

## LEGAL LIABILITY OF GOVERNMENT ADMINISTRATORS IN MALADMINISTRATION

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### ABSTRACT

*The existence of all government is essentially intended to protect all the people and all the blood spilled and promotes the general welfare. It is therefore the duty of public service for all government and constitution is a fundamental right for citizens. But in practice sometimes the administrators in carrying out its constitutional duty to act of maladministration which cause a loss to the community, both material and immaterial. On the other hand, responsibility of the government to the citizens embraced by almost every state based on law. Indonesia is a country that applies the rule of law as stated in Article 1 (3) of the 1945 Constitution of Indonesia. Based on this reason that administrators act of maladministration in the implementation of government should be legally defensible. Furthermore, a person who should be responsible is not a government administrator's position, this is due to the action of maladministration is a violation of norms of government officials' behavior. The legal liability by legislation could be accounted for by administrative law separately, civil law and criminal law.*

**Keywords:** Government administrators, legal liability, maladministration, public service

### INTRODUCTION

Indonesian country aims to take on the important task of protecting and creating prosperity for its people. It is as in the preamble to the Constitution of the Republic of Indonesia 1945 in fourth paragraph states that: "then than it is to protect all the people of Indonesia and the entire country of Indonesia and to promote the general welfare, the intellectual life of the nation, and," In order to implement the objectives, the state has a duty to facilitate the entire fulfillment of the rights of every citizen. Hence was born the state's role undertaken by a government with the basic tasks that bring together and organize a variety of needs and interests of citizens.

Public service is a constitutional obligation for the government administrators and is a fundamental right for citizens to be met by the government. Public service is not merely an instrument to prepare for the operation to abort liability governing the country, but more than that, public service is an essential basic for the realization of social justice( Hesti Puspitosari, 2011;179). State has an obligation to serve all citizens and residents to fulfill the basic needs and rights within the framework of public service that is mandated by the 1945 Constitution of Indonesia, as mandated in Article 34 paragraph (3), namely: "The state is responsible for the provision of health care facilities and service facilities common decent.

The effect of public service law no. 25 of 2009 intended for all government services to its citizens could be better. However, services performed by the administrators of the public related to the public service even worse. As the result, there are many public affairs that cannot be solved well, almost every government agency can still be found maladministration or poor service delivery. The act of maladministration are behaviors or actions against the

law, beyond the authority, to exercise authority for purposes other than the purposes of the authority, including negligence or disregard the legal obligations in the public service performed by the Operator of State and government to incur losses of material and / or immaterial to the communities and individuals.

The existence of all government is essentially necessary to protect the public interest and provide public services such as public goods and services as well as administrative services. The government was established not to serve themselves, but to serve the community and create conditions that allow every member of the community to develop the ability and creativity to achieve a common goal. (M. Ryaas Rasyid, 1997; 11)

Therefore, government administrator's legal liability in the event of maladministration is a must. Yet this is not easy because there are still some issues that surrounded. Theoretically, there are different concepts of legal liability theories about maladministration in the public service, where the lawyers are still different opinions, especially regarding who should be responsible for the acts of maladministration, whether the responsible agency office or charged to the person who do the act of maladministration ( Ridwan HR, 2011;323).

However, the juridical problem is Indonesia's legal system determines the use of government norms and norms of behavior of government officers simultaneously. On the other hand, the Ombudsman law no. 37 of 2008 itself only provides explanations forms of maladministration, but in terms of legal liability, whether a personal responsibility or liability positions are still no textual clarity in the law that requires further study.

Based on the background above, the researcher offers the concept of legal accountability for administrators who perform acts of maladministration in the public service. So that will be found by someone who is responsible for the law and how to shape their legal liability in the event of maladministration in the implementation of the government.

### **Legal Liability Subject of law When It Happens Maladministration in Governance**

According Sjachran Basah, protection of citizens granted when the attitude of the administration of the State's acts cause harm to it. While the protection of the administration of the State itself made against its actions with good posture and correct according to the law, both written and unwritten. In other words, to protect the administration of the State from doing something wrong based on the law (Sjachran Basah, 1986; 7).

Government administrator's agency or office is in the field of executive power that has independent authority under the law to take measures both in the field of government and governance arrangements.

The government's responsibility to the citizens or third party is embraced by almost all of states based on law. Indonesia is one of countries that apply the rule of modern law, as stated in Article 1 paragraph (3) State Republic of Indonesia Constitution of year 1945 which states that "Indonesia is a country of law", so this makes Indonesia is a country based on the constitution of the Constitution State Republic of Indonesia year 1945.

In principle the concept of Rule of Law and Human Rights, the legal aspects of the protection is the main aspect. The protection of the people is an important part of administrative law. If associated with legal liability for the administrators in the execution of their duties may harm the interests of the people and in issuing decisions that are flawed law, it must be able to account for it in terms of action or claim for his actions.

Accountability is defined as an embodiment of the obligation to account for the success or failure of the mission of the organization in achieving goals and objectives that have been

established through media accountability periodically (Sedarmayanti, 2003; 8). In the explanation of Article 3, item 7 of Law No. 28 Year 1999 on State Officials Clean and Free from Corruption, Collusion and Nepotism mentioned that the term "accountability principle" is a principle which determines that any activity and the final results of the activities of the Operator State must be accountable to the people or the people as the supreme sovereign state in accordance with the provisions of the legislation in force.

In the administration of state and government accountability is attached to positions, which embraced by juridical authority. In the perspective of public law, the authority is what gave rise to the liability, in line with the general principle; "*geen bevoegdheid zonder verantwoordelijkheid*"; there is no authority without responsibility.

Granting certain powers to perform certain legal actions raises accountability for the use of that authority. AD. Belinfante said, "*Niemand's bevoegdheid uittoefenen verantwoording schuldig zonder te zijn of zonder dat of die uitoefening controle bestaan*". Suwoto mention that sense of responsibility contains two aspects, namely the internal and external aspects. Accountability containing internal aspect, only realized in the form of report on the implementation of power. External accountability is the responsibility of the third party, if the implementing authority raises a pain or loss. (Suwoto Mulyosudarmo 1990,75-80)

Legal liability position with respect to the legality acts of government administrators. In administrative law issues related to the legality of acts of government approach to government power. Power approach relates to the authority granted by law based on the principle of legality or principle *rechtmatigheid* (Tatiek Sri Djatmiati , 2012; 94).

Legal liability to third parties as a result of the use of authority was taken by courts. In the process of judicial magistrate authorized to examine and test whether the use was authorized or not bring harm to others. If proved in court proceedings that the uses of authority by government officials that cause harm, the judge authorized by decision impose responsibility on the officials concerned.

FR. Bothlingk stated that the duties and authority inherent in the office is run by humans (*natuurlijke persoon*), acting as the representative office and called the office holders or officials. Any use authorized by an officer always carries with it responsibility, in accordance with the principle of "*deen bevoegdheid zonder verantwoordelijkheid*" (no authority without accountability). Because authority is inherent in the position, but the implementation is run by humans, as the representative or office functionary, who should bear the legal responsibility in the event of irregularities should be viewed as a casuistic because it may be the responsibility of the position and responsibilities may also be the responsibility and personal accountability.

In the perspective of public law, the legal action is the position (*ambt*) which is an institution with its own scope of work established for a long time and he was given the task and authority. The institute is in the Dutch language called *organ* which means the equipment, while the equipment means that the person or assembly consisting of persons who by law or the articles of association authorized to propose or to realize the will of the legal entity. Thus, the organ that is synonymous with the agency.

Hereinafter referred to as the official one was when he was running the authority for and on behalf of the office (*ambtshalve*), while when a person is not to take legal actions in order to post or not to act in accordance with the authority vested in that office, he cannot be categorized as an officer or referred to as the official was not authorized (*onbevoegd*). In the public sector, the legal consequences are born not of officials acting for and on behalf of the

office has never been considered or deemed to be violations of the law, that if the legal consequences that cause harm to others can be prosecuted.

Based on the above, it appears that the legal action is undertaken by the authorities in order to carry out the authority of office, and then his actions were categorized as office legal action. Officials have acted in accordance with the command post, so the responsibility is also attached to the post. While officers were acting not in the office or outside the framework of the authority vested in the position, it cannot be called authorities, so that the legal responsibility must personally (*in persoon*) instead of the office.

If the administrators or administrative official act of maladministration, the officials must be held accountable by law. This is what is meant as legal liability, both a lawsuit and demands for his actions (Philipus M.Hadjon, 2012; 41)

On the question of who is accountable in the event of maladministration, whether personal or official as official agencies concerned. According Sjachran basah, incidental damages suffered by citizens can be caused by two possibilities, the first attitude of the state administration acts in violation of the law, namely the implementation is wrong, but the law is right and worthwhile. Second, the attitude of the administrative act is not legally wrong but legal practice itself materially untrue and worthless. (Sjachran Basah, 1986,11). Some errors in the implementation of the law are right and worthwhile is the responsibility of state administration, while the law is not correct and not worth the responsibility of the law makers, in this case the legislature.

According Kranenburg and Vegting, the government accountability are two theories: first, *fautes personnelles*, namely the theory that the loss of a third party that is charged to the officer for his actions cause harm and second, *fautes de services*, namely the theory that the loss of the third-party agency that is charged to the concerned officials. According to the first theory, the burden of responsibility aimed at the officials as a person (*in persoon*), while according to the second theory charged to office. In practice, losses were adjusted also to whether the errors made were mild (*faute Legere*) or severe fault (*faute Lourde*). Heavy or light the mistakes made, of course there are differences in the burden of responsibility that must be borne by the offender.

Kranenburg and Vegting have made a classification of legal liability administrators who perform acts of maladministration, said that the responsibility is borne by the office or agency if an unlawful act committed by an officer that is objective, otherwise government officials or organizers were burdened liability when he makes a mistake opinion. Therefore FR bothlingk confirmed that (Ridwan HR, 2012;142):

all authors mentioned in this chapter agreed that representatives (officials, *inpersoon*) responsible for any third party, when he did act in a way that is morally reprehensible or, in other expressions, acting with bad conviction or negligent and reckless. For other unlawful acts, only a fully representative and he has abused the situation, where he is as a representative, by doing its own immoral against the interests of third parties.

Based on the scope of maladministration as in the discussion, the researchers concluded that maladministration is a personal fault, so follow Kranenburg and Vegting opinion about responsibility for errors opinion and the opinion of FR bothlingk above, that the officials or administrators who have done wrong opinion or otherwise act in a way which is morally reprehensible act or bad intention or negligent and reckless then be categorized administrators act of maladministration which require the personal legal liability (*in persoon*). It is also as stated by Julista Mustamu that position of responsibility occurs when policy makers use

discretion for and on behalf of the office, while personal responsibility is applied in terms of policy-makers act of maladministration.

This argument is also reinforced by Philip M. Hadjon stating that positions of responsibility with regard to the legality acts of the government in administrative law, with regard to the approach to government power. While personal responsibility related to approach of functionaries and behavioral approaches in administrative law. With regard to the use of authority and maladministration in the public service, a personal behavior and it will be a personal responsibility, not the responsibility of office. (Philipus M. Hadjon, 2011; 16)

Furthermore, the opinion of Tatiek Sri Djatmiati stated that keeping in view the type of errors made, whether it is included in the personal fault (*Faute Peronelle*) or an error term (*Faute de Service*) Personal responsibility related to approach behavior approach functionaries or government officials. From the point of view of administrative law, personal responsibility regarding maladministration in the use of authority in the public service, then the principle of personal responsibility is not known *respondeat superior* (employer responsible for the actions of subordinates) (Tatiek Sri Djatmiati, 2007;20).

If it is a mistake caused by faulty personal privacy is a part of the government of maladministration or disadvantaged communities to gain legal protection to the concerned employee sued the general court as a person and is personally accountable for mistakes. However, if only such title relating to errors related to the validity of a KTUN, then KTUN issued by the officials can be sued in Judicial Administration (*Administrative Court*).

This is a rationalization that maladministration is a violation of the norms of behavior of government officials in the public service is not a violation of government norms that mistakes were categorized errors opinion that demands personal accountability (*in person*).

Application of the principle of accountability *Fautes de personnelles* or privately (*in person*) for the administrators if you do the maladministration in the State Administrative Law in Indonesia normatively justifiable. This has been confirmed in various legislations separately. One that can be relied upon is as defined in Article 59 of Law No. 1 of 2004 on State Treasury. Where in the article explains that:

- a. Any loss countries/ regions caused by unlawful acts or omissions of a person must be resolved in accordance with applicable laws and regulations.
- b. Treasurer, civil servants and not the treasurer, or other officer for his actions violated the law or dereliction of duty levied directly detrimental to the state, are required to replace the loss.
- c. Every head of state ministries/ agencies/ head working units to conduct their demands for compensation, after learning that the state ministry/ agency/ work unit area concerned the loss caused by the act of any party.

Judging from the article above, it can be argued that judicial officers personally (*in person*) can be justified by law if you do the maladministration which could cause losses to the state. This argument can be made the basis that the purpose of the preparation of this article is a personal responsibility; it is with respect to the rationale for the preparation of legislation on the State Treasury that states that;

To avoid financial loss countries / regions due to unlawful acts or omissions of a person, the law of the State Treasury is set loss settlement provision states / regions. Therefore, the law of the State Treasury is emphasized that any loss to the state / region caused by the unlawful act or omission of a person should be replaced by the guilty party. With the completion of

these losses countries / regions can be recovered from the losses that have occurred,,,, and so on.

Treasurer, civil servants and not the treasurer, and other officers who had been assigned to indemnify countries / regions may be subject to administrative sanctions and / or criminal penalties if found guilty of administrative violations and / or criminal.

It can be seen in Law No. 12 Year 2006 on Citizenship of the Republic of Indonesia. Where in Article 36 paragraph (1) and (2) asserts that:

(1) The official negligence carrying out their duties and obligations as provided in this Act causing a person to lose the right to obtain or regain and / or loss of citizenship of the Republic of Indonesia shall be punished with imprisonment of 1 (one) year.

(2) In the case of a crime referred to in paragraph (1) is due deliberation, shall be punished with imprisonment of 3 (three) years.

Researchers looked at the provisions of the above article is meant to explain that officials due to their negligence in performing their duties and obligations, resulting in a loss for someone to gain citizenship is an action for violation of norms of behavior of government officials so officials had committed acts of maladministration. The sanctions set forth in the article are criminal penalties, so it automatically officials as the official in private question. Because of the criminal sanctions demand personal accountability.

Furthermore, to clarify the spirit of the desire of the law on citizenship to demand personal accountability can be seen in the government statement represented by Hamid Awaluddin as minister of law and human rights when responding to a question from the FPD MW Saul Boy asks a question of the right of citizens not served by the administration of the State when the citizens apply for citizenship. So the government's answer to that question is;

Because of this we are talking about behavior that does not meet the administration of the State qualifying time, therefore sanctions or juridical mechanism PETUN run because that's how its laws, that all the administrative acts that violate the rights of citizens of the mechanism is there,,,, and so on.

It was further yes sir, yes; it's about the power of the judiciary, judicial TUN. I read it, yes sir, yes, in Article 116 paragraph (4) in the case of the defendant is not willing to make decisions, so administration country, and court defeat minister. If I did not execute the judgment which has gained legal force against the concerned officials imposed forceful measures, no sir, in the form of a payment of money or forced labor and administrative sanctions. " So is this person, this administration officials. If I as a minister in a policy of passive administration of the State, and I were charged by the applicant, then I lost and I did not execute, then there are sanctions. So actually there sir, legal certainty here. Mechanism was obvious mechanism PETUN,,, etc.

And underneath there was another pack, the official who did not execute the judgment referred to in paragraph (4) was announced in the local print media by the secretary of court (*Panitera*) since the non-fulfillment of the provisions referred to, so there are sanctions Sir.

From the responses given by government ministers above the law and human rights, research has shown clearly that according to the government's interpretation of the Article 116 paragraph (4) of Law No. 9 of 2004 on the change in the law No. 5 of 1986 on the Administrative Court also embraced the official legal liability in person the sanction of compulsory payments and administrative penalties if the authorities do not enforce the judgment. The act did not execute the judgment can be categorized act of maladministration.

If the administrators act for the citizens and on behalf of the office, the responsibility borne by the office. But otherwise if the officials concerned acted outside the authority granted tenure, then the official has committed a mistake subjective or maladministration, so the responsibility and liability of the jerk as a person is an officer (*in person*).

## CONCLUSION

Based on the analysis of the description of the two problems above, the conclusion can be stated as follows:

1. Parties are liable if the government administration to do something for the sake of fulfilling the tasks assigned to him, it is the responsibility and accountability of office. But if the government administrators act of maladministration in the implementation of responsible government and accountability is the official personally
2. Legal liability if you do the government administrators of maladministration in the implementation of the rule of legislation by sector, then the responsibility is administrative law, civil law, and criminal law.

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