

# INTERNATIONAL JOURNAL OF CREATIVE RESEARCH AND STUDIES

www.ijcrs.org

ISSN-0249-4655

## Depenalization Elements of Abuse of Power From Corruption Delict

A'an Efendi

Lecturer, Faculty of Law, University of Jember, Jember

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### **Abstract**

*The decision of the Supreme Court interprets the meaning of abuse of power in a corruption delict Article 3 of Law no. 31 of 1999 concerning the Eradication of Criminal Acts of Corruption is the same as the meaning of abusing the power in Law no. 5 of 1986 concerning the Administrative Court resolves the problem of law enforcement in corruption cases but raises problems in the legal theories. The two laws are not related to the same subject so the concept of abusing the power cannot be used in the two laws simultaneously. Depenalization of the element of abusing power from corruption delict to create legal certainty that abusing the power is part of administrative law so that the settlement procedure also uses administrative law tools instead of criminal law (corruption delict).*

**Keywords:** *depenalization, abuse of power, legal certainty.*

### **Introduction**

This research refers to Article 3 of Law no. 31 of 1999 concerning the Eradication of Criminal Acts of Corruption (the ECAC Act), which states as follows:

Anyone with the intention of enriching himself or other persons or a corporation, abusing the power, the facilities or other means at their disposal due to rank or position in such a way that is detrimental to the finances of the state or the economy of the state, shall be liable to life imprisonment or a prison term of not less than 1 (one) year and not exceeding 20 (twenty) years and/or a fine of not less than Rp 50.000.000 (fifty million rupiah) and not exceeding Rp 1.000.000.000 (one billion rupiah).

One of the elements of a corruption delict in Article 3 of the ECAC Act is abusing the power, opportunities, or facilities available to him because of his position or position. The element of this corruption delict raises three legal problems. First, what is meant by abuse of power? This question has no answer in the ECAC Act, either

in a general explanation or in its articles. To obtain answers to these questions, the decision of the Supreme Court to apply the provisions of Article 3 of the ECAC Act in cases of corruption delict.

Based on the results of the investigation, founded that five decisions of the Supreme Court in the case of corruption delict interpreted the meaning of abusing power in corruption act according to Article 3 of the ECAC Act, namely:

1. The decision of the Supreme Court of the Republic of Indonesia Number 1340K/Pid/1992 in the corruption delict case with the defendant Drs. Striking Wijono.
2. The decision of the Supreme Court of the Republic of Indonesia Number 977K/Pid/2004 in the corruption delict case with the defendant Prof. Dr. H. Heru Soeprapto, SH.SE.
3. The decision of the Supreme Court of the Republic of Indonesia Number 979K/Pid/2004 in the corruption delict case with the defendant Drs. Hendrobudiyanto.
4. The decision of the Supreme Court of the Republic of Indonesia Number 1485K/Pid.Sus/2013 in the corruption delict case with the defendant M. Riza Kurniawan, SE.
5. The decision of the Supreme Court of the Republic of Indonesia Number 3/Pid.Sus-TPK/2015/PN.Tpg in the corruption delict case with the defendant Yusrizal.

The five decisions of the Supreme Court, the panel of judges in the weighing section interprets the abusing power by taking over the abuse of power in administrative law consists of three forms. First, abuse of power is an act that is contrary to the public interest or to benefit personal or group interests. Second, abuse of power means that the actions of government organs or officials are right for the public interest but deviate from the purpose for which the authority is granted by law or other regulations. Third, abuse of power means abusing procedures that should be used to achieve certain goals but have used other procedure to achieve that goal.

Based on the meaning of abusing power in the decision of the Supreme Court, a second legal problem arises, namely the inaccuracy of Article 3 of the ECAC Act, which defines everyone as the subject of an offense. The reason is that only the point of the power owner can commit acts of abusing his authority, and not everyone can become the owner of the power according to administrative law. Following Article 1 point 3 of the ECAC Act, everyone is an individual or a corporation. Apart from the point of corruption offenses, there are specific subjects, namely civil servants, state administrators, advocates, judges, contractors, and construction experts.

The third legal problem is whether or not it is appropriate to impose a criminal offense in a corruption delict using the concept of abusing power which is a concept of administrative law. This needs to be questioned because administrative law has procedures to resolve acts of abusing power committed by government organs or officials. Law Number 30 of 2014 concerning Government Administration in (the GA Act) Articles 20 and 21 regulates the procedure for resolving abuse of power according to administrative law carried out by the Government Internal Supervision Apparatus and Administrative Court. Article 20-21 of the GA Act make it an abuse of power in two different legal regimes with different procedures. The existence of dualism in the procedure resolving cases of abuse of power between criminal law (corruption delict) and administrative law makes the settlement of acts of abuse of power without legal certainty. Misuse of power by government organs or officials that has been resolved using open administration law procedures may still be a corruption delict. This opportunity is wide open because there are two different legal regimes that both regulate abuse of power but with different settlement procedures.

Based on these three problems, the central issue of this research is the idea of depenalization of the element of abusing power from corruption delict and placing abuse of power only in the administrative jurisdiction. From that idea, the novelty of this research is that abuse of power is a concept of administrative law so the settlement procedure must use administrative law, not criminal law. The central issue is divided into two sub-problems, namely: (1) why should the element of abusing power be depenalization from a corruption delict?; and (2) how will the act of abusing power be resolved after being depenalization from a corruption offense?

## Materials and Methods

This research is normative legal research about analyzing legal sources that have authority, namely the ECAC Act and the GA Act. The analysis was to find that abusing power is part of administrative law so that it cannot be part of a corruption delict and should be depenalization. To support this argument, it also analyzes legal sources without authority in the form of books, journal articles, or research reports that are relevant to the research issue.

## Discussion

Criminalization, depenalization, and decriminalization are basic concepts in criminal law, related but have differences. Criminalization is the process of making a certain act an offense.<sup>1</sup> Criminalization occurs when the law makes an act a prohibited act, and the perpetrator is subject to criminal sanctions. Depenalization is replacing of criminal sanctions against actions with legal sanctions, civil sanctions, or other administrative sanctions.<sup>2</sup> Discrimination is removed as an act from criminal law and cannot be given any sanctions.<sup>3</sup> In addition to the three legal concepts, criminal law also recognizes de-judicializing. De-judicializing still maintains the offensive nature of an act but gives the authority to enforce the act to an organ other than the court.<sup>4</sup>

The idea of depenalizing the element of abusing the power of a corruption delict is based on two reasons. First, abuse of power is administrative law regime so the settlement procedure must use administrative law, not criminal law (corruption delict). Article 3 of the ECAC Act includes abuse of authority as an element of a corruption delict without any explanation as to what is meant by abuse of power. The search for the minutes of discussion of the ECAC Act also does not find the meaning of abusing authority. Discussion of Article 3 of the ECAC Act only concerns the alternative to life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years which is confusing when linked to Article 21 paragraph (4) letter an of the Book Criminal Procedure Law.<sup>5</sup>

The Supreme Court in adjudicating corruption cases that apply Article 3 of the ECAC Act interprets the meaning of abuse of power as the same as abusing the existing power in administrative law in the form of three forms of action, namely:

1. Government organs or officials carry out actions within the scope of their authority, follow procedures appropriately, and comply with the laws and regulations governing their actions, but they use their power for purposes beyond that authority.
2. Abuse of authority is when a government organ or official uses its power for prohibited purposes, i.e. other purposes than those intended by the legislator.
3. Government organs or officials take action, not for a public interest, but personal or private purposes.<sup>6</sup>

Abusing power in administrative law is a deviation from the principle of specialty. According to this principle, an government organs or ofcials must use its power only for the purpose for which it was granted by law and not for any other purpose.<sup>7</sup>

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<sup>1</sup> Sudarto, *Hukum dan Hukum Pidana* (Bandung: Alumni, 1986), h. 31-32.

<sup>2</sup>Jean Pradel, *Criminal Law*, dalam George A. Bermann and Etienne Picand (eds), *Introduction to French Law*, (AH Alphen aan den Rijn, The Nethrlands: Kluwer Law International, 2008), h. 106.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Sekretaris Panitia Khusus Sekretariat Jenderal DPR-RI, *Risalah Rapat Panitia Khusus Rancangan Undang-Undang tentang Pemberantasan Tindak Pidana Korupsi* (Jakarta: Sekretaris Panitia Khusus Sekretariat Jenderal DPR-RI, 1999), h. 5.

<sup>6</sup> Bernard Schwartz, *French Administrative Law and The Common-Law World* (Clark, New Jersey: The Lawbook Exchange, Ltd, 2006), h. 216.

<sup>7</sup> Rene Seerden & Frits Stroink, *Administrative Law in the Netherlands*, dalam Rene Seerden & Frits Stroink(Eds), *Administrative Law of the Eurpean Union, Its Member States and the United States: Comparative Analysis* (Antwerpen-Groningen: Intersentia Uitgevers, 2002), h. 168.

Interpretation of the Supreme Court's decision that abuse of power in Article 3 the ECAC Act is the same as the meaning of abusing power in administrative law, resolving the problem of applying this article in law enforcement practices in corruption cases, but it raises problems from a legal theoretical point of view. Can abuse of power which is an administrative law concept be used in criminal law that is different from administrative law? To answer this question, using the modern interpretation.

The modern interpretation is an interpretation whose emphasis is on the meaning of the word in the context in which the word is used, so the most important thing in modern interpretation is the ability to identify the elements that make up the context. Modern interpretation interprets words based on two contexts, namely the problem of language which applies to all linguistic communication, and the problem of law which considers the specific problems of interpretation that arise from the technical nature of the law.<sup>8</sup>

Regarding the analysis of the context of language problems, *the principle of pari materia* means on the same subject applies.<sup>9</sup> Based on this principle, laws relating to the same subject must be interpreted consistently, for example, the definition of labor in the Labor Law will have the same meaning as labor in the Labor Union Law. According to *the principle of pari materia*, one legal concept can be used in several laws on the condition that these laws must relate to the same subject.

Based on *the principle of pari materi*, it means that one legal concept not be used in several laws if it does not relate to the same subject. The concept of abusing the power became the subject of the ECAC Act, Law no. 5 of 1986 concerning the Administrative Court (the AC Act), and the GA Act. The three laws have different subjects.

The ECAC Act, the subject is criminal law (corruption delict), the AC Act, the subject matter is substantive administrative law and adjective administrative law, and substantive administrative law is the subject of the GA Act. Because the ECAC Act has a different subject to the AC Act and the GA Act, the concept of power in the three laws cannot be interpreted consistently.

Only abusive concepts are power in the AC Act and the GA Act only which can be interpreted consistently because it relates to the same subject. So, the meaning of abuse of power contained in the ECAC Act, is different from the concept of abuse of power contained in the AC Act and the GA Act. The implication is that criminal law (corruption delict) cannot use the concept of abusing the powers contained in administrative law.<sup>10</sup>

After conducting a context analysis of language, the next step is to analyze the context of the law. Context analysis regarding law means every word, phrase, section, subsection, article, and paragraph in the ECAC Act must be interpreted in the context of the entire of the ECAC Act.

In the section "considering" point a the ECAC Act states that corruption crimes that have occurred so far have not only harmed state finances but also violated the social and economic rights of the wider community so that criminal acts of corruption need to be classified as crimes whose eradication must be carried out extraordinary. In the second paragraph of the general explanation of the ECAC Act, it is stated as follows:

In addition to this, considering that corruption in Indonesia occurs systematically and widely so that it is not only state finance but also has a violated the social and economic rights of the community at large, the eradication of corruption needs to be carried out extraordinarily. Therefore, eradicating corruption must be carried out especially, including a practice of the evidentiary system imposed on the defendant.

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<sup>8</sup> Thomas Ian McLeod, *Legal Method*, Second Edition (London: Macmillan Press, 1996), h. 278.

<sup>9</sup> William H. Putman. *Legal Analysis and Writing for Paralegals* (Albany, NY: West Publishing, 1998), h. 57.

<sup>10</sup> A'an Efendi, *Interpretasi Modern Makna Menyalahgunakan Wewenang Dalam Tindak Pidana Korupsi: Kajian Putusan Nomor 977K/Pid/2004*, Jurnal Yudisial, Vol. 12, No. 3, Desember 2019, h. 338.

From understanding the "weighing" considerations and general explanations, it is clear that the background of the ECAC Act is in the context of eradicating criminal acts of corruption. Based on the general explanation of the ECAC Act, corruption is a *formeel delict*.

The ECAC Act consists of 7 (seven) Chapters and Article 3 is contained in Chapter II entitled "Corruption Delict". All articles, paragraphs, and letters or numbers under the title must relate to corruption delict. Thus, to find the meaning of abuse of power in Article 3 the ECAC Act must be interpreted in the context of a corruption delict and not in other contexts. So, abuse of power in Article 3 of the ECAC Act must be interpreted within the scope of a corruption delict, not abusing the power in the administrative jurisdiction.<sup>11</sup>

The second idea of depenalization of abuse of power from corruption delict states that abuse of power as a concept of administrative law and elements of corruption delict makes the procedure for resolving acts of abuse of authority confusing and contrary to legal certainty. The decision of the Supreme Court which interprets the meaning of abuse of power in Article 3 of the ECAC Act is the same as the meaning of abusing power in administrative law, both of which have implications for the dualism of regulation and settlement of acts of abuse of power between criminal law and administrative law. In criminal law, abuse of power is regulated in Article 3 of the ECAC Act, the settlement of which is utilizing a corruption delict, in administrative law, abuse of power is regulated in Article 20-Article 21 of the GA Act, the settlement of which is carried out by the Government Internal Supervisory Apparatus and the Administrative Court use administrative law facilities.

The settlement of acts of abusing power by government organs or officials according to Article 20-Article 21 of the GA Act is as follows:

#### Article 20

- (1) Supervision of the prohibition of abuse of power as referred to in Article 17 and Article 18 is carried out by the Government's Internal Supervisory Apparatus.
- (2) The results of the supervision of the Government Internal Supervisory Apparatus, referred to in paragraph (1) are in the form of:
  - a. no errors;
  - b. there is an administrative error; or
  - c. there is an administrative error that causes state financial losses.
- (3) If the results of the supervision of the internal government apparatus are in the form of administrative errors as referred to in paragraph 2 (letter) b, follow-up actions do in the form of administrative improvements following the provisions of the legislation.
- (4) If the result of supervision by the government's internal apparatus is in the form of an administrative error causing state financial losses referred to in paragraph 2 letter (c), the state financial loss shall be refunded no later than 10 (ten) working days as of the decision and publication.
- (5) The refund of state financial losses as referred to in paragraph (4) is charged to the Government if the administrative error as referred to in paragraph (2) letter c occurs not due to an element of abuse of power.
- (6) The refund of state financial losses as referred to in paragraph (4) is charged to the Government if the administrative error as referred to in paragraph (2) letter c occurs due to an element of abuse of power.

#### Article 21

- (1) The court has the authority to accept, examine, and decide whether or not there is an element of abuse of power committed by a government official.

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<sup>11</sup> *Ibid*, h. 339.

- (2) Government may submit a request to the Court to assess whether or not there is an element of abuse of authority in the request.
- (3) The court is obliged to decide on the application as referred to in paragraph (2) no later than 21 (twenty-one) working days after the application is submitted.
- (4) Adjudication referred to in paragraph (3), may be appealed to the Administrative High Court.
- (5) The Administrative High Court is obliged to decide on the appeal as referred to in paragraph (4) no later than 21 (twenty-one) working days after the appeal is submitted.
- (6) The decision of the Administrative High Court is referred to in paragraph (5) as final and binding.

However, when the case of abuse of power has been resolved following Article 20-Article 21 of the GA Act, it does not prevent it from being resolved again using criminal law instruments following Article 3 of the ECAC Act. The dualism of the procedure for the settlement of acts of abusing this power creates a lack of legal certainty.

In fact, the government organs or officials who have been examined by the Government Internal Supervisory Apparatus and proven to have abused their power and are burdened with administrative sanctions to pay compensation are reluctant to do so because the case will be resolved again using criminal law. Government organs or officials who commit acts of abuse of power do not want their cases to be punished twice with two different legal procedures.

Depenalization of the element of abuse of power from the corruption delict Article 3 of the ECAC Act, make the procedure for resolving acts of abuse of authority only use administrative law and realizing legal certainty. Government organs or officials no longer have to worry that when they have completed the sanctions imposed on them, they will be burdened again with criminal sanctions. After depenalization, the Corruption Court resolved corruption cases without involving any element of abuse of power .

## **Conclusion**

The depenalization of the element of abusing the power of a corruption delict based on two reasons. First, abuse of power is part of administrative law, so cannot be used in criminal law. The AC Act and the ECAC Act is not related to the same subject so the legal concept of abusing power cannot be used simultaneously in the two laws. Second, depenalization of the element of abusing power from corruption delict makes the procedure for resolving acts of abuse of authority only use the administrative law means and creates legal certainty.

After depenalization of the element of abuse of power from a corruption delict, the settlement of acts of abusing power committed by government organs or officials is carried out by the Government Internal Supervision Apparatus and the State Administrative Court. The Corruption Court no longer hears corruption cases using elements of abuse of power but with other elements in accordance with the provisions of the ECAC Act (after depenalization of the element of abuse of power).

## **Recommendation**

Legislators must end the position of abusing authority in two different legal regimes (administrative law and criminal law) by depenalizing the abuse of power element of Article 3 the ECAC Act. This depenalization makes the procedure for resolving acts of abuse of power only use administrative law, and this is a form of legal certainty.

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