CONTEMPORARY INDONESIA CORRUPTION PREVENTION POLICY OF THE PROCUREMENT OF GOODS AND SERVICES

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ABSTRACT

The efforts to eradicate corruption in Indonesia perceived by some people as a very hard way that caused widespread fear, especially for state officials, Sometimes these efforts are organized by specific law enforcers to obtain private gain. Fighting corruption by means of criminal law is no longer considered as "ultimum remedium" but it is already considered as "premium remedium". One of the excesses of such policies is the possibility of "criminalization" by apparatus of state officials, particularly those who have the authority as "Project Manager". Today popular meaning of criminalization is "forcing someone to undergo criminal justice process, which should not be. "Criminalization" popularly arising from made up cases that occurred in the handling of corruption. The purpose of this study is to make an inventory of Government policy in providing protection to the apparatus of procurement of goods services to not be made a suspect in the criminal act of corruption. This research is done by using normative research method by giving priority to the use of secondary data in the form of primary law material and secondary law material. The results of the study show that there are several steps taken by the government to prevent the procurement of goods and services into perpetrators of criminal acts of corruption, either through legislative, executive and judicial policies. Through the legislation means, it's has been done with the enactment of constitution No. 30 of 2014. Through the executive means, it's carried out by the issuance of INPRES (Presidential Instruction) No. I of 2016 on the acceleration of national strategic projects. While through judicative means it's done with the issuance of SEMA (letters of the Supreme Court) No. 14 of 2016.

Keyword: Corruption, Prevention, Policy, Procurement of Goods and Services

INTRODUCTION

In Indonesia there is Fearing among project managers of procurement of goods and services to carry out their duties. Fear of being a suspect, defendant and convicted along with malignant law enforcement officers in the law enforcement of corruption. Determination of suspect status of the governmental apparatus on allegations of corruption, especially in the procurement of goods and services, these days often becomes trending topic on news media. Too much information in the mass media and electronic media, was dominated by law enforcement which sometimes controversial. As time went on, the rhythm of law enforcement began to walk, 'victims' fall. Some of the high-rank and lower-rank bureaucrats, forced to live in prodeo hotel (jail). Not a few of the businessmen participate in the agenda. The suspect of corruption also pinned to them who has caused losses to the state. Apparatus of government officials actually interpret this as frightening spectra. This issue is certainly not only has disrupted the governance process but also potentially caused the stagnation on government organization.

Fear of procurement project manager responded by President Joko Widodo, "We've been scrambling to make breakthroughs, either in the form of economic deregulation, which already

established for 12 times. Then a breakthrough with regard to the tax amnesty also has been issued. We've done various methods, but if it is not supported, there is no support from local area, both from the local government, both in the ranks of the State Prosecutor's Office, Police, then it cannot be run well. Again, everything must be in line, everything must be in tune so the orchestra can produce good voice". The Corruption criminalizes the state's policy country in implementing development. Thus, the absorption of the budget for development can run optimally.

The issue of assessment toward policy apparatus is studied from the perspective of criminal law and state administrative law. "Overheidsbeleid" is meant as policy of the State Apparatus. Implementation of the authority includes within the meaning of this policy now often tested materially as the scope of the State Administration Law or the Criminal Law. Officials of the State Apparatus and officials of state enterprises suffered directions obscuur meaning that in performing their duties, functions and authorities are confronted with the problem beetwen the aspect of the Criminal Law which has a correlation with the administrative functions, so that law enforcement comprehend the meaning mistakenly on the functions, duties and authority officials and officials of the state apparatus and SOE as a criminal act, although sometimes the meaning of Criminal Act is still related to function implementation.

Policy aspects when viewed from jurisprudence can use the review of State Administrative Law. Theoretically the State Administrative Law, the government's actions in running the government (bestuurhandeling) can be split between real action (feitelijke handelingen) and legal actions (rechts handelingen). Action in the field of law can be divided into action in the field of public law and in the field of private law. Action in public law means legal action undertaken based on public law. Whereas private legal action means the action taken by the private law. The phenomenon raises issues that will be the focus of study in this paper, namely "How is the legal effort that can be done to prevent the criminalization of the government apparatus in the procurement of goods and services"?

RESULT AND DISCUSSION

Criminalization in Criminal Law

In the academic sense, criminalization meaning is somewhat different from the meaning that popularly developed. According Soerjono Soekanto, criminalizing is an act or determination of the authorities concerning certain actions by public or classes of society regarded as acts that may be liable to be a criminal act, or make an act becomes a criminal act and therefore can be imprisoned by the government on behalf of law. Edwin H. Sutherland and Donald R. Cressey define criminology as:

".... the body of knowledge regarding delinquency and crime as a social phenomenon. It includes within its scope the process of making law, the breaking of laws, and reacting to word the breaking of laws ..."

Made up cases in the form of criminalization or imposed are regularly occurred and unfold in Indonesia. The public's attention becomes higher and greater with the case with the leadership of the Corruption Prevention Commission, especially on Bambang Widjojanto and Abraham Samad, at the beginning of 2015. The case began on the sentenced to Budi Gunawan as the criminal suspects by Corruption Prevention Commission. Not long after this determination, Abraham Samad (AS) and Bambang Widjojanto (BW) subject to legal action, in the form of arrest on the basis of criminal cases handled by the police. Events to BW, is a reminder of a similar case, where the rule of law used as a tool to force a person, group or institution not to continue its work. The development of the meaning of criminalization also due to the tendency of society to give priority to criminal law as an option in solving various problems in society. Criminal law should not be placed as the first instrument (premium

remedium) to organize the life of society, but as the last instrument (ultimum remedium) to control the behaviour of individuals in a common life.

Theoretically, policy's option to do criminalization was done to answer some basic questions, namely: "Given a natural understanding of criminalization, the theory off ers plausible answers to the three questions as to why we ought to criminalize, what we ought to criminalize, and how we ought to criminalize", moreover we also must consider some respects, at least there are some principles that should be considered to criminalize an act, namely; the principle of extended criminalization, which includes the creation of new criminal offenses (crimes new creation); Actualization or affirmation of some provisions of the existing criminal acts; Expansion of the scope of application of the criminal law. Other principles which must be considered are; non-discriminatory basis; complementary principle between the jurisdiction of national laws ratione materiae and jurisdiction ratione materiae in another state law.

Criminalization of an act must be based also on the ability to enforce it. Criminalization must be selective and made to avoid over-criminalization. I argue that over-criminalization is objectionable mainly because it produces too much punishment. The central problem with punishment is analogous to the central problem with the criminal law: We have too much of it. I say that we inflict too much punishment because many of these Punishments are unjust. Reviewed from political perspective of the criminal, the criminalization should be a solution for crime prevention efforts, not vice versa in which it becomes criminogenic factor. An adequate theory of criminalization should include a principle of proportionality, according to which the severity of the sentence should be a function of the seriousness of the crime. Injustice occurs when punishments are disproportionate, exceeding what the offender deserves.

The Boundaries of Authority being Objects in Administration Law

Policy makers are always faced with difficult choices and often have to face the dilemma of taking action or not. Sometimes an official needs to take a discretion to solve a problem. According to Dworkin, discretion is a relative concept that takes the meaning from the context of the rules or standards, and exist as as an area left open by a surrounding belt of restriction. In the event of a deadlock in decision-making foundation in the governance process, an administration official actually protected by the principle freies ermessen/ discretion. Freies ermessen comes from the word frei that means free, independent, unattached. Freis word means free man, while the word ermessen means consider, assess, susspect, assessment, judgment.

There are three reasons or conditions that make the government does discretion or action on its own initiative. First, it has not been regulated in the laws and regulations governing the in concerto settlement of a problem, whereas the matter requires an immediate settlement. Secondly, the laws and regulations that form the basis of the actions of the government apparatus have granted complete freedom. Third, the existence of legislative delegation, namely the granting of power to self-govern to the government that this power is actually owned by a higher level of apparatus. In addition it has become common knowledge that in principle mistakes in making policy or decisions cannot be criminalized. In the law of state administration it is unknown criminal sanctions.

The activity of running the government for a government official is actually a personification of the state because in it is embedded "position" as a source of legitimate state representation authority. E. Utrech disclosed that "position" is the proponent of rights and duties, as a legal subject (persoon) authorized to perform legal acts (rechtshandelingen) both under public and private law. For the government, the basis for public legal action is the existence of authority (bevoegdheids). Through the authority sourced from the legislation, the government takes legal action. Authority is a right owned by the Agency and / or Government Officials or other state organizers to take decisions and / or actions in the administration of the government.

Conversely, if a decision is issued by an unofficial authority (onvoegdheid) then it is referred to as a defective decision regarding the authority (bevoegdheidsgebreken) which includes:

- Onbevoegdheid ratione materiae, if a decision is not found in the legislation or issued by an unauthorized person;
- Onbevoegdheid ratione loci, decisions taken by officials outside geographically;
- Onbevoegdheid ratione temporis, if the decision is made by an unauthorized official or not authorized to issue a decision.

Administratively the existing benchmark is sufficient to assess whether an official's actions are in accordance with his authority or misuse his authority. The appropriate official's action or according to the authority given to him certainly cannot be the object of an act against the penalty. Only the actions of officials who misuse their authority can be objects in the criminal law, provided that abuse of authority is accompanied by bad intents. (mens rea).

In general, an official in running his / her authority is bound to the principle of good governmental principle. The principle of good governance (AUPB) in the practice of dispute resolution in case of objection to the actions of an official, then AUPB also becomes the basis for judges in assessing whether an official's acts can be exhausted or not. The General Principle of Good State Government is a principle that upholds the norms of decency, propriety and legal norms, to realize a clean countryman and free from corruption, collusion and nepotism which explicitly Law Number 28 of 1999 stipulates the general principle of government organizers, as set forth in article 3.

Misuse of Authority which Becomes the Object of Corruption Crime

The authority abuse often occurs in Indonesia. However, after the enactment of Law No.30 of 2014 on Government Administration (AP Act), some circles argue the domain of law enforcement the abuse, because it relates the absolute competence of the judiciary. The settlement of cases of abuse of this authority is still resolved in the two judicial institutions, only the administrative completion takes place in the State Administration Judiciary, after that it can only be submitted to the General Court (Criminal/Tipikior).

Another theory of authority abuse is also mentioned in the Supreme Court Decision Number 977 K/PID/2004. In the verdict it is said that the notion of "authority misuse " is not found in its explicit in the Criminal Law, the Criminal Law may use the same meaning and word that exist or derive from other branches of law. It departs from the criminal law having the autonomy to give a different understanding to the understanding contained in other branches of jurisprudence, but if the Criminal Law does not specify otherwise, it is used of the meaning contained in another branch of law (De Autonomie van bet Materiele Strafrecbt). Still derived from the same verdict, this teaching was accepted by the District Court of Jakarta Utara which was further strengthened by the Supreme Court Decision. No.1340 K/Pid/1992 on February 17th, 1992 ("Supreme Court") during the corruption case known as the "Sertifikat Eksport (Export Certificate)" case. The Supreme Court of the Republic of Indonesia took over the definition of "misusing authority" in Article 53 verse (2) letter b of Law Number 5 of 1986 regarding State Administrative Court ("Law of Decision of State Administrative") which has used its authority for other purposes than the purpose of granting authority or otherwise known as "Detournement de pouvoir".

This MA ruling is also discussed about the definition of Detour de pouvoir. According to Prof. Jean Rivero and Prof. Waline, the definition of authority abuse in Administrative Law can be interpreted in 3 forms, namely:

1. Misuse of authority to perform acts contrary to the public interest or to benefit private, group or group interests;
2. Misuse of authority in the sense that the official's actions are rightly intended for the public interest, but deviate from what purpose the authority is granted by law or other regulations;
3. Misuse of authority in the sense of misusing procedures that should be used to achieve certain objectives, but having used other procedures to be implemented;

According to the provision of Article 17 of Law Number 30 of 2014, the Prohibition on Abuse of Authority as referred in verse (1) covers:

- prohibition beyond Authority;
- prohibition of confusing Authority; and / or
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Efforts to prevent criminalization of Government Apparatus in the procurement of Goods and Services.

Based on research conducted by Dian Puji N Simatupang, it revealed, she has done research on 150 corruption criminal cases throughout Indonesia. From the results of her research revealed that 73 percent of them are wrong guess, which should not be punished. "73 percent of the 150 corruption cases I studied since the 1999-2009 reform era turned out to be the wrong judges in deciding the case, and they should not be punished for administrative errors," she said. Administrative error according to Dr Dian, are fine or dismissed from his post. The legal case that occurs concerning public policy is actually dwaling, (wrongly suppose).

According to Dian, to the problem of dwaling, the settlement is not through criminal sanction but must be through administrative law. Dian also believes that not all policy makers cannot be convicted of the policies it takes. Policy makers may still be punished if the policy takes into account the elements of bribery, threats and deceit. As long as the element can be proven during the decision process, policy makers may be subject to criminal sanctions. Based on these facts then to provide legal protection to the officials, it is issued Law No. 30 of 2014 on Administration of government.

- That in the framework of improving the quality of government administration, governmental bodies and / or officials in the use of authority shall refer to the general principles of good governance and in accordance with the provisions of laws and regulations.
- That to solve the problems in the administration, the administration of governance is expected to be a solution in providing legal protection for both citizens and government officials.

Law Number 30 of 2014 on Government Administration affirms that the state administrative court is a judicial institution with absolute competence to examine the presence or absence of suspected misuse of authority. If an officer has been declared a suspect of corruption, he will be directly examined in the TIPIKOR (Criminal Act) court. Now, with the regime of this law, an official may file an application to the State Administrative Court first to check and ascertain the presence or absence of an element of abuse of authority in the decision and / or actions that have been taken. In the event, an authority is not clearly regulated and a momentary condition that requires an official to make a decision, then it is possible to do discretion. Regime of law number 30 of 2014 About Government Administration has given general guidance in running discretion and embrace expansion of meaning of discretion. Discretion is a Decision and / or Action established and / or implemented by a Government Official to address the concrete concerns faced in the administration of government in terms of choice, non-regulating, incomplete or unclear legislation and / or government stagnation.

Other efforts made by the government, particularly the Attorney General of the Republic of Indonesia to prevent the criminalization of government officials, especially in the provider of goods and services is the issuance of the Decree Attorney General No. KEP-152 / A / JA /

10/2015 concerning the establishment of the Guards and Security for Development and the Central Government and Regional Prosecutor Republik Indonesia.

In addition to the provisions of Law No. 30 of 2014, preventing the criminalization of person's authority can also be found in Presidential Instruction No. I of 2016 on the acceleration of national strategic project, which instruct the Attorney General and Indonesian National Police in conducting an investigation (investigation and prosecution)

Efforts addressed to prevent the criminalization for authority person to execute a special authority in the implementation budget of APBN(state Budged) by implement the presidential directive to the Attorney General and the entire of Indonesia of Attorney General's Office together with Indonesia National Police Chief (KAPOLRI) and Province Chief of Police (KAPOLDA) on 19th of July, 2016 at State palace

There are five things, years ago that I tell you all. Concerned, the first is that the policy, that discretion cannot be criminalized, does not be criminalized. Secondly, action is the same administration. Please distinguish where the intention of stealing's, and where the actions of the administration. I think the rules in the State Audit Agency were obvious, which returns, which are not. The third, the BPK that stated the losses were still given the opportunity 60 days. It also should be given a note. The fourth, the state's loss should be concrete; it must be concrete, not making it up. Fifthly, it is not exposed to excessive media before we have prosecute. Yes, if one's right, if I'm not mistaken?

Regarding to the deadline for repayment of state losses have been calculated by the Financial Audit Board (BPK), it is governed by Article 20 of Law No. 15 of 2004 on the Management and the financial responsibility of the State.

1. Officials are required to follow the recommendations in the report of examination results.
2. Officials are required to provide an answer or explanation to the BPK on the follow-up on recommendation in the examination report.
3. Response or explanation as referred in paragraph (2) shall be submitted to the BPK no later than sixty (60) days after the examination report is received.
4. The BPK monitors the implementation of the follow-up results of the examination referred in paragraph (1).
5. The official, who is known not implement the obligations as referred in paragraph (1) may have administrative sanctions in accordance with the provisions of the legislation in the staffing field
6. BPK notices the monitoring results of the follow notify the BPK as referred in paragraph (4) to the representative institutions in the semester examination results

Based on these provisions it can be concluded that the results of BPK examination and authority to monitor the follow-up examination in principle fall within the law of the State administration (administrative), so that as long as all the recommendation to the results of the examination have been followed up by the authorities concerned, it means the obligation of administrative of management finances, for BPK has been completed. Thus the state loss of return by the parties as defined in the BPK recommendations had recovered the state/regions losses that have been found.

The authority of BPK is reinforced by the Supreme Court Circular Letter (SEMA) No. 14 of 2016. Particularly, in number 6, which states that "The authority agencies whether or not stated the a financial loss is BPK which has the constitutional authority while other institutions-5- such as State Development Audit Agency/ inspectorate /Regional Work Unit still have authorities in doing examination and audit of the financial management of State but was not authorized to declare the financial state loss. In a certain way, judge based on the fact the trial can judge the losses and the amount state loss.

CONCLUSION

Some policies have been undertaken to anticipate the "criminalization" of competent authorities in the management of goods and services either through legislative, executive and judicial policies. Through the legislation means, it's has been done with the enactment of constitution No. 30 of 2014. Through the executive means, it's carried out by the issuance of INPRES (Presidential Instruction) No. I of 2016 on the acceleration of national strategic projects. While through judicative means it's done with the issuance of SEMA (letters of the Supreme Court) No. 14 of 2016.

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