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The Resolution and Accountability of State Financial Loss In Administrative and Criminal Law Perspectives

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ABSTRACT
Government officials, in performing public legal actions, may abuse their authority, resulting in financial loss to the state, which can have implications for both administrative and criminal resolution and liability. Purposes of this research, to determine and/or differentiate the resolution of financial loss to the state caused by the abuse of authority by government officials from administrative and criminal law perspectives, in order to avoid criminalizing government officials' actions and weakening the corruption eradication efforts. This research methods, this normative legal research applied a statute approach. The study findings indicate that the abuse of authority causing the state's financial loss is primarily resolved under administrative law based on Law No. 30 of 2014 concerning Government Administration. This involves the return of the financial loss to the state or regional treasury and the imposition of severe administrative sanctions. However, the abuse of authority causing state financial loss can be treated as a criminal offense if the Internal Supervisory Apparatus (APIP) or law enforcement agencies find elements of a criminal offense as defined in Article 2 paragraph (1) or Article 3 of Law No. 31 of 1999.

Keywords: *State Financial Loss; Administrative Law; Criminal law*

1. Introduction

Indonesia adheres to the principle of a welfare state or commonly known as a material legal state. In a welfare state, the government is not passive, meaning it is not solely responsible for maintaining the security and order of the people ("night watchman" role); it also actively participates in activities aimed at achieving the well-being of the populace.(Juliani, 2019) This principle aligns with Indonesia's state objectives, as enshrined in the Fourth Preamble of the 1945 Constitution, which is to advance the general welfare. The attribution of authority for the implementation of these state objectives is vested in the sovereign government as one of the elements of the state. In realizing the state objectives, the government is empowered to intervene in all matters concerning the lives of its citizens. In the effort to achieve the welfare of the people, the government, through its bureaucracy, provides public services to the community in a professional, non-discriminatory manner. However, the government's public services often encounter deviations and abuses that result in financial losses to the state and may lead to the occurrence of corruption offenses. The government continues to use various methods to eradicate criminal acts of corruption, but these methods do not necessarily make corruption disappear in this country,(Ilham, 2019) Even though efforts to eradicate corruption currently involve the Police, Prosecutor's Office and Corruption Eradication Commission.(Jupri, A.ST Kumala Ilyas, Suardi Rais, Rusmulyadi, 2022) Presently, corrupt behavior has permeated all branches of government, including the executive, legislative, and judicial branches, both at the central and regional levels.(Barhamudin, 2019)

Indonesia, as a country that upholds the supremacy of law, establishes that every practice of state administration is always based on laws and regulations, also known as the principle of legality. The government should organize the governmental affairs based on authority acquired through attribution, delegation, or mandate. The authority of government officials stems not only from laws and regulations but also, under certain circumstances, from discretionary powers (*freies ermessen*). The utilization of governmental authority is regulated in Article 17, paragraphs (1) and (2) of Law No. 30 of 2014 concerning Government Administration, which prohibits government officials from abusing their authority. This

prohibition encompasses actions such as exceeding authority, mixing different authorities, and acting arbitrarily. In performing their duties, government officials are susceptible to abusing their authority, which may result in the infringement of the rights of the citizens. This line of thought aligns with the notion put forward by Lord Acton's famous dictum: "Power tends to corrupt, and absolute power corrupts absolutely."(Dinata, 2021) Therefore, it is essential to establish supervision over the exercise of governmental authority to ensure that the actions taken by government officials conform to the applicable laws and regulations and provide legal protection for the citizens in the administration of government affairs.(Ridwan HR, 2010)

The enforcement of the state's administrative law is carried out through supervision and the application of sanctions. Supervision aims to ensure whether the implementation of government duties has been carried out correctly or not.(Rais, 2019) The supervision of the prohibition of abuse of authority by government officials is conducted by the Internal Governmental Supervisory Apparatus (APIP). The result of the APIP's supervision of the use of government officials' authority may fall into several categories, one of which is the administrative errors leading to the state financial losses. According to the Law on Government Administration, administrative errors causing state financial losses should be resolved through administrative procedures and sanctions. It is necessary to examine these provisions because the abuse of authority resulting in state financial losses may contain an element of corruption offenses as stated in Article 2, paragraph (1), and Article 3 of Law No. 31 of 1999, namely the abuse of authority and the state financial loss. The APIP's authority in resolving abuse of authority that causes state financial loss will inevitably intersect with the authority of Law Enforcement Apparatus (APH) in combating corruption offenses. Changes in the legal domain may determine the mechanism of resolution and the form of legal accountability, whether cases of abuse of authority resulting in state financial losses are resolved through administrative law with administrative sanctions or addressed through criminal law with criminal sanctions. Therefore, precision is required from both the Internal Governmental Supervisory Apparatus and the Law Enforcement Apparatus to avoid the criminalization of government officials' actions and also to ensure that the efforts to combat corruption offenses are not weakened.(M. Irsan Arief, 2022a) The following is an example of the Mataram High Court decision No. 4/Pid.TPK/2022/PT MTR, decided to release the defendant from all demands for punishment by not being sentenced to a crime because the act was an administrative error. Based on this description, the problems that will be answered in this research are how to resolve and account for state financial losses from an administrative law perspective and how to resolve and account for state financial losses from a criminal law perspective.

2. Method Research

This work is categorized as a normative legal study or a literature review. Data sources in this study consisted of secondary data, such as legislative provisions, court decisions, legal journals, legal books, legal theories, opinions of legal experts, legal dictionaries, and legal encyclopedias. The research employed a statute approach, which involved examining all regulations related to the legal issue under investigation to gather information and answers to the legal issues being studied. Data for this study were collected through literature review and document analysis. Subsequently, the gathered data were analyzed qualitatively This involved interpreting the processed legal materials to provide arguments for the research findings.(Muhaimin, 2020)

3. Results and Discussion

3.1. Results

a. State Financial Loss

The state's administrative law is inseparable from criminal law/corruption, as it plays a crucial role in ensuring good and clean governance, free from corruption, collusion, and nepotism. Additionally, administrative law is expected to prevent corruption through both preventive and repressive measures, closely related to the use of authority by government officials as specified in laws and regulations. From the perspective of a welfare state, the management of state finances in Indonesia is mandated by Articles 23, 23A-G, and 33 of the 1945 Constitution. This financial management should be carried out openly and responsibly to promote the maximum prosperity of the people. In this regard, the management and accountability of state finances require the principles of state administrative law.(Tjandra, 2014) Furthermore, to realize good and accountable financial management, supervision is needed, both internally and externally.(Ernita Rahmadhani Bym, Andi Pangerang Moenta, 2021) The Audit Board (BPK) is a state institution that has the authority to carry out audits of the management and responsibility of state finances. In exercising its duties, BPK has the authority to conduct three types of audits: financial audit, performance audit, and specific purpose audit. The results of the BPK examination are presented to the representative institutions and the government at their

respective levels for further action in accordance with the law. The Internal Governmental Supervisory Apparatus (APIP) is a government agency with the main duty and function of conducting internal supervision and preventing errors in every governmental action and rectifying any mistakes to prevent their recurrence. According to Government Regulation No. 60 of 2008 on the Internal Control System of the Government, APIP consists of the Financial and Development Supervisory Board, the Inspectorate General, or other names given to it, the Provincial Inspectorate, and the Regency/Municipality Inspectorate. In carrying out its supervisory role, the APIP conducts two types of audits: performance audits, which focus on the state's financial management and the implementation of tasks and functions of government agencies, and specific purpose audits, which encompass audits beyond performance audits.

Managing state finances is not an easy task, as it comes with various challenges and risks, including the occurrence of state financial losses. As defined in Article 1 number 5 of the Law on the Audit Board and Article 1 number 22 of the Law on State Treasury, state losses refer to a deficiency of money, securities, or tangible goods in a certain and evident amount resulting from unlawful acts, whether intentional or negligent. The term "state finances" as defined in Law No. 17 of 2003 encompasses all rights and obligations of the state that can be valued in monetary terms, as well as all matters, whether in the form of money or goods, that can be considered state property related to the implementation of those rights and obligations. In the Law on the Corruption Offense Eradication and the Law on Government Administration, the term used is "state financial losses." While "state financial losses" and "state losses" have different meanings, they are interconnected. State losses occur as a result of unlawful acts committed intentionally or negligently, whereas "state financial losses" is not explicitly defined in the laws. However, in the Law on the Corruption Eradication, "state financial losses" can be understood as the loss or reduction of state finances resulting from unlawful acts and/or the abuse of authority, opportunities, or means due to one's position or position. Furthermore, in the Law on Government Administration, state financial losses can occur with or without the element of abuse of authority.

The potential for state financial losses is at the stage when funds will be entered into the state treasury and at the stage when funds will be removed from the state treasury.(Ajawaila, 2023) The various forms of state financial losses include the expenditure of state assets in the form of money or goods that should not have been incurred, the expenditure of state assets in the form of money or goods that exceeded what is deemed appropriate according to applicable criteria, the loss of state assets in the form of money or goods that should have been received, the receipt of state assets in the form of money or goods that are smaller or lower than what should have been received, including receiving damaged goods or goods that do not meet specifications or criteria, the emergence of state obligations that should not exist, the emergence of obligations that are greater than what should be, the loss of state rights that should be possessed, and the state receiving fewer rights than it should.(M. Irsan Arief, 2022b) In essence, state financial losses fall within the domain of administrative law, where the resolution and legal accountability are based on provisions of administrative law, including the Law on Government Administration, the Law on State Treasury, the Law on State Finance, and other related regulations. However, on the other hand, state financial losses may also come under the domain of criminal law, specifically corruption offenses, as stated in Article 2 paragraph (1), and Article 3 of the Law on the Corruption Eradication. Therefore, the resolution and legal accountability for state financial losses are addressed in both the perspective of administrative law, which is the domain of the APIP, and the perspective of criminal law, which falls under the authority of APH.

b. Resolution and Accountability of State Financial Losses in the Perspective of Administrative Law

Abuse of authority and state financial losses are terms in administrative law. Fundamentally, every exercise of authority by government officials must be based on prevailing legislation (the principle of legality) and the general principles of good governance. Additionally, authorized government officials may exercise discretion, subject to the conditions and procedures stipulated in the prevailing laws and regulations. Government officials are prohibited from abusing their authority, and this prohibition constitutes one of the principles under the general principles of good governance, i.e., the principle of non-abuse of authority. This principle obliges every government official not to utilize their authority for personal or other inappropriate interests, and not to exceed, abuse, or intermingle their authority. In the exercise of authority by government officials, the principle of specialty (*specialiteitsbeginsel*) applies, which determines that authority is granted to government bodies for specific purposes. Deviation from this principle results in the abuse of authority (*detournement de pouvoir*). According to Law No. 30 of 2014, government officials are considered to have engaged in the abuse of authority if, in making decisions or taking actions, they exceed their authority, intermingle their authority, and/or act arbitrarily.

The outcomes of the supervision conducted by the APIP regarding the use of authority by government officials can fall into three categories: absence of errors, presence of administrative errors, or presence of administrative errors resulting in state financial losses. The presence of state financial losses does not automatically trigger criminal

prosecution, as there are also avenues for recovering state financial losses through administrative law by imposing administrative sanctions and civil law through claims for compensation (civil lawsuits). Administrative errors resulting in state financial losses can arise due to either abuse of authority or other reasons unrelated to abuse of authority. In cases where APIP's supervision identifies administrative errors causing state financial losses, the restitution of state financial losses must be made within a maximum of 10 (ten) working days from the date the supervision result is decided and published. Furthermore, the APIP's examination results indicating administrative errors causing state financial losses, due to the presence of elements of abuse of authority, which are also elements in corruption offenses under Article 2, paragraph (1), and Article 3 of the Law on corruption eradication, are considered within the realm of administrative law when there is no intention to benefit oneself or others or corporations, in other words, there is criminal intent (*mens rea*) in such actions. Consequently, the resolution and legal accountability for such administrative errors are conducted in accordance with administrative law.

According to M. Irsan Arief, government officials' actions that involve administrative errors (unlawful act/abuse of authority) resulting in financial losses to the state, as long as they are not done with the intention of benefiting oneself, others, or corporations, are still considered within the domain of administrative law. Abuse of authority falls under criminal law if it is committed intentionally. However, if the abuse of authority occurs due to negligence or carelessness (*calva*), it does not fall under criminal law but remains within the realm of administrative law, with its resolution and legal accountability based on administrative law. Furthermore, based on the opinion of the Constitutional Court in Decision Number 25/PUU-XIV/2016, with the existence of the Law on Government Administration, administrative errors resulting in state financial losses and the presence of abuse of authority by government officials are not always subject to corruption criminal charges, and their resolution is not always through criminal law.(Putusan Mahkamah Konstitusi Republik Indonesia Nomor 25/PUU/XIV/2016, 2016) Hence, there are two boundaries concerning the use of administrative law and criminal law when government officials are suspected of engaging in corruption. If the actions or policies of government officials are due to mistakes, administrative errors, or procedural defects, then the approach used is the administrative law approach. On the other hand, if there is criminal intent (*mens rea*) in the actions or policies and they are clearly aimed at enriching oneself, others, or corporations while causing financial losses to the state, then the criminal law approach is used as stipulated in Article 2, paragraph (1), and Article 3 of the Law on corruption eradication.(Trisna, 2021)

The state financial losses, from the perspective of administrative law, is essentially oriented towards the recovery of state losses and can be subject to cumulative administrative, criminal, and civil sanctions.(Suhendar and Kartomo, 2020) Furthermore, according to Law No. 30 of 2014 on Government Administration, the resolution and accountability for administrative errors resulting in state financial losses are as follows: If the administrative error causing state financial losses occurs not due to abuse of authority, then the responsibility for restitution is imposed on the government agency, and the resolution is carried out by the agency returning the money to the state treasury. On the other hand, if the administrative error causing state financial losses is due to abuse of authority, then the responsibility for the losses is imposed on the government official, and the resolution is carried out by the official returning the money to the state treasury. The imposed administrative sanction is a severe administrative sanction based on Article 80, paragraph (4) of the Law on Government Administration, and the imposition is carried out according to Government Regulation No. 48 of 2016 on the Procedure for Imposing Administrative Sanctions on Government Officials. In addition to restitution to the state or regional treasury, if the state financial losses occur not for the protection of public interest, are done in bad faith with the intention of self-enrichment or benefiting others or corporations, and evidence of criminal deviations is found, then the APIP reports and hands over the further process to the APH.

Urthermore, Law No. 1 of 2004 concerning State Treasury also regulates the resolution of state losses for treasurers, civil servants who are not treasurers, or other officials. The law stipulates that in principle, any state losses caused by unlawful actions or negligence of an individual must be compensated by the responsible party, ensuring the recovery of state losses through this resolution. In this regard, the leaders of state ministries/agencies/head of regional work units must immediately file a claim for restitution once state losses are identified. After the state financial losses are known, the person involved is promptly requested to provide a statement of willingness to compensate for the state losses incurred . If an absolute statement of accountability cannot be obtained or does not guarantee the return of state finances, the respective minister/agency leader/regional head should issue a temporary liability letter for the loss compensation. The imposition of state loss compensation against treasurers is determined by the BPK, and if criminal elements are found, it is followed up in accordance with the applicable laws and regulations.(Panjaitan, 2017) As for non-treasurer civil servants, the imposition of state loss compensation is determined by the respective minister/agency leader/regional head. The mechanism for settling the loss compensation for treasurers is regulated in the Regulation of the Audit Board No. 3 of 2007, while for non-treasurer civil servants or other officials, it is regulated by Government Regulation No. 38/2016. Furthermore, the party identified to compensate for the losses may be subject to administrative sanctions and/or criminal sanctions.(Juliani, 2017) Provisions that require the BPK to report findings of criminal elements in financial audits to the

authorized agency as intended in Article 14 of Law no. 15 of 2004 concerning Management and Responsibility of State Finances, is a manifestation of the BPK's role in speeding up the processing of prosecutions for criminal corruption cases.(Lisa Ade Candra, Achmad Ruslan, 2022)

c. Resolution and Accountability of State Financial Losses in the Criminal Law Perspectives

Abuse of authority and state financial loss are elements of corruption as stipulated in Article 2 paragraph (1) and Article 3 of the Law on the Corruption Eradication. The existence of Article 2 paragraph (1) and Article 3 in the Law on Corruption Eradication has been revoked with Article 603 and Article 604 of Law No. 1 of 2023 concerning the Criminal Code, which will take effect in 2026. Regarding the element of causing state financial loss in corruption cases, the Constitutional Court in Decision No. 25/PUU-XIV/2016, has decided that the term "*dapat* (may)" in the element of causing state financial loss, which is found in Article 2 paragraph (1) and Article 3 of Law No. 31 of 1999 on the Corruption Eradication, as amended by Law No. 20 of 2001, is contrary to the 1945 Constitution and lacks binding legal force. Thus, the offense of corruption as stipulated in Article 2 paragraph (1) and Article 3 is no longer a formal offense, but has become a material offense, where the state financial loss is no longer interpreted as potential loss but as actual loss that has already occurred. The application of the element of "causing state financial loss" has shifted to emphasize the consequences, not just the act itself. The "state loss" is the result of unlawful acts that benefit oneself, others, or corporations as referred to in Article 2 paragraph (1) of the Law on the Corruption Eradication, while the "state financial loss" is the result of abuse of authority with the intention of benefiting oneself, others, or corporations as referred to in Article 3 of the same law.

Administrative errors that cause state financial loss to the state, which were initially subject to resolution and accountability under administrative law, may change and be treated as criminal acts of corruption if, based on the Law Enforcement Agencies found evidence of a criminal nature, thus fulfilling all the elements in Article 2 paragraph (1) or Article 3 of the Law on Corruption Eradication. The restitution of the state financial loss does not absolve the criminal liability of the perpetrator of corruption who has fulfilled the elements in Article 2 and Article 3; it only serves as a mitigating factor. The restitution of the state financial loss by government officials does not necessarily preclude the authority of Law Enforcement Agencies to prosecute under criminal law if there is evidence of criminal intent (*mens rea*) in the unlawful acts or abuse of authority that led to the state financial loss. The elements of corruption in Article 2 paragraph (1) of the Law on Corruption Eradication are as follows: any person; acting unlawfully; enriching oneself or others, or corporations; and may cause the state financial loss. The presence of the element "acting unlawfully" in Article 2 paragraph (1) is not a substantive element but rather a means to carry out the prohibited act of enriching oneself or others, or corporations. Therefore, the fulfillment of the element of acting unlawfully does not by itself result in the criminal liability of another person unless it can be proven that the unlawful act is intended to enrich oneself, others, or corporations.(Shinta Agustina, Roni Saputra, Alex Argo Hernowo, 2016)

The lack of precision on the part of Law Enforcement Agencies in uncovering and proving the nature of unlawfulness may have adverse effects on handling corruption cases, as it can lead to uncertainty and arbitrariness due to the presumption that any act in violation of law and regulations, even if causing state financial loss, is an act of corruption. Essentially, any act in violation of civil or administrative regulations inherently possesses the nature of unlawfulness, but this does not automatically fall under the category of criminal unlawfulness, particularly in cases of corruption. Theoretically, for an act of violation to constitute a criminal unlawfulness (formal unlawfulness), especially in the context of corruption as stated in Article 2 paragraph (1), several additional conditions need to be fulfilled: the violation must be committed intentionally; the violator must be aware or conscious of its potential to cause financial loss to the state; the violation must be logically potential to result in financial loss to the state or the state's economy; and the violation must be carried out with the intent of enriching oneself or others, or corporations. These four conditions in the context of corruption under Article 2 paragraph (1) are cumulative; all of them must be fulfilled. If all conditions are met, the act that was initially considered as civil or administrative unlawfulness can then be turned into criminal unlawfulness/corruption, and the perpetrator can be held accountable and subject to criminal liability.(Adami Chazawi, 2014) Therefore, the factor for determining whether or not the nature of unlawfulness and state financial loss falls under the domain of criminal law/corruption, as stipulated Article 2 paragraph (1), is the awareness or consciousness of the perpetrator in committing the unlawful act with the intention of self-enrichment or benefiting others or corporations, as this element demonstrates the presence of criminal intent (*mens rea*) on the part of the subject of law.

The elements of corruption offense under Article 3 of the Law on Corruption Eradication consist of: any person; with the intent to benefit oneself or others or a corporation; abusing authority, opportunities, or facilities available to them due to their position or office; and can cause financial loss to the state or the state's economy. The element of "abusing authority" in the corruption offense is a species of the genus delict "acting unlawfully" and will always be associated with

the actions of public officials. According to Andi Hamzah, the formulation of the element "with the intent to benefit oneself or others or a corporation" as specified in Article 3 is the intent with specific aim or *opzetmet oogmerk*, where the crucial point to be proven is whether the act of abusing authority is intended to benefit oneself or others or a corporation.(Nugraha, 2016) The decisive element in Article 3 is when the element "with the intent to benefit oneself or others or a corporation" is fulfilled, the act of abusing authority that results in state financial loss transforms into a criminal offense/corruption. In this context, although it is proven that the elements of abusing authority and causing state financial loss under Article 3 exist, it does not automatically qualify as a corruption offense unless it can be proven that the subject who committed the abuse of authority resulting in financial loss to the state had a malicious intent, specifically, the perpetrator consciously intended to benefit themselves or others, or a corporation. Thus, the law enforcement apparatus in its investigation and inquiry must find evidence of malicious intent and wrongful actions in the unlawful act or abuse of authority that causes state financial loss and meets all elements of the criminal offense under Article 2 paragraph (1) or Article 3 of the Law on Corruption Eradication. Only then, the resolution and legal accountability for such actions will be conducted according to criminal law, with the imposition of criminal sanctions.

3.2. Discussion

Basically, abuse of authority and loss of state finances are terms that fall within the realm of administrative law, which can also enter the realm of criminal law. There are 2 (two) limitations regarding the use of administrative law and criminal law in the event of state financial losses. If a government official commits an act of abuse of authority which causes state financial losses, which is caused by an error or administrative error or procedural flaw as long as it is not carried out with the aim of benefiting himself or another person or corporation, then the approach used is an administrative law approach which is handled by Internal Governmental Supervisory Apparatus (APIP). Meanwhile, if an act of abuse of authority that causes state financial losses occurs due to malicious intent (mens rea) on the part of the perpetrator and is clearly carried out to enrich himself or another person or corporation, then the criminal law approach as intended in Article 2 paragraph (1) or Article 3 of the Corruption Eradication Law is handled by Law Enforcement Apparatus (APH). This research problem was also studied by previous researchers, namely (Marojan Panjaitan, 2017; Suhendar & Kartono, 2020). There are similarities between this research and 2 (two) previous studies, namely discussing state financial losses from the perspective of administrative law and criminal law. However, when compared with the 2 (two) studies, this research has a different study focus, namely examining the resolution and accountability for state financial losses from the perspective of administrative law and criminal law with the aim of clarifying the limits of the authority of the Government's Internal Oversight Apparatus and the authority of the Law Enforcement Apparatus. in resolving state financial losses.

4. Conclusion

The abuse of authority and state financial loss are essentially terms within the realm of administrative law. However, these terms also constitute elements in the offense of corruption. If an unlawful act or abuse of authority causing state financial loss is committed without intent or not intended to benefit oneself or others, or a corporation, in other words, there is no criminal intent (*mens rea)* in such actions, then the resolution and accountability are handled administratively. This involves the government official returning the funds to the state or regional treasury and facing severe administrative sanctions as regulated in the Government Administration Law. However, if the unlawful act or abuse of authority is committed intentionally and driven by criminal intent (*mens rea*) on the part of the perpetrator to benefit oneself or others, or a corporation and meets all elements of the criminal offense under Article 2 paragraph (1) or Article 3 of the Law on Corruption Eradication, then the unlawful act or abuse of authority causing financial loss to the state will be categorized under the domain of criminal law/corruption. The resolution and legal accountability for such actions will be governed by the provisions of criminal law/corruption, and the perpetrator will be subjected to criminal sanctions.

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