

# Legal Uncertainty in Disharmony Phrase Abuse of Authority in Legislation in Indonesia

Rina Nur Widyastuti<sup>1</sup> Nuria Siswi Enggarani<sup>2,\*</sup> Nunik Nurhayati<sup>3</sup>

<sup>1,2,3</sup> Law Science Department, Universitas Muhammadiyah Surakarta

\*Corresponding Author. Email: nse178@ums.ac.id

## ABSTRACT

This article is purposeful for Discussing legal uncertainty in the occurrence of disharmony phrase abuse of authority in legislation in Indonesia, namely Law No. 30 of 2014 concerning Government Administration and Law No. 20 of 2001 concerning Amendments to Law No. 39 of 1999 concerning Eradication of Corruption. The research method used is normative juridical with a statutory approach. The result of the discussion is that in the view of HAN (State Administrative Law), abuse of authority can occur if a government body / official has used its authority not as it should be, so that for his actions there can be deviations from the intended purpose. Viewed from the point of view of criminal law, abuse of authority has an unlawful nature both militarily and materially. The nature of the law as the parent act and the nature of abuse of authority as its derivative. The impact of the difference in phrases from the two regulations causes disharmony, resulting in several gaps in harmonization in the traceability, determination, and synchronicity of the law.

**Keywords:** Authority, Legal Uncertainty, Disharmony Phrase, Indonesia

## 1. INTRODUCTION

Indonesia is part of the State of Law and is neither a *machstate* nor an *absolute state*. [1] Law-making which is to limit the power of a State means as a law made based on power or sovereignty in the people. [2] The concept of a state of law is actually a firm guideline held by Indonesia based on Pancasila and the Indonesia Constitution the Constitution of 1945. Statement regarding to Indonesia as a State of Law as stated in Article 1 paragraph (3) of the 1945 Constitution which reads "*Indonesia is a State of Law*".

According to Hans Kelsen's theory, various norms are shaped with tiers and have layers in a hierarchy, and have basic norms (*grundnorm*). [3] Harmonization vertically with the principle of "*Lex Superiori Derogat Legi Inferiori*" which means that the rules in higher legislation negate the rules in the lower legislation. [4] While the horizontal harmonization of the principle of "*Lex Specialis*

*Derogat Legi Generalis*" which means a regulation in legislation that is specifically excluded from general laws and regulations. [5] In this case, it is necessary to pay attention to harmonize one regulation with another so that there is no overlap of the law (*overlap*), as well as legal uncertainty, the existence of legal dualism, and ambiguity, and also chaos in the enforcement of the

law (*law enforcement*). [6] That the mind of the Indonesian nation is to provide a certainty of law and justice for all communities which is contained in Article 28D paragraph (1) of the 1945 Constitution.

There is Law No. 30 of 2014 concerning Government Administration, actually a big step made by the state to form and regulate good government. The law discusses the prohibition of abuse of authority for government officials located in Article 17 paragraph (1) while article 20 paragraph (6) regulates the enforcement of sanctions for government officials who abuse authority and cause harm to the state. If you look at the flashback, the element of abuse of authority is a typical term in state administrative law, as well as closely related to corruption. This became one of the basis in the formation of laws and regulations on combating corruption. As stated in Article 3 of Law No. 31 of 1999 concerning the Eradication of Corruption, "abuse of authority" and "state losses" Elements have become a solid basis for judges in charging government officials who have fulfilled these elements. The important point is that the element of "harming the country's finances" is the result of violations of the law committed by government officials. [7]

Based on the statement submitted by the KPK (Corruption Eradication Commission) R&D Agency that state losses caused by irregularities in abuse of

authority committed by officials or government agencies can be found by BPK (Financial Audit Board), which in 2009-semester 1 2013 there were many cases as many as 193,600 that harmed the country due to corruption. [8] In addition, in the decision 979 / K / PID / 2004 which stated that the Director of Bank Indonesia committed corruption and fell into the category of abuse of authority where with his authority, and in his opportunity, position and position carried out actions enriching himself by committing corruption that harmed the country's finances. [9] That, The Constitutional Court Decision No. 25 / PUU-XIV / 2016 becomes a momentum to restore harmony on the demarcation line between criminal responsibility and accountability in the administration that has been initiated by the Government Administration Law and other related laws.

However, in this case, the phrase abuse of authority can result in multi-interpretation and cause legal dualism. There is a disharmony in Article 20 of Law No. 30 of 2014 concerning Government Administration of Article 3 of UU PTPK (Corruption Eradication Law), that there is no limit in the abuse of authority that falls into the realm of administrative violations and the extent to which an act of abuse of authority falls into the realm of special criminal acts.

In this research, there are several problem formulations including (1) How is abuse of authority in the perspective of Criminal Law and State Administrative Law, and (2) What is the impact of legal uncertainty in Law No. 30/2014 on Government Administration with Law No.20 of 2001 concerning changes to Law No. 39/199 on Combating Corruption.

## 2. RESEARCH METHODS

The method used in research is the normative juridical research method with a statutory approach. The primary legal materials used are Law No. 30 of 2014 concerning Government Administration and Law No. 20 of 2001 concerning Amendments to Law No. 39 of 1999 concerning The Eradication of Corruption. Secondary legal materials in the form of books and journals related to the discussion of abuse of authority. Research materials are processed in a qualitative way where the data obtained from data collection through literature studies is then analyzed, the analysis used is an analysis that uses interpretation in a systematic way also with grammatical, so that a conclusion is produced that is general to the problems and objectives in the research.

## 3. DISCUSSION

### 3.1. *Abuse of Authority in the perspective of State Administrative Law and Criminal Law*

The state of law has its peculiarities in its implementation in relation to the enforcement of the rule of law known as the principle of legality. The principle of legality occupies an important position because the principle of legality is the basis for the implementation of all countries and governments. In the field of state administrative law known as "*Dat het bestuur aan de wet is onder worpen*". That is, the government is subject to the law. There is also the term "*Hetlegaliteits beginelhoudt in date alle*". It is established that, based on the principle of legality, all regulations binding on citizens must be based on the law.

State law requires that all administrations of national affairs must rely on the law to guarantee the basic rights of the people. Sjachran Basah stated that the principle of legality is based on a single principle as a pillar that is essentially constructive, a harmonious and unified duel between understanding the rule of law and understanding people's sovereignty.

On the other hand, the application of the principle of legality is ideal for the state of law. Because the application of the principle of legality certainly produces legal certainty and equal treatment in terms of law. The government /civil servants can only do so if regulated by laws and regulations. In short, all government actions are based on legality as an expression of citizens' wishes. In the perspective of a democratic state of law, all government actions must be passed by the people, this legality is usually expressed in the form of legislation.

The implementation of legality-based government automatically refers to written laws and regulations that form the basis for the implementation of all government actions. But this is also a dilemma for some professionals who think that social life is always moving (dynamic). This creates a gap in which it indicates weaknesses in the application of written law. Bagir Manan argues that there are difficulties arising from written law:

1. Law is an existing part of society because it is an important part that covers all aspects of life that are broad and complex. It is impossible for the entire law to be established by law.

2. Laws are generally static and cannot adapt quickly to the growth and development of society.

This proves that, as mentioned above, the principle of legality is not actually the perfect basis for the implementation of national life. This of course affects the judiciary that is accepted by both the government and the community. But because the principle of legality is still the *prima donna* of the rule of law, the principle of legality remains the main principle and becomes the basis for the implementation of all countries and governments. In other words, the content of the principle of legality is authority, namely "Het vermogen tot het verhaspen van bepalderich thandelingen".

Study the concept of the state of law in relation to power derived from the existence of laws and regulations, and ensure that government agencies / officials have power when established by laws and regulations. Theoretically, legislative power can be obtained in three ways: transfers, delegates, and delegates. HD Van Wijk / Williem Konijnenbelt defines the three: [10]

a. *Atributie: toekening van een bestuursbevoegheid door een wetgever aan een bestuursorgan* (Attribution is the granting of governmental authority by lawmakers to the organs of government).

b. *Delegatie: overdracht van een bevoegheid van het ene bestuursorgan aan een ander*, (delegation is the devolution of other governmental authority).

c. *Mandaat: een bestuursorgan laat zijn bevoegheid names hem uitoefen door een ander* (mandate occurs when the organ of government allows its authority to be exercised by another organ in its name).

The presence of *freis ermessen* gives freedom to state institutions / civil servants to carry out their duties, especially to achieve state goals. However, the existence of *freis ermessen* does not allow the authorities / staff to act arbitrarily, so there is no conflict between the ruler / staff and the community. Therefore, AUBP (General Principle of Good Governance) can be used as a measure of whether the actions taken by the government are appropriate or contrary to the concept of a state of law. Government actions are particularly vulnerable to problems such as abuse of authority if they do not follow those principles.

The abuse of authority itself has long been controversial, as it is in a gray area. Not only the field of administrative law, but also the abuse of authority is a criminal field. The two have very different views, and it's no wonder that they sometimes cause conflict when dealing with them. However, administrative law

plays a broader role in this, as the debate about authority is more specific in HAN (State Administrative Law).

The abuse of office is known as *detournement de Pouvoir* (France). Passing translation Indonesian means deviation, embezzlement, or abuse. *Pouvoir* means power, ability, influence, authority. Therefore, *Detournement de Pouvoir* can be interpreted as an abuse of authority. [11]

HAN (State Administrative Law) believes that abuse of power can occur when an agency/government official has abused its power, so their actions can deviate from their goals. Jean Rivero and Waline debate the notion of abuse of power from HAN (State Administrative Law) point of view in 3 (three) sections:[12]

1. Abuse of power due to acts contrary to the public interest, for the purposes of individuals, groups or groups.

2. Abuse of power in the public interest and deviate from the purpose of being empowered as determined by law.

3. Abuse of power due to procedural errors, because it is not in accordance with the required procedures.

As discussed earlier, in HAN (State Administrative Law) assessment of authority is discussed in detail, even abuse of authority also has several categories, in Article 17 of the AP Law categorizes abuse of authority into 3 (three) types, namely:

a. Overreaching authority is when decisions and/or actions are taken with exceed the time limits of the effectiveness of authority, exceed the limits of authority, and/or conflict with the provisions of laws and regulations;

b. Mixing authority, if a decision and/or action is taken outside the scope of the field given and/or conflicts with the authority given;

c. Act arbitrarily, if decisions and/or actions taken without the basis of authority conflict with the decision of a court of permanent legal force.

Abuse of authority is referred to as a gray area because it is discussed in criminal law in addition to state administrative law. Abuse of authority in criminal law is closely related to corruption. From the point of view of criminal law, abuse of authority will occur if you violate regulated norms such as the free use of power under the power of attorney system. The existence of *ex officio* abuse can be assessed if the criteria for *ex officio* abuse are met.

In the context of criminal law, abuse of authority as a form of corruption is classified as a special delict. That is, it is a special crime. Abuse of authority will occur in the jurisdiction of the state government if government agencies /employees act incompatible with laws and regulations and AUBP (Common Principles of Good Government). Abuse of authority has contradictory meanings on both sides. This can complicate the abuse of this power in the field of state administrative law or criminal law. Therefore, the author argues that with this legal dualism, it is also possible to have a dispute between the concept of abuse of office in state administrative law and criminal law. Therefore, before getting into the details, the author tries to explain the term abuse of authority from all directions.

Administrative law enforces the AUPB (Common Principles of Good Government) so that government officials can act in accordance with the facts. In the criminal law this principle also applies, where the principle of maintaining standards of decency, decency, and legal standards to realize a country free from collusion, corruption and autocratic, in Article 3 of Law No. In 1999 mentioned several general principles of the implementation of the state, especially as follows:

1. Principle of legal certainty
2. Principle of orderly state administration
3. Principles in the public interest
4. Principles of transparency
5. Principle of proportionality
6. Principles of professionalism
7. Principles of accountability

To discuss the abuse of authority in the criminal law, we need to review first Article 3 of Law No. 20 of 2001 concerning changes to Law No. 31 of 1999, which reads:

*"Any person who with the aim of benefiting himself or others or a corporation, **abuses the authority, opportunity or means that exist there for position or position that can harm the country's finances or the country's economy, is sentenced to life imprisonment or imprisonment of at least 1 (one) year and a maximum of 20 (twenty) years and/or a fine of at least Rp. 50,000,000.00 (fifty million rupiah) and a maximum of Rp. 1.000,000,000.00 (one billion rupiah).**"*

To determine a criminal offense, it is first necessary to look at these factors. Abuse of privileges occurs when the following factors are met:

1. Benefit yourself or others or businesses.
2. Abuse of power, opportunity or institution that exists for a position or position.
3. Harm the country's finances or the country's economy.

The element "benefiting oneself or the corporation" means that a person aims to gain benefits for himself or others in a corporation. Soedarto argues that this element is an inner element that determines the direction of abuse of authority and so on, therefore an objective assessment is needed by paying attention to all circumstances born that encourage the suspect to commit his actions. [13]

Based on the constitutional court's decision No. 25/PUUXIV/2016 that the "vested interest" factor should take precedence over other factors, since the purpose of corruption is basically to benefit oneself. The element of "abuse of power, opportunity or existing facilities for the benefit of position or position" is the act of taking advantage of the power, opportunity or means attached to a person to occupy a position, power. Abuse of power also occurs because incumbents with positions and powers have the opportunity to take advantage of it.

The element of "harming state finances", the state's own finances according to the UU PTPK (Corruption Eradication Law) constitute all wealth in the state, in any form and anything, which is separated or not to be separated, which in it constitutes all parts of the wealth in the state and all rights and obligations that arise due to:

- a) the existence in its mastery, management, and accountability by officials in the institutions of a country, that either at the central level or in the region;
- b) its existence in its mastery, management, and liability to BUMD (state-owned enterprises), in foundations, in legal entities, and in companies that include capital to third parties based on agreements with a country. [14]

From the point of view of criminal law, abuse of authority is formally and practically illegal. The nature of illegality as a top priority and the nature of abuse of authority as a derivative. However, the debate about abuse of authority in criminal law is not explained specifically, making it difficult to assess abuse of authority by rulers.

Under the jurisdiction of the state government, the Ruling of abuse of authority is in accordance with the principle of legality, AUBP (Common Principles of Good Government). The discovery that this act constitutes an abuse of authority within the HAN (State Administrative Law) framework is still controversial. Because the principle of legality cannot judge whether government actions are discretionary. Sory Rubis believes that the Government Administration law is HAN (State Administrative Law) substantive law, and the administrative court primarily regulates HAN (State Administrative Law) formal law.

PTUN (State Administrative Court) is intended as a tool to examine abuses of power by officials before criminal proceedings. Therefore, it is very likely that there is dualism in considering the abuse of power factors. Abuse of authority by officials can be determined from tun decisions. The road between prosecuting abuse of power is part of the criminal law or state administration, so we can find it in Article 2 of Perma (Supreme Court Rules) Number 4 of 2015:

(1) The competent court accepts, tests, and terminates the request to assess whether there was an abuse of power in the decisions and/or actions of government officials prior to criminal proceedings.

(2) The new court is authorized to accept, consider, and issue a ruling on the assessment of the complaint as intended in paragraph (1) after obtaining the results of supervision of the government's internal control apparatus.

Therefore, law enforcement mechanisms for government organizers who commit acts of "abuse of authority" are legally responsible for government administration and criminality. The case stems from an audit by the government's Internal Supervision Agency (APIP). The TUN (State Administration) court then accepts, investigates, and decides whether there was an abuse of authority. If there is no abuse of authority, the court will determine that there was no wrongdoing, and the examination will reveal an abuse of authority deemed to be financially detrimental. Demanding an investigation. Therefore, in the field of law there are two dichotomies, namely administrative law and criminal law against corruption. In the practice of investigating cases of jurisprudence abuse, this can cause two consequences. One is the abuse of authority in this case for the same case, but the process takes place in two areas of public law: different fields of science. The result can of course lead to different decisions. Second, the existence of this dichotomy makes it difficult to achieve a comprehensive truth (objectivity).

**a. The impact of legal uncertainty in Law No. 30/2014 concerning Government Administration with Law No.20 of 2001 concerning amendments to Law No. 39/1999 concerning The Eradication of Corruption**

Phrases relating to the abuse of power in state administrative law and criminal law have different interpretations, so the responsibilities also become different, causing disputes, which have an impact on:

(1) The disharmony of the state finances;

(2) There is no harmony between state indemnity in criminal law and administrative law;

(3) There is no harmonization institutional between internal and external supervisors;

(4) No. there is a synchronization of repair efforts as intended in PP article 35. No. 48/2016 with the provisions of article 21 of the UUAP (Government Administration Law) jo. Perma (Supreme Court Rules) is not. April 2015 or take ordinary action against administrative law;

(5) The administrative law system in the draft criminal code has not been synchronized. [15]

Therefore, in the long term, Perma (Supreme Court Rules) No. 4/2015 concerning jurisdictional violation test event guidelines needs to be revised because the Perma (Supreme Court Rules) remains oriented towards criminal regulation as the main communication tool of administrative points and criminal law in the fight against corruption, so it can be seen as a last attempt.

#### **4. CONCLUSION**

From the above description, we can conclude that determining whether abuse of authority is within administrative or criminal jurisdiction is based on at least two approaches. The first is the administrative law enforced by the state administrative court. The state administrative court is investigating whether the state's financial losses were caused by abuse of authority. This is because government agencies / civil servants can act outside the scope of legislation to carry out their discretion in an emergency. To avoid unfair punishments/crimes against government agencies/employees. The TUN (State Administration) ruling will be issued if the examination by PTUN (State Administrative Court) does not find elements of abuse of office that endanger corruption. If the state administrative court checks that you have satisfactory intentions, the corruption court will continue the investigation.

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