MALADMINISTRATION AND INTENTIONALITY ON THE CRIMINAL CORRUPTION COURT IN INDONESIA

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Abstract: Maladministration and state financial losses have been the basis of the Criminal Court of Corruption's decision to punish the defendant. Judges' decisions are often based on proven objective facts while subjective facts, including the "intentions" of offenders, are often disregarded even though the principle of criminal responsibility presupposes both objective and subjective aspects as a basis sentencing defendant. As a result, the enforcement of corruption in Indonesia has become a long-standing and polemic issue of justice. This study examines how "intention" is the main element used to determine whether the defendant is guilty under Article 2 and Article 3 of the "PTPK Law" in the Indonesian Corruption Court. The analysis is based on the theory of Criminal Responsibility through the "analytical and critical approach" in which its aim is to avoid "liability without fault" and to ensure that "committed intentionally" is the main element used in decision making regarding corruptor sentencing.

Keywords: Maladministration, Intentionality, Corruption Court, Justice

1.1 Introduction

Corruption laws in Indonesia began with the formation of PPTK Law No. 3 of 1971 (PTPK Law, 1971), in which the element of guilt is a condition for determining the sentencing for perpetrators. In the original sense of the act, an offender of corruption (dader; pleger; pembuat, pelaku)'s guilt was accounted for in terms of whether the act was "committed intentionally" and/or...
in "negligence". The element of intentionality has typically been defined as an act done with "known, knowledge, intends, intention or purpose." Meanwhile, the element of "negligence" refers to something that the offender "should have known" (patut menduga/menyangka), and the negligence element also extends to categories of negligence committed "directly" or "indirectly". These definitions are as contained in Article 1 paragraph (1) sub a and sub b of the PTPK Law (1971). In Article 1 paragraph (1) sub a and sub b referred, as below:

a) **barangsiapa dengan melawan hukum melakukan perbuatan memperkaya diri sendiri atau orang lain, atau suatu Badan, yang secara langsung atau tidak langsung merugikan keuangan negara dan atau perekonomian negara, atau diketahui atau patut disangka olehnya bahwa perbuatan tersebut merugikan keuangan negara atau perekonomian negara;** (whoever unlawfully commits acts of enriching oneself or another person, or an Agency, which directly or indirectly contributes to losses of the country's finances and/or the country's economy, or is known or should have been known by him or her that the acts could contribute as such to the losses of country's finances or the country's economy);

b) **barangsiapa dengan tujuan menguntungkan diri sendiri atau orang lain atau suatu Badan, menyalahgunakan kewenangan, kesempatan atau sarana yang ada padanya karena jabatan atau kedudukan, yang secara langsung atau tidak langsung dapat merugikan keuangan negara atau perekonomian Negara** (whoever has the purpose of benefiting himself or another person or an Agency, abuses the authority, opportunity or means available to him because of his or her position or occupation, which directly or indirectly contributes to losses of the country's finances or the country's economy).

According to this formulation, then the corruption act described in Article 1 paragraph (1) sub a and sub b (the PTPK Law, 1971) was committed "intentionally" and in "negligence" of each action or as omission and commission of the offenses. Additionally, the concept of corruption is described in the PTPK Law (1971) Explanation of Article (1), as follows:

"**Tindak pidana korupsi pada umumnya memuat aktivitas yang merupakan manifestasi dari perbuatan korupsi dalam arti yang luas mempergunakan kekuasaan atau pengaruh yang melekat pada seorang pegawai negeri atau kedudukan istimewa yang dipunyai seseorang di dalam jabatan umum yang secara tidak patut atau menguntungkan diri sendiri maupun orang yang menyupaya sehingga dikwalifikasikan sebagai tindak pidana korupsi dengan segala akibat hukumnya yang berhubungan dengan Hukum Pidanaany dan Acaranya" (Criminal Acts of Corruption generally include manifestations of corruption in the broadest sense of using the power or influence inherent in a civil servant or public office position improperly or in order to benefit oneself or another person who bribes. Acts meeting this criteria qualify as criminal acts of corruption with all the legal consequences associated with the Criminal Law and its Procedure)."

This explanation shows that a criminal act of corruption according to the PTPK Law (1971) is manifested through a corrupt act in the form of "the abuse of public office for private gain" or to benefit him or herself or others through bribery. Therefore, there are legal consequences against him or her that should be accounted for their actions. These legal consequences referred to acts as summarized in Article 1 paragraph (1) and paragraph (2) of the PTPK Law (1971). Thus, actions that are conducted beyond acts described in Article 1 paragraph (1) and paragraph (2) are not acts that can be punished as corruption according to the PTPK Law (1971).

Meanwhile, the concept of "unlawful acts" in Article 1 paragraph (1) sub a of the PTPK Law (1971) states that its philosophy is not to be used as an "act that can be punished", but only as a "means or instrument" for an action that can be punished. In the explanation of Article 1 paragraph (1) sub a of the PTPK Law (1971), it was stated that "unlawful acts" were not made as "an act that

1 Article 1, PTPK Law (1971).
could be punished," but rather as a "means" for carrying out acts that "could be" punished. "Unlawful acts" therefore includes both subjective and objective acts. Whereas, the actions which can be punished are the actions carried out to "enrich oneself or others or an agency" (perbuatan yang "memperkaya diri sendiri atau orang lain atau suatu badan").

However, the element of "unlawfully" in Article 1 paragraph (1) sub a of the PTPK Law (1971), will not make a person liable except if deemed guilty of committing an act, namely for "enriching oneself" or "others" or "an agency". Here, the loss of the state finances is not the main element for the sentencing of the offender but it is just the supplement element. Due to the "unlawful act," it is only as a means to fulfills the guilty element that "could be" punished, so the main factor in the sentencing of the offender is the guilty element. Namely, these actions are those that were taken "directly" or "indirectly" "knowingly" or as one "should have known" and were done to "enrich oneself" or "another person" or "an agency" causing loss of the country's finances or the country's economy.

Nevertheless, when the PTPK Law (1971) was revised and replaced with Law Number 31 of 1999 jo. Law Number 20 of 2001 (PTPK Law, 1999), it had substantially changed. Mainly, the changes stemmed from the updated philosophy of both criminal responsibility and how sentencing was imposed on the offender by the corruption court in Indonesia. The amendments of PTPK Law (1971) were based on the decision to replace Law No. 24 Prp. (1960), as it was no longer considered adequate to achieve the expected results (in the context of saving the country's finances and economy for the implementation of the National Development Program).

Conversely, the PTPK Law (1999) was based on the "euphoria" of reforms of Indonesia (1998), regarding efforts to prevent and combat corruption. The reform movement encouraged the spirit of fighting corruption because acts of corruption had increased, causing huge state losses, having critical impacts on various aspects of nation-building. Therefore, it also offered a series of propositions about how every type of corruption can be fought. As a result, "unlawful acts" were made to be a legitimate basis to punish defendants, not just acts that fulfill the guilty requirement or the essence of having been "committed intentionally". Moreover, the meaning of "unlawful acts" allowed the court to sentence maladministration acts as "unlawful acts" and determine fault according to the Criminal Responsibility in Criminal Law principle. Finally, solving corruption cases in Indonesia has been a polemic issue of justice, and it is also always being debated. Particularly, debates focus on how to prove the defendant's guilt and sentence the offender in the Indonesia corruption court.

Proving guilt (of the wrongdoing act) is one condition that is important in criminal acts under judicial requirements to obtain objective and subjective facts of justice (requirements of justice and fairness). Conversely, punishing the criminal's offense of corruption or criminal responsibility on Article 2 and 3 of the PTPK Law (1999) should not be solely based on "objective facts" or "daad strafrecht". Objective and subjective facts should be standard for the sentencing of the offender so that real corruptors, who have culpability and are worthy of such punishment, can be punished

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2 See The Explanation of Article 1 paragraph (1) sub a PTPK Law (1971), p. 13; Cf. too Treatise of Discussion of the Article 1 paragraph (1) sub a PTPK Law (1971); For the words "illicit enrichment/enrich oneself" or "others" or "an Agency" in this paragraph, referred that it is can be related to Article 18 paragraph (2), which giving burden obligation on the defendant to explain about the sources of his or her assets in such way that significantly increase the assets cannot be balanced concerning his or her lawful income, it is can be used to strengthen the testimony of other witnesses that the defendant has committed a criminal act of corruption.

3 See General Explanation, Law No. 31 of 1999; Cf. Treatise of Discussion of the Draft-PTPK Law (1999).

4 E. Utrecht, Rangkaian Sari Kuliah Hukum Pidana I, (Surabaya: Pustaka Tinta Mas, 1994), p. 117. According to Utrecht "daad strafrecht", derived from the views of classical doctrines, namely, the actions that cause the "criminal act" are the center-point. Only the actions that are expressly included in the "Criminal Code" are criminal offenses and deserve liability to the individuals due to supposed violation of social order. The initial purpose of this doctrine is to impose limits on the arbitrary actions of the criminal court. However, it is understood as legal-formal to sentence the action (based on objective facts), not the action that was "committed intentionally".
properly. Thus, the criminal liability concept, both an unlawful act and one committed intentionally (daad-dader straf recht), is becoming a condition for criminal responsibility under criminal law enforcement at corruption court. Therefore, it will punish the exactly guilty person.

This study will examine how to prove the element of intentionally on the maladministration to demonstrate criminal liability under Article 2 and Article 3 of the PTPK Law (1999). In other words, it will examine how the "intention" is the main element used to determine whether the defendant is guilty under Article 2 and Article 3 of the PTPK Law (1999) in the Indonesian Corruption Court. This study aims to determine if "committed intentionally" is the main element for the sentencing of the defendant. The method of this study is doctrinal research through library-based studies, such as written documents and formal government reports, state institutions, court rulings, books, journals, treatise or papers of discussion of laws, internet, etc. These resources will be used to examine and evaluate the questions of this study. The analysis is based on the theory of Criminal Responsibility through the "analytical and critical approach".

This paper proceeds as follows. The first section discusses a brief history of the formulation of Articles 2 and Article 3 of the PTPK Law (1999) and discusses the phrase "could be" and its consequences. The following section discusses the theory of criminal responsibility and its development in Indonesia. Then, the paper uses analytical and critical approaches to develop the element of intentionally on the maladministration and discuss how that can define criminal responsibility. The final section offers some rethinking about how one can prove the "intentionally" element as the main factor in the practice of Law Enforcement of corruption on the Corruption Court of Articles 2 and 3 of the PTPK Law (1999) in Indonesia.

1.2 Brief History of the Derivation of the Phrase "Could Be" and Its Consequences

Article 2 and Article 3 of the PTPK Law (1999) is a sweeping article used as the central foundation for law enforcement of corruption cases in Indonesia. This section will examine the origins of such articles. Article 2 and Article 3 of the PTPK Law (1999) derive from Article 1 paragraph (1) sub a and sub b of the PTPK Law (1971). The phrase "which is directly or indirectly" and the words "known" or "should have been known/predictive belief" (diketahui atau patut disangka) before the phrase "losses of the country's finances and/or the country's economy" in Article 1 paragraph (1) sub a and sub b of the PTPK Law (1971), have been replaced with the words "could be" (dapat) in Article 2 and Article 3 of the PTPK Law (1999). In this version also, "criminal acts of corruption" previously meant "delict materiel" (substantive offenses/commissions of the offenses) became "delict formiel" (objective facts/omission of offense). As explained in Article 2 paragraph (1) of the PTPK Law (1999), it is stated that the words 'could be' before the phrase 'losses of the country's finances and/or the country's economy' indicates that the criminal act of corruption under Article 2 (and including Article 3) is a "delict formiel". That is, the existence of a criminal act of corruption is sufficiently fulfilled by elements of the criminal acts that have been formulated not by the arising of consequences of its action. It means that the result of the action is not a matter of consideration. Therefore, what to prove is unlawful action but not a guilty mind or "vicious will" (committed intentionally) behind this action. Finally, in practice, unlawful action is similar to a regulatory offense/violation of regulations or maladministration acts.

Due to these changes, it then led to the confusion of the "Public Prosecutors" in their efforts to prove the "unlawful act", then enacted with the "guilty" element. Whereas it should be declared as an element of a criminal act/offense. It means liability without fault has to be standard to prove and punish corruption. It was a mistake to understand the wrongdoer guilt and criminal act/offense (unlawful) implications caused by the words 'could be' in the previous formulation. As a result, the

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5 Cf. Anwarul Yakin, Legal Research and Writing, (LexisNexis, 2007), pp. 10;19-20. Cf. too M. Smits, The Mind and Method of the Legal Academic (Cheltenham: Edward Elgar Publishing, 2012), p. 28.

6 See The Explanation of Article 2 Paragraph (1) PTPK Law, 1999.
proof of the unlawful act element in Article 2 and Article 3 of the PTPK Law has become a polemic of "justice", so that is always the reason for a "judicial review". However, its reasons still revolve around the issue of "delict formiel and materiel", such as, issues regarding how to establish proof of state financial losses or economic losses but not about wrongdoers' intentions for such losses. This regulation was considered to have caused "legal uncertainty". In this case, there is no question about how to prove the element of guilt as a condition of criminal liability at the court, so that it is appropriate to punish those who are "truly guilty".

In the end, namely on July 25, 2006, the Constitutional Court Ruling No.003/PUU-IV/2006, removed "subjective unlawful" from the explanation of Article 2 paragraph (1) of the PTPK Law (1999), but it also balanced the meaning of the words "could be" in relation to the calculation of state financial losses which so far have been treated as a condition creating legal uncertainty. The Constitutional Court Ruling No.003/PUU-IV/2006 states that the proof of the element of "losses of the country's finances or the country's economy" must be calculated both in actual and potential losses. The words "could be" remained a polemic of "justice" and a reason for judicial review. Finally, in the Constitutional Court Ruling No.25/PUU-XIV/2016, the words "could be" were erased from the formulation of Article 2 and Article 3 of the PTPK Law, 1999.

This Constitutional Court Ruling No. 25/PUU-XIV/2016 has been the most influential on the practice of law enforcement of corruption in Indonesia. It was especially impactful in clarifying the issues of intentionally or the defendant's "knowledge" in the criminal act of corruption under Article 2 and Article 3 of the PTPK Law, 1999. After the Constitutional Court Ruling No.25/PUU-XIV/2016, the state's financial losses and the economy's losses became a basis on which the corruption court could punish the defendant's actions. The account of state financial losses also became a measure of severity for the sentencing of the defendant. The explanation of Article 4 of the PTPK Law (1999) supports this, adding that restoring state losses can only be seen as mitigating factors, but cannot eliminate the criminal offense.

As a result, to determine the existence of a criminal act of corruption under Article 2 and Article 3 of the PTPK Law (1999), it was sufficient to fulfill the elements of the criminal acts that were formulated not by the arising of consequences of its actions, that were "committed intentionally". It means that the "guilty mind" of the action is not a matter of import, but rather the state's financial losses are paramount. Therefore, to prove an unlawful action is required, but it is not required to prove a guilty mind or "vicious will" (committed intentionally) for a standard of criminal responsibility.

Finally, in practice, unlawful action examination looks like the evaluative process conducted for a regulatory offense/violation of regulations or maladministration act. This is unlike the criminal liability principle of Criminal Justice. Whereas, the words "could be" indicate that there is a "knowledge" of the perpetrator that his/her actions are aimed at the purpose of causing loss of the country's finances. Unfortunately, the words "could be" in Article 2 and Article 3 of the PTPK Law, 1999, were erased by Constitution Court. After the words "could be" were erased from Article 2 and Article 3 of the PTPK Law (1999), the corruption courts considering the defendant's fault tend to stick to practices of "legalism" or "formalism" in their exercise of judicial discretion when using the independence of the court. This places additional emphasis on the "formal legalist" aspect of proving the elements of the criminal act through objective conditions rather than on proving the defendant's guilt or "committed intentionally" over its action.

1.3 Criminal Responsibility Theory and Its Development in Indonesia

The committed intentionally aspect is the main condition of criminal responsibility and a basis for the sentencing of offenders. As in the principle of criminal responsibility that a person can

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7 See Agus Sahbani, “Kisah Pengujuan Pasal 2 dan Pasal 3 UU Tipikor”, in Hukumonline, Wednesday, April 6, 2016, http://www.hukumonline.com/, accessed in October 10, 2019.
8 Cf. Richard Posner, How Judges Think, (Cambridge: Harvard University Press, 2008), pp. 56; 324. Cf. too E. Fernando M. Legisme, Legalitas dan Kepastian Hukum. (Jakarta: Prenadamedia Group, 2016), p. 97.
only be accounted for and given reproof/blame (nestapa) if it has fulfilled the elements of criminal acts (Latin: delictum; Dutch: strafbaar feit) and if it was done intentionally. For that reason, the criminal responsibility includes the "unlawful" action (wederrechtelijkheid) and a requisite aspect of having been "committed intentionally" to determine guilt (schuld). Thus, to punish the defendant, the actions must fulfill both the definition of an "unlawful act" and the aspect of "intentionality" because the criminal acts and the associated guilt are the main conditions on which to punish people who are criminalized as offenders, namely doers (dader; pleger). Simons said that "wederrechtelijkheid" and "schuld" are the elements of criminal acts. Utrecht said they both have a very close relationship. If an action is not "wederrechtelijk", then according to positive criminal law, the act cannot be held responsible to the offender. So, there can be no "schuld" without "wederrechtelijkheid". However, what can occur otherwise is that a "wederrechtelijkheid" does not have "schuld". As Vos said, "schuld" generally includes the "wederrechtelijkheid" but it is not the case that "wederrechtelijkheid" includes "Schuld".

The Common Law System Countries, or Anglo-American Legal Systems, which adhere to the doctrine of monism about the offense (delict), stated that the essential elements of a crime are both the actus reus (physical element) and mens rea (mental element), namely "the state of the defendant's inner attitude" (sikap bathin terdakwa). Mens rea is always associated with the psychic state of the offender. This view is no different from the opinion of Jonathan Herring, that "mental elements" are always associated with mens rea. In contrast, the dualism doctrine separates criminal acts from criminal liability. It states that actus reus alone is an element of the offense while mens rea is included in the guilt of the perpetrator. Therefore, in Civil Law Countries or the Continental European legal system (Penal Code Model), the principle of legality is a measure of offense while the principle "Nothing penal without fault" (Geen straf zonder schuld) is the culpability principle. In the Criminal Justice "Penal Code Model" (Civil Law System), expanding the reach of legislation (comprehensive constitutional) is uncertain. Conversely, in the Common Law System, solving cases based on a statutory system is orthodoxy (legalist).

The Principle of "Geen straf zonder schuld"; Germany: "Keine Straf ohne schuld"; in English is known by the Latin terms: "Actus non facit, nisi mens sit rea" meaning "an act does not make a person guilty unless the mind is guilty". The Geen straf zonder schuld principle is the principle of criminal liability, which requires an element of guilt in the broadest sense; such as dolus or culpa (intentionality and negligence). Primarily for crimes; "rechtsdelicten" applies, except for the reasons for negating fault referred to as 'avas' (afwezigheid van alle schuld; nothing fault at all). It implies "liability without fault", but for "wetsdelicten". In the Common Law System, "wetsdelicten" known as "statutory offenses", are mostly formulated without a mental element or without "mens rea" unlike the "criminal act" which requires a mental element to define fault and culpability in criminal liability.

In practice in Indonesia today, the resolution of criminal cases in court is strongly influenced by the development of theories from Common Law and Anglo-American legal systems. Indonesia had adhered to a Civil Law System, but sometimes it cannot be distinguished between which traditions are held. That makes the process of law enforcement even more disjointed because the basic concept of legal formation is very much determined by which legal tradition is adopted by a country. As the principle of convergence itself was developed in Indonesia, it no longer purely

9 See Jan Remmelink, Hukum Pidana; Komentar atas pasal-pasal terpenting dari Kitab Undang-Undang Hukum Pidana Belanda dan padanannya dalam Kitab Undang-Undang Hukum Pidana Indonesia. Terjemahan Tristam Pascal Moeliono. (Jakarta:PT Gramedia Pustaka Umum, 2003), p. 190.
10 Utrecht, Op.Cit., pp. 287-188.
11 Cf. Posner, Op.Cit., p. 324.
12 Moeljatno, Moeljatno, Asas-Asas Hukum Pidana. Edisi Revisi. Cetakan Kesembilan, (Jakarta: Rineke Cipta, 2015), pp. 5; 165.
13 Remmelink, Loc.Cit. p. 142.
14 See Gabriel Halevy, A Modern Treatise on the Principle of Legality in Criminal Law. (London, New York: Springer, 2010), pp. 4-5.
implements the Civil Law System consistently. Moreover, in Criminal Law Enforcement, both the Civil Law system and the Common Law (include the Anglo-American legal systems) apply criminal responsibility principles to declare someone guilty by the court. In the same way, it applies to the "committed intentionally" aspect as a basis for a criminal offense. It’s just that in the United States and the United Kingdom, not to be deferent between the terms of criminal acts and the conditions of punishments (strafvoraussetzungen). Now, at Articles 37 and 38 of the Criminal Code Draft (R-KUHP) in Indonesia, meanings have been separated between criminal acts and criminal responsibility. Intentionality is the one condition of criminal responsibility to punish the criminal act. Negligence is only if it was explicitly formulated in the offense.¹⁵

According to Moeljatno, someone who commits a crime will certainly be threatened with a penalty, but that does not mean that every person who commits the act must then be punished. Because to convict someone of committing a criminal act, his/her guilt must also be investigated. Criminal acts are based on the principle of "legality", while the guilty aspect is based on the principle of "Geen straf zonder schuld".¹⁶ Romli Atmasasmita, said the "Geen Straf Zonder Schuld" principle is an assembly line on the acting arbitrary by the law enforcement officer, or as a selective filter towards whether or not a criminal act can be held responsible.¹⁷

In action theory, criminal liability cannot be separated from someone's act. The popular theory of action in criminal liability is the work of Michael S. Moore. According to Moore, the existence of action is a requirement of criminal liability, and "an act is understood as a willed bodily movement". Here, Moore makes the connection between action and responsibility.¹⁸ Oliver Wendel Holmes, quoted by Moore, said that "an act is a willed muscular contraction, nothing more". Meanwhile, Jhon Austin; "an act is a voluntary movement of my body or a movement which follows a volition". Holmes emphasized the volition of "muscle movements", while Austin focused on "a voluntary body movement" or "a body movement based on one's own volition". However, both Holmes and Austin together emphasize the "a volition movement (body or muscle)". It’s here where the "intentionally" portion refers to the offenses of the commission. This also forms the basis of Moore’s next theory, which says that "an act is a willed bodily movement".¹⁹

According to Ristroph, Moore’s stressing must be understood in the broader context regarding the philosophical commitments of moral realism and retributive theories of punishment.²⁰ According to Moore, responsibility is an objective fact about a person. However, it’s not solely a person’s behavior that is shown to another person, but it also defines how one can maintain a penalty as "the imposition of the retributive desert" against the wrongdoers. Therefore, according to Ristroph, commitments from moral realism and the retributive theory of punishment have produced one of the dimensions of criminal responsibility, namely the offenses of the commission (positive behavior).²¹

Someone who is declared to have committed an "unlawful act" or a circumstance that violates the stipulated provisions; if it was not committed intentionally, it is not a condition of liability. According to Fletcher, "the assumption is that someone who brings about an unlawful state

¹⁵ See Articles 37 and 38 Draft of Criminal Code (As of October 10, 2017), p. 16
¹⁶ Moeljatno, Op.Cit., p. 5.
¹⁷ Romli Atmasasmita, Rekonstruksi Asas Tiada Pidana Tanpa Kesalahan; Geen Straf Zonder Schuld, (Jakarta: Gramedia Pustaka Utama, 2017), p. 187. Normatively, the boundaries of "geen straf zonder schuld", says Romli, is found out in the principle of legality of Article 1 paragraph (1) Indonesia Criminal Code. In von Feuerbach’s view it contains four aspects, namely lex stricta, lex certa, lex scripta and lex praevia. According to Romli, the four aspects of the principle of legality provide a basis for reference and legal certainty in conducting an assessment of the presence or not of "actus reus" and "mens rea" in a criminal act.
¹⁸ Michael S. Moore, Act and Crime; The Philosophy of Action and Its Implications for Criminal Law, (New York: Oxford University Press, 1993), p. 78.
¹⁹ Moore, Ibid.
²⁰ See. Alice Ristroph, "Responsibility for the Criminal Law", in R.A. Duff dan Stuart P. Green (editor), Philosophical Foundations of Criminal Law, (New York: Oxford University Press, 2011), p. 113.
²¹ Ristroph, Ibid.
of affair is not responsible for his action if it is involuntary". Furthermore, Fletcher said that a condition for involuntary action is when there is coercion from others or the inability to do something due to coercion (it is subject to coercion or it is carried out in ignorance of the relevant facts). Two forms of coercive action can be carried out, namely "external coercion" and "internal coercion". External coercion is coercion with violence/threat (duress) and/or because it is forced (personal necessity). For example, one could have been forced by having a gun pointed at the victim's head, among other examples. Meanwhile, the internal analogy to external pressure is related to mental illness. Mental illness, according to Fletcher, hinders a person's ability to think freely and often manipulates the offender (as in compulsion in the sense of external coercion) to perform "the possibly voluntary action". Mental illness (insanity) is associated with the rational thinking ability of perpetrators who are used (pelaku yang diperalat). Here, not the choices of thinking by the offender, but rather the inability to think causes the offender to take an action voluntarily.

It's referred to as "responsibility rationale" (kemampuan bertanggung-jawab), which is a condition that must be met in determining someone's guiltiness to be sentenced to criminal reprecussions or not. Weekes said that "the assumption of responsibility rationale is derived from the test of proximity in establishing a direct duty of care". Furthermore, according to Weekes, "a voluntary assumption of responsibility [is an] exception to the rule". An unlawful act is truly desirable, and the liability's personal. Therefore, establishing that the act was "committed intentionally" is a condition of liability. To be held liable to someone's guilt is a consequence of an action having been "committed intentionally", and the law responds to these certain conditions to account for its actions. Barak says:

"The law lays down certain conditions under which liability is created; it arises whenever the individual's conduct meets these conditions. Thus, for example, we are wont to say that a person under a duty of care will be held liable for negligence if his conduct constituted a breach of this duty, and damage resulted from the breach: a person will be held liable for fraud where he made a false representation of fact to another party, knowing it to be false and intending it to be acted upon, and it was acted upon by the other party, to his detriment. In these cases, the person is held liable for the consequences of his acts. The liability is, in other words, personal".

The consequences of his actions that cause him to be accounted for, and that responsibility acts personally. However, according to Barak, in certain circumstances, a person is accounted for, not because of the actions he made himself, but for those actions carried out by others. Barak said, "the situations in which a person incurs liability as a result not of his acts but of the acts of other persons, whose liability is imputed to him by law". Such liability is known as "vicarious liability".

Vicarious liability is a form of "liability without fault; "strict"; or "strict liability". However, vicarious liability is "secondary liability". It's distinguished from the "contributory liability", is another form of "secondary liability" that derives "corporate liability" (enterprise liability) in tort law theory. This secondary liability 'is derived from common law doctrine regarding 'agency'. That is a superior's responsibility against their subordinates. Normally, such responsibility is managed by third parties who have the right, ability, or obligation to control violators. In the law of tort, legal

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22 George P. Fletcher, "Punishment and Responsibility", in Dennis Patterson (editor), Blackwell Companions to Philosophy; A Companion to Philosophy of Law and Legal Theory, (Blackwell Publishing, 2008), pp. 520-522.
23 Fletcher, Ibid.
24 Robert Weekes, "Vicarious Liability for Violent Employees", The Cambridge Law Journal, Vol. 63, No. 1 (Mar. 2004), pp. 53-63.
25 Andrew Tettenborn, Authority, Vicarious Liability and Negligent Misstatement, JSTOR: The Cambridge Law Journal, Vol. 41, No. 1 (Apr., 1982), pp. 36-38. Cf. Kenneth J. Rojc and Karoline E. Kreuser, End of the Road for Vicarious Liability, JSTOR: The Business Lawyer, Vol. 64, No. 2 (February 2009), pp. 617-626.
26 Aharon Barak, Mixed and Vicarious Liability: A Suggested Distinction, JSTOR: The Modern Law Review, Vol. 29, No. 2 (Mar. 1966), pp. 160-169.
27 Aharon Barak Ibid.
responsible for the violation acts that direct harm to others. Secondary liability, also called "indirect infringement" (pelanggaran tidak langsung), appears when a party of goods backers (materially) have facilitated, induced; persuaded or influenced someone to do something, or vice versa, and is responsible for the violation acts that direct harm to other parties. For example, in the United States, there is a codification of "secondary liability" law, which is addressed to the "trademarks" and "patents". However, for matters relating to "copyright" solely in the development of court cases, the decision of the court is the main developer of theory and policies of the "secondary liability", rather than Congress.29

In Indonesia, "strict liability", is known as one form of "liability without fault", which is distinguished from "liability based on fault". "Liability based on fault" is based on "unlawful acts" under the Civil Law concept.30 It's different from Criminal Law if the element of guilt is released from the formulation of a criminal offense, but it cannot be separated from other elements, which Remmelink referred to as "objectified".31 In certain offenses, the guilty element exists if the prohibited consequences are fulfilled, or if the fault element is inherent in all of the criminal offense formulations.32 Particularly, this applies to the crimes about corporate offenses. As such, the "unlawful" element is made to be a standard of fault in the Criminal Responsibility principle but not under the Civil Law concepts. The same matter applies to the statutory offense that permits the sentencing of the offender without an "intentional" element. In such a case, "liability without fault" is a standard practice in sentencing the offender. It is different from corruption cases in which an offense of commission is "liability based on fault", so "committed intentionally" must be a component of the offenders' sentencing. Thus, the guilty element, "committed intentionally," in Criminal Law is always inherent to the formulation of the criminal act of corruption. In particular, Article 2 and Article 3 Corruption Law (1999), explain that guilt is required due to its classification as an offense of commission (kesengajaan) rather than as an offense of omission (kelalaian).

1.4 Maladministration and Proving the Intentionality Element

The offender's awareness that his/her actions are worthy of blame is one condition for the sentencing of the action. It's related to the determination of fault wherein there is the reproachable act and the decision to commit the act. This is the essence of criminal responsibility. As Ashworth said, "censure" is the mission of Penal Law.33 This is also called "responsibility rationale" (kemampuan bertanggungjawab).34 An action must have both a criminaland punishable nature (strafwaardigheid; sift layak dipidana). It is not enough if it solely fulfills all of the elements of a criminal offense. Besides unlawfulness (wederrechtelijkheid), it must also have guilt (schuld). The principle of "Geen straf zonder schuld" (No punishment without fault), is a culpability principle of the Criminal Responsibility which determines whether or not to punish the defendant's actions.35 As explained before, the philosophical foundation of the "Geen straf zonder schuld" has an ontological sense about the "schuld", because it puts culpability as the sole determinant of whether the offender is actually to blame. Culpability (verwijtbaarheid) is measured by the offender's awareness that his/her actions are unlawful (wederrechtelijkheid) and from that determines the willful nature of his/her actions, so it is associated with "responsibility rationale", which is the condition for determining if someone is guilty. In the many discussions about guilt, subjective and objective factors have been understood as

28 Stephen R. Perry, “Tort Law”, in Dennis Patterson, A Companion to Philosophy of Law and Legal Theory, (United States: Blackwell Publishing, 2008), p. 57.
29 The Free Encyclopedia accessed on 10 September 2017.
30 Andri G.Wibisana. “The Many Faces of Strict Liability in Indonesia’s Wildfire Litigation”, RECIEL: Review of European, Comparative & International Environmental Law, (Wiley, 2019), p. 6.
31 Remmelink, Op.Cit., p. 190.
32 Cf. Moeljatno, Op.Cit., p. 77.
33 Andrew Ashworth, Principles of Criminal Law, Fourth Edition, (Oxford: Oxford University Press, 2003), p. 196.
34 Cf. Weekes, Op.Cit., p. 56.
35 Culpability: responsibility for a fault or wrong; blame; a level of moral culpability.
the core of criminal responsibility. Therefore, "committed intentionally" is the main condition for the sentencing of the defendants (because there is a guilty mind behind the action). 36

The same applies to corruption in Article 2 and Article 3 of the PTPK Law (1999). The offender's awareness must also be a condition for criminal liability of corruption. Perpetrators of corruption in Article 2 and Article 3 of the PTPK Law (1999) must be fully aware that their actions are actually intended for the abuse of authority for private gain or that they are unlawfully committing such acts to enrich themselves or others or even a corporation. Their actions must then result in a loss of the country's finances or the country's economy. Therefore, there is a reason why the "unlawful act" (wederechtelijkheid) deserves to be blamed because there is a reproachable act in those actions. Here, "unlawful act" is not to be used as an "act that can be punished", but only as a "means or instrument" for an action that can be punished. In other words, only the actions that were "committed intentionally" can be punished. At least, according to Fletcher, "an intentional unlawful state that is worthy responsible". 37

For that reason, the aspects of " unlawl act" and "intentionality" are parameters to measure "criminal liability of the corruption", as a level of moral culpability. It is not solely the country's financial loss that is used as a base to determine the criminality and sentencing of the offender corruption under Article 2 and Article 3 of the PTPK Law (1999). However, the existence of "the country's financial loss" has since been associated with several regulations violated by the perpetrators, and used as the standard for criminalization of corruption and as proof of the element of "unlawful acts". Moreover, it's also been used to punish based on omission. Generally, the model of criminal liability relies on proving the elements of Articles 2 and 3 of PTPK Law (1999) that have been violated by a perpetrator, but the main standard for determining the sentencing of the guilty defendant is the "country's financial losses" and "violations of several administrative rules".

The 30 corruption cases of 2015 to 2019 at Supreme Court Ruling serve as the sample of this research show that none of them proved that the actions were "committed intentionally". The existence of the "country's financial losses" and "violations of several administrative rules" was always made to be the standard against which to measure the form of "unlawful" without considering the defendant's intentions for the act or "unlawful act" in context of Criminal Responsibility according to Criminal Justice principles. This was demonstrated in Supreme Court Ruling No. 2476/K/Pid.Sus/2017 for example. In these cases, the proven unlawful acts are measured by "neglecting obligations" contrary to Article 18 jo. Article 21 paragraph (1) of Law No. 1 of 2004 of the State Treasury; Article 3 paragraph (1) of Law No.17 of 2003, about State Finances; Article 61 paragraph (1), Article 86 paragraph (2) Government Regulation (Peraturan Pemerintah; PP) No. 58 of 2005 about Regional Financial Management; Article 12 paragraph (2) Presidential Regulation No. 42 of 2002 jo. Presidential Decree No. 72 of 2004 regarding Amendments to Presidential Decree No. 42 of 2002 about Guidelines for the Implementation of the State Revenue and Expenditure Budget; and Article 132 paragraph (1) Regulation of the Minister of Domestic Affairs No.13 of 2006. 38

Furthermore, in such Supreme Court Ruling No. 2476/K/Pid.Sus/2017, the defendant's culpability is concluded from reality regarding "negligence" (omission). This was especially true for legal obligations in violation of the bureaucratic administrative process. The defendant's guilt was measured by the mere process of signing administrative documents. Administratively, the document signing process is done consciously. However, whether the act that was carried out was actually "intended" to cause private gain as a criminal act of corruption is unclear and has not been able to be proven comprehensively by the court. The evidence of the defendant's guilt is measured by the administrative fault, particularly, in carrying out the duties and obligations of the defendant as a Budget User official (Pejabat Pengguna Anggaran). The legal facts regarding the existence of the budget difference were calculated as a "loss of country finances". It is seen as a result of the

36 Cf. Eddy O.S. Hiariej, Prinsip-Prinsip Hukum Pidana, Edisi Revisi (Yogyakarta: Cahaya Atma Pustaka, 2016), p. 157.
37 Fletcher, Op.Cit., p. 521.
38 See Supreme Court Ruling No. 2476 K/Pid.Sus/ 2017, p. 15.
"negligence" of the defendant in signing the disbursement documents 100% of the unfinished work according to the Budget Plan (Rencana Anggaran Belanja; RAB). The point is the Corruption Court finding the defendant guilty was solely based on administrative regulation violation as "unlawful acts" and "omission of offense" as defendant fault. In this case, the criminalization of corruption is not linked to a standard of criminal act pertaining to the "commission of the offense" or whether it was "committed intentionally". It instead imposes the sentencing based on the defendant's culpability. In other words, it looks like "the regulatory offense or statutory offense", not like unlawful action in the sense of Criminal Law.\textsuperscript{39}

Thus, in proving the defendant's actions as a criminal act of corruption against Article 2 and Article 3 of the PTPK Law (1999) in the Corruption Court, this often tends to focus on acts contrary to Administrative Law, as the concept of "onweetmatigedada" (unlawful act) in the Civil Law concept. It has become a measure of unlawful acts on corruption, but not in the sense of actions that are "wederrechtelijkheid" (unlawful act) in the Criminal Law concept. In short, the examination of the "unlawful act" elements of Article 2 and Article 3 of the PTPK Law (1999), was only a "justification standard on judging" the action, not regarding determining if the defendant is guilty. This form of criminal liability puts more attention on punishing the "criminal act" (daad strafrecht), rather than the unlawful acts and fault (committed intentionally) of the offender (daad-dader straf recht).\textsuperscript{40} In other words, the corruption court has punished the defendant based solely on maladministration rather than on their guilt.\textsuperscript{41}

Maladministration is "bad service", or "bad behavior" by the public service officials. It is closely related to "apparatus behavior norms" in public services. \textsuperscript{42} Anton Sujata, referred to that as "deviations of public officials".\textsuperscript{43} Maladministration, on Article 1 point 3 of Law No. 37 of 2008, about Ombudsman of the Republic of Indonesia, is defined as:

"Maladministrasi adalah perilaku atau perbuatan melawan hukum, melampaui wewenang, menggunakan wewenang untuk tujuan lain dari yang menjadi tujuan wewenang tersebut, termasuk kelalaian atau pengabaian kewajiban hukum dalam penyelenggaraan pelayanan publik yang dilakukan oleh Penyelenggara Negara dan pemerintahan yang menimbulkan kerugian materiil dan/atau immateriil bagi masyarakat dan orang perseorangan" (Maladministration is a behavior or act that is unlawful, exceeds authority, uses authority for other purposes than those intended, including negligence or omission of legal obligations in the administration of public services carried out by State Administrators and governments which cause material and/or immaterial losses to community and individuals).

Generally, maladministration occurs when a public body fails to act under the rule or principle which is binding upon it. Maladministration occurs, according to Hadjon, due to conduct by public officials or government officials in the implementation of government functions in particular. The action, however, pertains to "personal responsibility" when associating with corruption. This differs from the "position responsibilities" (the responsibilities of the department; tanggung jawab Jabatan), in particular, which relate to "legality" or "validity" of governmental acts in Administrative Law. The issue of legality in government actions is related to "the government power approach". Meanwhile, the "personal responsibility" is related to the "functional approach" or "behavioral approach".\textsuperscript{44}

The behavioral approach like this is about "maladministration", both used to "government authority" and "public service". However, between 'the position responsibilities' and 'personal' both lead to the consequences of criminal, civil, and administrative law. On the contrary, the abuse of

\textsuperscript{39} Supreme Court Ruling, No. 2476 K/Pid.Sus/ 2017.
\textsuperscript{40} E. Utrecht, \textit{Op.Cit.}, p. 117.
\textsuperscript{41} Supreme Court Ruling, \textit{Ibid.}
\textsuperscript{42} Hadjon, \textit{Ibid.}
\textsuperscript{43} in Hadjon, \textit{Ibid.}
\textsuperscript{44} Hadjon, \textit{Op.Cit.}, p. 16.
power by public officials relating to governmental acts that result in criminal law is a "personal responsibility". It can be related to the existence of "maladministration", but it pertains to the concept of "unlawful act" in Criminal Law. Meanwhile, the civil and administrative law consequences can be in the form of civil liability and administration. However, civil liability can be a "position's liability", but it's relating to "unlawful acts" by the government authorities. Conversely, civil liability becomes a "personal responsibility" if there is an "element of maladministration". Nevertheless, administrative liability is a "position's responsibility" in Administration Law.\(^{45}\)

Thus, "maladministration" that is categorized as a criminal offense of corruption includes the aspect of "personal responsibility". This is because there are corruptive acts or "bad behaviors" behind the actions used to abuse government authority for private gain. These acts are carried out in various ways, such as, bribery, fraud, embezzlement, influence peddling, nepotism, collusion, and other acts that are worthy of liability due to their impacts on the state's financial losses. These are the manifestations of "unlawful acts" (wederrechtelijkheid), demonstrated by the willingness of the offenders (vicious will) to pursue such actions for the means of private gain (Schuld). Likewise, "unlawful acts" were created from the corruptive act so that there is "intentionality" behind the actions. Therefore, establishing that the acts were "committed intentionally" by offenders (with a guilty mind) becomes the starting point and general mindset for corruption cases. In that way, the criminal offense of corruption that pertains to "maladministration" on Articles 2 and 3 PTPK Law (1999) is one of "personal responsibility". This includes determining if acts were "committed intentionally" to categorize the "commission of the offense". This is the meaning of the true law of corruption. The "unlawful acts" (wederrechtelijkheid) and guilt (Schuld) are the main conditions of the criminal responsibility for imposing and sentencing corruption wrongdoers.

The criminal offense of corruption is an act committed by public officials and/or the action involving a private sector on the implementation of the government administration against the development of the country's economy and nation-building. In the context of corruption of public/government officials, Shleifer and Vishny said, "we define government corruption as a sale by government officials of government property for personal gain."\(^{46}\) The definition stressed by Shleifer and Vishny was "selling positions for state property for personal purposes or private gain." There are two most decisive propositions on the level of corruption of this form, namely the structure of government institutions and the political process. Corruption in government structures occurs at various levels. Meanwhile, corruption in the political process occurs in the form of "common abuses", mainly in the election and appointment of public officials. These actions generally take the form of bribery, embezzlement, influence peddling, nepotism, and others.\(^{47}\) Meanwhile, corruption in the private sector is "participating with public officials in committing a crime of corruption", or "corruption of the private sector involving state finances". Corruption in the sense of law is always identified as "abuse of authority by government/public officials for private gain". These actions are, therefore "unlawful". The nature of corruption is that it can be committed in various ways, namely through bribery, extortion, fraud, collusion, nepotism, conspiracy, illegal kickbacks, and favoritism (pilih-kasih). Generally, it occurs within the employment contract, although with various means and so on.\(^{48}\)

The corrupt actions should be proven because there are committed "intentionally", which is as a reproachable act ('censure') that is worthy of blame (morally blameworthy for that harm), as a shape of culpability of the offender's. Culpability is becoming an important element to determine

\(^{45}\) Ibid., p. 17.  
Andrei Shleifer and Robert W. Vishny, Corruption, JSTOR: The Quarterly Journal of Economics, Vol. 108, No. 3 (Aug. 1993), accessed on 22 Oct 2019, p. 599. Cf. to Geraldine, Mackenzie, and Nigel Stobbs. Principles of Sentencing, (Sydney Australia: The Federation Press, 2010), p 1.  
\(^{47}\) Ibid.  
\(^{48}\) Robert Klitgaard. Controlling Corruption (Los Angeles: University of California Press, 1991), p. 3; Cf. Andi Hamzah, Pemberantasan Korupsi Melalui Hukum Pidana Nasional dan Internasional, Ed. Revisi. Cet. 7. (Jakarta: PT. RajaGrafindo Persada, 2015), pp. 25-28.
This refers to acts committed in the form of a commission of offenses, and not by omission or negligence. As in the United Nations Convention Against Corruption (UNCAC, 2003), it is emphasized that "to establish as criminal offences, when committed intentionally, and the 'commission of any of the offences'. In a sense, corruption is a criminal offense committed intentionally, not because of negligence (omission). Therefore, the forms of intentionality; "knowledge", "intent" or "purpose" are elements of an offense established in UNCAC's definition clarifying "the commission of any of the offenses". In other words, they are not acts committed by omission or negligence. For example, in Article 20 of UNCAC, it refers to the definition of corruption that is "established as a criminal offense, when committed intentionally as an illicit enrichment because not be a relation with its lawful income".

Therefore, in the criminal acts of corruption Article 2 and Article 3 of the PTPK Law (1999), it does not always automatically require "state financial losses" to become a parameter for measuring a criminal act of corruption. Rather, emphasis should be placed on establishing the "committed intentionally" aspect of every "maladministration" act. It means that the proof of corruption in Article 2 and Article 3 of the PTPK Law (1999), which should be sought and proven, is the connection between maladministration and corruptive acts. Therefore, the "blame" of the offender is manifested under "unlawful acts" (wederrechtelijkheid) when that action is truly done willingly by the offenders. In other words, there's the aspect of "committed intentionally" behind the action. This includes actions such as, bribery, embezzlement, influence peddling, nepotism, collusion, and other acts that are worthy of accountability due to their impacts on the state's financial loss. They are called corruptive acts or acts that worthy of criminalization as corruption due to their intentionally committed elements.

Such matters should be proven by the Corruption Court concerning Article 2 and Article 3 of the PTPK Law (1999). Thus, the convicted defendants of corruption should be those who have fulfilled the requirements of criminal liability and who truly have been guilty with undoubtful evidence. Therefore, no one will be criminalized without the "vicious will" of his/her action. According to Huzak, the justification criteria for criminal offenses are not just the contents of justified evidence. Therefore, in Criminal Law, protection and respect for the "human being" is the main principle of the criminal liability system. "Human beings" here are related to the state effort to protect fundamental values derived from human dignity. This is especially related to the state's concern in terms of shaping the limits of "ius puniendi", as well the impact of the human rights against perpetrators/defendants. Even still, the standards of human rights protection by the states are divergent among varying states. Generally speaking, however,
the state is not supposed to inflict suffering on someone because he/she has committed the act only, without fully establishing "vicious will" with undoubtful evidence. Without that, then a person's actions cannot be categorized as a "despicable" act (to blame), and he/she cannot be held responsible and convicted as a guilty person.

1.5 Conclusion

In criminal responsibility of corruption under Article 2 and Article 3 of the PTPK Law (1999), the Corruption Court should prove that the unlawful act by the defendant is truly committed intentionally, not solely proving "maladministration" and without "intention" or "culpability" in any action. The defendant's actions must have been intended to abuse power for private gain so that it resulted in "state finances losses or economy". The corruptive acts or "bad behaviors", such as, bribery, fraud, embezzlement, influence peddling, nepotism, collusion, and any other act, are the set of parameters used to measure an "unlawful act" (wederechtelijkheid), or "unlawful circumstances" that deserve to be convicted along with wrongdoer culpability (Schuld). As in the UNCAC, 2003, Chapter III, Criminalization and law enforcement, it is stressed that "to establish as criminal offenses," the focus must be on those that were "committed intentionally", and "the commission of any of the offenses", meaning not committed only by omission or negligence. Article 20 of UNCAC emphasizes this requirement "to establish as a criminal offense, when committed intentionally, illicit enrichment not in relation to its lawful income".

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