



RESEARCH ARTICLE

DISCOURSE ON LEGAL EXPRESSION IN
ARRANGEMENTS OF CORRUPTION
ERADICATION IN INDONESIA

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ABSTRACT

The purpose of this research is explain and examine the expansion of the absolute competence of Administrative Court (Hereinafter referred to as PTUN) after the Government Administration Law is promulgated and the implications of the application of the Administrative Law on legal certainty to eradicate and enforce corruption in Indonesia. This research uses a normative juridical research method, and uses a statutory approach (statute approach). The results showed "that there are several forms of expansion of PTUN competencies, such as the authority that acts factually, the authority, administrative authorization, decides on positive fictitious decisions, and discretionary trials". Meanwhile, the implications of the Government Administration Law on corruption are known as corruption crimes, which are true. So, in this context there are at least two problems, namely: "1. If the authorized court case is carried out by the state

government which is submitted to the court simultaneously, to the State Administrative Court and to the District Court in a corruption case? 2. If at any time a PTUN decision has been issued stating that it is not authorized, but there is also a party who submits the case to the District Court on charges of corruption. What is the attitude of the District Court, whether to accept the PTUN decision on the case or choose to override the PTUN decision". So the author is of the view that in this case there is concern that it will complicate the prosecution or eradication of criminal acts of corruption in the case of abuse of authority committed by government officials.

Keywords: Administrative Court; Corruption; Abuse of Authority

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INTRODUCTION

Corruption has become a kind of daily phenomenon in Indonesia. Various institutions, actions, and studies on them are endeavored in a series of actions large which are usually under the heading: "eradicating

corruption". In line with these efforts, skepticism actually spreads around the actions and discourses of eradicating corruption, both critical-constructive from among supporters or fighters of anti-corruption, as well as those that weaken politically from circle of collective elites who felt threatened by their interests.¹ This shows that the eradication of corruption eradication of law is not only a matter of achievement or achievements of the KPK, but also the responsibility of various parties, ranging from advocacy and monitoring institutions, existing legal institutions, to the Indonesian people themselves.

So it is not wrong if there is a view that states that corruption is a reality of deviating social and legal norms that society does not want and is threatened with sanctions by the state. Corruption is a form of abuse of position (position), power, opportunity to fulfill the interests of oneself and/or groups that go against common interests (society).²

Law enforcement against corruption is very different from other crimes, including because there are many institutions that are authorized to conduct judicial proceedings against corruption as mentioned in the first alenia. This condition is a logical consequence of the predicate placed on the crime as *extra ordinary crime*. As a crime which is categorized as *an extra ordinary crime*, the crime of corruption has an extra ordinary power and destructive against the joints of life of a State and nation.

In the case that corruption is used as a tool to gain political power, it will result in governments and community leaders who are not legitimate in the eyes of the public. If this is the case, then the people will not believe in the government and these leaders, as a result they will not obey and submit to their authority. Corrupt practices that are widespread in politics such as fraudulent elections, violence in elections, money politics and others can also cause damage to democracy, because to maintain power, corrupt rulers will use violence (authoritarianism)³ or spread corruption more widely in society.⁴ Furthermore, it will lead to social political

¹ INO SUSANTI, *Refleksi Ilmu Hukum Dalam Analisis Penegakan Hukum Pemberantasan Korupsi Di Indonesia*, 1 JDH (JURNAL DINAMIKA HUKUM) 14. 123-133 (2014)

² RB. SOEMANTO, SUDARTO, SUDARSANA, *Pemahaman Masyarakat Tentang Korupsi*, 1 YUSTISIA (JURNAL YUSTITIA). 3. 80-88 (2014).

³ SUSETIAWAN, "Harmoni, Stabilitas Politik Dan Kritik Sosial", *Kritik Sosial dalam Wacana Pembangunan*, 17-18 (1997)

⁴ ROBIN THEOBALD, *CORRUPTION, DEVELOPMENT AND UNDERDEVELOPMENT*, 128 (1990)

instability and social integration, due to conflicts between the rulers and the people. In fact, in many cases, this has resulted in a dishonorable fall in government power, as happened in Indonesia.⁵

In the case of corrupt practices occurring in the bureaucracy of a country, it causes inefficiency of the bureaucracy and increases administrative costs in the bureaucracy. If the bureaucracy has been surrounded by corruption in its various forms, then the basic principles of a rational, efficient, and quality bureaucracy will never be implemented. The quality of service is definitely very bad and disappoints the public. Only people who have it will get good service because they are able to bribe.⁶ This situation can lead to widespread social unrest, social inequality and possibly social anger which leads to the downfall of bureaucrats.⁷

So it is not wrong when Nyoman United Putra Jaya said that “the negative consequences of the criminal act of corruption are very damaging to the order of life of the nation, corruption is a deprivation of economic rights and social rights of the Indonesian people”.⁸ Moreover, the most dangerous negative effect of corruption in the long term is the destruction of the younger generation. In a society where corruption has become daily food, children grow up with an antisocial personality, then the younger generation will perceive corruption as a common thing (or even culture), so that their personal development becomes accustomed to dishonesty and irresponsibility.⁹ If the young generation of a nation is in that condition, you can imagine how grim the future of that nation will be.

Even empirical research conducted by Transparency International shows that corruption also results in reduced investment from domestic and foreign capital, because investors will think twice about paying higher than necessary costs in investing (such as bribing officials to obtain permits, fees security to the security forces so that the investment is safe and other unnecessary costs). Since 1997, investors from developed countries (America, Britain and others) have tended to prefer to invest

⁵ SUKARDI RINAKIT, *THE INDONESIAN MILITARY AFTER THE NEW ORDER*. 67-73 (2005).

⁶ GERALD M. MEIER DAN JAMES E. RAUCH, *READINGS IN COMPARATIVE ANALYSIS*, ED. 2, 536 (2005)

⁷ TUNKU ABDUL AZIZ, *FIGHTING CORRUPTION: MY MISSION*. 60 (2005).

⁸ NYOMAN SAREKAT PUTRA JAYA, *BEBERAPA PEMIKIRAN KE ARAH PENGEMBANGAN HUKUM PIDANA*. 69 (2008)

⁹ SYED HUSSEIN ALATAS, *THE SOCIOLOGY OF CORRUPTION*, ED. 2. 62 (1996)

their funds in the form of Foreign Direct Investment (FDI) to countries with small levels of corruption.¹⁰

This shows the magnitude of the influence caused by the practice of corruption in a country besides detrimental to state finances, it can also eliminate the desire of investors who threaten the development of the Indonesian economy and it is an obligation for all of us, especially the government to strive to eradicate and minimize the criminal act of corruption. Meanwhile, law enforcement activities against corruption do not always meet expectations. “The political configuration of a country will affect the activities of law enforcers in enforcing law. This is because law enforcement against criminal acts of corruption always involves state officials or state officials. This is different if the parties are ordinary people, in this case law enforcers are freer to express their authority in upholding justice and law. In the event that one of the parties is a State or a State official, law enforcers will be extra careful in using their authority so that there will be an impression of being slow, selective and so on”.¹¹

As it is known, the efforts taken to eradicate corruption in Indonesia have been carried out for a long time, either by using various means, sanctions against corruption actors have been heavier, but almost every day we still read or hear news about corruption. News about hand-catching operations (OTT) against corruption perpetrators is still common. There is even one case where corruption has affected almost all members of the legislature in a region, namely members of the Malang City DPRD, out of 45 members of the city DPRD, 41 of which were caught red-handed by the Corruption Eradication Commission (KPK). Then, no less shocking was the news about the arrest of a member of the Mataram City DPRD who carried out extortion related to the aid for the rehabilitation of educational facilities affected by the earthquake in Lombok, NTB.¹²

This shows that the disease of corruption in Indonesia is severe enough so that members of the council have the courage to extort money, especially for education funds intended for natural disasters whose impact should be very difficult for people in the area. So it is appropriate,

¹⁰ DAVID JAY GREEN, “*Investment Behavior And The Economic Crisis In Indonesia*”, 2 JOURNAL OF ASIAN ECONOMICS 15. 285-305 (2004).

¹¹ ROMLI ATMASASMITA, ARAH PEMBANGUNAN HUKUM DI INDONESIA, DALAM KOMISI YUDISIAL DAN KEADILAN SOSIAL, 116 (2008)

¹² WICIPITO SETIADI, *Korupsi Di Indonesia (Penyebab, Bahaya, Hambatan Dan Upaya Pemberantasan, Serta Regulasi)*, 3. LEGISLASI (JURNAL LEGISLASI INDONESIA). 15. 249-262. (2018)

government programs in an effort to eradicate corruption crimes must be strengthened and sustainable. Not even taking an action that has the potential to erode the efforts to eradicate the criminal act of corruption, as the authors will discuss later in this paper.

As it is known that in Indonesia regarding the provisions eradication of Corruption (Tipikor) are regulated in "Law Number 31 of 1999 concerning Corruption Crime" which has been amended and supplemented by "Law Number 20 of 2001" (hereinafter referred to as Corruption Act). In Article 3 of the Anti-Corruption Law it is said that:

"Anyone who has the purpose of benefiting himself or someone else or a corporation, abuses his authority, opportunity or means because of his position or position which can harm the country's finances or the economy of the country, is punished with imprisonment life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years and or a minimum fine of Rp. 50,000,000.00 (fifty million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah)".

The provision is based on the Constitutional Court Decision Number 25/PUU- XIV / 2016 which states that the word can be erased so that it implies that there must be a real and definite state loss resulting in a shift in article 3 of the Corruption Act from formal offenses to material offenses..¹³ But still, based on the interpretation and content of the article that has changed based on Regulation the Constitutional Court Number 25 / PUU-XIV / 2016 if the article has been fulfilled, government officials or officials can be held criminally liable.

Then in 2014 Law Number 30 of 2014 formed concerning Government Administration (hereinafter referred to as the AP Law) was which in Article 21 states that:

1. "The court has the authority to accept, examine, and determine whether or not there is an element of abuse of Authority carried out by Government Officials ..

¹³ See *THE DECISION OF THE CONSTITUTIONAL COURT NUMBER 25 / PUU-XIV / 2016*

2. Government Agencies and / or Officers can submit applications to the Court to assess whether or not there is an element of abuse of Authority in Decisions and/or Actions.
3. The court must decide upon the application as referred to in paragraph (2) no later than 21 (twenty one) working days after the application is submitted.
4. Against the Court's decision as referred to in paragraph (3), an appeal can be appealed to the State Administrative High Court.
5. The State Administrative High Court must decide the appeal as referred to in paragraph 6. no later than 21 (twenty one) working days after the appeal is submitted.
6. The decision of the State Administrative High Court as referred to in paragraph (5) is final and binding”.

Seeing the contents of Article 21 of the AP Law above, it has implications for increasing absolute competence for the State Administrative Court (PTUN) which is known beforehand that the absolute competence of the PTUN is contained in Article 47 of Law No. 5 of 1986 which stipulates that the court has the duty and authority to examine, decide upon and resolve a state administration dispute. What is meant by said state administrative dispute, according to Article 1 number 4 is a dispute arising in the field of state administration between a person or a legal entity with a state administrative agency or agency, both at the central and regional levels, as a result of the issuance of the Administrative Decree State, including employment disputes based on applicable laws and regulations.¹⁴

From the provisions in Law No. 5/1986 it appears that PTUN competencies are very narrow, only related to the State Administrative Decree which is considered detrimental to the community. Decisions as they are known must be concrete, individual and final, apart from that PTUN does not have the authority to try them. The above conditions last for almost 20 years, then in line with the increasing tasks that must be carried out by the government which is influenced by the understanding of the welfare state. Coupled with the government's authority to discretion, namely freedom to take policy if there is no law that regulates it or vague

¹⁴ R WIYONO, *HUKUM ACARA PERADILAN TATA USAHA NEGARA*, 5. (2007)

laws owned by the government. Therefore, the competence of PTUN contained in Law No. 5 of 1986 is no longer relevant, because it is too narrow to only hear decisions that are concrete, individual and final.

For the State Administrative Court as a sub system of the system judicial in Indonesia based on RI Law Number 5 of 1986 concerning State Administrative Court as amended lastly with RI Law Number 51 of 2009 concerning Second Amendment to Law RI Number 5 year 1986 concerning State Administrative Court (Peraturan Law) in Article 47 regulates the competence of PTUN in the judicial system in Indonesia, namely the duty and authority to examine, decide upon, and resolve disputes state administrative.¹⁵ Over time, the competence of PTUN has also developed, for example the authority to examine personnel dispute issues, public information disclosure disputes. However, that authority is felt to be insufficient to guarantee the protection of the rights of community members, some of whom are also human rights. So needed that a much more comprehensive law is that not only guarantees the rights of citizens but also becomes a reference for state officials in making policies.¹⁶

Arguments built above are the main reasons that form the basis of the AP Law in Indonesia, the desire to provide protection legal to every community that allows Citizens to submit objections and appeals to Decisions and/or Actions, to Government Agencies and/or Officials or Superiors The official concerned. Citizens may also submit claims against Decisions and/or Actions of Government Agencies and/or Officers to Administrative Court States and as a reference for State Officials in making policies.

This can be seen in the "Explanation of the General Section Paragraph 5 of Law Number 30 of 2014 concerning Government Administration, it is said that in order to guarantee protection to every Citizen of the Community, this Law allows Citizens to submit objections and appeals against decisions and / or Actions, to the Agency and / or Government Officials or Superior Officials concerned. Citizens can also file a lawsuit against the Decisions and / or Actions of Government Agencies

¹⁵ See Article 47 of Law Number 51 of 2009 Concerning Second Amendment to Law Number 5 of 1986 Concerning State Administrative Courts.

¹⁶ RIDWAN, ET. AL, *Perluasan Kompetensi Absolut Pengadilan Tata Usaha Negara Dalam Undang-Undang Administrasi Pemerintahan*, 2 IUSTUM (JURNAL HUKUM IUS QUIA IUSTUM) 25. 339-358. (2018)

and / or Officials to the State Administrative Court, because this Law is the material law of the State Administrative Court system. Then for the argument as that the AP Law is used as a reference for State Officials in making decisions, it is stated in Paragraph 8 that: “Government Administration Arrangements in this Law guarantee that Decisions and / or Actions of Government Agencies and / or Officials against Citizens cannot be done arbitrarily. With this Law, Citizens will not easily become objects of state power”.¹⁷

However, the main problem is in the formation of the AP Law, especially Article 21 of the AP Law concerning the testing of abuse of authority by PTUN, seems to forget the formal side¹⁸ and only focus on the formation of legislation. It finally adds new problems, as it is said in the research Ridwan, Despan Heryansyah, and Dian Kus Pratama, which says that:¹⁹

“The expansion of absolute competence in administrative court creates legal effect of its own either formally or materially, and in practice there are also problems new arising from the expansion. This is because in the PTUN itself has long established a standardized system and procedural law, of course it has not accommodated the existence of these new authorities”.

This certainly causes the absence of “regulating” (*regulatory*) between the AP Law which causes an expansion of the absolute competence of PTUN, coupled with the existence of *conflict norms* that cause uncertainty²⁰ between Article 21 AP Act and provisions of Article 3 of the Law on

¹⁷ General Section Paragraph 5 of Law Number 30 Of 2014 Concerning Government Administration

¹⁸ In the explanation of law number 30 of 2014 concerning government administration it is clear that “..... This law is a material law of the state administrative court system.”.

¹⁹ The results of interviews conducted by ridwan, et.all show that: “so far there have been difficulties by the judges in exercising the authority mandated by Law No. 30 of 2014, because since the beginning the judges have only trained to implement Law No. 5 of 1986. This of course it has an impact on the professionalism and quality of decisions issued by judges”, See RIDWAN, ET. AL, *supra note* 16, at 343.

²⁰ regulatory and certainty legal rules are needed in order to support the functioning of the legal system properly and smoothly. For further reading, please also see MIRZA SATRIA BUANA, HUBUNGAN TARIK-MENARIK ANTARA ASAS KEPASTIAN HUKUM (LEGAL CERTAINTY) DENGAN ASAS KEADILAN (SUBSTANTIAL JUSTICE) DALAM PUTUSAN-PUTUSAN MAHKAMAH KONSTITUSI, 34 (2010)

Corruption²¹ *juncto* Article 5 and Article 6 of Law Number 46 Year 2009 concerning Corruption Criminal (Corruption Law Court Court),²² which one of the elements regulates Corruption as a result Corruption of acts of abuse of authority, where absolute competence to examine the matter is given to the Corruption Court.

Meanwhile, based on the AP Law, the State Administrative Court through Article 21 of the Law is given the authority or competence to test whether or not there is an element of abuse of power committed by government officials in a region in Indonesia in the event of state financial losses resulting from the abuse of power, which is a problem is that until the Law is enacted, the PTUN Court has never been given the authority to try this matter, the PTUN is only given the authority to examine the decisions of State Administrative Bodies or Officials who in their decisions have used their authority for other purposes than the purpose for which the authority was granted.²³

Seeing the preamble of Article 53 Paragraph (2) of Law Number 5 of 1986 regarding State Administrative Courts (PTUN Law), the PTUN is not actually authorized to examine the elements of abuse of authority committed by officials who are indicated to cause losses to state finances. So based on the above problems, through this paper the author will describe and discuss how "the form of expanding the absolute competence of the State Administrative Court as an effort to prevent (preventive) corruptive acts in the AP Law" and "legal uncertainty in an effort to eradicate corruption in Indonesia. after the formation of the AP Law".

²¹ The Anti-Corruption Law Was Enacted on August 16, 1999 (State Gazette of 1999 Number 140, Additional State Gazette 3874). Meanwhile, Law Number 20 of 2001 Was Promulgated On November 21, 2001 (State Gazette of 2001 Number 134, Additional State Gazette 4150).

²² The Corruption Court Law Was Enacted on 29 October 2009 (State Gazette of 2009 Number 155, Additional State Gazette Number 5074).

²³ See Article 53 Paragraph (2) of Law Number 5 of 1986 Regarding State Administrative Courts

CORRUPTION IN THE ADMINISTRATIVE LAW PERSPECTIVE

I. A FORM OF EXPANDING THE ABSOLUTE COMPETENCE OF THE STATE ADMINISTRATIVE COURT AS AN EFFORT TO PREVENT CORRUPT ACTS IN THE GOVERNMENT ADMINISTRATION LAW

Absolute competence is related to the authority of the Administrative Court to examine and adjudicate a dispute according to the object or material or principal of the dispute. Even though state administrative bodies / officials can be sued at PTUN, not all actions can be tried by PTUN. The actions of state administrative bodies / officials that can be sued in PTUN are regulated in Article 1 paragraph (3) and Article 3 of Law No. 5 of 1986, while the remaining actions become the competence of the General Courts or Military Administrative Courts or even for the problem of making regulations (*regeling*) which is made by the government and is of a general nature, the authority to try it rests with the Supreme Court through the Right to Judge Material.²⁴

Article 47 of Law No. 5 of 1986 states: the court has the duty and authority to examine, decide and settle state administrative disputes. What is a state administration dispute? Article 1 number 4 of Law No. 5 of 1986 also formulates disputes arising in the field of state administration, both at the center and in the regions, as a result of the issuance of state administrative decisions, including employment disputes based on applicable laws and regulations.²⁵

KTUN is the basis for the birth of a state administration dispute. What is KTUN? Article 1 number 3 formulating KTUN is a written stipulation issued by a state administration body or official containing legal

²⁴ MOH MAHFUD MD, *Lingkup Kompetensi Peradilan Tata Usaha Negara Dan Kapasitas Tuntutan Atas Satu Tuntutan Administrasi*, quoted from. SF Marbun, *Peradilan Administrasi Negara dan Upaya Administrasi di Inodnesia*, 41 (1997)

²⁵ PHILIPUS M HADJON, ET.AL., *PENGANTAR HUKUM ADMINISTRASI INDONESIA (INTRODUCTION TO THE INDONESIAN ADMINISTRATIVE LAW)*, CETAKAN KEENAM. 318. (1999)

action on state administration based on applicable legislation that is concrete, individual and final, which results in legal consequences for a person or entity civil law. The provisions in Law No. 5/1986 were deemed no longer relevant to be maintained, so the government issued Law No. 30 of 2014 concerning Government Administration as its successor. The issuance of this Act provoked pros and cons among administrative law experts related to various materials that were arranged, especially in terms of expanding the absolute competence of PTUN.

UU No. 5 of 1986 concerning State Administrative Court is deemed no longer relevant to the development of society, so it must be renewed, namely through the presence of Law Number 30 of 2014 concerning Government Administration. While the government's actions in running the government must also be given a reference. So the substance of this Government Administration Act gives a lot of new authority to PTUN. Many people call it the PTUN material procedural law. Some of the authorities mandated by Law No. 30 of 2014, based on the study of researchers include the following:

a. Meaning of the State Administrative Decree

Referring to Law No. 5 of 1986 as also regulated in Law Number 51 of 2009, that the meaning of the Decree of the State Administration is a written stipulation issued by the State Administration Agency or Officer which contains the legal action of the State Administration based on statutory regulations applicable, which are concrete, individual, and final, which cause legal consequences for a person or private legal entity.²⁶ Compare with Article Law Number 30 of 2014, TUN Decree is interpreted: "Written decree issued by the Government Agency and / or Officer in the administration of government".²⁷ This provision does not yet provide a concrete explanation regarding the criteria of the Decree. Then in Article 87 Transitional Provisions ²⁸ the criteria of the State Administrative Decree shall be understood as:

²⁶ See Article 1 Number 3 of Law Number 5 of 1986 and Article 1 Number 9 of Law Number 51 of 2009

²⁷ See Article 1 Number 7 of Law No. 30 of 2014.

²⁸ many have criticized the detailed provisions of this decision that are only included in the transitional terms. Because the substance of this transitional provision is very basic, it is actually placed in the core article of the law. There are even experts who say that this provision

- 1) "A written determination which also includes factual action;
- 2) Decisions of State Administration Agencies and / or Officers in the executive, legislative, judicial, and other state administration circles;
- 3) Based on statutory provisions and AUPB;
- 4) Is final in a broader sense;
- 5) Decisions that have the potential to cause legal consequences; and / or
- 6) Decisions that apply to Community Members".

From the provisions in Article 87, some interesting notes are: First, if previously the decision was always associated with a concrete, individual, and final nature, where decisions that do not cover the three things cumulatively cannot be submitted to PTUN. However, in this Government Administration Act no longer must include these three characteristics, in this Article it is only said "Final in a broader sense".

Second, government administration is not only limited to decisions as in the PTUN Law, but also includes factual actions. This means that the Government Administration Act equalizes the term decision with action. This factual action is a new term that is not yet known in the previous law, although theoretically it has been widely discussed by many administrative law experts. PTUN handles the object in the form of government administrative actions (Article 1 number 8 of the Government Administration Law) which was originally tested by courts in the general court environment through Acts against the Law by Officials (PMHP) using Article 1365 of the Civil Code. Even in Article 85 of the Law on Government Administration, it is stated that the filing of a lawsuit on Government Administration disputes that have been registered at a general court but have not yet been examined, with the enactment of this Law transferred and resolved by PTUN. From the monthly reports of all PTUNs throughout Indonesia there are no cases of delegation from the District Court.

Third, the scope of government administrative arrangements that not only cover the executive field, but government in a broad sense, namely executive, legislative, and judiciary. This provision is clearly stated in Article 4 which reads: The scope of government administrative

contradicts hans kelsen's theory of stufenbau das rechts. See for example, YODI MARTONO WAHYUNADI, KOMPETENSI ABSOLUT PENGADILAN TATA USAHA NEGARA DALAM KONTEKS UNDANG-UNDANG NOMOR 30 TAHUN 2014 TENTANG ADMINISTRASI PEMERINTAHAN. 140-141. (2016)

arrangements in this law covers all the activities of government agencies and / or government officials who carry out government functions within the scope of the executive, legislative, judiciary, and other state institutions. Thus, at this time the decision that can be sued to the PTUN is not only the decision of the president, governor, regent, or mayor as has been going on. But it also includes the decision of the chair of the DPR and the decision of the chairman of the Supreme Court.

b. Administrative Efforts

The existence of administrative efforts actually get resistance from many experts. So according to them it should no longer be regulated in the law. This condition is supported by the reality of the existence of administrative efforts which have so far been rarely successful in solving problems. Yet according to the PTUN Law this administrative effort is a must. SF Marbun, for example, states that the existence of administrative efforts has several technical issues, namely: the absence of procedural law, lack of information, assessment of policy aspects, determination of deadlines and lack of facilities.²⁹

Administrative efforts regulated in the PTUN Law, the Law on Civil Apparatus (Law No. 5 of 2014), and the Government Administration Law are in principle the same, namely administrative objections and appeals. Addresat filing objections and administrative appeals is also the same, namely objections filed to officials who issue decisions while administrative appeals are submitted to superiors of officials who issue decisions or other agencies.³⁰

However, there are differences in the process leading to a lawsuit in the PTUN Law and the Government Administration Act. In the PTUN Law regime, if a dispute resolution requires administrative efforts, all administrative efforts must be taken first. The court is only authorized to hear cases if the administrative efforts available have been taken by the community. Whereas in the Government Administration Law regime, Article 75 paragraph (1) states, "Citizens who are harmed by a Decree and / or Actions may submit administrative efforts to government officials or

²⁹ SF MARBUN, *PERADILAN ADMINISTRASI...* *supra* note 24, at 102-103

³⁰ TRI CAHYA INDRA PERMANA, *CATATAN KRITIS TERHADAP PERLUASAN KEWENANGAN MENGADILI PERADILAN TATA USAHA NEGARA*, 5. (2016)

superiors of officials who determine and / or make decisions and / or actions".

Some argue that the word "can" in Article 75 paragraph (1) of the UUAP is an *adresat* norm which means that one may not exercise his right to submit administrative efforts because he accepts the decision / action, but when the person concerned will file a lawsuit then the administrative effort available it is still mandatory to be taken first. This opinion arises because the Government Administration Act does not explicitly require administrative efforts to be taken before filing a lawsuit with the Administrative Court. However, there are still other laws which require administrative efforts that have not been firmly revoked so that they are still relevant using administrative efforts.

However, there are also those who argue that in the Government Administration Law there is no rule that the new court is authorized to examine, hear, and resolve disputes when all administrative efforts have been taken first. This means, if the community members choose not to use administrative efforts and directly file a lawsuit it remains justified. Therefore the court cannot declare the claim as unacceptable on the grounds that the plaintiff has not yet taken administrative measures.

Another principle difference is that in the PTUN Law resulting from public dissatisfaction over the settlement of administrative appeals, then submit a lawsuit to the State Administrative High Court (PT TUN), based on Article 51 paragraph (3) of the PTUN Law which states, "The State Administrative High Court is tasked with and have the authority to examine, decide upon and settle at the first level the State Administration dispute referred to in Article 48 ". Whereas according to the Government Administration Law which has the authority to adjudicate due to this administrative effort is the State Administrative Court (PTUN), in Article 76 paragraph (3) the Government Administration Law states, "In the event that the Citizens do not accept the settlement of appeals by the Superiors' Officials, Citizens can filed a lawsuit to the Court ". Article 1 number 18 of the Government Administration Law states that what is intended by the Court in this Law is the State Administrative Court.

PTUN's absolute absolute competence according to the Government Administration Act is to test the consequences of administrative efforts that are not approved by the community. While previously it was the competence of the State Administrative High Court. Thus there are two

legal norms governing administrative efforts. In relation to the completion of administrative efforts the community members still want to submit to the court, there are two courts namely PTUN in accordance with Article 48 of the Peratun Law and to the PTUN in accordance with Article 76 paragraph (3) of the UUAP.

c. Request for Positive Fictitious Decisions

There is a principle difference between the PTUN law and the AP Law regarding negative fictitious decisions and positive fictitious decisions. Article 3 of the PTUN Law regulates negative fictitious decisions, namely if a State Administration Agency or Officer does not issue the petition for a decision while the time period has passed, then the State Administration Agency or Official is deemed to have refused to issue the said decision.

According to Article 53 UUAP in principle regulates if within a specified time limit, the Government Agency or Officer does not issue and / or make a decision and / or action, then the application is considered legally granted. In this positive fictitious decision, the applicant does not automatically obtain the results of his application, but must first submit a request to the Administrative Court to obtain a decision on receipt of the request. PTUN must decide on the application no later than 21 (twenty one) working days after the application is submitted. The PTUN decision is final and binding, there is no other remedy. Government Agencies and / or Officers must determine the Decree to implement the PTUN decision no later than 5 (five) working days after the decision of the Court is determined.

Completely regulated in Article 53:

- 1) "The deadline for the obligation to determine and / or make a decision and / or action in accordance with the provisions of the legislation.
- 2) If the provisions of the legislation do not specify the time limit for the obligations referred to in paragraph (1), the Government Agency and / or Officer shall determine and / or make a Decision and / or Action within a maximum period of 10 (ten) working days after the application is received completely by the Government Agency and / or Officer.
- 3) If within the time limit referred to in paragraph (2), the Agency and / or Government Official does not stipulate and / or make a Decision and / or Action, then the said application is considered legally granted.

- 4) The applicant submits an application to the Court to obtain a decision on receipt of the application as referred to in paragraph (3).
- 5) The court is obliged to decide on the application referred to in paragraph (4) no later than 21 (twenty one) working days after the application is submitted.
- 6) Government agencies and / or officials are obliged to determine a decision to implement the court's decision as referred to in paragraph (5) no later than 5 (five) working days after the decision of the court is determined”.

The birth of positive fictitious decisions is inseparable from the change in the paradigm of public service which requires government agencies or officials to be more responsive to community requests. One of the basic desires and direction of legal politics in government administration laws is to improve the quality of government administration. The reality is that PTUN is domiciled in the provincial capital, making it difficult for justice seekers to gain access to justice. The condition of some regions which are geographically difficult or expensive, according to the writer, is not effective with positive fictitious provisions through the PTUN.

d. Authority to Evaluate the Elements of Abuse of Authority

The Government Administration Act gives PTUN the authority to assess whether or not there is an element of abuse of authority committed by a government agency or official. This provision is regulated in Article 21 of Law No. 30 of 2014, which reads in full:

- 1) "The court has the authority to accept, examine and decide whether or not there is an element of abuse of authority carried out by Government Officials;
- 2) Government agencies and / or officials may submit an application to the court to assess whether or not there is an element of abuse of authority in decisions and / or actions.
- 3) The court is obliged to decide on the application referred to in paragraph (2) no later than 21 (twenty one) working days after the application is submitted.

- 4) Against the Court's decision as referred to in paragraph (3), an appeal can be appealed to the State Administrative High Court.
- 5) The State Administrative High Court must decide the appeal as referred to in paragraph (4) no later than 21 (twenty one) working days after the appeal is submitted.

The decision of the State Administrative High Court as referred to in paragraph (5) is final and binding”.

e. Authority to Test Discretion

Ermessen's discretion or *freies* are defined as a means of providing space for officials or state administrative bodies to take action without having to be fully bound to the law, or actions taken by prioritizing the achievement of objectives (*doelmatigheid*) rather than in accordance with applicable law (*rechtmatigheid*).³¹ *Freies Ermessen* is used mainly because: first, emergency conditions that are not possible to set written rules, second, there are no or no regulations governing them, third, there are rules but the editorial is vague or multiple interpretations (*vogue norm*),³² Meanwhile, according to Bagir Manan, the characteristics of policy regulations are :³³

- 1) "Policy regulations are not statutory regulations.
- 2) The principles of restriction and testing of laws and regulations cannot be applied to policy regulations.
- 3) Policy rules cannot be tested *wetmatigheid*, because there really is no legal basis for making policy policy decisions.
- 4) The policy rules were made based on Ermessen's *freies* and the absence of administrative authority concerned making laws and regulations.
- 5) Testing of policy regulations is more up to *doelmatigheid* and therefore the test stones are general principles of proper governance.
- 6) In practice, various forms and types of rules are given, in the form of decisions, instructions, circulars, announcements, etc., which can even be found in regulations.

³¹ BACHSAN MUSTAFA, POKOK-POKOK HUKUM ADMINISTRASI NEGARA, *see also*, RIDWAN HR, TIGA DIMENSI HUKUM ADMINISTRASI DAN PERADILAN ADMINISTRASI, CETAKAN PERTAMA, 81 (2009).

³² *Id.*

³³ *Id.*, at. 85

Based on the description above, according to Bagir Manan, the restriction on the implementation of discretion is the general principles of proper governance. If a policy complies with these principles, it can continue but if not, the policy can be canceled. So based on Ermessen's freies, the government can issue various policies both in the form of regulations, announcements, guidelines, circulars, instructions, and so forth. Philipus M Hadjon added that Ermessen's freies had to be written down in order to become policy regulations.³⁴

In connection with this discretion there is a dilemma, on the one hand discretion and policy regulations are the necessary governance and instruments of governance that are even called "discretion is a heart of agency power" for the implementation of government tasks, especially in providing services to citizens effectively and efficient. But on the other hand, discretion and policy regulations have aroused suspicion, concern, and are considered a ruthless master. Discretion is like a double-edged sword: it can be used for good and benefit as well as for evil and arbitrariness.³⁵

Provisions regarding discretion are regulated in Article 22 of the administration law. It was stated that the use of discretion was intended to: expedite the administration of government; fill the legal vacuum; provide legal certainty; and overcome the stagnation of government in certain circumstances for the benefit and public interest.²⁷ Provisions on discretion cover two things at once, namely the procedure for the use of discretion by state officials and discretionary testing if there are people who feel their rights are violated on the implementation of a discretion.

Discretion that can be sued in the State Administrative Court and canceled by the Administrative Court is a discretion which: is categorized as over authority, is categorized as a confusing authority, and is categorized as an arbitrary act if issued by an unauthorized official. These three categories of discretion which according to Articles 30, 31 and 32 become invalid or can be canceled. However, in the articles governing discretion, indeed there is not a single word that clearly gives the right to test for discretion is PTUN.

³⁴ PHILIPUS M. HADJON, ET, AL., *PENGANTAR HUKUM ADMINISTRASI INDONESIA*. 152. (1993)

³⁵ RIDWAN., *supra note 16. at 153.*

II. LEGAL CERTAINTY FOR THE ERADICATION OF CORRUPTION CRIME

As the authors stated earlier that the AP Law grants authority to PTUN to assess whether or not there is an element of abuse of authority committed by a government agency or official, this can be seen in Article 21 of the AP Law.³⁶ In the provisions of the Article it is stated that:

- a. "The court has the authority to accept, examine, and decide whether or not there is an element of abuse of authority committed by Government Officials;
- b. Government Agencies and / or Officials can submit a request to the Court to assess whether or not there is an element of abuse of authority in decisions and / or actions;
- c. The court is obliged to decide the application as intended in paragraph (2) not later than 21 (twenty one) working days from the time the application is submitted;
- d. An appeal may be submitted to the Court's decision as referred to in paragraph (3) at the High State Administrative Court;
- e. The High State Administrative Court is obliged to decide on the appeal as referred to in paragraph (4) not later than 21 (twenty one) working days after the appeal is filed;
- f. The decision of the State Administrative High Court as referred to in paragraph (5) is final and binding ”.

So, what is meant by abuse of authority? UUAP provides quite detailed limitations in this law. However, the scope of abuse of authority in UUAP differs from what is regulated in Article 53 paragraph (2) letter b of Law No. 5 of 1986, namely the state administrative body or officials when issuing a decision as referred to in paragraph (1) have used their authority for other purposes from the purpose of granting that authority. That reason

³⁶ a. "The court has the authority to accept, examine, and decide whether or not there is an element of abuse of authority committed by government officials; b. Government agencies and / or officials can submit a request to the court to assess whether or not there is an element of abuse of authority in decisions and / or actions; c. The court is obliged to decide the application as intended in paragraph (2) not later than 21 (twenty one) working days from the time the application is submitted; d. (3) an appeal may be submitted to the court's decision as referred to in paragraph (3) at the high state administrative court; e. (2) the high state administrative court is obliged to decide on the appeal as referred to in paragraph (4) not later than 21 (twenty one) working days after the appeal is filed; f. The decision of the state administrative high court as referred to in paragraph (5) is final and binding.

is interpreted as an abuse of authority. In the UUAP expand and distinguish three forms of abuse of authority as stipulated in Article 17 which reads as follows:

- 1) Government Agencies and / or Officials are prohibited from abusing authority.
- 2) Prohibition of abuse of Authority as referred to in paragraph (1) includes:
 - a. prohibition beyond Authority;
 - b. prohibition of mixing up Authorities; and / or
 - c. prohibition of acting arbitrarily”.

The criteria for exceeding authority, confusing authority, and acting arbitrarily are further regulated in Article 18 as follows:

- 1) "Government Agencies and / or Offices are categorized as exceeding the Authority as referred to in Article 17 paragraph (2) letter a if the Decree and / or Actions taken:
 - a. beyond the term of office or the validity period of the Authority;
 - b. beyond the territorial validity of the Authority; and / or
 - c. contrary to statutory provisions.
- 2) Government Agencies and / or Officials are categorized as confusing the Authority as referred to in Article 17 paragraph (2) letter b if the Decree and / or Actions taken:
 - a. outside the scope of the field or material given Authority; and / or,
 - b. contrary to the stated purpose of the Authority.
- 3) Government Agencies and / or Offices are categorized as acting arbitrarily as referred to in Article 17 paragraph (2) letter c if the Decree and / or Actions taken:
 - a. without the basis of Authority; and / or
 - b. contrary to court decisions that have permanent legal force”.

In the Republic of Indonesia Supreme Court Regulation (PERMA) No. 4 of 2015 concerning Procedure Guidelines for Evaluating the Abuse of Authority, regulating parties in the application, Government Agencies and / or Officers who feel that their interests have been impaired by the results of supervision by the government internal control apparatus can submit an application to the competent Court containing demands that the Decision

and / or Acting of Acting Officials Government is declared to have or not an element of abuse of Authority.³⁷

As the author mentioned earlier that the implications of the enactment of the AP Law in particular Article 21 of the AP Law resulted in the competence of PTUN to test the validity of government actions in terms of law (legality). The concept of abuse of authority in UUAP is a mistake of private officials (maladministration). For this reason, it is not appropriate for personal responsibility to become PTUN's competence. In addition, the formulation of abuse of authority in Article 17 paragraph (2) UUAP:

- a. "Prohibition goes beyond authority;
- b. prohibition of confusing authority; and / or
- c. prohibition of arbitrary actions ".

In the opinion of the author the concept of abuse of authority in UUAP violates the theory of Administrative law. Abuse of authority should use authority not in accordance with the purpose of granting authority, known as the principle of *detournement de pouvoir*. This can be seen in "Article 53 paragraph (2) of Law Number 5 of 1986 concerning State Administrative Courts, which states that the reasons that can be used in the lawsuit as referred to in paragraph (1) are":

- a. The State Administration Decision being sued contradicts the prevailing laws and regulations;
- b. At the time of issuing the decision as referred to in paragraph (1), the State Administration Agency or Officer has used their authority for another purpose than the purpose for which the said authority was granted;
- c. At the time of issuing or not issuing the decision as meant in paragraph (1), the State Administration Agency or Official after considering all the interests related to the decision should not arrive at the decision making or not.

Another implication related to the abuse of authority is the intersection between criminal law and state administrative law. As it is known that in the corruption law it is also stated that one of the main elements of corruption is the abuse of authority. So, in this context there are at least two problems, namely: 1. What if there is an abuse of authority

³⁷ Article 3 of The Supreme Court Regulation No. 4 of 2015 Concerning Guidelines for Conducting The Assessment of Elements of Abuse of Authority

by state officials brought to two courts simultaneously, namely to the Administrative Court and to the District Court in corruption cases? 2. If at any time the PTUN decision is issued stating that there is no abuse of authority, but there are also parties who submit the case to the District Court on corruption charges. What is the attitude of the District Court, whether to accept the PTUN decision on the case or instead choose to override the PTUN decision.

Furthermore, even though PERMA No. 4 of 2015 has stated that PTUN has the authority to accept, examine, and decide upon an application for assessment of whether or not there is abuse of authority in the Decisions and / or Actions of Government Officials prior to criminal proceedings. Four words from before the criminal process ". The word is a keyword limiting the intersection of authority to try to abuse the authority between the TUN Court and the Corruption Court. However, "Perma Number 4 of 2015 does not provide an explanation of what is meant by criminal proceedings".³⁸

It can be explicitly interpreted "that the limitation in the form of provisions prior to the existence of this criminal process seems to give the impression that the criminal justice process can override the administrative court process related to the assessment of whether or not there is an abuse of power".³⁹ Therefore, it is appropriate for and for legal certainty to carry out an elaboration and harmonization of the two laws (the AP Law and the Anti-Corruption Act) for the purpose of more effective eradication of corruption in the future, in order to avoid chaos in society as a result of ineffective regulations. regarding the eradication of corruption. Like a chaotic society, no social system can work well. Every individual in society will only be selfish (self-interest), even selfishness.⁴⁰

Apart from that, it is also to eliminate or minimize the negative influence of corruption on the sense of social justice and social equality. Corruption causes sharp differences between social groups and individuals

³⁸ BUDI SUHARIYANTO, *Persinggungan Kewenangan Mengadili Penyalahgunaan Diskresi Antara Pengadilan TUN dan Pengadilan Tipikor*, 2 JHP (JURNAL HUKUM DAN PERADILAN) 7, 213-236 (2018).

³⁹ DANI ELPAH, *TITIK SINGGUNG KEWENANGAN ANTARA PENGADILAN TATA USAHA NEGARA DENGAN PENGADILAN TIPIKOR DALAM MENILAI TERJADINYA PENYALAHGUNAAN WEWENANG*, 69 (2016)

⁴⁰ M. UMER CHAPRA, *ISLAM AND ECONOMIC CHALLENGE, USA: IIIT DAN THE ISLAMIC FOUNDATION*, 220. (1995)

both in terms of income, prestige, power, and others,⁴¹ it is also necessary to make efforts to revise the State Administrative Court Law considering that several provisions in the AP Law have not been regulated in formal regulations, namely the State Administrative Court Law

CONCLUSION

Based on the analysis that the author has presented and described in the above paper, the authors conclude that: "First, the form of expanding the absolute competence of the State Administrative Court according to Law Number 30 of 2014 concerning Government Administration includes: Expanding the meaning of decisions and government administration, which includes executive, legislative and judicial government decisions and factual actions; Testing the results of administrative efforts; Application for a fictitious positive decision "; "Second, the implication of expanding the absolute competence of PTUN in the government administration law is that there is a conflict with the theory of administrative law so that it confuses the public and law enforcement officials themselves as well as creating uncertainty regarding law enforcement on corruption in Indonesia," which in this case is feared will complicate prosecution or eradicating the criminal act of corruption in the case of abuse of authority by government officials.

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⁴¹ MAHATHIR MOHAMAD, THE CHALLENGE. 144 (1986).

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QUOTE

Power does not corrupt. Fear
corrupts... perhaps the fear of a loss of
power.

John Steinbeck

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