Journal of Law, Policy and Globalization www.iiste.org
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.57, 2017

The Nature of Criminal Responsibility on Distribution Policy of Social Assistance Awarding for the Society in East Kalimantan

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Abstract
The preambule of the Indonesia Constitution 1945 (hereinafter referred to UUD 1945) states that "the state of Indonesia shall protect the people of Indonesia and to improve public welfare, to educate the life of the people in order to embody docial justice for all the people of Indonesia. Some laws govern of the social asssistance are The Law No. 40 of 2004 Concerning System of National Social Guarantee (The State Gazette of 2004 No. 150, Supplement to the State Gazette No. 4456); The Law No. 24 of 2007 Concerning Disaster Management (The State Gazette of 2007 No. 66, Supplement to the State Gazette No. 4723); and The Law No. 11 of 2009 Concerning Soscial Welfare (The State Gazette of 2009 No. 12, Supplement to the State Gazette No. 4967). If the official represents its position and out of the "purpose and intention", it means that it is misuse of the position. The position misuse must be interpreted that it is against to the laws as a basic argumentation of giving the authority. The misuse of it then is connected to responsibility matter, which is the official in doing governemntal action must be burdened to legal responsibility *(*geen bevoegheid zonder verantwoor delijkheid *atau* there is no authority without responsibility). In the context of subject of delict, the criminal responsibility is not only referred to the official "person", but also to "corporation". *The basic difference between* "everybody" and "corporation" as the subject of delict is its responsibility particular in terms of sueing and sentencing. If "everybody" is the subject of delict, the criminal responsibility will be put to "the person". Whereas, if "corporation" is the subject of delict, the criminal responsibility will be put to "its management or corporation". The subject of delict then must be put the responsibility in the term of "function' and "position".
Keywords: Criminal responsibility, Social Assistance Provsion, East Kalimantan

1. Introduction

The preambule of the Indonesia Constitution 1945 (hereinafter referred to UUD 1945) states that "the state of Indonesia shall protect the people of Indonesia and to improve public welfare, to educate the life of the people in order to embody docial justice for all the people of Indonesia.[1] To reach the purpose of it as mandated in the Preambule of UUD 1945, the Indonesian government then creates The national Medium Term Development Plan (hereinafter referred to RPJMN). In its implementation, it is created an annual activity, which is arranged and contained in stated budget or local budget (hereinafter referred to APBN/APBD to be done by the government. The budget annually itself is detailed based on types and function of the budget. One of its budget is social assistance granting budget.[2]

Social assistance (hereinafter referred to Bansos) is a grant consisting money or property from the local government to individu (person), family, group, and/or community that is not continously and is selected also in order to avoid the possibility of social risks taking place.[3] The social risk is an event that is able to pose potential social vulnerability borne by the individu (person), family, group, and/or community as an effect of crisis of social, economic, politic, and natural fenomena and disaster. Some laws govern of it is:

1. The Law No. 40 of 2004 Concerning System of National Social Guarantee (The State Gazette of 2004 No. 150, Supplement to the State Gazette No. 4456);
2. The Law No. 24 of 2007 Concerning Disaster Management (The State Gazette of 2007 No. 66, Supplement to the State Gazette No. 4723); and
3. The Law No. 11 of 2009 Concerning Soscial Welfare (The State Gazette of 2009 No. 12, Supplement to the State Gazette No. 4967).

If the social assistance budget is addressed to protect social welfare or disaster management as stipulated into those laws above. Theoritically therefore, the budget is only purposed to the activities covering by the laws. However in fact, there are some activities can cover the budget as if civil society organization activities

[1] See the Preambule of The Indonesia Constitution 1945. See also Muhammad Yamin, 1995. Risalah Sidang Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia (BPUPKI) and Panitia Persiapan Kemerdekaan Indonesia (PPKI), State Secretary, Part I, Cet.2nd, 3rd Ed., Jakarta, p. 417.
[2] See www. Kemendagri.go.id/produk-hukum/2011/08/08.
[3] See article 22 subsection 2 the Internal Affairs Decree No. 32 of 2011 Concerning the Guideline of giving Grant and Social Assistance sourced from APBD – then chaged to the Internal Affairs Decree No. 39 of 2012.

as stated in the Law No. 8 of 1985 Concerning Civil Society Organization.

The fenomena of the social assistance budget in practice then creates some legal problems particular the social assistance resulted from APBD. The problem is arising due to there is no limitation of the scope of the social assistance budget. The laws themselves do not define clearly on the social assistance. So, the social assistance budget is potential to be misused. The possibility of misuse it is started from planning process, implementation, and control. Both the Internal Affairs and Corruption Eradication Commission (hereinafter referred to KPK) then cooperation to order the implementation of the Bansos. KPK has found out 10 (ten) weaknesses of the implementation of the Bansos in the government practices.[1]

In practice, there are 2 (two) majority modus related to the implementation of the Bansos – regulation and operated mechanism. For the purpose of the operated mechanism, it has separated into process of budgeting, distribution, responsibility, and control. In practice, realization of the social assistance is not suitable for the purpose of it. It is also double distribution and there is a bribery in the process of the payment of it. Those problematic of the social assistance bring a legal consequence to officially employee of the social assistance, including governer, major, and/or regent.

The laws on the social assistance budgeting generally are part of budgeting system as stipulated in the Law No. 17 of 2003 concerning State Finance (The State Gazette of 2003 No. 47, Supplement to the State Gazette No. 4286). It is basically must be managed orderly, effectively, efficiently, economically, transparantly and responsibly with considering the principle of justice, legal certainty, and benefit for the society. The Laws refer to the Government Decree No. 58 of 2005 concerning Local Finance Management (The State Gazette of 2005 No. 140, Supplement to the State Gazette No. 4578) and the Internal Affairs Minister Decree No. 13 of 2006 concerning Management of Local Finance Management as amanded into the Internal Affairs Minister Decree No. 21 of 2011 concerning Second Amandement of the Internal Affairs Minister Decree No. 13 of 2006 concerning the Guideline of Management of Local Finance Management (State Gazette 2011, No. 310).

The policy of the social assistance is potential to be abused. There is some criminal case of it is not caused by the abused of the it but it is resulted from administrative matters of it. Basically, it must be the area of administrative law that must be asked the criminal responsibility. This situation supports the spirit of the law enforcement officers to eradicate corruption, particular the misuse of the social assistance. In the context of it, it tends to be a stigm and criminalization of the administrative matters. In some scholars point of view, they state that law enforcement of the social assistance provision in the cases of the misuse of it appears opinion that the misuse is able to administered (administrative corruption cases). The stigm therefore states that a policy and an order will be invalid if there is wrongful administrative or otherwise. In this perspective, there are worriness for giving the social assistance because they worry that their action will be crimed.

There are some cases of the social assistance courted in the court of corruption, which is decision of the cases are free. One of the accused is Salahuddin in his court decision No. 14/Pid.Tipikor/2011/PN.SMDA. The court decided that Salahuddin Bin Rachman Sidik proved for his action but it was no a crime. Therefore, he was freed for his charge - *Onslag van Alle Recht Vervolging* -. Salahuddin Bin Rachman Sidik was charged to corruption case on financial assistance (operational) of the legislative in 2005 about 2,6 billion. The court of corruption sentenced that he did not prove for the charge of the attorney (hereinafter referred to JPU) – article 2 and 3 of the Law No. 31 of 1999. The court concluded that he did not prove the primary and the secondary of the sentence. Therefore, he should be freed from all sentenced.[2]

It is also a case related to the social assistance courted by the court of corruption, which is its decision No. 08/Pid.Tipikor/2013/PT.KT.SMDA. The judge sentenced 1 (one) year and 6 (six) months in jail, the fine for approximately 50 (fifty) million, and the secondary sentence was 2 (two) months in jail for Fajri Tridalaksana and Dedy Sudarya, as the accused of the social assistance (Bansos) Kutai Kertanegara about 19,7 billion. In this case, the attorney (JPU) charged the accused for breaching primary indictment of article 2 and 3 of the Law No. 31 of 1999 as amanded by the Law No.20 of 2001 concerning Eradication of Corruption. JPU was also junto his charge with article 55 of the Indonesian Penal Code. The JPU sued them to 6 (six) years and 6 (six) months in jail, plus fine 200 billion and secondary 3 (three) months in jail. In judges decision, only article 55 of the Penal Code was charged. It meant that they were deemed to "joining in" to the corruption act.

In the past, the Bansos receiver almost ignored the responsibility of the Bansos. This made the officially employee always busy to deal with the responsibility of the Bansos receivers. Based on the Internal Affairs Minister Decree No. 32 of 2011, the Bansos receivers is responsible formally and informally for the Bansos they get. The responsibility is consisting of:

a. reporting of the utilizing of Bansos accepted by the Bansos receiver;
b. declaration letter on responsibility of the receiver to use Bansos properly including all documents that

[1] See Koran Suara Karya, Jakarta, Terbitan Hari Rabu, 6 April 2011, p.1.
[2] Chairul Huda, 2006, Dari Tiada Pidana Tanpa Kesalahan Menuju Kepada Tiada Pertanggungjawaban Pidana Tanpa Kesalahan, Prenada Media, Jakarta, p. 102.

has been used.

c. handing over letter on property accepted by Bansos receiver to be conveyed to the head of government (governor, major, or regent).

The Internal Affairs Minister Decree No. 39 of 2012 on amandement of the Internal Affairs Minister Decree No. 32 of 2011concerning Guideline of Giving Grant and Social Assistance sourced by APBD governs that the local government is allowed to give Bansos to member of its society based on its local budgeting after prioritizing its compulsory matter with considering the principle of fairness, rationality, benefit, and public order. Bansos receivers are decided for unstable individu, family, and/or the community as an effect of crisissocial, economic, politic, disaster, and natural fenomena. Bansos program itself is one of components of social guarantee as part of responsibility of the government/the local governments to its poor and impoverished people in grass root level. It is implementation of article 34 subsection 1 of UUD 1945 that states that "impoverished persons and abandoned children shall be taken care by State".[1]

Bansos awarding can be critized in the context of policy of administrative law. Theoritically in administrative law, the action of government in operating its governance *(bestuurhandeling - Dutch language)* can be segregated into real action *(feitelijke handelingen - Dutch language)* and legal act (*rechts handelingen - Dutch language*). In legal act itself is separated into "an act" in the area of public law and privat law. In the area of public law, 'the act' means legal act conducted basing on public law. Whereas, In the area of privat law, 'the act' means legal act conducted basing on privat law.

Authority and principle of legality is known in "rechtstaat". One of the important principles is the principle of legality.[2] It means that "every action of the government shall base on the regulation". The regulation must be the authoritative sources of the government action. For the government, its basis public law act is "authority - *bevoegdheids*".[3] The authority must be stated clearly in the regulation. In administrative law, the authority is put in its "position". In the context of the privat law, the basis of doing privat law act is "ability to do something" (bekwaamheid) from the subject of law. It can be "person" and "legal entity".

Term of position is a fiction in legal term. Therefore, the position must be applied by an employer officially. The employer is someone who poses the position. It is a subject of law and can not be separated between the position and people who pose the position. Every act of the government must be given the authority and based on the existed regulation. Indeed, its act must guarantee the basic rights of its people.

In other word, every state and government establishment shall have legitimate. It means that it has an authority given by the Laws. The authority is an ability to do certain legal action. To judge the authority of the employer officially in making a policy, it must be seen in the source of the officer authority to make it. In some condition, it almost uses term of "criminalization of policy" to draw legal practices of qualification of an officer acts either in the government or the local government. Basically, it is resulted from *"discretionary power"*[4] as a crime. Term of "criminalization" is referred to process of enacting one act as a crime in the context of law. The criminalization isemphasized to implementation of legislative policy in local autonomy.

Article 17 of the Law No. 23 of 2014 concerning of Local Government states that:

> "the local government has rights to determine local policy for establishment of governance matter that become local authority".[5]

The local government officials formulate, propose, discuss, and enact a local government (hereinafter referred to Perda) and a head of local government decree. Both Perda and Decree are not asked criminal responsibility. Perda as a local policy is put in the hierarchy of the Indonesian Laws (*algemene verbindende voorschriften*)[6] and it is made *(wetgeving)* by "official act", not a person. However, the subyek of criminal law is "person" and "corporation" and not "official ".

Misunderstand of the official to make a regulation inculding Perda and Decree due to against to public interest or highest laws can be corrected only by rejecting the responsibility report of the head of local government; or being controlled by a politic institution; or being evaluated and withdrawn both Perda and Decree; or doing judicial review to the Supreme Court or administrative court. However, right local policy will be enacted and bound as 'a law". Therefore, this article will focus on the nature of criminal responsibility on distribution policy of social assistance awarding for the society.

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[1] See the 4th Amandement of UUD 1945, 10 August 2002.

[2] See Andi Hamzah, 1986, Stelsel Pidana dan Pemidanaan di Indonesia. See also Muladi and Barda Nawawi Arief, 1992, Teori-teori dan Kebijakan Pidana, Alumni, Bandung. See also Oemar Seno Aji, 1985, Hukum Pidana Pengembangan, Erlangga, Jakarta. See also Soedarto, 1990, Hukum Pidana I. Yayasan Soedarto. Semarang.

[3] Philipus M.Hadjon, 1997, Tentang Wewenang, Yuridika, No 5 & 6 Year XII, p.1.

[4] See John M.Echols and Hassan Shadily, 2006, Kamus Inggris Indonesia, Gramedia Pustaka Utama, Jakarta, p.185.

[5] See explanatory of article 17 of the Law No. 23 of 2014.

[6] See the Law No. 12 of 2011 concerning The Form of Indonesian Laws.

2. The Nature of Criminal Responsibility on Distribution Policy of Social Assistance Awarding for The Society in East Kalimantan

2.1 The Criminal Responsibility of Misuse of the Social Assistance

A position (ambf) is subject of law in constitution and administrative law. It is a subject of law because it is a subject of right and duty and can not be moved. Therefore, it is needed official to pose the position. The official is acted on behalf of th eposition.

In legal doctrine, it is stated that it is given an authority to do something. It can not be acted its own action. So, its position will be represented by the official (legal personafication). The official as the legal personafication has the authority to do something. The authority is meant as legal authority, right to order, right and duty of public official to order the law in the area of public duty.[1]

In administrative law, every given authority to institution or administrative law official is always attached with "purpose and intention". The implementation of authority must be in line with the "purpose and intention". If it is not in line with the "purpose and intention" of the official, he/she does "authority misuse" (detournement de pouvoir).

The official is only doing his/her authority due to he/she does not have authority to do his/her authority attached to its position. If the official represents its position and out of the "purpose and intention", it means that it is misuse of the position. The position misuse must be interpreted that it is against to the laws as a basic argumentation of giving the authority. The misuse of it then is connected to responsibility matter, which is the official in doing governemntal action must be burdened to legal responsibility (geen bevoegheid zonder verantwoor delijkheid atau there is no authority without responsibility).

Concept of legal responsibility (aansprakelijk) in public law literature is acknowledged as the official responsibility to do its function. It is differed between postion's rsponsibility (ambtseed responsilbility) and personal responsibility. The personal responsibility in law dictionary is known as "aansprakelijk", which is meant responsibility based on mistake conducting or as a result of one action. Criminal responsibility is then responsibility pursuant to the law burdened to someone on behalf of its mistake or as aresult of its action personally. This concept affirms the concept of no crime, without mistake (geen straf zonder schuld).

The authority misuse is onrechtmatig overheidsdaad done by the official to operate its governance. However, to prove it, it must be measured and used standard parameter of evidence known in procedure law. The reason of the authority misuse in criminal law is taking place because it is not "a neglect" (culpa) but it is because of dolus or opzet.[2] In terms of it, dolus is interpreted as moving of the purpose of the authority based on the personal interest (met het oogmerk) either for his/her interest or third party interest. Therefore, the moving of the purpose must be proved whether it is or no to determine that the auhority has be misused. Therefore, pivotal element of the authority misuse is dolus. It is because it is not in line with the purpose of the authority and is not a neglect (culpa). If it can be proved that the misuse of the authority will be ended to criminal decision as scope of criminal law or otherwise, it will be onslag van alle rechts vervolging.

Discussing of the authority misuse in its connection with the criminal responsibility is very important because it is core of delict (bestandeel delict) to prove that there is a crime. So, the core of delict must be proved first by judges before proving other elements. Considering the delict's core related to corruption matter, "the purpose to rich itself or a corporation" becomes an element of delict to determine the act can be sentenced (strafbareanding). In the context of the corruption matters, the element of the authority misuse as bestandeel delict must be examined or proved first before deciding that the misuse's authority can be categorized as position responsibility or criminal responsibility.

In administrative law, principle of legality (legaliteit beginsel/wetmatigheid van bestuur) consists of 3 (three) aspects – authority, procedure, and substance. Those aspects must be based on the laws (principle of legality). If they are not fulfilled, it will be invalid for the governmental action. Every the governmental action requires valid and null authority. The authority found out from attribution, delegation, and mandate. The authority misuse is possible to happen into attribution, delegation, and mandate. The parameter of misuse of the authority is the principle of legality.

In court practice of some corruption court decisions, the official or administrative institution in using "policy" is almost exchanged between procedure authority misuse and (pretend) procedure authority misuse or between the authority misuse and invalid authority use. The exchange takes place because no every mistake of using authority is the authority misuse. In discussing of the court decision in corruption cases is found out that every procedure mistake of using the authority will be ended to the authority misuse and can be implicated to the position responsibility.

[1] See Irfan Fachruddin, 2004, Pengawasan Peradilan Administrasi Terhadap Tindakan Pemerintah, Alumni, Bandung, p.38.
[2] Wirjono Prodjodikoro, 2003, Asas-Asas Hukum Pidana di Indonesia, Refika Aditama, Bandung, p. 66.

2.2 The Criminal Responsibility on Delict Subject in Misuse of the Social Assistance

Basic argumentation to measure that someone act can be responsible in corruption particular in connection to position misuse is against to laws as consists of basic rule of the authority. The criminal responsibility in criminal law is intended to "person" as a delict actor. It is because person can be burdened an obligation to his/her crime. In every delict formula, law maker always posite "person" as a subject of law and a subject of delict. It is said as the subject of law and the subject of delict because it is supporting right and duty *(rechten en plichten). In general crime, the subject of delict is "everybody" and will create personal responsi*bility.in the context of certain crime, the subject of delict can be "everybody" and "corporation".

The basic difference between "everybody" and "corporation" as the subject of delict is its responsibility particular in terms of sueing and sentencing. If "everybody" is the subject of delict, the criminal responsibility will be put to "the person". Whereas, if "corporation" is the subject of delict, the criminal responsibility will be put to "its management or corporation". It is affirmed in article 20 subsection 1 the Law No. 31 of 1999 juncto the Law No. 20 of 2001 concerning Amandement of the Law No. 31 of 1999 on Corruption Crime. The article states that in terms of corruption crime done by a corporation, sueing and sentencing of crime can be done to its corporation and/or its management.

The pattern of "person" and "corporation" as the subject of delict is governed in article 1 point 3 the Law No. 20 of 2001 concerning Amandement of the Law No. 31 of 1999 on Corruption Crime. The article stipulates that "everybody is a person or corporation". The corporation itself is meant that the corporation in the context of the Law is group of people and/or the corporation's wealth either legal entity or non-legal entity. The article 3 of the Law No. 20 of 2001 states that"

> "everybody for the purpose of self or other party advantage or a corporation to misuse the authority, a chance or a facility due to its position can be harmful state finance or state economy".

To see the subject of law on its position in the area of administrative law can be posited as the subject of delict in criminal law especially to put its position as the subject of delict in corruption crime. It ican be analysed, as followings:

1. The responsibility in terms of "function".

According to J.H.A.Logemann, position is the subject of law (persoon) that means supporting right and duty. Therefore, the position is able to do "legal act" (*rechtshandelingen*) to create the right and duty. Although, the position is able to do "legal act" (*rechtshandelingen*), the position can not act or do itself action. It is because it must be represnted by"an official of the position". Then, the official acts on behalf of the position due to the position is the subject of law.

In terms of the official act a legal action based on its authority and is against to the laws (the authority of misuse), the official will be burdened 2 (two) legal responsibility. According to Philipus M. Hadjon, the official responsibility in doingits function will be differed between position responsibility and personal responsibility. Therefore, it can be understood that the position responsibility is responsibility pursuant to law burdened to state/government over its mistakes or a result of its position's acts the personal responsibility itself is burdened to personal acts.

2. The responsibility in terms of "position"

In the Law No. 20 of 2001, it governs also the pattern of "the position". According to Soedarto, the term "the position" is hesitate. According to him, "if the position is meant as "a function" generally, a private bank director has also "the position". In the explanatory of the articles, the law maker compare between type of corruption and article 52 of Indonesian penal Code that is criminal act of the official to breach its certain obligation or doing a crime by usingits authority, chance, and facility given to him due to its position. In this context, there is no position or function. It can be concluded then that a corruption can be done and not limited to the official".

Analysing Soedarto point of view, it is clear that the subject of delict according to article 3 is not only "the position", but also "private" as embodied from the word of "the position". Soedarto's opinion is similar to R.Wiyono and Andi hamzah.

3. Conclusion

The social asssistance are governed into the Law No. 40 of 2004 Concerning System of National Social Guarantee (The State Gazette of 2004 No. 150, Supplement to the State Gazette No. 4456); The Law No. 24 of 2007 Concerning Disaster Management (The State Gazette of 2007 No. 66, Supplement to the State Gazette No. 4723); and The Law No. 11 of 2009 Concerning Soscial Welfare (The State Gazette of 2009 No. 12, Supplement to the State Gazette No. 4967). The reason of the authority misuse in criminal law must be dolus or opzet. Discussing of the authority misuse in its connection with the criminal responsibility is very important because it is core of delict (bestandeel delict) to prove that there is a crime. It must be proved first by judges before proving other elements.

In terms of subject of delict, the criminal responsibility is not only referred to the official "person", but also to "corporation". The basic difference between "everybody" and "corporation" as the subject of delict is its

responsibility particular in terms of sueing and sentencing. If “everybody” is the subject of delict, the criminal responsibility will be put to “the person”. Whereas, if “corporation” is the subject of delict, the criminal responsibility will be put to “its management or corporation”. The subject of delict then must be put the responsibility in the term of “function’ and “position”.

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