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Criminal Law Policy On Article 27 Section 2 Of Law Number 2 Of 2020 Concerning PolicyState Finance And The Stability Of The Financial System For Managing The Covid-19 Pandemic Associated With The Potential Of Corruption

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Abstract

The assumption of immunity under the pretext of implementing Perppu Number 1 of 2020 arises because clearly Article 27 paragraph (2) of the Perppu states that KSSK Members, KSSK Secretaries, KSSK secretariat members, and officials or employees of the Ministry of Finance, Bank Indonesia, the Financial Services Authority, and The Deposit Insurance Corporation, and other officials, related to the implementation of this Government Regulation in Lieu of Law, cannot be prosecuted either civilly or criminally if carrying out their duties is based on good faith and in accordance with the provisions of laws and regulations. The research used is normative legal research, normative legal research is library law research conducted by examining library materials or secondary data. This study uses a research methodology on legal principles. The finding that the author found is that the Criminal Law Policy against Article 27 paragraph 2 of Law Number 2 of 2020 is linked to the potential for committing criminal acts of corruption, there is no doubt, this is proven by the many corruption cases that occurred at the time of the passage of Law Number 2 of 2020, precisely in Article 27 paragraph (2), which triggers the corruption of pandemic funds is a regulation that relatively gives flexibility to financial management officials. Law Number 2 of 2020 is the legal basis for disbursing funds to overcome the Covid-19 pandemic, providing extraordinary powers by making this Law an exception (lex specialis) from the regular legal regulations that have been in force so far.

INTRODUCTION

Government Regulation in Lieu of Law (Perppu) is one type of legislation in the system of legal norms of the Republic of Indonesia. The Perppu is conceptualized as a regulation which in terms of its content should be stipulated in the form of a law, but due to a state of urgency it is forced to be stipulated in the form of a government regulation.[1]

[1]Jimly Ashiddiqie. *Emergency Constitutional Law 1st Edition*, (Jakarta: PT. Raja Grafindo Persada, 2007), 3.

With regard to the Covid-19 Pandemic that is currently engulfing Indonesia and the world, in fact this pandemic does not only affect the economic, social, political, and cultural sectors, but also affects the law enforcement sector. Therefore, in this temporal period, enacting emergency law can be a policy option in the field of law enforcement.[2]

In Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia (UUD 1945) it is stated that "In the case of a compelling emergency, the President has the right to stipulate government regulations in lieu of law". If we refer to this formulation, it is clear that the Perppu is actually a government regulation, but functions as a law. Thus the Perppu is one of the legal instruments that can be determined by the President without requiring the involvement of the House of Representatives (DPR). The role of the DPR in the context of the new Perppu can be seen in Article 22 paragraph (2) and paragraph (3) of the 1945 Constitution which stipulates that "the government regulation must obtain the approval of the House of Representatives in the following trial" and "if it does not get approval then the government regulation must revoked".[3]

In the system of legal norms of the Republic of Indonesia, the applicable legal norms are in a system that is layered and tiered, as well as in groups, where a norm is always valid, sourced, and based on a higher norm, and higher norms apply, sourced and based on even higher norms, and so on until a basic state norm (Staatsfundamentalnorm) of the Republic of Indonesia, namely Pancasila.[4]

As a type of statutory regulation, Perppu must also be based on Pancasila and the 1945 Constitution of the Republic of Indonesia as the source of all sources of state law and basic law in statutory regulations and should also be a source of lower laws and regulations.[5]

As previously stated, in dealing with the Covid-19 Pandemic in Indonesia through state policies as a reflection of the rule of law, Indonesia has issued at least 2 (two) Perppu. The first Perppu deals with State Financial Stability, and the second Perppu deals with the Simultaneous Election of Regional Heads. In the first Perppu, the regulation concerns the issue of state losses. First regarding “state losses”, article 27 paragraph (1) states that the costs that have been

[2]Michael Ramsden, Zainab Abdul, and Kadhim Hasan. “Dualism in the Basic Law: The First 20 Years”, *Hong Kong Law Journal* 1, no. 1 (2019): 23.
[3]Reza Fikri Febriansyah, “Existence and Prospects of Perppu Regulations in the Legal Norms System of the Republic of Indonesia”, *Indonesian Legislation Journal* 6, no. 4 (2009): 668.
[4] Maria Farida Indrati S., *Legislation: Types, Functions, and Content (Book 1) Revised Edition*, (Jakarta: Kanisius Publisher, 2007): 57.
[5]Nur Rohim, “Controversy for the Establishment of Perppu No. 1 of 2013 concerning the Constitutional Court in the Realm of Forcing Crisis”, *Journal of Cita Hukum* 2, no. 1 (2014): 123.

incurred by the Government and/or member institutions of Financial System Stability (hereinafter referred to as KSSK) in the context of implementing state revenue policies including policies in the field of taxation, state spending policies including policies in the field of regional finance, financing policy, financial system stability policy,

The assumption of immunity under the pretext of implementing Perppu Number 1 of 2020 arises because clearly Article 27 paragraph (2) of the Perppu states that KSSK Members, KSSK Secretaries, KSSK secretariat members, and officials or employees of the Ministry of Finance, Bank Indonesia, the Financial Services Authority, and The Deposit Insurance Corporation, and other officials, related to the implementation of this Government Regulation in Lieu of Law, cannot be prosecuted either civilly or criminally if carrying out their duties is based on good faith and in accordance with the provisions of laws and regulations.[6]

The article indicates that the KSSK, which consists of the Ministry of Finance, BI, OJK and LPS, in carrying out their duties, of course, every relevant official carries out it in good faith and in accordance with the laws and regulations. However, impunity is felt when the KSSK and other officials cannot be criminally prosecuted and even cannot file a civil lawsuit. Refli Harun in a discussion released by Realia TV said that indeed anyone cannot be punished if the act committed does not contain elements of Mens Rea or malicious intent. However, the laws and regulations in Indonesia still have gaps that allow a civil lawsuit to be filed. This civil lawsuit is important as one of the efforts to control the performance of government officials to remain in the legal corridor.

Good faith/according to the legislation can be justified. This refers to the dualistic view of criminal law which explains that a person's punishment is not only based on a bad act (actus reus) but also because he or she deserves to be blamed for his evil intentions (mens rea).[7]Several articles such as Article 50 of the Criminal Code also stipulates that people who commit acts to carry out the provisions of the law cannot be punished. Likewise, Article 51 paragraph 1 of the Criminal Code states that whoever commits an act to carry out an order given by the competent authority, that person cannot be convicted. Even if one examines the various contents of other laws, it turns out that many arrangements such as those contained in Article 27 of the Perppu

[6]Siti Nurhalimah, "Questioning the Urgency and Articles of Impunity in the Corona Perppu," *Journal of Law and Justice Bulletin* 4, no. 1 (2020): 43.
[7]Candra, Septa, "Criminal Law Reform: The Concept of Criminal Liability in the Future National Criminal Law," *Journal of Cita Hukum* 1, no. 1 (2013): 19.

have been carried out. Such is the case with Law Number 9 of 2016 concerning Prevention and Handling of Financial System Crisis (UU PPSK).

Article 48 paragraph 1 of the Law stipulates that unless there is an element of abuse of authority, KSSK members and officials or employees of the Ministry of Finance, BI, OJK and LPS cannot be prosecuted, either civilly or criminally for the implementation of functions, duties, and authorities based on the PPSK Law. . The key word in the regulation of immunity rights is as long as the actions taken are based on good faith and in accordance with the applicable laws and regulations.[8]

Reflecting on the 2008 case, the decision to bail out or bail out Century Bank dragged several policy makers in the KSSK at that time into the realm of law. In the case of Century Bank, KSSK decided that the bank was a bank with a systemic impact. However, one of the deputy governors of BI was imprisoned on charges of causing state losses of Rp. 6.7 trillion due to providing short-term funding facilities (FPJP) at Century Bank. Responding to the KSSK's 'immune immunity' shield in the corona budget, Economist of the Institute for Development of Economics and Finance (hereinafter referred to as INDEF) Eko Listiyanto agreed that this point was made as a form of protection so that the Century Bank case would not occur as before. From these rules, it can be seen that the legal protection of government officials in carrying out their authority is not a new substance.[9]

Seeing this situation, Perppu Number 1 of 2020 which has been ratified into Law through Law of the Republic of Indonesia Number 2 of 2020 concerning Stipulation of Government Regulation in Lieu of Law Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling Pandemic Covid-19 and/or In the Context of Facing Threats That Endanger the National Economy and/or Financial System Stability Becomes Law, the Corruption Eradication Commission (KPK) does not remain silent because it sees the potential for corruption to occur, then issues Circular Letter Number 8 of 2020 about some of the things that are prohibited:[10]

a. Not to collude/collusion with the provision of goods/services.
b. Not getting a kickback from the provider.

[8]Siti Nurhalimah, *Op. Cit.*, 43-44.
[9] Agnes Savithri, "Analysis of Corona Budget Legal Immunity Mirror KSSK Century Bank Trauma," CNN Indonesia, , Tuesday 27 April ,2021, https://www.cnnindonesia.com/ekonomi/20200402082336-532-489405/kebal-law-anggaran-corona-cermin-kssk-trauma-bank-century.
[10]Erwin Ubwarin and Patrick Corputty, "Criminal Accountability in a Covid-19 Disaster Emergency," *Mizan Journal: Journal of Legal Studies* 9, no. 1 (2020): 3-4.

c. Does not contain elements of bribery.
d. Does not contain elements of gratuity.
e. Does not contain any conflict of interest in procurement.
f. Does not contain elements of fraud and or maladministration.
g. No malicious intent by taking advantage of an emergency.
h. Do not allow corruption to occur.

Meanwhile, Circular Number 11 of 2020 regulates which in essence:

a. DTKS Data Funding in aid distribution
b. That if the DTKS data is different from the field, it must be corrected immediately
c. Use of Population Identification Number for Social Assistance Recipients.
d. Transparency and accountability in the provision of social assistance.
e. Community participation in providing social assistance.

Based on the description of the background above, I am interested in carrying out a study entitled "Criminal Law Policy Against Article 27 Paragraph 2 of Law Number 2 Year 2020 Associated with the Potential for Committing Corruption Crimes".

THE INTERPRETATION OF ARTICLE 27 PARAGRAPH 2 OF LAW NUMBER 2 OF 2020 SAYS GOOD FAITH CANNOT BE PUNISHED

In the historical or teleological interpretation method in finding the meaning of the element of good faith in the provisions of Article 27 Paragraph 2 (two) of the COVID-19 Handling Law. Sociological or teleological interpretation is an attempt to determine the purpose of the law based on societal goals,[11]or interpretation adapted to the circumstances of society. Sociological interpretation is an interpretation that is adapted to social conditions in society so that the application of law can be in accordance with its objectives, namely legal certainty based on the principle of community justice. The social context when a text is formulated can be used as a concern for interpreting the text in question. Events that occur in society often affect legislators or lawmakers when the legal text is formulated.[12]

To start a sociological or teleological interpretation of the good faith element in the provisions of Article 27 paragraph 2 (two) of the COVID-19 Handling Law, it is necessary to

[11]Ahmad Ali. *Revealing Takbir Law*, (Jakarta: Prenadamedia Group, 2015), 187.
[12]Alif Khalid., "The Interpretation of Law by Judges in the Indonesian Judicial System," *Journal of Law Al' Adl* 6, no. 11 (2014): 13.

examine the sociological basis for the stipulation of this Perppu on COVID-19 Handling as a Law. The sociological basis is a consideration or reason that illustrates that regulations are formed to meet the needs of the community in various aspects. The sociological basis actually concerns empirical facts regarding the development of problems and needs of society and the state (Hasanah, 2018).[13]

The sociological basis of the COVID-19 Handling Act is contained in the preamble to the law, which basically contains the spread of COVID-19 which was declared by the World Health Organization (WHO) as a pandemic in most countries around the world, including in Indonesia, showing an increasing trend. from time to time and has caused casualties, as well as material losses that are getting bigger, so that it has implications for social, economic, and community welfare aspects. The preamble to the COVID-19 Handling Act also explains that the implications of the COVID-19 pandemic have also had an impact on the deterioration of the financial system as indicated by the decline in various domestic economic activities.[14]

The stability of the financial sector is a consideration or reason that illustrates that this regulation was formed to meet the needs of the community. So in essence, good faith means all actions that are in accordance with the purpose of this law, namely to support stability in the financial sector. The last is to use grammatical interpretation in interpreting or interpreting the meaning of the element of good faith in the provisions of Article 27 paragraph 2 (two) of the COVID-19 Handling Law because grammatical interpretation is the simplest interpretation or explanation of the law compared to other interpretation methods.

Meanwhile, according to the legal dictionary, good faith is a state of mind consisting of honesty in belief or purpose, fidelity to one's duties or obligations, adherence to reasonable commercial standards of fair dealing in a particular trade or business, or the absence of any intention to deceive or to seek unreasonable profits. From the results of the interpretation that the author did with various methods of interpretation, there were several results that gave different meanings and interpretations. , the authors approach with adjustments to the principle of contextualism (contextual).

The initial philosophy of the birth of Law No. 2/2020 is that when facing the Covid-19 Pandemic in Indonesia through State Policy as a reflection of the State of Law, Indonesia

[13] Hasanah, Sovia, "The Meaning of Philosophical, Sociological, and Juridical Foundations," July 6, 2021, www. Hukumonline.com.
[14] *Ibid.*

has issued at least 2 (two) Perppu. The first Perppu deals with State Financial Stability, and the second Perppu deals with the Simultaneous Election of Regional Heads. In the first Perppu, the regulation concerns the issue of state losses.[15]

First regarding "state losses", article 27 paragraph (1) states that the costs that have been incurred by the Government and/or member institutions of Financial System Stability in the context of implementing state revenue policies including policies in the field of taxation, state expenditure policies including policies in the field of regional finance, financing policies, financial system stability policies, and national economic recovery programs are part of the economic costs of saving the economy from the crisis and are not state losses.

The assumption of immunity under the pretext of implementing Law Number 2 of 2020 arises because Article 27 paragraph (2) of the Law clearly states that KSSK Members, KSSK Secretaries, KSSK secretariat members, and officials or employees of the Ministry of Finance, Bank Indonesia, the Financial Services Authority, and The Deposit Insurance Corporation, and other officials, related to the implementation of this Government Regulation in Lieu of Law, cannot be prosecuted either civilly or criminally if carrying out their duties is based on good faith and in accordance with the provisions of laws and regulations.[16]

The article indicates that the KSSK, which consists of the Ministry of Finance, BI, OJK and LPS, in carrying out their duties, of course, every relevant official carries out it in good faith and in accordance with the laws and regulations. However, impunity is felt when the KSSK and other officials cannot be criminally prosecuted and even cannot file a civil lawsuit. Refli Harun in a discussion released by Realia TV said that indeed anyone cannot be punished if the act committed does not contain elements of Mens Rea or malicious intent. However, the laws and regulations in Indonesia still have gaps that allow a civil lawsuit to be filed. This civil lawsuit is important as one of the efforts to control the performance of government officials to remain in the legal corridor.[17]

Good faith/according to the legislation can be justified. This refers to the dualistic view of criminal law which explains that a person's punishment is not only based on a bad act (actus reus) but also because he or she deserves to be blamed for his evil intentions (mens

[15]Siti Nurhalimah, *Op. Cit.*, 43.
[16] *Ibid.*
[17] *Ibid.*

rea).[18]Several articles such as Article 50 of the Criminal Code also stipulates that people who commit acts to carry out the provisions of the law cannot be punished. Likewise, Article 51 paragraph 1 of the Criminal Code states that whoever commits an act to carry out an order given by the competent authority, that person cannot be convicted. Even if one examines the various contents of other laws, it turns out that many arrangements such as those contained in Article 27 of the Law have been carried out. Such is the case with Law Number 9 of 2016 concerning Prevention and Handling of Financial System Crisis (UU PPSK).

Article 48 paragraph 1 of the Law stipulates that unless there is an element of abuse of authority, KSSK members and officials or employees of the Ministry of Finance, BI, OJK and LPS cannot be prosecuted, either civilly or criminally for the implementation of functions, duties, and authorities based on the PPSK Law. . The key word in the regulation of immunity rights is as long as the actions taken are based on good faith and in accordance with the applicable laws and regulations.[19]

Historically interpreting the element of good faith in the provisions of Article 27 of the COVID-19 Handling Law. The historical interpretation of the law or the historical interpretive is the interpretation of the meaning of the law by means of researching according to the history of the formation of the law. Minister of Finance Sri Mulyani Indrawati in a Working Meeting with the DPR's Budget Board when Submission of the Bill on the Determination of the COVID-19 Perppu into Law[20].

Sri Mulyani said that the Perppu which has now been passed into law was issued to create a cushion so that the threat is not materialized or at least the threat can be mitigated or minimized its impact. It is necessary as soon as possible so that the Government and Authorities can carry out the required extraordinary actions, including widening the deficit and other matters in maintaining financial sector stability. To deal with these threats, it is supported by providing expansion and strengthening of authority to the institutions or officials concerned, such as members of the KSSK, KSSK secretaries, members of the KSSK secretariat, and officials or employees of the ministry of finance, Bank Indonesia, the Financial Services

[18]Septa Candra, "Criminal Law Reform: The Concept of Criminal Liability in the Future National Criminal Law," *Journal of Cita Hukum* 1, no. 1 (2013): 19.
[19]Siti Nurhalimah, *Op.Cit.*, 43-44.
[20] This is the explanation of the Minister of Finance regarding the background of Perpu Number 1 of 2020, *Secretariat of the Cabinet of the Republic of Indonesia*, 6 July, 2021, https://setkab.go.id/ini-pencepatan-menkeu-saat-latar-back-perpu-nomor-1-tahun- 2020.

Authority, as well as deposit insurance institutions, and officials others, related to the implementation of the handling of COVID-19.

Considering that in the COVID-19 Handling Law there is no explanation at all regarding the meaning of the element of good faith in the body, general explanation and explanation in each of its articles, authentic interpretation cannot answer the interpretation of the element of good faith in the provisions of Article 27 Paragraph 2 (two). COVID-19 Handling Act. Moving on from an authentic interpretation.[21]

Systematic interpretation is an interpretation according to the existing system in the formulation of the law itself (systematische interpretative). Systematic interpretation can also occur if one legal text and another legal text, both of which regulate the same thing, are linked and compared with each other. In a systematic interpretation, the law is seen by judges as a unit, as a system of regulations. A rule is not seen as a stand-alone rule, but as part of a system. Not only a rule in a set of rules can justify a certain interpretation of a rule, but also in some rules can have the same basic intent or principle. The relationship between all rules is not solely determined by the place of the rules with respect to each other,[22]

The provisions of Article 27 Paragraph 2 (two) of the Covid-19 Handling Law are one of the provisions made with the aim of providing an expansion of authority to officials related to the Covid-19 Handling Act. The government hopes that this regulation will become a strong legal basis for the Government and related institutions to continue taking steps to overcome the Covid-19 threat in the health sector, social threats and economic threats as well as financial system stability.

It is hoped that the expansion of authority and additional flexibility granted to the relevant officials will not become a barrier to the government's own goals. So, according to what was conveyed by the Government at the time of the formation of this law, the element of good faith contained in the provisions of Article 27 Paragraph 2 (two) means that all actions or actions taken by authorized officials in this law must be carried out based on good governance.

The sociological basis of the Covid-19 Handling Act is contained in the preamble of the law which basically contains the spread of Covid-19 which was declared by the World Health Organization (WHO) as a pandemic in most countries around the world, including in

[21]Gede Surya Aditya Madra, Dewa Gede Sudika Mangku, and Made Sugi Hartono, "Interpretation of the Elements of Good Faith in the Provisions of Article 27 Paragraph 2 of the Covid-19 Handling Law," *Journal of the Yustisia* 3, no. 3 (2020): 178.
[22]Sudikno Mertokusumo, *The Discovery of Law An Introduction*, (Yogyakarta: Liberty, 2006), 59.

Indonesia, showing an increase from time to time and has caused casualties, as well as material losses that are getting bigger, so that it has implications for social, economic, and community welfare aspects.

The preamble to the Covid-19 Handling Act also explains that the implications of the Covid-19 pandemic have also had an impact on the deterioration of the financial system as indicated by a decrease in various domestic economic activities, so that the Government and KSSK need to jointly mitigate against them to take forward looking actions in order to maintain stability. financial sector. Financial sector stability is a consideration or reason that illustrates that this regulation was formed to meet the needs of the community.

So in essence, good faith means all actions that are in accordance with the purpose of this law, namely to support stability in the financial sector. The last is to use grammatical interpretation in interpreting or interpreting the meaning of the element of good faith in the provisions of Article 27 paragraph 2 (two) of the Covid-19 Handling Law because grammatical interpretation is the simplest interpretation or explanation of the law compared to other interpretation methods. Grammatical interpretation or taalkundige interpretative or interpretation according to the meaning of the words. Grammatical interpretation is the interpretation of words in the law according to language norms or grammatical norms.

When viewed from the point of view of language norms or grammatical norms, etymologically good faith comes from two word elements, namely goodwill and goodwill. The Big Indonesian Dictionary emphasizes that iktikad has the meaning of belief or trust, while good has the meaning of right or right.

Based on the meaning of each of these words, when viewed in a single unit, the phrase good faith can be interpreted with meaning, as an act based on a firm belief or belief or good will. Meanwhile, according to the legal dictionary, good faith is a state of mind consisting of honesty in belief or purpose, fidelity to one's duties or obligations, adherence to reasonable commercial standards of fair dealing in a particular trade or business, or the absence of any intention to deceive or to seek unreasonable profits.

The principle of good faith is actually an idea used to avoid acts of bad faith and dishonesty that may be carried out by one of the parties, both in the making and implementation of the agreement.[23]In the end, this principle actually wants to teach that in social life in the

[23] Ridwan Khairandy, *Op.Cit.,* 74.

midst of society, those who are honest or have good intentions should be protected; and conversely, the dishonest party should feel the bitter taste of the dishonesty.

Good faith is not a term or element known in the Indonesian Criminal Code (KUHP). To describe the intentionality in an offense, the Criminal Code more often uses terms other than good faith, such as “intentionally”, “knowing that”, “knowing about”, and “with intent”. In Black's Law Dictionary the terminology of good faith is defined as in or with good faith, honestly, openly and sincerely, without deceit or fraud truly, actually, without simulation or pretense. It is not clear the meaning of good faith adopted in Law No. 2/2020 is which one. According to ML Wry, good faith is: "Actions without deceit, without deceit, without profanity, reasoning, without disturbing other parties, not only by looking at their own interests, but also by looking at the interests of others".

The principle of good faith can be distinguished into subjective good faith and objective good faith. Good faith in a subjective sense can be interpreted as someone's honesty in carrying out a legal act, namely what lies in a person's inner attitude when a legal act is held. Meanwhile, good faith in an objective sense means the implementation of a job that must be based on the norms of propriety or what is deemed appropriate in a society.

Good faith subjectively refers to the inner attitude or elements that exist within the maker, while good faith in an objective sense refers to things outside of the actor. Regarding the notion of subjective and objective good faith, it is more clear that good faith is subjective, namely whether the person concerned is aware that his actions are contrary to good faith, while objective good faith is if public opinion considers such actions to be contrary to good faith.[24]

Good faith is not a term or element known in the Criminal Code. To compare the intentionality in an offense, the Criminal Code more often uses terms other than good faith, including: "intentionally", "knowing that", "knowing about", and "with intent". This philosophy should be the grip of all state administrators related to Law No. 2/2020, not acting intentionally, abusing authority, enriching oneself or others, knowing that it is an unlawful act but still being violated, knowing that it is not in accordance with the laws and regulations is still ignored. and with the intention of harm is still carried out.

[24] Adib Auliawan Herlambang, “Critical Notes on the Principle of Good Faith in Perppu 1/2020,” May 26, 2021, https://www.ayosemarang.com/read/2020/04/18/55555/tangan-kritis-asas-itikad-baik-dalam-perppu-12020.

The word good faith is very abstract, but according to the author in deciding a problem in the judicial system, it must be understood correctly what is meant by good faith committed by perpetrators who commit crimes For this reason, it is necessary to interpret the law through a judicial interpretation, which is interpreted as a theory or method of thinking that explains how the judiciary should provide legal interpretation of a law, especially the constitution.

This method of interpreting is not a provision based on a standard method as understood in the exact field of science. Legal interpretation is even called an art (Interpretation is an art). It is called art because interpreting the law cannot see a problem "A", then it is interpreted as "A". The interpretation of the law at one time can be very specific but at other times the interpretation can be very, very abstract and even "two-faced". It takes a lot of thought methods and tools to carry out an interpretation. The effort to assemble all the elements to help a good legal interpretation is what is called art.[25]

In the event that the legislation is not clear, an interpretation method or interpretation method is available. Interpretation is not only carried out by judges, but also by legal researchers, and those related to cases or conflicts and legal regulations, but interpretation by judges who have the power because it is stated in the form of a decision.[26]

CRIMINAL LAW POLICY AGAINST ARTICLE 27 PARAGRAPH 2 OF LAW NUMBER 2 YEAR 2020 RELATING TO THE POTENTIAL FOR CORRUPTION

The term "policy" in this paper is taken from the term "policy" (English) or "politiek" (Dutch). Starting from these two foreign terms, the term "criminal law policy" can also be referred to as "criminal law politics". In foreign literature the term "criminal law politics" is often known by various terms, including "penal policy", "criminal law policy" or "strafrechts-politiek".[27]

Efforts and policies to make good criminal law regulations essentially cannot be separated from the purpose of crime prevention. So the policy or politics of criminal law is also

[25]Arif Hidayat, "Law Discovery through Judge's Interpretation in Court Decisions", *Pandecta Journal* 8, no. 2 (2013), 159-160.
[26]Erdianto Effendi, "Sexual Harassment and Interpretation of Obscene Acts in Indonesian Criminal Law," *Journal of Legal Studies* 8, no. 2 (2019), 418.
[27] Barda Nawawi Arief, *Criminal Law Policy*, (Bandung: Aditya Bakti, 2002), 31.

part of criminal politics. In other words, viewed from the point of criminal politics, the politics of criminal law is synonymous with the notion of "crime prevention policy with criminal law".[28]

Crime prevention efforts with criminal law are essentially part of law enforcement efforts (especially criminal law enforcement). Therefore, it is often said that politics or criminal law policies are also part of law enforcement policies.[29]

In addition, efforts to combat crime through the making of criminal laws (laws) are essentially also an integral part of social welfare efforts. Therefore, it is also natural that criminal law policies or politics are also an integral part of social policies or policies.[30]

In criminal law policy which is one way to carry out law enforcement efforts, in this case the author analyzes the birth of Law No. 2/2020 in Article 27 paragraph (2) which can trigger the corruption of pandemic funds is a regulation that relatively gives flexibility to financial management officials. UU No. 2/2020, which is the legal basis for disbursing funds to overcome the Covid-19 pandemic, gives extraordinary powers by making this Law an exception (lex specialis) from the regular law regulations that have been in effect.

The exceptions are parties involved in managing these funds, namely members of the Financial System Stability Committee, secretary of the Financial System Stability Committee, members of the secretariat of the Financial System Stability Committee, officials or employees of the Ministry of Finance, Bank Indonesia, the Financial Services Authority, and the Deposit Insurance Corporation. and other officials.

According to the author, this great authority is still accompanied by legal relaxation and impunity for state administrators as regulated in Article 27 of Law No. 2/2020. Paragraph (1) of the article stipulates that all costs incurred during this crisis period are not state losses. So, whatever and however the expenditure is made, it cannot be considered corruption because it is not considered a state loss. While paragraph (2) of the same article regulates those relating to the implementation of government regulations in lieu of this law, they cannot be prosecuted either civilly or criminally if carrying out their duties is based on good faith and in accordance with the provisions of the legislation.

The provisions of Article 27 Paragraph 2 (two) of the COVID-19 Handling Law are one of the provisions made with the aim of providing an expansion of authority to officials

[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid*, 32.

related to the COVID-19 Handling Act. The government hopes that this regulation will become a strong legal basis for the Government and related institutions to continue taking steps to address the COVID-19 threat in the health sector, social threats and economic threats as well as financial system stability.

The Government hopes that all the provisions stipulated in this regulation are carried out based on good governance, in the author's opinion, are the intentions that the Government wants to convey in the good faith element contained in the provisions of Article 27 Paragraph 2 (two) of the COVID-19 Handling Law. It is hoped that the expansion of authority and the additional flexibility given to the relevant officials will not be a barrier to the government's own goals. Therefore, according to what was conveyed by the Government at the time of the formation of this law, the element of good faith contained in the provisions of Article 27 Paragraph 2 (two) means that all actions or actions carried out by authorized officials in this law must be carried out based on good governance. the good one.

According to the author, what happened to the policy made by the government was to do something as based on article 27 paragraph 2 of Law No. 2 of 2020, making violating a characteristic of a legal state that has been adopted in Indonesia so far. Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia clearly states that Indonesia is a state of law, in the sense that the principles of the rule of law are inherent in the Indonesian legal system. According to Jimly Asshidiqie, there are twelve important characteristics of the rule of law, namely: 1) rule of law; 2) equality in law; 3) the principle of legality; 4) power limitation; 5) independent executive organs; 6) free and impartial judiciary; 7) state administrative court; 8) constitutional court; 9) protection of human rights; 10) democratic; 11) means to realize the country's goals; and 12) transparency and social control.[31]

: In the provisions of the state which are characterized by equality in law, Article 28 D paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that everyone has the right to equal treatment before the law. In a sense the law must treat everyone in the same way and method. This was emphasized by Frej Klem Thomsen, who stated that the principle of equality before the law is a principle of procedural legal equality will hold that a court ought to treat a case in a certain way if similar cases have been treated that way before. This was

[31] Jimly Asshiddiqie, *Indonesian Constitution and Constitutionalism*, (Jakarta: Constitution Press, 2005), 15.

then emphasized by Wallerstein who stated that the fundamental thing in equality is the same rights, the fundamental social equality of all individuals endowed with equal rights.[32]

However, what is happening at this time, the author sees that such a large authority plus widespread impunity will only provide opportunities for the birth of the intention to commit corruption. In criminology, the theory of willingness and opportunity to corrupt applies, namely corruption occurs when there is an opportunity/opportunity (system weakness, lack of supervision, etc.) and intention/desire (driven by need for funds or greed).

The occurrence of potential corruption according to the author is because there is a gap that makes officials in implementing a policy there is leeway and opportunity for the provisions given to be implemented. How not to be tempted, in the context of handling the Covid-19 outbreak, the government allocated and spent a total of Rp. 405.1 trillion. The budget is allocated to various sectors. *First*, health sector Rp75 trillion, covering the protection of health workers, purchase of medical devices, improvement of health facilities, and incentives for doctors. Second, the Rp110 trillion social safety net, which will include additional budgets for basic food cards, pre-employment cards, and electricity subsidies. Third, tax incentives and people's business loans worth IDR 70.1 trillion. Fourth, financing the national economic recovery program worth Rp150 trillion. The funds are still added from the provincial/district/city budgets resulting from the reallocation and refocusing of the budget.[33]

According to the author by looking at Law No. 2/2020, the key word of which is whether or not there is corruption in pandemic funds, as long as the implementation of tasks is based on good faith, there is no corruption. The problem is, the terminology of good faith here is very multi-interpreted and has the potential to invite corruption because it is abstract, very flexible, and difficult to prove.

About good faith Ideally there should be legal certainty. Good faith in the laws and regulations in Indonesia is Das Sollen which must be reflected in positive law. By applying good faith in carrying out a job, it will provide a more comfortable feel. Good faith will

[32]Immanuel Wallerstein, "Citizens All? Citizens Some! The Making of the Citizen," *Comparative Studies in Society and History* 45, no. 4 (2003), 650–680.
[33] Muhammad Jamin, "Beware of Pandemic Fund Corruption," May 25, 2021, https://www.solopos.com/waspadai-korupsi-dana-pandemi-1060885.

provide comfort in managing, spending and accounting for state money because the parties will be more careful and careful in carrying out their main tasks and functions.

For this reason, the loss of the new state can be considered as a lack of policy conformity with the provisions, and the absence of a conflict of interest is fulfilled. If it does not meet the parameters and then it is added that it is not in accordance with good faith, authority and conflict of interest, then the logic is still not immune or immune to the official concerned. It is very difficult if the regulation only relies on the good faith of state administrators. Corruption is only considered to occur if the execution of duties is based on bad faith. Proving someone's actions are not based on good faith or based on bad faith has no measure because good faith is actually just a legal principle that is not operational and does not have clear benchmarks.

Law No. 2/2020 does not make State Administrators immune from the law. The legal protection given to the implementing officials of Perppu 1/2020 must be understood as a corridor and a limit so that there is no abuse of authority. The government does not protect those who carry out their duties in bad faith and do not comply with the provisions of the legislation.

In carrying out their duties, of course, every official carries out in good faith and in accordance with the laws and regulations. In Article 50 of the Criminal Code it is stated that whoever commits an act to carry out the provisions of the law, is not punished, while in Article 51 paragraph 1 of the Criminal Code it is stated that whoever commits an act to carry out an office order given by the competent authority, is not punished. Thus the corridor in the implementation of this law is clear that it should not be violated.

Considering the potential for corruption in pandemic funds which is quite large, the KPK and elements of the anti-corruption society should always warn that corruption in the midst of the Covid-19 pandemic, which has been designated as a non-natural and national-scale disaster emergency, the perpetrators can be sentenced to death. .

This is based on the provisions of Article 2 paragraph (2) of Law No. 31/1999 concerning the Eradication of Criminal Acts of Corruption which emphasizes that in the case of criminal acts of corruption carried out under certain circumstances, namely when the country is in a state of danger or when a disaster occurs, the perpetrators may be subject to heavy sanctions with the death penalty.

Reflecting on the 2008 case, the decision to bail out or bail out Century Bank dragged several policy makers in the KSSK at that time into the realm of law. In the case of Century Bank, KSSK decided that the bank was a bank with a systemic impact. However, one of the deputy governors of BI was imprisoned on charges of causing state losses of Rp. 6.7 trillion due to providing short-term funding facilities (FPJP) at Century Bank. Responding to the KSSK's 'immune immunity' shield in the corona budget, Economist of the Institute for Development of Economics and Finance (hereinafter referred to as INDEF) Eko Listiyanto agreed that this point was made as a form of protection so that the Century Bank case would not occur as before. From these rules, it can be seen that the legal protection of government officials in carrying out their authority is not a new substance.[34]

The above happened according to the author, because in Article 16 paragraph 1 of Law No. 2 of 2020 has the potential for a violation of state losses, one of the actions considered to enrich the corporation. As the article reads

(1) To support the implementation of the authority of the KSSK in the context of handling financial system stability problems as referred to in Article 15 paragraph (1), Bank Indonesia is given the authority to:

a. provide short-term liquidity loans or short-term liquidity financing based on sharia principles to Systemic Banks or banks other than Systemic Banks;
b. provide Special Liquidity Loans to Systemic Banks that experience liquidity difficulties and do not meet the requirements for providing short-term liquidity loans or short-term liquidity financing based on sharia principles guaranteed by the Government and granted based on the Decree of the KSSK;
c. purchase long-term Government Securities and/or State Sharia Securities in the primary market for handling financial system problems that endanger the national economy, including Government Securities and/or State Sharia Securities issued with a specific purpose, especially in the context of the Corona Virus Disease 2019 pandemic (covid-19);
d. purchase/repo of state securities owned by the Deposit Insurance Corporation for the cost of handling solvency problems of Systemic Banks and banks other than Systemic Banks;

[34] Agnes Savithri, *Op.Cit.*, 22.

e. regulate the obligation to receive and use foreign exchange for the population, including provisions regarding the delivery, repatriation and conversion of foreign exchange in the context of maintaining macroeconomic and financial system stability; and
f. provide access to funding to corporations/private sectors by way of repo for Government Securities or State Sharia Securities owned by corporations/private sectors through banks.

Contrary to referring to the article above, there is the potential to nullify the supervision of powers outside the executive power of the decision to disburse liquidity assistance funds to systemic and non-systemic Banks. In fact, the case of disbursement of liquidity funds against the Bank has a very large deviation capacity. An example is the case of the Bank Indonesia Liquidity Assistance (BLBI) in 1998 which was estimated to have cost the state Rp. 138,000,000,000,000.00.[35]

In addition, there was another case that occurred in 2008 namely the provision of bailout funds (bailout) to Century Bank which caused a loss to the state amounting to Rp. 6,742. 000,000,000.00.[36]Based on the cases mentioned above, the provision of liquidity funds opens a gap for criminal acts of corruption to be born, therefore, liquidity assistance should be monitored more closely and its use should not be given leeway because it has the potential to give birth to similar irregularities in the future. In addition, until now, the Government has never declared Indonesia's status in a monetary emergency as happened in 1998 and 2008, but what has been determined by the Government in 2020 is a health emergency as an effect of the Covid-19 pandemic. Meanwhile, the basic principle of providing liquidity funds (bailout) is based on the conception caused by the financial crisis.

As for the other case, according to the author, one of the corruption cases that caused a lot of excitement during the pandemic was the case of Social Minister Juliari P Batubara who had been named a suspect on suspicion of accepting bribes related to the procurement of social assistance for handling Covid-19 at the Ministry of Social Affairs. According to the author, this is a form of potential corruption from Article 27 paragraph (2) of Law No. 2/2020 because officials who are said to carry out their duties in good faith cannot be prosecuted.

This gives officials the opportunity to commit corruption, because the government is given the discretionary authority to carry out government duties and functions that are not

[35] Iswi Hariyani, *Restructuring and Elimination* of Bad Credit, (Jakarta: Kompas Gramedia, 2010), 169.
[36]Widita Kurniasari, "Balance Analysis of the Case of Century Bank Bailout", *Infestasi Journal* 8, no. 1 (2012), 97–106.

explicitly specified in the law. According to Article 24 of Law Number 30 of 2014, Government Officials who use discretion must meet the following requirements: 1) in accordance with the discretionary objectives as referred to in Article 22 paragraph (2); 2) does not conflict with the provisions of laws and regulations; 3) in accordance with AUPB; 4) based on objective reasons; 5) does not create a conflict of interest; and 6) done in good faith.

This is actually in accordance with the opinion of Bagir Manan who said that:[37] "Policy regulations (beleidsregel), pseudowetgeving, policy rules, namely regulations made both authority and material content are not based on laws and regulations, delegations, or mandates, but are based on authority arising from Fries Ermessen attached to the state administration to realize a certain purposes permitted by law.

Policy rules are only found in the field of state administration. However, the use of excessive discretion is certainly not legally justified, this has the opportunity for abuse of authority which will result in violations of rights and/or losses for citizens. As said by Lord Acton that "power tends to corrupt, absolute power corrupts absolutely".[38]

M. Sofyan Lubis, interpreting discretion is a policy of officials which essentially allows public officials to carry out a policy where the law has not explicitly regulated it, with 3 (three) conditions, namely: in the public interest, still within the boundaries of their authority, and not violating the principle of -General Principles of Good Governance (AAUPB).

Indarti Erlyn, defines discretion as independence and/or authority/authority to make decisions and then take actions that are deemed appropriate/in accordance with the situation and conditions at hand, which are carried out wisely and by taking into account all possible considerations and choices.[39]

Meanwhile Philipus M. Hadjon said that:[40]"The policy regulation is essentially a product of state administrative actions aimed at "naar buiten gebracht schriftelijk beleid (showing out a written policy" but without being accompanied by the authority to make regulations from the state administrative agency or official that created the policy regulation).

[37] Bagir Manan, *Positive Indonesian Law*, (Yogyakarta: FH UII Press, 2004), 15.
[38] Ni‟matul Huda, *Theoretical and Juridical Study of Constitutional Law on the Indonesian Constitution*, (Yogyakarta: Gama Media, 1999), 77.
[39] Riki Marjono, "Discretion: Between Policy and Abuse of Authority," 21 May 2021, http://marginal86kopin.blogspot.com/2013/01/discretion-antara-policy-dan.html.
[40] Philipus M. Hadjon et al, *Introduction to Indonesian Administrative Law*, (Yogyakarta: Gadjah Mada University Press, 2005), 152.

CONCLUSION

To protect the parties who will make a rental agreement within the Shopping Center area, there should be a special regulation from the local government which obliges the parties to insure their respective obligations in accordance with the agreed content, and if they are violated there will be strict sanctions. This can prevent conflicts that can harm many parties. So that if in the future an unexpected event (force majeure) occurs, the parties can lighten the burden.

Particularly in legal settlement related to lease agreement disputes in the Shopping Center Area, if the non-litigation settlement by the parties is not achieved, and if it has to take legal settlement by means of litigation, then the choice of legal settlement should be sufficient through the local district court. This is to make it easier for the parties to resolve the dispute. Therefore, if the parties choose settlement through Arbitration, even though Arbitration Courts only exist in three provinces in Indonesia.

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