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Implications Of Abuse Of Authority In State Administrative Law On The Legal Certainty Of Corruption

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Abstract

In Law No. 20 of 2001 on Combating Corruption and Law No. 30 of 2014 on Government Administration, there is a fundamental difference between unlawful acts and abuse of authority. In unlawful acts there is an element of error in a person who has the intention to enrich themselves or others or corporations to harm the state finances, while in the abuse of authority tends to lead to personal losses with categories of violations of an administrative nature.

The problem in this study is; (1) What is the conception of abuse of authority in the law of the State Administration? (2) How is the arrangement on the abuse of authority as a crime of corruption?, (3) How is the Element of abusing authority in the crime of corruption as the Absolute competence of the State Administrative Court? The approach method used in this study is normative juridical method. Normative legal research is conducted (especially) on primary, secondary, tertiary legal materials, as long as they contain legal rules.

Based on the results of the study found that (1) Parameters that limit the free movement of the authority of the State apparatus (discretionary power) in the perspective of state administrative law are detournement de povouir (abuse of authority) and abus de droit (arbitrary). (2) Understanding and regulating abuse of authority or abusing authority in the Criminal Code as well as in Law No. 20 of 2001 on Combating Criminal Acts of Corruption is not found understanding expressis verbis, this confirms that the abuse of "abuse of authority" in the criminal law of corruption does not have an explicit understanding of its nature. (3) Abuse of authority is one of the elements contained in Article 3 of Law No. 31 of 1999 on Combating Criminal Acts of Corruption jo. Law No. 20 of 2001 on Amendments to Law No. 31 of 1999 on Eradication of Criminal Acts of Corruption (Law No. 20 of 2001 on Eradication of Criminal Acts of Corruption). Elements in the crime of corruption listed among others in Article 3 of Law No. 20 of 2001 on Combating The Crime of Corruption, are distorted, since the presence of Article 21 paragraph (1) of Law No. 30 of 2014 on Government Administration which basically states the court is authorized to accept, examine, and decide there is or is no element of abuse of authority committed by government officials. For law enforcement, especially in the criminal law, the Presence of Law No. 30 of 2014 should be a benchmark for KPK investigators not to make arrests of investigations against defendants before a verdict from the State Administrative Court, considering the authority of state officials who carry out their duties if committing violations then to the concerned if the case is still in the judicial process of the KPK State Administration cannot withstand The accused first awaits the release of the TUN verdict which has permanent legal force. This is as mandated in Article 21 of Law

No. 30 of 2014 on Government Administration. Then the Supreme Court needs to socialize the Supreme Court of Indonesia Regulation No. 4 of 2015 concerning Guidelines for Speech in Testing Abuse of Authority.

Keywords: Authority, Abuse of Authority, Corruption

A. Introduction

Based on the provisions of the Constitution of the Republic of Indonesia of 1945 (UUD 1945), the system of governance of the Republic of Indonesia is based on the principle of sovereignty of the people and the rule of law, which is often referred to as constitutional democracy. A law including a law is created with the basic values of law, namely 3 (three) kinds of legal values and purposes (zweckmaszigkeit) namely justice, certainty and expediency. According to Satjipto Rahardjo that Radbruch argues 3 (three) kinds of legal values and objectives (zweckmaszigkeit) has spannungsverhältnis (a tension (contradictory) between each of the values of the legal purpose).

In the criminal law environment, certainty becomes one of the important things considering that the Indonesian state adheres to the Continental European legal system. The principle of legality becomes important, so that an act (feit) cannot be punished without the first regulation that regulates it (nullum delictum nulla poena sine praevia lege poenali), including in the enforcement of corruption crimes. Corruption is categorized as an act against the law because its nature not only violates the law, but violates the rights of others, especially violations of the interests of the community.

Corruption with an unlawful nature (Wederrechtelijk), has developed in recent decades. Corruption is generally carried out by white collar crime groups, including people who have power in a position, such as employees / government officials both central and regional and private with their own pure capital, pure state and / or mixed capital both. According to Indriyanto Seno Adji, the breadth of the range of categories for perpetrators of corruption itself occurs as a result of the expansion of jurisprudence, although it gives rise to pro-cons among academics and practitioners.

Abuse of authority in Law No. 31 of 1999 concerning the Eradication of Criminal Acts of Corruption (PTPK Law) which is categorized as a criminal act of corruption regulates the actions of government officials / employees who abuse the authority, opportunities or means that exist in it because of positions or positions that can harm the state finances or the country's economy.

In practice, the provisions of Article 2 paragraph (1) and Article 3 of the PTPK Law are often used by the Public Prosecutor (JPU) in indicting corruption suspects. From the results of ICW monitoring in the period January - June 2017, of the 193 (one hundred and ninety-three) cases of corruption, 134 (one hundred and thirty-four) verdicts included using Article 3 of the PTPK Law as an indictment and 59 (fifty-nine) verdicts were charged with Article 2 of the PTPK Law. The other 3 (three) each use Articles 7, 11, and 12a of the PTPK Law. The use of Article 3 of the PTPK Law will open a large judicial space for breaking the lightest sentence. When the prosecutor charges the suspect with Article 2 paragraph (1) or Article 3 of the PTPK Law, it is likely that the judge will choose Article 3 of the PTPK Law as a proven indictment.

The Corruption Eradication Act which is the foundation for efforts to prevent and combat corruption has undergone fundamental changes. The first change occurred on July 24, 2006 when the Constitutional Court declared the norm of Explanation of Article 22 Paragraph (1) of Law No. 31 of 1999 contrary to the constitution so that it becomes delik formil. The second change occurred again on January 25, 2017 on the change of phrase in the PTPK Law, the Constitutional Court through its ruling stated, the phrase "can" in the formulation of Article 2 and Article 3 of the PTPK Law is contrary to the constitution so that it does not bind the word "can" make Article 2 and Article 3 of the PTPK Law into material decal. It is explained that the objections of the Petitioners, in particular to the enactability of the phrase "can" and the phrase "or any other person or a corporation". The applicant argues that it is not possible as a state official, not to issue decisions aimed at carrying out development projects in their respective regions, and it is impossible that projects won by the project organizers (tender winners) do not benefit from the projects they organize. So that the implementation of norms a quo, at any time can be imposed on the Applicants, even in the position of carrying out their duties and functions as an ASN as ordered by the laws and regulations.

This Constitutional Court ruling interprets that the phrase can harm the state's finances or the state economy, in Article 2 paragraph (1) and Article 3 of the PTPK Law must be proven by real state financial losses (actual loss) instead of potential or estimated state financial losses (potential loss). The decision of the Constitutional Court No. 25/PUU-XIV/2016 was pronounced in a hearing open to the public on Wednesday, January 25, 2017. Since the pronouncement of the a quo verdict, the enactment of the decree in Article 2 paragraph (1) and Article 3 of Law No. 31 of 1999 juncto Law No. 20 of 2001 on Amendment of Law No. 31 of 1999 on Eradication of Criminal Acts of Corruption has shifted its meaning because it has been declared invalid and contrary to the 1945 Constitution In its consideration, there are at least four benchmarks that become the legislative ratio of the Constitutional Court shifting the meaning of Substance against delik corruption. And can be seen from 4 (four), benchmarks, namely:

1. Nebis in idem with the previous Constitutional Court Decision, namely the Constitutional Court Decision No. 003 / PUU-IV / 2006;
2. The emergence of legal uncertainty (legal uncertainty) in the formal corruption delik so that it is converted into a material delik;
3. The relationship or harmonization between the phrase "may harm the state finances or the country's economy" in the criminal approach to the Corruption Act with the administrative approach to Law No. 30 of 2004 on Government Administration; and
4. The alleged criminalization of the State Civil Apparatus (ASN) by using the phrase "can harm the state finances or the country's economy" in the PTPKUU.

When referring to Article 1 number 22 of Law No. 1 of 2004.

About the State Treasury and Article 1 number 15 of Law No. 15 of 2006 concerning the Audit Board, state losses are defined as State losses (Central / Regional) are a lack of money, securities, and goods, which are real and certainly the amount as a result of unlawful acts both intentionally and negligent. This conception is actually the same as the Explanation of the PTPK Law which states that there have been state losses that can be calculated by authorized agencies or appointed public accountants.

Although it does not grant the entire application of the Petitioners, the Constitutional Court ultimately interprets that one of the elements of corruption is actual loss and not potential loss (potential state financial loss or estimated state financial loss) as has been regulated and practiced. This is what makes the shift in the meaning of delik in Article 2 paragraph (1) and Article 3 of the PTPK Law which was originally a formal and material delik to be material only.

One of the legal reasons for the Applicant to consider the phrase "can" in Article 2 paragraph (1) and Article 3 of the PTPK Law contrary to the 1945 Constitution is the emergence of Law No. 30 of 2014 concerning Government Administration. The enactment of the Government Administration Act brings the affirmation that the State Civil Apparatus (ASN) is wrong or makes administrative errors in carrying out a state administration then the approach taken is an administrative approach. The criminal approach is used as the final weapon (ultimum remedium).

Based on the nature of the function of government (governmental power) as an active function in the sense of driving or controlling the lives of the people and the state to realize the welfare of the people (welfare staat) and directed to the function of the construction and community development, is the real reason for the role of government interference in every sector of public life, or in other words when it comes to the public interest, then there is also the implementation of government affairs. It is the business and responsibility of the government.

According to Hans Kelsen, the principle of activeness of government is a symptom of the transformation from the state of law to the administrative state which is essentially a welfare state, in the sense of a state whose government officials act directly to achieve the goals of the state by directly producing what the people want. The arrangement of these principles is not infrequently found in Indonesian laws and regulations (positive law) or conventions of governance, where the government is given the authority to act on its own initiative freies ermessen (Germany), or pouvoirdecritionnaire (France), To be able to do anything for the welfare of the people. Differing views on the role and legal consequences resulting from the government's factual actions. (feitelijke handelingen), it is possible, because there is no attention in the form of a thorough and in-depth review of the role and legal consequences of the use of government factual measures (feitelijke handelingen) in the administration of government as stated by Indroharto earlier.

Government Administration Law is needed to provide a legal basis for all actions, behavior, authority, rights and obligations of each state administrator in optimizing his daily duties serving the community. Juridically, abuse of authority in the Government Administration Act is declared to occur when government bodies and/or officials make decisions and/or take acts beyond authority, mix up authority, and/or act arbitrarily. Citing the opinion of Yulius, when traced the ratio of the legislature of the formation of some of these laws and regulations, there is a very close relationship between the three, namely equally formed in the framework of efforts to combat the Crime of Corruption. The Law of the Corruption Criminal Court and the Law on the Eradication of Corruption in the Criminal Law are intended to eradicate the Crime of Corruption through the means of enforcement (repressive measures), while the Government Administration Law, although it is in the family of State Administrative Law is intended as a means of eradicating Criminal Acts of Corruption through preventive measures with a bureaucratic reform approach.

B. Formulation of the problem

Based on background, the problem can be formulated as follows:

1. What is the conception of abuse of authority in the administrative law of the state?
2. What is the regulation of abuse of authority, a crime of corruption?
3. How does the Element abuse authority in the crime of corruption as the Absolute

competence of the State Administrative Court?

C. Research Methods And Materials

1. Method

In this journal writing uses normative research. Research related to legal principles or legal rules fall into the category of normative legal research. Normative legal research is legal research that lays down law as a building system of norms. The system of norms in question is about the principles, norms, rules of laws and regulations, court decisions, agreements and doctrines (teachings), because this study examines elements of abuse of authority then this research falls into the category of normative legal research (legal research). Normative legal research is conducted (especially) on primary, secondary, tertiary legal materials, as long as they contain legal rules. This type of normative research in journal research has 3 (three) inherent research properties that are exploratory, descriptive and explanatory.

2. Research Material

Journal Research with normative juridical research type, using only secondary data. Secondary data collection is done through documentation studies or library research studies. The source of these research data, in the form of legal research materials collected through documentation studies for this study, consists of:

a. Primary legal materials directly related to environmental and natural resource regulations, including:
1) The 1945 Constitution;
2) Law No. 5 of 1986 juncto Law No. 9 of 2004 Law No. 51 of 2009 on the Second Amendment to Law No. 5 of 1986 on State Administrative Justice;
3) Law No. 31 of 1999 on Combating Criminal Acts of Corruption, as amended by Law No. 20 of 2001;
4) Law No. 46 of 2009 concerning the Criminal Court of Corruption;
5) Law No. 48 of 2009 on Judicial Powers; and
6) Law No. 30 of 2014 on Government Administration.
b. Secondary legal material, legal material that provides an explanation of primary legal material. This secondary legal material is used as a guide in carrying out research Secondary legal materials. What is required in this research are: scientific journals, papers, research results, articles, textbooks, and other documents relevant to the object of the research.
c. Tertiary legal materials, i.e. materials that provide clues to primary legal materials and secondary legal materials, such as dictionaries, encyclopedias, commutative indices, and so on. Tertiary legal materials with the term non-legal materials, but it is highly recommended to use the term non-legal materials.

D. Theoretical framework

The theoretical framework in this Journal research, is needed to help explain and solve the formulation of problems in this Journal research. Theoretical Framework is the relationship between concepts based on empirical studies, Theoretical frameworks must be based on theory of origin (grand theory). Theoretical framework functions and tasks, including:

1) Analyze and explain the understanding of law (the understanding of law) and various legal notions or juridic concepts (concepts used in law);
2) Examine the relationship between law and logic; and
3) Study things related to methodology (teaching methods).

In this journal research uses several theories that become a framework for analyzing, reviewing and explaining the answers and discussions of problem formulations. These theories are:

a) Legality Theory of Law

The theory of legal certainty is part of the main purpose of the birth of law in a country and society. The main purpose of the law in question is justice, expediency / usefulness and legal certainty. According to Radchbruch, that legal certainty falls into the basic values of the law, although these three values are basic values but they have spannungsverhältnis (a tension (contradictory) with each other). In this view, the main thing for legal certainty is the existence of the regulation itself. Whether the regulation should be fair and have usefulness / usefulness for its people is beyond the first of the value of legal certainty.

Certainty is a matter of certain (circumstances), provisions or provisions. The law must be sure and fair. Certainly as a guideline for conduct and fairness because the code of conduct must support an order that is considered reasonable. Just because it is fair and is carried out with certainty can the law perform its function. Legal certainty is a question that can only be answered normatively, not sociologically. On the contrary, the creation of legal certainty, especially in the law as stated by Nur Hasan Ismail, requires requirements relating to the internal structure of the legal norm itself.

b) The Theory of Harmonization of Law

Harmonization in law includes the adjustment of laws and regulations, government decisions, judges' decisions, legal systems and legal principles with the aim of enhancing legal unity, legal certainty, justice and equality, legal usefulness and clarity, without obscuring and sacrificing legal pluralism. Harmonization of the law is an effort or process that wants to overcome the limitations of differences, things that conflict and irregularities in. Efforts or processes of realization of harmony, conformity, compatibility, compatibility, balance between legal norms in the laws and regulations.

Without the harmonization of the legal system, it will give rise to circumstances that cannot guarantee legal certainty that can cause disruption in people's lives, inequality and unprotected feelings. In such perspective the issue of legal certainty will be perceived as a need that can only be realized through harmonization of the legal system.

The condition of disharmony (disharmoni) in the field of legislation is very potential, this happens because of so many laws and regulations in Indonesia.

c) Theory of Legal Reform

The renewal of the law is essentially a sustainable reform, because it is always related to the sustainable development of society and the continuous development of scientific activities and the development of philosophical thought (basic ideas / intellectual conceptions). According to Barda Nawawi, whose author sadur opinion that the renewal of the law is essentially meaningful, an effort to conduct review and reassessment in accordance with the central socio-political, socio-philosophical and socio-cultural values of Indonesian society that underlie social policies, criminal policies and law enforcement policies in Indonesia.

The renewal of the law aims so that the law is completely in accordance with the soul of the nation and able to solve the nation's problems. Therefore, the renewal of the law is oriented to the fair enforcement of the law, both from the aspect of legal substance (legislation), structural aspects (judiciary) and cultural aspects (legal education in higher education). The benefit of legal reform is that the law that applies in Indonesia, whether written (legislation) or not written (values or norms that live in society), is in accordance with the principles contained in Pancasila, namely the principles of Divinity, humanity, society, social justice, and democracy.

d) Authority of Theory

Authority of Theory (UK), theorie der autorität (Germany) and theorie van het gezag (Netherlands) which etymologically consists of 2 (two) syllables namely theory and authority. According to H.D. Stoud, authority is all rules relating to the acquisition and use of governmental authority by the subject of public law in public legal relations. There are 2 (two) elements contained in the sense of the concept of authority, namely the existence of legal rules and the nature of legal relationships. Conceptually, the term authority or authority is often aligned with the Dutch term "bevoegdheid" (meaning authority or power).

According to S.F. Marbun in the book Of State Administrative Justice and Administrative Efforts in Indonesia, it is explained that the validity of government actions is measured based on the authority stipulated in the laws and regulations. The matter of authority can be seen from the State Constitution which gives legitimacy to public bodies and state institutions in carrying out their functions. Authority is the ability to act provided by applicable laws for conducting relationships and legal acts. Authority is a very important part of the Law of Governance (Administrative Law), because the new government can carry out its functions on the basis of the authority it obtains. According to Ateng Syafrudin, there is a difference regarding authority (authority; gezag), which is meant by authority (authority; gezag) is what is called formal power, power derived from the power given by law.

e) Legal Liability Theory

Etymologically the law according to N.E. Algra and friends states that accountability is the obligation to assume accountability and bear the losses suffered (when prosecuted), both in law and in the field of administration. So there are 2 (two) types of responsibilities in this theory, namely legal responsibility and administrative responsibility. Legal responsibility is assigned to the legal subject or perpetrator who commits an unlawful or criminal act, so that the person concerned can be charged with paying damages and/or carrying out the crime. If referring to the above understanding of legal etymology, the theory of legal liability theory is a theory that examines and analyzes the willingness of the subject of the law or the perpetrator of a criminal offense to shoulder costs or losses and carry out criminals for their mistakes or because of their mistakes.

Legal liability theory can be categorized into 3 (three) areas of legal liability, namely civil law liability. What is meant by civil law liability is due to the legal subject not carrying out achievements (broken promises) and / or doing unlawful acts (PMH), criminal law responsibilities. What is meant by criminal law liability is caused because the subject of the law commits criminal acts that are against the law that occur either intentionally or because of their innocence and administrative legal responsibility. What is meant by administrative legal liability is caused because the legal subject committed violations and administrative errors.

D) Discussion

1. Conception of abuse of authority in the administrative law of the state.

For the State of Indonesia abuse of authority is used as the reason (basis) of a lawsuit for a person or civil legal entity who feels his interests are harmed by a TUN Decision (Plaintiff). Verklarend Woordenboek Openbaar Bestuur formulated abuse of authority as an improper use of authority. In this case, the office is considered to violate the principle of speciality (principle of purpose) because the person concerned uses his authority for purposes that deviate from the purpose that has been given to that authority.

This principle of speciality has previously been applied in Indonesia's positive law, which is related to the reasons for filing a lawsuit to the PTUN Court. In the explanation section, this provision is expressly stated as an abuse of power, the term abuse of authority in the TUN Judicial Law after the change is no longer known, not even included in the AUPB. The term only reappeared when the Government Administration Act was promulgated as one of the AUPB, but with a different term that is "not abusing authority" with an expanded meaning.

The occurrence of abuse of authority needs to be measured by proving factually that an official has used his authority for another purpose or not. It must also be proven that the abuse of authority is done consciously by transferring the purpose that has been given to that authority (not because of a void). The transfer of purpose is based on personal interests, both for their own benefit and for others.

Juridically, abuse of authority is declared to occur when bodies and/or government officials make decisions and/or take acts beyond authority, mix up authority, and/or act arbitrarily. Governing Bodies and/or Officials exceed authority when decisions and/or actions are taken in the manner of:

a. Beyond the term of office or the deadline for the entry into force of authority;
b. Beyond the territorial boundaries of the authority; and/or
c. Contrary to the provisions of the laws and regulations.

While in the Government Administration Law it is explained that the Decisions and / or actions of The Agency and / or Government Officials are categorized as mixing authority if done outside the scope of the field or material authority granted and / or contrary to the purpose of the authority given. Finally, the Body and/or Government Officials are declared arbitrary when their decisions and/or actions are carried out without the basis of authority and/or contrary to the Court's Decision of permanent legal force.

In the Government Administration Act does not explain the definition, understanding, or concept of abuse of authority, only regulates the prohibition of abuse of authority and 3 (three) species of prohibition of abuse of authority, which includes prohibition of overreaching authority, prohibition of mixing authority and prohibition of arbitrary acts, which conceptually and theoretically according to experts of State Administrative Law and practitioners of State Administrative Law (PTUN judges) are not appropriate and Tends to be misleading.

However, the expansion of the meaning of abuse of authority in the Government Administration Act and the debate that comes with it should not hinder the implementation of the norms of abuse of authority in the law in question, because as a law established by the competent institution that is the legislature, it is in accordance with the principle of legality of the law is generally binding and must be implemented and cannot be maintained before it is repealed or canceled by state institutions. the authorities.

According to the jurisprudence of the Supreme Court of Indonesia, the element of "abusing authority" in the provisions of Article 3 of the Eradication of Tipikor Law is the core of the article, so that in its application to carry out prosecutions against corruption defendants based on the provisions of Article 3, the element of "abusing authority" must be fulfilled.

Abusing authority as one of the elements in the Crime of Corruption according to Abdul Latif, is a delict species of unlawful element as a genus delict. Abusing authority in this context will always be related to the office of public officials, not in relation to and understanding of positions in the realm of civil structures. However, the term abusing authority as well as abuse of authority is actually a term born in the family of State Administrative Law, even though the term is one of the principles in the AUPB, namely the principle of not abusing authority.

The element of abusing authority in the crime of corruption can be found in the formulation of the Corruption Act, which is always associated with the position owned by a public official (abusing authority due to office), which is the following formulation:

Any person who, with the aim of benefiting himself or any other person or a corporation, abuses the authority, opportunity or means available to him or her for a position or position that may harm the country's finances or the economy of the country, shall be punished with... rupiah).

The subject of the law in this criminal act is any person who means an individual or including a corporation. However, because the corporation as a rechtspersoon is unlikely to have a position or position such as natuurlijke persoon, the Crime of Corruption contained in the provisions of the Corruption Act can only be done by individuals, namely state officials or public officials.

The authority referred to in Article 3 of the Corruption Act is the authority of civil servants as referred to in the provisions of Article 1 number 2 letter a, letter b, letter c, letter d, and letter e of the Criminal Act of Corruption, whose understanding is broader than the understanding of authority according to the concept of State Administrative Law or State Administrative Law which is limited to the provisions of Article 1 number 2 letter a, letter b, letter c, and letter e of the Corruption Act. The Law on the Eradication of Corruption, in Article 1 number 2. That civil servants are covering:

a. Civil servants as referred to in the Law on Staffing;
b. Civil servants as referred to in the Criminal Code;
c. Persons who receive salaries or wages from state or local finances;
d. A person who receives a salary or wage from a corporation that receives assistance from a state or regional financial; or

People who receive salaries or wages from other corporations that use capital or facilities from the state or society. Juridically, regarding abusing authority because of office, the Corruption Act does not provide its own definition or understanding. The term abuse of authority is found in the Government Administration Act as part of the General Principles of Good Governance (AUPB), which is among the "principles of not abusing authority".

2. ***Regulation of abuse of authority as a criminal act of corruption.***

Acts against the law in the broadest sense or nature of the law in its material establishment as an act that in addition to directly violating the laws and regulations (written law), but also includes acts that violate the unwritten rule of law, namely in the form of regulations in the field of decency, religion, manners. When following the teachings of material unlawful nature, moeljatno's opinion can be seen, which gives the difference between material views and formil views:

1. Recognizing the existence of exceptions / elimination from the nature of unlawful acts according to written and unwritten law, while the view that formil only recognizes the exceptions that are in the Law only, for example Article 49 of the Criminal Code, regarding forced defense (noodweer); and
2. The nature of the law is the absolute element of every criminal act, also for those who in its formulation do not mention these elements, while for the formal view, the nature is not always an element of criminal acts, only if in the formulation of the delik mentioned clearly, then become the element of delik.

As explained earlier, the teaching of unlawful nature in its material view is that the unlawful act does not have to be a violation of the law, but it also needs to be seen whether it is a violation of common principles in society including unwritten law to prove the material unlawful nature of its actions. For adherents of this material view, by providing a broad understanding of unlawful acts it is necessary to fulfill the sense of justice of society, considering the applicable law is not only written but also the recognition of unwritten laws, even including the rules of decency and propriety that grow in society.

Understanding acts against the law of the civil law is very influential on criminal law. In fact, some legal experts do not hesitate to say the understanding of unlawful nature in the field of criminal law (wederrechtelijk) is the same as unlawful acts in the field of civil law (onrechtmatige daad). As Pompe and Satochid Kartanagara argue that the notion of onrechtmatige daad is synonymous with wederrechtelijk in the Material sense. Oemar Seno Adji said that by not making an onrechtmatige daad as a criminal act that wederrechtelijk in nature, then the understanding of against the law as a means that is an element of the criminal act, has a broad understanding and similar to the understanding of onrechtmatige daad after 1919.

Actually, the emergence of views on the teaching of nature against material law is a reaction to the statement that the law is law. Adherents understand the teaching of nature against material law then develops the understanding of the teaching of nature against the material law, that although an act has been compatible with the formulation of the decal, it is not always the perpetrator punished if there is indeed an exception based on unwritten legal rules. This view of the teaching of nature against material law was developed by CH.J. Enschede and A. Heijder and M.L.CH. Hulsman who filed a case known as a Veterinarian based on the hoge raad ruling of February 20, 1933, thus, according to adherents of the teachings of nature against material law, exceptions as the reason for the revamping, in addition to those contained in the law (written law) also exist outside the law (unwritten law).

Regarding the notion of nature against material law, as mentioned earlier in the beginning, is divided into:

1. Nature is against material law in its positive function.
2. Nature is against material law in its negative function.

The division of nature against the law in its positive and negative function by these jurists can also, to answer the problem of interpretation that is too broad in the context of nature against material law in the field of criminal law.

The unlawful nature of material law in its positive function according to Tjandra

Sridjaja Pradjonggo who quoted Sudargo's opinion said, the nature of unlawful material law in its positive function considers a permanent act as a delik, although not real threatened with criminality in law, if it is contrary to the law or other measures that occur outside the law. Thus it means being recognized by the unwritten law as a source of positive law. Meanwhile, according to Juniver Girsang, the nature of the law in its positive function is interpreted even though an act does not meet the elements of the delik formulation, but according to the community the deed is considered reprehensible, then positively the act is considered as against the law.

The unlawful element in law No. 31 of 1999 is not much different from the previous law. There are only a few editorial changes only with the formulation pattern spread across several articles. The formulation against the law can be seen in Article 2 paragraph (1), Article 3,5,6,7,8,9,10,11,12 and Article 13. In this article the formulation against the law is not much different from the formula contained in the previous law. There is no affirmation whether it is against the law in the sense of formal or material.

Some of the above chapters, against the law formulated with "everyone who commits a criminal offense......" There are still restrictions on the subject of corruption. There is only an editorial change, while whether the element against the law is applied materially or only in the sense of formil is not affirmed. It's the same as what happened in the previous law. Likewise, the application of teaching against material law positively or negatively is not affirmed in the formulation of article of law No. 31 of 1999.

Known to be unlawful in nature formil and materially in criminal law. An act is said to be against the law legally if the act is contrary to the provisions of the written law. While against the law materially is an act said to be against the law is not only contrary to the provisions of the law but the act must be truly felt by the community as an act that should not or should not be done. So in such a construction an act is said to be against the law when it is considered reprehensible in a society. The affirmation of the application of teaching against material law is affirmed in the Explanation section of Article 1 paragraph (1) of Law No. 31 of 1999 which states:

"Although an act is not regulated in the laws and regulations, but if the act is considered reprehensible because it is not in accordance with the sense of justice or norms of social life in society, then the act can be punished"

The positive application of doctrine against material law is the opposite of teaching against material law negatively. In its function negatively the teaching against material law can remove the criminal then positively the teaching against the material law can be a reason for the criminal to drop the criminal. With this positive application has opened up opportunities and given the possibility to judicial practice to prosecute someone who has committed corrupt acts, based solely on the feeling of community justice or the norms of social life that consider the act reprehensible. The application of the positive function of the teachings of nature against material goods is considered contrary to the principle of legality as a fundamental principle of the rule of law. The principle of legality is formulated in Article 1 paragraph (1) of the Criminal Code which reads:

Geen feit is strafbaar dan uit kracht van een daaraan voorafgegane wettelijke strafbepalingen (an act cannot be punished, except under the provisions of existing criminal legislation.).

The principle of legality requires a written regulation before an act can be punished. In Latin, this principle is better known as "Nullum delictum nulla poena sine praevia lege poenali". The application of the teaching of nature against material law with positive functions as embraced in Law No. 31 of 1999 among criminal law experts is considered to cause legal uncertainty. In the context of the principle of legality, the application of this teaching is not possible. Therefore, in the implementation of teachings against material law with positive function in criminal acts of corruption can only be applied with the consideration of judges. This application must also be done with proper proof. Because there are elements that are not listed in the legislation but with a positive function of teaching against material law, it can be used as an excuse for criminal prosecution.

The change from Law No. 31 of 1999 to Law No. 20 of 2001 which was made although substantially not directly alluded to the application of teachings against material law but in the discussion of things that were changed can be seen to have been directed to implement the teachings against material law positively. The case that can be presented here as a form of jurisprudence from the Supreme Court's decision on the application of the teachings of nature against material law is the Supreme Court Decision No. 97 K / Kr / 1973 dated October 17, 1973. The accused is Sabar Soediman, a Director of PN. Telecommunications Department of Transportation in Bandung. The defendant's actions violate Article 55 paragraph 1 jo Article 56 paragraph 1 jo Article 415 of the Criminal Code jo Article 1 sub c jo Article 24 (1) Perpu No. 24 of 1960 jo Law No. 1 of 1961. The Bandung District Court's ruling found the defendant guilty of consecutive corruption and sentenced him to 4 (four) years. At the appeal level examination this District Court decision was overturned on the consideration that in his office the defendant was entitled under the law to take the necessary discretion in the interests of the company and his actions were deemed not against the law. The consideration is based on the Supreme Court Jurisprudence dated January 8, 1966 Reg. No. 42 / K / Kr / 1965 which determines an action in general can be lost against the law not only based on a provision in the law, but also based on the principle of justice or the principle of legal principles that are not written and general.

The case of Sabar Soediman is the application of teachings against material law negatively. Where a criminal act suspected of corruption will lose its unlawful nature if it turns out that the defendant's actions according to propriety are reprehensible. In this application the defendant can escape from lawsuits even if formil found guilty of utilizing the authority or power that exists to him to manage the company's finances not according to the applicable rules. In the period of enactment of Law No. 31 of 1999 the application of teaching against material law has been directed to the positive application of teaching against material law.

3. The element of abusing authority in the crime of corruption as the Absolute competence of the State Administrative Court

In theory, when there is legal antinomy due to conflict of norm, it can be solved by the principle of legal preference, which consists of 3 (three) principles, namely: lex superior derogat legi inferiori; lex specialis derogat legi generalis; and lex posteriori derogate legi priori. The legal principle lex superior derogat legi inferiori, can be applied when there is a conflict between legislation that is hierarchically lower level with legislation above it. According to this principle, the laws and regulations with a lower level, their implementation is ruled out by higher-level laws and regulations, unless the substance regulated by higher laws and regulations by law is established as the authority of lower-level laws and regulations.

Furthermore, the legal principle lex specialis derogat legi generalis, this principle can be applied when there is a conflict between special laws and regulations of a general nature. Based on this principle, the general rule of law can be ruled out by a special rule of law when fulfilling several principles, namely: a) the rules of law must be within the same legal environment (regime), for example the Law on Eradication of Tipikor with the Criminal Code which both include the criminal law; b) the rules of the law must be equal (law with law); and c) other provisions contained in the general law shall remain in force, except those provided for in that particular rule of law. Finally, the legal principle "lex posteriori derogat legi priori", which can be implemented when there is a conflict between the law made earlier and the law formed later.

The implementation of this principle shall be based on the fulfillment of some of the following principles: a) the new rule of law must be equal to or higher than the old rule of law; and b) aspects set out in the new law and the old law are the same. When looking at the explanation of each of these principles, then the principle of legal preference that can be applied to the conflict of norm in the provisions of the Law of the Court of Tipikor jo. The Law on Eradication of Tipikor with provisions in the Government Administration Law is the legal principle "lex posteriori derogat legi priori", because conflict occurs between the norms contained in the existing law, with the provisions contained in the newly formed law. In addition, the three laws are positioned in the hierarchy of equal legislation, namely at the level of the law and the substance of the norms that are disputed aspects are the same, namely regarding handling the problem of abuse of authority / abuse of authority.

When traced the ratio of the legis of the formation of the three laws and regulations, there is a very close relationship between the three, which are both formed in the framework of efforts to eradicate Tipikor. The Law of the Court of Tipikor jo. The Law on eradication of Tipikor which is in the criminal law is intended to eradicate Tipikor through means of enforcement (repressive measures), while the Government Administration Law, although it is in the family of State Administrative Law is intended as a means of eradication of Tipikor through preventive measures (preventive) with a bureaucratic reform approach. The common thread can be seen also in the substance of the regulation of state implementation by Law No. 28 of 1999 on State Organizers Who Are Clean and Free From Corruption, Collusion and Nepotism, in which it regulates the relationship between HAN and criminal law (corruption). Based on the legal principle of "lex posteriori derogate legi priori", the authority to examine and break the abuse of authority in tipikor is the absolute competence of administrative justice, because the absolute competence of administrative justice is given by the Administrative Law of the Government which was formed later (post) after the birth of the Law on Eradication of Tipikor and the Existing Judicial Law of Tipikor (prior).

In addition, when referring to the political direction of government law in efforts to combat corruption, there is a shift in government legal politics in efforts to eradicate Tipikor carried out by state organizers. Currently, the government tends to balance between prevention efforts (preventif) and enforcement efforts (repressive). Romli Atmasasmita, stated that there is a change in the political direction of law related to law enforcement in the fight against corruption in Indonesia, where corruption prevention efforts are found to be as important as corruption enforcement. Therefore, the approach that has been used in the Eradication of Typhoid Law, which makes repressive measures as "primum remedium" must be reviewed. The criminal law shall be returned to its khittah as the ultimate weapon or as a last resort which shall be used in law enforcement efforts in accordance with the principle of "ultimum remedium". Moreover, in the context of Administrative Law, the existence of criminal sanctions according to Barda Nawawi Arief, is essentially an embodiment of the policy of using criminal law as a means to enforce / implement administrative law or in other words a form of "functionalization / operationalization / instrumental of criminal law in the field of administrative law", so that it is at the last stage.[1] It is as stated by W.F. Prins quoted by Philipus M. Hadjon, that almost every regulation under administrative law ends with a criminal provision as "in cauda venenum".

E. Conclusion

1. The concept of abuse of authority in administrative law is that the abuse of authority to commit acts contrary to the public interest or to benefit the interests of individuals, groups or groups; Abuse of authority in the sense that the actions of such officials are properly intended in the public interest, but deviate from the purpose of such authority provided by other laws or regulations; Abuse of authority in the sense of abusing procedures that should be used to achieve certain goals, but have used other procedures to be implemented.
2. The arrangement of abuse of authority or abuse of authority in the Criminal Code as well as in Law No. 20 of 2001 on Combating Criminal Acts of Corruption is not found to express its understanding expressis verbis, this confirms that the abuse of "abuse of authority" in the criminal law of corruption does not have an explicit understanding of its nature. In the criteria of the perspective of criminal law that limits the free movement of the authority of the state apparatus in the form of elements of wederrechtelijkheid and "abuse of authority". The problem of the criminal law area is not as difficult if distinguished as a point of tangent (grey area) between state administrative law and criminal law, especially criminal acts of corruption. The existence of Article 21 of Law No. 30 of 2014 on Government Administration, testing against the presence or absence of elements of abuse of authority becomes authority and tested first in the State Administrative Court (PTUN) gives rise to various interpretations. On the one hand, the granting of authority to test the presence or absence of elements of abuse of authority arises because Law No. 30 of 2014 on Government Administration gives authority to PTUN to assess the presence or absence of an element of abuse of authority. On the other hand, the Corruption Criminal Court based on the authority granted by Law No. 46 of 2009 tested whether or not there is an element of abusing authority as one of the elements in Article 3 of Law No. 20 of 2001 on Combating Corruption Crimes is the authority of the Corruption Criminal Court.
3. Abuse of authority is one of the elements contained in Article 3 of Law No. 31 of 1999 on Eradication of Criminal Acts of Corruption jo. Law No. 20 of 2001 on Amendments to Law No. 31 of 1999 on Eradication of Criminal Acts of Corruption (Law No. 20 of 2001 on Eradication of Criminal Acts of Corruption). Elements in the crime of corruption listed among others in Article 3 of Law No. 20 of 2001 on Combating The Crime of Corruption, are distorted, since the presence of Article 21 paragraph (1) of Law No. 30 of 2014 on Government Administration which basically states the court is authorized to accept, examine, and decide there is or is no element of abuse of authority committed by government officials. The formulation of Article 21 paragraph (1) and paragraph (2) of Law No. 30 of 2014 on Government Administration when connected with Article 3 of Law No. 20 of 2001 on Combating Corruption Related to one of the elements, namely "abuse of authority" has meaning: (1). If there is abuse of authority

[1]Barda Nawawi Arief, *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*, PT. Citra Aditya, Bandung, 2005, h. 139.

by government officials, it must first be tested about its truth in a hearing in the State Administrative Court. Whereas before there was Article 21 paragraph (1) and paragraph (2) of Law No. 30 of 2014 on Government Administration, then the implementation of Article 3 of Law No. 20 of 2001 on Combating Criminal Acts of Corruption was carried out directly. But since the enacting of Law Number. 30, 2014 on Government Administration, there has been an addition of "bureaucratic pathways" in the fight against corruption. This is one of the "step backwards" or "twisting steps" in the enforcement of the law against corruption; And (2). If the results of the State Administrative Decree prove there is an abuse of authority by government officials, it can be continued with the crime of corruption. But conversely, if according to the State Administrative Decree, government officials are not proven to abuse authority, then criminal justice can continue. This means that there is no reliance on any outcome decided by the state administrative court. Referring to the meaning of Article 21 paragraph (1) and paragraph (2) of Law No. 30 of 2014 on Government Administration is connected with Article 3 of Law No. 20 of 2001 on Combating Criminal Acts of Corruption as it has been unraveled above, showing the interpretation of Article 3 of Law No. 20 of 2001 on Eradication of Criminal Acts of Corruption related to Article 21 paragraph (1) and paragraph (2) of Law No. 30 of 2014 on Government Administration There is a problem regarding the settlement of abuse of authority by the government apparatus in terms of administrative law associated with criminal acts of corruption, so that in the future, the application of criminal sanctions as a last resort (ultimum remedium) for abuse of authority in state administrative law in order to achieve legal certainty.

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