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PRESIDENT PERMISSION TO THE INVESTIGATION OF STATE OFFICERS ON MALADMINISTRATION ACTION

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Abstract

The purpose of writing this journal is to find out that permits is a juridical instrument used by the government to influence the people to want to follow the recommended way to achieve a concrete goal. Permission serves as the spearhead of the legal instrument as advisors, engineers and designers. Permits can be used as a control instrument and an instrument to realize good governance, structuring and regulation of these permits are supposed to be done as the realization of government function related to the inspection of state official by law enforcement official. The research methods utilized is a normative method which involved the method of regulatory analysis and conceptual analysis. This research confirms that presidential permit for the examination and summon of public official are indeed needed and necessary, which can be formulated through special law and regulations on the procedures of examination permit, which are to be synchronized with other related laws and regulations. President Permission, when viewed from the standpoint of administrative law has meaning as preventive instrument used for protect President that the governance and functioning of public service at the central and local government. This research recommends for a formation of special court which can take place through a forum privilegium, under the Supreme Court to allow for recognition of the state official' positions, status, and dignities.

Keywords: Vergunning President; State Official; Acts of Maladministration.

Abstrak

Tujuan penulisan jurnal ini untuk mengetahui yang memungkinkan instrumen yuridis yang digunakan oleh pemerintah untuk mempengaruhi orang untuk mau mengikuti cara yang disarankan untuk mencapai tujuan yang konkret. Izin berfungsi sebagai ujung tombak instrumen hukum sebagai penasehat, insinyur dan desainer. Izin dapat digunakan sebagai instrumen kontrol dan instrumen untuk mewujudkan tata pemerintahan yang baik, penataan dan pengaturan izin tersebut seharusnya dilakukan agar fungsi pemerintahan terkait untuk pemeriksaan pejabat negara oleh aparat penegak hukum. Metode penelitian yang digunakan adalah metode normatif yang melibatkan metode analisis peraturan dan analisis konseptual. Penelitian ini menegaskan bahwa Izin Presiden untuk pemeriksaan dan memanggil pejabat publik memang dibutuhkan dan diperlukan, yang dapat dirumuskan melalui hukum dan peraturan tentang prosedur kebutuhan dan izin untuk pemeriksaan, yang harus sinkron dengan terkait lainnya khusus undang-undang. Izin Presiden bila dilihat dari sudut pandang hukum administrasi memiliki arti dalam instrumen pencegahan agar digunakan untuk Presiden menjadga bahwa pemerintahan dan fungsi pelayanan publik di tertanggung pusat dan daerah tidak. Penelitian ini merekomendasikan untuk pembentukan pengadilan khusus yang dapat terjadi melalui forum privilegium, di bawah Mahkamah Agung (Mahkamah Agung) untuk memungkinkan pengakuan dari negara resmi.

Kata Kunci: Izin Presiden; Pejabat Negara; Tindakan Maladministrasi.

Introduction

The function of constitution is as a written foundation for a state which regulates the basic matters in the administration of the state and government, includes the form and structure of the state, the state organs and the guarantee of protection against Human Rights and citizens. Implementing this function, the state establishes institutions that are able to embody the values of democracy and fight for the aspirations of the people to fit the demands of the development of national and state life. Article 1 paragraph 1 of the 1945 Constitution of the Republic of Indonesia declares;

“The State of Indonesia shall be a unitary state in the form of a republic”. This article contains the essential meaning that the form of the Indonesian state shall be a unitary state in the form of a republic, which is the Archipelagic State of The Indonesian Republic (*referred in Indonesian language as, NKRI*). Thus, Indonesia inherits the character of a unitary state which transforms in the existence of central power that is central in determining governmental affairs at all levels of government. The form of a unitary state gives the consequence that in the whole country, there is only one legitimate government and there is only one national law applicable throughout the country”.¹

The authority mandated in the 1945 Constitution of the Republic of Indonesia has pronounced President as the head of state and head of government. Such indicates that the system of government adopted by Indonesia is a presidential government system. This is under the reason that the presidential government system only recognizes one kind of executive who runs the function of the head of government (chief executive) and the head of state (single executive),² Therefore, to carry out the division of powers and perform the functions of government, it further supported through Law Number 32 Year 2004 on Regional Government (before amended). (Hereinafter, Law 32/2004).

According to Djatmiati³ in her dissertation, she describes that administrative law or administration law (*administratiefrecht or bestuursrecht*) contains the norms of governmental law. These governance norms serve as the parameters used in the

¹ Sukardi, ‘Pembatalan Peraturan Daerah dan Akibat Hukumnya’ (Universitas Airlangga 2009).[1].

² Zakaria Bangun, *Sistem Ketatanegaraan Indonesia Pasca Amandemen UUD 1945* (Bina Media Perintis 2005).[43].

³ Tatiek Sri Djatmiati (1), ‘Prinsip Izin Usaha Industri di Indonesia’, (Universitas Airlangga 2004).[62].

exercise of authority exercised by government agencies. The parameters applied in the use of authority are legal compliance or legal non-compliance. Thus, when there is legal non-compliance conducted by a government body, such institution must be held accountable.

The power possessed by state official often have different interests with the community; whether it is intentionally or unintentionally. In performing the duties, state official often conducts legal non-compliance both due to misuse of authority (*detournement de pouvoir*), arbitrary acts (*willekeur*) or other criminal acts.⁴ Legal non-compliance caused by misuse of authority according to Hadjon⁵ is should be measured by finding whether or not the said officers have used its authority for another purpose. The occurrence of abuse of authority is not due to an omission. Intentional misuse of authority should be intended to divert the purpose that has been given to such authority. The alteration of purpose is based on a negative personal interest both for its own sake and for others.

Additionally, Djamiati pronounces the legal non-compliance due to arbitrary act as⁶ unreasonable acts. It is due to arbitrary action in Dutch administrative law known as *willekeur* which also mentioned as *kennelijk on redelijk*. The inspection permits granted by Article 36 of Law Number 32 Year 2004 on Regional Government (prior to amendment) solely intended to protect the dignity of state official and the permit must be interpreted as an administrative procedure for good governance. Special treatment of the regional head and Vice head of the region is further processed in *forum privilegiatum*. *Forum Privilegiatum* is a special right held by high-ranking official to be tried by a special legal proceeding or high court instead of tried before the district court. It also embodies a special judicial process in the Supreme Court; which applied at the regime of Article 106 of the Temporary Constitution of 1950 and the Constitution of The Republic of the United States of Indonesia.

In accordance with the substance of legal issues to be discussed, the type of research used is normative law research; which is a study that mainly examines the provisions

⁴ Anwary, *Perang Melawan Korupsi di Indonesia* (Institut Pengkajian Masalah-Masalah Politik dan Sosial Ekonomi 2012).[21-33].

⁵ Philipus M Hadjon,[*et.,al.*](1), *Hukum Administrasi dan Tindak Pidana Korupsi (Kisi-Kisi Hukum Administrasi dalam Konteks Tindak Pidana Korupsi)* (Gadjah Mada University Press 2011).[22].

⁶ Tatiek Sri Djatmiati,[*et.,al.*](2), *Hukum Administrasi dan Tindak Pidana Korupsi (Pelayanan Publik dan Tindak Pidana Korupsi)* (Gadjah Mada University Press 2011).[46].

of positive law, as well as legal principles by systematically explaining the provisions of law in a particular legal category, analyze the relationship between Legal provisions, explaining and predicting future developments.⁷ The specialty of this method according to Marzuki⁸ is that this method is highly dependent to seek the coherent truth. Coherent truth it self is a truth based on the suitability between the studied with the rules applied. Legal research is a process to find the rule of law, legal principles, and legal doctrines to address the legal issues faced. This is in accordance with the prescriptive character of law.

The study of law has a peculiar nature of study; the study of law (*rechtsbeoefening*) – this method of research transformed from the study of positive law which its study covered three layers of legal science, namely legal dogmatic, legal theory and legal philosophy. In this method as well, it will conduct systematization of primary legal materials and secondary legal materials. According to Marzuki,⁹ the primary legal materials are authoritative legal material that embodies an authority. Primary legal materials consist of: UUD NRI 1945, legislation (Act), travaux preparatoires and court verdict. While the secondary legal material that is in the form of publications about the law, which is not an official document. Legal publications include textbooks, legal dictionaries, legal journals, and judge dissenting opinion.

The legal substance in this journal is normative legal research; consisting of primary legal materials and secondary legal materials. The Primary legal materials are; UUD NRI 1945; On the matter of the written approval and the authority of the President, it is regulated in Article 36 of Law 32/2004 on Regional Government and Article 66 jo Article 220 jo Article 289 of Law Number 27 Year 2009 concerning MPR, DPR, DPD and DPRD. The Supreme Court has issued Circular Letter Number 09 Year 2009 About the Guidance of Investigation Permit against Head of Region / Vice Head of Region and DPRD Member. The circular letter establishes the case when President's written approval time has passed; the approval of the

⁷ Philipus M Hadjon (2), 'Pengkajian Ilmu Hukum Dogmatik (Normatif)' [1997] Paper Pelatihan Metode Hukum Normatif.[3].

⁸ Peter Mahmud Marzuki, *Penelitian Hukum* (Kencana Prenada Media Group 2013).[93].

⁹ *ibid.*[35].

investigation from the President becomes irrelevant. The Cabinet Secretary of the Republic of Indonesia has issued the Decree of the Cabinet Secretary Number 5 of 2010 on the Final Evaluation Team for Investigation, Investigation and/or Detention of State Official Requiring the Written Approval of the President dated March 28, 2010. Secondary legal sources are legal materials that provide further explanations on primary law sources. It obtained from law books including law thesis and dissertation, legal journals, legal dictionaries and judge dissenting opinion and previous research results related to the problem discussed in this journal.

Grants of President Permission to Investigate State Official on Maladministration Action

The authority of the President in granting the investigation permission of the state official must contain the conditions to be fulfilled in order for the permit to be granted. The existence of the conditions intended as a form of legal certainty of law enforcers. It will help them to assure whether it has been held in accordance with the procedure or not.

According to N.M.Spelt and J.B.J.M. Ten Berge in Philipus M. Hadjon,¹⁰ There are three juridical aspects in permission grant system, as follows (a) Prohibition, which means that the authority of a governmental organ allowed deviating from the prohibition by granting permission. It shall be established in a legislation, in accordance with the principle of legality in a democratic constitutional state, which emphasizes that the government authority is strictly as promulgated in the Constitution or other legislation; (b). Permission, which is an authority granted to a governmental organs to replace the prohibition with an agreement set forth in a certain form, in the form of concrete, individual and final state administrative decisions, which contain a legal relationship, that is, the permits and certain obligations (through provisions) for the entitled; and (c). Conditions – a part that is related to the function of the permission as one of the government controlling instruments (*sturen*).

The president's authority in granting permits for investigation of state official is not to protect state official from the law enforcement process, but the president only

¹⁰ Philipus M Hadjon (1).*Op.Cit.*[5-7].

implements the contents of the provisions of the law. The existence of such authority according to Djatmiati,¹¹ only authorized governmental bodies or authorities may issue a permit requested by a person and it is said that the government (official or organ) is a dynamicator in government duties. Because the meaning of permission by Tatiek Sri Djatmiati's view,¹² is an instrument commonly used in the field of administrative law, the purpose of which is to influence citizens in order to follow the recommended way to achieve concrete objectives.

The President as the head of government makes the administrative law as a provision in the administrative procedure and implementation of the ethics of the government, including the granting of permits. The view of Tatiek Sri Djatmiati is written in her dissertation, that the role of government as both Provider, entrepreneur or as umpire in the framework of economic politics should be shifted towards the facilitator aimed at the prosperity of the people. Regulation in permits matter must always contain two aspects of interest that are to control the life of the community, as well as to support the state income.¹³ Because, one of the government functions in the field of guidance and control is the function of granting licenses to certain communities and organizations.¹⁴ Permits are necessary to control the life of the community and to promote the achievement of the objectives,¹⁵ and the legal compliance (*de rechtsorder*), which, in the view of Tatiek Sri Djatmiati,¹⁶ divided into five functions of legal order namely: (1) resolving conflict (*reactiefunctie*); (2) regulates public order (*ordeningsfunctie*); (3) altering (*inrichtingsfunctie*); (4) Distribution of rare objects in community life (*regeling-en planningsfunctie*); And (5) control or supervision (*controlefunctie*).

Based on the view of Tatiek Sri Djatmiati above, it is indicated that the implementation of control and supervision functions owned by the President (government) is shown through granting permission to the investigation of state official. Thus, the law enforcer in investigating state official shall follow

¹¹ Tatiek Sri Djatmiati (1). *Op. Cit.* [55].

¹² *ibid.* [1].

¹³ *ibid.* [27].

¹⁴ *ibid.* [17].

¹⁵ *ibid.* [32].

¹⁶ *ibid.* [50].

the Decree of the Cabinet Secretary Number 7 of 2013 on the Final Evaluation Team for investigation and/or Detention of State Official Requiring the Written Approval of the President on the fifth dictum.

The background of requiring President Permission to investigate state official is a special procedure (administrative procedure) contained in the considerant section of Law No.13 of 1970 on the Procedures of Police Action against Members / Heads of the Provisional People's Consultative Assembly and the House of Representatives in the regime of *Gotong Royong*; Presidential Instruction No. 9/1974 on the Procedures of Police Action against the Head / Members of the Regional House of Representatives / Level I and Level II, Supreme Court Letter Number: KMA/ 125 / RHS / VIII / 1991 dated 31 August 1991; Explanation of Article 15 of Law No. 15 Year 1973 on the State Audit Board; Law no. 22 of 2003 on the Composition and Position of the People's Consultative Assembly, DPR, DPD, and DPRD concerning the procedure of investigating legislative members; Likewise, Law No. 32 of 2004 on Regional Government (before amendment) still stipulates the provision of inspection permit to the official.

President Permission to the Investigation of State Official as the Authority of the President

F.A.M. Stroink in Abdul Rasyid Thalib mentioned that state official in exercising their authority as government organs are guided by constitutional law and administrative law. The authority of government organs is an authority reinforced by positive law, intended to regulate and implement it.¹⁷ Authority must be based on the existing legal provisions in order to be called a legitimate authority. According to Philipus M. Hadjon's view, any governmental action is required to holding on the legitimate authority of attribution, delegation and mandate. Attribution is derived from the Latin ad *tribuere* which means "giving to". The technical concept of constitutional law and administrative law define that the authority of attribution is the authority granted or assigned to a particular position that was attached to a

¹⁷ Abdul Rasyid Thalib, *Wewenang Mahkamah Konstitusi dan Aplikasinya dalam Sistem Ketatanegaraan Republik Indonesia* (Citra Aditya Bakti 2006).[219].

position. An attribution refers to the original authority on the basis of the provisions of constitutional law. Attribution is the authority to make a decision (*besluit*) directly sourced to the law in the material sense. Delegate is coming from the Latin *delegre* which means to delegate. The concept of delegation is the authority to appoint a delegation. Mandate comes from the Latin *mandar* which means ordered, not giving out authority. The transfer of authority to the delegate according to JBJM ten Berger as in Philipus M. Hadjon¹⁸ requires that: First, delegates must be definitive; meaning that delegates can no longer use their delegated power. Second, the delegation must be based on the provisions of legislation; meaning that delegation is possible when there is a provision for it in the legislation. Third, the delegation is not to subordinates; meaning that delegated authority in the hierarchy of personnel relationship is not allowed. Fourth requirement is Principal obligation to provide an explanation; meaning that the delegate may request an explanation in exercising such authority. Fifth, *beleidsregels* (policy); it refers to the Principal obligation to provide instructions on the use of the authority.

The above opinion is in line with the view of Henc van Maarseveen in PWC Akkermaans,¹⁹ that the authority possessed by the government in taking real action; arranging or issuing state administrative decisions can be based on the authority obtained by attribution, delegation and mandate. Legislation requires that law enforcer obtain permission from the President prior to investigating state official (heads of regions). The existence of the permit is to know and determine which act of state official is contrary to the laws and regulations.

President permission for the investigation of state official can be interpreted as a control instrument (*sturen*) and administrative law enforcement of the maladministration act conducted by state official as the President's subordinate. Permission from the President is a normative dimension of administrative law and a form of administrative law enforcement. Related to the normative dimension of administrative law, Philipus M. Hadjon's believes that the normative dimension of administrative law will provide

¹⁸ Philipus M Hadjon (1).*Op.Cit.*[4-5].

¹⁹ P.W.C. Akkermaans,(*et.,al.*), *Algemene Begrippen Van Staats Recht* (WEJ Tjeen Willink Zwolle Netherlands 1985).[55].

insight into the nature of the administrative law itself. The importance of administrative law enforcement both from the government and society aspect is the administrative law review of administrative law enforcement for the present and future needs. Philipus M Hadjon²⁰ further asserts his view of the normative dimensions of administrative law which includes: (1) the law of authority, (2) the law of public organization, and (3) the law of legal protection for the society against government power.

The Authority of the President in granting permission concerning the investigation of state official for the Members of MPR, DPR and DPD is embodied in Article 106 paragraph 1 of Law No. 22 of 2003 on the Composition and Position of the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly and Articles 66, 220 and 289 of the Law. 27 of 2009 concerning the Composition and Status of the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representatives Council, and the Regional People's Legislative Assembly. Furthermore, it is also embodied in Article 17 paragraph 1 of Law No. Law No. 14/1985 on the Supreme Court jo. 5 of 2004 on Amendment to Law no. 14 of 1985 on the Supreme Court jo. Law No. 3 of 2009 on the Second Amendment of Law no. 14 of 1985 on the Supreme Court, Article 15 paragraph 1 and paragraph 2 of Law no. 5 of 1973 on the State Audit Board, as well as Article 24 and Article 25 paragraph 2 of Law no. 15 of 2006 on the State Audit Board. For Governors, Regents, and Mayors and their representatives, pursuant to Article 36 paragraph 1 and paragraph 3 of Law no. 32 of 2004 on Regional Governance. Likewise, it is also provided for the Governor, Senior Vice Governor and Vice Governor of Bank Indonesia, pursuant to Article 49 of Law no. 23 of 1999 concerning Bank Indonesia and Law No. 3 year 2004 on the amendement of Law. No. 23 year 1999.

Djatmiati²¹ asserts that permission is a state administrative decision that commonly used in the field of administrative law or often referred to as a decision. N.M.Spelt and J.B.J.M.Ten Berge in Philipus M. Hadjon,²² said that permit is a

²⁰ *ibid.*[2].

²¹ Tatiek Sri Djatmiati (1).*Op.Cit.*[15].

²² Philipus M. Hadjon (4), 'Pengantar Hukum Perizinan' [1993] Yuridika.[3].

state administrative decision or an administrative act of a state. This means that there exists a legal relationship following the permission established. In regards, government in issuing a permit will be followed by imposing conditions and obligations to be observed and executed by the licensee. The application will be rejected if the criteria set by the authority are not met.

In accordance to President Permission for the investigation of state official, every state conduct must be based on the legitimacy to perform state administration act as the basis of its authority. Such Permission granted by the President is an applicable law that exclusively given to state official at the central and regional levels if there is a conduct of maladministration while conducting the function of government. Opinion of William Wade as quoted in Tatiek Sri Djatmiati²³ explains that “*administrative law is the rule related to control of governmental power. Administrative law is concerned with the nature of power public authorities and especially, with manner of their exercise*”. The enforcement of administrative law by the President in granting permission concerning the investigation of state official to law enforcers is absolutely based on the legality of acts derived by legitimate authority and it is used in the case of power supervision. The authority to impose sanctions either through direct orders or through decisions (*beschikking*) and the authority to regulate.

President Responsibility for the Maladministration Conduct of State Official

From the Constitutional aspect, President Involvement as a state representative in the field of governance and law is to organize, manage, and supervise in order to realize the state’s objectives. According to Jimly Asshiddiqie,²⁴ the concept of responsibility consists of personal responsibilities and institutional or occupational responsibilities. If an official exercise its duties and authorities in accordance with applicable legal norms or regulations, his actions shall be held accountable as an institutional responsibility, but when

²³Tatiek Sri Djatmiati (3), ‘Administrative Penal Law’ [2013] Makalah Diskusi Panel Pertanggungjawaban Pidana Korporasi dalam Tindak Pidana Korupsi dalam Perspektif Hukum Pidana, Administrative Penal Law, dan Business Judgement Rule.[1-2].

²⁴Jimly Asshiddiqie, ‘Islam dan Tradisi Negara Konstitusi’ [2010] Makalah pada Seminar Indonesia-Malaysia.[12-13].

an official exercises its duties and authorities with violating the applicable norms or rules of law, it will be considered as personal responsibility.

Related to the responsibility of the President (government) in public service, according to Djatmiati,²⁵ the president (government) is required to actively carry out governmental duties related to public services. Administrative law is a law relating to governmental authority and control over the use of authority which its purpose is to protect individuals or communities. Further, Tatiek Sri Djatmiati²⁶ asserts that there are two forms of responsibility that are personal responsibility and institutional responsibility. Personal responsibility is related to a functional approach or behavioral approach. From the point of view of administrative law, personal responsibility concerns maladministration in the use of authority in public services. The use of authority which includes governmental action under the provisions of legislation and action in establishing a policy or discretion; and the institutional responsibility is related to the legality of government action. In the administrative law the question of legality of government acts is related to the approach to government authority. Thus, it determines the control of authority.

Article 1 number 3 of Law no. 37 of 2008 concerning the Ombudsman of the Republic of Indonesia define that the notion of maladministration includes matters which may cause both material and immaterial damages and situations of injustice that harm the rights of citizens of the actions of public official.²⁷ The opinion of Sir William Armstrong in the *Head of the Home Civil Service* as quoted by Tatiek Sri Djatmiati²⁸ pronounces the types of maladministration, which are

“Failure to answer a letter, losing the papers or part of them, giving misleading statements to citizens about their legal position, delay in reaching a decision, exhibiting bias, giving incomplete or ambiguous instructions to the officer

²⁵ Tatiek Sri Djatmiati (4), *Pelayanan Publik dan Tindak Pidana Korupsi, dalam Buku Hukum Administrasi dan Tindak Pidana Korupsi* (Gadjah Mada University Press 2011).[39].

²⁶ Tatiek Sri Djatmiati (5), ‘Maladministrasi dalam Praktek Kesalahan Pribadi dan Kesalahan Jabatan, Tanggungjawab Pribadi dan Tanggungjawab Jabatan’, *Dalam Buku Hukum Administrasi dan Good Governance Hukum Administrasi dan Good Governance* (Universitas Trisakti 2010).[94].

²⁷ Hendra Nurtjahjo,[*et.,al.*], *Memahami Maladministrasi* (Ombudsman Republik Indonesia 2013).[4].

²⁸ Sir William Armstrong, *Cases and Materials Constitutional and Administrative Law* (Cambridge University Press).[10]. Lihat Tatiek Sri Djatmiati (5).*Op.Cit.*[77].

who is applying the rule, getting the facts of the case wrong, or failing to take facts into account which the department should have taken into account”.

According to Rene Seerden and Frits Stroink in Tatiek Sri Djatmiati,²⁹ British legal system did not define maladministration in legislation, but during the course of the legislation itself, the word maladministration is mentioned repeatedly, including the word bias, neglect, inattention, delay, incompetence, ineptitude, and so on. Furthermore, Tatiek Sri Djatmiati³⁰ assert that British law focuses on the material aspect of the *Ultra Vires* doctrine since the introduction of maladministration has always been linked to legal cases viewed as maladministration. Similarly, Tatiek Sri Djatmiati establishes her opinion in her paper entitled “*Maladministrasi Dalam Konteks Kesalahan Pribadi dan Kesalahan Jabatan, Tanggung Jawab Pribadi dan Tanggung Jawab Jabatan*”³¹ that maladministration highlights the behavior of the officers in performing governmental duties, as well as in terms of public service duties. Therefore, measures on action are attributed to the officer’s behavior. The behavioral norms of the officers are aimed at actions that can be qualified as maladministration measures, whereas government norms are aimed at a legality of government action.

Philipus M. Hadjon states that maladministration is always associated with conducts in service, in this case, the services performed by public official.³² Associated with administrative legal norms, maladministration is categorized as behavior norms of state official in public service. Philipus M. Hadjon³³ further stated that to measure whether maladministration is an administrative violation that must be accounted using three spheres of government that includes authority, procedure, and substance.

Based on the understanding and classification of maladministration mentioned by the experts, the Author agrees with Tatiek Sri Djatmiati and Philipus M. Hadjon,³⁴ that maladministrasi is a study of administrative law. It is due to the reason that in

²⁹ Rene Seerden dan Frits Stroink (eds), *Administrative Law of the European Union, Its Member States and United States* (Intersentia Uitgevers Antwerpen 2002).[222].

³⁰ Tatiek Sri Djatmiati (5). *Op.Cit.*[78].

³¹ *Loc.Cit.*

³² Philipus M. Hadjon (5), *Kisi-Kisi Hukum Administrasi dalam Konteks Tindak Pidana Korupsi dalam Buku Hukum Adminsitrasidan Tindak Pidana Korupsi* (Gadjah Mada University Press 2011).[20].

³³ Philipus M. Hadjon (6), ‘Tanggungjawab Jabatan dan Tanggungjawab Pribadi Atas Tindak Pemerintah’ Makalah, disampaikan pada Semiloka Hukum Pajakakan pada Semiloka Hukum Pajak.[2].

³⁴ Philipus M. Hadjon (5).*Op.Cit.*[20].

maladministration, there exist behavior of the official in carrying out government duties, as well as in providing public service that can not be separated from the existence of mistake in carrying out duties and functions. Therefore, the formulation contained in these provisions mainly involves official and people associated with the position. In addition, in carrying out its duties and functions, official are provided with the authority to carry out administrative legal actions, whether in the form of acts that have no legal consequences (*feitelijkhandelingen*) or any legal administrative action that causes legal consequences (*rechtshandeling*). In the event that the authority provided was being misused, existence of arbitrary acts or exceeding the authority granted, the official concerned may be held accountable for any errors that he or she has committed.

In regards to the responsibility, the Authors agree with Philipus M. Hadjon that asserts maladministration is categorized as behavior norms of state official in public service. Philipus M. Hadjon further stated that to measure whether maladministration is an administrative violation that must be accounted using three spheres of government that include authority, procedure, and substance.³⁵

Thus, it can be concluded that maladministration is actually a misconduct done by official in providing public service. It then resulted in disruption of the rule of law and behavior that is not based on the applicable regulation, such as negligence in carrying out duties and function as civil servant.

Aspect of Administrative Procedure and Legality of President Permission to the Investigation of State Official

Legal procedural aspect is one of the important conditions that must be met by a decision issued by the state administrative body or officer. Article 53 Paragraph 2 Sub-Article a of Law Number 9 Year 2004 concerning Amendment of Law Number 5 Year 1986 on State Administrative Court, one of the reasons that can be used in the lawsuit is that the decision of state administration is against the prevailing laws and regulations. The legality of investigation permit of state officials can be given directly by the President or through the Minister of Home Affairs on behalf of the

³⁵ Philipus M. Hadjon (6).*Op.Cit.*[2].

President. In relation to the provisions of the presidential permit, it also prescribes the procedures for the examination of the head and members of the MPR, DPR and DPD of the Republic of Indonesia. The authorized body to permit the investigation and authorization of letter of summon before the court (including summoning as a witness) for state official are President. This is as stipulated in Article 106 of Law No. 23 of 2003 on the composition and position of the MPR, DPR, DPD and DPRD paragraph (1 to 6) and Article 66, Article 220 and Article 289 Law No. 27 Year 2009 on The People's Consultative Assembly, the People's Legislative Assembly, the Regional Representatives Council and the Regional People's Legislative Assembly.

The arrest or detention of the Supreme Court Head Justice and Justice shall be made on the orders of the Attorney General after obtaining the President's permission, as governed by Article 17 of Law no. 14 of 1985 on the Supreme Court jo. Law No. 5 of 2004 on Amendment to Law no. 14 of 1985 on the Supreme Court. Examination of the Board of Governors of Bank Indonesia, Chairman and Member of the Board of Governors of Bank Indonesia, in the event of a summons, a request for information and an investigation of a member of the Board of Governors of Bank Indonesia shall obtain a written approval from the President, provided for in Article 49 of Law no. 23 of 1999 concerning Bank Indonesia jo. Law No. 3 of 2004 on Amendment to Law no. 23 of 1999 Concerning Bank Indonesia.

Investigation against head and members of BPK shall be conducted on the orders of the Attorney General after obtaining written approval from the President. It is regulated in Article 24 of Law no. 15 of 2006 on the State Audit Board. Likewise for the Head of Region and Vice of Regional Head the authorized body to issue permit on investigation is the President. This is in accordance with Article 36 paragraph 1 of Law No. 32 of 2004 on Regional Government as amended by Article 90 of Law No. 23 of 2014.

The Standard Operating Procedure of requesting President written approval or subsidiary replaced by the Minister of Home Affairs and the Governor shall fulfill two requirements: administrative requirements and material requirements. The procedure for requesting permission to investigate state officials through the police can be done

in three methods, namely permits addressed to the President in relation to the Head or Members of the MPR, DPR, DPD and Regional Head / Vice Head of Region; Permit addressed to the Minister of Home Affairs specifically for the Head or Members of the Provincial DPRD; And the request of the Governor's permission to the Head or Member of the Regional DPRD. The outcome of the preliminary investigation shall then be submitted to the Cabinet Secretary, the Ministry of Home Affairs and the Governor to be processed and decided whether the case has fulfilled the requirement for a further investigation. In general, the purpose and function of the permit are to control the activities of the government in certain matters where it contains guidelines to be implemented and serve as an instrument of supervision or control by the President in carrying out the task of administering the government.

Presiden Permission as *Specialitetbeginsel* Administrative Procedure

The basic foundation of a legal state both in the concept of *rechtsstaat* and the rule of law is to protect basic human rights. The concept of *rechtsstaat* and the protection of basic human rights are manifested through the principle of legality. The principle of legality is the principle that limits the power of government. This limitation itself contains the authority to control (sturing) the life of the community. *Sturing* authority for the life of the community is manifested through various legal instruments; among them is the instrument of permit as one form of State Administrative decision as regulated in Article 1 No. 3 of Law Number 9 Year 2004 on State Administrative Court.³⁶

Permit in administrative law is a juridical instrument used by the government to force its citizens to follow the recommended way to achieve a concrete objective. Permission as a legal instrument serves as a tool aimed to direct, control, alter, and establishing a prosperous society. The grant of President Permission to investigate state officials in the case of alleged maladministration is one of the functions and authorities of the President. According to the law, the grant of the permit is a part of the State Administrative Decree. In regards to *toetsing gronden testing*, Tatiek Sri Djatmiati³⁷

³⁶ Bahder Johan Nasution, 'Upaya Penerapan Sanksi Administratif dan Perizinan Sebagai Pembatasan Terhadap Kebebasan Bertindak' 48 Jurnal Ilmu Syari'ah dan Hukum.[212].

³⁷ Tatiek Sri Djatmiati (1).*Op.Cit.*[247].

explains that “permit is one form of State Administrative Decree which its issuance and revocation shall be based on juridical foundation. According to Hadjon,³⁸ the permit issued by the State Administrative Officer is used to resolving conflict, regulates public order, altering, distributing rare objects in community life and supervising.

The use of such permit indicates that permission basically restricts individual freedom. Thus, in limiting such freedom, the government should not violate the basic principles of a legal state, namely the principle of legality. In this regard, Hadjon³⁹ asserts that the authority to grant permission is the authority granted by the legislation. Authority is given to achieve concrete objectives. The juridical aspects of a permit include a prohibition to engage in an activity without permission and authorization to grant permission from the Agency or State Administration Officer. The authority to grant permission is essentially a public authority. A public authority is an authority under the Constitutional and/or Administrative Law.

The existence of permission to inspect state officials from the President as a regulatory function is also attached to the function of control (sturing), which must be subjected to the principle of legality. Both functions are legal instruments that are used to restrict a person’s basic rights or freedom.⁴⁰ Permit in juridical sense are administrative authorities owned by the government. Permission is an agreement which is based on the power government to govern the society that serves as a controller of citizen behavior and supervisor of the state. To answer the question whether or not President has the authority to grant permission for the investigation of state officials; it can be reviewed using the principle of speciality (*specialiteitsbeginsel*). According to Djamati,⁴¹ *specialiteitsbeginsel* means that every authority has a specific purpose. In the literature of administrative law, such thing is known as *zuiverheid van oogmerk principle* (direction or purpose). Deviating from this principle will result to *detour de pouvoir*. In terms of substance, *specialite beginsel* can be

³⁸ Philipus M. Hadjon (4).*Op.Cit.*[1].

³⁹ Bahder Johan Nasution.*Op.Cit.*[213].

⁴⁰ *ibid.*[224-225].

⁴¹ Tatiek Sri Djamati (1).*Op.Cit.*[108].

translated as the principle of purpose. It is affirmed by Tatiek Sri Djatmiati that through the *specialiteits beginsel*, every authority has a certain purpose; namely the purpose of giving authority which in administrative law is known as direction or purpose (*zuiverheid van oogmerk*).

The relationship of *specialiteits beginsel* and the principle of legality are also affirmed by Mariette Kobussen in Tatiek Sri Djatmiati;⁴² that the said principle becomes the basis for the government's authority to reach its goal. Every government authority (*bestuurs bevoegdheid*) is regulated under legislation with a certain definite purpose. From the standpoint of administrative law *specialiteitsbeginsel* is expressed as a series of rules relating to a particular public interest. Tatiek Sri Djatmiati⁴³ further asserts that *specialiteitsbeginsel* is an *onderdel* of the principle of legality.

Both of the above principles when associated with the existence of the requirements to acquire President Permission to investigate state officials very have the right rationality, since the Presidential Permit is specific when associated with the principle of *specialiteitsbeginsel* on the grounds that it can only be issued on specific case involving state official. Moreover, only the President is permitted by law to issue the permission to investigate certain state officials. Third, the said permission is overriding other laws related to law enforcement processes. Although it is permitted in other regulations, some laws require the President Permission to be obtained prior the investigation.

Specialiteitsbeginsel from the administrative law aspect is expressed as a set of rules relating to a particular public interest.⁴⁴ This principle was developed by Mariette Kobussen in the *De Vrijheid Van De Overheid* book. Substantially *specialiteitsbeginsel* means that each authority has a specific purpose. The term has long been known in administrative law and called the principle of *zuiverheid van oogmerk* (direction or purpose). Deviation from this principle will result to *detournement de pouvoir*.⁴⁵

⁴² Tatiek Sri Djatmiati (1).*Op.Cit.*[108].

⁴³ *Loc.Cit.*

⁴⁴ *Loc.Cit.*

⁴⁵ *Loc.Cit.*

The existence of regulation governing the examination of state officials with President Permission indicates that the permit of the President fulfills the legality principle. With this regulation, the President Permission is a conduct and administrative action that can only be done by the President and can not be done by other government organs (unless the legislation regulates it). In accordance to the principle of *specialiateitsbeginsel*, the authority of the President is in line with aim purposed in *specialiateitsbeginsel* which is to fulfill a specific purpose. In addition, the President Permit is also in conformity with the principles of administrative law and check and balance instruments for a State Administrative Decree. The Author believes that the investigation permission for state official has *specialiateitsbeginsel* character. It is due to the reason that it is fulfilling the purpose or intent of an authority and held in accordance with the principle of good governance.

Conclusion

The legal responsibilities of the President in granting inspection permits for state official are faced with administrative legal responsibilities promulgated by the law and democracy under the 1945 Constitution of the Republic of Indonesia. President grant for maladministration investigation conducted by state official is not to be understood as an obstacle in the law enforcement process. Such permission shall be interpreted as a procedure of summon a state official. This procedure is crucially needed to understand whether the mistake is made during performing task or not. Presidential permission when perceived from the perspective of administrative law has a meaning as a preventive instrument used by the President to keep the implementation of government and public service functions at the central and regional levels are not disturbed. Service activities basically concerning the fulfillment of a right, and the right to service is already universal. This procedure is necessary to know the mistakes made in performing the task or not. Granting permission to examine the head of the region related to maladministration is the application of the prudential principal and precision

since determining the actions of state official as the act of maladministration is considered very important. This is related to the dignity of a state official which also stated in Article 28G paragraph 1 of the 1945 Constitution of the Republic of Indonesia.

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