# SHIFT OF POWER ABUSE THAT INFLICT STATE LOSSES FROM THE PERSPECTIVE OF CRIMINAL LAW INTO ADMINISTRATIVE LAW

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***Abstract***

*In order to fulfill the principle of the constitutional state, Republic of Indonesia in its constitution admit and guarantee that every people have rights of recognition, guarantee, protection, fair legal certainty and equality before the law. Discretionary power or freies ermessen attached to administrative power even according to the principle of constitutional state every authority should be based on law, but in certain situation and condition in which the law has not or does not clearly regulated, the officials or administration agencies should make an action or decision based on policy or discretionary of power. Although freies ermessen is created in the form of regulation that is known as policy rule or beleid regel but the act of administration agencies that is freies ermessen that is most potential for abuse of power. Therefore, in sentence of Corruption Crime it is based on the purpose of sentence namely improving and protecting society thus the criminal responsibility who is always asked for the convict in the criminal act while it is still based on purpose of sentence.*

***Keywords:*** *criminal law, abuse of power, administrative law, Indonesia.*

***JEL Classification:*** K14, K23

## 1. Introduction

The eradication of corruption has been started since the establishment of Law of Republic of Indonesia on Eradication of Corruption Crime Number 3 of 1971 made by the Representatives is a regulation beside delegating what people wants which then followed by the establishment of Decree of People's Consultative Assembly of Republic of Indonesia Number: XI/MPR/1998 on State Administrators that is clean and free from Corruption, Collusion and Nepotism, and followed by the establishment of Law of Republic of Indonesia Number 28 of 1999 on State Administrator that is clean and free from Corruption, Collusion and Nepotism as a form to create just and prosperous society as mandated in Constitution of 1945.

The era development influences changes of legal need in the society thus it is replaced by Law of Republic of Indonesia Number 31 of 1999 *junco* Law of Republic of Indonesia Number 20 of 2001 on Eradication of Corruption Crime in terms of ensuring legal certainty, avoiding variety of interpretation of law, and providing protection for the society's economy and social rights, and fair treatment in eradicating corruption act.[5] The word of eradication in Law of Indonesia Number 31 of 1999 *junco* Law of Republic of Indonesia Number 20 of 2001 is shown to eradicate corruption crime, in fact by the sentence only will not be easy to eradicate corruption because to eradicate the corruption it should find the cause while in it there is no regulation regarding direct preventive effort on corruption act.

Referring to Law of Republic of Indonesia of 1945 in the fourth Amendment on Article 1 paragraph (3) it is stated that Indonesia is constitutional state, Article 27 paragraph (1) states that All citizens shall be equal before the law and the government and shall be required to respect the

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[5] Indonesia, *Tindak Pidana Korupsi dan Suap Disertai dengan Undang–Undang Pencucian Uang*, Nuansa Aulia, Bandung, first printed, Agustus 2008, p. 49.

law and the government, with no exception and Article 28D (1) Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law. In doing its governmental duties, government is equipped with attributive, delegative and mandatory authorities**.** Those authorities are given thus the State Civil Apparatus (ASN) can do its duty to provide welfare to the people because the duty is closely related to public service. In doing its authority, the government frequently has an obstacle; there is no regulation of law on the implementation of authority thus the government officials cannot do optimally in carrying out public service.

To be able to act optimally, the government officials should be given a space to act based on their own initiative in solving any problem that needs quick handling where to solve the problem there is no a legal basis to solve it by the legislative institution which then in administrative law it is given an authority in the form of policy or discretion which is often known as *freies ermessen*. According to Laica Marzuki, *Freis Ermessen* is a freedom that is given to State Administration in the context of administering the government that is in line with the increase of public service demand that should be given by state administration to the more complex socio-economic life of society. The use of *Freies Ermessen* should not be against the law both written law and unwritten law. According to Muchsan the restrictions of the use of *freies Ermessen* are as follows:[6]

a. The use of *Freies Ermessen* may not be against the applied legal system;

b. The use of *Freies Ermessen* is only intended for public interest.

Discretion according to Ridwan HR as one that gives space for officials or state administration agencies to take an action without being fully bounded by Law, which can be juridically defined as: "Decision and or act can be determined and or carried out by government officials to solve concrete problem faced in the administration of government in terms of laws and regulations that give options, do not regulate, are incomplete or unclear."

Article 3 UU PTPK creates fear and worry for every person that is holding a government position, because every action in making a decision or action in its position is always under the threat of corruption crime because state administration policy which inflicts the state even it gives the benefit to the state or people, still can be convicted. In fact, the obligation of state administrator to establish a decree in carrying out state duties for interest of people and Constitution of 1945 requires a guarantee that everyone has the right of feeling safe and protection from threat of fear.

Decision or action in managing state finance frequently get financial losses due to management of state finance, it becomes one of factors of decreasing budget absorption in the region because the local government worry if its policies will have a huge impact and or are criminalized. Every policy that is made qualified as corruption criminal act, will cause a dilemma because a policy is a part of system in wheel of government because if government official is afraid of being caught in a criminal act in making policy. Thus, the expected wheel of government will not work especially in making policy in the field of investment.[7]

It really obstruct the development in Indonesia especially in the implementation of National Medium-Term Development Plan (RPJMN) 2010-2014 which is the second stage of implementation of National Long-Term Development Plan (RPJPN) 2005-2025 determined through Law Number 17 of 2007 and Presidential Regulation of Republic of Indonesia Number 5 of 2010. In terms of smoothen the development and expedite the effort of prevention and eradication of corruption and in line with commitment of government which has ratified United Nation Convention Against Corruption of 2003 (Constitution Number 7 of 2006) it establishes Presidential Regulation of Republic of Indonesia Number 55 of 2012 on National Strategy for Prevention and Eradication of Corruption in the long-term of 2012-2025 and Medium-term of 2012-2014. In its implementation, it establishes Presidential Regulation of Republic of Indonesia namely Presidential Instruction of Republic of Indonesia Number 1 of 2013 on Action of Prevention and Eradication of Corruption of 2013 which instructs Ministry/Agency and Local Government to take the needed

[6] Ridwan HR, *Hukum Administrasi Negara Edisi Revisi*, Rajawali Pers., Jakarta, 2017, p. 173.

[7] Marwan Effendy, *Apakah Suatu Kebijakan Dapat Di Kriminalisasi? (Dari Perspektif Hukum Pidana/Korupsi),* Seminar LPFA, Jakarta, 2010, p. 22.

steps based on duties, functions, and authorities in terms of Action of Prevention and Eradication of Corruption of 2013 which is guided by strategies of prevention, law enforcement, laws and regulations, international cooperation and recovery of assets of corruption, education and culture of anti- corruption, and reporting mechanism.

Therefore, it is necessary to find and answer legal problems on how should the accountability of abuse of power that inflict state finance losses after the enactment of Law of Republic Indonesia Number 30 of 2014 on Government Administration seen from perspectives of criminal law and administrative law due to a shift in which the provisions in Administrative Law have led to pros and cons among legal experts, especially state criminal law experts and state administrative law experts on related to the enactment of the intended provisions and its influence on the settlement of handling in Corruption Case after the establishment of Law of Republic of Indonesia Number 30 of 2014 on Government Administration especially inflict state finance losses in order to prevent the *overlapping* such as the implementation in the Act of Corruption with Government Administrative Law in terms of implementing Instruction of President of Republic of Indonesia Number 1 of 2016 on Action of Prevention and Eradication of Corruption of 2016 and of 2017.

## 2. Abuse of power that inflict state finance losses from the perspective of criminal law

In Corruption Crime, especially Article 2 and Article 3 in Law Number 31 of 1999 juncto Law Number 20 of 2001 the form of offense in this crime can be said to be a combination of formal offense and material offense. In terms of formal, the sentence can happen if the behavior has fulfilled the element while material offense is the sentence if it appears due to the act that is happened. Offense of abuse of power in corruption crime is regulated in Article 3 of Law of Republic of Indonesia Number 31 of 1999 juncto Law Number 20 of 2001 on Eradication of Corruption crime that is stated as follow:

Anyone with the intention of enriching himself or other persons or a corporation, abusing the power, opportunities, or other means at their disposal due to rank or position in such a way that is inflicting to the finances of the state or the economy of the state, shall be liable to life imprisonment or a prison term of not less than 1 (one) year and not more than 20 (twenty) years and or a fine not less than Rp 50.000.000, - (fifty million rupiah) and not more than Rp 1.000.000.000, - (one billion rupiah).

In Article 3 of Law of Republic of Indonesia Number 31 of 1999 in the formulation of the offense there is no element of "against the law", but there is an element of "abusing power". Hence, whether the abuse of power is similar to "against the law" or not, implicitly this abuse is similar to "against the law", because the essence of abuse of power is the same as "against the law". The element of "against the law" is a "genus" while the element of "abuse of power" is "species".

Indriyanto Seno Adji states that abuse of power and corruption are not based on the understanding the policy but it tends to the matter of relation between power and bribery. In the Law of Eradication of Corruption crime, the characteristics against the law in material is related to the effect of corruption which not only causes state financial losses and economy but also is a violation of social and economic rights of people in a broader sense, so the corruption crime can be classified as (*extra ordinary crime*)[8]. Authority in Corruption crime is rights and power that is owned to do something. What is meant by authority existed in the position of the perpetrator of corruption criminal act is a set of powers or rights attached to position of the perpetrator of corruption to take an action that is needed in order to do the duty or work properly. [9]

According to Prof. Dr. Eddy O. S. Hiariej, S. H., M. Hum. in Decree of Constitutional Court Number: 25/PUU-XIV/2016 the Law of Eradication of Corruption Crime overall is arranged in a inwardness ambience of reform that demands to eradicate corruption to its roots so it uses criminal law as *lex talionis* or law of retaliation. The use of criminal law as *lex talionis* is no longer in

[8] Abdul Latif, *Hukum Administrasi Dalam Praktik Tindak Pidana Korupsi*, Kencana, Jakarta, 2014, p. 43.
[9] Ibid, p. 45.

accordance with the paradigm of modern criminal law as in the convention of UN on anti-corruption that implicitly adheres to corrective, rehabilitative and restorative justice. Corrective justice is related to sentence imposed on the convicted person. In contrast, rehabilitative justice is related to the efforts to improve convicted person. On the other hand, restorative justice is related to the recovery of corrupted state asset. The words "with a purpose" in Article 3 indicate intentional feature in Article *a quo* is deliberation as a purpose. This means that between motivation, action and result should be truly realized. This means that Article *a quo* has closed the opportunity of deliberation as a purpose as a certainty or deliberation as a purpose as a possibility and there should be a causal relationship between abuse of power, opportunity or means with position of the perpetrator.

According to Prof. Dr. Eddyo. S. Hiariej, S. H., M. Hum, the explanation in the Decision of Constitutional Court Number 25/PUU-XIV/2016 the words "with a purpose" in Article 3 indicate deliberation motive in Article *a quo* is a deliberation as a purpose that means between motivation, action and result should be truly realized. It means that Article *a quo* has closed an opportunities of deliberation as a certainty or deliberation as a possibility and there should be a causal relationship between abuse of power, opportunity or means with position of perpetrator. In this case causality concept of Birkmeyer namely "*meist wirksame bedingung*": the most important condition to decide the effect that the involved judge does not understand classification of offenses as *tatbestandmassigkeit* and offense as *wesenschau*. *Tatbestandmassigkeit* can be simply defined as an act that fulfills element of formulated offense while *wesenschau* means that an act is said to fulfill element of offense not only because the act is in accordance with the formulation of offense but also the act is also intended by legislators (Vos, 1950, page 35).

In Decision of Constitutional Court of Republic of Indonesia Number 977 K/PID/2004 on 10th of June 2005, Prof. Dr. Indriyanto Seno Adji, in his paper "Between Material Law in Perspective of Corruption Crime in Indonesia" the main point is that the definition of "abuse of power" is not found explicitly in Criminal Law, so an extensive approach is used based on doctrine found by H.A. Demeersemen on Criminal Law Studies "*De Autonomie van bet Materiele Strafrecht*" meaning that autonomy of material criminal law that questions whether there is a harmony or disharmony between the same meaning of criminal law, especially with Civil Law and State Administrative Law as another branch of law with the conclusion that the same words are stated, Criminal Law has an autonomy to give different definition in other branches of law. Thus, if the definition of "abuse of power" is not found explicitly in Criminal Law, so the Criminal Law can use same definition or meaning that exists or comes from other branches of law by taking over definition "abuse of power" in Article 53 paragraph (2) letter b of Law of Republic of Indonesia Number 5 of 1986 on State Administrative Court.

### 3. Abuse of power that inflict state finance from the perspective of administrative law

In public perspective, there are many public officials decided as corruption suspect of corruption can be interpreted as a result of success of law enforcers in eradicating corruption meanwhile for government officials it can be interpreted as a scourge because there is no guarantee that in turn they will experience the same thing because they are included in corruption crime. It will disturb the process of government administration but it is also potential for governance stagnation happened. Act and decision of public officials that are actually protected by principle of discretionary of power in giving service to public are often shadowed by worry and fear when policy regulation and decision are judged to affect the state losses and are qualified as criminal act.[10]

Act of agencies or officials of administration which are *freies ermessen* are the most potential in the abuse of power while from the perspective of Administrative law, Officials or

[10] Fathudin, *Tindak Pidana Korupsi (Dugaan Penyalahgunaan Wewenang) Pejabat Publik (Perspektif Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan),* Artikel Ilmiah Pusat Konstitusi dan Legislasi Nasional (Posko Legnas) Fakultas Syahriah dan Hukum UIN, Jakarta, diakses tanggal 23 April 2020, p. 2.

Agencies of Administration which do an act that should do in terms of public services and fulfilling rights of society, including the category of "ignoring legal obligation" that is a form of against the law by the authorities (*onrechtmatig overheidsdaat).* By the enactment of Law of Republic of Indonesia Number 30 of 2014 which is not only as legal umbrella for government administration but also as an instrument to improve the quality of government services to the society so the existence of Law can create good governance for all Agencies or Officials of Government in Central and Local Government in order to meet the legal need of society in government administration, agencies and/or officials of government in using authority should refer to the general principles of good governance and based on provisions of laws and regulations and to solve the problem in government administration so the regulation on administration of government is expected to be a solution in providing legal protection for both public and government officials as stated in considering the Law of Republic of Indonesia Number 30 of 2014 on Government Administration.

Therefore, the existence of Law of Government Administration is not to change the pattern of settlement approach of corruption crime or to reduce Law of Corruption crime but rather to give signs of act of government officials for not doing things that are not its authorities in terms of preventing corruption, collusion and nepotism criminal acts happened. Law of Government Administration regulates specifically to prevent corruption criminal act in the environment of government officials while Law of Corruption Criminal Act, eradication of corruption criminal act in general. As predicted by some parties that the existence of Government Administration Law will affect contiguity of criminal law enforcement, especially in the field of eradication of corruption. Law of Government Administration is aimed by the government and parliament; one of them is to strengthen function of prevention and to complete the penal/repressive approach, so not all administrative errors can be categorized as corruption act in the perspective of Law of Corruption Criminal Act.

Abuse of power in State Administrative Law concept is always paralleled by the concept of *detournement de pouvoir* in French legal system or *abuse of power*/*misuse of power* in English term. Historically, the concept of "*detounement de pouvoir*" firstly appeared in France and is the basis of examining of State Administrative Law to government action and considered as principle of law that is a part of "*de principes geberaux du droit*". *Conseil d'Etat* is the first judicial institution that uses it as a testing tool then followed by other countries. Government officials is considered to violate the principle or *detounement de pouvoir* if the purpose of a decision established or the act done is not for interest or public order but for the personal interest of the official. [11]

There are several characters or characteristics to say that there has been abuse of power such as:

1. deviating from the purpose or intention of an authorization.
2. deviating from the purpose or intention related to principle of legality.
3. deviating from the purpose or intention related to general principle of good governance.

The characteristics is a parameter of abuse of power namely the specialty principle both related to legality principle and general principle of good governance that becomes a basis for government's authority to act by considering a good purpose in administrative law and corruption criminal act that are two interrelated aspects of law because point of contact of administrative law among legal norm of government and criminal law where there are three ways to get the government authority namely attribution, delegation and mandate.

## 4. Conclusion

The characteristic of retaliation from the criminal is a general characteristic from sentence, but it is not a purpose of criminal because the purpose of criminal is essentially to improve and

[11] Mohammad Sahlan, *Unsur Menyalahgunakan Kewenangan Dalam Tindak Pidana Korupsi Sebagai Kompetensi Absolut Peradilan Administrasi*, Jurnal Hukum Ius Quia Iustum, Nomor 2, Volume 23, 23 April 2016, p. 276.

protect the society.[12] Theory of unity which focuses on improving and protecting the society is identical to the imposition of sentence on the basis of opportunity principle that implement *plea bargaining* that enables to do prosecution in the court or not based on the purpose of sentence that wants to be achieved. Likewise, in the criminalization of sentence of Corruption criminal act, it should be based on the purpose of the sentence namely improving and protecting the society. Basically, the criminal responsibility is always asked for the convict in a criminal act by keep being based on the purpose of the sentence. Therefore, the attempts of prevention and eradication of corruption need to be improved further and intensified by keep upholding human rights and interest of society. From the perspective of state administrative law indeed the parameter is to limit discretionary power of state apparatus namely *detournement de pouvoir* and *abus de droit* while in criminal law area that limit discretionary power of state apparatus, it is called *wederechtelikheid* and abuse of power considering the characteristics of special sentence of corruption so the acts against the perpetrator of corruption should be conducted quickly and effectively in a reasonable time limit (Vide explanation of Article 4 UU Number 3 of 1971).

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9. Ridwan HR, *Hukum Administrasi Negara Edisi Revisi*, Rajagrafindo Persada, Jakarta, 2017.

[12] Adami Chazawi, *Pelajaran Hukum Pidana Bagian 1*, RajaGrafindo Persada, Jakarta, 2002, p. 167-168.