

Conference Paper

Instrumental Communication Actions By Investigators/Public Prosecutors As Objects of a State Administrative Lawsuit

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ORCIDRocky Marbun: <https://orcid.org/0000-0003-2528-3740>**Abstract.**

Law Number 8 of 1981 concerning the Criminal Procedure Code is legislation that has been positioned as a legal umbrella for every law enforcement officer. However, not all powers and discretion exercised by law enforcers—especially investigators and public prosecutors, can be tested or questioned for their validity through the submission of a pretrial application. One model of action that cannot be tested is the act of instrumental communication. Every act of instrumental communication always accompanies the application of the authority and discretion of the Investigator and Public Prosecutor, which causes harm to someone who is made a suspect and a defendant. This study aims to find opportunities for legal remedies that can be taken by suspects and defendants against acts of instrumental communication from law enforcement. This research is legal research using an interdisciplinary and multidisciplinary approach. The results of this study indicate that every act of instrumental communication that accompanies the use of authority and discretion and causes harm to the suspect and the defendant can be the object of a state administrative lawsuit based on Law Number 30 of 2014 concerning Government Administration.

Keywords: criminal procedures, state administrative lawsuits, investigators, public prosecutors, communication actions

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1. INTRODUCTION

Euphoria at the promulgation of Law no. 30 of 2014 concerning Government Administration (Law No. 30/2014) raises self-awareness of the performance pattern of government institutions, especially pessimism in the period before its emergence. However, this "joy" is only directed at the understanding model of the existence of legal protection for state officials in carrying out their authority in making policies, related to the threat of criminal sanctions for the emergence of elements of state financial losses in criminal acts of corruption[1]. In fact, efforts to carry out binary contamination of the superior binary opposition, which has become a single narrative in the form of punishment for discretionary policies, gain legitimacy and justification through scientific persuasion

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(hegemony) issued by the National Administrative Institute (NAI). Where, discretionary policies which are always associated with state financial losses, must stop criminal discourse about policies from state administrators based on discretionary authority.[2].

The hegemony efforts mentioned above are based on the legal text of the President of the Republic of Indonesia which specifically asks the Attorney General of the Republic of Indonesia not to prioritize the efforts of Criminal Law over State Administrative Law, even though it is only limited to policies within the scope of the National Strategic Project (Instruksi Presiden Republik Indonesia Nomor 1 Tahun 2016 tentang Percepatan Pelaksanaan Proyek Strategis Nasional, 2016). President of the Republic of Indonesia Number 1 of 2016 concerning Acceleration of Implementation of National Strategic Projects, 2016). Thus, the hypothesis that arises, in relation to policy making based on discretion based on Law no. 30/2014, there have been two poles facing each other, namely public officials and law enforcement.

Meanwhile, the law enforcers themselves in carrying out their general authority in enforcing the law, seem to be detached from their meaning of the institutional position in the government structure. Where, Law Number 2 of 2002 concerning the National Police of the Republic of Indonesia (UU No. 2/2002), in Article 1 number 2, which stipulates that every Police Member is a civil servant, who carries out the function of the police as one of the functions of the state government. in the field of law enforcement (see Article 2 of Law No. 2/2002). Likewise, the regulation regarding the Prosecutor's Office in Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia -as amended by Law Number 11 of 2021, in Article 1 points 1 and 2, which confirms that the Prosecutor's Office is a civil servant and is an institution government exercising prosecution authority. That is, Investigator —a functional position in the Indonesian National Police institution which is a government institution, as well as a Public Prosecutor —is a functional position in the Prosecutor's Office which is a government institution, both of which are the object of study in Article 4 paragraph (1) letter A of Law no. 30/2014, namely as a Government Agency and/or Official who carries out government functions within the scope of the executive institution.

However, the work pattern of Investigators and Public Prosecutors is often hegemonized by studies embedded in the study of the Integrated Criminal Justice System. In fact, in the study of Criminal Law, the concept of "Investigator" is often referred to as the Institute for Investigation and Prosecution[4], whereas Law no. 2/2002 and Law no. 16/2004 is expressly stated as a functional position in a government agency. Although there is binary contamination in the investigator's discretion study, it is associated with Law no. 30/2014 to prevent the existence of authority from investigators. However, this

research was not practical, so in the end the effort to fight the investigator's discretion was returned to the pretrial submission[5].

As for other research, there is also a similar effort by linking the meaning of the functional position as the personification of the concepts of State Administrative Law, so that every decision and/or non-object pretrial legal action that is *eenzijdige publiekrechtelijke handeling* (one-sided public law action) is a object of examination in the State Administrative Court.[6]. However, the two binary contaminations collide with Article 2 letter d of Law Number 9 of 2004 concerning Amendments to Law Number 5 of 1986 concerning State Administrative Courts (Law No. 9/2004) which confirms that every decision of the The public whose authority comes from the Criminal Code and the Criminal Procedure Code are not objects of the State Administrative Court. What is interesting then is related to the types of actions carried out by law enforcers which are *feitelijke handelingen* (not legal actions), for example are the forms of communication that appear in the process of examining criminal cases.

One form of communication that appears and intersects with the process of examining criminal cases in the realm of Investigation and Prosecution is the implementation of Article 72 jo. Article 143 paragraph (4) of the Criminal Procedure Code. Where Investigators and Public Prosecutors refuse to provide case files to suspects and defendants without any normative reasons[7]. Or, the emergence of communication that is instrumental in nature from members of the Police —not investigators, to lead suspects not to use Advocates as their legal counsel[8]. In fact, the President of the Republic of Indonesia once warned the Prosecutors not to frighten businessmen [9].

Based on the explanation above, it would be interesting to examine how the instrumental communication model operates in the criminal case investigation process, and how legal remedies can be taken against the instrumental communication act as a factual act by law enforcement?

2. METHODOLOGY

This study uses a legal method based on secondary data obtained from literature studies. The approaching model used is the legal approach, the case approach, and the conceptual approach. However, as normative-descriptive research, it is allowed to use various models of approaches from outside the science of law [10]. Thus, this study also uses a conceptual approach from the realm of Social Sciences, including the concept of Social and Political Science, namely the concept of Power-Relationships; the concept of Communication Science, namely the concept of Communication Speech

Acts; the concept of Critical Sociology, namely the concept of Social Praxis; and the concept of Semiotics with the interpretation model of Critical Discourse Analysis.

3. RESULTS AND DISCUSSIONS

3.1. Instrumental Communication Models By Law Enforcers in Maintaining Grand Narratives

The submission of the legal system in Indonesia to the Civil Law System model in the Continental European legal family causes the pattern of laws and regulations to always be manifested in written language [11], [12]. Thus, spoken language or speech acts in communicating in law (*berrechten*) will always ignore the impact of delivering language in the form of messages and signs to the communicant or the person who is the interlocutor as the recipient of the message. As a result, the reasoning process in law becomes a myth of modernity which is assumed to be true without criticism, as long as the reasoning is contained in the form of an authoritative text. In fact, language itself is a big house for existence (Being) [13]. Thus, language in language activities is never neutral [14]. In fact, the use of language has a close relationship with efforts to maintain power [15]. Therefore, every use of media—including laws, to convey messages to the general public, in the Critical Discourse Analysis approach, is also not neutral [16], [17]. So, it is not surprising when Sudikno Mertokusumo explained that there should be a connection between the legal language and the language itself[18].

In the process of examining criminal cases —at the pre-adjudication stage, even though the legislators have done so — there is self-awareness of the arbitrary nature of the use of language in communication, formulating and designing legal narratives in Article 117 of the Criminal Procedure Code which orders investigators (1) to place the suspect in a state of freedom without pressure; and (2) being passive by noting only the words used by the suspect, as well as the existence of Article 166 of the Criminal Procedure Code which prohibits entangling questions. However, the method of examination in the investigation process has been designed in such a way through education for investigators to be instrumental and place suspects in situations desired by investigators [19].

In more detail, a study by Roxanna Dehaghani has also explained how the mechanism carried out by the police in such a way can actually cause a suspect to become reality in a vulnerable position. In practice, the police will use tactics, whether intentional or not, to prevent suspects from getting legal advice. In addition, some police officers will

also ignore some important information, which is actually important for revealing the actual incident that is being investigated by the police to the suspect. Furthermore, the police can also carry out tactics in the form of reading the rights of the suspect quickly, whether the suspect understands it or not, it is not an issue or is not an important thing to pay attention to[20]

The explanation above actually shows that the process in criminal procedural law is indeed potential, even factually, it is fulfilled by the practice of unequal relations or communication between the examiner, namely the police, and the suspect. Even this inequality, as already explained by Fenwick, can also continue to be examined in court. [21].

So, it is not surprising that investigators often raise angular questions and lead to answers, and even create a sense of distrust of the information that has been given. Of course, normatively, there will be objections to this phenomenon by stating the role and function of the accompanying legal counsel. However, the throwing of the suspect and the witness in the examination process which was detrimental to him was not well maintained. Because, also normatively, the existence of Article 115 paragraph (1) of the Criminal Procedure Code stipulates a legal obligation for an advocate as a legal representative to act passively during the examination process[22].

The dominant position of the investigator to maintain order in the investigation process, in Gramsci's perspective, is a necessary thing[23]. This dominant position causes an imbalance in verbal communication because investigators have the capital in the form of power —as a form of concrete practice[24], to be creative in interpreting[25] legal texts targeted at suspects. As a result, the meaning of the teleological basis in Consideration Letter c of the Criminal Procedure Code which aims to foster the "ATTITUDE" of law enforcers is, connotatively, interpreted only as the legal rights of law enforcers.

The Science of Law and Criminal Procedure Law in Indonesia has failed to decipher the meaning of "ATTITUDE", due to the independence of science which puts up a fence from the intervention of other sciences. In fact, the concept of "ATTITUDE", in the study of Psychology, shows a collaboration between cognitive aspects, conative aspects, and affective aspects[26]. In fact, if the legal activity (*berrechten*) is linear with language activities (communication), then the study of psycholinguistics explains how an ATTITUDE is formed as a result of "what is thought" or the human mind with the language itself[27]. As a result, the Investigator will control the understanding of the knowledge in question as a regime of truth[28], [29]. Thus, in Bourdieu's view, as a praxis, the

act of instrumental communication—through self-awareness of power ownership and discretion, is nothing but a language strategy for maintaining power[30].

Instead of carrying out government functions, the Police and the Prosecutor's Office use a language strategy (communication) to distill legal values and texts by using discretion which is then manifested in the form of actions that can be forced by force[31]–[33]. Thus, the suspect in the examination process during the investigation seems to be displayed in the accusatoir framework, but there is a grammar game - as a strategy, which places the suspect as an object (inquisatoir).[34]

Language games do not always appear in investigators' communication speech acts. However, based on the concept of civic mindedness, all members of the National Police have a habitus and awareness in the same field, namely the National Police as a joint institution so as to create confidence to fight for the same interests. As stated by LBH Masyarakat in its research, it turns out that not only investigators who convey speech acts do not use legal counsel, but also prison guards[8]. The communication speech act is based on a model of misguided thinking against the interests of the institution that dominates the legal rights of the suspect.

Likewise, the phenomenon of epistemological errors that arise from creative language games in interpreting Article 72 of the Criminal Procedure Code jo. Article 143 paragraph (4) of the Criminal Procedure Code. Where the case file has a very important function for suspects and defendants to prepare their defense efforts. Thus, the defense effort is seen as a threat to the fulfillment of the target system which has an impact on the absorption of the state budget for its institutions. Creativity in the meaning, in Rolland Barthes' Semiotics concept, is a connotative meaning model[35] of legal obligations, which law enforcers realize about the absence of the threat of sanctions for violations of the authoritative text. Awareness of the absence of the threat of sanctions becomes one of the symbols or signs to carry out speech acts of communication as an ethical problem[36]. In fact, the epistemological error, with no reason to refuse to provide the case file on the pretext of being a state secret document, was also justified by the judge[7].

In order to track the activities of instrumental communication, Legal Science lacks a concept to examine the expression of thoughts from law enforcement through three models of questions posed by psycholinguistics experts, namely: 1) the extent to which verbal expression of thoughts (speaking) is the syntactic and semantic characteristics of a language. a sentence is determined before the sentence is spoken? 2) is the form of a clause completed before the clause is pronounced, or is there some part of the clause that is formed while being pronounced? and 3) how is the planning of a sentence in

speaking?[37]. The law will only simply detect the loss through tracking the fulfillment of the legal rights of the suspect. However, no one can predict the speed at which the inspection process goes from one stage to the next. Thus, the suspect's self-awareness of the violation of his legal rights is too late to anticipate.[38]

In the Semiotics approach of Roland Barthes, the undisclosed originality of the law enforcers' thoughts, which views connotative meanings—basically, is a "silent operation" of the workings of an ideology (interests). Thus, connotative meaning, according to Roland Barthes, is a myth in the form of a communication system and a message system that has been formed historically[35]. Thus, every communication model that occurs in the examination process has been preceded by a pre-understanding (*vorgriff*) which has been formed as a "regime of truth" without legal action. This is because there is a "curse" for every power holder who productively creates knowledge - through the use of individual language (*parole*), which dominates everyone outside the group. As a result, law no longer has its emancipatory character[39], and is exclusive.

Expression of thoughts before a communication or speech act of communication, which is tried to be traced through the study of psycholinguistics and semiotics mentioned above, becomes interesting when it is associated with the description of the existence of pre-understanding or presuppositions—this concept is used by Hans-Georg Gadamer, or preconceptions structure of understanding—this concept is used by Martin Heidegger, or *vorurteil* (German), in which Gadamer explains that it is impossible for a person to produce meaning by standing outside the trajectory of history. Every interpreter—in this case an activity of law enforcement in applying a legal norm, will always move in history through the intervention of a horizon of understanding that is different from the texts and expressions that he will understand. This pre-structure of understanding is a pre-existing meaning so that it is seen as something objective-neutral[40]. Thus, *vorurteil* is the main aspect that controls the creative whole to bring up an understanding of legal texts and legal events. Thus, a preconceived notion/pre-understanding/pre-structure of understanding (*vorurteil*) moves in the circle of tradition.

In fact, the tradition will gain its strength when it is simultaneously present with authority as an element of pre-understanding. Therefore, a pre-understanding (*vorurteil*) that controls the pattern of interpretive work is constructed based on aspects of tradition and aspects of authority[40]. At this point, Gadamer introduces the concept of History of Influence (*Wirkungsgeschichte*) which is the starting point for the interpreter's self-awareness as objective-knowledge, either through the mechanism of *genetivus-objectivus* or through *genetivus-subjectivus*[41].

The strength of the objectivity of an understanding as a result of preconceived notions/pre-understanding/pre-structured understanding (Vorurteil) —within the framework of the History of Influence (Wirkungsgeschichte), as the basis for creating a Decision and/or Action, even though in the end it has an impact, it will emphatically reject [42], [43] by the interpreter himself. Therefore, an understanding and meaning of the legal norms are not possible only based on the actions of rational actors. Where in this position, it seems as if there is a subjective-objective dichotomy when drawn into the realm of law enforcement for every law enforcer as its structural agent. Although in principle, there is an awareness of the position of law enforcement implementers - as executors of executive and judicial power functions, through the concept of a welfare state law, which according to Herman, is the implementation of service functions to the community which is primarily directed to create prosperity and welfare. people. However, for researchers, this awareness is a false consciousness, which according to Horkheimer and Adorno is a myth and an attempt to avoid conceptual debate[44].

Based on the construction of understanding from hermeneutic studies, in the end, the understanding and meaning of authoritative texts will find their articulation in language. As previously explained, language operations or language activities are not only tangible in written form, but also in verbal and nonverbal forms as well as gestures. In fact, it departs from the view that language is a universal medium for the hermeneutic experience. Thus, it is clearly stated that "what can be understood is language"[40]. Thus, this is the entry point of the communication paradigm built by Jürgen Habermas with the Rational Action Theory of Communication.

The Communication Rational Action Theory, constructed by Habermas, is in the framework of resisting instrumentalist rational action. In providing resistance to the action of the instrumentalist ratio, Habermas provides a critique of knowledge based on the instrumentalist ratio which causes the loss of the emancipatory aspect of knowledge itself. Therefore, knowledge is driven by the interests of the speaker of knowledge[45]. So, not surprisingly, Habermas stated that knowledge and interest are one[14], [46]. In fact, it is impossible to construct a meaning which is completely independent of the paradigm that influences it[47].

Habermas explains the important difference between the act of instrumental communication and communicative action, by proposing the premise that instrumental action implies that someone involved does what he or she wants[48]. Therefore, the act of instrumental communication contains a monologue logic that dominates and hegemonizes the interlocutor. The logic of the monologue, in the end, is indeed in line

with the single narrative in the logic of Legal Positivism which uses the mechanism of a closed logic system[49].

3.2. Verbal Communication And The Expansion Of The Concept Of Government Action As The Object Of The Lawsuit Of The State Administrative Court

Major changes in the field of State Administrative Law, including in the field of State Administrative Court Procedural Law, occurred after the enactment of Law Number 30 of 2014 concerning Government Administration, and one of the concerns was the expansion of the concept of state administrative decisions (*beschikking*) which can be used as an object of dispute in the State Administrative Court[50].

Initially, Law Number 5 of 1986 concerning the State Administrative Court, which was later amended through Law Number 9 of 2004 and Law Number 51 of 2009, stipulates that the object of dispute examined by the State Administrative Court is the only product of government law in the form of state administrative decisions which have the characteristics of a written determination issued by a government agency or official containing public legal actions, which are concrete, individual and final (Article 1 point 9 of Law Number 51 of 2009).

However, after the enactment of Law Number 30 of 2014, especially through the provisions of Article 87, the object of dispute in the form of a state administrative decision has expanded its meaning, to also reach forms of action from the government that does not stipulate a written determination[51]. In a theoretical perspective, actions that are not in the form of letters or such determinations are referred to as real actions or material actions (*feitelijke handelingen*)[52], [53].

As a juridical consequence of the expansion of the meaning of state administrative decisions through Article 87 of Law Number 30 of 2014, currently, the State Administrative Court is also authorized or able to examine and adjudicate disputed objects in the form of government actions, both active and non-active. Passive, other than state administrative decisions in the form of written legal documents. Lawsuits against government actions other than state administrative decisions in the form of written documents are accommodated in the form of a mechanism for filing lawsuits for unlawful acts carried out by the government (*onrechtmatige overheidsdaad*).

In more detail, the mechanism for lawsuits against the law carried out by the government through the State Administrative Court based on Article 87 of Law Number 30 of 2014 was then followed up with the issuance of several technical guidelines regarding

the submission and settlement of lawsuits on the *onrechtmatige overheidsdaad* case consisting of a Circular Letter of the Supreme Court Number 4 of 2016, Supreme Court Circular Number 2 of 2019, and Supreme Court Regulation Number 2 of 2019.

The expansion of the meaning of the decision as well as the object of the state administrative dispute as regulated in Article 87 of Law Number 30 of 2014 can actually be understood as a dynamic that actually has the potential to increase the opportunity for the community to participate in supervising the government when it uses its authority. So from the perspective of access to justice, this is an important and positive point for efforts to fight for justice for the community when they are dealing with the government in power[54].

In the context of practice, there have been several lawsuits filed by community members against the government with the object of the lawsuit being an act of the government solely and not in the form of a written legal document. Such claims can be seen, among others, in Case Number 99/G/TF/2020/PTUN-JKT between Sumarsih and Ho Kim Ngo (Plaintiff) against the Attorney General of the Republic of Indonesia (Defendant), and Case Number 230/G/TF /2019/PTUN-JKT between the Alliance of Independent Journalists and Defenders of Freedom of Expression in Southeast Asia (Plaintiff) against the Minister of Communication and Information of the Republic of Indonesia and the President of the Republic of Indonesia (Defendant).

In fact, the lawsuit in Case Number 99/G/TF/2020/PTUN-JKT becomes very interesting to observe, because the object of the lawsuit is in the form of a statement from the Attorney General of the Republic of Indonesia (Defendant) which he delivered in a Working Meeting with Commission III of the House of Representatives of the Republic of Indonesia on dated January 16, 2020, which the Plaintiff considered detrimental to the interests of the Plaintiff in the process of settling cases of alleged human rights violations in the “Semanggi I and Semanggi II incidents.” Of course the statement from the Attorney General of the Republic of Indonesia (Defendant) is not an object in the form of a written legal document, but a form of verbal communication. But by relying on the provisions of Article 87 of Law no. 30/2014, the statement from the Attorney General of the Republic of Indonesia (the Defendant) can ultimately be used as the object of a lawsuit that is examined and tried by the State Administrative Court through the Jakarta State Administrative Court.

In addition to Case Number 99/G/TF/2020/PTUN-JKT, efforts to sue the government's verbal communication actions have also been submitted by the Association of Community Legal Aid Institutes (Plaintiffs) against the Head of the National Narcotics Agency of the Republic of Indonesia (Defendant I) and the President. Republic of Indonesia

(Defendant II) in Case Number 145/G/TF/2021/PTUN.JKT. In this case, the object of the lawsuit was an oral statement regarding the war on drug abuse from the Head of the National Narcotics Agency of the Republic of Indonesia (Defendant I) which was later supported by the President of the Republic of Indonesia (Defendant II).

However, especially regarding government actions in the form of verbal communication, it is still necessary to wait for further developments from the practices of lawsuits against the law carried out by the government in the State Administrative Court. This is necessary to see how the legal construction tends to be built by judges in the State Administrative Court through their decisions in adjudicating disputed objects in the form of verbal communication actions taken by the government.

One of the important points that can be observed from Case Number 99/G/TF/2020/PTUN-JKT and Case Number 145/G/TF/2021/PTUN.JKT is that it turns out that forms of verbal communication from a government official can also be sued through the State Administrative Court. This shows that, in Indonesia, the public is now given wider opportunities together with other state power structures, namely the judicial power structure through the State Administrative Court, to exercise control over all forms of activity carried out by the government as the executor of executive power in the state, ranging from government activities that are manifested in the form of written documents to those that are not written documents, such as speech, forms of verbal communication, neglect and passive attitude on the part of the government.

In addition to the control aspect, the practice in Case Number 99/G/TF/2020/PTUN-JKT and Case Number 145/G/TF/2021/PTUN.JKT also reinforces one of the functions of protecting the human rights of citizens which is inherent in the State Administrative Law system, as has been expressed by several scholars such as Philipus M. Hadjon and John S. Bell[52], [55], [56]. The aspect of protecting human rights in the State Administrative Law seems also worth trying to apply to the problems faced by suspects or defendants who experience acts of "pressure" when examined by law enforcement officials, both investigators, and public prosecutors.

It has become a "public secret" that the examination process is often colored by the forms of actions that tend to "pressure" carried out by law enforcement officers against suspects or defendants. Against such actions, pretrial is still an option for the suspect or defendant who has been harmed. However, after the enactment of Law no. 30/2014, especially with the existence of Article 87 which expands the meaning of the decision as well as the object of a state administrative dispute, at this time actually the parties who feel aggrieved also have other alternatives, apart from pretrial, to be able to legally sue the actions of "pressure" from law enforcement officers in the investigation process.

4. CONCLUSION AND RECOMMENDATION

The act of instrumental communication, as a form of the speech act of communication, from law enforcement is unique in the narrative process, whether it is based on authority through creative language play or because of self-awareness of the common good for the sake of the institution (civic-mindedness). Therefore, the discourse is something that is formed based on the awareness of the history of influence -which consists of the premise of tradition and authority, which productively produces knowledge and rites of truth ("regime of truth") in order to dominate and hegemony parties. other parties. The establishment of the truth regime is supported by the awareness of the weakness of legal texts that do not provide legal remedies to carry out binary contamination of the powers of law enforcement, such as investigators and public prosecutors, as interpreters of legal texts.

In connection with the foregoing, in relation to legal remedies against interpretations made by law enforcers, so far there are still obstacles for the community who will file lawsuits against law enforcement officers who have harmed the community through their actions, for example through a kind of "pressure" in the investigation process. However, after the enactment of Law Number 30 of 2014 concerning Government Administration, the opportunity to sue government officials as law enforcers has become more open. This is because in Article 87 of Law Number 30 of 2014 there is also an opportunity for mechanisms to be able to challenge government actions which are not only in the form of decrees (*beschikking*) but also other government actions that tend to take the form of physical actions or statements verbal statement as a form of verbal communication.

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