

ABUSE OF AUTHORITY BY GOVERNMENT OFFICIALS: CONTROVERSY BETWEEN ADMINISTRATIVE AND CRIMINAL SANCTIONS

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ABSTRACT

This study discusses the issue of abuse of authority within the administration in Indonesia as more pressure is mounting from the public regarding the corrupt behaviours/actions of government officials in carrying out their duties. There has been an increase in the number of abuse of authority cases involving corrupt government officials in various courts throughout Indonesia in recent years. In an attempt to remedy this situation, Law No. 30/2014 on Government Administration was enacted which prescribes that abuse of authority causing the loss of state finance does not necessarily mean there has been an act of corruption by a government official. This law goes further to say that abuse of authority is not punishable as an act of corruption provided that the guilty official makes compensational payments for the state financial loss. In so prescribing, this law seems to be promoting the very disease it was supposed to cure. As a consequence, this law not only weakens the fight against corruption by giving a free pass to corrupt and crooked government officials but it also contradicts Law No.31/1999 on Corruption Eradication. This study seeks to investigate the issue as to what extent Law No. 30/2014 weakens the fight against corruption in Indonesia. The study shows that both the government administration law and the corruption law not only contradict one another but are also incoherent in imposing sanctions related to the abuse of authority. It is as if there is a dualism of application of sanctions: criminal sanctions and administrative sanctions.

Keywords: Abuse of Authority, Government Officials, Government Administration, Administrative Sanctions, and Criminal Sanctions.

INTRODUCTION

According to the Indonesian Criminal Law, corruption is a serious criminal offense punishable under Law No. 31/1999 on the Eradication of Corruption as amended by Law No. 20/2001 on the Amendments to Law No. 31/1999 on the Eradication of Corruption, or Undang-Undang Tindak Pidana Korupsi (UU TIPIKOR, as it is commonly referred to in Indonesia). An article 5 section 2 of this law says that there is corruption within the administration when civil servants or state administrators receive gifts or money in exchange for their actions or inactions which are not only contrary to their duties and obligations but also to the law. Corruption within the administration in Indonesia has strongly been criticized since the advent of the Reformation Era or Era Reformasi in 1998. The prosecution of corrupt government officials is seen by the public as a success of the Corruption Eradication Commission or Komisi Pemberantasan Korupsi (KPK) in the fight against corruption in Indonesia (Isra et al., 2017). Throughout the year 2013 alone, there were at least 290 Heads of the region (Governors, Regents, and Mayors) involved in corruption scandals by abusing their powers in providing administrative services to their

population.¹² In addition to Law No. 30/2002 establishing the Corruption Eradication Commission or KPK, several measures have also been taken by the government to combat corruption in Indonesia. These measures include the Presidential Decree No. 5/2004 on Steps and Concrete Programs to Accelerate the Eradication of Corruption, the Presidential Decree No. 9/2011 on the Action Plan for the Prevention and Eradication of Corruption, the Presidential Decree No. 2/2014 on Corruption Prevention and Eradication.

However, despite the enactment of these regulations however, corruption continues its rapid expansion from the highest level of the government all the way down to the lowest level of the Indonesian society (Isra et al., 2017). The attempt to fight corruption has also been backed by the passing of Law No. 30/2014 on Government Administration, which adds more polemic to the already complex war on corruption in Indonesia by prescribing that a loss of state finance as the result of alleged abuse of authority does not necessarily imply corruption. This law goes on to say that if the loss/damage suffered by the state is restored by the accused government official, then the act may not be deemed as corruption. In other terms, an abuse of authority is punishable as an act of corruption if the offender fails to rectify/restore the wrongdoing. But even proven guilty, the law still maintains that the matter shall be resolved through administrative courts instead of criminal courts. This is the point where lies the contradiction between administrative sanctions and criminal sanctions with regard to the prosecution and punishment of corrupt government officials. Many criminal lawyers and scholars consider this as one of the weakening points of the fight against corruption in Indonesia as they believe that the enactment of Law No. 30/2014 is at odds with one of the important corruption eradication laws, i.e., Law No.31/1999 on Corruption, which clearly stipulates that if there is a financial loss in the management of public funds as a result of an abuse of authority, then there definitely is an act of corruption. The same law on government administration also stipulates that either criminal sanctions or administrative sanctions can apply to such conduct after an investigation by Government Internal Supervisory Apparatus.

This paper begins by explaining what abuse of authority means the role of administrative law so as to point out its importance in strengthening the eradication of corruption in Indonesia. In so doing, the paper argues that although authority itself is not always corruptive, and that not all government officials are corrupt, it is important to note that the greater the authority of government officials, the greater the possibility for them to abuse their power in dispensing public services to the people. After such an analysis, the paper then carries on to discuss the controversy between administrative and criminal sanctions with regards to the prosecution and punishment of an abuse of authority involving corruption within the administration in Indonesia.

RESULTS AND DISCUSSION

Understanding of Abuse of Authority in Indonesia

Law No. 30/2014 on Government Administration defines abuse of authority as the use of authority by government institutions or officials in making decisions exceeding their authority or acting arbitrarily and against the law for their own interests. Authority can be obtained through three ways: attribution, delegation, and mandate (Law and Regulation, 2014). Ridwan (2011) argues that attribution is the granting of government authority to the organ of government by the legislator, while delegation is the transfer of government authority from one government organ to another. Ridwan claims that a mandate is when the organ of government allows its authority to be run by another organ on its behalf (Ridwan, 2011). Every state administrator must first be

bound by a legitimate authority under the laws and regulations prior to carrying out his/her duties. Thus, the source of government authority is in the legislation. Public authority, according to Nugraha (2007), has two main characteristics: (1) Every decision made by government officials has binding power to all members of society; (2) Any decisions made by government officials have a public function (Nugraha, 2007).

A government official's act is deemed illegitimate if it is not attributed, delegated, or mandated (Philipus, 2011). This means that every decision/act of a government official is valid and binding as long as it is based on a law or regulation. Similarly, every decision or act of an official must be based on a legitimate authority emanating from a lawful institution of the government. This is meant to prevent government officials from acting arbitrarily by holding them accountable for the use of such authority. Above all, the principle of formal legality is intended to prevent abuse of authority or maladministration. Under the provisions of Article 1 section 3 of Law no. 37/2008, maladministration is a "behaviour or acts against the law, a transcending authority or the use of authority for any purpose other than that of such authority, including negligence or neglect of legal obligations in the administration of public services carried out by government officials which causes material and/or immaterial damages to the public and individuals". Maladministration is provided for by the law on government administration, which stipulates that a government official is prohibited from misusing their authority in performing their duties. Abuse of authority in state administrative law can be interpreted in 3 forms i.e., the misuse of authority to perform acts contrary to the public's interest, the misuse of authority in the sense that the official's actions are rightly intended for the public interest, but deviates from the purpose of the authority granted by law or other regulations, the misuse of authority in the sense of abusing procedures that should be used to achieve certain goals, but has used other procedures (Law and Regulation, 2014).

Government Official and the Issue of Abuse of Authority

According to the Constitution of the Republic of Indonesia (Law and Regulation, 1945), and the Indonesian government system, state affairs are run by (1) the President as Head of State and Government; (2) the ministers; (3) the governors, regents, and mayors. The authority and role of the state administration are increasingly widespread and complex if viewed from the legal and historical perspective. State administration plays an important role not only in maintaining law and order but also in improving the social and economic conditions of the population. The increase of the role and authority of state administration means an increase in the responsibility of government officials in carrying out their duties. But it is important to keep in mind that the greater the authority of government officials, the greater the possibility for them to abuse their authority in dispensing public services to the people. This creates opportunities for deviations and dysfunction in the administration. "Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority, still more when you super add the tendency or the certainty of corruption by authority. There is no worse heresy than that the office sanctifies the holder of it", as Lord Acton puts it. Powerful people are prone to take risky, inappropriate, or unethical decisions and often overstep their boundaries (Emler & Cook, 2001). Power tends to weaken one's social attentiveness, which leads to difficulty understanding other people's point of view and interest (Galinsky, 2006). As pointed out earlier, in the year 2013 alone, there were at least 290 Heads of the region

(Governors, Regents, and Mayors) involved in corruption scandals by abusing their powers in dispensing public services to the people.¹²

However, it is important to note that power does not necessarily corrupt and not all the great men are bad men, as Acton observed in his letter. Authority itself is not always corruptive, and not all government officials are corrupt. Sometimes, people with authority tend to carry out executive cognitive functions more rapidly and successfully, including internal control mechanisms that coordinate attention, decision-making, planning, and goal-selection (Smith et al., 2008). Authority makes individuals more responsive to changes within a group and its environment (Keltner et al., 2008). Maurice Duverger argues that the tasks of state administrative organs are not only limited to enforcing the law but also and more importantly to serve and protect the public's interest, which forces them to actively participate in social interaction so as to guarantee the Indonesian people's happiness and well-being. State administration is responsible for the regulation and implementation of almost every activity and program of the state, which, sometimes, leads to high bureaucratization and overwhelming regulations (Espring, 1990). Peter Leyland and Terry Woods argue that state administrative law, as a legal matrix, has five main functions: the function of control to prevent abuse of power, the function of command to allow for all acts and decisions of state administration to remain within the limit of the law, the function of facilitating the administration of justice and fairness, the function of assuring accountability, transparency and participation, and the function of providing legal remedies for citizens whose rights and interests have been violated by the state administration (Leyland, 1999). State administrative law, as a controlling instrument in the implementation of state administration, creates policy guidance in governance, as specified in Law No. 30/2014 on Government Administration.

The Handling of Abuse of Authority by Administrative Law

Article 17 of the Law on Government Administration stipulates that government agencies and/or officials are prohibited from abusing their authority through decisions and/or actions taken outside the scope of their authority, and/or contrary to the law or the purpose of the authority granted. The prohibition of abuse of authority is classified into three forms, namely: (1) prohibition beyond Authority; (2) prohibition of confusing Authority; (3) the prohibition of ill-treatment. Therefore, every government official is always monitored by the government's internal supervisory apparatus in the use of their authority. If the government apparatus finds an administrative error causing state financial loss, it asks for the loss to be repaid no later than 10 (ten) working days. According to the law on government administration, only administrative sanctions applied at this stage. The shortcoming of this law lies in the fact that it only treats abuse of authority leading huge state financial losses as a mere administrative error when it should be seen as corruption since it involves the misuse of public funds. Abuse of power causing serious loss of public funds should be punished by criminal sanctions, not administrative sanctions. Because the error is administrative does not mean it is not criminal. When the law provides such a mild treatment to government officials who abuse their authority to misuse public funds, it weakens the fight against corruption by providing legal protection to corrupt government officials (Isra et al., 2017). The guidance provided by the government administration law is related to the norms of governmental authority, which include: the source of the authority of government officials (attributions, delegations, and mandates), the principles of governance, and the use of discretion. Law No. 30/2014 was enacted not only to bring about good governance

by making sure that government officials do not abuse their authority in carrying out their duties but also to solve problems within the administration, and to provide legal protection for both the citizens. In fact, should the public suspect abuse of authority, this law allows citizens to file a complaint petition to the administration within which the abuse of authority allegedly occurred (Law and Regulation, 2014). If no answer is received from the administration within a certain period of time, then the application shall be brought before an administrative court for investigation (Law and Regulation, 2014). This law, therefore, serves as the legal basis underlying the decisions/actions of government officials. The same law on government administration also stipulates that either criminal sanctions or administrative sanctions can apply to such conduct after an investigation by Government Internal Supervisory Apparatus. But it adds some confusion when it prescribes that abuse of authority must be resolved by administrative means for it does not necessarily imply an act of corruption (Law and Regulation, 2014). It is worth acknowledging that administrative matters ought to be resolved through administrative courts at first, but when such matters involved corruption, they fall within the jurisdiction of criminal law as specified by Law No. 31/1999 on the Eradication of Corruption as amended by Law No. 20/2001 on the Amendments to Law No. 31/1999 on the Eradication of Corruption or Undang-Undang Tindak Pidana Korupsi (TIPIKOR).

The Handling of Abuse of Authority by Criminal Law

As argued at the outset of this paper, according to the Indonesian Criminal Law, corruption is a serious criminal offense punishable under Law No. 31/1999 on the Eradication of Corruption as amended by Law No. 20/2001 on the Amendments to Law No. 31/1999 on the Eradication of Corruption. An article 5 section 2 of this law says that there is corruption within the administration when civil servants or state administrators receive gifts or money in exchange for their actions or inactions which are not only contrary to their duties and obligations but also to the law. Law No. 31/1999 on the Eradication of Corruption considers the violation the law by committing an act that enriches oneself or another person or a corporation that can harm the state's finance or the country's economy as a corruption (Law and Regulation, 1999). According to this law, perpetrators of such a crime shall be sentenced to life imprisonment or minimum imprisonment of four years and a maximum of twenty years and a fine of at least Rp. 200,000,000.00 (\$ 14,000,00) minimum and Rp. 1,000,000,000.00 (\$70,000,00) maximum. The law goes further to say that any person in the attempt to enrich themselves or another person or a corporation, misusing the authority, opportunity or means available to them because due to their position harms the state's finances or the country's economy is guilty of corruption and shall receive similar sentenced as mentioned above (Law and Regulation, 1999). As a contradiction to Law 30/2014 on Government Administration which says that there is no corruption if the loss or damage suffered by the state has been returned, Law No. 31/1999 on the Eradication of Corruption makes it clear that returning state financial losses or the state economy does not take away the criminal offense (Law and Regulation, 1999). In addition to the law on the eradication of corruption, abuse of authority involving corruption is also regulated in Article 209 of the Indonesia Penal Code.

Controversy between Criminal and Administrative Sanctions

Criminal sanctions and administrative sanctions are instruments in administrative law enforcement. But in practice, both procedures differ from one another. Administrative sanctions

are corrective or preventative, and sometimes disciplinary actions taken as part of a response to an incident where policy, procedure, or rule of behaviour has been violated within an administration. The imposition of administrative sanctions can be directly done by government agencies and/or officials without having to go through court process first. Only when the party object administrative sanction can the case then is brought to justice. Enforcement of criminal sanctions, on the other hand, must first be done through the judicial process leading to a court decision (Philipus, 2011). Criminal sanctions are penalties or punishment used to provide incentives for obedience with the law, or with rules and regulations. Criminal sanctions can be in the form of serious punishment, such as corporal or capital punishment, incarceration, or severe fines (Black, 1990). Abuse of authority that leads to the misuse of public funds is referred to as an act of corruption in the Law No. 31/1999 on the Eradication of Corruption. Whereas administrative sanctions applying to abuse of authority are specified in the Law No. 30/2014 on Government Administration, as mentioned earlier. Both laws appear to be contradicting and incoherent in the imposition of sanctions related to abuse of authority resulting in financial losses of the state. It is as if there is a dualism of the application of sanctions, namely between criminal sanctions and administrative sanctions.

In 2015, the Chief Justice of the Indonesian Supreme Court attempted to settle the matter when he ruled that government officials who commit corruption in which there is an element of abuse of authority should/can be prosecuted by Corruption Court. This creates a dichotomy as to which court has jurisdiction over a case of abuse of authority involving an act of corruption. Since there are two courts vested with the power to decide such a case (administrative court and criminal court), there would be two different outcomes. Guntur Hamzah argues that the government administration law aims to provide legal protection to both government officials and the public. It provides standard guidelines for decision making and action and builds mutual communication between citizens and government officials in bureaucratic reforms (Hamzah, 2015). Hamzah goes on to say that the law on government administration is preventive while the criminal law regime is repressive in the sense of being the last effort in eradicating corruption (Hamzah, 2015).

CONCLUSION

In Indonesia, corruption takes place within almost all domains of power and at all levels of government both in the Central / Regional Government (Isra et al., 2017). The passing of Law No. 30/2014 on Government Administration, which adds polemic to the already complex war on corruption by saying that a loss of state finance does not necessarily imply corruption, and that abuse of authority is not punishable as an act of corruption provided that the guilty official makes compensation payments for the state financial loss. This law, serving as the legal basis underlying the decisions/actions of government officials, has contributed to the weakening of the efforts to eradicate corruption as it seems to provide legal protection to corrupt government officials who misuse their power for personal gains. Law N30/2014 is wrong when it spares corrupt government officials from criminal court prosecutions on the ground that the financial loss suffered by the state be returned or restored by the alleged offender. Because the financial loss/damage has been returned or restored does not mean that corruption did not take place. In so prescribing, Law No. 30/2014 seems too lenient on corrupt government officials. This adds more complexity to the fight against corruption, a crime that is already hard to deal with in Indonesia.

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