

## Legal Actions in Advocacy Against Criminal Act of Corruption

Bangun Patrianto

Faculty of Law, Bhayangkara University, Surabaya,  
INDONESIA.

### ABSTRACT

*Basically the way all apparatuses of law upholders work, starting from police, prosecutor, justice, and advocate is not different; ranging from: to ensure the fact, to qualify and to constitute. The law upholders should always deepen their legal knowledge to strengthen their considerations as the basis for their actions or decisions. Logical consequences of consideration from MA: 1) to differentiate between position liability and personal liability; position liability is related to liability of TUN (Tata Usaha Negara) and personal liability is related to criminal liability. 2) Criminal liability is personal liability, in relation to government action; it is personal liability whenever an officeholder commits the act of maladministration.*

**Keywords:** Legal action, criminal, corruption

### INTRODUCTION

In the framework of law enforcement, in particular law enforcement against criminal act of corruption, for this enforcement is in accordance with expected by the law and justice, the way that the law upholders work is not different, between police, public prosecutor, court or judge, and advocate.

We take an existing example in the UU 8/1981 on criminal law procedure, especially on inquiry and investigation, it can be inferred that all law enforcement apparatuses have the same understanding and they all agree that the understanding is right. Inquiry is a series of inquirer's acts to seek and discover an incident alleged as criminal act to decide whether investigation can be carried out or not according to the way regulated in this UU (Vide Article 1 number 5 of UU 8/1981 on criminal law procedure. Investigation is a series of investigator's acts in the way regulated in this UU to search and collect evidence or proof and find the suspect (Vide Article 1 number 2 of UU 8/1981 on criminal law procedure).

So the investigator's duties in carrying out the investigation are to search for evidence or proof and collect evidence and find out the suspect, and it will be carried on by a prosecutor to do prosecution in court.

In his book *Hukum Acara Perdata Indonesia*, Prof. Dr. Sudikno Mertokusumo said:

“That in trying a case, the judge has to do three acts, those are:

1. The judge must first to constatre the incident is true or not; it means that the judge must ensure the constatering the truthfulness of the incident and it is not estimation anymore, by proving all at once.
2. After the judge successfully constatire the incident, the act has to be done is to qualify the incident; it means that the incident is qualified to find out legal relationship or to find the law by applying legal rule to the incident.
3. In the final step, the judge must constitute or give the constitution; it means that the judge decides the law and gives the justice.

From those three steps, then the judge concludes from premise mayor, i.e. the law, and premise minor, i.e. the incident. Even this is syllogism, but it is not solely logic that becomes the basis of the conclusion. Justice given by the judge is not the product of the judge's intellect, but of his spirit, said Sir Alfred Denning, a famous judge in England.

## **LEGAL STEPS IN ADVOCACY AGAINST CRIMINAL ACT OF CORRUPTION**

If we talk about criminal act of corruption, in order to take part in the law enforcement and justice to eradicate the criminal law of corruption, we have to know legal aspects related to criminal act of corruption. The objective is in order that in the process of law enforcement, related to formal and material legal instruments to achieve the truthfulness, can be brought about correctly without violating human rights of the parties caught as the actors of criminal act of corruption.

Participation of all people is needed, therefore, as well as law enforcement apparatuses with their respective function in suggesting argumentations based on the law and reliable logically and academically to the court or judge who tries the case.

Aspect of criminal law in order to bring back the state loss, in reference to UU 31/1999 jo UU 20/2001 on eradication of criminal act of corruption henceforth abbreviated UUPTPK, that is:

Article 2 point 1 of UUPTPK states:

“Every body who against the law commits an act to enrich himself or other people or a corporation which can inflict financial loss to the state or state economy, is sentenced with life imprisonment or imprisoned at least four years and the longest twenty years and fined at least two hundred millions rupiah and at most one billion rupiah.”

Article 3 of UUPTPK states;

“Every person who with the purpose to take advantage for himself or other person or a corporation, misuses the authority, the opportunity or the facility available to him because of the position that can inflict financial loss to the state or state economy, is sentenced with life imprisonment or imprisoned at least one year and the longest twenty years and/or fined at least fifty millions rupiah and at most one billion rupiah.”

General explanation of UUPTPK is stated about:

“state finance is the entire state wealth, in any form, separated or not separated, including inside it all parts of state wealth and all rights and obligations raised because;”

- a. Under the control, management, and responsibility of the officer of state institution, at the central and regional levels;
- b. Under the control, management or administration, and responsibility of BUMN/BUMD, foundation, corporate, company which joins with it the capital of third parties based on the contract with the state.

“State economy is the life of economy formed as join venture based on principle of kinship or public venture independently based on state policy at central and regional levels in accordance with prevailing regulation to bring about benefit, prosperity, welfare to all people's life.”

Authority in the state financial management according to UU 17/2003 on state finance is regulated in: Article 6 essentially regulates, that is:

“President as the head of government (chief executive) holds the power of state financial management, as part of governmental power. Then the financial management is authorized to secretary (minister) or institutional leader who uses state budget and also to regional government.”

Article 34 essentially regulates, that is:

“Secretary/institutional leader/Governor/regent/mayor proved to commit abuse of APBN policy/regional regulation on APBD or leader of unit of organization/state ministry/institution/operational unit of regional apparatus proved to commit abuse of budgetary activities set in the UU on APBN/regional regulation on APBD is threatened by imprisonment and fine in accordance with UU.”

Then UU 1/2004 on the treasury that defined the meaning of state/regional financial loss, in article 1 point 22:

“State/regional losses are short of money, securities and real goods and in definite quantities, as a result from acts against the law, purposely or inadvertently.”

It can be seen from the laws and UUPPK, a fundamental difference in the process of offsetting or returning the loss suffered by the state. The laws underline mechanism of offsetting for civil servant (treasurer or not), with consideration:

- a. Law upholders cannot be bound to legal principle “ultimum remedium” and principle “primeun remedium” against the case they handle in the interest of the state needs to be protected by the law. If they are bound to both principles, the law of state financial will ask: “When the offset can be realized or the state loss will be returned?”
- b. In behalf of law enforcement, in order to the case can be completed in a faster period of time, the offset done by the treasurer or not as responsibility for money shortage and only to restore the offset and not as sanction/punishment.
- c. Mechanism based on the law of state finance is the way to return the state finance or to offset because of state loss without the court.

Whereas UUPPK regulates the state loss of money is attributable to the acts against the law or the acts of abuses of power by somebody because of his position/rank, so that the application of UUPPK in order to offset or to return the state money with the court is as sanction / punishment.

According to Abdul Latif, who quoted Arifin P Soeria Atmajaya, (2009: 98-99), said that in article 23 of the Constitution on the meaning of state finance in order to offset or to return the state money resulted in multi-interpretations, at least 3 interpretations, those are:

- a. State finance with narrow meaning, i.e. only covers state money that comes from APBN.
- b. Related to historical and systematic method, state finance with wide meaning, covers state money comes from APBN, APBD, BUMN, BUMD; the entire wealth of the state as a system of state finance. It means all activities related to money received or formed will be based on state’s privilege for public interest.
- c. With systematic, teleological or sociological approaches to the state money based on the objective. If the objective of interpreting the state money is meant to learn the system of management and responsibility (state finance with narrow meaning, only

APBN), but it is meant to learn the system of supervision or the inspection of responsibility (state finance with wide meaning).

Abdul Latif said that the third interpretation is the most dynamic and essential in answering various problems of management and responsibility of state money. Because when government invests its money in public company, limited company, the question is how the position of state money in the aspect of government investment?

If in regional company (corporation), the position of the state money is inseparable wealth of state, whereas in limited company, the capital is separated wealth of state. Abdul latif said that separation of the state wealth means government separates the state wealth for joint capital, for capital of founding corporation or company or for strengthening the capital structure of limited company.

Logical consequence of government's joint capital in limited company is government jointly runs the risk and it is responsible for the losses. Here government is not as public corporation, because government duty as public corporation, Lemaire called it "bestuurszorg", is to bring about public welfare, with special task for public administration granted freedom on its own initiative to take action quickly and correctly (doeltreffen) to deal with interested parties for public welfare (Bachsani Mustofa: 1990:40).

So based on the legal logic related to alleged losses of the state in the limited company, a part of the shares owned by the state, it means that the concept of state losses, i.e. inflict financial loss, cannot be achieved. Therefore, in deciding an act as criminal act of corruption, an act can inflict financial losses, cannot only be based on the formulation of the formal act but more importantly on material formulation (to cause the state suffers losses). Because in formulation of articles of criminal act of corruption there are two types of delik, those are delik formil and delik formil. Public prosecutor must be able to prove both types of delik in court especially about causal relationship between the accused act and the effect of the act which had caused the state suffered the losses.

Because many experts said that state losses is identical with state finance. This opinion is not wrong; the goal is to prevent abuse of the state money, so that financial aspect in the criminal act of corruption is widely regulated, covers an act to enrich oneself or other person or corporation against the law.

In carrying out bestuurszorg, state implementers based on the administrative law are provided discretion, i.e. public administration is granted freedom to on its own initiative commit acts to deal with urgent problems and there are no rules, including the authority to decide independently and authority for interpreting vague norms.

In addition to discretion granted to them, state implementers have to exercise their authorities in accordance with what have been set by the laws (bound authorities). Providing the authorities to the state implementers is based on consideration, that the authorities based on regulation is not enough to do maximally to serve the interest of the public rapidly developing and in the concept of welfare state, state implementers (government) exercise much more discretionary power in bringing about public welfare.

In the implementation of law enforcement, abuse of power is not always considered as an act against the law, so the writer does not agree with the perspective from Nur Basuki Minarno in his dissertation who said that in the criminal act of corruption, the element 'against the law' is the genus, whereas the element 'abuse of power' is the species, i.e. every act of power abuse is certainly against the law and if the element of delik in article 3 of UUPTPK remains to be proved, then article 2 of UUPTPK is not necessarily to be proved.

In some verdicts from Supreme Court stated that not all of the acts of power abuses is the acts against the law and an act can lose the feature of its against the law based on regulation, principle of justice, and other unwritten legal principles in casu, factor of public interest is served, the state does not sustain a loss, the accused will not benefit from the act, and the act of the accused is not a contemptible act.

Aspect of administrative law in law enforcement, especially law enforcement of criminal act of corruption, becomes very urgent, because concepts of authorities reside in the scope of administrative law, and not in the scope of criminal law. According to our dissertation titled “Penyalahgunaan Kewenangan dalam Tindak Pidana Korupsi”, abuse of power regulated in the UUPTPK is not clear.

Concept of power abuse has implication in responsibility of position with responsibility of public administration, and the concept of against the law has implication in personal responsibility or liability related to personal responsibility criminally. For clearer explanation, we quoted the case of Ir. AT from the book titled *Hukum Keuangan Negara* written by Muhammad Djafar Saidi.

The case of Ir. AT as MENSESNEG (Menteri Sekretaris Negara) who was accused to commit an act of corruption or delik korupsi because it was considered as merugikan keuangan Negara (the state suffers from financial losses), in this case is Bulog’s money as much as forty billions rupiah.

The judge who tried the case used the concept of “melawan hukum” (against the law) implicated in personal liability (responsibility) so that it was related to criminal responsibility. When the case was brought to Supreme Court, he was tried by using the instrument of administrative law. Because of Ir. AT was in the position of officeholder as MENSESNEG.

The verdict of MA, No 572/K/Pid/2003, February 12, 2004, in its injunction (in particular only Ir. AT) is as follows:

1. States that the defendant I: Ir. AT not proved legally and convincingly to be guilty to commit the criminal act as accused to him in the primary and subsidiary accusations;
2. To release the defendant from primary and subsidiary accusations;
3. To restore the rights of the defendant in capacity, position, and dignity.

Legal substance considered by MA (Supreme Court), according to Amirudin (2010; 142-143) among other things is related to Article 1 point (1) sub b of UU No 3 of 1971 as in the primary accusation, according to MA that the most principal element (bestanddeel delict) is “abuse of power”, opportunity and facility available to him because of his position.

To prove the element, MA had considered the aspect of position liability and personal liability, as reflected in the consideration (see Amirudin, 2010; 143- 144) as follows:

1. That whenever a accusation has been related to subject of authority or position as accused against the defendant I. Then according to MA this cannot be separated from legal considerations or aspect of administrative law, where basically prevails the principle of position liability which has to be differentiated and separated from the principle of personal liability as it prevails in the criminal law.
2. That from the perspective of administrative law, the man who responsible for outflowing the money as much as forty billions rupiah was not the defendant I (Ir. AT), he was blameless because the defendant as MENSESNEG and coordinator

only accepted and carried out in accordance with the instruction from President, BJ Habibie.

3. The relationship of president and his secretaries in our system of public administration, based on Article 17 of Constitution, minister or secretary is the assistant of President, especially for someone like Mensesneg who has function to support and provide staff and administrative service every day to President and he is not a decision maker.
4. Therefore, responsibility of public administration resides in President.
5. Regarding President instruction or disposition on non-budgeter fund, the responsibility reside in president and not in Mensesneg because it did not the minister's initiative to outflow as much as forty billions rupiah from Bulog's non-budgeter fund.
6. The outflowing of Bulog's non-budgeter fund as much as forty billions rupiah came from the president instruction and approval, then the prevailing responsibility was position liability (responsibility), in which it was applied the principle of vicarious liability, i.e. superior who has to be responsible for.

Logical consequences of consideration from MA:

- a. To differentiate between position liability and personal liability; position liability is related to liability of TUN (Tata Usaha Negara) and personal liability is related to criminal liability.
- b. Criminal liability is personal liability, in relation to government action; it is personal liability whenever an officeholder commits the act of maladministration.

According to Philipus M Hadjon; two-step division of legal fact is correct, i.e.:

- a. The position of the first defendant (Ir. AT) is an officeholder who holds the government authority submits to norm of administrative law.
- b. Legality (*rechtmatigheid*) of exercising the government authority must be measured with norm of administrative law, in writing – in form of regulation – and unwritten law – in form of general principles of good governance.
- c. In an emergency, there is no legal ground to regulate. This condition creates discretionary power in the concept of administrative law.
- d. Discretionary power is an active feature of government power; in the necessary condition, government cannot sit still with the reason there is no legal rule.
- e. In the consideration of MA, the issue of discretionary power with regard to presidential instruction taken in an emergency to provide food and there is no rule for deciding whether usage of the non-budgeter fund to provide goods and services has to be carried out according to Keppres Nomor 6 Tahun 1999 or Keppres Nomor 18 Tahun 2000.

## **CONCLUSION**

Basically the way all apparatuses of law upholders work, starting from police, prosecutor, justice, and advocate is not different; ranging from: to ensure the fact, to qualify and to constitute. The law upholders should always deepen their legal knowledge to strengthen their considerations as the basis for their actions or decisions. Logical consequences of consideration from MA:

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