ANALYSIS OF THE LEGAL LIABILITY OF THE DISCRETIONARY AUTHORITY BY THE GOVERNMENT RELATING TO CORRUPTION CRIMES BASED ON LAW NUMBER 30 OF 2014 CONCERNING GOVERNMENT ADMINISTRATION

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Abstract: *This study aims to determine and analyze the formulation of the Discretion concept in Law Number 30 of 2014 concerning Government Administration and the application of discretionary legal responsibility by the government relating to criminal acts of corruption.*
The results of the study indicate that Discretion is an important essence of a democratic State, which philosophically discretion is a consequence of the authority that has been given to State administration officials in the form of freedom acting as an alternative to a textual impasse of an Act. The formulation of the discretion concept in Law Number 30 of 2014 concerning Government Administration is regulated in Article 22, which gives a discretionary limit in two respects, first the discretion must be issued by an authorized official, and both discretion must have clear objectives that contain things, as follows: launching the administration of government; fill in the legal vacuum; provide legal certainty; and to overcome the stagnation of government in certain circumstances for the benefit and public interest. Discretion is one part of the actions of the State administration regulated in Administrative Law. In accordance with its nature, State Administrative Law is a stand-alone branch of law so that it has its own accountability mechanism called administrative accountability sanctions. In Law Number 30 of 2014 concerning Government Administration, there are several forms of administrative accountability mechanisms given to an error committed by government officials in terms of good discretionary actions relating to State financial losses or not, which are contained in the provisions of Article 80 of the Act. Law Number 30 of 2014 concerning Government Administration, which consists of mild, moderate and severe administrative sanctions.

Keywords: *accountability, administration, discretion, corruption*

I. INTRODUCTION

The Declaration of Discretion the government was formally juridical accommodated for the first time; the law was a manifestation of the will of legislators to improve government administration. The promulgation of Law Number 30 Year 2014 concerning Government Administration on 17 October 2014 ago, was seen as a progressive step in carrying out government administrative reforms. This is partly because Law Number 30 of 2014

concerning Government Administration is considered to increasingly emphasize the responsibility of the state and government to ensure the implementation of a fast, convenient and inexpensive government-oriented public service government. For this reason, Law Number 30 Year 2014 concerning Government Administration is placed as one of the pillars of good bureaucratic reform and governance.[1]

Discretion *(freies ermessen)* can be carried out by public officials and in practice when it comes to government matters; it prioritizes the achievement of its goals *(doelmatigheid)* rather than the legal legality that applies *(rechtsmatigheid).*[2] Discretion in the context of government official policy cannot be separated from the general principles of good governance *(algemene beginselen van behoorlijk bestuur)*. One of the functions of this principle is to limit and avoid the possibility of government officials using or carrying out policies that are far from deviating from regulated provisions such as acts of abuse of authority.[3]

However, the ambiguity point will arise when State officials who use discretionary authority in terms of development are confronted with corruption cases whose settlement is regulated in Law Number 31 of 1999 Jo. Law Number 20 Year 2001 concerning Corruption Crime especially in relation to the use of the budget in the APBN / APBD. Issues which then arise when public officials use their discretion, in this case issue a policy to accelerate the achievement of the objectives in relation to the use of the budget so that they must change the budget allocation, when overlapping with the law there will be overlapping in determining which legal references have jurisdiction for handling the official's deviation. This concerns the issue of which legal sanctions will be applied[4] or what form of legal liability can be given to the relevant public officials.

From various legal perspectives, the issue of policy of public officials, especially in the field of criminal law, state administrative law, and civil law are in the gray area so that the parameters regarding policy boundaries vary. From the perspective of State administrative law which becomes the parameter of limiting the free movement of the authority of the state apparatus (discretionary power) is the abuse of authority *(detournement de puvoir)* and arbitrary *(abus de droit)*, in civil law it is considered an illegal act as *onrechtmatigedaad* and default. Whereas in criminal law it is referred to as being against the law *(wederechtelijkheid)* and abusing authority.[5]

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[1] M. Guntur Hamzah, Mahasiswa pada Program Studi Magister Ilmu Hukum Program Pascasarjana, Universitas Mataram "Paradigma Baru Penyelenggaraan Pemerintahan Berdasarkan Undang-Undang Administrasi Pemerintahan (Kaitannya Dengan Perkembangan Hukum Acara Peratun)", makalah yang disampaikan pada Seminar Sehari dalam rangka HUT Peradilan Tata Usaha Negara ke-26, diselenggarakan di Hotel Mercure-Jakarta, tanggal 26 Januari 2016, p. 1.

[2] Munir Fuady, *Teori Negara Hukum Modern (Rechtstaat),* Refika Aditama, Bandung, 2009, p. 147.

[3] Saifullah Anwar, Skripsi, "Kriminalisasi Kebijakan Terhadap Kepala Daerah Dalam Tindak Pidana *Administrative Corruption* (Studi Kasus Walikota Kota Parepare Provinsi Sulawesi Selatan)", Pada Fakultas Hukum Universitas Hasanuddin, Makassar, 2014, p. 2.

[4] *Ibid*, p. 02-03

[5] *Ibid*, p. 03

In addition, in some cases in the regions there are often law enforcers, especially prosecutors and the police when finding a case that fulfills the elements of corruption as contained in Article 2 or Article 3 of Law Number 31 of 1999 concerning TIPIKOR, using only the old paradigm regardless of the purpose of using the policy. It must be realized that in order to run the government both at the central and regional levels, everything can be predicted will occur within a budget period, for example disaster events, the way out is that Regional Heads must use discretion to carry out rehabilitation and emergency responses for the common interest, but this, when read from the perspective of the science of corruption, will clearly violate the rules and authority. So that government administrators are often rigid and have no innovation because of the hegemony of the norms of corruption, and which is a public concern today, the extent to which the power of discretionary norms in Law Number 30 of 2014 concerning Government Administration is able to guard policies that have important impacts in the area.

Based on the description contained in the background, the author proposes the following problems: 1). what is the formulation of the Discretion concept in Law Number 30 of 2014 concerning Government Administration? 2). How is the implementation of the discretionary legal responsibility by the government related to criminal acts of corruption?

II. RESEARCH METHOD

This research is normative legal research. Normative law is understood as the science of norms, a science that examines law as a rule or system of rules, with dogmatic law or systematic law. Normative legal research according to Mukti Fajar and Yulianto Achmad "is legal research that puts law as a building system of norms. The norm system in question is regarding principles, norms, rules of law and regulations, judicial decisions, agreements and doctrines (teachings).[6]

Given that this study is a normative legal research study (theory/concept, principles and per law), the main approach used is the normative approach. The type of normative approach used is the statute approach, the conceptual approach, historical approach and analytical approach. The theoretical framework used by researchers in this study, namely: the theory of authority and the theory of legal responsibility. The object of the research is some content about the discretionary authority regulated in Law Number 30 of 2014 concerning Government Administration with qualitative prescriptive analysis.

III. RESULT AND DISCUSSION

3.1 Formulation of the Discretion Concept in Law Number 30 of 2014 concerning Government Administration

According to Saut P. Panjaitan[7], discretion (pouvoir discretionnaire, France) or Freies Ermessen (Germany) is a form of deviation from the principle of legality in terms of wet *matigheidvan bestuur*, so it is "an exception" from the principle of legality. According to Prof.

[6] Mukti Fajar ND. and Yulianto Achmad, Dualisme Penelitian Hukum, Normatif dan Empiris, (Yogyakarta, Pustaka Pelajar, Cet. I, 2010), p. 34.

[7] The Institute of State Administration of the Republic of Indonesia, Discretion Study in the Implementation of Government Based on the Law on Government Administration, Jakarta: Center for the Study of State Administration and State Administrative Law of the State Administration Institute, 2016, p. 14

Benjamin, discretion is defined as the freedom of officials to make decisions according to their own considerations. Thus, according to him, every public official has discretionary authority. Next is Gayus T. Lumbun[8], define discretion as follows:

"Discretion is the policy of state officials from the center to the regions which essentially allows public officials to carry out a policy that violates the law, with three conditions. That is in the public interest, still within the boundaries of his authority, and does not violate the General Principles of Good Governance (AUPB). "

Regarding the definition above, then Gayus T. Lumbun explained that legally it is possible for people who use the discretionary principle to violate, but in principle it does not violate the public interest and it is an instant decision (without a plan) and it is not a violation of a crime. While the definition of discretion according to Sjachran Basah as quoted by Patuan Sinaga, is[9] "The purpose of state life that must be achieved involves the state administration in carrying out its very complex, wide-ranging public service tasks and entering all sectors of life. In the case of state administrations having the freedom to determine policies, however, the attitude of their actions must be accountable both morally and legally."

Based on the definition given by Syachran Basah, it is concluded that the elements that must be met by discretion are:

a. There are public service tasks carried out by the state administrator;
b. In carrying out this task, State administrators are given the freedom to determine policies;
c. These policies can be accounted for both morally and legally.

Discretionary philosophy is actually the essence of the rule of law. Discretion is a consequence of authority attribution given to government administration officials because in the reality of the administration of government functions there are limitations to laws which have implications for legal norms that are not clear, the vacuum of legal norms, or the gap between the rule of law norms and government practice needs. In this context, the principle of a modern law state generally tolerates legal discovery by government administration officials called discretion.[10]

Because it is realized that the principle of discretion does not only need to be wrapped in an understanding of philosophies alone, then through Law Number 30 of 2014 juridically-normative regulations are published so that the discretionary actions/decisions of the government receive legal certainty. In Article 22 of Law Number 30 of 2014, it explains that:

1) Discretion can only be done by authorized Government Officials.
2) Every use of Government Official Discretion aims to:
   a. Launch governance;
   b. Fill in the legal vacuum;
   c. Provide legal certainty; and
   d. Overcome the stagnation of government in certain circumstances for the benefit and public interest.

[8] *ibid*
[9] *ibid*, p. 15.
[10] M. Guntur Hamzah, *Op. Cit*, p. 3.

The authority referred to in Article 22 of Act Number 30 of 2014 concerning Government Administration is an authority that has the character of attribution. According to Philipus M. Hadjon in Buslianto gave a view of authority, namely:

1. Attribution, is the authority to make decisions (besluit) that are directly sourced from the Law in the material sense.
2. Delegation, defined as the surrender of authority to make besluit, by Government officials (State Administration Officers) to the other party.
3. Mandate, interpreted as delegation of authority to subordinates, delegation of authority intends to authorize subordinates to make decisions a / n Administrative Officials of the State who give mandates.[11]

From the formulation of Article 22 it can be seen that the discretion which is accommodated in this law has limitations, first formally issuing discretion is the Government Official in Article 1 number (3) explained that Government Officials are elements that carry out Government Functions, both within government and other state organizers. And secondly in terms of substance the use of discretion must have clear objectives.

Furthermore, in Article 23 explains that the scope of government discretion includes:

1) Decision making and / or Actions based on the provisions of legislation that provide a choice of Decision and / or Action;
2) Decision making and / or action because the laws and regulations do not regulate;
3) Decision making and / or action because the legislation is incomplete or unclear; and
4) Decision making and / or action due to government stagnation for wider interests.

The use of discretion must also be in accordance with the conditions contained in Article 24, as follows:

1) In accordance with the objectives of the Discretion as referred to in Article 22 paragraph (2);
2) Does not conflict with the provisions of the legislation;
3) In accordance with AUPB;
4) Based on objective reasons;
5) Does not cause Conflict of Interest; and
6) Done in good faith.

From several requirements for the use of discretion, it can be concluded that basically the use of discretion is not arbitrary, it must require accuracy by government officials. Especially in interpreting the terms set out in point b above, the author sees that this is what will always be a stumbling block of the use of discretion. The phrase "does not conflict with the provisions of legislation" has no further explanation in Law No. 30 of 2014, the condition is feared to cause multiple interpretations, especially discretionary actions relating to cases of corruption because even though discretionary actions have been carried out in accordance with the mandate of Law Number 30 Year 2014, but if it causes State losses, the act of

[11] Buslianto, Efektivitas Pembuatan Akta Peralihan Hak Milik Atas Tanah Melalui Jual Beli Oleh Camat Sebagai PPAT Sementara, Tesis Magister Kenotariatan Fakultas Hukum Universitas Mataram, 2018, p. 14.

discretion has contravened the corruption offense in Law Number 31 of 1999, then of course the deed is deemed contrary to the content in point (b) above.

In addition to the technical requirements contained in Article 24 above, the relation to discretion relating to the State budget allocation, in more detail, has the additional conditions mentioned in Article 25, as follows:

1) Discretionary use that has the potential to change budget allocations must obtain approval from the superior of the official in accordance with the provisions of the legislation.
2) Approval as referred to in paragraph (1) shall be carried out if the use of Discretion is based on the provisions of Article 23 letter a, letter b, and letter c and creates legal consequences that have the potential to burden state finances.
3) In the event that the use of Discretion raises public unrest, emergencies, urges and / or natural disasters occur, Government Officials must notify the Superiors of Officials prior to the use of Discretion and report to the Office of Officials after the use of Discretion.
4) Notification before the use of Discretion as referred to in paragraph (3) is carried out if the use of Discretion based on the provisions in Article 23 letter d has the potential to cause public unrest.
5) Reporting after the use of Discretion as referred to in paragraph (3) is carried out if the use of Discretion is based on the provisions in Article 23 letter d which occurs in an emergency, an urgent situation, and / or a natural disaster occurs.

The details of the procedures for using discretion relating to this State budget allocation are explained further in Articles 26, 27, 28 and 29, which are:

Article 26, reads:

1) Officials using Discretion as referred to in Article 25 paragraph (1) and paragraph (2) must describe the purpose, objectives, substance, and administrative and financial impacts.
2) The official who uses the Discretion as referred to in paragraph (1) must submit a written application for approval to the Chief Official.
3) Within 5 (five) working days after the application file is received, the superior of the official determines the agreement, instructions for improvement, or rejection.
4) If the superior of the official as referred to in paragraph (3) makes a refusal, the superior of the official must provide a reason for rejection in writing.

Article 27 reads:

1) Officials who use Discretion as referred to in Article 25 paragraph (3) and paragraph (4) must describe the purpose, objectives, substance and impact of the administration that have the potential to change the imposition of state finances.
2) Officials who use the Discretion as referred to in paragraph (1) must submit notifications orally or in writing to the Official Officers.
3) Notification as referred to in paragraph (2) shall be submitted no later than 5 (five) working days prior to the use of Discretion.

Article 28 reads:

1) Officials who use Discretion as referred to in Article 25 paragraph (3) and paragraph (5) must describe the purpose, objectives, substance, and impacts caused.
2) Officials who use Discretion as referred to in paragraph (1) must submit a report in writing to the Official Officer after the use of Discretion.
3) Reporting as referred to in paragraph (2) shall be submitted no later than 5 (five) working days after the use of Discretion.

Article 29 reads:

"Officials who use Discretion as referred to in Article 26, Article 27, and Article 28 are excluded from the provision of notifying the Citizens as referred to in Article 7 paragraph (2) letter (g)".

From some of these requirements, there are two important things that become writers' writers, which are related to the conditions that result in the retreat of government administration progression through this discretion, which was considered an important breakthrough in the administration of the State government. First, the conditions contained in Article 24 points (b), the use of the discretion "does not conflict with the provisions of the laws and regulations", and the two discretions related to budget allocations must obtain approval from the superior of the official.

The author tries to examine further the limitations in Article 24 point b, with reference to his opinion Foulkes,[12] in his book Introduction to Administrative Law, which states that:

"If the government has decided on certain actions - It can, like any other employer, direct the work employees. It can send troops to Suez and bring them back. It can create new organizations by purely administrative action. All of these can do without having to get the priority of the parliament whether by Act or otherwise.

(If the government has decided to take certain actions - the Government can, like other entrepreneurs, direct the work of employees. The government can send troops to Suez and return them. The government can create new institutions with guaranteed statutes or through mere administrative actions. The government can do all that without first having to get parliamentary permission whether through law or otherwise).

From the above opinion there are two important things that do not have to limit the use of discretion, that is, first, there is no permit and both do not have to adjust to the law. In simple terms this opinion is rather extreme but does not eliminate the spirit of the use of discretion, because if the use of discretion is still within the confines of the rule of law, then there is something missing from all the free principles contained in the meaning of this discretion.

Broadly speaking, governance is based on the principle of legality, which means that it is based on the law (written law), in practice it is not adequate especially in a society that has

[12] Foulkes dakam Ridwan H.R., *Hukum Administrasi Negara Edisi Revisi*, Jakarta: Raja Grafindo Persada, 2010. p. 93-94

a high dynamic level. This is because written law always contains weaknesses,[13] as stated by Bagir Manan, who explained that written law had various congenital and artificial disabilities. Further mentioned:[14]

"As a written rule or written rule, legislation has a limited range - just" hospitalization moment "of the most influential political, economic, social, cultural and defense elements at the time of formation, because it is easily out of date when compared to changes in society that are getting faster or faster (change).

Furthermore the concept of the use of discretionary power mandated in Article 25 of Law Number 30 of 2014 invites question marks. First, what if the official superior of a quo does not approve of the discretion plan that will be taken? Second, if a state loss arises from the agreement, who will bear the responsibility and accountability for the loss of the country?

If it is understood about several important things in the opinion of Foulkes above, that discretionary power should be freed from the conditions that make the process wordy, because it will cause uncertainty which can result in loss of spirit of discretionary authority. Article 25 of Law No. 30/2014 shows a setback in the concept of discretion. Because, literally and intrinsically, discretionary power is a related organizer's decision / action taken in a very fast time to answer the problem of meeting the needs and interests of the community (public good). By requesting prior approval from the supervisor, the rapid concept attached to discretionary power has faded. By law, there is no agreement from the boss that negates the discretion itself.[15]

To respond to the second issue above, it should be explained in Article 25 an explanation of what the pattern of authority is regulated along the phrase "getting the approval of the superior official", because this process will also relate to procedures and responsibilities when legal consequences arise from discretionary power that is. In more detail, the pattern of transfer of authority should be in the form of a delegate or mandate. When delegated its authority, responsibility and accountability are located in the delegation *(delegataris)*. If the mandate is chosen, then responsibility and accountability remain in the hands of the mandate *(mandans)*.

3.2 Forms of Discretionary Legal Responsibility by the Government Relating to Criminal Acts of Corruption

Although discretion is free power, using discretion is not without limits. J.B.J.M. ten Berge believes that free authority is limited by the contents of the provisions of the law which become the basis of the discretionary authority and general principles of good governance, and also must not deviate from the applicable policy regulations or civil agreements.[16] Whereas H.D. van Wijk / Willemkonijnenbelt argues that the thing that limits free authority is the general legal norm that comes from administrative law and unwritten legal norms (good

[13] Andi Dzul Ikhram Nur, "Tinjauan Hukum Administrasi Terhadap Penyalahgunaan Kewenangan Dalam Tindak Pidana Korupsi",*Skripsi pada Fakultas Hukum Universitas Hassanudin, Makassar*, 2015, p. 49.
[14] Ridwan, H.R, *Op. Cit*, p. 95-96.
15 Lembaga Administrasi Negara Republik Indonesia, *Op. Cit*, p. 68
[16] J.B.J.M ten Berge, et.al.,*Verklarend Woordenboek Openbaar Bestuur*, Alphen aan den Rijn : Samsom H.D. Tjeenk Willink, 1992, p. 168

principles of government that are not written).[17] According to J.H Gray, discretion by the following principles, namely good faith, uninfluenced by irrelevant considerations or motives, reasonably, and within the statutory bounds of the discretion.[18]

Because of the narrow boundary between governmental discretionary powers regulated in the State administrative law with acts of corruption regulated in criminal provisions, so that these conditions form a kind of gray norm in law enforcement. In addition, what is always a serious challenge is when law enforcers (Police, Prosecutors, and Judges) consider criminal law to be the main drug and only apply dogmatically every formulation of articles of corruption in the TIPIKOR Law without any deep interpretation of the case. And the legal norms related to the case. This step will eventually lead to any problems related to state financial losses by government officials considered an act of corruption.

Not infrequently then many problems after the remaining problems of law enforcement activities like this, there are many public officials who are dragged down by corruption cases and convicted even though they are not resolved concretely what is a mistake both starting from the investigation, investigation and trial stages. No wonder then there are several factual decisions relating to the policies of government officials that result in state losses, classified as follows:[19]

a. Violations of administrative regulatory norms are considered legal norms, not administrative norms;
b. Settlement of state losses directly becomes State losses according to Articles 2 and 3 of the Anti-Corruption Law, although there is no element against criminal law, so the settlement according to Article 59 of the State Treasury Law and Article 20 of Law Number 30 Year 2014 should be done first.

From the note above there are two major mistakes in law enforcement relating to public officials' policies relating to acts of corruption, firstly actions that violate administrative norms are considered to be contrary to legal norms (including criminal law), secondly every official action that results in State losses considered to be in accordance with the contents of Articles 2 and 3 of the Corruption Act. So that law enforcers always close themselves with other solutions beyond the elements of criminal law, for example in the form of criminal liability. And the three abuses of authority[20] often interpreted as "norms of administrative violations and legal norms" even though abuse of authority in the legal norms of the State administration has its own definition. According to HAN's theory, abuse of authority is "the use of positions that are available to him to accept / give bribes, threaten violence, and / or cheat to get illegal money."

The author's further study material in this sub-chapter is to examine further the nature of the state administrative law and its difference from the criminal law that regulates corruption in Law Number 31 of 1999, especially Articles 2 and 3. Both of these Articles

[17] H.D. van Wijk/Willemkonijnenbelt, *Hoofdstukken van Administratief Recht*, Utrecht : Uitgeverij Lemma BV, 1995, p. 172.
[18] J.H Grey, "Discretion in Administrative Law", http://digitalcommons.osgoode.yorku.ca/ohlj/vol17/iss1/3, downloaded on February 20, 2019.
19 Institute of State Administration of the Republic of Indonesia, *Op. Cit*, p. 78-79
[20] *Ibid.* p. 79

often become causes of overlapping with the provisions of administrative accountability in Law Number 30 of 2014 in the context of the reality of law enforcement.

Departing from the definition of State Administrative Law in the opinion of De La Bassecour Laan, there is an overview of the nature of State Administrative Law, as follows:[21]

"State Administrative Law is a set of certain rules which are the cause of the state functioning (in action), then the regulations govern the relations between each citizen and his government."

From the definition above, State Administration Law consists of two important entities, namely the first is a set of regulations (legal norms), the second is a regulation about the functions of the State, and third is regulating the relationship between citizens of the State and its government. From this description it can be concluded that State Administrative Law is a stand-alone scientific discipline in the field of law, meaning that it is not a sub-part of Criminal Law or Civil Law. So that State Administrative Law also has its own method in its legal liability mechanism.

This opinion is very much in line with the distinction between the form of personal error and the error in the position in Logemann's opinion [22], that:

"Based on Constitutional Law, the position is burdened with obligations, which are authorized to carry out legal actions. Because the authority is inherent in the position, but in its implementation carried out by humans as the representative or functionary of office, then who must assume legal responsibility when there is a deviation must be seen casuistically because that responsibility can be in the form of job responsibilities and responsibilities and personal accountability ".

Whereas in different sources, F. R. Bothlingk [23] completes the opinion of Logemann above, that:

The responsibility of the office is pleased with the validity of government legal actions carried out by officials for and on behalf of the position *(ambtshalve)*. Both the representative and the represented are actors, but that does not mean that both have responsibilities. Regarding legal actions, the answer is clear. Legal action is a statement of will and responsibility specifically directed to the party whose intention is stated, namely the party represented. The Deputy does not declare his own will; therefore putting responsibility on him is not in his place.

In relation to the authority of discretion of public officials, there must be a separation between the terms of personal error and errors in office. If the person who made a mistake then there is only one will for that error, namely the will of the perpetrator. But in the position of action there are two sources of will, first from the person (self-official) and by his authority (his position) because on the basis of that authority officials can act.

When referring to the opinion of the Logemann above, to determine how the accountability mechanism or who is responsible must be seen casuistically because there will

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[21] Jawade Hafidz Arsyad, *Korupsi dalam Perspektif HAN (Hukum AdministrasiNegara),* Jakarta: Sinar Grafika, 2013, p. 72.

[22] Anthon F. Susanto, *Wajah Peradilan Kita : Konstruksi Sosial tentang Penyimpangan, Mekanisme Kontrol, dan Akuntabilitas Peradilan Pidana*, Refika Aditama, Bandung, 2004, p. 74

[23] Bothlingk ,F.R., *Het Leerstuk der Vertegenwoordiging en Zijn Toepassing op Ambtsdragers in Nederland en in Indonesia*,Gravenhage : Juridische Boekhandel en Uitgeverrij A. Jongbloed & Zoon's, 1954, p. 137

be two forms of accountability in wrong positions, namely job responsibility or personal responsibility. The responsibility of the position referred to here is certainly a form of administrative accountability stipulated in Administrative Law, so this mechanism will be a remedium premium in relation to Discretion relating to corruption while the mechanism of criminal liability will be used as an alternative.

This form of separation is rarely carried out by law enforcers in Indonesia, so it is not surprising then that many cases of errors in government administration must be snared indiscriminately with corruption cases which lead to criminal liability, both fines and imprisonment.

This concept is automatically accommodated by the Supreme Court (MA) in several of its decisions when examining Corruption cases relating to office actions (state administrative actions) relating to criminal Corruption, examples in legal considerations in decision Number 572K/Pid/2003, MA states:[24]

> "That when an indictment has been linked to a matter of authority or position and position as charged to the 1st defendant, according to the Supreme Court, this is not separated from legal considerations or aspects of state administrative law, where basically applies the principle of job liability (position liability) which must be distinguished and separated from the principle of individual or individual or personal liability (personal liability) as applicable as a principle in criminal law."

In its verdict, the Supreme Court did not explain in more detail about what this position liability meant. However, the agreement of this Supreme Court's opinion can be found from Logemann and F.R. Both of the above, of course the responsibility of this position is included in the realm of State Administrative Law. Even more explicitly the Supreme Court condemned that there should be a separation in the study of judicial legal considerations if there were administrative errors related to alleged corruption because this would relate to the competence of the judicial institution.

Arifin P. Soeria Atmadja[25] said, "A policy may not be submitted to the Court especially due to criminal law because the legal basis of the policy that will be the legal basis for its prosecution is not available. This is because a policy generally does not go hand in hand or has not been regulated in legislation ". A citizen or civil legal entity cannot dispute it before a State administrative court because the policy regulation *(beleidsregel)* is not a decision (stipulation) of the state administration. Courts may not adjudicate policies *(doelmatigheid).*[26]

Amarullah Salim said that the actions of the ruling policy did not include the competence of the court to judge in accordance with the jurisprudence of law. Judges should not consider *"doelmatigheid"* from a government action, because the function and competence of the judiciary in a legal state is only limited to the *rechtmatigheid* aspect of government actions. In this regard, Belifante said, *"de rechter mag niet op de stoel van deadministratie gitten zitten, die een eigen verantwoordelijkheid draagt"* (judges may not sit

[24] Andi Dzul Ikhram Nur, *Op. Cit*, p. 80

[25] Arifin P. Soeria Atmadja, *Keuangan Publik dalam Perspektif Hukum; Teori, Kritik, dan Praktik*, Rajawali Pers, Jakarta, 2008, p. 198.

26 Ridwan H. R, *Op. Cit*, p. 387.

on administrative seats, which bear their own responsibility). The same thing was stated by Van der Burg; "The judge may not sit on the administrative seat".[27] This has long been a permanent expression in the literature on State Administration Law. Because not all actions or decisions of public officials relating to State finance will be solely considered an act of corruption and then must be punished criminal, but there are specific criteria that must be studied more deeply in relation to discretion or actions in government positions.

In the process of enforcing the law forever there is a precedent that is not right in relation to proving the element of "abuse of authority" in the administrative actions of public officials, which is often the basis of a government official suspected of committing acts of corruption if his policies pertain to State finance. But basically law enforcers need to provide opportunities to Administrative Law as a remedium premium in relation to if there are cases mentioned above, because Administrative Law also has its own legal mechanism in determining whether an official action has an element of "abuse of authority" or not.

In Article 20 of Law Number 30 of 2014 concerning Government Administration, states that:

1) Supervision of prohibition of abuse of authority as referred to in Article 17 and Article 18 is carried out by government internal control apparatus.
2) The results of supervision by the government internal control apparatus as referred to in paragraph (1) in the form of:
   a. No errors;
   b. There is an administrative error; or
   c. There are administrative errors that cause losses to the state's finances.
3) If the results of supervision by the government internal apparatus in the form of administrative errors as referred to in paragraph (2) letter b, follow-up shall be carried out in the form of administrative improvements in accordance with the provisions of the legislation.
4) If the result of supervision by the internal government apparatus is in the form of administrative errors that cause state financial losses as referred to in paragraph (2) letter c, the state financial losses shall be carried out no later than 10 (ten) working days from the decision and issuance of supervision results.
5) Returns of state losses as referred to in paragraph (4) shall be borne by the Government Agency, if the administrative error as referred to in paragraph (2) letter c occurs not because of an element of abuse of Authority.
6) Returns of state losses as referred to in paragraph (4) shall be borne by the Government Official, if the administrative error as referred to in paragraph (2) letter c occurs due to an element of abuse of Authority.

From the form of money refund sanctions as explained in Article 20 paragraph (4) above it can be seen that this law indeed forms a separation from a personal corruption crime with corruption in administrative actions, so that gray norms do not occur in legal proceedings and for protect public officials from accusations of corruption against a discretionary policy

[27] *Ibid*

that has not been proven to be a concrete mistake.[28] Furthermore in Article 21 explain in more detail that:

1) The court has the authority to accept, examine and decide whether or not there is an element of abuse of authority carried out by Government Officials.
2) Government Agencies and / or Officials can submit requests to the Court to assess whether there is or no element of abuse of Authority in Decisions and / or Actions.
3) Courts must decide on the application as referred to in paragraph (2) no later than 21 (twenty one) working days after the application is submitted.
4) The Court's decision as referred to in paragraph (3) may be appealed to the State Administrative Court.

The court institution referred to in Article 21 is an institution of the State Administrative Court (PTUN), because when a lawsuit occurs, what will be the object of the dispute are the Decision and / or Action of government officials.

Therefore, some of the descriptions above are very appropriate when in the content of Article 80 of Law Number 30 of 2014 concerning Government Administration, it has provided a description of the pattern of administrative responsibility from administrative errors of government officials, that:

1) Government Officials who violate the provisions referred to in Article 8 paragraph (2), Article 9 paragraph (3), Article 26, Article 27, Article 28, Article 36 paragraph (3), Article 39 paragraph (5), Article 42 paragraph (1), Article 43 paragraph (2), Article 44 paragraph (3), Article 44 paragraph (4), Article 44 paragraph (5), Article 47, Article 49 paragraph (1), Article 50 paragraph (3), Article 50 paragraph (4), Article 51 paragraph (1), Article 61 paragraph (1), Article 66 paragraph (6), Article 67 paragraph (2), Article 75 paragraph (4), Article 77 paragraph (3), Article 77 paragraph (7), Article 78 paragraph (3), and Article 78 paragraph (6) are subject to mild administrative sanctions.
2) Government Officials who violate the provisions referred to in Article 25 paragraph (1), Article 25 paragraph (3), Article 53 paragraph (2), Article 53 paragraph (6), Article 70 paragraph (3), and Article 72 paragraph (1) subject to moderate administrative sanctions.
3) Government Officials who violate the provisions referred to in Article 17 and Article 42 are subject to heavy administrative sanctions.
4) Government Officials who violate the provisions referred to in paragraph (1) or paragraph (2) which cause losses to state finances, national economy, and / or damage to the environment are subject to severe administrative sanctions.

On a number of points in bold by the author showing a special Article governing discretion. In the Article above there are two kinds of sanctions that will be imposed on errors in discretionary actions, the first being moderate administrative sanctions for Articles 26, 27, and 28. And both administrative sanctions are moderate for Article 25 paragraph (1) and (3), with additional provisions if it causes state financial losses, national economy, and / or damages the environment, the sanction status becomes severe administrative sanctions.

[28] Julista Mustamu, "Diskresi dan Tanggungjawab Administrasi Pemerintahan*", Jurnal Sasi Vol. 17 No. 2 Bulan April-Juni 2011*, p. 10

The form of severe administrative sanctions, explained in Article 81 paragraphs (3) that severe administrative sanctions in the form of:

a. Permanent termination by obtaining financial rights and other facilities;
b. Permanent termination without obtaining financial rights and other facilities;
c. Permanent termination by obtaining financial rights and other facilities as well as being published in the mass media; or
d. Permanent termination without obtaining financial rights and other facilities and published in the mass media.

Furthermore, Article 82 explains that:

1) The imposition of sanctions as referred to in Article 81 is carried out by:
   a. Supervisor of the Decision Officer;
   b. Regional head if the Decree is determined by regional officials;
   c. Minister / head of the institution if the Decree is determined by an official in his environment; and
   d. President if the Decree is determined by the ministers / leadership of the institution.
2) The imposition of sanctions as referred to in Article 81 is carried out by:
   a. Governor if the Decree is determined by the regent / mayor; and
   b. The minister who organizes domestic government affairs if the Decree is determined by the governor.

Basically, in Law Number 30 of 2014 concerning Government Administration, there are several forms of administrative accountability mechanisms given to errors committed by government officials in terms of discretionary actions, but in law enforcement mechanisms in a concrete case relating to acts of corruption during this, law enforcers often close themselves with legal factors that are outside the criminal provisions in Law Number 30 of 1999 Jo. Law Number 20 Year 2001 concerning Eradication of Corruption Crimes. Conditions result in many government agencies, especially government administrators in the regions, losing their creativity and innovation in development and using their right to freedom because they are hegemony by the constraints of the use of state financial allocations which result in corruption which will be subject to criminal penalties in accordance with the provisions of corruption laws.

IV. CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

Discretion is an important essence of a democratic state, which philosophically discretion is a consequence of the authority that has been given to State administrative officials in the form of freedom acting as an alternative to a textual impasse of a law. The formulation of the discretion concept in Law Number 30 of 2014 concerning Government Administration is regulated in Article 22, which gives a discretionary limit in two respects, first the discretion must be issued by an authorized official, and both discretion must have clear objectives that contain things, as follows: launching the administration of government; fill in the legal vacuum; provide legal certainty; and to overcome the stagnation of government in certain circumstances for the benefit and public interest.

Discretion is one part of the actions of the State administration regulated in Administrative Law. In accordance with its nature, State Administration Law is a stand-alone branch of law so that it has its own accountability mechanism called administrative responsibility sanctions. In Law Number 30 of 2014 concerning Government Administration, there are several forms of administrative accountability mechanisms given to an error committed by government officials in terms of good discretionary actions relating to State financial losses or not, which are contained in the provisions of Article 80 of the Act. Law Number 30 Year 2014 concerning Government Administration, which consists of minor, moderate and severe administrative sanctions.

4.2 Recommendations

The author recommends that all law enforcers, especially the Police, Prosecutors and Judges be more open in examining each case related to the alleged corruption in administrative actions (discretion) of public officials. Not dogmatically and blindly applying Articles in mere criminal provisions.

The author advises law enforcers to reverse the mind set in law enforcement by placing administrative law provisions as remedium premiums in certain cases because these provisions have been stated in Law No. 30 of 2014 concerning Government Administration to avoid stagnation in the administration of demand.

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