

REFORMULATION OF CRIMINAL LIABILITY CONCEPT IN CRIMINAL ACT OF CORRUPTION IN INDONESIA BASED ON PANCASILA

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ABSTRACT

The successful action of eradicating corruption in Indonesia influences by the accuracy of formulating the Criminal liability concept of corruptors. Accuracy is needed in determining corruptor to convict those who take part in corruption cases so they can be responsible for their corruption and be punished according to the regulation applied. This study used an empirical legal research method composing into an article from several research reports. The current concept of Criminal liability seems inadequate to arrest the doer that takes part in corruption that has been executed for his crime responsibility. This indicates the discrimination in sentencing the corruptor. Different from regulation to charge doer in general crime, corruptor is charged based on the concept of individual responsibility, thus it is necessary to propose another responsibility developed based on Adat Law such as collectivity principle of responsibility.

Key words: *Criminal liability, Corruption, Law of Pancasila*

Introduction

One of action done by the government of Indonesia to press the number of corruption cases through Law No. 31 of 1999 that has been strengthen by Law No. 20 of 2001. The purpose of composing Law of Corruption can be found in the consideration of Law No. 31 of 1999 jo Law No. 20 of 2001 that:

Considers:

- a. that criminal acts of corruption create huge losses for state finance and state economy and does hinder national development, so it must be eradicated in order to realize just and prosperous society based on Pancasila and the 1945 Constitution
- b. that criminal effect of corruption causes as well as creating losses to state finance and economy,

can also hinder the growth of national development, which demands a high level of efficiency¹.

Actual facts show that those purposes cannot be achieved thus it is needed to be strengthened by the formation of Corruption Eradication Commission (KPK) based on Law No. 30 of 2002 to increase the accuracy of corruption eradication. The considerations of Law No. 30 of 2002 are:

Considers:

- a. that in the course of realizing a fair, bountiful, and prosperous community under the Pancasila and the Constitution of the Republic of Indonesia of 1945, the eradication of

¹ Considerants of Law No. 31 of 1999

- criminal acts of corruption needs to be professionally, intensively and continuously improved, as corruption has had dire consequence on the wealth and the economy of the nation, as well as hampering national development;
- b. that government agencies that have handled corruption cases have not been functioning effectively in eradicating corruption;
 - c. that according to article 43 of Law No. 31 of 1999 on the eradication of Criminal Acts of Corruption, as improved by Law No. 20 on Changes in Law No. 31 of 1999, there is a need for the formation of an independent Corruption Eradication Commission to fight against corruption in Indonesia;

The improvement of corruption eradication with legal structure through formation of KPK is also supported by Criminal Acts of Corruption Court based on Law No. 46 of 2009. The considerations to form Corruption Court are:

Considers:

- a. that the Republic of Indonesia is a country of law, which are intended to make the life of the community, the nation and the state of order, peace, and justice in order to achieve the country's goal as stated in the Preamble of the Constitution of the Republic of Indonesia Year 1945;
- b. that corruption has caused damage in many of the affected communities, nations, and states that the prevention and eradication of corruption needs to be done continuously and sustainably that demand an increase in the capacity of resources, both institutional, human resources, and resources others, as well as developing the awareness, attitudes, and behavior that society anti-corruption

institutionalized in national legal systems;

- c. that the Corruption Court that the basis of its formation under Article 53 of Law Number 30 Year 2002 concerning the Commission for Corruption Eradication, based on the decision of the Constitutional Court declared contrary to the Constitution of the Republic of Indonesia Year 1945, so it is necessary to re Crime Court corruption with new legislation;

These facts shows that substance and new legal structure that are purposely made to decrease the number and quality of corruption cases has not shown satisfied result, then corruption becomes the acute social problem in Indonesia. It has been a chronic disease in this state in where public officers who ideally give a descent model to society take part in the widespread of corruption culture².

Recapitulation of criminal acts of corruption never decreases but increases. KPK has handled lots of corruption cases ranging from 61 preliminary investigation cases, 58 investigation cases, 46 prosecution cases, 41 *inkracht* cases and 53 execution cases by August 31st, 2016. The total corruption cases from 2014-2016 is 813 preliminary investigation cases, 526 investigation cases, 435 prosecution cases, 361 *inkracht* cases and 386 execution cases.

² Korupsi di Indonesia Makin Akut dan Kronis | Pikiran Rakyat. www.pikiran-rakyat.com. downloaded on Wednesday, November 2nd, 2016 at 11.05.

Indonesia stands in rank 88 with CPI score of 36. That score increase 2 points from 2014 that was in rank 107³. Indonesia Corruption Work (ICW) maps out corruption cases in Indonesia from January through Juni2016. Along that period, there were 210 cases found and 500 people were prosecuted as defendants by 3 institutions of law enforcement⁴. “Law enforcer has increase the status of investigation into police investigation of 210 corruption cases that causes government loss of Rp. 890,5 billion and bribery case of Rp. 28 billion, SGD 1,6 million, and USD 72 thousand along first semester of 2016”⁵.

One of the corruption cases that attracts public interest is corruption case of Ministry of Maritime and Fisheries Affairs. It charged Rokhmin Dahuri as defendant due to illegal flow of fund from Department of Maritime and Fisheries Affairs (DPK) to several national figures, however those who take part in corruption cannot merely be charged as corruptor.

Amien Rais claimed to accept some amount of money of Rp. 200 million directly from Rokhmin Dahuri, the former Ministry of Maritime and Fisheries Affairs. While Salahudin said that his campaign team may get some money of Rp. 200 million. Ruki stated

that Amien and Salahudin had been asked for official statement to avoid inclarity. Corruption Eradication Commission (KPK) monitored the progress of this case of non budgeter DPK. The official statement was taken under oath that can be used as legal evidence for further investigation. KPK will inventory the court facts which later to be compared to KPK data. “it can be determined who received the money, in case the receiver is a civil servant, then to him can be applied Law No. 31 of 1999 or Gratification article while if it is not civil servant then KPK has no authority to prosecute the case since KPK can only handle the eradication of Corruption”, said Ruki. Last Wednesday, former president of Partai Keadilan Sejahtera, Tifatul Sembiring met KPK head to ask clarification on list of recipients of DPK fund. It is said that one of PKS leader, Fahri Hamzah, was given that fund. PKS also claimed receiving money of Rp. 100 million in December 2003, and Rp. 200 million in March 2004. However, both Hidayat dan Tifatul denied it. They also asked the validity of the data since PKS has been vacuum since 2003. Separately, the Chief of Yayasan Blora Institute, Taufik Rahzen, insisted law enforcers to expose and emerge the truth related to the floew of illegal fund of DKP to Blora Center that support the candidate president Susilo Bambang Yudhoyono in election campaign on 2004⁶.

Until the present day, there is no one of those figures that is claimed officially receipt the money of corruption done by Rokhmin Dahuri, as the former Minister of Maritime

³ Ini Daftar Peringkat Korupsi Dunia, Indonesia Urutan Berapa? | hukum ...*m.tempo.co*. Retrieved on Wednesday November 2nd, 2016 at 11.31

⁴ ICW: 500Orang Jadi Tersangka Kasus Korupsi Sepanjang Januari ...*news.detik.com*. Retrieved on Wednesday November 2nd, 2016 at 11.36

⁵ *ibid*

⁶ Kompas “KPK akan Panggil Amien Rais, Penerima Dana Bisa Dijerat UU Korupsi”. Kompas, May 31st 2007 retrieved from www.iprowatch.org/?pilih=lihatberitaminggu February 22nd 20019 at 13.58.

and Fisheries Affairs and also charged as convicted corruptor. Rokhmin Dahuri shall take responsibility alone as well as go through all punishment sentenced on him by the court. This fact perturbs society justice and leads to society demand to those that involved and get benefit of DKP fund to be responsible and charged guilty.

One important question is why persons that take part or get benefit of illegal fund in corruption can't be charged responsible for their crime. Whether the concept of criminal liability used in court⁷ cannot reach that scope.

Research Method

This article is written based on the result of normative research. Legal forms used includes primary law in form of legislation (Perpu) and secondary law of draft bill (RUU), previous research, and any related publications in law. In this part, researcher also collected abundance legal document related to research on *Adat* law from some region of Indonesia. Data collection method covers literature review in both printed and digital legal document. Data analysis includes grammatical interpretation, systematic interpretation, historic,

systematic, functional, futuristic, and anticipatory.

Analysis and Discussion

Ideally, persons who involved prior to, along with, or after the criminal acts of corruption shall be possible to take criminal liability. The only problem to apply this concept is the conventional believe of responsibility concept. The essential part of general principle in criminal liability is "no crime without failure" or culpabilities principle or also known as humanity principle⁸. Criminal liability is largely related to the proven fault. A person commits a crime, only if society claims that action despicable⁹. Fault can also indicated as the "mental condition of someone with sane, will, and aware on his action to decide his will. This mental condition is owned my normal people".¹⁰

Criminal liability concept is influenced by thinking development or called indeterminism and determinism in criminal legal system, both related to criminal liability and criminal punishment.

Classic ideology with indeterminism suggests a person could determine his will freely though in a certain degree influenced by other factors such personal and

⁷ Problem on fault and criminal liability in many countries aren't arranged officially in Criminal Code, but it becomes the authority of judges to expand. "most of the legislation in criminal law has related to offences. General principles of criminal liability are largely still the judges". Chairul Huda, *Dari Tiada Pidana Tanpa Kesalahan, Menuju Kepada Tiada Pertanggungjawaban Pidana Tanpa Kesalahan*, Kencana Prenada Media, Jakarta, 2006, p. 3.

⁸ Barda Nawawi Arief, *Perkembangan asas... Op.Cit.*

⁹ Martiman Projohamijoyo, Martiman, *Memahami Dasar-Dasar Hukum Pidana Indonesia*. 2, PT. Pradnya Paramita, Jakarta, 1987, p. 31.

¹⁰ *Ibid.*, p. 4

environmental conditions, but basically every human being has free will. In the opposite modern ideology with determinism claims that a person cannot in the least to determine his will freely. Human's will to do something is influenced by some factors such personal and environmental factors. In determining his will, a person shall obey the causal law, such causing factors that cannot be controlled. Even personal factor also follows heredity factor and later along his life environmental factor holds most important role.¹¹

The development of criminal liability once concerns on doer's fault. Doer cannot be claimed guilty without crime found on his behalf. It means that the concept of "*Feit Materil*"¹² recently left behind for a while. The definition of responsibility in criminal code is based on despicable view (*verwijtbaaheid*) toward the action done by doer. The acceptance of that action will change the definition of fault into normative fault¹³. In criminal code, this concept is called the principle of "*Liability based on Fault*".

According to Pompe, a person can be convicted guilty if he commits doing an action. Fault can also indicated as the "mental condition of someone with sane, will, and aware on his action to decide his

will. This mental condition is owned my normal people"¹⁴

Criminal liability or fault imperially (*Schuld in niumezin*) covers three fields namely:

- a. the ability to take responsibility of the doer (*toerekenin, gsvathaarheid*).
- b. Psycology relation between of the doer and his action:
 - 1) Determined actions or
 - 2) Negligent actions (*culpa, schul in enge zin*).
- c. No excuse to remove criminal liability from doer (*anasir toekenhaarheid*)¹⁵

The further development of criminal liability has generalized new concept of liability without fault¹⁶. This concept is also called *Strict Liability* doctrine while severally liability is called Vicarious Liability.

According to L.B Curson, *Strict Liability* doctrine is based on these following reasons:

- a. Very essential to guarantee the obedience toward certain regulations for social welfare;
- b. Verification towards *mens rea* will be tough to violations related to social welfare;
- c. The high level of social threat caused by doer's action.¹⁷

In the other hand, vicarious liability is criminal liability charged to a person upon another's fault or the criminal liability of one person for the wrongful acts of another. That liability can be found in some cases related to

¹¹ Teguh Prasetyo and Abdul Barkatullah, *Politik hukum Pidana, (Kajian Kebijakan Kriminalisasi dan Dekriminalisasi*, Pustaka Pelajar, Yogyakarta, 2005, pp. 63-64.

¹² *Ibid*, p. 4

¹³ MadeShadiAstuti. *Op/Cit.*,p.,19

¹⁴ *Ibid.*,P.32

¹⁵ *Ibid.*, 34-35

¹⁶ Chairul Huda Op.Cit. P.10

¹⁷ E, Saefullah Wiradipradja, "tanggungjawab Pengangkut dalam Hukum Pengangkutan Udara Internasional dan Nasional", Dissertation, 1989, P.,35.

actions done by others in scope of work filed or job position.¹⁸

Comparison between "strict liability" and "vicarious ability" seems obvious similarities and differences. The equation appears that either "strict liability crimes" or "vicarious liability" do not require the existence of a "mens rea or element of fault in the people who is prosecuted criminal. It is located on the "strict liability crimes" criminal liability are directly charged to the culprit, whereas in "vicarious liability" criminal liability is indirect.¹⁹

In addition, the emergence of new phenomena that were touted by *indirect command liability* or command liability in a form of participant by omission which according to Muladi

now back to the discussion, especially regarding the limits of enforceability.²⁰ In addition

addition to the above mentioned doctrine, also known as the so-called "*collective, responsibility*" especially on the unwritten law in simple societies. Collective responsibility is almost similar with the understanding of "*vicarious liability*" It's just that on the latter is still individually. The development of the concept of criminal liability if it is linked to the participation in the conduct crime, so this indicates that the

development tendency to be responsible crime for someone does not had to commit a criminal offense factually. Meanwhile, if the criminal liability is linked to the possibility of crime sanctions to those who are considered in a responsible, to convict the person should not factually committed a criminal act.

The Criminal liability Which is Based on The Concept of Pancasila for perpetrators of criminal acts of corruption. The basics of the determination of criminal responsibility for the offender and the recipient of the proceeds of crime of corruption can be searched in the theoretical justifications. The criminal liability for recipient of the proceeds of crime of corruption as human naturally in the customary law as the originally law based on Pancasila is a collective responsibilities.

Collective responsibility is philosophically based on the concept of Pancasila Monodualism. Basic idea need to be proved in this concept oriented to the idea / principle of balance that includes among monodualistics balance between the "public interest / society" and "the interests of the individual / individuals. A balance between protection / interests of the offender (crime individualization idea) and victims of crim.²¹ The determination of criminal liability of the perpetrators was based on a consideration of the interests of the

¹⁸ Muladi dan Dwidja Priyatno, *Coorporation Liability*, STIH Bandung, P., 88, See Romli Atmasasmita, *Comparative of Procedure*, Jakarta : Legal Aid Institute Foundation of Indonesia, 1989, P, 93,

¹⁹ *ibid*, P.90

²⁰ Dwija, *Op.Cit.*, P., 11.

²¹ Barda Nawawi Arief, *Development of Indonesia Criminal Law*, Master Library, Semarang, 2008, P., 23

perpetrator involvement in preparing or when conducting and after the deed is done. The development of the concept of criminal liability can not be separated from the struggle of thought of the nature and the position of the Indonesian people. The discussion of the nature and the position of Indonesian people must be linked to the philosophy of the nation of Indonesian, namely, Pancasila as the first Principle in Believe in the one supreme God, provides guidelines for us to realize that essentially the position of Indonesian as human being creatures of God Almighty. As the God Almighty raises the awareness that human must be submissive and obedient to God Almighty. With regard the obedience every human surrender all efforts did to the provisions of God Almighty. " Faithful and pious to the God Almighty in accordance to religion and belief for each according to on just and civilized humanity. The determination of criminal to the perpetrators collectively before, while and after did the act was based on the "values of divinity". Based on the value of dignity as human being as creatures of God Almighty it will give understanding that human are not allowed for doing something freely as they want to. This understanding is called by "determinism". Based on the determinism concept everything has causal law that can be found in past, now or in the future. causal law can happen in the individual interactions of society. Some

points of view related to the determinism concept can be expressed that Theological determinism is a thesis that God makes all the human decision, both of them had known and had not known by the human.

The second principle, Just and civilised humanity gives the guidelines in understanding of Indonesian dignity and human dignity, in which realize to the equality, equal rights and equality of obligations between fellow human beings.²²

Principle on Just and civilised humanity consists of "human values" that can be used for the philosophical basis of the determination of criminal responsibility for the recipient of the Proceeds of corruption. Human values give understanding about the human of Indonesian in he position of creatures who have free will. Such concept is already known as indeterminism concept. The concept of free will was mentioned that human is the morality subjects who has responsibility to the events or circumstances morally, that received praise or be blamed morally to the events and certain conditions they did. According to the dominant view regarding to the relationship between free will with moral responsibility, if the agent does not have free will, then the agent is not morally responsible for his actions.²³

²² Pormadi, Loc.Cit.

²³ Free Will, Loc. Wit.

Based of Free Will concept, the criminal offenders were asked to the liability because of human as the nature acts and manage or legitimate agent of cooperation is morality subject to the events and condition if the criminal offenders be prised or blamed morally, on the events and conditions. Contrary if someone does not have free will, it is concerned not morally responsible for his actions.

Based on this basis idea, the offender either at before, during or after did act colletively can be asked for the criminal liability if they have the freedom to choose and then will to do such act. The human values can be elaborated through attitudes “acknowledge equality, equal rights and equality of obligations between fellow human beings and love their fellow human beings, as well as develop attitudes of tolerance”, Equal rights and equality of obligations guide the Indonesian people in implementing the responsibility as individuals or society members. The granting of basic rights to the Indonesian shows that the position of Indonesian being recognized personally, otherwise granting of the basic obligation is a form of human recognition of Indonesia as a social creature. The implementation of human rights of Indonesian people was limited by the tolerance attitude. Attitude of tolerance is a tool of limits to the implementation of rights in order not to interfere with the rights of

others. Developing of tolerance attitude is good as the basic of Indonesian in implementing the responsibility to help others includes of bear the burden of another person as part of the community.

The term "Tepo Seliro" (reciprocal tolerance), gives sense to respect the rights of others and understand their obligations "keep the others feelings". Indonesian community get to know the attitude of tolerance and bear the burden of another person called as principles of mutual aid or kinship. The concept of kinship is the concept of society customary law, so to understand that should trace the life of customary law communities. The soul of kinship, I Gusti Ketut Sutha in his writings, titled “the soul kinship in the customary law and Development” has been summarized like cited below. The soul of kinship contained in a social unity can be drawn between the magnitude of other which is “the there are variety of as basis of social unity binders such as love, mercy, compassion, sympathy and strong sense of solidarity on teach, love, care for either inside or outside.”²⁴

Based on the concept of reciprocal (tolerance) as the value’s elaboration of humanity, so the Perpetrators who receive the proceeds of crime are able to held of criminal responsibility. The receivers of the proceeds of crime who have beneficial from

²⁴ Darji Darmodiharjo, *Op. Cit.*, P.,158

corruption of others should have the tolerance of responsibility in bear the burden of another person (togetherness in the disapproval of society and receive criminal sanctions) as the effects of acts. As well as the family (husband or wife, children, father and mother, brother and sister) it properly have the reciprocal tolerance on the suffering of offenders. The togetherness responsibility to the raises of disadvantages had been legal issues for a long time. Related to the work relationship the employer can be asked for the responsibilities of the employers, the employers who have the advantages on employees' works and if contrary also they have to responsible for disadvantages by the employee, like in Arrest susu HR February 14th 1916.²⁵

Related to the family relationship, the heir as the benefits receiver from devisor also have the debt burden to other parties. The participation of heirs in debt left by devisor can be found in the law of provision inheritance, including of provisions that related to the load acceptance of corruption sanctions, as regulated in the Article 33 and 34 of legislation number 31 of 1991, that determine " In the event of the demise of the suspect during investigation, whereas it is evidence that there were without doubt losses suffered by the state, investigators shall then hand over the resulting dossiers to the

prosecutor/state attorney or to the office suffering the loss to enable the filling of a civil suit againts the heir" The bounding of society members to others is basically based on the kinship relationship or work relationship. Related to the them as the recceivers of benefits or advantages of property or others on the corruption by another was also reciprocal in responsibility through sanctions charged by the givers.

This kind of thought can be used as the basic of asking for responsibility by the perpetrators who receiving the proceeds of corruption that was conducted by one of the family members (husband or wife, father or mother, children, and siblings) as long as they receiving the benefits or enjoying the corruption by one of their family members. This applies the same to them, work relationship to the perpetrators of corruption can be asked the criminal respinsibility as long as they receive the benefits or enjoy the corruption by partners. This condition can be enacted to them that normaly in guessing that theresult that was enjoyed and beneficial as well as donation and give they received or the benefits of selling to someone that is perspretator of corruption which is the result of corruption.

The concept of collective responsibility can be basic of law costumary of Inonesia. Several studies showed that in case of the violation of customs the completion will not only

²⁵ Bambang Poernomo, *Criminal Law Principles*, Ghalia Indonesia, Yogyakarta, 1992, Page., 153.

involves the persecutor but also other people who have the relationship or other relationship. The involvement of others in family relationship, kinship or other society unity, also for stipulated sanctions.²⁶

Conclusion

The nature of crime of corruption as the crime congregation can be handled individually. Crime of corruption can be conducted singly, crime of corruption is a series of action that involved by many people both of before, during and after that act were happened. As well as the use of proceeds of corruption naturally enjoy by more than one people. Based on the facts the concept of responsibility which is in accordance with the natural crime of corruption is collective responsibility. Collective responsibility is based on the values of Pancasila as the Basic

Norm (Grundnorm) which have the normative basics in the customary law in Indonesia. For the future, the concept of collective responsibility can be one of the criminal liability that can be used to asking for the criminal liability for the perpetrators of corruption.

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²⁶ In the Rjang customary law the initiative and readiness of family of perpetrator to responsible and relieze of fault called as *Mulo Tepung or menepung*. *Mulo tepung or menepung is conducted by procedure and steps as follows: First, the perpetrator's family, after the accident that caused hurt to the victims for inform soon that acts to victims' family. Second, at the right mement visits the victims' family by brought bokoa iben (iben law), that is bokor betel, or called as mengipar sayap, menukat paruh, that declared the liability to treats the victim, and said to disaggre to the offender, springkle of setawar sedingin. Herlambang, et all*"the development of customary deliberation Models"Kutei" in order organize the criminal law compilation of Rejang custom as the gudelines of discretion law enforcer in the process of the criminal justice at Rejang Lebong Regency. 2003. Grant Competitives of DIKTI. In the Melayu custom of Bengkulu. Similar things was found see Herlambang, Edi Hermansyah, Edra satmaidi, Sussi Rhamadani. "Development of Customary Deliberation Models" agreement of Rajo Penghulu" in completing the of violation of faults as the guidelines of the using of discretion by law enforcer in process of the criminal justice at Bengkulu City", Reseach Report Grant Competitive DP3M, Dirjen Dikti, 2007.