POSSIBLE ABUSE OF AUTHORITY BY STATE ADMINISTRATIVE OFFICERS IN THE DEVELOPMENT AND IMPLEMENTATION OF PUBLIC POLICIES

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Received 10 Sep 2021 • Revised 21 Oct 2021 • Accepted 20 Nov 2021

Abstract

power motivated by evil intentions is to have the inherent perfection of power, because power can do what it wants, act on behalf of and for its power on the basis of law. explained that constitutional law in maintaining the rule of law requires its implementation, otherwise power itself is determined by legal boundaries. Therefore, law and authority are not absolute in a society that regulates law in the sense that society is governed by law and no action or power is abused.

Keywords: Abuse of authority, Public Policy, HAN

INTRODUCTION

Indonesia as a country based on Pancasila and the 1945 Constitution of the Republic of Indonesia, all aspects of social, national and state life, including government, must always be based on law.

Realizing the principle of legality in the field of public administration law, which according to HD Stout means "the government is subject to the law" or "the principle of legitimacy stipulates that all regulations that bind citizens must be based on a legal basis". Implementing the rule of law helps ensure legal certainty and equal treatment .

In this context, the government has the power to make laws and regulations, as well as laws and regulations that physically bind the community; Determine the specific load, concrete and final load; Take real and active administrative action; and perform administrative functions related to administrative complaints.

In addition, the government has discretionary authority, namely the power to regulate for its own initiative, especially on important issues without rules and the power to interpret different statements.

This power is given with the knowledge that legislators are not able to investigate or examine in detail every issue that arises, so the government needs to develop initiatives and ways of thinking to be able to address these problems. The extent to which the local government's actions or actions do not constitute an abuse of power means that these actions must be wet, legal, and elastic.

In constitutional practice, it is not uncommon for administrative procedures or actions to be carried out by government officials in order to protect the public or deal with urgent emergencies. corruption, which leads to criminal and administrative sanctions in the form of the release or appeal of civil servants.

Discussing state politics (state insults), abuse of office (detournement de pouvoir), which is a constitutional discussion which is then used in criminal law, z) b Law no. 3 of 1971 in conjunction with Article 3 of Law no. 31 of 1999), the element of "haram" (Article 1 paragraph 1 letter a of Law No. 3 of 1971 in conjunction with Article 2 paragraph 1) of Law no. .31 of 1999), the element "may harm the state's finances or harm the state's economy" Article 2 paragraph 1 of Law Number 31 of 1999 jo. Not the US. 20 of 2001.

By observing the characteristics and practices of criminal acts of corruption, it can be explained that the tendency of a public official to be exposed to corruption cases can arise because of corruption, one of the characteristics is fraud that obscures reality, fraud and the dimensions of crime that always consume energy and space.

RESEARCH METHOD

This research is a legal theory research and reform-oriented research. Doctrinal legal research is used to explain in detail the confusing parts of several legal norms (Hutchinson, 2008: 1068), in this study the emphasis is on the idea, meaning, meaning of abuse of power in Article 3 of the PTPK. Law. , and its relation to the notion of abuse of power in law. administrative.

Doctrinal legal research is carried out through analysis of basic legal documents, including Law 5 of 1986 on State Administrative Courts which has been revised twice, most recently Law 51 of 2009 the second modification of Law no. 5 of 1986 concerning to the State. State Administrative Court (UU PTUN), PTPK Law, State Administration Law no. 30 of 2014 (UU AP) and decision no. 977 K/Pid/2004, as well as secondary legal documents in the form of manuals, articles and search results related to the research topic.

This study uses a conceptual, legal and case study approach. A conceptual approach is used to analyze modern interpretations, abuse of power and decision making for public policy makers.

RESEARCH RESULTS AND DISCUSSION

1. Abusing Authority

Abuse of power or as defined by French administrative law as embezzlement of power is a type of unlawful act that leads to the annulment of the decision of a government agency or official (Auby, 1970). : 549). Abuse of power occurs when a government agency or official uses its power for purposes that deviate or differ from the purpose of granting that power (Efendi & Poernomo, 2017: 127).

1. Abuse of power is a wrong action by a government agency or official, including the use of its authority to achieve goals other than those for which power is supposed to be given (Parchomiuk, 2018: 456). According to Schwartz (2006: 216), an action taken by a government agency or official is considered an abuse of power if: compliance with applicable laws and regulations. regulates his actions, but uses his powers for purposes other than those

given.

2. Abuse of power occurs when an organization or government official uses its power for prohibited purposes, i.e. for purposes other than those prescribed by the legislature.
3. Government agencies or officials who do not act in the public interest but for personal or private gain. The abuse of power by government agencies or officials is a fundamental deviation from administrative law, especially professional or special principles. According to this principle, government agencies should use their authority to make decisions for purposes other than those for which they are authorized (Seerden and Stroink, 2002: 168).

The abuse of power involves 3 (three) main factors, namely: (1) intentional (intentional); (2) transfer the object of authority; and (3) have negative personal interests (Hadjon, 2015: 60). Thus, the abuse of power occurs intentionally not due to negligence, namely deliberately deflecting the object of rights so that it deviates from the object that has been granted the right. The act of transferring the object of power based on negative personal gain, for example for personal gain or for another person.

Abuse of power becomes the basis for overturning decisions of government agencies or court officials. Revocation occurs when, in fact, a government agency or official intentionally uses its power for purposes other than those granted (Auby, 1970: 549). Annulment may include restitution if the annulted decision causes harm to the person affected by the decision.

2. Legitimacy of the Authority of State Administration Officials

Historically, the rule of law emerged from 19th century thought, along with the classical rule of law or a free state (de Liberia rechtsstaatidee) and controlled by the rule of law. positivist legal thought, especially the influence of the legal movement, which treats law as written in law. Thus, the law becomes a government mechanism of government, the principle of law becomes the central element or basis of the rule of law. The principle of legitimacy is closely related to the ideas of democracy and the rule of law. The idea of democracy requires that all forms of law and various decisions are made by the representatives of the people and respect the interests of the people as much as possible. The principle of legitimacy underlies the legitimacy of government actions to ensure the protection of human rights, even Sjachran Basah argues that the principle of legitimacy is an effort to achieve injustice. and an understanding of state sovereignty based on the monolingual principle is a pillar of the nation's constitutive nature, and the application of the rule of law helps create security and processing legitimacy.

All state and government institutions must have legitimacy, that is, have legal authority. Thus, power is not inherently free in the broad sense or limited to the rule of law. Therefore, the essence of the principle of law is authority, namely the ability to carry out certain legal actions. Authority occupies an important place in the study of constitutional law and constitutional law, therefore F.A.M. Stroink and J.G. Steenbeek calls it a central concept in constitutional and administrative law. With the main pillar of the rule of law being the rule of law, based on this principle, government power is regulated by laws and regulations, namely the source of government power is law. Theoretically, the authority that comes from laws and regulations is obtained in three ways, namely allocation, authorization, and authorization. Attribution is the act of legislators who gives government power to government agencies, delegation is the granting of government authority from one government agency to another, while tenure occurs when the government agency is in charge.

The law must be a source of authority for all government actions, and the basis for the government to take public legal action is the existence of authority (bevoegdheids). Through the authority that comes from the laws and regulations, the government takes legal action, and the granting of such authority must be clearly stated in the laws and regulations. In public administration law, what is associated with the authority or holder of the rights and obligations of public law is the position, which is different from private law is the ability to act (bekwaamheid) of the legal subject.

The definition of this position is fictitious in the law, because the position is carried out by a public official, namely the person who occupies the position so that he carries out the truth. The post office is a legal subject, namely a person whose rights and obligations cannot be separated from the person who officially holds the postal item. Post has the right to guarantee the continuity of rights and obligations. Liability under applicable public legal acts. Thus, procedural actions in state administrative disputes are directed to those who are responsible for making decisions.

Regarding the definition of function, it is necessary to first explain that the subject of dispute law from the perspective of state administrative law is an individual or a legal entity that has state administrative bodies and civil servants. Civil servants are called state apparatus on behalf of and on behalf of positions, because positions are institutions that have a long scope of activities and are entrusted with tasks and authorities. Because the position is a work of fiction or abstraction that is appointed by law into a legal reality, a personality created by law.

An official act carried out by an agency, namely a human being (natuurlijke person) on the one hand is subject to its own laws, on the other hand, and the name of the position is an official agent regulated in the legislation. public law. So, if the director general (Dirjen) at the time of signing the decision is an official with two functions, namely as a human being (natuurlijke person) and as a general manager who embodies the state apparatus.

A person as a public official is when he exercises his power for and on behalf of the position. In the event that the Director General as a civil servant determines technical policies in accordance with his authority based on the applicable laws and regulations, then the person concerned must implement the policies of the state apparatus (overheidbeleids) which are the administrative responsibility of the rule of law. If a dispute arises in the territory of the State Administrative Law with reference to Law Number 5 of 1986 concerning the State Administrative Court as amended by Law Number 9 of 2004, then all aspects of jurisdiction, dispute resolution, trial process, evidence and adjudication In principle, it is regulated by laws and regulations.

WF Prins (2008) states that most of the work outside the government is aimed at meeting real needs which for some people outside the scope of the law are known as physical actions (feitelijke handeling). Kuntjoro Purbopranoto called for feitelijke to manipulate government actions based on facts, but any government action to gain legitimacy must be based on the authority granted by invitation. This means that administrative officials in running the government and exercising their power are bound by laws that guarantee the basic rights of the people or the power of political leaders.

In other words, every state and government organization has legitimacy, namely the authority given by law to carry out certain legal actions. To assess the authority of public officials to make policies, it is necessary to look at the source of the authority or authority. What if the decision is issued by an unauthorized office (onvoegdheid)? In the event that it is made by an official who does not meet the requirements, the decision regarding authority (bevoegdheidsgebreken) is a wrong decision, including:

a. Onbevoegdheid ratione materiae, when a decision has no legal basis or is made by an unqualified official.
b. Onbevoegdheid ratione loci, a decision made by an office that is geographically located outside its territory.
c. Onbevoegdheid ratione temporis, when an official is no longer or is no longer authorized to make decisions.

The government or state administration is a legal subject as the bearer of rights and obligations. The government as a legal entity, like other legal entities, takes various actions, both concrete actions (feitlijkhandelingan) and legal actions (Rechtshandelingan). The actual action is an act that does not have a legal reference so that it has no legal consequences, while legal actions according to R.J.M. Huisman, a lawsuit by its nature can cause certain legal consequences or Rechtshandeling es gericht op het scheppen van rights of plichten (a lawsuit is an act that aims to establish rights and obligations).

Muchsan is of the opinion that the government's judicial action has the following elements:

a) The action is carried out by government officials in their position as rulers and as a government team (organizationally) with their own prologue and responsibilities.
b) The act occurred in the context of carrying out state duties.
c) The purpose of law is to produce legal consequences in the field of administrative law.
d) These actions occur in order to protect the interests of the state and the people.

It is necessary to add the elements put forward by Muchsan, particularly regarding the law that stipulates the principle of legality or Wetmatigheid van bestuur, namely that administrative actions must be based on the prevailing laws and regulations. Therefore, the government can only take legal action if it is legal or based on a law that embodies the aspirations of its citizens. In a democratic rule of law, state actions must be legitimized by the people, who are formally anchored in the law.

State administration actions to enforce the law require a power of attorney to carry it out; instead, power itself is determined by law. Mochtar Kusumaatmadja popularly formulated the motto: "Law without imagination, power without law is despotism." Therefore, law and power are absolute elements in a legal society in the sense of a society governed by law and based on law, so that no act or authority is abused.

The meaning of law as a limitation of authority so that there is no absolute abuse of authority, as said by Lord Acton, a British historian, "Power tends to corrupt, but absolute power corrupts absolute", but it must be misused. abused). On the other hand, abuse of authority is often motivated by evil intentions, which when associated with power becomes perfect, or in other words crime becomes perfect when associated with power, 35 because an official in power under the pretext that

he can act for and on behalf of his power based on regulations. legislation. Such officials can be called unbelievers because they earn income from crime.

Abuse of power in the economic sector, of course affects the upper class economy (for example, conglomerates) and high classes (such as high officials) who approve and implement several economic interests which then develop, systemic and structural) state money, which must be taken into account for the benefit of people. to achieve justice and prosperity for the people, in the field of public money corruption embedded by people in positions / power to enrich themselves or enter the participation of Prosperity and justice people can not apply.

Based on this description, the goodness or badness of a power depends on how it is used, namely that power must always be measured for its usefulness to achieve a goal that has been determined or carried out by the community. It is an absolute element for the orderly life of society and even for any organized form of organization. The element that has power is an important factor in the use of its power in accordance with the will of the community. Therefore, in addition to the need for law as a restrictive instrument, the holder of this power also requires other conditions, such as honest character and a sense of devotion to the interests of the community.

One of his actions is stated in a decision that is addressed to a certain person and is of a certain norm44 according to the laws and regulations. Legislation is the basis for making and making decisions, and without laws and regulations it is impossible to make decisions because one of the elements and even the conditions for the decision are based on laws and regulations. Therefore, in the series of norms of public law, the decisions are called the final norm or the spearhead of the series of norms.

Decisions regarding material needs must be made by an authorized government agency, it must not be a crime or legal crime that must not conflict with the basic regulations, while the formal requirement is to be signed (after submitted) in accordance with the procedures set out in the basic regulations, the form has been determined, the determination expiration date, notice . (recognition) or notification to those affected by the decision) in an authorized Representative.

If the material and formal conditions have been met, then the decision is legally valid and has material and formal legal force (material en formeel Rechtsskracht), that is, it cannot be simply revoked by interested parties, third parties, judges, regulatory bodies. body. consequence of the basic principle underlying the decision, namely the principle of a valid presumption that every decision made by the government can only be annulled after the court overturns it.

The principle of presumption of law is used to fulfill another principle that is closely related to the decision, namely the principle of legal certainty, which requires that a decision taken cannot be simply canceled without a valid or valid reason. This decision that has been taken and is always valid does not mean that the decision in question cannot be reversed. The decision can be canceled if it turns out that there is an error or contains other defects and it is clearly known.

Decisions made by government officials are not ordinary facts, but legal facts in which actions, circumstances, and events are carried out which consequently are regulated by law. Furthermore, Sudikno conveyed the understanding that legal events are essentially events, conditions or actions of people that are legally related to legal consequences.

Therefore, the actions/power of government officials, whether they comply or disobey (abuse), therefore remain within the scope of the rules.

3. Legal protection of state administrators as decision makers and implementers

Hikmahanto Juwana argued that in the field of law, when it comes to politics, decisions and their perpetrators are included in the jurisdiction of state administration, which of course needs to be distinguished from criminal law, setting penalties for mistakes. If policies and decisions are considered wrong and the perpetrators can be punished, it means that the policy maker's mistake and the decision is a crime (criminal act), this is certainly not true. Therefore, the directive should not be penalized, but if other aspects of the directive are omitted, there will be deviations, these deviations can be processed, without guidelines, without regulations.

Errors in policy making or decision making in principle cannot be punished, because in state administrative law there are no criminal sanctions. Penalties known in state administrative law include verbal and written warnings, demotion, demotion, and dismissal from office to disgrace. Contrary to the general principle that wrong policies and decisions cannot be punished by criminal law, there are at least 3 (three) exceptions, namely

a. Policies and decisions made by officials who are motivated to commit crimes are punished. There are four categories of international crimes, namely crimes against humanity, genocide, war crimes, and wars of aggression.
b. Even though it is an anomaly, errors in policy formulation and decisions are strictly regulated in

laws and regulations. An example in Indonesia is the provisions of Article 165 of the Minerba Law. These provisions allow officials who issue them in the mining sector to be subject to criminal sanctions.

c. Corrupt policies and decisions, or policymakers making policies and decisions, are criminally motivated. What is considered evil here is not politics, but the misunderstanding of policy makers and decisions made in policy making. Examples include officials making guidelines and decisions to bribe other public officials, or guidelines made by officials with the pretext of enriching themselves or others.

In this last example, if the act of issuing a policy contains a hidden element of committing a crime, then envoys of regional heads can result in illegal activities and abuse of power. Facts like this can only be revealed and explained by causality theory that there is a series of crimes between the politics of a regional leader and the crimes committed. Therefore, it must be disclosed that a certain result becomes its inventory (the central part of the facts for the constitutive elements that are expressly stated in the law).

Furthermore, the principle of “no punishment without falser” has been known in criminal law since 1930 and occupies a central place,60 and in line with that, Sauer argues that there are three basic meanings in criminal law. namely, the nature of haram (evil), guilt (guilt) and criminal (punishment).

The error contains elements of intent, negligence (fault) and can be calculated. According to Hazewinkel Suringa, committing a crime is a mistake and a violation of the law. Willingness or negligence can be recognized from the perpetrator's internal behavior (actus reus). The actus reus element is very difficult to prove if the issuance of a policy is intentional or negligent, so the theory of error and various types of intent can be used. According to Vos and Zevenbergen, the perpetrator "intentionally" does not need to "know" that his act is against the law. Knowing or not knowing that someone's actions are against the law is not a condition of "intentional", as knowing or not knowing that his negligence is an act against the law and not a condition of "negligence". At the empirical level, judges only need to prove sufficient facts or strong and valid evidence for a policy and the resulting consequences are misleading for the occurrence of a crime.

A policy that has been taken must not be outside the exercise of an official's power or exceed the limits of power established by law or regulation, in this case an abuse of power occurs. The definition of abuse of power in state administrative law according to Jean Rivero and Waline can be interpreted in 3 (three) things, namely:

a. Abuse of authority to carry out activities that are contrary to the public interest or for personal, group or group interests
b. abuse of power in the sense that the actions of public officials serve the public interest, but deviate from the purpose of granting that power by law or other regulations.
c. Abuse of authority, in the sense of misuse of procedures that must be used to achieve certain goals but other procedures have been used to achieve them.

The third form, called abuse of procedure (or abuse of authority in the sense of abusing a procedure intended to achieve a specific goal but using a different procedure), is often used by law enforcement agencies to identify forms of internal behavior. . criminalize the jurisdiction of state administrative law and civil law as corruptors. In conclusion, a government administration policy can become a criminal offense if the above mechanism is violated. Therefore, it is important to know that the starting point of acts of corruption (crimes that are always related to public order) are acts that appear legitimate but contain elements of irregularities in decision-making/politics.

According to Dwidja Priyatno, in the context of legal certainty and the nuances of justice and legal protection, especially in cases of political criminalization, policy makers and law enforcement officers must be clearly stated in the form of law. instruct. For government duties and functions, as well as applicable laws and regulations, the principle of security and common interest is the rule of law (solus Populari suprema lex).

In order to protect the status of government officials who cannot refuse to take decisions and principles that prioritize the safety and welfare of the people, there is always the possibility that the government will lose its decisions or government actions, but in reality it is done to avoid losses or risks that are much higher. Thus, the existence of a market that criminalizes candidates can harm state officials and threaten the health of the state at higher levels.

The criminalization of the actions of state officials is not only in the corridor of mere perception or interpretation, but is legally confirmed: state losses occur in state decisions or actions, but this is done to avoid losses or risks that are much higher. Thus, the existence of a criminalized applicant bazaar can endanger the foundations of state administration and threaten the health of the state at a higher level.

Criminalization of actions by state institutions is not only found in cognitive or interpretative corridors but also normatively affirmed in various laws, such as the Land Use Law, the Land Use Law, and the Land Use Law, roads and solid waste. legal, environmental and economic protection. Act. As a last resort, this follows from the function and role of criminal law with other laws, the character of the ultimatum of medicine must be maintained in relation to its corrective nature of primitive consequences in the sense of maintaining criminal order in society. as the last weapon after other fields of law are used properly, while maintaining the consequences that the law must also be applied in the case of the apocalypse (fiat justitia and pereat mundus).

Based on the description above, in the case of an error according to the principle of "no punishment, no crime", only the perpetrator or act is responsible for the crime and has the elements that make up the crime. law. Clearly framed as the core of crime (at best and evil) as well as elements of crime, the criminal justice system is responsible. However, if the responsibility concerns matters that fall within the authority or position of the official and the position of the official in his ability to exercise the rights of the official, then this cannot be separated from the activities of the Constitutional Court (HAN), according to the principle of responsibility. Professionalism is basically a principle. personal responsibility or personal responsibility. . Liability, as applied in criminal law.

For this reason, the Criminal Sanctions Regulations should only apply to purely criminal acts by the public administration (for example: ne malis expediat esse malo), for criminals who adhere to the principle of freedom of judgement. is the highest authority. State law. Common interests and interests are, first of all, the function and role of the State in carrying out its authority, as a State tool for the State to implement, perfect, perfect and develop constitutional law. economic, social and cultural fields. This is of course the wider role of public administration law in realizing a welfare state so that in the end it becomes a welfare state because the state is responsible for public service tasks.

The authority of the state apparatus, both actions taken based on statutory regulations (binding authority) or those that deviate from the laws and regulations (active authority), as well as in accordance with the general principles of good governance, in urgent matters. The urgency and/or emergency situation is within the jurisdiction of the state administration which is not a legal area and the definition of abuse of office and/or in a joint court or the purpose of the establishment of such authority. Therefore, the authority that comes from the joint court is a deviation, so here the sand puts its feet under the criminal law.

Criminal law is one of the formal means of social control, including norms interpreted and applied by the judiciary and, in general, promulgated by the legislative power. Its function is to set boundaries for citizens' behavior and direct the apparatus, as well as to determine the state of deviation or unacceptable behavior.

CONCLUSION

A policy cannot be subject to sanctions, but policy makers can be subject to sanctions if behind the policy there is a possibility of abuse of power or profit for themselves or others who have caused losses / the state economy, except that criminal responsibility cannot be carried out if he is sanctioned. late. if politics does not, there has been a setback. Therefore, legal protection against alleged criminalization of policies against decision makers and political implementers as the reason for the elimination of criminal acts must be strictly regulated in laws and regulations, namely the abolition that is against the law (justification) with maximum legality. the remedial nature is even compared to the primum remedium nature in the sense of applying criminal law to maintain order in society, after using other fields of law, the implementation of which refers to the general principles of good governance.

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