

New Paradigm Of Abuse Of Power On Discretion After Government Administration Act

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ABSTRACT

Discretion is one of government actions that are very vulnerable to abuse of power in it. Law Number 30 Year 2014 on Government Administration as a legal provision in the field of state administration currently regulates in detail related to discretion, abuse of power, and abuse of power in discretion in particular. This paper discusses the regulation related to abuse of power that has a paradigm shift based on Law Number 30 Year 2014 on Government Administration and benchmark it in discretion. The Government Administration Act builds a new paradigm of abuse of power by interpreting broadly abuse of power comprising beyond authority, misuse of authority and arbitrary. There are several indicators to show that discretion can be considered as abuse of power, namely: • Contrary to the Act and/or the principle of good governance; Notwithstanding the purpose of discretion or the purpose of the state in general; Breaking discretionary procedures; Beyond the Authority (onbevoegdheid); And/or has no basis of authority.

Keywords: Abuse of Power; Discretion; Government Administration Law

INTRODUCTION

The government freedom to issued a discretion has two side implications. The first side is, this freedom could help the government to handle various concrete problems which law cant handle. The other side is this freedom could generate negative impacts such as deviations in government acts.

The freedom actions of government in certain urgent situations (*freies ermesen*) may allow the government to conduct the discretions in order to creates legal certainty, handled the government stagnant and other urgent situations. Without *freies ermesen*, it is very difficult

to build a good and responsive governance in order to fulfill public needs in every aspects. But in other side, freies ermessen may be a problem if it used a medium to do deviations acts.

This matters already explained by the scholars that *freies ermessen* could generate deviations which create *detournement de pouvoir*. Indonesian scholars explained that *detournement de pouvoir* as abuse of power. The state administration expert constantly connecting the *freies ermessen* and *detournement de pouvoir*.

E. Utrecht reminding that “..we have to keep the state administration official to not to misused the freies ermessen that will lead to the *detournement de pouvoir*¹. S.F Marbun and Mahfud MD, explained that :

“Although as a logic consequences of freies ermessen, the Government is given authority based on initiative, delegation and *droit function* in laws, it doesnt mean the government allows to acts arbitrarily. The government prohibit to acts *detournement de pouvoir* or against the law. Because every government acts which injured its community because of *detournement de pouvoir* or *onrechtmatigeoverheidsdaad*, the government could be prosecuted before the judges, whether in state administrative courts or in public court”².

Discretion lied on a grey area. In the one side, discretion is a legal acts although it sometimes lead to losses in order to create a greater public interest. so sometimes, the actual acts of government is a corruption will protected by the discretion reasons. And, the right discretion but raised state financial loss will consider as corruption, whereas his acts should be justified for the public needs.

To manage this situations, should be determined and understood in a clear vision, the line between the good and bad discretions. Therefore, must be identified how is the abuse of power and the limit between discretion and abuse of power. This discretion problems not only related to abuse of power. Some experts state that discretion related to others deviation authority. So that, this research will describes all types of authority deviation to know the differences of each acts. Until the government discretion is not turned out to authority deviation.

This research is juridical normative research. Data collecting conducted by library research through related data, legal materials, books and also related regulation. The collected data analyzed qualitatively and presented prescriptively.

¹E. Utrecht. (1960).*Pengantar Hukum Administrasi Negara Indonesia*. Bandung: Fakultas Hukum dan Pengetahuan Masyarakat Universitas Negeri Padjajaran, p. 31.

²S.F. Marbundan Mahfud M.D. (2009).*Pokok-Pokok Hukum Administrasi Negara*. Yogyakarta: Liberty, p. 47.

ANALYSIS AND DISCUSSION

Deviations of authority can be divided into several types. The experts generally divide it into two types of authority irregularities, namely the abuse of power (*detournement de pouvoir*) and arbitrary (*Willekur* or unreasonableness or irrationality). In addition there are also one type of authority irregularities that is beyond the authority or unauthorized (*onbevoegd* or *onbevoegdheid*).

Abuse of Power

The first deviation on authority is *detournement de pouvoir* or in Bahasa Indonesia we are familiar with the term abuse of authority. Abuse of authority in the British concept is abuse of power, is the same concept with *detournement de pouvoir* in the French legal system which means abuse of authority by officials by deviating from the provisions of applicable law.³

Abuse of power could occurred because of, are:

- a. Use of authority for personal or political purposes.
- b. Use authority in contravention of the law containing the legal basis of the authority granted.
- c. Carries out authority for any other purpose than is expressly required by law with such authority

In the French legal system of abuse of authority or *detournement de pouvoir*, used as one of the parameters of legality of authority.⁴ One example in France in the case of *detour de pouvoir* in France is the CE case of May 17, 1907 (*Societe Philharmonique Libre de Fumay*), namely:

In order to exercise his authority, a district head or Bupati rejects a request for permission to a regional music band to parade and play music on the street at the funeral of their member; refusal of a permit was canceled when the reason was found not to guarantee public order but in reality the Bupati appreciated another musical group, subsidized by the Bupati group, and unlike the plaintiffs with good faith in the local government.⁵

The example shows that abuse of power is exercised in the event that the Official has the authority to take action. Nevertheless such action is not made in order to realize the

³Tatiek Sri Djamiati dalam Phliipus M. Hadjon, dkk.(2011).*Hukum Administrasi dan Tindak Pidana Korupsi*. Yogyakarta: Gadjah Mada University Press, p. 44.

⁴ Ibid., p.44.

⁵ Ibid., p. 45

purpose of granting such authority, or the purpose of the general government action, but deviates from that purpose. In the case of musical parade for example, it shows that what the mayor does is clearly not to realize the public interest, but only for their personal benefit. So it became obvious, in measuring *detournement de pouvoir*, the benchmark to be seen is the purpose of authorization. The abuse of this authority includes the holding of other public interests of the public interest set forth in the basic rules.

Arbitrarily

The form of deviation against authority is arbitrary or *willekeur* or otherwise referred to as irrationality or unreasonableness or *kennelijke onredelijke*. If *detournement de pouvoir* uses its purpose as a measure instrument, the measuring tool used in the *willekeur* is in consideration whether to take an action or not, as a government action. A categorical action contains an arbitrary element, if the action is clearly irrational or unreasonable.⁶ So, the *willekeur* relate to the logical, proportional and rational reasons underlying an act of government. For example its application is in the following cases:

The judgment of the Medan Administrative Court in a lawsuit against the Head of the National Electricity Company for deciding the electricity at the plaintiff's factory, but after being questioned by the police it is apparent that the plaintiff meter is good. National Electricity Company (PLN) will reinstall it if the plaintiff pays their debt for Rp. 73 million. When the plaintiff asked this question to PLN, PLN suggested that the plaintiff meet Team Opal. After the plaintiff has contacted the Opal team, the plaintiff is required to contact the defendant himself. The administrative court considered that in this case the defendant had committed an act of arbitrary (*willkeur*). Therefore, the Court canceled the warrant to pay Rp 73 million while ordering the defendant to issue a new order to reconnect the electricity of the plaintiff's factory.⁷

Beyond the Authority

The third form of deviation of authority is beyond authority. Essentially exceeding this authority is an action performed outside of its authority or not authorized (*onbevoegdheid*). Authority is limited by materials (substance), space (region: *locus*), and time (*tempus*). Beyond these limits a government act is an unlawful act (*onbevoegdheid*) which may be *onbevoegdheidrationemateriae*, *onbevoegdheidratione loci* and *onbevoegdheidrationetemporis*.⁸ So it is clear that the benchmark of a beyond of authority acts is the authority itself.

⁶Ridwan HR. *Hukum Administrasi Negara*, Jakarta : Rajagrafindo Persadap. 386.

⁷Aminuddin Ilmar. (2014). *Hukum Tata Pemerintahan*. Jakarta: Kencana, p. 275.

⁸Philipus M. Hadjon dalam Aminuddin Ilmar, *Ibid.*, p. 119.

The Government Administration Law regulates both *detournement de pouvoir* and beyond authority into a term of abuse of authority. In this Law there is an extension of meaning which abuse of authority is not merely interpreted as *detournement de pouvoir* but more broad. Article 17-19 of the Government Administrative Law regulates abuse of power as follows.

Article 17

- (1) Agency and / or government officials are prohibit to misuse their authority.
- (2) The prohibition of abuse of power as referred to in paragraph (1) includes:
 - a. prohibition on beyond Authority;
 - b. prohibition on confusing Authority; and / or
 - c. prohibition of acting arbitrarily.

Article 18

- (1) The Agency and /or government officials shall be categorized as exceeding the authority as referred to in Article 17 paragraph (2) letter a if the their decision and /or action:
 - a. exceed the terms of officials or the period of validity of the power;
 - b. beyond the territory of the enforced authority; and / or
 - c. contrary to the provisions of legislation.
- (2) The Agency and / or Government Official shall be categorized as confusing the Authority as referred to in Article 17 paragraph (2) letter b if the Decision and / or Action:
 - a. outside the scope of the area or material of the given authority; and / or
 - b. contrary to the purposes of the given authority
- (3) The Agency and / or Government Official shall be categorized as arbitrary the Authority as referred to in Article 17 paragraph (2) letter c if the Decision and / or Action :
 - a. Without authority basis ; and/or
 - b. Against the verdict

Article 19

- (1) Decisions and/or determined measures and/or performed by exceeding Authority as referred to in Article 17 paragraph (2) letter a and Article 18 paragraph (1) as well as Decisions and / or Measures established and / or conducted arbitrarily (2) letter c and Article 18 paragraph (3) is not valid if it has been tested and there is a Court Decision with permanent legal force.
- (2) Decisions and / or Measures established and / or committed by confusing Authority as referred to in Article 17 paragraph (2) letter b and Article 18 paragraph (2) may be revoked if it has been tested and there is a Court Decision with permanent legal force.

This provision indicates a paradigm shift in terms of nomenclature and meaning of types of irregularities over authority. The abuse of authority is no longer narrowly defined as

detournement de pouvoir but more widely reaches deviations from other authorities. So the terms of abuse of powers included *detournement de pouvoir*, beyond authority even includes violations of the Laws and General Principles on Good Governance (Asas-Asas Umum Pemerintahan yang Baik/AUPB).

Beyond the authority referred to in Article 18 paragraph (1) a and b of the Government Administration Law is in fact referred to earlier as *onbevoegdheidratione loci* or beyond the authority of territory and *onbevoegdheidrationetemporis* or beyond the authority of time. Also included in it is a violation of the law that is contrary to laws and regulations. Elements beyond this authority are cumulative alternatives, meaning they can be fulfilled in a part or in a whole.

Mixing authority in Article 18 paragraph (2) letter a of the meaningful administrative law *onbevoegdheidrationemateriae*. Over the authority in the matter of authority, this is categorized as confusing authority because it has different legal consequences with *onbevoegdheidratione loci* and *onbevoegdheidrationetemporis*. Mixing of authority also concerns the *detournement de pouvoir* contained in Article 18 paragraph (2) b, or in the literature Administrative law was originally known as abuse of authority. So now, the *detour de pouvoir* is acting contrary to the purpose of authority, referred to as confusing authority.

The arbitrary action in Article 18 Paragraph (3) Sub-Paragraph a of the Government Administration Law is different from the concept of *willekeur*. On the *willekeur*, which serve as an indicator is the rationality of the reasons for taking the government's action. The arbitrary nature of the Government Administration Law covers two aspects: without grounds of authority and / or contradiction to the permanent court verdict or judgement. This according to the author is actually somewhat confusing, because the element "without authority basis" is basically almost the same as *onbevoegdheid* which has been outlined in Article 18 Paragraph (1) a and Paragraph (2) letters. In the *onbevoegdheid* state administration has no basis of authority so that it exceeds the territory of office, time and / or matter of authority. In the explanation of the law also not explained the description and the differences between all of them. Only the legal consequences of the forms of abuse of authority mentioned in Article 19. Therefore, I considers related Article 18 Paragraph (3) a of this letter needs to be explained further.

One element of arbitrary in Article 18 Paragraph (3) letter b is contradictory to a Court

Decision with a permanent legal force. So the state administration is declared arbitrary if its actions violate the decision that has been *inkracht van gewijde*. This matters also shows efforts to maintain respect and execution of court decisions and to prevent any attempt to deny the Court's decision.

The concept of *willekeur* which is theoretically defined as arbitrary in this Law is not included in the arbitrary category in Article 18 Paragraph (3) nor in the category authority misused in general. None of these forms of abuse are provided in articles 18 and 19 of the Government Administration Law which makes “rationality of consideration or reason for taking government action” as a benchmark of abuse of authority. So clearly in this case the *willekeur* is not categorized as an abuse of power based on the Government Administration Law.

Although the abuse of authority not included of *willekeur*, it does not mean *willekeur* may be done by the government. The government still can not take action for irrational reasons. This is, for example, implied in some articles which state on every government action, it should include reasons, for example in Article 36 in the case of a denial of assistance. State Administration decision making should also be based on clear reasons as set forth in Article 55 of the Government Administration Law.

Nevertheless, rationality is no longer the main indicator in determining an abuse of power. It is also not attributed to the AUPB (General Principles of Good Governance) by law scholars attached to the principle of motivation in acting or the principle of propriety because these principles are no longer known in the Government Administration Law. Even if it should be attached to the AUPB under the Act Administration of government, the most approaching as a means of rationality test is the accuracy and impartiality.

Therefore, the *willekeur* is still not permitted for the state administration. But the consequences of the *willekeur* are not fully regulated as the abuse of authority. This is different from the abuse of authority as regulated in Article 19 of the Administrative Law.

In the event of a misuse of authority in the form of exceeding authority and acting arbitrarily, the Administration Court shall declare such decision and / or action to be invalid. The invalidity in this Administration Court Judgement is the same as the concept of null and void in civil law. This means that from the outset it is considered to be absent and the circumstances that have occurred as a result of the decision and / or action are returned to its

original state. Whereas in the case of abuse of authority in the form of confusing authority, the consequences when sued in the PTUN is reversible. The purpose of cancellation is The Administrative Court may cancel or not cancel a Decision and / or Government action.

I make an identification to make it easier to understand the abuse of this authority. The first identification is the division of deviations from the authority known in the theories advanced by scholars and in the literature of state administrative law described as follows:

No.	Types of Abuse of Power	Indicators
1.	<i>Detournement de pouvoir</i> / abuse of power	Depart fromt the purposes of the given authority
2.	<i>Willekeur</i> /irreasonable/ irrationality	Unreasonableness of the consideration in the decision
3.	Beyond authority/ <i>onbevoegdheid</i>	- Onbevoegdheidrationemateriae, - Onbevoegdheidratione loci, and - Onbevoegdheidrationetemporis

Discretion is an extraordinary government action that can easily be exploited by state administration as a shield for abuse of authority. Discretion, especially free discretion, as a consequence of governmental freedom, often leads to confusion in law enforcement that considers an act of discretion to be a misuse of authority. Discretion, especially free discretion, is justified and can not be punished.

The mistake of declaring discretion as a misuse of authority makes many officials get legal problems especially corruption. Officials in some cases undertake discretion to address a concrete and urgent issue, but are declared as abuse of authority resulting in state losses that are subject to punishment for alleged acts of corruption. Abuse of authority is an element in the criminal act of corruption as regulated in Article 3 of Law Number 31 Year 1999 as amended by Law Number 20 Year 2001 on the Eradication of Corruption (hereinafter only referred to as PTPK Law). This can not be separated from the lack of understanding of state administration and law enforcement on the extent to which discretion can be done so as not to become an abuse of authority.

Some cases of corruption indicate the possibility of confusion in assessing discretion

as abuse of authority, such as the case of Teddy Tengko and Irianto MS Syafiuddin aka Yance. Both are declared free at the first level because of they both considered to be discretionary so that they can not be punished. However, on the appeal level they are still subjected to a verdict of corruption. Indeed there is sometimes a mistake in applying the law to the misuse of authority in the Corruption Court or the actual General Court is the authority of the PTUN (Administrative Court). It is because the indicators used in the case of abuse of authority is basically different from the indicators on the Act against the law. Indriyanto Seno Adji commented on this by saying that:

.. The two elements are distinctly different from both the “material feit” and “strafbarefeit” sides, therefore the placement of these provisions constitutes separate articles in the Indonesian Corruption Act. Often found a misunderstanding or even not understood by law enforcement officials including the judiciary as the ultimate pillar of the law, the element of "misuse of authority" is based on the principle of propriety by the principle of “materialelewederechtelijkheid” the principle of principle is a very worrisome error, and things this is found in the case of Ir. Akbar Tandjung at the first level of the Central Jakarta District Court (later annulled by the Supreme Court). Similarly, the former Director of Bank Indonesia has the [sic!] With "beleid" (public policy).⁹

Indriyanto Seno Adji then continued his opinion regarding this matter by saying:

In the case that the parameters of the rule of law as positive law are inconsistent with the development of society and state to determine whether an acts abuse of power or not, the propriety principle is one of the parameters whose primarity is of the parameters, and this parameter is not written in character and categorically as the criteria for determining whether or not there is an element of “abuse of power”, however, in the area of Government Administration Law, even though this discretionary authority often deviates from the principle of propriety, it is justified in the case that this active authority is necessarily implemented on the basis of urgent conditions and or emergency nature.¹⁰

In fact in the State Administration Law has been regulated on the consequences of the discretion in this matters to be intended on how discretion will lead on abuse of power as regulated in article 30 until 32, which stated :

Article 30

- (1) The use of Discretion is categorized beyond Authority if
 - a. acting beyond the time limit of entry into force of the powers granted by the provisions of legislation;

⁹Indriyanto Seno Adji. (2009). *Kebijakan Aparatur Negara & Hukum Pidana*. Jakarta: Diadit Media, p. 441.

¹⁰*Ibid.*, p. 442-443.

- b. acting beyond the territorial limits of the entry into force of the powers granted by the provisions of laws and regulations; and / or
 - c. not in accordance with the provisions of Article 26, Article 27, and Article 28.
- (2) The legal consequences of the use of Discretion as referred to in paragraph (1) become invalid.

Article 31

- (1) A discretion categorized as mixing the authority, if :
- a. The discretion is contrary to the purposes of given authority;
 - b. not in conformity to the regulations on the Article 26, Article 27, and Article 28; and/or
 - c. against the General Principles of Good Governance
- (2) the legal consequences on the using of discretion as stated in the paragraph (1) is can be invalidated. .

Article 32

- (1) A discretion categorized as arbitrary action whether the it was issued by unauthorized officials
- (2) the legal consequences on the using of discretion as stated in the paragraph (1) is can be invalidated. .

This provision looks at a glance not much different from the general abuse of authority as regulated in Article 17-19 of the Government Administration Law. But actually there are some differences and things that should be criticized.

First, in terms of exceeding authority. Article 18 Paragraph (1) Letter c which states that one form exceeds the authority is contrary to the prevailing laws and regulations. This is interpreted only narrowly in the application of discretion as seen in Article 30 Paragraph (1) Letter c which defines it as "not in accordance with the provisions of Article 26, Article 27 and Article 28" which only concerns the general procedure of a discretion. In fact, contrary to this law can not be interpreted narrowly only concerning procedural in general. Even violations of discretionary procedures are not narrowly understood only in Articles 26-28 of the Act, as there may be specific procedures established by other laws concerning the procedure of issuing such discretion, for example in bound discretion, usually governed by ordinances and the requirement to issue such discretionary measures. So actually the form exceeds the discretion authority in Article 30 Paragraph (1) Letter c should be interpreted the

same as Article 18 Paragraph (1) Letter c that is contrary to the prevailing laws and regulations.

Second, the provision in Article 30 Paragraph (1) Letter c is the same as Article 31 Paragraph (1) Letter b which is a form of merging authority. This obviously causes confusion, because in terms of discretion incompatible with chapters 26-28 it can be categorized as transcending authority and confusing authority. Though both have different consequences, because exceeding authority must be declared invalid while mixing authority is irrevocable. Therefore, according to the author, this provision should only be regulated in the realm beyond the authority as a form of contradictory to the legislation.

Another difference is that elements contradicting to the General Principles of Good Governance are included in categories exceeding authority in discretion. While the general provisions on exceeding the powers set forth in article 18, there is no mention of such elements. Another thing that is also different is that the element contrary to a judicial ruling with a legal force remains not included as an arbitrary element in discretion. The differences are according to the researchers should be avoided and synchronized only, so it is aligned and does not cause confusion in applying it.

Based on the description, to facilitate the understanding of the scope of abuse of authority in the discretion, the researcher draws a criterion or distinction limits between discretion and abuse of authority. It is presented in the following table:

No.	Benchmark	Discretion	Abuse of Power
1.	Time, Place and Authority Substances	<ul style="list-style-type: none"> - On bound discretion, discretion must be done within the scope of time, place and matter of authority possessed - On free discretion, must also be in accordance with the scope of time and place of authority. In the case of authority material, as it is not specifically regulated, it is sufficiently within the scope of its authority. For example the head of the education office, can perform a free discretion in the field of education, not in other areas such as health, etc. 	Out of the scope of time, place, and terms of the authority. On the free discretion, since it is not specifically regulated, it goes beyond the scope of its authority
2.	Purposes	<ul style="list-style-type: none"> - In terms of bound discretion, it 	Out of the purposes of

		<p>shall be in accordance with the purpose of granting such discretionary authority.</p> <ul style="list-style-type: none"> - In the case of free discretion, implemented to realize the purpose of the state that is protecting the entire Indonesian nation and the entire blood of Indonesia, and to promote the general welfare, educate the life of the nation and participate in implementing the world order. 	the discretion.
3.	Conformity with the Law	Must be in accordance with the rule of law as well as the decision of a court with permanent and / or legal force	Contrary to the rule of law as well as the permanent court judgement and or General Principles of Good Governance.
<p>One that is also actually a benchmark, but not regulated in the Government Administration Act as a misuse of authority is a consideration / reason for discretion (in this case is a willekeur indicator). Discretion must be made by expressing the reasons for concrete and urgent conditions in terms of legislation that provides choice, not regulatory, incomplete, or unclear, and / or governmental stagnation. Beyond that it can be said to be a willekeur.</p>			

CONCLUSION

The Government Administration Act builds a new paradigm of abuse of authority by interpreting widespread misuse of authority comprising transcending authority, confusing authority and acting arbitrarily. There are several indicators so that discretion can be declared abuse of authority that is: Contrary to Law and/or AUPB; Violating Discretionary Procedures Notwithstanding the purpose of discretion or the purpose of the state in general, transcending authority (onbevoegdheid); and / or has no basis of authority. However, the concept of willekeur (irrational consideration in taking government action) is not explicitly regulated as part of the abuse of authority in the Government Administration Act.

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