Research Article

Discretion of Government Officials Detrimental to State Finances: The Intersection Between Administrative Illegality and Criminal Illegality

Wahbi Rahman[1*], Sudarsono[2], Prija Djatmika[3], Abdul Madjid[4], Rehulina[5]
[1,2,3,4]Faculty of Law, Universitas Brawijaya, Indonesia
[5]Géza Marton Doctoral School of Legal Studies, University of Debrecen, Hungary
[*]wahbirahman7@gmail.com

ABSTRACT

The regulation of the criminal accountability system for discretion that causes state losses is governed by Law Number 31 of 1999, as amended by Law Number 20 of 2001 on the Eradication of Corruption. This law includes the element of "abusing authority, opportunity, or means available due to one's position or rank that may cause state financial losses," which can lead to criminal punishment. Additionally, Law Number 30 of 2014 on Government Administration also regulates the imposition of administrative sanctions. The purpose of this research is to analyze the priority mechanism when there is an overlap between administrative and criminal illegality in cases of discretion by government officials that result in state financial losses. This research employs a normative legal method. The findings suggest that, according to current legislation, when a case involves overlapping issues between the Corruption Law and the Government Administration Law, priority should be given to administrative measures based on the Government Administration Law. This approach is aimed at improving orderly government administration and preventing abuse of authority.

Keywords: Discretion; State Financial Losses; Criminal Acts

A. INTRODUCTION

The legal policy underlying the enactment of Law Number 31 of 1999 on the Eradication of Corruption, as amended and supplemented by Law Number 20 of 2001 (hereinafter referred to as the Anti-Corruption Law) (Wahyu MJ, 2023), is fundamentally intended to address the legal needs and challenges of preventing and eradicating corruption. The primary objective of the anti-corruption policy is to restore state finances or the national economy and to punish the perpetrators. This includes addressing acts related to the exercise of authority that result in financial losses to the state (Wangga, Pujiyono, & Arief, 2019), as stipulated in Article 3 of the Anti-Corruption Law, which provides:

> "Any person who, with the intention of benefiting themselves or another person or a corporation, abuses the authority, opportunity, or means available to them due to their position or rank, which can cause financial losses to the state or the national economy, shall be punished with life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years, and/or a fine of at least Rp. 50,000,000.00 (fifty million rupiah) and at most Rp. 1,000,000,000.00 (one billion rupiah)."

Nevertheless, it is essential to emphasize that the fundamental concept for preventing state financial losses (Ningrum & Darmadi, 2021), particularly in acts related to the exercise of

authority, has been regulated through various instruments. These include not only criminal law but also non-penal mechanisms (Budiyono et al., 2022), such as administrative and civil law instruments. Given the structure of the norms in the Anti-Corruption Law, recovering state finances resulting from corruption can indeed be achieved through two approaches: a civil approach (conducted by prosecutors as state attorneys) and a criminal mechanism involving the seizure and confiscation of assets that have changed hands or are under the control of the convicted person. On one hand, the recovery of state finances has a preventive (deterrent) significance, while on the other hand, it also serves a repressive (eradication) function, aiming to deter perpetrators (Wedha & Nurcahyo, 2021; Yulius & Utama, 2024).

In addition to these mechanisms, another method focused on preventing state financial losses due to actions related to the exercise of authority by the government is through the instrument of administrative law, implemented by government oversight bodies. These bodies perform the function of overseeing government administration (Rakia, 2021), as per Article 20, Paragraph (4) of Law Number 30 of 2014 on Government Administration (hereinafter referred to as the Government Administration Law), which regulates the distinction between administrative abuse of authority by government officials and abuse of authority constituting a criminal act as provided in Article 3 of the Anti-Corruption Law.

In practice, cases related to the exercise of authority often use a criminal approach (Wasahua et al., 2021), applying Article 3 of the Anti-Corruption Law to actions involving the active use of authority, namely discretionary power ("discretionary power," "vrijsbestuur," "freies ermessen") to implement policies ("beleid") promptly and effectively. This is done by determining actions in the interest of governmental duties (Sihotang, Pujiyono, & Sa'adah, 2017), rather than merely executing statutory power ("bound authority"). According to Philipus M. Hadjon, government power is an active power that includes the authority to make independent decisions and interpret vague norms ("vage normen") (Adjie, 2016). Regarding "beleidsvrijheid," the active power of the government, according to Girindro Pringgodigdo, includes "wijsheid," which can involve instant decisions based on urgency and situation, including making regulatory (written) or oral decisions based on the discretionary power/authority they possess (Adjie, 2016).

The use of discretion by the government is intrinsically linked to the implementation of the welfare state principle, which generally entails extensive government intervention in various aspects of society and the use of discretion (Muchsan, 1992). Discretion essentially manifests as a tendency to deviate from the obligation to act according to the general rule of legislation (rule-based or rule-following approach). This exceptionality is closely related to the freedom accompanying a broad functional scope,

proportional to the extent of power and authority held by governmental bodies and officials (Marbun, 2013).

Although discretion is viewed as the exercise of active authority related to the freedom of government action, its implementation is still subject to legal limitations. One of the main limitations is that the purpose of the discretion must adhere to public interest objectives as regulated in legislation, based on the principles of good governance. The juridical consequence of using discretion that does not adhere to purpose, legislation, and the general principles of good governance is that such discretion may lead to arbitrary actions and abuse of power, potentially causing financial losses to the state.

Regarding the implementation of discretion resulting in state financial losses (Darojad, 2018) due to abuse of authority, it creates a juridical dilemma because, based on the structure of existing legislation, there are two legal regimes governing the accountability system for abuse of authority resulting in state financial losses: the criminal accountability system under the Anti-Corruption Law and the administrative accountability system as regulated in the Government Administration Law.

The regulation of the criminal accountability system for discretion resulting in state financial losses is based on Article 3 of the Anti-Corruption Law, which includes the element of "…abusing authority, opportunity, or means available due to their position or rank, which can cause financial losses to the state…" and culminates in criminal punishment as stipulated in the Article. On the other hand, the Government Administration Law also regulates the accountability mechanism for discretion that falls under the category of abuse of authority, resulting in financial losses for the state. This can lead to the imposition of administrative sanctions, as outlined in Article 80, Paragraph (4) of the Government Administration Law:

> *"Government officials who violate the provisions referred to in paragraph (1) or paragraph (2) that cause losses to state finances, the national economy, and/or damage to the environment shall be subject to severe administrative sanctions."*

The existence of two regulations regarding the accountability system for the exercise of discretion that results in state financial losses creates a legal issue related to a conflict of norms (Suprayoga, Hartiwiningsih, & Rustamaji, 2023). This is because the two accountability systems have different legal regimes or policies. In practice, conflicts often arise in cases where there is an overlap between the legal policy of the Anti-Corruption Law, which prioritizes criminal measures to address state financial losses caused by abuse of authority, and the use of administrative measures under the Government Administration Law, which aims more at improving orderly government administration and preventing abuse of authority.

Based on this issue, the author raises a theoretical problem concerning the intersection between administrative violations and criminal violations in relation to discretion that causes

state financial losses. This is due to the fact that accountability for discretion is regulated by two different legal regimes. The accountability system for discretion resulting in state financial losses under the Anti-Corruption Law has a different nature compared to the accountability for discretion under the Government Administration Law. In this paper, the author employs a legal research methodology, which examines the law, considering the unique position of legal studies as sui generis, with the law comprising, among other things, legal norms. Therefore, the focus of the research is on the norms themselves.

Barda Nawawi argues that the term “Policy” is derived from the English term “policy” and the Dutch term “politiek,” so “Criminal Law Policy” can also be called “Criminal Law Politics” and is often known as “penal policy,” “criminal law policy,” or “strafrechspolitiek.” In his book, Barda Nawawi Arief quotes Marc Ancel, who states that Penal Policy is one of the components of Modern Criminal Science, alongside other components such as “Criminology” and “Criminal Law.” Marc Ancel argues that “Penal Policy” is a science with a practical purpose to enable the formulation of positive legal regulations and to provide guidance not only to lawmakers but also to courts applying the law (Arief, 2008).

From the perspective of criminal law policy underlying penal policy, prioritizing criminal measures through the process of criminalization, especially in acts of corruption as regulated in the Anti-Corruption Law, is part of the state's efforts to prevent corruption crimes that have a massive impact on society (Nikolaienko et al., 2024).

However, Hoefnagel, as cited by Marwan Efendi and Indriyanto Seno Adjie, has reminded us of the importance of considering various factors when implementing criminalization to uphold the principle of ultimum remedium and avoid over-criminalization. These factors include: not using criminal law in an emotional manner; not using criminal law to punish acts that have no clear victims or losses; not using criminal law if the harm caused by the punishment will be greater than the harm caused by the criminal act being addressed; not using criminal law if its application is not strongly supported by the community; not using criminal law if its use is expected to be ineffective; considering the priority scale of regulatory interests in certain cases; and utilizing criminal law as a repressive means simultaneously with preventive measures (Adjie, 2016).

In State Administrative Law, responsibility (*verantwoordelijk*), namely *verplicht tothet afleggen van verantwoording en tot het dragen van event toerekenbare schade* (*desgevorderd*), *in rechte of in bestuursverban*” (the obligation to bear responsibility and the obligation to bear losses that arise, both in law and in government relations), is imposed on the authority holder. Based on the methods of granting and delegating authority, it will be known who must bear responsibility (HR, 2003).

Conceptually, there are two basic things related to the principle of responsibility and

accountability of Officials in relation to the use of discretion according to HR Ridwan. First, the principle of the rule of law which states that every action taken by government organs must be based on authority or power. This is closely related to the principle of "*geen bevoegdheid zonder verantwoordelijkheid*" (no authority without responsibility) or "*zonder bevogdheid geen verantwoorddelijkheid"* (without authority there is no responsibility). Second, there are two entities, namely positions and office holders or officials. Related to these two entities, there are two types of norms, namely the norm of government (*bestuurnorm*) and the norm of apparatus behavior (*gedragsnorm*) (HR, 2014).

Sjachran Basah explained that accountability for the implementation of discretion, or freies ermessen (discretion), delegated to the government involves freedom of action within certain limits or flexibility in determining policies (Nuna & Marthen, 2019). According to Stanley de Smith, "discretion implies the power to choose between alternative courses of action" (Fasyehhudin, 2023).

Hans J. Wolf suggests that discretion should not be interpreted excessively, as if state administrative bodies or officials can act arbitrarily or without a basis or with subjective-individual considerations. Instead, discretion should be given a neutral meaning (Panjaitan, 2016).

The implementation of discretion that results in state financial losses due to abuse of authority creates a juridical dilemma. Based on the current legislation, there are two legal regimes governing accountability for abuse of authority resulting in state financial losses: the criminal accountability system under the Anti-Corruption Law and the administrative accountability system regulated by the Government Administration Law.

Examples of decisions on state losses due to discretion include the Indonesian Supreme Court Decision Number 572 K/PID/2003 in the Akbar Tanjung case and the Indonesian Supreme Court Decision Number 1555 K/Pid.Sus/2019 in the Syafruddin Arsyad Temenggung case.

Given this issue, the research is important to address the overlap between administrative unlawfulness and criminal unlawfulness. The aim is to enhance the orderly administration of government affairs and prevent abuses of authority. The originality of this research compared to previous studies is its focus on the intersection between administrative illegality and criminal illegality in the context of the discretion of government officials detrimental to state finances.

Based on the background, the author formulates two research objectives: to analyze the concept of unlawful conduct under the Anti-Corruption Law and the Government Administration Law, and to analyze the accountability system for discretion that results in state financial losses.

There are several previous studies (state of the art) related to the title of this research. The first, research written by Fitriah Faisal et al, entitled Discretion from the Point of View of Criminal Law. The research shows that Discretion is considered an act against the law even though

it is not because of its own will and not for its own interests, but it can benefit other parties so it can be considered detrimental to The State. Then from the research it is known that the cause of the criminalization of the policy so that it is considered a criminal act of corruption, namely a misunderstanding of the meaning of the element of offenses against the law as a genuus delict and misuse of authority as a species delict. the author causes injustice to the "perpetrators" who are actually only carrying out their duties as policy makers (Faisal et al., 2021).

Second, the research was written by M. Ikbar Andi Endang, entitled Discretion and Responsibility of Government Officials Based on Law of State Administration. This research concluded that Law number 30 in 2014 concerning State Administration (UUAP) was born to meet a legal standing as the protection for decision making and/or action (discretion) from state institutions and/or government officials and to prevent authority abuse in using the discretion itself. Therefore, UUAP regulates discretion along with its environments, requirements, procedures of uses, legal effects, and its person in charge (Endang, 2018).

Third, the research was written by Zaqiah Darojad, entitled The Use of Discretion by Government Officials in Relation to State Financial Losses Resulting in Corruption Crime. This research concluded that The purpose of discretion is for public interest or the sake of the community therefore should the discretion is done for another purpose other than public interest or the sake of the community, then that said discretion could be qualified as an abuse of authority which might have implications on an act of corruption should there be any evil intent (contains the element of force (*dwang*) and bribery (*omkoperii*) and fraud that is deceptive in nature (*kuntgrespen*) in the government official (Darojad, 2018).

Forth, the journal was written by Louis E. Howe, entitled Administrative Law and Governmentality: Politics and Discretion in a Changing State of Sovereignty. This research concluded that in the end of the New Deal era, administrative law is called upon to adjudicate new issues in the economy of risk management. In this highly discretionary new arena administrators might find both new dangers and new opportunities for democratic action. However, these possibilities depend upon not accepting rigid formalistic definitions of federal/state, public/private,politics/administration,society/individual, or economic/noneconomic (Howe, 2002).

Fifth, the research was written by Paul H. Robinson, entitled Legality And Discretion In The Distribution Of Criminal Sanctions. This research concluded that Decisionmakers would receive greater discretion when they assign liability and more guidance when they pre- scribe sanctions. Criminal codes, he contends, should explicitly give judges and juries the flexibility to incorporate normative judgments into their decisions on liability. Sentencing guidelines, however, should be more detailed and precise. Professor Robinson offers several strategies to ad. dress

the practical difficulties of drafting sentencing guidelines that firmly direct judges and juries in dealing with complex issues, and he illustrates how criminal codes could give decisionmakers more discretion in certain circumstances (Robinson, 1988).

The last, the article was written by McCabe, B.C., and Nank, R., Entitled Design and Implementation of Legislation: The Role of Discretion. This journal discusses the role of administrative discretion in the design and implementation of legislation. It highlights the balance between discretionary power and legal boundaries to prevent abuse and ensure accountability in government actions (McCabe & Nank, 2022).

B. RESEARCH METHODS

This paper is the result of research utilizing legal research as the primary research type, encompassing various forms such as research on legal principles, legal systematics, and the level of legal synchronization. Normative legal research seeks to uncover the philosophical underpinnings, official standards, and structures that govern specific issues (Ridwan, Jaya, & Imani, 2022).

The emphasis on legal research means that the legal materials used in this study are primarily sourced from literature. The types and sources of legal materials in this research include primary, secondary, and tertiary legal materials (Jaya et al., 2023). Primary legal materials encompass various international provisions or regulations, as well as statutory regulations (Irawan et al., 2024).

To gather these materials, the researcher will employ two methods for legal material search techniques: library research and internet searches. In both methods, the researcher approaches the study with an open-ended mindset, having previously identified legal issues relevant to the theme of this research.

C. RESULTS AND DISCUSSION

1. The Consept of Unlawful Counduct in the Anti-Corruption Law and the Government Administration Law

In its development in Indonesia, the term "corruption" became part of the juridical terminology starting in 1957, based on the Military Authority Regulation applicable within the Army's jurisdiction (Military Regulation Number PRT/PM/06/1957). This definition was later expanded under the Central War Authority Regulation of the Army Chief of Staff Number PRT/PEPERPU/031/1958 or the Central War Authority Regulation Number 13 of 1958, along with its implementing regulations. These regulations distinguished between corruption with criminal sanctions and corruption without criminal threats.

On June 9, 1960, the government revoked the two War Authority Regulations issued in 1958 and replaced them with Government Regulation in Lieu of Law Number 24 of 1960 concerning the Investigation, Prosecution, and Examination of Corruption Crimes, which was subsequently

enacted as Government Regulation in Lieu of Law Number 24 of 1960. The formulation of corruption crimes in Government Regulation in Lieu of Law Number 24 of 1960 included many actions that harmed the state's finances and economy and hindered national development. However, these actions could not be prosecuted because the formulation required a specific crime or offense committed by the individual concerned (Purnomo & Soponyono, 2015).

The distinction between punishable and non-punishable acts of corruption at that time was based on the reality that many actions harming the state's finances and economy were not always preceded by a specific crime or offense. These actions, inherently corrupt in nature, could not be prosecuted under Government Regulation in Lieu of Law Number 24 of 1960 because they did not fall within the definition of corruption crimes under that law. To address such actions, the definition of corruption crimes was expanded to include acts of enriching oneself, another person, or an entity "unlawfully," which directly or indirectly harmed the state's finances and economy, or were known or reasonably suspected to harm the state's finances or economy. By including the concept of "unlawfully," which encompasses both formal and material meanings, it was intended to facilitate easier proof of punishable acts, such as "enriching oneself, another person, or an entity," rather than meeting the requirement of proving a specific crime or offense as stipulated by Government Regulation in Lieu of Law Number 24 of 1960 (Hadiyanto, 2022).

Law Number 3 of 1971 defines corruption as acts of enriching oneself, another person, or an entity unlawfully, which directly or indirectly harm the state's finances and economy, or are known or reasonably suspected to harm the state's finances. Law Number 3 of 1971 then updated and categorized the types of acts that constitute corruption crimes as part of efforts to improve and develop legal factors and personal factors, which are integral to national development (Hamzah, 1986).

With the rapid progress of development, the leakage of development funds has also increased (Farahwati, 2021). Media reports on corruption issues have also become more prevalent. For instance, the then-Minister of Development Supervision and Environmental Affairs, Prof. Emil Salim, stated at a Department of Public Works meeting on September 29, 1981: "If corruption and misuse in the Department of Public Works can be addressed, a significant portion of the state's funds can be saved. This is because the Public Works Department absorbs the most development budget among all departments" (Hamzah, 1986).

Furthermore, the Chairman of the Central Operational Control (Opstib) Sedomo, after meeting with the President at the time, stated that "the five potential sources of corruption and abuse are physical development projects, procurement of goods, customs, taxation, issuance of business

licenses, and the granting of bank credit, all of which revolve around quality, price, and commissions" (Hamzah, 1986).

During the era of the enactment of Law No. 31 of 1999, the typology of acts categorized as corruption was more varied. Additionally, Law No. 31 of 1999 accommodated the mechanism for recovering state financial losses, as previously implemented during the era of Government Regulation in Lieu of Law Number 24 of 1960. However, Law No. 31 of 1999 explicitly states that the recovery of state financial or economic losses does not negate the criminal prosecution of the perpetrators of corruption (Article 4).

If the recovery of proceeds from corruption is done voluntarily without any external pressure before the case is known to the public or law enforcement, it cannot be used as a basis for prosecution. Such voluntary recovery should be treated as an act of unlawfulness in its negative function. This provision is distinctly different from the regulations under Government Regulation in Lieu of Law Number 24 of 1960 and related previous regulations, which differentiated acts of unlawfulness subject to criminal penalties. In other words, only behaviors such as bribery or embezzlement by civil servants, clearly stipulated in the Criminal Code, could be punished as corruption. Meanwhile, immoral behaviors also described as corrupt actions in the explanation of the Military Governor's Regulation over the Army Region No. Prt/PM/06/1957, which harmed state finances, were only subject to asset forfeiture penalties.

Law No. 31 of 1999 on the Eradication of Corruption, as amended and supplemented by Law No. 20 of 2001 (Corruption Eradication Law), stipulates that the element of 'unlawfulness' within the crime of corruption has been broadened as provided in Article 2, paragraph (1): "Anyone who unlawfully enriches themselves, or another person, or a corporation that can harm the state's finances or economy shall be punished (...)" The general explanation of the law states: "(...) the criminal acts regulated in this law are formulated in such a way that they include acts of enriching oneself or another person or a corporation 'unlawfully' in both formal and material senses. With this formulation, the concept of unlawfulness in corruption crimes can also encompass disgraceful acts that, according to the sense of justice of society, should be prosecuted and punished."

Furthermore, in the explanation of Article 2, paragraph (1) itself, it is stated: "(...) what is meant by unlawfully in this Article encompasses unlawfulness in both formal and material senses; that is, even if the act is not regulated in the legislation, if the act is deemed disgraceful because it does not conform to the sense of justice or the social norms of life in society, then the act can be punishable" (Bunga et al., 2019).

In the broad sense under Law No. 31 of 1999 on the Eradication of Corruption (Corruption Eradication Law), as amended and supplemented by Law No. 20 of 2001, 'unlawful' is interpreted not only as actions that contravene written regulations but also as disgraceful acts that

violate the sense of justice or social norms of life in society. This broad interpretation of unlawfulness absorbs the meaning of 'unlawful act' (onrechtmatige daad) in civil law, which, under the regulations of the central military authority, is considered another form of corrupt behavior (besides criminal acts).

The expanded meaning of 'unlawful' in the Corruption Eradication Law also includes actions related to the exercise of authority within an official position. As stipulated in Article 3 of the Corruption Eradication Law: “Any person who, with the intent to benefit themselves, another person, or a corporation, abuses their authority, opportunity, or means available to them due to their position or status, which can cause financial losses to the state or the economy, shall be punished with life imprisonment or a minimum imprisonment of 1 (one) year and a maximum of 20 (twenty) years, and/or a fine of at least Rp. 50,000,000.00 (fifty million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah)” (Wahyudi, 2019).

From the perspective of the legal politics behind the formation of the Corruption Eradication Law, the enactment of this law is essentially expected to address the legal needs for preventing and eradicating corruption. The primary goal of the anti-corruption policy is to recover state finances or the national economy and to punish the perpetrators. This includes actions related to the exercise of authority that subsequently cause financial losses to the state, as stipulated in Article 3 of the Corruption Eradication Law.

In contrast to the concept of unlawfulness in the Corruption Eradication Law, which restricts the discretionary power of state administration, within the framework of administrative law, the parameters that limit the discretionary power of state administration are detournement de pouvoir (abuse of power) and abus de droit (arbitrariness) (Yopie). Abuse of power (detournement de pouvoir) differs from acting arbitrarily (willekeur).

The presence of elements of abuse of power is tested against the General Principles of Good Governance, which dictate that authority is granted to a governmental organ for a specific purpose. Deviation from this purpose is considered an abuse of power. The element of arbitrariness is tested against the principle of rationality or reasonableness (redelijk). A policy is categorized as containing elements of willekeur if it is clearly irrational or unreasonable (kennelijk onredelijk).

Abuse of power in Administrative Law is closely related to the concept of *détournement de pouvoir* in the French legal system, or abuse/misuse of power in English terminology (Sahlan, 2016). Governmental authority is categorized into several types: bound, facultative, and discretionary (HR, 2014). According to Indroharto, as cited by Odie Faiz Guslan, these types of governmental authority are defined as follows (Guslan, 2018):

a. Government authority is bound when the basic regulations specify when and under what

circumstances the authority can be exercised, or when the basic regulations largely determine the content of the decision to be made. In other words, when the basic regulations detail the content of the decision to be taken, such government authority is considered bound authority.

b. Government authority is facultative when the relevant administrative body or official is not obligated to exercise their authority or still has some degree of discretion, even if that discretion can only be exercised in certain situations as specified by the basic regulations.

c. Government authority is discretionary when the basic regulations grant the administrative body or official the freedom to determine the content of the decisions to be made or when the basic regulations provide a scope of freedom to the relevant administrative official.

Historically, the concept of *détournement de pouvoir* first emerged in France and served as the foundation for the State Administrative Court's review of governmental actions, considered a legal principle part of *principes généraux du droit*. The Conseil d'État was the first judicial body to use it as a review tool, and it has since been adopted by other countries. A government official is deemed to violate the principle of *détournement de pouvoir* when the purpose of the issued decision or action is not for the public interest or order but for the personal benefit of the official (including their family or allies) (Yulius, 2015).

The French Conseil d'Etat has developed the concept of *détournement de pouvoir* into three categories: (Yulius, 2015)

a. when the administrative act is completely taken without the public interest in mind;

b. when the administrative act is taken on the basis of the public interest but the discretion which the administration exercises in doing so was not conferred by law for that purpose;

c. in cases of détournement de procedure where the administration, concealing the real content of the act under a false appearance, follows a procedure reserved by law for other purposes.

The concept of *détournement de pouvoir*, which originated and developed in France, later influenced law enforcement in other European countries, such as the Netherlands, a former French colony, and Indonesia, a former Dutch colony. The misuse of authority by the Hoge Raad has been used as a legal basis for judicial decisions (Malian, 2020).

According to Muchsan, arbitrary acts by authorities may occur if the following elements are present (Muchsan, 1992): a. The authority acts with juridical authority (there is a legal basis for their actions). b. The element of public interest is inadequately considered in the government's decision-making process. c. The action causes concrete harm to a specific party.

In the theory of Administrative Law, there are five categories of arbitrary actions :

1) Unlawful acts by the authorities (onrechtmatige overheidsdaad), a concept based on the idea that the state is a collection of offices established by the state to achieve its objectives. Consequently, these offices

have a personified nature, meaning they can act as legal subjects with rights and obligations. These rights and obligations are exercised by state officials. Therefore, state officials, or what are often referred to as authorities (overheid), can commit unlawful acts, which in Administrative Law are known as unlawful acts by the authorities (onrechtmatige overheidsdaad), often abbreviated as OOD. This doctrine of OOD essentially originates from the concept of unlawful acts in civil law. The unlawful act committed by the government refers to the provisions that also apply to individuals, namely Article 1365 of the Civil Code (Edyanti & Erliana, 2022).

2) Acts against the law (onwetmatig). The interpretation of unlawful acts as the same as acts contrary to the law was caused by the school of legism, which was dominant at the time. This school considers that the law is only what is stated in the legislation, outside the legislation there is no law (Edyanti & Erliana, 2022).
3) Inappropriate acts (onjist) are concepts aimed at an administrative action or decision that involve the interpretation of the disputed or misunderstood provisions of legislation. (Muchsan, 1992).
4) Ineffective acts (ondoelmatig) are a concept related to the failure of state administration to perform its duties to provide services to the public and achieve societal welfare (Muchsan, 1992).
5) Acts of abuse of power (détournement de pouvoir). According to W.F. Prins, the concept of détournement de pouvoir is used to describe a deficiency in the actions of the state administration. Détournement de pouvoir occurs when the government uses its authority to pursue a public interest different from the one intended by the regulation that serves as the basis for that authority (Edyanti & Erliana, 2022).

In contrast to the theoretical concept of abuse of power, Article 17, paragraph (2) of the Government Administration Law outlines the types of abuse of power, including:

1) Prohibition against exceeding authority.
   A government body and/or official is categorized as exceeding authority if the decision and/or action taken:
   a. exceeds the term of office or the time limit of the authority,
   b. exceeds the territorial jurisdiction of the authority, and/or
   c. contradicts the provisions of legislation.
2) Prohibition against mixing authority.
   A government body and/or official is categorized as mixing authority if the decision and/or action taken:
   a. falls outside the scope of the authority's field or subject matter, and/or
   b. contradicts the purpose of the authority granted.
3) Prohibition against arbitrary action

4) A government body and/or official is categorized as acting arbitrarily if the decision and/or action taken:
   a. lacks legal authority, and/or
   b. contradicts a legally binding court decision.

Law Number 30 of 2014 concerning Government Administration addresses government decisions or actions and the responsibility for each decision or action taken by a government body or official. As stated in Article 45, paragraph (1), government bodies and/or officials, as referred to in Articles 42 and 43, guarantee and are responsible for every decision and/or action they establish and/or execute. Paragraph (2) states that decisions and/or actions made due to conflicts of interest can be revoked. Decisions subsequently deemed invalid due to formal or substantive deficiencies under the Government Administration Law are categorized accordingly, whether for procedural or substantive errors.

The legal consequences of revoked decisions and/or actions are that they become non-binding from the time they are revoked or remain valid until revocation, and end upon their revocation. Furthermore, if losses arise from the revoked decisions and/or actions, government bodies and/or officials are liable.

2. Accountability System for Discretion Resulting in State Financial Consequences

As discussed in the background of the problem, discretion that results in financial losses to the state due to abuse of authority ultimately creates a legal dilemma. This is because, under the current legal framework, two legal regimes govern the accountability system for such abuses: the criminal accountability system under the Anti-Corruption Law and the administrative accountability system as regulated by the Government Administration Law.

The regulation of the criminal accountability system for discretion resulting in state losses is based on the construction of Article 3 of the Anti-Corruption Law, which includes elements such as "...abusing authority, opportunity, or means available to them due to their position, which could harm state finances..." leading to criminal sanctions as stipulated in the article. On the other hand, the Government Administration Law also regulates the accountability mechanism for discretion categorized as an abuse of authority that causes state losses, potentially leading to the application of administrative sanctions, as stipulated in Article 80, paragraph (4) of the Government Administration Law:

> "Government officials who violate the provisions as referred to in paragraph (1) or paragraph (2) causing losses to state finances, the national economy, and/or environmental damage, shall be subject to severe administrative sanctions."

Based on the above, from a criminal law policy perspective, penal policy background, which prioritizes criminal measures through the process of criminalization, particularly in corruption acts as regulated by the Anti-Corruption Law, is part of the state's efforts to prevent corruption crimes that have a massive

impact on society. However, Hoefnagel has emphasized the importance of considering various factors in implementing criminalization to maintain the principle of *ultimum remedium* and avoid over-criminalization.

In line with this, Hungary's Criminal Code states that criminal liability may only be established in connection with conduct that a legal instrument requires to be criminalized at the time it was committed, except for acts punishable under universally acknowledged rules of international law (Chapter 1, Section 1, Hungary Criminal Code). Based on this reasoning, criminal punishment is intended as a last resort for penalizing a criminal act. In other words, *ultimum remedium* requires the prior application of other sanctions (non-penal), such as compensation, fines, warnings, or other measures before utilizing criminal law measures such as imprisonment (Adjie, 2016).

Crime prevention policy itself can be carried out by integrating efforts to apply criminal law, prevent crime without using criminal law (prevention without punishment), and influence societal views on crime and punishment through mass media (Hoefnagels, 1973).

According to current legal norms, the Government Administration Law (Muhsin, 2019) stipulates that any abuse of authority must first be examined by the Government Internal Supervisory Apparatus. The results of this examination may be as follows: a. No error; b. Administrative error; or c. Administrative error causing financial loss to the state.

Subsequently, Article 21, paragraph (2) of the Government Administration Law stipulates: "If the results of the supervision indicate an abuse of authority, the Agency and/or Government Official may submit a request to the Court to assess whether there is an element of abuse of authority in the Decision and/or Action."

The provisions of Article 21 of the Government Administration Law were subsequently followed up by the issuance of Supreme Court Regulation of the Republic of Indonesia Number 4 of 2015 concerning Guidelines for Proceedings in the Assessment of Elements of Abuse of Authority. This regulation stipulates in Article 2, paragraph (1) that "The Court has the authority to receive, examine, and decide upon a request to assess whether there is an abuse of authority in the Decision and/or Action of a Government Official before any criminal process." Furthermore, Article 2, paragraph (2) stipulates that "The Court shall only have the authority to receive, examine, and decide upon the assessment request as referred to in paragraph (1) after the results of the supervision by the Government Internal Supervisory Apparatus."

The provisions in Article 2 of the Supreme Court Regulation of the Republic of Indonesia Number 4 of 2015 essentially indicate that before a criminal process is conducted, there must first be an assessment regarding the existence of an abuse of authority based on an examination by the Government Internal Supervisory Apparatus, which can then be followed up in the

Administrative Court through a decision on the existence of an abuse of authority, allowing the elements in Article 3 of the Anti-Corruption Law to be fulfilled. This provision is essentially related to the legal policy regulation of the Government Administration Law, which, when associated with acts of corruption, is more aimed at prevention efforts.

This objective also underlies the issuance of various government policies that prioritize prevention over eradication, such as the Presidential Instruction of the Republic of Indonesia Number 10 of 2016 on Actions for the Prevention and Eradication of Corruption for 2016 and 2017, or through the Presidential Regulation of the Republic of Indonesia Number 54 of 2018 on the National Strategy for Corruption Prevention.

Based on this mechanism, when combined with the concept of penal policy that prioritizes the *ultimum remedium* approach, the accountability system for government officials' discretion that causes financial losses to the state should prioritize a non-penal approach. In this case, administrative legal measures should be taken first, as stipulated in the Government Administration Law, for the purposes of prevention and the orderly administration of state governance.

D. CONCLUSION

Based on the discussion narrative above, it can be concluded that Under Law Number 31 of 1999 concerning the Eradication of Corruption Crimes (Corruption Law), as amended and supplemented by Law Number 20 of 2001, "contrary to law" is interpreted not only as actions conflicting with written regulations but also as reprehensible acts, because they contradict justice or social norms in society. This broad interpretation of "contrary to law" absorbs the meaning of "onrechtmatige daad" from civil law, which is considered another form of corruption under central government regulations (besides criminal acts). The expansion of the meaning of "contrary to law" in the Corruption Law also includes acts contrary to law related to the exercise of authority in a position. In contrast to the concept of "contrary to law" in the Corruption Law, which limits the discretion of state administrative authority, within the framework of state administrative law, the parameters limiting the discretion of state administrative authority (discretionary power) are "*detournement de pouvoir*" (abuse of power) and "*abus de droit*" (arbitrary action).

The regulation of criminal accountability for discretion that causes state losses is implemented based on the framework of Article 3 of the Corruption Law. On the other hand, the Government Administration Law also regulates mechanisms for accountability concerning discretion categorized as abuse of authority that results in state losses, which can subsequently lead to the application of administrative sanctions as stipulated in Article 80 paragraph (4) of the Government Administration Law. Current norms under the Government Administration Law

mandate that any abuse of authority must first be examined by the Government Internal Supervisory Apparatus. Furthermore, based on Supreme Court Regulation of the Republic of Indonesia Number 4 of 2015, it essentially indicates that before any criminal process is undertaken, there must first be an assessment regarding the presence of abuse of authority based on examination by the Government Internal Supervisory Apparatus, which can then be followed up in the Administrative Court through a decision on the existence of such abuse of authority, thereby fulfilling the elements in Article 3 of the Corruption Law.

In this writing, the author suggests several recommendations related to the theme of government officials' discretion causing financial losses to the state, particularly regarding the issue of overlaps between administrative unlawfulness and criminal unlawfulness. The author recommends that in cases where there is an overlap between the legal policies of the Corruption Law and the Government Administration Law, priority should be given to the use of administrative remedies under the Government Administration Law. The aim is to enhance the orderly administration of government affairs and prevent abuses of authority.

REFERENCES

JOURNALS

Budiyono., Prayitno, Kuat Puji., Hendriana, Rani., & Sukirman. (2022) Non-Penal Policy In Managing Criminal Acts Of Bribery And Nepotism Corruption. *International Journal of Advance Research*, Vol.10, (No.7), pp.302-307. http://dx.doi.org/10.21474/IJAR01/15034

Bunga, Marten., Maroa, Mustating Dg., Arief, Amelia., & Djanggih, Hardianto. (2019). Urgensi peran Serta Masyarakat Dalam Upaya Pencegahan Dan Pemberantasan Tindak Pidana Korupsi. *Law Reform,* Vol.15,(No.1),pp.85-97. https://doi.org/10.14710/lr.v15i1.23356

Darojad, Z. (2018). Penggunaan Diskresi Oleh Pejabat Pemerintahan Dalam Kaitannya Dengan Kerugian Keuangan Negara Yang Mengakibatkan Tindak Pidana Korupsi. *Jurnal MP (Manajemen Pemerintahan)*, Vol.5,(No.2),pp.125-140. https://ejournal.ipdn.ac.id/JMP/article/view/435

Edyanti, Yusrin., & Erliyana, Anna. (2022). Perbuatan Melawan Hukum Oleh Penguasa (Onrechtmatige Overheisdaad) (Suatu Tinjauan Analisis Administrasi Pemerintahan). *Dharmasisya*, Vol.2, (No.2),pp.719-734. https://scholarhub.ui.ac.id/dharmasisya/vol2/iss2/14

Endang, M. Ikbar A. (2018). Diskresi Dan Tanggung Jawab Pejabat Pemerintahan Menurut Undang-Undang Administrasi Pemerintahan Discretion And Responsbility Of Government Officials Based On Law Of State Administration. *Jurnal Hukum*

Peratun, Vol.1,(No.2), pp. 223–244. https://doi.org/10.25216/peratun.122018.223-244

Faisal, Fitriah., Jamaluddin, Fitriani., Rahman, Hasima., & Tarta, Ahmad Firman. (2021). Diskresi Dari Sudut Pandang Hukum Pidana. *Mulawarman Law Review*, Vol.6, (No.1), pp.32-41. https://doi.org/10.30872/mulrev.v6i1.466

Farahwati. (2021). Peran Aktif Masyarakat Dalam Upaya Pemberantasan Tindak Pidana Korupsi Yang Merupakan Kejahatan Luar Biasa. *Legalitas; Jurnal Ilmiah Ilmu Hukum,* Vol.6,(No.2),pp.28-47. http://dx.doi.org/10.31293/lg.v6i2.5864.

Fasyehhudin, M. (2023). Freies Ermessen Dalam Tindakan Nyata di Pemerintah Daerah. *Jurnal Ius Constituendum*, Vol.8,(No.1), pp.69-86. http://dx.doi.org/10.26623/jic.v8i1.6250

Guslan, Odie F. (2018). Batasan Antara Perbuatan Maladministrasi Dengan Tindak Pidana Korupsi. *Riau Law Journal*, Vol.2, (No.2), pp.138-158. http://dx.doi.org/10.30652/rlj.v2i2.4942.

Hadiyanto, A. (2022). Pelaksanaan Dan Penerapan Ajaran Sifat Melawan Hukum Materil Dalam Perundang-Undangan Tindak Pidana Korupsi di Indonesia. *Petita*, Vol.4, (No.2), pp.160-174. https://doi.org/10.33373/pta.v4i2.4969

Howe, Louis E. (2002). Administrative Law and Governmentality: Politics and Discretion in a Changing State of Sovereignty. *Administrative Theory & Praxis*, Vol.24 (No.1), pp.55–80. https://doi.org/10.1080/10841806.2002.11029340

HR, Ridwan. (2003). Pertanggungjawaban Publik Pemerintah dalam Perspektif Hukum Administrasi Negara. *Jurnal Hukum Ius Quia Iustum*,Vol.10,(No.22),pp.27-38. https://journal.uii.ac.id/IUSTUM/article/view/4770

Irawan, Beni., Firdaus., Jaya, Belardo Prasetya Mega., Taufiqurrohman, A. H. Asari., and Sari, Siti Wulan. (2024). State Responsibility and Strategy in Preventing and Protecting Indonesian Fisheries Crews Working on Foreign Fishing Vessels from Modern Slavery." *Australian Journal of Maritime and Ocean Affairs*, pp. 1-21. *https://doi.org/10.1080/18366503.2024.2333107*

Jaya, Belardo Prasetya Mega., Ridwan., Mucharom, Rully Syahrul., Wibowo, Dwi Edi., Aisah, Siti Nur., Sulastri., & Alifvia, Novia Bela. (2023). Criticising the Implementation of the ACTIP in Southeast Asia. *Sriwijaya Law Review*, Vol.7, (No.2), pp.355-373. http://dx.doi.org/10.28946/slrev.Vol7.Iss2.2542.pp350-367

Lytvyn, Nataliia A., Artemenko, Olena V., Kovalova, Svitlana S., Kobets, Maryna P., & Kashtan, Elena V. (Grygorieva). (2023). Administrative And Legal Mechanisms For Combating Corruption. *Journal of Financial Crime,*Vol.30,(No.1),pp.154-166. https://doi.org/10.1108/JFC-11-2021-0241

Malian, S. (2020). Penyalahgunaan Wewenang Jabatan Oleh Pejabat Negara/Pemerintah: Perspektif Hukum Administrasi Negara Dan Hukum Pidana. *Jurnal Hukum Respublica*, Vol.20,(No.1),pp.102-121. http://dx.doi.org/10.31849/respublica.v20i1.5363.

McCabe, Barbara Coyle., & Nank, Renee. (2022). Design and Implementation of Legislation: The Role of Discretion. *Global Encyclopedia of Public Administration, Public Policy, and Governance*. pp.3116–3121. https://doi.org/10.1007/978-3-030-66252-3_2520

Wahyu MJ, Stefanus., M A, Fernanda., Triwardani, Satya., Puspita S, Dwi., & Fattah, Hidayatul. (2023). Peran Politik Hukum Dalam Pemberantasan Tindak Pidana Korupsi di Indonesia. *Wijayakusuma Law Review*, Vol.5, (No.1), pp 8-13 https://doi.org/10.51921/wlr.v5i1.229

Muhsin, Mustika S. (2019). Kajian Yuridis Terhadap Penyalahgunaan Kewenangan Diskresi Oleh Pejabat Pemerintahan Menurut Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan. *Lex Administratum*, Vol.7, (No.3), pp.57-64 https://ejournal.unsrat.ac.id/v3/index.php/administratum/article/view/27934

Nikolaienko, Andrii., Nikolaienko, Oleksii., Avanesov, Hryhorii., Koshmal, Serhii., & Lukashuk, Oksana. (2024). Corruption as a Threat to National Security: Analysis of Anti-corruption Mechanisms and their Effectiveness. *Economic Affairs (New Delhi)*, Vol.69 (Special Issue), pp.23-31. DOI: 10.46852/0424-2513.1.2024.4

Ningrum, Anak Aagung Anggy Tryeza Purnama., & Darmadi, AA Ngurah Oka Yudistira. (2021). Pengembalian Kerugian Keuangan Negara Berdasarkan Analisis Ekonomi Mikro. *Kertha Wicara: Journal Ilmu Hukum,* Vol.10,(No.3),pp.252-261. https://doi.org/10.24843/KW.2021.v10.i03.p06

Nuna, Muten., & Marthen, Roy. (2019). Kebebasan Hak Sosial-Politik Dan Partisipasi Warganegaradalam Sistem Demokrasi Di Indonesia. *Jurnal Ius Constituendum*, Vol.4,(No.2),pp.110-127. http://dx.doi.org/10.26623/jic.v4i2.1652

Panjaitan, Saut P. (2016). Makna Dan Peranan Freies Ermessen Dalam Hukum Administrasi Negara. *Jurnal Unisia*, Vol.07, (No.20), pp.53-60. https://journal.uii.ac.id/Unisia/article/view/5165

Purnomo, M. Aris., & Soponyono, Eko. (2015). Rekonseptualisasi penyidikan tindak Pidana Korupsi Oleh Polri Dalam Rangka Efektifitas Pemberantasan Tindak Pidana Korupsi. *Law Reform*, Vol.11, (No.2), pp.230-240. https://doi.org/10.14710/lr.v11i2.15771

Rakia, A. Sakti R. S. (2021). Perkembangan Dan Urgensi Instrumen Hukum Administrasi Pasca Penetapan Undang-Undang Nomor 2 Tahun 2020 Pada Masa Pandemi Covid-

19. *SIGn Jurnal Hukum*, Vol.2,(No.2), pp.157-173. https://doi.org/10.37276/sjh.v2i2.106

Ridwan., Jaya, Belardo Prasetya Mega., & Imani, Sarah Haderizqi. (2022). The Implementation of General Principles of Convention on The Rights of The Child During Covid-19 Pandemic in The City of Serang. *Law Reform*, Vol.18,(No.1), pp. 16-27.https://doi.org/10.14710/lr.v18i1.44643

Robinson, Paul H. (1988). Legality and Discretion in the Distribution of Criminal Sanctions. *Harvard Journal of Legislation*, Vol.25, (No.393),pp.393-460. https://scholarship.law.upenn.edu/faculty_scholarship/619

Sahlan, M. (2016). Unsur Menyalahgunakan Kewenangan dalam Tindak Pidana Korupsi sebagai Kompetensi Absolut Peradilan Administrasi. *Jurnal Hukum Ius Quia Iustum*,Vol.23,(No.2),pp.271-293. https://doi.org/10.20885/iustum.vol23.iss2.art6

Sihotang, Githa Angela., Pujiyono., & Sa'adah, Nabitatus. (2017), Diskresi Dan Tanggung Jawab Pejabat Publik Pada pelaksanaan tugas Dalam Situasi Darurat. *Law Reform*, Vol.13,(No.1), pp.60-69. https://doi.org/10.14710/lr.v13i1.15951

Suprayoga, Bima., Hartiwiningsih., & Rustamaji, Muhammad. (2023). Reconstruction Of State Economic Losses In Criminal Acts Of Corruption In Indonesia. *Revista de Gestão Social e Ambiental*, Vol.17, (No.4), pp.1-15. https://doi.org/10.24857/rgsa.v17n4-024

Wedha, Yogi Yasa., & Nurcahyo, Edy. (2021). Criminal Law Reform Toward Deprivation Of Property Resulting From Corruption Criminal Acts: A Criminological Perspective. *Prizren Social Scince Journal*, Vol.5,(No.1),pp.97-103. https://doi.org/10.32936/pssj.v5i1.207

Wahyudi, S. (2019). Penal Policy on Assets Recovery on Corruption Cases in Indonesia. *Journal of Indonesian Legal Studies (JILS)*, Vol.4, (No.01), pp.45-72. https://doi.org/10.15294/jils.v4i01.28224

Wangga, Maria Silvya E., Pujiyono., & Arief, Barda Nawawi. (2019). Revocation Of Political Rights Of The Perpetrators Of Criminal Acts of Corruption. *Journal of Indonesian Legal Studies (JILS)*, Vol.4, (No.2),pp.277-298. https://doi.org/10.15294/jils.v4i2.29689.

Wasahua, Idris., Istislam., Madjid, Abdul., & Widagdo, Setyo. (2021). Legal Implications Of The Criminal Policy Of Returning State Financial Losses By Corporations In Corruption Criminal Acts To Restore State Financial Losses. International Journal of Research in Business and Social Science, Vol.10, (No. 8).pp.298–303. https://doi.org/10.20525/ijrbs.v10i8.1464

Yulius., & Utama,Yos Johan. (2024). Optimizing the Role of State Administrative Court Decisions in State Financial Recovery. Law

Reform,Vol.20,(No.1),pp.34-53. https://doi.org/10.14710/lr.v20i1.61779

Yulius. (2015). Perkembangan Pemikiran dan Pengaturan Penyalahgunaan Wewenang di Indonesia (Tinjauan Singkat Dari Perspektif Hukum Administrasi Negara Pasca Berlakunya Undang-Undang Nomor 30 Tahun 2014). *Jurnal Hukum dan Peradilan*, Vol.4,(No.3),pp.361-384. http://dx.doi.org/10.25216/jhp.4.3.2015.361-384

ARTICLE / PAPERS

Adjie, Indriyanto S. (2016). Korupsi : Kriminalisasi Kebijakan atau Kebebasan Diskresioner?. Presented at the Technical Working Meeting of the Special Crimes Division 2016, with the theme "Criminal Acts and Criminal Liability". Jakarta: The Jampidsus Building, Attorney General's Office of the Republic of Indonesia.

BOOKS

Arief, Barda N. (2008). *Bunga Rampai Kebijakan Hukum Pidana Perkembangan Konsep KUHP Baru*. Jakarta: Kencana Prenadamedia Grup.

Hamzah, A. (1986). *Korupsi di Indonesia : Masalah dan Pemecahannya*. Jakarta: PT Gramedia.

Heofnagels, G.P. (1973). *The Other Side Of Criminology.* Holland: Kluwer Deventer.

HR, Ridwan. (2014). *Diskresi & Tanggung Jawab Pemerintah*. Yogyakarta: FH UII Press.

Marbun, S.F. (2013). *Hukum Administrasi Negara II.* Yogyakarta: FH UII Press.

Muchsan. (1992). *Sistem Pengawasan terhadap Perbuatan Aparat Pemerintah dan Peradilan Tata Usaha Negara di Indonesia*. Yogyakarta: Liberty.

LAWS AND REGULATIONS

Act C of 2012 on the Hungary Criminal Code. https://www.refworld.org/pdfid/4c358dd22.pdf

Law Number 31 of 1999 concerning the Eradication of Corruption Crimes (State Gazette of the Republic of Indonesia Year 1999 Number 140, Supplement to State Gazette of the Republic of Indonesia Number 3874).

Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes (State Gazette of the Republic of Indonesia Year 2001 Number 134, Supplement to State Gazette of the Republic of Indonesia Number 4150).

Law Number 30 of 2014 concerning Government Administration (State Gazette of the Republic of Indonesia Year 2014 Number 47, Supplement to State Gazette Number 4286).