Return of Damage to the Country in the Use of Weapons to Create a Good Government

Fitria(✉), Sukamto Satoyo, and Helmi

Faculty of Law, Universitas Jambi, Jambi, Indonesia
fitria@unja.ac.id

Abstract. This study aims to examine the arrangements for recovering state losses due to abuse of authority and to logically analyze the concept of abuse of authority for recovering state losses due to government actions. This study uses a normative juridical method that examines theoretical matters: principles, conceptions, legal doctrines and the content of legal rules relating to the recovery of state losses due to abuse of authority in realizing good governance. The research approach used is a conceptual approach, statutory approach and historical approach. The results of the study show that in Article 3 letter c of Law Number 30 of 2014 it is stated that the purpose of this law was to prevent abuse of authority. That means that this law expressly prohibits all forms of abuse of authority. Law Number 30 of 2014, does not provide an explicit explanation of abuse of authority, but provides a form of prohibition of abuse of authority as stated in Article 17 of Law Number 30 of 2014. 2014 concerning Government Administration Refunds for State/Regional losses to treasurers are determined by the BPK (Financial Audit Agency), while returns for State/Regional losses to non-treasurer civil servants are determined by Ministers/Heads of Institutions/Governors/Regents/Mayors. In Article 35 paragraph (1) of Law Number 17 of 2003 concerning State Finances that every State official and non-treasurer civil servant who violates the law or neglects his obligations either directly or indirectly which harms the State is required to compensate for the loss.

Keywords: Recovering State Losses · Abuse of Authority · Good Governance

1 Introduction

A. Background

The 1945 Constitution of the Unitary State of the Republic of Indonesia hereinafter referred to as the 1945 Constitution in Article 1 paragraph (2) stipulates that sovereignty is in the hands of the people and implemented according to the Constitution. Furthermore, in Article 1 paragraph (3) of the 1945 Constitution it is emphasized that Indonesia is a country based on law. This means that the state is not only driven by legal provisions, and in administering government the state is obliged to guarantee legal certainty and legal protection to the people and administration of government. The goal of the state to advance public welfare has several consequences for governance, including adhering to

D. A. Kurniawan (Ed.): GDIC 2022, ASSEHR 772, pp. 373–382, 2023.
https://doi.org/10.2991/978-2-38476-110-4_39

the principles of good governance and clean government in which there is the concept of a Welfare State, namely placing the government as the party responsible for the general welfare of citizens [1].

Clean and good governance must also be supported by the principle of equality, namely equality in treatment and service. This principle must be seriously considered by all government administrators in Indonesia because of the sociological reality of our nation as a pluralistic nation, both ethnically, religiously and culturally. There are three main pillars that support the ability of a nation to implement good governance, namely: the first is the government (the state), the second is civil society (civil society, civil society, civil society), and the third is the market or the business world. The administration of good and responsible governance is only achieved when in the application of political, economic and administrative authority the three elements have equal and synergic networks and interactions. Such interactions and partnerships usually only thrive when there is trust, transparency, participation, and clear and definite rules and regulations. Healthy good governance will also develop healthily under leadership that is authoritative and has a clear vision.

In Indonesia, the substance of the Good Governance discourse can be equated with the term good, clean and authoritative governance. Good governance is an attitude in which power is exercised by the people governed by various levels of state government with regard to social, cultural, political and economic resources. In practice, clean governance is a model of government that is effective, efficient, honest, transparent and responsible. In order to guarantee legal certainty and legal protection to the people and the administration of government, a law is needed that regulates the systems and procedures for administering government. The law, on the one hand, serves as a legal basis for every government official in determining actions and decisions, and on the other hand, it is to limit the power of government officials so that they do not conflict with laws and regulations and the general principles of good governance. In the case of abuse of authority that conflicts with the concepts of good governance and clean governance, this is a concept derived from the general principles of good governance in its development (AUPB) which is an important part of administrative law [2].

Quoting Discipline F Manao, Abuse of authority, According to Indianto Seno Adji (Aji quotes W. Konijnenbelt) using the following parameters:

1. The element of abuse of authority is assessed whether there is a violation of written basic regulations or the principle of propriety that lives in this society and this country. The criteria and parameters are alternative: and
2. The principle of decency in the context of implementing a policy or zorgvuldigheid is determined if there are no basic regulations or this principle of decency is applied [2]

Forms of abuse of Authority, There are at least three components, first, Detournement de pouvoir Derived from French, detournement has the meaning of deviation, misappropriation, and misuse. While Pouvoir has the meaning of power, ability, influence and authority. So the term deurnement de pouvoir can be interpreted as a form of abuse of authority. Systems and procedures for implementing government and development tasks must be regulated in law. For this reason, [3] concerning Government Administration was issued as a guideline for carrying out government administration. In Article 3 letter

c of [3] it is stated that the purpose of this law is to prevent abuse of authority. That means that this law strictly prohibits all forms of abuse of power.

1) [3], does not provide an explicit explanation regarding abuse of authority, but provides a form of prohibition on abuse of authority as stated in Article 17 of [4] concerning Government Administration, states; Government agencies and/or officials are prohibited from abusing their authority.
2) Prohibition of abuse of Authority as referred to in paragraph (1) includes:
   a. Prohibition of exceeding authority;
   b. Prohibition of mixing authority; And
   c. Prohibition of acting arbitrarily.

Furthermore, Article 18 of [3] concerning government administration, states;

1) Government Agencies and/or Officials are categorized as exceeding the Authority as referred to in Article 17 paragraph (2) letter a if the Decisions and/or Actions taken:
   a. Exceeding the term of office or the validity period of the Authority;
   b. Exceeding the boundaries of the area where the Authority applies; and/or
   c. Contrary to the provisions of the legislation.
2) Government Agencies and/or Officials are categorized as confusing the Authority as referred to in Article 17 paragraph (2) letter b if the Decisions and/or Actions taken:
   a. Outside the scope of the authority given field or material; and/or
   b. Contrary to the purpose of the given Authority.
3) Government agencies and/or officials are categorized as acting arbitrarily as referred to in Article 17 paragraph (2) letter c if the decisions and/or actions taken:
   a. Without the basis of Authority; and or
   b. Contrary to the Court Decision which has permanent legal force.

Furthermore, Article 19 of [3] concerning government administration, states;

1) Decisions and/or Actions determined and/or carried out by exceeding the Authority as referred to in Article 17 paragraph (2) letter a and Article 18 paragraph (1) as well as Decisions and/or Actions determined and/or carried out arbitrarily the authority referred to in Article 17 paragraph (2) letter c and Article 18 paragraph (3) is invalid if it has been tested and there is a Court Decision with permanent legal force.
2) Decisions and/or actions that are stipulated and/or carried out by confusing the authorities as referred to in Article 17 paragraph (2) letter b and Article 18 paragraph (2) can be canceled if they have been tested and there is a court decision that has permanent legal force.

The Government Administration Law does not explain the definition, meaning or concept of abuse of authority. Article 17 of the Government Administration Law only regulates the prohibition of abuse of authority and three types of prohibition of abuse of authority, which include the prohibition of exceeding authority, the prohibition of mixing authority and the prohibition of acting arbitrarily, which conceptually and theoretically according to State Administrative Law experts and Administrative Law practitioners The state (PTUN judges) are imprecise and tend to mislead. However, the expansion of the meaning of abuse of authority in the Government Administration Law and the accompanying debates may not preclude the application of the norm of abuse of authority

in the law in question, because as a law formed by an authorized institution, namely the legislature, it is in accordance with the legality principle of the law. It is generally binding and must be implemented and cannot be deviated before it is revoked or canceled by an authorized state institution [5]. In the Context of Administrative Law Against this abuse of authority in [3] the settlement mechanism is regulated.

In this case, the Government Internal Monitoring Apparatus (APIP) was formed. If APIP finds that there was an administrative error that caused state losses (Article 20 paragraph (2) letter c), said state losses must be returned no later than 10 working days after the decision was made and the results of supervision were issued (Article 20 paragraph (4). Refunds for state losses be borne by government officials, if administrative errors are due to abuse of authority (Article 20 paragraph (6)) In this regard, according to Article 21 of Law Number 30 of 2014 that the State Administrative Court is also authorized to examine and decide whether or not there is an element of abuse of authority by government officials.

However, apart from what was mentioned above, according to the provisions of Law Number 1 of 2004 concerning the State Treasury, it is the BPK that determines whether state losses occur. In the case of state losses due to abuse of authority in regional financial management must be optimized in terms of supervision aspects. Supervision is the main instrument in administrative law which is part of preventive law enforcement efforts. Law enforcement as an effort to realize legal compliance, in the context of administrative law does not always mean responsive action by imposing sanctions on perpetrators of violations. Government officials at the central level also took part in increasing this phenomenon. This is inseparable from the lack of supervision that should be carried out by the central government on the implementation of regional government.

B. Problem Formulation

Starting from the background of the problems above, the problems (Legal Issues) studied can be formulated as follows:

1. What is the arrangement for returning state losses due to abuse of authority.
2. How is the concept of abuse of authority to return state losses due to government actions.

2 Method

In accordance with the problems studied, this research is normative research. According to Bahder Johan Nasution, Normative legal research is research that pays serious attention to the existing positive legal structures, maintains and develops them with logical structures by conducting a study of three layers of legal science, namely legal dogmatics, legal theory and philosophy related to Restitution of State Losses. The consequences of abuse of authority in realizing good governance and the normative nature of legal research are related to the scientific character of law itself. [6].

3 Result and Discussion

A. Regulating the recovery of state losses due to abuse of authority.

The definition of state losses according to Article 1 number 22 of [7] concerning the State Treasury, namely State/regional losses is a real and definite lack of money, securities and goods as a result of unlawful acts, whether intentional or negligent. In Article 35 paragraph (1) of [8] concerning State Finances that every State official and non-treasurer civil servant who violates the law or neglects his obligations either directly or indirectly which harms the State is required to compensate for the loss. The settlement of state/regional compensation is in principle a mandate of law that must be carried out by each head of a state ministry/institution/head of a work unit of a regional apparatus. This has been confirmed in [7] concerning the state treasury. Any state/regional loss caused by an unlawful act or someone's negligence must be resolved immediately in accordance with the provisions of the applicable law. The treasurer, non-treasurer civil servant or other official who because of his actions violates the law or neglects the obligations imposed on him directly harms state finances, is obliged to compensate for the loss. Each head of a state ministry/institution/head of a work unit of a regional apparatus can immediately file a claim for compensation, after knowing that the state ministry/institution/work unit of the regional apparatus in question has experienced a loss as a result of the actions of any party. Settlement of state compensation is primarily intended to avoid state/regional losses due to unlawful acts either due to someone's negligence on purpose.

Therefore, it has been explicitly stated that state/regional losses caused by unlawful acts or someone's negligence must be reimbursed by the guilty party and the state losses incurred can be recovered immediately. While the goal other than for state finances to recover or to return lost or reduced State Assets is also to increase the discipline and responsibility of civil servants/state officials or especially the managers of state/regional finances, as well as in the framework of law enforcement, especially in the field of state finances. Therefore it is mandated that every head of a state ministry/institution/head of a work unit of a regional apparatus is obliged to immediately file a claim for state compensation after knowing that his creation has incurred state losses. The obligation to compensate state/regional losses by state/regional financial managers is an element of reliable internal control that exists in every head of state ministries/institutions/heads of work units of regional apparatuses, even for all state/regional financial managers.

Likewise, it is emphasized in the elucidation of [9] concerning state finances. In addition, it is necessary to emphasize the universally applicable principle that whoever is authorized to receive, store and pay or hand over money, securities or state property is personally responsible for all the deficiencies that occur in its management.

B. The concept of abuse of authority to return state losses due to government actions

The Government Administration Law does not explain the definition, meaning or concept of abuse of authority. Article 17 of the Government Administration Law only regulates the prohibition of abuse of authority and three types of prohibition of abuse of authority, which include the prohibition of exceeding authority, the prohibition of mixing authority and the prohibition of acting arbitrarily, which conceptually and theoretically according

to State Administrative Law experts and Administrative Law practitioners The state (PTUN judges) are imprecise and tend to mislead. However, the expansion of the meaning of abuse of authority in the Government Administration Law and the accompanying debates may not preclude the application of the norm of abuse of authority in the law in question, because as a law formed by an authorized institution, namely the legislature, it is in accordance with the legality principle of the law. It is generally binding and must be implemented and cannot be deviated before it is revoked or canceled by an authorized state agency [10].

With regard to the Administrative Law which does not explain the definition of the concept of abuse of authority, it can be interpreted through interpretation through Legal Hermeneutics. According to Philipus M. Hadjon, argumentation theory examines how to analyze, formulate an argument quickly. Argumentation theory develops criteria on which to base a clear and rational argument.

1. The three layers of rational legal argumentation include:
   a) Logic layer, this layer is for the internal structure of an argument. This layer is part of the traditional logic. That which appears here relates to the premises used in drawing a logical conclusion and the steps in drawing conclusions. For example deduction, analogy.
   b) The dialectical layer, this layer compares the arguments for and against. There are two parties in dialogue or debate, which in the end may not find an answer because they are equally strong.
   c) Procedural layer (structure, dispute resolution procedures)
2. Procedure not only regulates the debate but the debate also determines the procedure. A dialogue rule must be based on the established rules of the game with rational procedural requirements and clear dispute resolution requirements. Thus there is a mutual attraction between the dialectical layer and the procedural layer [11].

According to Bruggink, interpretations are grouped into 4 models, namely:

a) language interpretation (de taalkundige interpretatie)
b) Historical law (de wetshistorische interpretatie)
c) Systematic (de systemetische interpretatie) [12]

There are three rational legal argumentation structures, namely:

a) Logic Layer: the internal structure of the argument

This layer enters the area of traditional logic. The main issue in this layer is whether the flow from the premises to the conclusion of an argument is logical. Deductive reasoning step, analogy. Abduction and induction come into focus. With the deduction step of the statutory approach with a different precedent approach. In the Civil Law system, it is clear that first of all is the statute approach. With a statute approach in dealing with a legal fact, it is traced to the relevant legal provisions. The provisions are in the articles that contain norms. Norm in logic is a process (normative). Explaining norms must begin with a conceptual approach because norms are a form of proposition over a series of concepts. Thus misconceptions result in perverted lines of Reason and misleading

conclusions. Examples of the concept of abuse of power. People who do not understand Administrative Law may interpret abuse of authority as violating procedures. If such a concept is used as a basis, the conclusion is clearly misleading.

b) A dialectical layer of comparison of the pros and cons of arguments

This dialectical layer is an argumentation that is not monotonous. In dialectics, an argument is tested especially with arguments for and against. The dialectical process in an argumentation tests the reasoning strength of an argument. Strength lies in the strength of logic thus dialectic is related to logic.

c) Procedure layer

Procedural law is the rules of the game in the process of argumentation in handling cases in court. Thus the dialectical procedure in court is governed by procedural law. In the pattern of Civil Law the main law is legislation. Therefore, the basic step of the reasoning pattern is known as reasoning based on rules, the successor to legislation. This step is the first step known as the statute approach. The next step is to identify the norm. The formulation of the norm is a proposition, thus according to the nature of the proposition, the norm consists of a series of concepts. To understand the norm must begin with understanding the concept. This is the third step known as the conceptual approach. Example of the norm of article 1365 BW: every unlawful act that causes a loss obliges the person who caused the loss to pay compensation.

In these norms the main concepts of loss must be explained, namely:

1. The concept of deed

If this concept is not explained, it will cause difficulties, for example, whether the losses caused by the earthquake can be sued based on the provisions of article 1365 BW. The legal question that arises is whether an earthquake includes the concept of action. The next question is whose act it was and ultimately the question of who is responsible.

2. The concept of breaking the law

The elements of breaking the law must be clearly defined. In the area of civil law one turns to jurisprudence. Based on jurisprudence breaking the law occurs in terms of:

a) violate the rights of others
b) conflicts and legal obligations
c) violates propriety
d) violate decency
e) loss concept

Elements of loss include:

a) damage suffered
b) expected profit
c) cost incurred

With the example above, it is not enough just to be based on written legal norms directly applied to legal facts. Formulation of norms is abstract in nature and its supporting concepts are in many ways open concepts or vague concepts. With such conditions

The third step as described above is the rechtsvinding step. Rechtsvinding itself is done through two techniques. The first technique is interpretation and the second technique is legal construction which includes analogy, reasoning or argumentum a contrario.

The function of rechtsvinding is to find concrete norms to be applied to related legal facts. Understanding rechtsvinding in Indonesian as a legal discovery. After finding concrete norms, the next step is applying them to legal facts. As in the example above after finding concrete norms of action in the context of article 1365 BW it can be used as a parameter to answer legal questions, for example relating to criminal acts of corruption committed by officials. The first element is abuse of authority. Abuse of authority by itself is difficult to use as a parameter to measure whether an act or action is an act of abuse of authority. One concept resulted in an error in drawing conclusions.

Quoting Muhammad Sahlan that the provisions in the Government Administration Law have raised pros and cons among legal experts, especially criminal law experts and state administrative law experts regarding the enforceability of the said provisions and their influence on the authority of the Corruption Court. Guntur Hamzah, Professor of Administrative Law at Hasanuddin University, stated that the existence of the Government Administration Law would strengthen and add to the breaking power of efforts to eradicate corruption because with the APIP, allegations of abuse of authority can be detected early as a preventive measure [13].

4 Conclusion

The Government Administration Law does not explain the definition, meaning or concept of abuse of authority. Article 17 of the Government Administration Law only regulates the prohibition of abuse of authority and three types of prohibition of abuse of authority, which include the prohibition of exceeding authority, the prohibition of mixing authority and the prohibition of acting arbitrarily, which conceptually and theoretically according to State Administrative Law experts and Administrative Law practitioners The state (PTUN judges) are imprecise and tend to mislead. However, the expansion of the meaning of abuse of authority in the Government Administration Law and the accompanying debates may not preclude the application of the norm of abuse of authority in the law in question, because as a law formed by an authorized institution, namely the legislature, it is in accordance with the legality principle of the law. It is generally binding and must be implemented and cannot be deviated before it is revoked or canceled by an authorized state agency. Settlement of state compensation is primarily intended to avoid state/regional losses due to unlawful acts either due to someone's negligence on purpose. Therefore, it has been explicitly stated that state/regional losses caused by unlawful acts or someone's negligence must be reimbursed by the guilty party and the state losses incurred can be recovered immediately. While the aim is other than for state finances to recover or to return lost or reduced State Assets as well as to increase the discipline and responsibility of civil servants/state officials or especially the managers of state/regional finances, as well as in the framework of law enforcement, especially in the field of state finances. Therefore it is mandated that every head of a state ministry/institution/head of a work unit of a regional apparatus is obliged to immediately file a claim for state compensation after knowing that his creation has incurred state losses.

5 Suggestion

1. The Central Government and DPRD need to jointly revise and regulate, especially Article 17 of the AP Law, to provide legal certainty against the concept of abuse of authority.
2. In the process of recovering losses, in terms of norms, it should be clearer and more thorough after officials pay for state losses as the official's responsibility in returning state losses from an administrative law perspective.

References

1. Bahder Johan Nasution. *Metode Penelitian Ilmu Hukum*, Mandar Maju: Bandung. 2008.
2. Disiplin F. Manao. *Penyalahgunaan Wewenang Pada Tindak Pidana Korupsi dalam Persfektif Hukum Administrasi Negara,* Cv. Kreasi Sahabat Bersama, Bandung. 2017.
3. Yulius. "Perkembangan Pemikiran dan Pengaturan Penyalahgunaan Wewenang di Indonesia (Tinjauan Singkat Dari Perspektif Hukum Administrasi Negara Pasca Berlakunya Undang-Undang Nomor 30 Tahun 2014)", artikel dalam *Jurrnal Hukum dan Peradilan*, Badan Penelitian dan Pengembangan Hukum dan Peradilan Mahkamah Agung RI, Volume 04 Nomor 3 . 2015.
4. Phipus M. Hadjon & Tatiek Sri Djamiati dalam E.T.Feteris, et.al. Op goede Gronden. *Argumentasi Hukum,* Gadjah Mada University, Surabaya, 2005.
5. M. Sahlan. "Unsur menyalahgunakan Kewenangan dalam Tindak Pidana Korupsi Sebagai Kopmpetensi Absolut Peradilan Admnistrasi", *Jurnal Huku Ius Quia Iustum*, No. 2, Vol. 23. 2016.
6. Phillipus M. Hadjon. "Tentang Wewenang". *Yuridika*, No. 5 & 6 Tahun XII. 1997.
7. Republik Indonesia, Undang-Undang Nomor 28 tahun 1999 tentang Penyelenggaraan Negara yang Bersih dan Bebas dari Korupsi, Kolusi dan Nepotisme.
8. Republik Indonesia, Undang-Undang Nomor 17 tahun 2003 tentang Keuangan Negara.
9. Republik Indonesia, Undang-Undang Nomor 1 tahun 2004 tentang Perbendaharaan Negara.
10. Republik Indonesia, Undang-Undang Nomor 15 tahun 2004 tentang Pemeriksaaan Pengelolaan dan tanggung Jawab keuangan Negara.
11. Republik Indonesia, Undang-Undang Nomor 15 tahun 2006 tentang Badan Pemeriksaan Keuangan.
12. Republik Indonesia, Undang-Undang Nomor 25 tahun 2009 tentang Pelayanan Publik.
13. Republik Indonesia, Undang-Undang Nomor 51 Tahun 2009 tentang Perubahan Kedua Atas Undang-Undang Nomor 5 tahun 1986 tentang Peradilan Tata Usaha Negara.
14. Peter Mahmud Marzuki. *Metode Penelitian Hukum*, Kencana: Jakarta. 2010.
15. Republik Indonesia, Undang-Undang Nomor 30 tahun 2014 tentang Administrasi Pemerintahan.
16. Republik Indonesia, Undang-Undang Nomor 5 tahun 2014 tentang Apartur Sipil Negara.
17. Republik Indonesia, Undang-Undang Nomor 23 tahun 2014 tentang Pemerintahan Daerah.
18. Republik Indonesia, Peraturan Pemerintah Nomor 58 Tahun 2005 tentang Pengelolaan Keuangan Daerah.
19. Republik Indonesia, Peraturan Menteri Dalam Negeri Nomor 5 tahun 1997 tentang Tuntutan Ganti Rugi Keuangan dan Barang Daerah.