



Maladministration in Corruption Case: A Study of Limitation on the Criminal Action

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Abstract

The aim of this research is to determine about the limitations between the act of government officials (*bestuurhandelingen*) that inflict state financial loss qualified as a maladministration or a corruption offence. The research method used is Juridical Normative. The result of the study show that, not every act of government officials that inflict state financial loss qualified as a corruption offence. In determine of the limits between maladministration act and corruption offence, the government officials must avoid itself from acts of discretion that containing the nuances of criminal law such as: cheating (deceit), manipulation, misperception, concealment of facts, breach of trust, subterfuge, or illegal circumvention.

Keyword: Corruption, Maladministration, Criminal Law

INTRODUCTION

One obstacle in the effort to realize Indonesia into a prosperous country is corruption. Crime of corruption is one of the selected problems (selectivity) in the study of law, especially criminal law. Corruption in Indonesia is like a flu virus that spreads throughout the government body so that since the 1960s eradication measures are still stagnant (Atmasasmita, 2004: 1). Multidimensional globalization factors supported by advances in communication, transportation and modern information technology are also very influential on their development (Muladi and Diah Sulistyani, 2016: 24). Nyoman Serikat Putra Jaya also stated that, corruption in Indonesia has seeped into all aspects of life, to all sectors and all levels, both at the central and regional levels, the cause of which is that corruption has been left alone for decades without adequate action taken from legal eye (Jaya, 2008: 57).

Internationally corruption is recognized as a global phenomenon that is extra ordinary crime (Pujiyono, 2007: 20). Therefore the handling of criminal acts of corruption requires special handling (extra ordinary measure). In the context of tackling corruption that seeps into all aspects of Indonesian people's lives, law enforcers more

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often use criminal law as *primum remedium* to resolve the problem. This certainly contradicts the nature of criminal law itself which is *ultimum remedium* or as the last drug / last resort in dealing with crime.

Lord Acton once revealed that "power tends to be corrupt, and absolute power is corrupt absolutely" (Djaja, 2010: 1). The relationship between the opportunity to commit a criminal act of corruption and the level of position or power possessed by a person is very closely related. For people who have a position or rank that is high the opportunity to commit acts of corruption will be more flexible. This is reflected in the rampant cases of corruption committed by public officials lately. However, not all government actions (*bestuurshandelingen*) carried out by public officials that harm state finances are criminal acts of corruption.

The rise of criminalization of policies carried out by government officials is due to the wrong implementation of material unlawful acts (Adji, 2009: 2). Based on this, the Law No. 17 was issued on October 17, 2014. 30 of 2014 concerning Government Administration, which is expected to solve the problem of criminalization of policies which results in disruption of government administration and stagnation in the administration of government.

The enactment of Law No. 30 of 2014 concerning Government Administration has changed the legal view of eradicating criminal acts of corruption which originally only used the criminal law approach to an administrative approach. Law No. 30 of 2014 concerning Government Administration affirms that administrative errors resulting in state losses that have been subject to corruption due to illegal acts and state losses must be reviewed. One form of maladministration related to corruption is "abuse of authority". The element of "abuse of authority" is contained in Article 3 of Law No. 31 of 1999 jo. Law No. 20 of 2001 concerning Corruption Crime. In its development, this element of "abuse of authority" is not only contained in Law No. 31 of 1999 jo. Law No. 20 of 2001 concerning Corruption Crime, but also contained in Article 17 of Law No. 30 of 2014 concerning Government Administration.

Doctrinally, there is a blurred line or an obscurity of interpretation regarding the element of "abuse of authority" is a legal act that includes the domain of criminal law (*wederrechtelijkeheid*), or only an act of maladministration which is an administrative legal domain whose settlement uses administrative procedures in accordance with the provisions in the Law No. No. 30 of 2014 concerning Government Administration.

So based on this, it is necessary to conduct a study entitled "Juridical Review Regarding the Limitation between Maladministration and Corruption". In order to achieve its goals, this writing will focus on the problem:

- 1) How determine the quality of abuse of authority carried out by government officials as maladministration?
- 2) How determine the quality of abuse of authority committed by government officials as a criminal act of corruption?

RESEARCH METHOD

In this study the research method that will be used is Normative Jurisdiction. The research specifications used are descriptive analysis. In researching legal issues with a normative approach, the researcher should make observations by studying and explaining secondary data, which is called the library study method (Soekanto and Mamuji, 2001: 1).

FINDING AND DISCUSSION

Abuse of Authority as a Maladiministration

Authority or authority (*bevoegdheid*) is basically a power to carry out certain legal actions. Authority has a very important role in the study of constitutional law and administrative law. According to Abdul Rokhim, authority is an understanding derived from the law of government organizations, which can be explained as a whole of rules relating to the acquisition and use of governmental authority by the subject of public law in public legal relations (Rokhim, 2013: 136).

The nature of government authority is divided into several things, namely bound, facultative and free, especially in relation to the authority of making and publishing decisions (*beschikkingen*) by government organs so that there are decisions that are bound and free (Ridwan HR, 2014: 107). Related to the understanding of the nature of government authority, according to Indroharto (1992):

- a. Authority of the Government is Bonded
Occurs when the basic rules determine when and in circumstances where the authority can be used or the basic rules more or less determine the contents of the decisions that must be taken, in other words, occur if the basic rules that determine the contents of decisions that must be taken in detail, then the authority such government is a binding authority;
- b. Government Authority Facultative
Occurred in the event that the body or administrative officials of the country concerned are not obliged to apply their authority or at least there are still choices, even if the choice can only be made in certain cases or conditions as specified in the basic regulations;
- c. Authority of the Government is Free
Occurs when the basic regulation gives freedom to the body or state administration officials to determine themselves about the contents of the decisions that will be issued or the basic regulations provide the scope of freedom to the relevant administrative officials.

This is in line with the opinion of Hadjon (2004) as quoted by Latif (2016) that, the concept of "*bestuur*" carries the implication of governmental power not only as bound power, but also a free power (*vrij bestuur*, *freis ermessen*, discretionary power). Government legal actions or "*beschikking*", is a decision by state administration officials that are concrete, individual and final. In its implementation, a number of deviations can be made by the Public Official itself, either *onrechtmatige overheidsdaad*, *detournement de pouvoir*, *ultra vires*, or *abus de troit* which are all forms of maladministration.

Maladministration has many forms, and in Law No. 30 of 2014 concerning Government Administration there is no specific definition of the definition of maladministration. In this law it only explains in detail the "Prohibition of Abuse of Authority" which is one form of maladministration. Based on Article 17 paragraph (2) of Law No. 30 of 2014 concerning Administration, the scope of misusing authority in this law includes:

- a. Prohibition of exceeding authority;
- b. Prohibition of mixing authority;
- c. Prohibition of acting arbitrarily.

According to Article 18 paragraph (1) an Agency and / or Government Official is categorized as exceeding authority, if the Decision and / or Action taken:

- a. Beyond the term of office or the deadline for authorization;

- b. Beyond the boundaries of the entry into force of authority; and / or
- c. Contrary to the provisions of the laws and regulations.

Then according to Article 18 paragraph (2), an Agency and / or Government Official is categorized as confusing authority if the Decision and / or Action taken:

- a. Outside the scope of the field or material authority given; and / or
- b. Contrary to the purpose of the authority granted.

According to Article 18 paragraph (3), an Agency and / or Government Official is categorized as acting arbitrarily if the Decision and / or Action taken:

- a. Without the basis of authority; and / or
- b. Contrary to Court Decisions that have permanent legal force.

The occurrence of a maladministration issued in the form of a decision can occur based on a binding authority or free authority by public officials (Minarno, 2009: 179). Based on this, then between the decisions of state administration officials originating from bound authority and free authority have their own parameters in determining whether there is a maladministration or not. In addition to using statutory provisions, in determining the parameters or limitations they can use the doctrines or theories contained in the realm of administrative law.

It has been explained before that the authority of a government that is bound is, if this authority occurs if in its basic regulations more or less determined about the contents of decisions that must be taken in detail, then the authority of this government is called: the authority of the government that is bound (Anggriani, 2012: 125). An administrative body or official of the country concerned cannot do anything other than carrying out the provisions written in the formulation of the regulation. In summary, it can be concluded, basically a public official only implements existing provisions without the existence of a space of freedom of action to determine other matters.

Here is one simple example of a binding state administrative decision: regarding the requirement to get a SIM must be at least 17 (seventeen) years old. So if a state administration official issues a SIM (which is a state administrative decision) against a child who is not yet 17 (seventeen) years old, even though the legislation requires a minimum of 17 (seventeen) years, then the official's action can categorized as maladministration in the context of bound authority. According to Sjachran Basah, the parameters used to test whether or not there is an abuse of authority in a binding authority is to use the *wetmatigheid* principle (legislation) (Latif, 2016: 39).

In other literature, according to Nur Basuki Minarno the notion of *wetmatigheid* is similar to the notion of the principle of legality which is the basis of legitimacy for the government to act in achieving a certain goal (Minarno, 2009: 179). The principle of legality in administrative law is commonly referred to as "*wetmatigheid van bestuur*" (Latif, 2016: 23). The principle of legality basically does not take into account the specificity of the direction and purpose given a certain authority in each decision issuance.

Whereas free government authority is a discretion (*freis ermessen*). According to Laica Marzuki as quoted by Juniarso Ridwan and Achmad Sodik Sudrajat that the *ermessen freis* is the freedom given to the state administration in the framework of organizing government, in line with the increasing demands of public services that must be administered by the state towards increasingly complex socio-economic life (Ridwan and Sudrajat, 2009; Arsyad, 2013). In Article 1 point 9 (nine) of Law No. 30 of 2014 concerning Government Administration: "Discretion is a decision and / or action determined and/or carried out by Government Officials to overcome the concrete problems faced in administering the government in terms of legislation not regulating, incomplete or unclear, and/or government stagnation ". Based on Article 22 Paragraph (2) of Law No. 30 of 2014 concerning Government Administration, states that discretion

can only be carried out by authorized Government Officials, with the aim of:

- a. Launching government administration;
- b. Fill in the legal vacuum;
- c. Providing legal certainty;
- d. Overcoming government stagnation in certain circumstances for the benefit and public interest.

The form of abuse of free authority is *detournement de pouvoir*, for example, because of an error in the use of discretion (*freis ermessen*), or a policy deviation by public officials in carrying out their duties as organs of government. Government action (*bestuursbandeling*) using policy regulations (*beleidsregel*) originating from discretion (*freies ermessen*) is indeed very necessary, because discretion (*freies ermessen*) is the freedom given to the state administration in the framework of administering government, in line with the increasing public demands (*bestuurzorg*) what the state administration must give to the increasingly complex socio-economic life of citizens (Nurhayati and Gumbira, 2017: 54). In this regard Sudikno Mertokusumo once stated that, in order to be able to carry out his duties perfectly, the government needs freedom in its actions (Mertokusumo, 2014: 56). In line with this, according to Sjachran Basah, the enactment of *freis ermessen* by the state administration is made possible by law in order to act on its own initiative, especially in resolving important issues that arise suddenly (Arsyad, 2013: 91). In this case, state administration officials were forced to act quickly to make a solution to avoid the occurrence of government stagnation. But the decisions or policies taken to solve those problems should be accountable.

The use of the *ermessen freis* does not cause a problem, this is because the possibility of violations of citizens' rights is getting bigger. These violations are reflected through *onrechtmatige overheidsdaad*, *detournement de pouvoir*, or *ultra vires*, or *abus de droit*, which are forms of maladministration. Doctrinally, according to Philipus M. Hadjon abuse of authority in the concept of administrative law is always paralleled by the concept of *detournement de pouvoir* (Hadjon, 2012: 21-22). 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 given to that authority. So based on this, the official violated the principle of speciality.

The principle of speciality (*specialiteitsbeginsel*) by Tatiek Sri Djamiati translates in the language of Indonesian law into "principle of purpose" (Djamiati, 2004: 108). The principle of specialization (*specialiteitsbeginsel*) or the principle of purpose is a benchmark or parameter "purpose and purpose" giving authority in determining the occurrence of abuse of authority. In the administrative legal concept, any authorization to a body or to a state administration official is always accompanied by "the purpose and purpose" given that authority, so that the application of that authority must be in accordance with the "purpose and purpose" given that authority. The use of authority that is not in accordance with the "purpose and purpose" of authorization, then a state administration official can be said to have committed an administrative violation (maladministration) in the form of abuse of authority (*detournement de pouvoir*). It can be concluded that this principle is the basis of the government's authority to carry out government activities by paying attention to a goal.

Regarding this matter, Philipus M. Hadjon, quoting Mariette Kobussen's opinion to measure abuse of authority in relation to "*beleidsvrijheid*" (discretionary power, *freis ermessen*) must be based on the principle of specialization that underlies the authority itself (Hadjon, 2012: 22). Based on this, the testing of policy regulations is based more on *doelmatigheid*, then the benchmark used is general principles of good governance. In line with that, according to H. Abdul Latif, in measuring the abuse of authority,

especially related to *beleidsvrijheid* (discretionary power, *freis ermessen*), it must be based on general principles of good governance, because the *wetmatigheid* principle is not adequate (Hadjon, 2012: 24) . . According to Philipus M. Hadjon, the general principles of good governance are unwritten legal principles (AUPB), from which for certain circumstances legal rules can be applied (Hadjon, 2011: 270). Therefore to prove the existence of AUPB violations must be measured factually (Latif, 2016: 26).

The Abuse of Authority as a Corruption

In accordance with the results of the Indonesian Supreme Court National Working Meeting held on September 2 - 6, 2007 in Makassar, the main opinion was among others:

- a. A policy is a matter of "freedom of policy" (*beleidsvrijheid, freis ermessen*) from the state apparatus in carrying out its public duties, so that it cannot be assessed by criminal judges or by civil judges;
- b. When connected with the application of policy (*beleidsvrijheid, freis ermessen, beleidsregels*), the administrative reason law is not included in the domain of corruption, not all actions / offenses that cause state finance are corruption;
- c. *Beleidsvrijheid* and *wijsheid* are owned by every state official or organizer, who has authority based on existing laws and regulations. Restrictions on *beleidsvrijheid* apply, if there are actions that fall into the category of abuse of authority (*detournement de pouvoir* and *abuse de droit*). Settlement of these irregularities is carried out through administrative courts or state administrative courts;
- d. *Freis ermessen* is used by officials or state administrators to act in order to resolve important and urgent conditions, which arise and are faced in the practice of state administration, and must be carried out to achieve the objectives of the country. The measure of *freis emmersen* usage is a parameter of general principles of good governance.

Abuse of authority is indeed a form of maladministration, namely violations committed by public officials in the realm of administrative law. However, this can be included in the realm of criminal law because of certain factors. According to the principle "*actus non facit reum nisi men sit rea*" (act does not make a person guilty, unless the mind is legally blameworthy) which means briefly, to determine an act done by someone is not a crime except on the basis of intention evil. Based on the adage, it can be concluded that there are two conditions that must be fulfilled so that a person can be convicted, namely *actus reus* (forbidden outer act) and *mens rea* (reprehensible inner attitude).

The act of abuse of authority is listed as one of the elements of offense or criminal offense in Article 3 of Law no. 31 of 1999 jo. Law No. 20 of 2001 concerning Corruption Crime which reads: "Anyone who aims to benefit himself or another person or a corporation, misuses the authority, opportunity, or means available to him because of a position or position that can harm state finances or the country's economy, be punished with imprisonment for life or imprisonment of at least 1 (one) year and a maximum of 20 (twenty) years and or a fine of at least Rp. 50,000,000 (fifty million rupiah) and at most Rp. 1,000,000,000.00 (one billion rupiah) ".

In the explanatory section of Article 3 of Law no. 31 of 1999 jo. Law No. 20 of 2001 concerning Corruption Crime, there is no further explanation of what is meant by "abusing authority". Therefore, theories or expert opinions can be used to explain the meaning of the term "abuse of authority". To find out whether the act of abuse of authority carried out by officials or the government falls into the category of corruption, it must be seen in full the elements of the offense in the article.

The first element is "with the aim of benefiting oneself or others or the corporation". According to Lilik Mulyadi, when viewed from the aspect of proof, the element "benefiting oneself or others or a corporation" can be more easily proven by the Prosecutor / Prosecutor because the "beneficial" element does not require a dimension of whether the suspect / defendant of corruption is getting rich or getting rich hence (Mulyadi, 2015: 91). In the phrase "with purpose" is an inner element that determines the direction of the act of abuse of authority carried out by the person (Sudarto, 2007: 134).

The second element is "misusing authority, opportunity, or means that exist in the state due to position or position". H. Abdul Latif argues that the element of misusing authority in corruption is a species delict from an unlawful element as a genus delict will always be related to the position of public officials, not in relation to position and understanding in the domain of civil structures. The formulation of criminal acts of corruption must be interpreted as a state apparatus or public relations officer who certainly fulfills the elements, namely: appointed by an authorized official, holding a position or position, and doing part of the state's tasks or equipment of the state government (Latif, 2016: 41). Based on this, the meaning of "abuse of authority" must be interpreted in the context of public officials, not officials in the private sphere even though private officials also have positions.

Referring to this formulation basically, the second type of corruption is only applied to an official / civil servant because only the state employee can abuse his position, position and authority, opportunity, or means available to him. According to the provisions of Article 1 paragraph (2) Law No. 31 of 1999 jo. Law No. 20 of 2001 concerning Corruption Crime, the definition of civil servants includes:

- a. Civil servants as referred to in the Civil Service Act (Law No. 43 of 1999);
- b. Civil servants as referred to in the Criminal Code (Article 92 of the Criminal Code);
- c. People who receive salaries or wages from a corporation that receives salaries or wages from a corporation that receives assistance from state or regional finance; and
- d. People who receive salaries or wages from other corporations that use capital or facilities from the state or society.

Lilik Mulyadi stated that, the term "abusing" is very broad in scope of understanding and not limited in limitative as stipulated in Article 52 of the Criminal Code (Mulyadi, 2015: 93). In simple terms, it can be explained that the word "abusing" here can be interpreted in the context of the existence of rights or powers which are not done properly as they have benefited themselves, others or corporations. Likewise regarding the word "abusing opportunity", it can be interpreted that there is an abuse of time or opportunity carried out by the perpetrator because of the position or position held.

In line with this, according to H. Abdul Latif, what is meant by "opportunity" is: "opportunities that can be exploited by perpetrators of corruption, which opportunities are listed in the provisions on how to work related to positions or positions held or occupied by perpetrators of criminal acts of corruption ". The definition of "misusing facilities" means that there appears to be misuse of equipment or facilities obtained due to the position or position of the perpetrator. Based on this, what is meant by means is the method of work or method of work relating to the position or position of the perpetrators of corruption.

The third element is, "the act can be detrimental to the country's finances or the country's economy" According to the legislators in their explanation, state finance is all state assets in any form, separated or not separated, including all parts of the country's wealth and all rights and obligations arising from:

- a. Being in the mastery, management and accountability of state officials, both at the central and regional levels; and
- b. Being in the management and accountability of State-Owned Enterprises / Regional-Owned Enterprises, foundations, legal entities, and companies that include third party capital based on agreements with the state.

Based on this description, it can be simply concluded that an act of harm is an act that results in a loss or becomes reduced, so that the element "detrimental to state finances" is defined as the loss of state finances or a reduction in state finances. According to Muhammad Djafar Saidi and Eka Merdekawati Djafar, specifically the definition of state financial losses contains the following elements:

- a. Reduced real and definite amount of money or state property;
- b. As a result of actions that are not in accordance with the law; and
- c. Done because of deliberate or negligence.

But in its development, based on the Decision of the Constitutional Court No. 25 / PUU-XIV / 2016, in its decision stating that the word "can" in Article 2 paragraph (1) and Article 3 of the Corruption Law does not have binding power. Then based on this matter Article 2 paragraph (1) and Article 3 of Law No. 31 of 1999 jo. Law No. 20 of 2001 concerning Corruption is a material offense which means that the existence of a criminal act of corruption must cause undesirable consequences in this case the state loss must be clear in number.

Based on the description it is very clear that *actus reus* in Article 3 of Law No. 31 of 1999 jo. Law No. 20 of 2001 concerning Corruption Acts is "misusing authority, opportunity, or means that exist in the state due to position or position" which results in "financial and economic losses of the country".

While the *mens rea* element is listed in the phrase "with the aim of benefiting themselves or other people or the corporation", which means that the actor really wants or has a goal to benefit himself or others or the corporation. The *mens rea* element is very important to prove, because if this element cannot be proven, then the act of "abuse of authority" carried out belongs to the act of Maladministration which is the realm of State Administrative Law because the act is not a criminal offense.

The same thing was once stated by Andhi Nirwanto, to determine whether the decisions and / or actions of government officials are the domain of corruption, of course, must look at the substance of their actions as a basis for revealing material truth in criminal cases. Regarding discretionary actions, Andhi Nirwanto quoted opinions from Ronald Dworkin and H. L. Hart through "doughnut theory of discretion" explaining the discretionary domain was in the hole of a donut circle. This means that wisdom or discretion is an empty area in the center of a donut (the hole in the donut), which cannot be regulated in detail in a law. However, Dworkin and Hart argue that the policy of government officials must always pay attention to the legislation, skills, knowledge, insights and visions of the public officials concerned about the main objectives to be achieved from the policies issued.

Nyoman Serikat Putra Jaya (2015) stated that, in order to prevent the occurrence of criminal acts of corruption besides having strict rules in determining decisions and taking actions in accordance with the Government Administration Law, the Agency and / or Government Officials must avoid discretionary actions that contain nuances criminal law such as: fraud (deceit), manipulation, misdirection, concealment of facts, breach of trust, trick (subterfuge), or illegal circumvention. If the parameters and legal theory mentioned are not proven, according to Andhi Nirwanto there can be two possibilities, namely:

- a. It is negligence due to lack of knowledge, lack of experience or professionalism (malpractice); or
- b. Default (failure to perform an obligation) or illegal acts (*onrechtmatigedaad*) as referred to in Article 1365 of the Civil Code.

The actions of government officials in the form of negligence as a result of lack of knowledge or skills can only lead to criminal charges, if the omission is formulated as an element of action or "*dolus eventualis*" (Schaffmeister et.al, 2007: 82). On the contrary, if the above parameters are met, the decisions and / or actions of government officials constitute the realm of criminal law, because all the negative parameters above are nuanced with evil intentions and cause an element of lawlessness in criminal law. Based on the description, it can be concluded to find out whether the decisions or policies issued by public officials are of quality as criminal acts of corruption if there has been an act against criminal law, and found an evil inner attitude (*mens rea*) from these public officials.

CONCLUSION

Not all government actions (*bestuurhandelingen*) carried out by public officials that harm state finances are criminal acts of corruption. In determining the boundaries between acts of maladministration and criminal acts of corruption related to the element of "abuse of authority" can use several parameters, namely in measuring the abuse of authority due to the binding authority is to use the *wetmatigheid* principle (legislation), and if due to a discretion or free authority, in addition to using the principle of speciality (*specialiteit beginsel*) also used the general principles of good governance (*algemene beginselen van behoorlijk bestuur*) based on its effectiveness (*doelmatigheid*) a decision of a public official who had been issued. Government agencies and / or officials must avoid discretionary actions that contain nuances of criminal law such as deceit, manipulation, misperception, concealment of facts, breach of trust, subterfuge, or circumvention of regulations (illegal circumvention). On the contrary, if the above parameters are met, the decisions and/or actions of government officials constitute the realm of criminal law, because all the negative parameters above are nuanced with evil intentions and cause an element of lawlessness in criminal law.

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