

The Authority of Internal Auditor to Prevent Corruption Committed by Civil Servants and Government Official

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Abstract

Internal audit is significant to guarantee and ensure the enforcement of laws and regulations as well as to prevent power abuse by civil servants or government officials that may cause financial loss for the country. The purpose of this study is to provide an overview of the authority of internal audit, to describe how this authority is regulated, to depict the authority to prevent power abuse, and to illustrate the protection over and enforcement of administrative law on allegation of power abuse. This study is a normative juridical study analyzing primary and secondary legal material relevant to the subject under study. The result of the study reveals that the authority of internal audit has been set in various legal products. The operating procedures for legal protection over allegation of arbitrary behavior against civil servants or government officials are filing an objection or an appeal against the discovery of the internal audit. If the case is not a subject of investigation of law enforcement officers the accused may contest the finding to Administrative Court and request the judge to review the finding. If the accused is proven to be guilty of abusing power that causes financial loss for the state and, thus, be sentenced for the alleged conduct (*inkracht*), he or she shall be immediately dismissed from his/her position. The regulation posits that officer who ignores the verdict and continues to keep the

defendant on his/her position shall be penalized.

Keywords: Authority; Internal Auditor; Corruption; Prevention; Civil servants; Government Official

A. Introduction

Corruption comes in many forms such as bribery, gratification, extortion, manipulation, forgery, collusion with project partner or collusion with officials in terms of licensure.¹ Bribery, for example, is a common practice in recruitment of civil servant. Those who manage to become a government official by bribing someone in the recruitment process is potentially committed to corruption, because, it is assumed, that they need to get a return for their initial investment.

However, there are also civil servants or government officials who are, due to administrative mistakes, accused of committing corruption because their action has resulted in financial detrimental.² According to Article 21 (d) and Article 22 (c) of Law Number 5 of 2014 regarding State Civil Apparatus (Law 5 / 2014), the accused is entitled for protection by the government. The government is obliged to provide legal assistance³ as long as the legal case is related to the

1 Based on data published on the website of the Corruption Eradication Commission (KPK), ASN (PNS) employees in 2014 there were 2 people who committed corruption, in 2015 increased to 7 people, in 2016 as many as 10 people, and in 2017 as many as 22 people. From 2004 to 2017, there were 155 ASN-PNS employees who committed corruption. (See <https://www.pressreader.com/indonesia/kompas/20170904/281517931265412>, accessed on 12 March 2019). According to data on corruption that has permanent legal force (*inkraht*) from 2001-2018, there were 1002 convicted corruption cases from ASN / PNS, most from the Regency Government agencies, as many as 557 convicted. The City Government has 130 convicted persons, (see <https://lokadata.beritagar.id/chart/preview/number-people-negeri-sipil-pns-terpidana-kasus-korupsi-1533612451>, accessed on 15 August 2019).

2 Civil servants are those who are vulnerable to committing corruption, particularly with respect to their responsibility to give public service. See for example Nurmalita Ayuningtyas Harahap, "Tanggung Jawab Pribadi dalam Kasus Pungutan Liar yang Dilakukan oleh Pegawai Negeri Sipil," *Undang: Jurnal Hukum*, Vol. 2 No. 1 (2019), p. 70.

3 Undang-Undang Nomor 5 Tahun 2014 tentang Aparatur Sipil Negara (Law

implementation of task and function of the accused.⁴

Corruption can be derived from weak supervision,⁵ either from internal⁶ or external⁷ supervisory body. The objective of supervision is to prevent corrupt action. It is through internal audit that the implementation of tasks and functions of the government can be done effectively and efficiently, in accordance with prevailing regulations, free of corruption. Nevertheless, the supervisory function of the government internal audit official (*Aparat Pengawasan Intern Pemerintah* or *APIP*) is not optimum.⁸ APIP should be the first body to detect irrelevant behavior and issue an early warning. It should be the prominent instrument to realize clean governance, and not be a “tool” for the government to justify wrong policy.⁹

Number 5/2014 regarding State Civil Apparatus), Article 106 (1) (e)

4 *Ibid.*, (3)

5 Supervision means supervisory actions to ensure effective and efficient governance that is in accordance with prevailing rules and regulations. It is believed that supervision is an inseparable component with law enforcement. See for example, Ridwan Arifin, “Law Enforcement in Banking Criminal Act Involving Insiders,” *Jambe Law Journal*, Vol. 1, No. 1, 2018, p. 78.

6 Internal supervision is the entire process of auditing, reviewing, monitoring, and other form of supervision activity towards the implementation of tasks and functions of an organization in order to sufficiently assurance that they have effectively met the predetermined target for the sake of realization of good governance, see Article 1 (3) Government Regulation Number 60 of 2008 on Government Internal Control System (Government Reg 60/2008). Internal supervisors are Inspectorate General, Provincial/District/Municipal Inspectorate, financial and development supervisory body (or BPKP), and Ministry for Bureaucracy Reform

7 External supervision is a supervision process performed by non government institution, such as financial supervisory board (or BPK), the people’s representative council (or DPR), the regional people’s representative council (or DPRD), commission for corruption eradication (or KPK), Administrative Court, Ombudsman, and NGO.

8 See the provisions of Article 49 of Government Reg 60/2008 on Internal Control Systems (SPIP), Article 10 and Article 16 PP No. 12 of 2017 concerning the Development and Supervision of Local Government Operations, also see the provisions of Article 383, Article 385 of Law Number 23 Year 2014 concerning Regional Government.

9 See Iskandar, “Kewenangan Apartur Pengawas Internal Pemerintah dalam Tata Kelola Perizinan Bidang Sumber Daya Alam untuk Mencegah dan Memberantas Korupsi, Kolusi, dan Nepotisme”, (paper delivered at the Public Lecture and National Seminar, FH UNIB., Thursday, November 23

The reality has proven otherwise. It is BPK, BPKP, KPK, police, and attorney general's office who frequently found violation against the law as committed by bureaucrats or government officials through investigation or sting operation (or OTT). This action is a repressive legal enforcement in relation to unlawful conduct that causes financial or economic loss for the region or state. Without underestimating the function of external audit bodies as agents for *checks and balances* or agents to monitor and remind the government, they are at the second tier of audit board. If the internal audit operates well, repressive legal enforcement by external body shall not emerge because it is an *ultimum remedium* or a final resort.¹⁰

Law Number 30 of 2014 on Government Administration (Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan) provides legal basis for APIP to perform its supervisory function.¹¹ Law 30/2014 is a basic reference for APIP to provide protection and administrative legal enforcement in carrying out the functions of the government. The function as a provider of legal protection for APIP means giving preventive and repressive legal assistance to subject under investigation to ensure that justice, order, certainty, benefits and peace is behold. On the other hand, the function as a legal enforcement official for APIP means giving and ensuring that law is prevailed.

This study analyzes the authority of internal audit, abuse of power, legal protection and administrative law enforcement for civil servants and government officials both at the central and regional levels. This is based on the assumption that audit system can prevent

2017), p.1.

10 The direction of eradicating corruption in the future must balance between a preventive approach and a repressive approach. Therefore, the repressive approach used as "*primum remedium*" must be revisited. Criminal law has to be returned to its *khittah* (original function) as the final step in law enforcement efforts in accordance with the principle of *ultimum remedium*. See Suhariyono AR, 2012, "Perumusan Sanksi Pidana dalam Pembentukan Peraturan Perundang-Undangan", *Journal Pespektif*, Vol. XVII, No. 1, January, 2012, p.21.

11 See Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan (Law 30/2014 regarding Government Administration), Article 20.

corruption, if supported by good legal instruments and implemented by legal enforcement officials (administrative and criminal) who have good integrity, mentality and morality.

B. Audit Function of APIP Based on the Prevailing Regulations

Corruption has a serious impact on various dimensions of the nation's life. Corruption puts a heavy burden on society, especially the poor. The scope of corruption in Indonesia is broad and comprehensive, both in horizontal and vertical direction, so that it ultimately leads to catastrophic economic and financial crises. Besides harming the country's economy and finance, corruption is also a violation of the social and economic rights of the people. The impact of corruption touches various aspects of life, endangers the stability and security of the community, endangers social economic and political development, and damages democratic values and national morality.¹²

To overcome this problem, policies to prevent and even eradicate corruption are needed. One of the policies is a good audit system. This is important because, usually, people tend to be corrupt because of the amount of power or authority they hold. As stated by John Emerich Edward Dalberg Acton (1834-1902), also known as Lord Acton, "power tends corrupt, but absolute power corrupts absolutely" both in form of *detournement de pouvoir* and/or *willkeur*, or unlawful acts by the government (*onrechmatige overheidsdaad*) through the use of various forms of governmental action (*bestuur handelingen*) which result in state and community losses.¹³

12 See Evi Hartanti, *Tindak Pidana Korupsi* (Corruption Crime), Jakarta: Sinar Grafika, 2007, p.1. Also, Patardo Yosua Naibaho, "Kebijakan Hukum Pidana dalam Upaya Meningkatkan Peran Serta Masyarakat dalam Pencegahan dan Pemberantasan Tindak Pidana Korupsi," *Diponegoro Law Journal*, Volume 5, Number 4, 2016, p.2.

13 See Bambang Arwanto, "Perlindungan Hukum bagi Rakyat Akibat Tindakan Faktual Pemerintah", *Jurnal Yuridika*, Volume 31, Number 3, September 2016, p. 373; Ermansjah Djaja, *Meredesain Pengadilan Tindak Pidana Korupsi*, Jakarta: Sinar Grafika, 2010, p. 25; Adib Bahari dan Khotibul Umam, *KPK: Komisi Pemberantasan Korupsi dari A sampai Z* (KPK: Corruption Eradication Commission from A to Z), Yogyakarta: Pustaka Yustisia, 2009, p.25.

Basically, administrative mistakes resulted from government administrative operation cannot be considered as criminal liability unless it is intentional and produces financial or economic detrimental condition to the state, is carried out to enrich/benefit oneself or others. For the latter, it has fulfilled the element of corruption.¹⁴

A shift from administrative law to liability for punishment is taking place if a violation against the criminal law (*wederrechtelijkheid*) is preceded and followed by bad intention (*mens rea*). In relation to court's decision as an act of the government, Utrecht¹⁵ mentions that one of the reasons for invalid state administration decision is juridical deficiency on the formulation of the will of the authorized issuing party as resulted from fraud (*bedrog*), coercion (*dwang*), and mistaken (*dwalig*). Administrative decision (or KTUN) that is deriving from mistaken or coercion can only be accountable administratively; consequently, it can be cancelled. Nonetheless, KTUN based on fraud, evil intention, vested interest, bad faith (*kwade trouw*), and abuse of power which implicates financial and economic detrimental is assumed to have fulfilled the elements of corruption.

Article 1 (46) of Law 23/2014 states that APIP is inspectorate general at the ministry, non ministerial unit for audit of government institution, provincial inspectorate, and district/municipal inspectorate. Audit or supervision as conducted by APIP should be within its authority. The governor is obliged to carry out guidance and supervision of the provincial official and is assisted by the provincial inspectorate.¹⁶ Meanwhile, the regent/mayor is obliged to carry out

14 See Article 3, Undang-Undang Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi (Law No. 31 of 1999 regarding Eradication of Corruption Crimes) which has been amended by Law No. 20 of 2001 on Amendments to the Law 31/1999

15 See Utrecht/Moh. Saleh Djindang, *Pengantar Hukum Administrasi Negara Indonesia* (Introduction to Indonesian Administrative Law), Jakarta: Ichtiar, 1985, p. 82-100; Firna Novi Anggoro, "Pengujian Unsur Penyalahgunaan Wewenang terhadap Keputusan dan/atau Tindakan Pejabat Pemerintahan oleh PTUN", *Jurnal Fiat Justisia*, Volume 10 Issue 4, October-December 2016, p. 647; <http://jurnal.fh.unila.ac.id/index.php/fiat>, retrieved on 12 March 2019.

16 Compare with Iskandar, *op cit.*, 4 -5, see Article 379 Law 23/2014

guidance and supervision of the district officials and is assisted by the regency/municipal inspectorate.¹⁷

Public can submit a report of alleged arbitrary behavior committed by the civil servants in regional agencies to APIP and/or to law enforcement officials and APIP is required to conduct an investigation of the alleged conduct. Law enforcement officers investigate the report after coordinating with APIP or the non-ministerial government agency in charge of supervision. If the investigation result found evidence of misconduct that is administrative, further proceedings are submitted to APIP. On the other hand, if the results found evidence of deviations that are criminal in nature, further proceedings are left to authorize law enforcement officials.¹⁸

APIP functions to monitor the provisions of prohibition of abuse. Audit by APIP resulted in three categories of verdict, they are not guilty, administrative mistake, and/or administrative mistake that leads to financial loss. If audit found that administrative mistake is prevailed, then perfection of the administration shall be taken. If the audit found that there is an administrative mistake that leads to financial loss, restoration of the state loss shall be taken in ten (10) working days since the issuance of the verdict. Government office shall shoulder the burden to restore the financial loss as resulted from administrative mistake that is emerged without any indication of power abuse. If allegation of power abuse is proven, the person exercising the unlawful conduct should restore the money to the state.¹⁹

The authority of APIP to perform supervision and audit is also mentioned in Government Reg. 60/2008. Article 48 (2) of the regulation stipulates that APIP is authorized to conduct internal audit, review, evaluation, monitoring, and other supervisory actions. Furthermore, Article 49 of the regulation describes that APIP is consisting of BPKP, inspectorate general or other similar entities with different names that hold the function to perform internal audit, provincial inspectorate, and district/municipal inspectorate.

¹⁷ *Ibid.*, see Article 380 of Law 23/2014

¹⁸ *Ibid.*, see Article 385 of Law 23/2014

¹⁹ *Ibid.*, see Article 20 the Law 30/2014.

Article 11 of the Government Regulation Number 18 of 2016 on Regional Officials (Government Reg. 18/2016) depicts that provincial inspectorate is a government element to oversee the regional administration and governance. It is led by an inspector and responsible to governor through regional secretary. The main function of the provincial inspectorate is to assist the governor in guiding and overseeing the regional administration.

Article 16 (2) of the Government Regulation Number 12 of 2017 on Guidance and Supervision of Regional Administration (Government Reg. 12/2017), mentions that audit and supervision as conducted by APIP should follow the principles of professional, independent, objective, improvement oriented and early warning system. Meanwhile, paragraph 3 (b) of Article 16 of the regulation states that APIP functions to guide and oversee the regional administration and paragraph 3 (e) of Article 16 of the regulation emphasizes that supervision shall follow the prevailing regulations.

Article 1 (11) of Presidential Regulation Number 4 of 2015 (Presidential Reg. 4/2015) on the Fourth Amendment of the Presidential Regulation Number 54 of 2010 on Procurement of Goods and Services depicts that APIP is the authority to perform audit, review, evaluation, monitoring and other supervisory actions towards the administration of government tasks and function. In addition, Article 17 of Presidential Regulation Number 7 of 2015 on State Ministerial Organization (Presidential Reg. 7/2015) depicts that the state ministry supervisory element is Inspectorate General that is led by the Inspector General, and is subordinated to and responsible to the Minister. Article 18 of the regulation mentions that inspectorate general holds the function of internal audit and supervision within the ministerial environment. Furthermore, the second dictum of Presidential Instruction Number 9 of 2014 on Improvement of the Quality of Internal Audit System and the Competence of Internal Control in Order to Achieve the Welfare of the People emphasizes the necessity to intensify the role of APIP to improve the quality, transparency, and accountability of state/ regional financial management and national development as well as to further develop the ef-

forts to prevent corruption.

Article 3 of the Regulation of the Interior Minister Number 76 of 2016 on the Policy of Audit in the Environment of the Interior Ministry and Administration of Regional Government of 2017 posits the purposes of internal audit are to 1) improve the quality of internal supervision in the environment of the Interior Ministry, 2) synchronize the supervision as conducted by the ministry/ non ministerial government agent, governor as the representative of the central government, regional and municipal government who administer regional governance, 3) improve the quality assurance of government administration, and 4) improve public trust on the supervisory authority of APIP.

Based on the identification of APIP's authority as arranged in some of the provisions above, the supervisory and guidance authority attached to APIP enables APIP to oversee and be directly involved in the implementation of government activities, starting from the planning, implementation, monitoring and evaluation of activities.²⁰ If the authority possessed by APIP is carried out properly and optimally, administrative violations which are detrimental in nature can be prevented.

Nevertheless, there are some weaknesses in the appointment of APIP officials and assignment of responsibility of APIP as stipulated in the regulations, for example, in the Presidential Reg. 60/2008 mentioned that BPKP, an APIP unit, answers directly to the President, whereas inspectorate general or other internal auditors report to the minister or chairperson. The same rule applies to regional inspectorates. They report directly to the governor, regent, or major.²¹ Given this structure of report and answer within the ministerial environment, it is assumed that the independence of APIP is compromised. It happens to regional APIP as well. At the regional level,

20 See the provision of Article 379 and 380 of the Law 23/2014; LAN, 2016, "Kajian isu-Isu Strategis Penguatan Peran Aparat Pengawasan Intern Pemerintahan (APIP) Pasca UU Administrasi Pemerintah," Pusat Kajian HAN-SAN, Jakarta, p. 49.

21 See Article 1 (4), (5), (6), and (7) of the Government Reg. 60/2008; Article 11 – 12 of the Government Reg. 18/2016.

APIP is equivalent to head of department and is subordinate to regional secretary. APIP is appointed and reporting to head of district through the regional secretary. This may cause psychological burden for APIP²² and, eventually, will result in minimum performance.

Institutionally, the legal position of APIP is still an internal part of government agencies, but functionally it must be autonomous and independent. For this reason, the staffing and reporting procedures of APIP's duties and responsibilities should not be carried out by the internal agencies concerned in order to keep the autonomy and independence of APIP, but is carried out by a, vertically, higher office instead. For example, APIP at the regency/municipal level should be led by the Governor, APIP at the Provincial level is led by the Minister of Interior Affairs, and APIP at the ministry/non-ministerial agent shall be led by the President.

C. The Authority of APIP with Regard to Power Abuse as Committed by Civil Servants or Government Officials According to the Law 30/2014

Article 17 of the Law 30/2014 mentions that government official is prohibited to misuse their authority. The law categorizes power abuse into three dimensions of 1) power beyond authority, which indicates the exercise of power beyond the predetermined term of office, beyond jurisdiction, and beyond the provisions of the prevailing regulations; 2) promiscuous authority, means that decision and/or action is beyond the predetermined scope of content of authority and/or irrelevant to the predetermined objective of the authority; and 3) abuse of authority, means that decision and/or action is performed without legal basis and considerations.

Moreover, Article 19 of the law regulates the legal consequences of invalid decision and/or action deriving from abuse of power, namely 1) it can be stated to be not valid if the court of law found that the decision and/or action is deriving from the exercise of power beyond authority and 2) it can be annulled if it is proven before law

22 See Iskandar, "Kewenangan Aparatur Pengawas ..., *op cit.*, p.7

that the decision and/or action is deriving from promiscuous authority.

In Article 20 of the law mentioned that APIP is given the authority to perform audit. If APIP concludes that an action is subjected to terms as stipulated in Article 20 of the law, APIP can have an audit on it. If the conclusion reveals that administrative mistake leading to financial losses is committed, then incidental audit can be performed upon request of APH. Audit that is conducted with certain objectives that are relevant to the conclusion that administrative mistake that leads to financial detrimental as taken by APIP, regardless the presence or absence of power abuse, is called investigative audit or audit for calculation of state losses.²³

The provision of Article 20 of the Law 30/2014 is in line with the one written in Article 385 of UU Pemda, which is APH can examine public report on misconduct after coordinating with APIP or other non ministerial supervisory agents. If, based on the examination, it is found that there is administrative mistake, further investigation is proceed by APIP. On the contrary, if the finding reveals a criminal action, further investigation shall be performed by APH with reference to prevailing regulations.

Article 21 of the Law 30/2014 serves as a legal basis for civil servants and government officials to identify if something is an exercise of administrative mistake or a criminal conduct. The presence of the element of power abuse can be tested with the principle of specialty (*specialiteits beginsel*), that determines that authority is given for specific purpose.²⁴

The provisions of Article 21 of the law provide legal protection for civil servants and government officials in making decisions and/or taking actions. This is in accordance with the principle of *presump-*

23 See Finna Novi Anggoro, *op cit.*, p.641 - 642

24 Sjachran Basah, *Eksistensi dan Tolok Ukur Peradilan Administrasi di Indonesia* (The Existence and The Benchmark of Administrative Justice in Indonesia), Bandung: Alumni, 1985, p. 54; Fathudin, "Tindak Pidana Korupsi (Dugaan Penyalahgunaan Wewenang) Pejabat Publik (Perspektif Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan)", *Jurnal Cita Hukum*, FSH UIN Syarif Hidayatullah Jakarta Vol.3 No.1, 2015, p.129-130.

tio iustae causa / vermoeden van rechtmatige or the principle of presumption of legitimacy, that is, "every act of a Government Official must always be considered valid (*rechtmatig*) until there is a cancellation, either a cancellation by the issuing official or a cancellation by the court of law."

Article 3 of the Law on the Eradication of Corruption, places the element of power abuse as a core offense (*bestanddelict*), which can actually run in parallel with the abuse of authority in the context of administrative law. This is due to the fact that both criminal law and administrative law have separate legal and regulatory principles, as in criminal law the principle is known as "*de autonomie van het materiele strafrecht*" (the autonomous rights of criminal law material), but this principle must not contradict or enter other legal principle areas, for example the principles in administrative law. This means that the application of the principle of law should not incur a disorder of law, because there will be error and destruction of legal order. However, it must be understood constructively towards the integrity of the complementary legal order.²⁵

Indriyanto Seno Adji outlines the non-delicts of Article 3 as follows, "misuse of authority" as "*bestanddeel delict*" and "for the benefit of ..." as "element delict". "*bestanddeel delict*" is always associated with criminal actions (*strafbare handeling*), whereas "*element delict*" does not determine if something is criminal or not. Consequently, if something can be proof as power abuse, then nothing else needs to be proven.²⁶

25 See Yulius, "Menyelisik Makna Penyalahgunaan Wewenang dalam Undang-Undang Administrasi Pemerintahan Ditinjau dari Optik Hermeneutika Hukum", *Majalah Hukum Varia Peradilan*, Tahun XXXI, No.360, 2015, 8-9. Compare with Firna Novi Anggoro, *op.cit.*, p.648.

26 See Indriyanto Seno Adji in Firna Novi Anggoro, *op cit.*, p.649; also see the Decision of the Supreme Court Number 1485K/Pid.Sus/2013, 2 October 2013, 132, concerning "power abuse", which is the core offense in the provisions of Article 3 the UU PTPK. Therefore the application of this element in corruption case should meet the requirement of "power abuse".

D. Protection and Enforcement of Administrative Law From Allegation of Power Abuse (*Detournement de pouvoir*) by Civil Servant or Government Officials

1) Protection for Civil Servants or Government Officials

Civil servants or government agencies/officials, in carrying out various government functions, are often entangled in criminal acts of corruption due to their decisions and actions. In practice, when there are allegations of abuse of authority as committed by civil servants or government agencies/officials, law enforcement officials (or APH) directly proceed the case to criminal law. APH processes such allegations based on the perspective of criminal law, without considering their actions are legal actions (*rechtelijke handelingen*) or actual actions (*feitelijke handelingen*), which must also be subjected to and based on the principle of legality (*rechtmatigeheids van bestuur*), which is the norm of administrative law (*bestuursnormen*) that must be followed, both in the form of written law (legislation) and also unwritten law (general principles of good governance or AUPB).

While Article 3 of the Law on Eradication of Corruption Crime (UUPTPK)²⁷ does not explicitly provide clear definition of what is meant by power authority, the abuse of authority in the concept of administrative law is parallel with the concept of *de pouvoir detournement*, The meaning of abuse of power is improper use of authority. Official who uses his authority for purposes other than the purpose that has been given to that authority has violated the principle of specialism (*specialiteitsbeginsel*). In the abuse of authority there is no element of negligence, because it consciously shifts the goals for personal or others interests.²⁸

27 Article 3 of the UUPTPK mentions that any one who aims to enrich oneself or another person or a corporation, abuse the authority, opportunity, or facilities available to him related to his post or position which creates losses to the state finance or the state economy, is sentenced to life imprisonment or imprisonment ...

28 See Philipus M. Hadjon, "PTUN Dalam Konteks UU No. 30 Tahun 2014 Tentang Administrasi Pemerintahan", (paper presented at a National Semi-

In reality, an act of abuse of authority is often interpreted as the misuse of facilities and opportunities, an act against the law (*werrechtelijkheid, onrechtmatige daad*), or even expanding the definition with any actions that violate any rules or policies and in any field. This expansion will easily become another weapon of abuse of authority and thus the freedom of action of the government in dealing with concrete situations on the ground (*freies ermessen*) becomes meaningless.²⁹

According to Law 30/2014, Law 23/2014, Law on State Administrative Court, and Law 31/1999, civil servants or government officials who convicted of abusing their authority as concluded by APIP can take such measures as follows:

- a. Legal standing³⁰ against the decision of APIP with regard to Article 20 and 21 of Law 30/2014/ (APIP refers to inspectorate general, provincial/regional/municipal inspectorate, BPKP)

- (1) Administrative effort

- (a) Objection procedure (*bezwaarchriften procedure*)

Based on the certainties in Article 77 of the Law 30/2014, civil servants and/or government agencies/officials may object the decision made by APIP within 21 (twenty one) working days since the announcement of the verdict. The objection is submitted in writing to APIP. In the event that an objection is accepted, APIP must determine a decision in accordance with the objection. APIP may resolve the objections in 10 (ten) working days. In the event that APIP does not resolve the objection within the said period, the objection is considered to be granted. Objection which is deemed granted, followed by determination of the verdict in accordance with the request for objection as submitted by civil servants or govern-

nar: *Administrative Law Update 2017*, Hyatt Regency, Yoyakarta, 23 Oktober 2017), p.9.

29 Compare with Firna Novi Anggoro, *op.cit.*, p.632-633.

30 Legal standing is a state wherein a person or party is determined to meet the requirements and therefore has the right to submit a request for dispute/dispute/case resolution to the administrative appeals body or the judiciary.

ment agencies/ officials. APIP must determine the decision in accordance with the application in 5 (five) working days after the end of the submission period for objection (10 days).

Article 66 (3) of the Law 30/2014 states that cancellation of decision can be made by a Government Official who made the decision, which, according to Laica Marzuki, is unusual, because government officials who make decisions cancel their own decisions. The concerned official can only revoke the decision issued by the objection procedure (*bezwaarschriften procedure*) on administrative efforts.³¹

(b) Administrative appeal (*administratief beroef*)

In the event that the applicant is not satisfied with the objections submitted to APIP, according to the provisions of Article 78 of the Law 30/2014, the decision may be appealed within 10 (ten) working days since the decision on objection efforts is received. The appeal is submitted in writing to APIP supervisor. APIP supervisor must examine the *rechtmatigeheids* and *doelmatigheids* aspects of the decision. In the event that an appeal is granted, the supervisor of APIP is required to make a decision in accordance with the appeal. APIP supervisor completes an appeal in 10 (ten) working days. In the event that the APIP supervisor does not resolve the appeal within that given period of time, the objection is deemed granted. APIP supervisor must determine a decision in accordance with the application within 5 (five) working days after the end of the 10 day grace period.

In the concept of administrative law, there is a principle of *contraries actus*, which means that the authorize government

31 See Laica Marzuki, "Pemberlakuan Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan Dalam Konteks Perkembangan Kompetensi Peradilan Tata Usaha Negara RI", (<https://www.google.com/search?q=Lihat+Laica+Marzuki%2C+Pemberlakuan+Undang-Undang+Nomor+30+Tahun+2014++Tentang+Administrasi+Pemerintahan++Dalam+Konteks++Perkembangan+Kompetensi+Peradilan+Tata+Usaha+Negara+RI%2C+&ie=utf-8&oe=utf-8&client=firefox-b>, retrived 12 March 2019).

agents or officials may revoke or cancel their own decision.³² The bottom line is that the one who can revoke or cancel a decision is the one who made the decision and cancellation cannot be performed by other party. Thus, APIP supervisor can only suggest and command APIP to revoke or cancel a decision and cannot cancel the decision by themselves.

(2) Administrative Court pathways (or PTUN)

When the applicant is dissatisfied with decision made by administrative efforts, he or she can take the judicial route and submit an application to the Administrative Court (or PTUN). Article 21 (2) and (3) of the Law 30/2014 opens the opportunities for civil servants and/or government officials to submit a request to the PTUN judge to assess whether or not there is an element of abuse of authority as stated in the decision made by APIP. PTUN is obliged to decide on the application in 21 working days since the application is submitted. This is in line with the provisions of Article 3 of the Regulation of the Supreme Court Number 4 of 2015 on Guidelines and Procedure of Evaluation of Abuse of Authority (Supreme Court Reg. 4/2015), which states that “government agencies and/or officials who feel that their interests have been impaired by the results of APIP audit can contest the decision to the competent court demanding a clarification of the act holds the element of abuse of authority.”

Article 21 (4), (5) and (6) of the Law 30/2014 stipulate that an appeal to Administrative Court (PTUN) can be submitted and the appellate judge must make a decision within 21 working days since the appeal is submitted, and the decision in appeal court is binding and no further remedies can be taken.

Zudan Arif Fakrullah states that PTUN decisions that have permanent legal power. If the decision determines that there is no abuse of authority, the relevant official cannot be

³² See Philipus M. Hadjon and Tatiek Sri Djatmiati, *Argumentasi Hukum* (Legal Argument), Yogyakarta: Gadjah Mada University Press, 4th ed, 2009, p.25.

examined in the context of criminal, civil or administrative law. The door for law enforcement officials to bring the case into criminal or other realm of law only opened if PTUN decided otherwise.³³

b. Legal standing against the decision of external audit agent

Article 4 (1) of the Supreme Court Reg. 4/2015 limits the absolute competence of PTUN to test the element of abuse of authority, that is before criminal process takes place. Nonetheless, the regulation does not explicitly define the definition of "before the criminal process takes place". In the Criminal Code (or KUHP), the definition of "criminal proceedings" is also not found. This condition can cause multiple interpretations for APH and cause legal uncertainty. According to Frans Hagan, the criminal process (Criminal Justice Process) is "the series of procedures by which society identifies, accuses, tries, convicts, and punishes offenders". This means that the criminal process is every stage of a decision that exposes a person to a process that leads to criminal determination for him. In relation to Criminal Code, the criminal process is interpreted as the process of how the criminal law is implemented starting from the investigation, investigation, prosecution, examination in court, legal efforts, until the implementation of the decision (execution). Therefore, what is meant by "before criminal proceedings" is in Article 2 (1) of the Supreme Court Reg. 4/2015 can be interpreted as a process before criminal investigation.³⁴

When process before criminal investigation is interpreted as before investigation process by APH, the problem gets complicated because to determine if there is financial detrimental, APH (according to Article 3 of the Anti-Corruption Law and Article 55 (1) of the Criminal Code), will usually ask APIP (BPKP) to con-

33 See Zudan Arif Fakrullah in Mohammad Sahlan, "Kewenangan Peradilan Tipikor Pasca Berlakunya Undang-Undang No. 30 Tahun 2014 Tentang Administrasi Pemerintahan", *Jurnal Arena Hukum*, Vol 9, No 2, August 2016), p.177.

34 Compare with Firna Novi Anggoro, *op cit.*, p.643

duct an audit (investigative audit), if so it means that the criminal proceedings by the APH have started (investigation). As a consequence, looking at Article 20 and 21 of the Law 30/2014 and Article 385 of the Law 23/2014, PTUN judges are not authorized to accept and examine applications submitted by civil servants or government officials under review. Thus the legal standing as performed by civil servants or government official becomes meaningless.

2) Administrative Law Enforcement (Application of Sanctions) towards Civil Servants or Government Officials

a) Norms of the administrative law

Civil servants and government officials who violate the provisions of administrative legal norms, namely the regulations in the field of staffing, both when the old provisions are still valid and the new provisions, are subject to administrative sanctions.³⁵ The current provisions are based on Law Number 5 of 2014 concerning State Civil Apparatus (Law 5/2014). Article 87 (2) of the law mentions that civil servants who, based on a court decision that has permanent legal force, commit an unplanned crime and are sentenced to imprisonment for 2 (two) years can be honorably dismissed or not dismissed. Article 87 (4) (b) of the Law, further explains that civil servants are dishonorably discharged because they are sentenced to prison or confinement based on a court decision that has permanent legal force for committing a criminal offense or a criminal offense related to their position and/or criminal offense in general; Meanwhile, Article 87 (4) (d) of the Law explicates that a civil servant shall be dishonorably discharged because the court has decided that he/she is sentenced to prison for committing a planned criminal offense with a minimum of 2 (two) years imprisonment. Article 250 (b) of Government Regulation Number 11 of 2017 on Management of Civil Servants (Government Reg. 11/2017) states that civil servants are

35 See Iskandar, "Analisis Yuridis ... *op.cit.*,p. 4.

dishonorably discharged if convicted with a prison or confinement sentence for committing a criminal offense or a criminal offense related to the position and/or general crime.

In addition to the legal norms in points (1) and (2) above, sanctions can also be imposed on the basis of the provisions on the disciplinary determination of civil servants as stipulated in Article 7 of Government Regulation Number 53 of 2010 on Discipline of Civil Servants (Government Reg. 53/2010). Based on the regulation, the relevant civil servants are considered not discipline because they abuse their authority, or do not obey the laws and regulations. The regulation does not specifically regulate civil servants who involved in criminal acts, but with disciplinary reasons the officials may be subject to sanctions. The form of sanctions is stratified ranging from mild, moderate, to severe. The sanctions are not limited to staffing officers, but they can be a direct superior or other authorized officials.

In a Circular of the Head of the State Civil Service Agency Number K.2 6-30V.326-299 dated on November 20, 2012 regarding Criminal Convicted Civil Servants explained that criminal convicted officials who commit criminal offenses related to the office and who have been sentenced based on court decisions, are dishonorably dismissed.³⁶

b) Legal consequences for staffing officer (or PPK)

Neither the Law 5/2014 nor the Government Reg. 11/2017 regulates the provisions of legal sanctions for superior officers and/or Head of Regional Office who fail to apply sanctions to civil servants who violate the law. There is also no legal consequence for the staffing officers who chose to or not to apply administrative sanctions to the convicted.

However, looking at the provisions of Article 67 of Law

36 The fact is that until June 2018, there are 307 civil servants or government officials who are convicted of criminal act (inkracht) but are not dismissed from their position by the PPK (<https://www.cnbcindonesia.com/news/20180717113136-4-23911/duh-sampai-juni-2018-sudah-ada-188-pns-korup>, retrieved on 15 August 2019).

23/2014, which regulates the obligations of Head and Deputy Head of Regional Office to follow through audit finding and the provision of Article 76 of the law that regulates prohibition to violate the regulation, such action can be resulted in termination. However, the implementing procedures of dismissal sanction of the Head and Deputy Head of Regional Office is complicated and long, as regulated in Article 80 of the Law 5/2014.

In order to provide a deterrent and learning effect for other government officials, administrative law enforcement by PPK must be carried out. If not, it will a "boomerang" for PPK because there will occur an allegation of corruption resulted from the payment of salaries and benefits for the convicted officials.³⁷ In this regard, APIP must encourage PPK to enforce the law firmly, so as to prevent further acts of corruption.

E. Conclusion

The authority of APIP to perform audit has been set in various laws and regulations. According to the laws, APIP is a significant instrument to establish clean and good governance and a government that is free of corruption. Nevertheless, the appointment of APIP's members and the reporting mechanism that APIP has to follow in doing their tasks and functions is weak because they are not carried out in proper stages resulting in possibility of poor and non objective performance. Indeed, preventing civil servants or government officials from power abuse can be exercised by, *first*, filing an administrative objection or appeal against the decision made by APIP. If this effort seems to be dissatisfying, the accused can contest the decision to PTUN. *Second*, upon the decision made by external audit agent, the accused civil servants or government officials may also request the PTUN to review the decision before a criminal investigation process

37 Until 1 August 2019, the number of BHT Corruption Civil Servant cases settlement reaches a percentage of 88% or as many as 1,906 civil servants out of a total of 2,357 have been stipulated SK PTDH, ([https://covesia.com/news/baca/80763/1-906-pns-terlected-tipikor-discontinued-not-- respect](https://covesia.com/news/baca/80763/1-906-pns-terlected-tipikor-discontinued-not--respect), retrieved on 15 August 2019).

by law enforcement officers takes place. In the meantime, legal enforcement upon corrupting civil servants or government officials is enforced through disrespectful dismissal or termination of job. This is to prevent further financial detrimental.

It is recommended that immediate establishment of proper regulations concerning internal control system, as a legal umbrella for the implementation of the supervisory authority by APIP be required. This is set clear legal position of APIP as an autonomous/independent audit institution. In order to prevent the act of power abuse by civil servants or government officials, harmonization of the Law 30/2014, the Law on State Administrative Court, and the Law on Eradication of Corruption has to be carried out immediately, especially the one concerned the absolute power of PTUN. This is important since the provisions of the Law 30/2014 that has added or expanded the absolute power of the Administrative Court and the certainties in Supreme Court Reg. 4/2015, which is used as a reference in the implementation of the power of the judge in reviewing the practice of power abuse is inadequate. Ammending or adding the authority to review misconduct as written in the Law on State Administrative Court has to be done by ammending the law itself, and cannot be done through other laws. Likewise, several legal norms as regulated in the Law 30/2014 need to be reviewed, especially those related to the concept of abuse of authority. However, for the current implementation and because the Law 30/2014 is in force, it is necessary to make a common perception about the practice of power abuse among government officials, APIP, and APH, PTUN judges and Corruption Court judges.

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