

Criminal Policy in Law Enforcement Related to *Malpublic Administration*

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ABSTRACT

Application of penal law in the so-called 'malpublic administration', refers to the three main issues in penal law. First, forms of 'malpublic administration acts' which have been formulated as criminal act (criminalization process). Second, legal subjects that are liable for 'malpublic administration'. Third, kinds and forms of sanctions applicable to the 'malpublic administration' deeds (penalization process)

Keywords: Criminal policy, malpublic administration

INTRODUCTION

One of the interests often affecting law in its implementation is political. Penal law is presently the most vulnerable to be wrapped by a given political interest. It is often applied as political means to trap or ensnare political competitors or officers in government. I prefer to term it *penal politization* as it is more abused for the sake of 'a given interest' instead of 'common good'.

The issue of 'penal politization' has been cited by Dionysios Spinellis in his presentation concerning '*Top hat Crimes*' in Penal Law Summit XV of 1994. According to him, the most salient characteristic of this crime of 'public officers' or '*Top hat Crimes*' is the element of capitalizing on chances related to their positions. It is often buffered by the fact that their deeds escape from detection. Even so, it often escapes from law. Their neutralization techniques include what Spinellis term as '*politicising of the criminal proceedings*'.

Simply put, the wrongdoings or crimes by 'public officers' are so much related to their authorities or power. Thus, the theme of this paper represented by the its title is material, since the issue of law enforcement is one of several aspects covered by *criminal policy* in a broad sense, including the one related to *malpublic administration*.

There are three main concerns that can be explored from the title of the paper above. **First**, how the position of penal law is within *malpublic administration*. **Second**, when penal law can be applied in *malpublic administration case*. **Third**, what criminal law is required to prevent *malpublic administration*. The first concerns with penal law position in anticipating wrongdoings within the field of public administration. The second concerns with penal law functions within the field of public administration. The third concerns with responses to practices of malpublic administration.

PENAL LAW AS *ULTIMUM REMEDIUM* AND *PRIMUM REMEDIUM*

Penal law is considered as special since the natures of its sanctions are commonly strict and pressing. So strict that they are often described by expression 'it cuts its own flesh' (J.M. Van Bemmelen, 1985: 15) other expressions are, 'it is like two-sided sword'. On one hand, penal law is intended to protect human rights and law interests. On another hand, its sanctioning system can potentially harm and downgrade human dignity.

Many penal law and criminology experts have warned this paradoxical nature of penal law (Barda Nawawi Arief, 1996: 23-44). In that case penal law should be applied in a deliberate

and rational way. It then can be said that penal law (its sanctions) will be applied when other laws — including public administration — are not adequate.

Van Wijk-Konijnenbelt: P.De Haan CS states that administrative law is juridical instrument enabling government to control public life and society to participate in that control in the endeavor to obtain law protection (Lutfi Effendi, 2003: 5-6) This is line with shift of paradigm of public administration from 'rule government' to 'good governance' which is emphasizing society in public administration.

Since public administration law contains 'public space', and have norms referring to public, there should be 'check & balances' based on 'clean & good governance' to protect those norms. Check & balances is one forms of supervision over government in a broad sense, particularly its public administration performance. If the supervision works, penal law then serves only as 'ultimum remedium' atau according to 'Model Law' made by 'Organization for Economic Co-operation and Development (OECD) (M. Sholehuddin, 2004:136) it is called 'ultima ratio principle', meaning that penal law serves as the last resort in criminal policy. In terms of legislation policy, it is intended to avoid 'over criminalization' and 'over belasting'.

There has been a global tendency towards policy to putting penal law first in handling penal crimes. In other words, penal law is applied as 'primum remedium' in certain penal crimes. For instance, any deeds that accrue one's self wealth to the disadvantage of public finance are considered as corruption.

Within 'malpublic administration' context, corruption is manifestation of law-disregarding behavior. As such, penal law in its relation to the wrongdoing in administrative law can be applied as either 'ultimum remedium' or 'primum remedium'. This is particularly so given administrative law position as 'in-between law' between civil law and penal law. WF. Prins has once said that almost all administrative law-based rules are complemented by penal sanctions (*in cauda venenum*).

Optimum Function of Penal Law in Administrative Law

If examined closely, there are many acts applying penal law as a means to enforce norms in administrative law. This application of penal law into administrative law in terms of administrative law signifies law efficacy and objectivity of any public policy. It means that, in any administrative law containing penal law (sanctions), there are stipulations over public policy, and public officers. This is the real main juridical task of penal law, as reflected in Peters' statement that "The juridical task of criminal law is not policing society but policing the police". (G.P. Hoefnagels, 1973:130)

However, there are also administrative acts without a clear-cut stipulation on sanctions against 'public officers' making wrongdoing in his official duty, authority and responsibility. In other words, penal law is not applied because legislators only rely on administrative law for law enforcement system. The question is, can penal law be applied against wrongdoings breaking administrative acts which only contain administrative sanctions? The answer is definitely, 'No!' This answer is grounded on two underlying arguments as follows:

1. Formal Legality Principle

It states that the condition to act on wrongdoings is that there should be stipulations in penal law formulating wrongdoings and their sanctions. This principle requires judges to act according to them. By this principle, law efficacy can be assured. This principle accordingly becomes the cornerstone of penal law and penal law procedure.

2. *Lex certa Principle*

It requires formulation of legal stipulations in a comprehensive fashion. An act should make a clear boundaries of public authorities because naturally “Penal law does not only regulate society, but also public officers”, as Peters’ statement above. The two basic principle in penal law are contained in article 1 and subsection 1 of KUHP (The Book of Penal Law), beside two other principles, namely: *Lex temporis delicti* and *Non-retroactive*.

Based on those arguments, theoretically it can be concluded that administrative act without clear penal law sanctions can only apply administrative sanctions to respond any misconduct against it. There should not be ‘leaping’ from Administrative Law to Penal Law, for the sake of law surety.

Application of penal law in the so-called ‘*malpublic administration*’, refers to the three main issues in penal law. *First*, forms of ‘*malpublic administration acts*’ which have been formulated as criminal act (criminalization process). *Second*, legal subjects those are liable for ‘*malpublic administration*’. *Third*, kinds and forms of sanctions applicable to the ‘*malpublic administration*’ deeds (penalization process).

Those three issues becomes material when it comes to the matter of penal law’s role in administrative law given that the understanding of ‘*malpublic administration*’ is relative to ethics. ‘*Malpublic administration*’ deeds deviate from administrative ethics or administrative practice that distances itself from obtaining administrative goal. (Joko Widodo, tt: 259) Nigro & Nigro in Muhadjir Darwin argue that there are eight forms of ‘*malpublic administration*’, namely: *dishonesty, unethical behaviour, disregard of the law, favoritism in law interpretation, unfairness to employee, inefficiency, covering mistakes and having no initiatives*.

These ethical values describe human attitude and behavior as ‘good’ and ‘bad’ in their social life in an abstract way. Penal law, in contrast, must be formulated to identify human attitude and behavior as ‘right’ and ‘wrong’ in a concrete way. By this sense, in order to apply penal law in ‘*malpublic administration*’ cases, forms of the ethical values must be formulated in terms of concrete deed, like ‘corruption’ which can be said as a concret deed of ‘dishonesty’ dan ‘disregard of law’ values.

Criminal Policy in ‘Malpublic Administration’

In 1965 Marc Ancel has formulated a short definition on ‘*Criminal Policy*’ as “*the rational organization of the control of crime by society*”. Drawing on it, in 1969 G.P. Hoefnagels went further that: “*Criminal policy is a rational total of the responses to crime*”. Around 1980 Sudarto argued that criminal policy is a rational endeavour from society to overcome crimes.

This rational endeavour relates to choices of the best way to overcome crime. The choices cover ways/means to be used, including penal law, and other non-penal law means considered to be the most appropriate and functional in overcoming the crime.

As noted above, *malpublic administration* is related to ethics. Hence, ethical treatment emphasis might be more functional in overcoming the *malpublic administration*. As for this ethical treatment, there are three things worth consideration in its implementation:

First, ethical treatment should be based on the understanding and internalization of values (*summum bonum*) of one’s work, position and authority. It means that one should be directed at understanding and internalization of the value-laden meaning of one’s work, position and authority.

Second, ethical *treatment* should also be directed to awareness of intention, motive, and consequence of any official decision and action made. The Principle is: any official decision and action should derive from grand intention or motive, and simultaneously result in good outcome. Stuart Mills' statement lends confirmation, *the greatest one for the greatest number*. Good action set the goal of and brings the best results to as many people as possible.

Third, ethical *treatment* must be directed to effort to develop responsibility to one' self. This responsibility includes taking all inherent risks in doing what he or she believes as the right things to do. He or she is the first person who will deal with all the subsequent risks, without trying to find any scapegoat.

Actually, many official crimes have their roots from the lack of understanding an internalization of job ethics. Morality/ethics of public officers in Indonesia, according to the terms of Kohlberg-Gilligan never take off from *pre-conventional* morality that is childish morality. He complies with the law, which is driven more by fear of sanction than by sense of responsibility. When sanction is non-existent, he is not averse to crimes. He will perform as most people expected, when there is worthy reward in doing so. He will do the other way around, if otherwise.

Public officers should be in area '*conventional morality*', a morality based on sense of responsibility and values of his or her position. Those who are in this area of morality avoid doing anything that plagues the values of his or her positions. He or she will take any risks resulting from his or her persistence in his or her beliefs. If it is the case, then penal law in the case of '*malpublic administration*' only stands as *ultimum remedium*, instead of '*primum remedium*'.

CONCLUSION

In concluding this writing, I intend to remind Albert Camus' existentialism philosophy in the context of criminal policy. Camus acknowledged justification of penalization to offender, but this penalization should not eliminate his or her *human power* in obtaining new values and new adaptation. Hence at the same time, the offender should be guided through various 'restoration efforts' to achieve his or her 'more complete human (Rudolph J. Gerber and Patrick D. McAnany, 1970)

ACKNOWLEDGEMENTS

This article is dedicated to civitas academica of Bhayangkara university Surabaya particularly law faculty. They have already contributed significantly to this article.

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