LINK POINT OF ELEMENTS OF CORRUPTION IN THE PERSPECTIVE OF CRIMINAL LAW AND ADMINISTRATION

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Abstrack
The government in carrying out its duties and functions to achieve goals certainly has the authority to do or not do something. The authority that gives rise to power can be exercised either properly or arbitrarily, as Lord Acton stated "Power tends to corrupt, and absolute power corrupt absolutely", So that there is an intersection between discretion in the administrative realm and abuse of power in the perspective of criminal acts of corruption. This research is a legal research with a normative juridical approach, The nature of this research is descriptive analytical with data collection methods through literature studies which will then be analyzed through qualitative juridical methods. The results showed that an action and/or policy that is considered discretionary and not a criminal act of corruption is if it does not violate Article 24 of Law Number 30 of 2014 concerning Government Administration and is carried out in good faith to achieve goals according to the authority given or in other words there is no malicious intent (mens rea).
***Key Words**: Discretion, Abuse of power, Administrative Law, Corruption.*

I. Introduction

The purpose of the Indonesian state is expressly contained in the Preamble to the 1945 Constitution. The state as an organization that has the highest authority and power, has the authority to manage, manage or administer government that is not spared from the accountability mechanism by state administrators.

The government in carrying out its duties and functions certainly has the authority to do or not do something. An authority needs to have a clear source, the Government gets the power or the authority comes from the power given by law, it aims to determine accountability as the principle *geen bevoegheid zonder verantwoordelijkheid* or *there is no authority without responsibility*.[1]

Authority is the ability to perform certain legal actions, there is a principle related to authority, namely the principle of speciality (*specialiteitsbeginsel*) which has the meaning that authority is given to certain legal subjects with a specific purpose. In addition to adhering to the principle of speciality, the exercise of authority to achieve goals effectively and efficiently government administrators are also given discretion power or *freies ermessen*.[2] Discretion is defined as actions determined and/or carried out by Government Officials to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide choices, do not regulate, are incomplete or unclear.[3]

The authority that gives rise to power can be exercised either properly or arbitrarily, as Lord Acton stated "*Power tends to corrupt, and absolute power corrupt absolutely*" which means that power tends to corrupt and absolute power tends to corrupt absolutely.[4] Corruption and power are likened to two sides of a coin, namely corruption always goes hand in hand with power.[5]

In the realm of criminal law there is a special crime, one of which is corruption. In Indonesia, corruption has elements against the law and abuse of power. The concept of unlawful elements and abuse of power is in the territory of *grey area*, There is an intersection between criminal law norms and administrative law norms. In the perspective of State Administration Law, the parameter that limits the free movement of State Administration authority is abuse of power, while in Criminal Law,

[1] Ridwan H.R., *Hukum Administrasi Negara*, Raja Grafindo, Jakarta, 2002.
[2] D.J. Galligan, Discretionary Power, Oxford Press University, New York, 1990, hlm. 2.
[3] Marchelino Christian Nathaniel, *Penerapan Asas Kekhususan Sistematis Sebagai Limitasi Antara Hukum Pidana dan Hukum Pidana Administrasi*, Jurnal Lex Crimen, Vol. VII No. 8, Oktober, 2018, hlm. 159
[4] Sanusi, *Relasi Antara Korupsi dan Kekuasaan*, Jurnal Konstitusi, Vol. 6 No. 1, 2013, hlm. 83
[5] *Ibid*

the parameter that limits the free movement of state administrative authority is in the form of elements of unlawful acts and abuse of power.

Often acts of abuse of power are equated with acts of corruption, especially when these actions cause state losses. Based on Article 1 number 22 of Law Number 1 of 2004 concerning the State Treasury, defines State/Regional losses as a real and definite lack of money, goods, and securities as a result of unlawful acts either intentionally or negligently. The provision formulates the existence of an element of real and definite deficiency as a result of unlawful acts or negligence as a cause. Thus, state losses are not only caused by an unlawful act, but exist due to negligence of an administrative nature.

In practice, law enforcement officials often interpret the terms "unlawful act" and "state losses" as elements of criminal acts. This is certainly the opposite (*opposite*) with the meaning of state losses contained in Law Number 1 of 2004 concerning State Treasury, that when a case has fulfilled the elements of state losses, it can be said that state losses have occurred, which needs to be carried out immediately procedures for settling compensation (administrative).

Based on Article 35 paragraph (1) and paragraph (4) of Law Number 17 of 2003 concerning State Finance, basically states that every state official and non-treasurer civil servant who violates the law or neglects their obligations that harm state finances is required to compensate the state, the settlement of state losses is regulated in the state treasury law. Furthermore, based on Article 59 paragraph (3) of Law Number 1 of 2004 concerning the State Treasury. The disharmonization of laws and regulations is also a problem in determining accountability, so that often the actions of government officials of an administrative nature become a criminal act of corruption.

II. RESEARCH METHODS

This research is a legal research with a research normative juridical approach, research that focuses on law as a system building norms that include principles, rules, laws and regulations, and doctrines related to the topic of discussion.[6] The nature of this research is descriptive analytical, which is research that aims to provide a systematic picture of the facts and / or laws and regulations that apply comprehensively then associated with legal theories regarding the topic of discussion.[7] Data collection is carried out through literature studies by collecting secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. The data obtained are then analyzed by qualitative juridical methods, namely research that is carried out in depth as a whole and then poured into a descriptive sentence narrative.[8]

III. DISCUSSION

A. The Link Point of Elements of Corruption in the Perspective of Criminal Law and Administration

Power is often simply equated with authority, power usually takes the form of a relationship in the sense that "there is one party who governs and another party governs".[9] Power can occur because of things that are not related to law, power that is not related to law by Henc van Maarseven is referred to as blote match, while power related to law by Max Weber is referred to as rational or legal authority, namely authority based on a legal system is understood as a rule that has been recognized and obeyed by the government apparatus and even strengthened by the state.[10]

Power is at the core of the administration of the state in a state of movement (*de staat in beweging*), So that the country can take part, work, excel in serving its citizens. Therefore, the state must be given power. Power according to Miriam Budiardjo is the ability of a person or group of human beings

[6] Bambang Sunggono, *Metodologi Penelitian Hukum*, Raja Grafindo Persada, Jakarta, hlm. 93.

[7] Soerjono Soekanto, *Pengantar Penelitian Hukum*, Universitas Indonesia, hlm. 10.

[8] Sugiyono, *Metode Penelitian Kuantitatif, Kualitatif dan R&D*, Alfabeta, Bandung, 2009, hlm. 216

[9] Budihardjo, *Dasar-Dasar Ilmu Politik*, Gramedia Pustaka Utama, 1998, hlm. 35

[10] Mulosudarmo, *Kekuasaan dan Tanggung Jawab Presiden Republik Indonesia Suatu Penelitian Segi-Segi Teoritik dan Yuridis Pertanggungjawaban Kekuasaan,* Universitas Airlangga, Surabaya, 1990, hlm. 30

to influence the behavior of another person or group in such a way that the behavior is in accordance with the wishes and goals of the state.[11]

The wheels of government are sometimes faced with many situations, one of which is when government officials are faced with situations where the authority to act is not regulated through laws and regulations. However, there is an urgent need for the government to act to achieve certain objectives and it is required to decide on that course of action in order to meet the needs of the people. Such acts in administrative law are known as *freis ermessen* or discretion, it's means that provides space for government officials or state administrative bodies to take action without having to be fully bound by the law.[12]

Discretionary exercise is expected to remain in accordance with the final objectives set by the state and must be present *conditio sine quo non* on which discretion is based is exercised. *Conditio sine qua non* at least it is the absence and/or vagueness of a regulation that will be used to solve problems that arise in emergency and compelling circumstances.[13] The exercise of discretion by Government Officials cannot be carried out arbitrarily, among others, it must be based on principles *fairplay*, precision (*zorgvuldigheid*), goal oriented (*zuiverheid van oogmerk*), balance or equal (*evenwichtigheid*), legal certainty (*rechts zekerheid*)[14]. Meanwhile, according to Article 24 of Law Number 30 of 2014 concerning Government Administration, basically states that discretion is carried out by fulfilling the requirements oriented to government goals, not contrary to laws and regulations, in accordance with the general principles of good governance, based on objective reasons, does not create a conflict of interest, and is done in good faith.

Juridically, discretion is regulated in Article 22 paragraph (2) of Law Number 30 of 2014 concerning Government Administration, basically stating that the use of discretion aims to:

a. Streamlining governance;
b. Filling legal vacuum;
c. Provide legal certainty; and
d. Overcoming stagnant government in certain circumstances for the benefit and public interest.

Furthermore, the form of discretion based on Article 23 of Law Number 30 of 2014 concerning Government Administration, among others::

a. Making decisions and/or actions based on the provisions of laws and regulations that provide a choice of decisions and/or actions;
b. Making decisions and/or actions because laws and regulations do not regulate;
c. Making decisions and/or actions due to incomplete or unclear laws; and
d. Decision and/or action making due to government stagnation for the wider benefit.

Discretion is an act in the realm of administrative law, but in the point of view of criminal law it is often considered an abuse of power. According to Jean Rivero and Waline, abuse of power is categorized:[15]

a. abuse of power to commit acts that are not in the public interest or for personal, group or group interests;
b. abuse in the sense that the official's actions are rightly intended for the public interest, but deviate from the purpose for which such authority is conferred by law or other regulations;

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[11] Budihardjo, *Dasar-Dasar Ilmu Politik*, Gramedia Pustaka Utama, 1998, hlm. 35

[12] Minarno, Nur Basuki, *Penyalahgunaan Wewenang dan Tindak Pidana Korupsi dalam Pengelolaan Keuangan Daerah*, Laksbang Mediatama, Palangkaraya, 2009.

[13] Nur Kumalaningdyah, *Pertentangan Antara Diskresi Kebijakan Dengan Penyalahgunaan Wewenang Dalam Tindak Pidana Korupsi*, Jurnal Ius Quia Iustum, Vol. 26 No. 3, September, 2019, hlm. 483

[14] Sumeleh, Elisa J.B., *Implementasi Kewenangan Diskresi dalam Perspektif Asas-asas Umum Pemerintahan yang Baik (AUPB) Berdasarkan Undang-Undang No.30 Tahun 2014 tentang Administrasi Pemerintahan*, Jurnal Lex Administratum, Vol. 5 No. 9, November, 2017, hlm. 130-137.

[15] Ridwan, *Diskresi & Tanggung Jawab Pemerintah*, FH UII Press, Yogyakarta, 2014. Lihat pula Nur Kumalaningdyah, *Pertentangan Antara Diskresi Kebijakan Dengan Penyalahgunaan Wewenang Dalam Tindak Pidana Korupsi*, Jurnal Ius Quia Iustum, Vol. 26 No. 3, September, 2019, hlm. 485.

c. abuse of power in the sense of abusing procedures that should have been used to achieve a particular goal, but have used other procedures to be carried out.

Based on the opinion of Jean Rivero and Waline which are also often used by the view of criminal law, the exercise of authority and the achievement of objectives can only be carried out based on applicable procedures, this often causes problems. The actions of government officials of an administrative nature are actually seen as a criminal act of corruption. The provisions of Article 3 of Law Number 31 of 1999 as amended into Law Number 20 of 2001 concerning the Eradication of Corruption Crimes, state:

"Any person who, with the aim of benefiting himself or another person or a corporation, abuses of power, opportunity or means available to him because of a position that harms state finances or the country's economy, shall be punished with life imprisonment or imprisonment for a minimum of 1 (one) year 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 Rp. 1,000,000,000.00 (one billion rupiah)."

The provisions of Article 3 of Law Number 31 of 1999 as amended into Law Number 20 of 2001 concerning the Eradication of Corruption Crimes, contain elements of "abusing of power, opportunity, or existing means because of position" so that it has the meaning of actions carried out by public officials or officials who carry out government functions. Article 17 of Law Number 30 of 2014 concerning Government Administration basically prohibits Government Agencies and/or Officials from abuse of power.

Based on Article 18 paragraph (1) of Law Number 30 of 2014 concerning Government Administration, it basically states that Government Agencies and/or Officials are categorized as exceeding authority if the actions and/or decisions exceed the term of office, exceed the limits of the area of enactment of authority, and/or contradict laws and regulations.

Based on Article 18 paragraph (2) of Law Number 30 of 2014 concerning Government Administration, it basically states that Government Agencies and/or Officials are categorized as mixing authority if the actions and/or decisions are carried out outside the scope of the field and/or contrary to the purpose of granting authority.

Based on Article 18 paragraph (3) of Law Number 30 of 2014 concerning Government Administration, it basically states that Government Administration Agencies and/or Officials are categorized as acting arbitrarily if the actions and/or decisions are carried out without a basis of authority and/or contrary to Court Decisions with permanent legal force.

To understand the concept or term abuse of power (*detournement de pouvoir*), It must first be understood what is mean authority/power (*bevoegdheid*). In the legal sense, authority is *"The entirety of rights and obligations explicitly granted by the framer of the law to the subjects of public law".*[16]

Problems regarding discretion that are often associated with acts of abuse of power or arbitrary actions are not necessarily caused by public officials who use discretion. However, discretion is often justified as a criminal act in the form of abuse of power that leads to corruption because of the understanding of law enforcement officials who are very positivistic so that they view discretion as an act without legal basis. Belinfante argued that Judges when giving consideration to the actions of the state administration in the form of policies, should respect the policies of the administration of the country. So that the Judge may not judge again the consideration of the interests of state administrative power or in other words the policy cannot be discriminated against or punished.[17]

According to administrative law with regard to such matters are: "doing the right thing and is doing this in the right way" which means doing something right the right way. The *Ultra Vires* doctrine consists of 2 (two) types. First, *Substantive Ultra Vires* which mean doing the wrong thing, such as the authority to buy ships, but in the exercise of buying aircraft. Second, *Procedural Ultra Vires*

[16] P.Nicolai, Bestuursrecht, Amsterdam, 1994, hlm. 4

[17] Belinfante, *Kort Begrif van het Administratief Recht,* Samson Uitgeverij, Alphen aan den Rijn, 1985, hlm. 109

which mean doing the right thing but it is doing it in the wrong way.[18] In case a Government Official or State Administration does something wrong or in the wrong way can be categorized as an act that abuses of power as stipulated in the criminal act of corruption. Therefore, actions and/or policies that are considered discretionary and not criminal acts of corruption are those that do not violate Article 24 of Law Number 30 of 2014 concerning Government Administration and are carried out in good faith to achieve goals according to the authority given or in other words there is no malicious intent (*mens rea*).

B. Settlement of State Financial Losses and Abuse of Power in the Perspective of Administrative Law

There is a link point between Administrative Law and Criminal Law, namely the special criminal law in this case is the criminal act of corruption. This can be seen in the formulation of Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 as amended into Law Number 20 of 2001 concerning the Eradication of Corruption. The main element in Article 2 paragraph (1) of Law Number 31 of 1999 as amended into Law Number 20 of 2001 concerning the Eradication of Corruption is unlawful acts and state losses, while the main element of Article 3 of Law Number 31 of 1999 as amended into Law Number 20 of 2001 concerning the Eradication of Corruption is abuse of power and state losses. The concept of unlawful elements and abuse of power is in the territory of "grey area", There is an intersection between criminal law norms and administrative law norms. In the perspective of State Administration Law, the parameter that limits the free movement of State Administration authority is abuse of power, while in Criminal Law, the parameter that limits the free movement of state administrative authority is in the form of elements of unlawful acts and abuse of power.

There is a problem when government agencies and/or officials commit acts that are considered abuse of power and against the law, whether the authority of the Administrative Court or the Criminal Court has the authority to examine, prosecute, and decide the case. Often law enforcement officials use a frame of reference in the form of a criminal law mindset, this mindset has distorted the essence of criminal law as a last resort (*ultimum remedium*).

The Corruption Eradication Law, which came before the State Finance Law, the State Treasury Law, and the Government Administration Law, caused law enforcement officials to focus more on the Corruption Eradication Law in resolving state financial losses.

Based on Law Number 17 of 2003 concerning State Finance, what is meant by state finance is all state rights and obligations that can be assessed with money, as well as everything both in the form of money and in the form of goods that can be made state property in connection with the implementation of these rights and obligations. Furthermore, based on Law Number 1 of 2004 concerning the State Treasury, what is meant by the state treasury is the management and accountability of state finances, including investment and separated wealth, which are stipulated in the National Revenue and Expediture Budget and Regional Revenue and Expediture Budget.

The drafting of the Corruption Eradication Law at that time as a whole was drafted in an atmosphere of spiritual reform that demanded the eradication of corruption to its roots, thus making the criminal law as *lex talionis* or the law of revenge. Use of criminal law as *lex talionis* It is no longer in accordance with the modern criminal law paradigm that prioritizes benefits.[19] Absolute punishment theory which means punishment as an attempt to retaliate for a mistake committed by someone who committed a criminal act,[20] has shifted to the theory of combined punishment which means punishment is prular, Because it combines the absolute principle (revenge) and the relative principle (purpose) or leans towards modern absolute penal theory which emphasizes a person should be punished only for having committed a criminal offense for which the punishment has been provided

[18] David Stott and Alexandra Felix, *Principles of Administrative Law*, Cavendish Publishing Limited, Sidney, 1997, hlm.81-82

[19] Keterangan Ahli Prof. Dr. Eddy O.S., Hiariej, S.H., M.Hum. pada Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016

[20] Andi Hamzah, *Asas-Asas Hukum Pidana*, Rineka Cipta, Jakarta, 2005, hlm. 31.

by the state.[21] In other words, the purpose of punishment is not just revenge but must contain beneficial value.[22]

Law is not a means of revenge, therefore there are 3 (three) purposes of law, including justice, expediency, and certainty. In realizing the objectives of the law, Gustav Radbruch stated that it is necessary to use the principle of priority of three basic values that are the objectives of the law.

The existence of Law Number 17 of 2003 concerning State Finance, Law Number 1 of 2004 concerning State Treasury, and Law Number 30 of 2014 concerning Government Administration have provided a new view on the settlement of state financial losses. So that the principle can thus apply *lex posterior derogat legi priori* pricipel which means that the new rules override the old rules.

After the Constitutional Court Decision Number 003/PUU-IV/2006, The framer of the law promulgated Law Number 30 of 2014 concerning Government Administration, so that administrative errors resulting in state losses and elements of abuse of power by government officials are not always subject to criminal acts of corruption. So it can be said that in the settlement of state losses, based on Law Number 30 of 2014 concerning Government Administration, it wants to emphasize that the application of criminal sanctions is a last resort (*ultimum remedium*).

Based on Article 35 paragraph (1) and paragraph (4) of Law Number 17 of 2003 concerning State Finance, basically states that every state official and non-treasurer civil servant who violates the law or neglects their obligations that harm state finances is required to compensate the state, the settlement of state losses is regulated in the state treasury law. Furthermore, based on article 61 paragraph (1) of Law Number 1 of 2004 concerning the State Treasury, it basically states that every state/regional loss must be reported by the direct supervisor or head of the work unit to the Governor/Regent/Mayor and notified to the Audit Board no later than 7 (seven) days after the state/regional loss is known.

Based on Article 59 paragraph (3) of Law Number 1 of 2004 concerning the State Treasury, it basically states that every state ministry/institution/head of a work unit can immediately make a claim for compensation. Furthermore, based on Article 63 paragraph (2) of Law Number 1 of 2004 concerning the State Treasury, basically states that compensation claims are regulated by Government Regulations. The regulation is Government Regulation Number 38 of 2016 concerning Procedures for Claiming State/Regional Compensation Against Non-Treasurer Public Servants or Other Officials.

Government Regulation Number 38 of 2016 concerning Procedures for State/Regional Compensation Claims Against Non-Treasury Public Servants or Other Officials, basically regulates that when state/regional losses occur, they are resolved through administrative mechanisms through the establishment of State/Regional Loss Settlement Teams, so that the State/Regional Loss Settlement Officer can immediately resolve state/regional losses by carrying out compensation claims.

With regard to the calculation and determination of state losses is the authority of the Audit Board, this is in accordance with the provisions of Article 10 paragraph (1) of Law Number 15 of 2006 concerning the Audit Board. If state losses have been known and determined by the Audit Board, then the claim for compensation becomes grounded and State/Regional Loss Settlement Teams can prepare a Certificate of Absolute Responsibility.

Settlement of state financial losses starting from administrative acts containing abuse of power through administrative law is more oriented towards the return of state/regional financial losses as victims, so as to provide value for expediency and justice. Different from the settlement of state financial losses through criminal law which is oriented towards punishing perpetrators rather than providing benefits to victims and is carried out without the determination of state financial losses by the Audit Board or in other words, not all formal laws are implemented properly. Furthermore, by putting in place a mechanism for resolving state financial losses through administrative law, it will provide legal certainty and realize criminal law as a last resort (*ultimum remedium*).

[21] Mahrus Ali, *Dasar-Dasar Hukum Pidana*, Sinar Grafika, Jakarta, 2011, hlm. 190

[22] Irfan Alfieansyah, Angrahatana Informasi Hukum: *Mengetahui Restorative Justice Di Indonesia*, APMC FH UNPAS, Bandung, 2022, hlm. 74.

IV. CONCLUDING

A. Conclusions

1. Problems regarding discretion that are often associated with acts of abuse of power or arbitrary actions are not necessarily caused by public officials who use discretion. However, discretion often gets justification as a criminal act in the form of abuse of power that leads to corruption because the understanding of legal practitioners is very positivistic so that they view discretion as an act without legal basis. This situation has resulted in the emergence of legal uncertainty in the field of state administrative actions which ultimately disrupt the performance of public officials for fear that their discretionary actions are considered criminal offenses. An action and/or policy that is considered discretionary and not a criminal act of corruption is if it does not violate Article 24 of Law Number 30 of 2014 concerning Government Administration and is carried out in good faith to achieve goals according to the authority given or in other words there is no malicious intent (*mens rea*).
2. The drafting of the Corruption Eradication Law was prepared in an atmosphere of spiritual reform that demanded the eradication of corruption to its roots, thus making the criminal law as *lex talionis* or the law of revenge. Use of criminal law as *lex talionis* It is no longer in accordance with the modern criminal law paradigm that prioritizes benefits. Juridically, there has been material law in resolving state financial losses and there are elements of abuse of power through the administrative realm, the settlement of state financial losses starting from administrative acts containing abuse of power through administrative law is more oriented towards the state/region as a victim, so that it can provide the value of expediency and justice. Different from the settlement of state financial losses through criminal law which is oriented towards punishing perpetrators rather than providing benefits to victims and is carried out without the determination of state financial losses by the Audit Board or in other words, not all formal laws are implemented properly. Furthermore, by putting in place a mechanism for resolving state financial losses through administrative law, it will provide legal certainty and realize criminal law as a last resort (*ultimum remedium*).

B. Suggestions

1. Government Agencies and/or Officials in taking an action and/or Decision should have good calculations and be based on good faith in order to achieve the objectives set in accordance with their authority. In addition, law enforcement officials should better understand the limitations of discretion with abuse of power, so that not all actions that are not in accordance with procedures are made criminal offenses; and
2. The government and law enforcement officials should have the same perspective on resolving state/local financial losses oriented towards benefit and justice or in other words focusing on the return of state/local financial losses rather than focusing on punishment through criminal mechanisms to realize criminal law as a last resort (*ultimum remedium*) through socialization and training on administrative settlement of state/regional financial losses.

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