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Research paper

Discretion as to the Object of the Criminal Law of Corruption in Indonesia

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Abstract

The high number of corruption cases among government officials in Indonesia cannot be separated from what is the object of the criminal law of corruption, especially since corruption laws in Indonesia do not distinguish between discretion and abuse of authority due to position. This raises the question, can discretion be the legal object of criminal corruption? This legal research is carried out with conceptual approach, statute approach and case approach, it can be concluded that discretion cannot be used as an object of the criminal law of corruption because discretion is not based on the principle of legality. Placing discretion as the object of the law of corruption is inconsistent with the demands of the welfare state. In the use of discretion, it is necessary only to set strict standards and supervision, and the use of discretion with consistent purpose principles. And it must be stated in the Act, that the expression is not the object of corruption.

Keywords: *Discretion, Object Of Law, Criminal Corruption.*

1. Introduction

Discretion in many literatures tends to be examined in the perspective of space or loopholes for government officials to corrupt. In contrast to this research, where the focus is discretion itself as an object of corruption. This is important in Indonesia, where the Attorney General's Office of the Republic of Indonesia notes that throughout 2016 alone there were 2434 corruption cases perpetrated by the Attorney General's Office and their staff. This fact explains, that in eradicating corruption required an appropriate action to control corruption (1). The majority of corruption cases are within the scope of government officials' actions in the form of unlawful acts and abuse of authority, and in it including the actions of government officials called discretion. The position of discretion is not the same as unlawful acts and abuse of authority. As such, this is one of the problems in corruption law enforcement in Indonesia and resulted in differences of views and legal uncertainty, as well as putting discretion in the gray areas in the effort to eradicate corruption.

The use of discretion (policy) is still being debated in many countries, including in Indonesia, especially the concept of legal accountability (2). In addition to the normative debate (3); the debate cannot be separated from the speculation of the use of discretion, which is susceptible abused. According to Yang Yang (4), 90% of the perceived injustice comes from the discretion and 10% of the regulations.. These data indicate that the government officials cannot use discretion freely.

Use discretion in practice of the government is based on principles, the government cannot refuse to provide services to the public for reasons of no laws regulating or there is no law that can be used as a basis for authority to take legal action (5). Lately, this principle is curbed, but not in the context of efforts to reduce corruption among government officials (6). Narrowing the discretionary space can be seen from the inability of government officials to build public facilities needs if the budget has not allocated or various forms of regulatory policies that function as part of the operational implementation of the tasks of government, which cannot change or deviate legislation (5). The end of discretionary use is seen in a number of government officials who are held accountable for their actions that are considered to be a criminal act of corruption.

Actually, corruption is a serious threat to state security and social justice (7); the situation is much more complicated, where the laws to eradicate corruption (UUPTPK) in Indonesia do not distinguish between discretion and abuse of authority. The approach used in the corruption criminal justice against the discretion is based on the legal expert opinion that leads to legal uncertainty. On the other hand, the inclusion of discretion as the object of the criminal law of corruption is mixed in the act of abuse of authority or tort. The situation contributes to the increasing the number of Corruption criminal acts in Indonesia (8). Based on this fact, the crucial question is, can discretion (policy) be the object of the corruption criminal act?

2. Literature Review

The problem of corruption and the government become an important problem, attract public attention (9), and has become an international concern. Each country has its own problems in dealing with corruption. This is mainly due to the problem of corruption associated with various factors, including the existence of a democratic government. In Thailand, for example, Ditsawanon 10) says, when the country returns to democracy, corruption will occur and democratic belief will disappear again like a vicious circle. While in the Netherlands, as (11) explains, corruption is a problem related to legal history, but is too long approached with a narrow criminal law approach. Condition is certainly different in other countries, such as in Indonesia for example, or other coun-

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tries, each has its own focus in efforts to eradicate corruption. Nevertheless, each country has its own problems in the regulation of corruption, such as the standing of discretion in Indonesia as the object of the corrupt criminal act.

Based on the "Donut Theory" (12), discretion is like a hole in the middle of the donut while on the sides are rules restricting as outer of a donut. Discretion is a tool that provides space for the government entity (institution) to take action without having to be bound completely by legislation (13). Discretion is a freedom given to the state administrative apparatus, namely freedom in which principle allows the state administration aparaturs give priority to the effectiveness of an objective (14) and flexibility in determining the policies should be accounted for (15). Nevertheless, there have been long-standing attempts to enact civil service laws, the main purpose being to reduce or completely eliminate discretionary power (16). In this case, examining the perspective of discretion in corruption should not be understood as negating criminal responsibility (17).

The existence of discretion on government officials is not without purpose, but cannot be separated from the function of government. The decision of government officials to prioritize the achievement of a goal or goal (doelmatigheid) rather than in accordance with the prevailing law (rechmatigheid) (18), and discretion in line with the increasing demand for public services to be given to the increasingly complex social and economic life of the citizens (19). Discretion was born as an alternative to fill the shortcomings and weaknesses in the application of the principle of legality (*wetmatigheidvanbestuur*). For a country that adheres to the welfare state, relying on the principle of legality alone is not enough to contribute optimally in serving the interests of society that are growing rapidly in line with the development of science and technology (5). Therefore, discretion is the logical consequence of the adoption of the welfare state.

In Indonesia, the legal concept of discretion is firstly appeared in 2014 after the enactment of Law Number 30 the Year of 2014 (UUAP). According to UUAP, "discretion is the decisions and/or actions which are assigned and/or carried out by government officials to address the issue of the concrete facing in governance in terms of legislation that gives the option, not regulate, incomplete or unclear, and/or stagnation of government". The concept of discretion given in UUAP is narrower than the concept of discretion in various theories of administrative law.

Beyond the legal concept of discretion, the importance of discretion needs to be viewed from where the position of government officials can use it. *First*, there is no legislation governing the settlement in concrete to a particular problem, but the problem demands an immediate settlement. *Secondly*, the legislation that became the basis of the government officials to provide full freedom. *Third*, the delegation of legislation, those government officials empowered to organize them, which is actually a higher power level apparatus (20). In fact, the existence of discretion is also reflected in the three key elements of the policy proposed by Lipsky, as recommended by Taylor (21), discretion rules; value discretion; task discretion. According to Taylor (21), Lipsky's discretion theory has resonance in all countries where it is a relatively high level of public service provision. Thus, the independent discretionary authority is not free, but there are restrictions that accompany its use.

On the other side, it has become the knowledge of the law, that the supervisory discretion (policy) of government officials cannot be left to the judge, but attached to the executive branch itself. Judges should not judge the policy because of the government policies, then the judge as if sitting as an executive. Thus, discretion has a special status in the governance of a country's welfare.

3. Methods

This research is legal research, that is research which applied especially for law science (22). Cohen (23) mentions, in legal research there are several approaches. This research is done with statute approach which is done integrally with conceptual approach and case approach. With a case approach, the main research is the ratio of decidendi or reasoning (24) judge's judgment to arrive at a decision. Against legal cases that already have the force of law sought by decidendory ratios or reasons for judges to make decisions (25).

In accordance with the nature of this study, namely normative legal research, the research on the subject of research conducted by studying primary and secondary legal materials. Techniques and methods of analysis of legal materials used are qualitative analysis. All legal materials obtained are assessed to obtain relevance or relevance to the research topic, in the form of ideas, suggestions, and arguments of legal provisions reviewed (26).

4. Results

A government official has the authority to make decisions and every decision taken by government officials, in the end, is a legal liability. From studies conducted in Indonesia, accountability of law of government officials on the use of discretion is in conflict with the law derived from the *"grey area"* between criminal law and administrative law. In this case, it is found different parameters towards the policy (discretion). *First*, in the realm of administrative law, the parameters that limit the movement of discretion *(discretionary power)* are *detournement de povouir* (abuse of authority) and *abus de droit* (arbitrary). *Second*, in the realm of criminal law, corruption criteria restrict the movement of discretion in the form of the element of *"wederrechtelijkheid"* or a violation *of the law* and "abusing authority" or *"abuse of power*. The differences of parameters are spawned legal uncertainty over the use of discretion, where the jurisdictional determination is still very limited in the life practice of judicial (27).

From the results of research on discretion in relation to criminal acts of corruption, there are two classifications of opinion, i.e.; *first*, the group which stands that discretion government official can be made the object of corruption criminal act; and *second*, the group that stand that policy stance among the government officials cannot be made the object of corruption criminal act. The opposing view arises from the understanding that mixed against discretion. At one situation, discretion is discussed, but matter discussed is the use of authority (authority) position as if the discretion and authority (authority) of government officials have no difference. However, the authority government officials originating from a basic regulation authority inherent in the office, while the basic policy of discretion base.

The argument often expressed by those who view discretion as an object of corruption criminal law is that if government officials' policies are unavailable, then government officials will be immune from the law because the policies they take cannot be tested in court. This group also asks the question, what if government officials arbitrarily in setting its policy or his policy is an act of abuse of authority. This is evident in the views put forward, under the terms of sentencing both *actus reus* and *mensrea*, principles of good governance and accountability of the criminal. It is not a liability policy (criminalization). But it is the officials who make the policy if the policies set contains elements of abuse of authority or the policy behind the enactment of these officials gain for themselves or others and can hurt state finances (28). This argument does not really explain whether discretion can be used as an object of corruption or not, because between the policy maker and the resulting policy are the two that cannot be separated. Therefore, putting government officials as a legal subject of corruption is not an integral part of policy making. The view that is considered the policy can be imprisoned is not being separated from the influence of their views were of the opinion, the general principle that the policy, as well as the wrong decision, cannot be subject to criminal sanctions, but there are exceptions (29). Exceptions were like; although it is an anomaly, an error in the policy and decision makers is expressly specified in the laws or policies and decisions

that are corrupt or policymakers in making motivated crime decisions.

Exceptions noted above actually are not about the policy itself and not an exception to a policy, which can be criminalized. Therefore, keeping in mind the position of discretion, then it is not right to make an administration official as the subject of corruption on his policy. This is certainly the remembrance of different policy parameters with abuses of authority (authority), which is the antithesis of the actions of government officials in accordance with the authority. Actions of government officials are classified as committing misappropriation when decisions fall into the category of prohibited acts, whereas the policy (discretion) as a means of overcoming the concrete facing in governance in terms of legislation that gives the option, doesn't regulate, incomplete or unclear and/or stagnation of government.

Based on the legal concept of the discretion, then whether government officials can be convicted of his policy or not, the parameter is not in any element of misuse of authority or putting allegations of gains on the measures, which are taken in state losses. Discretion which is taken by government officials, its parameters in order to address concrete problems are, if nowhere; [1] The regulation gives the option; [2] The regulation does not set; [3] the regulation is incomplete or unclear. The parameter is a reference for government officials to use discretion. Other parameters for the use of discretion in the form of an upper limit and a lower limit (15), while according to Article 23, Number 30 the year of 2014, discretion may be used, in terms of (a) decisions and / or actions based on the provisions of the legislation which provides a selection decisions and / or actions; (b) decisions and / or actions for the legislation does not set; (c) decisions and/or actions for the legislation is incomplete or unclear; and (c) decision and / or action due to a stagnation of government for broader interest.

Permissibility of using discretionary parameter can be understood that when a government official can be deemed guilty of corruption over the use of discretion, at least when the two principles are met. Firstly, if the measures which are taken are not government officials in order to meet the public interest and or provide public benefit and in accordance with AUPB. Secondly, of measures which are taken by the government officials are intent on enriching himself or others and harm the country's finances.

In the judicial practice of corruption in Indonesia, policy administration officials who made the object of corruption directed to Articles 2 and 3 of Law No. 31 of 1999 which normatively inappropriate and cannot in line. This reality requires, if discretion remains as the object of corruption, must be formulated in the Article corruption of its own. It is especially with the enactment of Law No. 30 of 2014 which has introduced the parameter of the normative permissibility of the use of discretion with its objectives, namely: (a) expedite implementation government; (b) fills a legal vacuum; (c) provide legal certainty; and (d) to overcome the stagnation of government in certain circumstances in order to benefit and the public interest. The purpose of the discretionary use is as well as a dividing line between discretion with the actions of government officials in the context of the exercise of the powers of office.

Researching a number of court rulings over the case of the criminal offence of corruption related to the actions of government officials, the Court almost did not distinguish between the actions of government officials in the form of discretion and the actions of government officials in the realm of the authority of the Office. The Court put both as the same or interrelated. It happened because at the time of forming the Act No. 31 of 1999 where there was no law of public administration as an umbrella or the basis for any actions and decisions of government officials. The situation is different after the enactment of Law No. 30 of 2014, which in the context of corruption Article 2 and 3 of Law No. 31 of 1999 shall be issued for each action or decision taken by government officials in the framework of discretion. In addition, UUAP have determined the norms and the legal consequences of the use of discretion, so the chances of discretion being the object of corruption only to the extent of discretion used in accordance with the objectives and the terms on which the permissibility of its use and not in the category of acts that the legal effects determined in UUAP. It means that making discretionary, as the object of corruption must be a legal element in the form of acts that can be criminally reprehensible beyond the elements of a legal act, which is set in a state administrative law.

5. Discussion

There are a number of cases studied in this study that relate to corruption criminal law enforcement, in which acts of government officials are in the domain of discretion. Two of the many cases studied are presented in this article.

The first case

The Century Bank bailout case shows how a contradiction happened between state administrative law and criminal law of government officials' discretion. Contradiction signals can be captured from a speech by President of Indonesia Susilo Bambang Yudhoyono, who among other states, perhaps in times of crisis and state of the emergency department when a decision must be taken very quickly, where there are technical issues that may be missed. However, it does not mean that his policies were wrong and should be prosecuted. It is very difficult to imagine our country can run well and effectively if every appropriate policy actually led to convictions (30).

In contrast to the President, the House of Representatives (DPR) of the Republic of Indonesia in the plenary session has taken a decision on the Century Bank case for one conclusion; there are allegations of misconduct and abuse of authority monetary and fiscal authorities in the policy of granting short-term funding as well as a bail Century Bank.

As noted, the discretion can be used when the urgency and emergency. Are there any irregularities or abusing authority is another matter. In the case of the Century Bank bailout should be measured first, whether there is a technical rule is omitted and only a mere administrative problem or even in which there are acts that can be denounced as a criminal. However, the urgency and emergency become the eraser reason for criminal legal responsibility. It should also be understood that the purpose of the law is integral with the aim of placing the discretion of the state and as objects of corruption is not merely seen in the perspective of efforts to against corruption.

Second Case

The second case, is a case of corruption with the decision of the Supreme Court of Indonesia (MARI) Number: 779.K / Pid.Sus / 2008, October 21, 2008. The essence of this case is the policy of renting out vacant lots and abandoned in the port area Teluk Bayur managed by state-owned PT. Pelindo II to a third party. At the court of the first instance, the court looked at the actions of the defendant (General Manager of PT. Pelindo II Branch Teluk Bayur at that time) as the action in the field of civil law and the accused was acquitted of committing corruption. While on appeal, stating MARI defendant found guilty of corruption by legal considerations, among others, Judex fact misapplied the law because it does not consider relevant matters juridical properly, i.e. at a rate lower than the value of contracts in place that is around.

In this second case, the court let the best policy and even in order to meet government obligations in the public interest (provision of accumulation of goods warehouses) as corruption. Permissibility of using discretionary is not considered in the corruption case, even if the measures took a positive action, but the court instead puts policies as corruption. Even paradox, in which case the two of the benefits countries, but argued that the amount of land lease MARI potentially harm the country's finances. When the state (PT. Pelindo II) is unable to meet its obligations to provide a warehouse accumulation of goods in the port area, and then carried out by a third party to lease land, but rather the policy was regarded MARI as corruption.

From both cases presented, if discretionary remain accessible as an object of corruption, it is necessary to determine first, whether the policy was purely a discretionary or only form of implementation of the policy actions (not the policy itself). The attitude of this law is very important in Indonesia after the enactment of Law No. 30 of 2014 (UUAP). It is mainly due to Law No. 31 of 1999 hardly saw discretion as a means of administration, which are important in a welfare state, let alone consider discretion in prospecting *based on the distinction between discretionary space and discretionary reasoning* (31*).* In other words, the use of discretion by government officials in Indonesia are still potential as an object of corruption, even if based on the legal doctrine of discretion, it cannot be convicted.

6. Conclusion and Recommendation

Normatively, discretion is required primarily because of legal vacuum, while government officials must move quickly to meet the needs of society. On the other hand, discretion is a strategic and effective instrument for government officials to meet the concrete needs of citizens to be met immediately. Although discretion, may be misused or used incompatible with its purpose, but discretion as a free authority of government officials should not be the object of the criminal law of corruption. In accordance with the excretion of discretion, and its purpose, what is required in the use of discretion is to tighten its standard of use, and strengthen control over its use. Therefore, in the Indonesian context, the use of discretion should be affirmed in the Government Administration Act (UUAP) as unlawful.

7. Conflict of Interest.

There is no conflict of interest

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