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Regulation of Banking Policies That Brings Implication for Criminal Act

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ABSTRACT

This research analyzes banking policy regulations that have implications for criminal acts. Decisions made by Bank Indonesia are in accordance with the authority and position pinned to Bank Indonesia officials. Policies made by Bank Indonesia can be appropriate or inappropriate with the principle of prudence and good faith. Bank Indonesia officials have authority related to their position. Bad ethics and inadvertent in making policies can cause state financial losses. As a result, the policy can be categorized as a criminal offense in banking sector. This is normative legal research. This study uses a legislative, conceptual, case and comparative approaches. Banking policies that have an impact on criminal acts can be seen from administrative, civil and criminal aspects related to the mistakes made by Bank Indonesia officials. If a Bank Indonesia official commits an error in implementing policy rules, criminal responsibility must be borne by the official.

Keywords: *policies, Bank Indonesia officials, Mistakes, and Crime Responsibilities.*

1. INTRODUCTION

There are 2 (two) differences in Bank Indonesia's banking policies. First, decisions made by Indonesian bank officials are in accordance with the authority attached to the position of Bank Indonesia officials. Second, policies made by Indonesian bank officials in banking sector have a bad ethical element. Policies that cause state losses can be categorized as criminal acts of corruption. The policy rules made by Bank Indonesia which have implications for criminal acts in principle are due to lack of good ethics and lack of caution. Policies made in this way make a person or legal entity benefit both personally and in groups that it is detrimental to the country's finances.

Banking arrangements are regulated in Law Number 6 of 2009 on Determination of Government Regulation in Lieu of Law Number 2 of 2008 on Second Amendment to Law Number 23 of 1999 on Bank Indonesia. In the Banking Act, Bank Indonesia is given broader bank supervision authority. Broad authority in Banking Law is that if the condition of a bank can endanger banking system, the head of Bank Indonesia can form a Liquidation Team and the authority of the Banking Law given to officials in the event of a systemic banking crisis. Systemic means a crisis that disrupts banking system extensively, affecting banks, society and the state.

According to Law Number 21 of 2011 concerning the Financial Services Authority (State Gazette of the Republic of Indonesia of 2011 Number 111, and Additional State Gazette of the Republic of Indonesia Number 5253), the Financial Services authority is a form of unification of regulation and supervision of the financial services sector. Previously the regulatory and supervisory authority was carried out by the Ministry of Finance, Bank Indonesia, and the Capital Market and Financial Institution Supervisory Agency (Bapepam-LK). In the Law, the Financial Services Authority is regulated in sufficient detail to regulate the transition so that the transition of tasks and regulatory and supervisory functions can work well.

Functions, duties and authority to regulate and supervise financial service activities in banking sector are shifted from Bank Indonesia to Financial Services Authority/*Otoritas Jasa Keuangan* (Article 33 paragraph (2) of Law Number 21 Year 2011). However, based on Article 66 paragraph (1) letter a of OJK Law, Bank Indonesia continues to carry out the functions, duties, and authority of regulating and supervising financial service activities in the banking sector. Therefore, BI has the duty to carry out the functions and duties of regulating banks in accordance with Article 37 of Banking Law. Where a bank experiences difficulties that endanger the continuity of its business, Bank Indonesia can carry out several actions as listed in Article 37 of Banking Act to save the bank, including:

a. Shareholders increase capital;
b. Shareholders replace the board of commissioners and / or directors of the bank;
c. Banks delete books of credit or financing based on sharia principles stalled and calculate bank losses with their capital;
d. Banks carry out mergers or consolidations with other banks;
e. Banks are sold to buyers who are willing to take over all obligations; and
f. Banks submit management of all or part of bank activities to banks or other parties.

They are the core considerations of Bank Indonesia in providing bailout assistance to unhealthy banks because systemic banking difficulties are the responsibility of the government. Funds issued by Bank Indonesia which will then be calculated with the Government are referred to as bailouts.

Regarding an urgent situation, it is necessary to make an effort to take a policy or decision. However, problems arise because there is no basis for action, even though the government cannot remain silent[1]. For example, the actions of Bank Indonesia officials in the policy of granting Bank Indonesia Liquidity Assistance (hereinafter abbreviated as BLBI) to Recap banks and lending

[1] Nur Basuki Minarno, *Desertasi*, Desember 2009, p. 4. Kondisi Sistemik : Jika kesulitan keuangan yang menimpa sebuah bank juga menimpa bank-bank lain terdapat dalam sistim perbankan suatu negara secara umum.

policies to Bank Century based on instructions and Presidential Decree dated 2 September 1997 for BLBI providers and Perpu Number 4 of 2008 to Century bail out. All policies are in the form of orders to the Minister of Finance.

The policy of Bank Indonesia officials in both cases is essentially a policy taken by Bank Indonesia officials in order to exercise authority in preventing the occurrence of a system impact on national banking services that have an impact on the economic sector. All of these policies are in the form of orders to the Minister of Finance to provide bailouts for banks that experience a banking financial crisis. The BLBI problem and Century bail out based on substantive studies can be seen from various aspects, i.e the background of BLBI issuance and Century bail out, Policy for granting bailout assistance to bank crises, and the use of funds from BLBI and Century bail out, in accordance with the issuance of Presidential Instruction Number 8 of 2002. The Presidential Instruction is about providing legal certainty to debtors who have completed their obligations or legal actions to debtors who do not settle their obligations based on resolving shareholders' obligations, paid off information, and Government Regulation Number 4 of 2008 concerning Century bailouts.

The policy of providing temporary capital as well as the Short Term Funding Facility (hereinafter abbreviated as FPJP) from Bank Indonesia in dealing with banking crises is based on instructions and decisions of the President and orders to the Minister of Finance and Governor of Bank Indonesia aimed at taking temporary measures to assist National banks healthy who experience liquidity difficulties. In addition, this is also to help truly unhealthy banks to get mergers/acquisitions with other healthy banks. In its implementation, bail out through FPJP and BLBI has 21 National Private Banks whose crisis liquidated by Bank Indonesia shows various irregularities.

The policy for granting bail out is in accordance with its designation and some are not in accordance with the provisions of the provision of liquidity which results in violating the law, and can have criminal acts. Deviations in the use of liquidity funds by banks in a crisis are not in accordance with their designation and can indicate the existence of elements against the law, both in the fields of administrative law, civil law, and criminal law.

The form of irregularities in the use of bail out which indicates a crime can be in the form of a general criminal offense or a banking crime. The form of banking crime is a general criminal offense if the act violates the Criminal Code and certain criminal acts if the act violates the Criminal Code but is related to a violation of certain legal interests. Banking crime can occur if the act violates the legal rules outside the Criminal Code which regulate banking crimes, for example: Banking Law, Bank Indonesia Law, Corruption Law, and Money Laundering Law.

The actions of Bank Indonesia officials can be categorized as acts that are against criminal law, especially those related to the use of BLBI funds, MPS (Temporary Equity Participation), FPJP that are not in accordance with the designation that indicates the nature of criminal law, the right to collect from Bank Indonesia to the Government (IBRA); IBRA in order to collect funds from the obligor through the MSAA mechanism (Master of settlement and Acquisition Agreement), MRNIA (Master Refinancing and Note Issuance Agreement) and APU (Debt Recognition Act) which are actually settlement mechanisms beyond the court.

Policies carried out by Bank Indonesia officials based on their authority, administratively in providing bailouts or BLBIs are essentially a facility specifically provided by Bank Indonesia to the national banks to overcome the problem of liquidity difficulties it faces. This policy was taken to save the national banking world from destruction which is certain to have implications for the national economy.

In reality, the policy turned out to have been misused by some recipients of facilities to enrich themselves. That is, the liquidity assistance was not used in accordance with the intention of issuing the policy resulting in a very large amount of state financial losses. Liquidity assistance in various forms and mechanisms given to recipient banks is civil law, because the parties are based on the existence of legal relations in the form of agreements or contracts as creditors and debtors. Utilization of authority carried out by officials clearly has implications for criminal acts.

2. METHOD

This is legal research with normative legal type. The approach in this study includes statutory approach, conceptual approach, and case approach. Case approach used is cases related to Bank Indonesia policy towards banks with "unhealthy" conditions.

3. DISCUSSION

3.1. Banking Policy Philosophy that has implications for criminal acts

The nature of banking policies in Indonesia refers to policies made by relevant officials in various fields. Legal policies are made so that they can be binding in community life. Every life of the community has an interest in the policies made. Interest is an individual or group demand that is expected to be fulfilled. The essence of every human being is a supporter or person of interest. Legal policies that are made are expected to meet the desired expectations and interests.

Policy regulations have several meanings. According to M. Solly Lubis, Policy formulation is interpreted as a policy, while for policy itself it is called wisdom. Wisdom in terms of policy or

wisdom, is a deep thought/consideration to become the basis for policy formulation. Thus, policy is a set of decisions taken by political actors in order to choose goals and how to achieve them.[2]

Juridically, the policy taken by the government is solely to carry out the authority based on the Law. To achieve better results to exercise authority, the government needs freedom to act on its own, known as Ermessen[3]. This freedom of action is in accordance with the authority attached to officials, including Bank Indonesia officials. The authority is given by law because of his position.

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Regarding legal policies in the banking sector, the authority that Bank Indonesia officials have in taking policies must be in accordance with the ethical, moral, and desired objectives in overcoming banking problems. Therefore, the freedom that Bank Indonesia officials have is freedom from their authority. Beccaria reveals that human actions are purposive and are based on the understanding of public law, the principle of pleasure and distress, that is, humans choose actions that will give pleasure and avoid actions that bring trouble[4]. Beccaria's opinion was also

[2] M. Solly Lubis, *Kebijakan Publik*, Mandar Maju, Bandung, 2007, p. 5.

[3] Irfan Fachruddin, *Pengawasan Peradin Administrasi terhadap Tindak Pemerintah*, Alumni, Bandung, 2004, p. 2.
Definition of Freies Ermessen; Freies come from the words frei and freie which means free, free, not bound, free and free. Ermessen means to consider, judge, suspect, evaluate, consider and decide. Etymologically, Freies Ermessen means people who are free to consider, free to judge, free to guess, and free to make decisions. Pouvoir Discretionare or Freies Ermessen is an act of independence at the initiative and own policy of the state administration in the welfare state. The function of the public service in the administration of the welfare state government results in a partial shift of power between state institutions, namely from the legislature to the executive institution (state administration). The definition of discretie in pourvoir discretionare is that the ruling official must not refuse to make decisions on the grounds that "there are no rules" and therefore is given the freedom to make decisions in his own opinion provided that they do not violate the principles of jurisdiction and legality. The nature of discretion is the freedom of action for the state administration to carry out its functions dynamically in order to resolve important urgent issues, while the rules for that do not yet exist. Not freedom in the broadest and unlimited sense, it remains bound to certain limits permitted by state administrative law. The realization of the attitude of the state administration in implementing the ermessen freies can consist of several things including:
1. Establish legislation under the law which is materially binding on the public;
2. Issue concrete, final and individual beschikking;
3. Acting in a real and active administration; and
4. Carry out quasi-judicial functions, especially "objections" and "administrative appeals".
The manifestation of the attitude of the state administration can be determined by the benchmark of the principle of ermessen in brief, namely: a) The existence of freedom or freedom of state administration to act on its own initiative; b) To resolve pressing problems that have no rules for it: and c) Must be accountable.

[4] Systemic conditions, if the financial difficulties that afflict a bank also afflict other banks in the banking system of a country simultaneously, Ibid. p. 30.

followed by Bentham who believed in the doctrine of freedom of will, although it required the theory of learned behavior as an explanation of criminal acts[5].

The legal policy of Bank Indonesia officials in terms of legal solutions to solving banking problems with the policy law in the form of bailouts by Bank Indonesia was carried out in order to save banks from being unwell. Requires new policies in the banking sector. Legal policy in the field of banking is a legal rule established by Bank Indonesia officials on the basis of authority derived from the existence of *beordordingsruimte, broordeling surijheid, beleidesvrijheid* or *ermessen*[6].

A policy (*beleidsregel*) is essentially a product of state's administrative actions which aim at *buiten gebracht schriftelijk beleid* (showing out a written policy), yet without the authority to make regulations from the administrative entity that creates the policy[7]. *Beleidsregel* has the authority of the state administration or agency in making policy regulations based on the principle of freedom of action. The term *Esmessen* is equivalent to *discretiaonair* which means according to wisdom, and as a meaningful adjective according to authority or power that is not or not entirely bound by the Act[8]. The implementation of *Ermessen* through the actions of state administrative tools can be manifested as follow[9]:

a. Establish legislation under an Act which is materially binding public;
b. Issues *beschikking* that is concrete, individual and final;
c. Perform a real and active administration; and
d. Carry out judicial functions, especially in terms of "objections" and "administrative appeals".

Public law policy cannot be separated completely from the problem of value especially for Indonesia based on Pancasila and its national development policy line aims to form a complete Indonesian human being. Thus, humanistic approach must also be considered. This is important not only because crime in essence is a humanitarian problem but also because it essentially contains the law of suffering which can attack the interests or values that are most valuable to human life[10]. Public legal policies related to criminal acts against policies carried out by Bank Indonesia officials

[5] Systemic conditions, if the financial difficulties that afflict a bank also afflict other banks in the banking system of a country simultaneously, Ibid. p. 30.
[6] Kusumaningtutik, S.S, *Peranan Hukum dalam Penyelesaian Krisis Perbankan di Indonesia*, Rajawali Press, 2009, p. 48.
[7] Philipus M. Hadjon, *Pengantar Hukum Administrasi Indonesia* (Yogyakarta, Gadjah Mada University Press, 1994), p. 152.
[8] Fokema Andreas, *Kamus Istilah Hukum* (Terjemahan), Saleh Adiwinata et.al (Trans), Bandung, Bina Cipta, 1983, h. 98, p. 145.
[9] Saut Panjaitan, *Makna dan Peranan Freies Ermessen Dalam Hukum Administrasi Negara*. Dimensi-dimensi Pemikiran Hukum Administrasi Negara, Yogyakarta, UII Press, 2001, p. 115.

[10] *Ibid*. h. 37 – 38.

can be applied using criminal law facilities and non-criminal facilities. Public legal policies carried out by means of criminal law are a criminal law policy.

Related to the authority of Bank Indonesia, there are responsibilities of several parties in the issuance of bailouts to save banks related to the responsibilities of positions carried out and accounted for personally. The concept of this position will determine whether a Government (Bank Indonesia) policy is administrative or civil law. Bank Indonesia's policy to save banks has been misused by parties involved in the bank restructuring process, starting with apparatus at Bank Indonesia, the finance ministry and banks being rescued.

For this reason, precautionary principle is adopted from the basel core principles issued by Basel Committee on Banking supervision and embodied in the form of good operational standard procedures, with good corporate governance and risk management. The application of the precautionary principle and the principle of goodness in banking is taken in order to protect the risk of corruption. To carry out the task of restructuring banks, the institutional framework or institutional coordination plays a very important role. The lack of optimal cooperation between Bank Indonesia and related institutions, especially the Ministry of Finance and the Deposit Insurance Agency (LPS) and the Financial Services Authority, has greatly affected banks restructuring activities. The lack of smooth coordination in terms of bank restructuring is itself a legal weakness.

After the entry into force of the Financial Services Authority with Law No.21 of 2011 (OJK Law), banking regulation and supervision has shifted from Bank Indonesia to OJK. Banking Act Article 37 B paragraph (1) states that each Bank is required to guarantee public funds deposited in the bank concerned. Paragraph (2) states that in order to guarantee public savings in banks as referred to in paragraph (1), the Deposit Guarantee Institution is formed. This is the legal basis for the establishment of Law Number 24 of 2004 concerning the Deposit Insurance Corporation (hereinafter referred to as the LPS Law). The function of the LPS is to ensure that customer deposits are actively involved in maintaining banking system stability in accordance with their authority.

3.2. Errors in Criminal Liability in Banking

Article 1 paragraph (1) of the Criminal Code requires the determination of a crime based on a regulatory provision. Article 1 paragraph ((1) of the Criminal Code states that "No act may be punished but rather the strength of criminal provisions in the Act, which previously existed than that". Thus,"**nullum crimen sine lege"** and **“nulla poena sine lege"** are the main principles of the principle of legality.

This principle has been somewhat deviated in the Draft Criminal Code[11]. A criminal act therefore contains a formulation of an act and is punishable by a crime against a person who violates the prohibition. Both, namely the formulation of the prohibition of an act and its criminal threat are subject to the principle of legality, meaning that both must be formulated in the Act of Invitation. Indonesian criminal law, as in other civil law countries, criminal acts is generally formulated in codification. However, so far the Criminal Code or other legislation does not regulate in detail the formulation of a crime. Various criminal acts, especially those contained in the Criminal Code, the formulation is not always in line with the theory of separation between criminal acts and accountability.

Formulation of a crime contains a prohibition against certain acts. The rule of criminal law contains the formulation of orders to do something/in material criminal offenses; the prohibition is aimed at the emergence of consequences. Criminal acts contain formulations of the consequences prohibited to be realized. Hence, a person can be convicted not only because he has been proven to have committed an act that violates the law but also because he performs acts that violate (contradict) the law, is against the law or fulfill an element of criminal offense. While his actions fulfills the formulation of criminal acts in the Act and were not justified, he does not necessarily meet the requirements for criminal charges. Criminalization still requires conditions, i.e that a person who commits a crime must have a mistake or guilt. The person must be held accountable for his action; his actions must be accountable to the person.

Related to that, Bank Indonesia liquidity assistance (BLBI) was strengthened by the issuance of Presidential Instruction Number 8 of 2002 to provide legal certainty to debtors who had completed their obligations or legal actions to debtors who did not settle their obligations based on settlement of shareholders' obligations and paid off. Regarding the BLBI-related policies, several Bank Indonesia Governors have been sentenced for criminal acts of banking and corruption. The policy they took was the implementation of Presidential Instruction Number 8 of 2002 but was misused for the benefit of individuals[12]. This means that if the ruler commits a violation of the law, like an ordinary person, he is responsible for the harm caused.

From the BLBI case, the basis for judging the violation of the law is the actions of the authorities rather than individuals as superiors. Individuals in carrying out their actions are driven by their own interests, while the authorities serve the public interest. In this case the ruler participates in the traffic of the community in an equal position with the individual, can be

[11] Article 1 paragraph (3) of the 2010 Criminal Procedure Code, opens up the possibility of actions which are not declared as criminal acts by laws and regulations, but stated otherwise according to living law, their existence is still recognized.
[12] Romli Atmasasmita, *Hukum Kejahatan Bank*, Kencana, Jakarta, 2014, p. 120.

accounted for based on Article 1365 BW, which is the civil liability that is the responsibility of the office related to illegal acts of the authorities. This means that the responsibility of the state is related to the concept of state administrative law which concerns the use of authority possessed by the authorities in carrying out their duties for public service[13]. The responsibility of the state is related to the use of government authority in the function of the public service. In carrying out these functions, loss/suffering can arise for the community.

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LPS is legal certainty in the regulation and supervision of banks and guarantees customer deposits so that there is public trust in banking. In administrative law, the policy of Bank Indonesia is known as Ermessen's principle, i.e the principle that gives freedom of action to government officials, especially in carrying out administrative functions. This freedom of action can be carried out by the government apparatus as follows[14]:

a. There has been no statutory regulation that regulates a concrete solutions to a particular problem, while the problem requires immediate resolution;
b. Laws and regulations that form the basis of government apparatus provide complete freedom; and
c. Government officials are given the power to regulate themselves.

[13] Tatiek Sri Djatmiati, *Kesalahan Pribadi dan Kesalahan Jabatan dalam Tanggungjawab atau Tanggunggugat Negara*, Seminar of Unair Faculty of Law, 2008.
[14] *Ibid.*

The application of the **Ermessen** principle is an opportunity for the emergence of losses on the part of individuals due to the actions of government officials. This is in accordance with statement proposed by Philipus M. Hadjon by taking Mariette's opinion that to measure abuse of authority in relation to **beleidsurifheid (discretionary power, Ermessen)** must be based on the principle of specialization that underlies that authority. In this case, Bank Indonesia made a mistake related to the Century Bank bailout that the director of Bank Indonesia bear the position responsibilities and personal responsibility in relation to government actions, an official's personal responsibility was related to maladministration in the use of authority and in public service. Position responsibilities is related to the legality of government actions. In administrative law, the issue of the legality of government action is related to the approach to government power[15]. The concept of position responsibility and personal responsibility in administrative law is closely related to the control of the use of authority, because the use of authority can lead to **ultra vires** (actions outside the authority).

Banking crimes which have implications for criminal acts of corruption can be seen in the element of illegal acts in the form of mistakes in administration, civil and criminal matter. For administrative legal actions, the actions of Bank Indonesia officials against the law with the authority belong to Bank Indonesia officials. This is to determine whether liability for mistakes made to Bank Indonesia officials includes personal or position mistakes. In banking crimes, mistakes made by these officials refer to Article 1365 BW for losses incurred by policies made in banking crimes.

Banking criminal acts which implicate corrupt crimes have an element of error based on the **principle of legality**, i.e the principle that determines that no act is prohibited and threatened with a criminal offense if it is not determined in advance in the legislation. Hence, when a Bank Indonesia official meets the element of conducting a mistake, it has been regulated in the Banking Law.

Corruption in banking sector emerged with a policy made by Indonesian bank officials related to aspects of general principles or legal principles related to handling corruption. For this reason, in dealing with banking crimes, criminal justice system is used as a working mechanism in crime prevention by using the basis of a criminal justice system system approach in corruption.
Authority attached to Bank Indonesia officials is in accordance with legal provisions. Criminal law policies carried out in banking sector by Bank Indonesia are based on acts of crime in banking sector and sanctions which should be used or imposed. Policies carried out by Bank Indonesia officials have elements that violate the law in banking regulations. Criminal acts in banking sector

[15] *Ibid*, p. 99.

show that policies carried out based on authority ignore elements of a principle of good faith and prudence that harm the country's finances and result in criminal acts.

4. CONCLUSION

The Philosophy of Criminal Law Policy in banking sector is based on good faith and the principle of prudence. The basis is interpreted that actions carried out by Bank Indonesia officials who violate these principles constitute an act against the law which results in detrimental to state finances originating from banking activities. The BI official's actions are one form of abuse of authority in the banking sector.

The abuse of authority contains elements of personal error, thus that the actions of these officials violate policy rules that can have implications for banking crimes. Bank Indonesia officials cannot be held liable for taking decisions/policies that are in line with the functions and authorities as referred to in the Bank Indonesia Law, insofar as they are carried out in good faith and the principle of prudence. Based on the development of the criminal accountability doctrine, corporations can be subject to sanctions. Where BI officials who carry out banking restructuring policies make personal mistakes, they are subject to criminal liability.

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