained in Article 3 and the explanation of Article 2 paragraph (1) of the PTPK Law states that "in this provision, the word "may" before the phrase "harm state finances or the state economy" indicates that the criminal act of corruption is a formal offense, namely the existence of a criminal act of corruption sufficient with the fulfillment of the elements of the act that have been formulated, not with the emergence of consequences.

In the Tipikor Law, the element of pure state financial losses is seen from the perspective of criminal law which is an unlawful act of its nature (genus) and abuses authority of a nature (specis). Meanwhile, in the AP Law, elements can harm state finances caused by misuse authority, not purely in the criminal law approach, but also through the state administrative law approach. Therefore, in the AP Law, the existence of state financial losses due to administrative errors is not an element of corruption. State losses become elements of corruption if there are elements against the law and abuse of authority.

CONCLUSION

Abuse of authority in government administration is a form of preventive restriction. Meanwhile, abusing authority in the Criminal Law is a form of repressive action.

Abuse of authority stipulated in Article 20 of the UUAP is interpreted as an administrative error committed by government agencies/officials. Although Article 20 of the UUAP divides abuse of authority into three categories, namely, exceeding authority, mixing authority, and acting arbitrarily, it is different when viewed from the theoretical study of administrative law. Meanwhile, abusing authority stipulated in Article 3 of the Criminal Law contains a causal relationship or correlation between position or position and potential criminal acts, which provides conditions for the existence of elements of unlawful acts when there is an abuse of authority, namely in the form of elements of state financial losses or state economy so that criminal sanctions can be imposed.

The method that must be taken by perpetrators of corruption crimes as contained in Article 3, namely by "abusing authority, opportunities or existing facilities because of position or position", it can be affirmed: that those who can commit corruption crimes by "abusing authority, opportunities or facilities that exist because of position or position", are Public Servants or government organizers; Meanwhile, perpetrators of corruption crimes who are not civil servants or private individuals can only be committed corruption crimes by misusing existing opportunities or facilities because of position.

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