http://dx.doi.org/10.18623/rvd.v22.n3.3405

CRIMINALIZATION 'A POLICY' "JURIDICAL REVIEW BASED ON GOOD GOVERNANCE ASPECTS"

CRIMINALIZAÇÃO 'UMA POLÍTICA' "REVISÃO JURÍDICA BASEADA EM ASPECTOS DE BOA GOVERNANÇA"

Article received on: 30/6/2025
Article accepted on: 29/9/2025

Tomson Situmeang*
*Christian University of Indonesia
Jakarta, Indonesia
Orcid: https://orcid.org/0000-0002-6448-3828
tomson.situmeang@uki.ac.id

William Andrew Sectionardo*
*Christian University of Indonesia
Jakarta, Indonesia
Orcid: https://orcid.org/0009-0004-8667-0474
william.sectionardo@uki.ac.id

Chris Anggi Natalia Berutu*
*Christian University of Indonesia
Jakarta, Indonesia
chris.angginatalia@uki.ac.id

The authors declare that there is no conflict of interest

Abstract
Public policy serves as a vital instrument through which the government regulates society, addresses public needs, and promotes welfare. However, the increasing complexity of governance sometimes results in policies that inadvertently cause state losses, particularly financial ones. This raises critical legal debates on whether such policy outcomes should lead to criminal prosecution. In Indonesia, this issue has become more prominent with cases involving public officials criminalized for policy failures made in good faith. This study employs a normative juridical approach, examining statutory frameworks and legal doctrines governing public administration and anti-corruption law. It focuses on Law No. 30 of 2014 on Government Administration and Law No. 31 of 1999 as amended by Law No. 20 of 2001 on the Eradication of Corruption. Central to the analysis are the concepts of freies Ermessen (administrative discretion) and the General Principles of Good Governance (AAUPB). Findings reveal that policy decisions should not be criminalized solely due to unfavorable outcomes. Criminal liability arises only when policies are made with malicious intent or violate

Resumo
As políticas públicas servem como um instrumento vital através do qual o governo regula a sociedade, atende às necessidades públicas e promove o bem-estar. No entanto, a crescente complexidade da governança resulta, por vezes, em políticas que, inadvertidamente, causam prejuízos ao Estado, particularmente financeiros. Isso suscita debates jurídicos críticos sobre se tais resultados políticos devem levar a processos criminais. Na Indonésia, essa questão tornou-se mais proeminente com casos envolvendo funcionários públicos criminalizados por falhas em políticas tomadas de boa-fé. Este estudo emprega uma abordagem jurídico-normativa, examinando os marcos legais e as doutrinas jurídicas que regem a administração pública e o direito anticorrupção. O foco recai sobre a Lei nº 30 de 2014, sobre Administração Pública, e a Lei nº 31 de 1999, alterada pela Lei nº 20 de 2001, sobre a Erradicação da Corrupção. Os conceitos de freies Ermessen (discricionariedade administrativa) e os Princípios Gerais da Boa Governança (AAUPB) são centrais para a análise. Os resultados revelam que as decisões políticas não devem ser criminalizadas

governance principles. The study calls for clearer legal standards to protect lawful discretion while maintaining accountability and promoting legal certainty in governance.

Keywords: Administrative Law. Criminal Liability. Discretionary Authority. Good Governance. Legal Certainty. Public Policy.

unicamente devido a resultados desfavoráveis. A responsabilidade penal surge apenas quando as políticas são elaboradas com dolo ou violam os princípios da governança. O estudo defende a necessidade de normas jurídicas mais claras para proteger a discricionariedade legítima, mantendo a responsabilização e promovendo a segurança jurídica na governança.

Palavras-chave: *Direito Administrativo. Responsabilidade Penal. Poder Discricionário. Boa Governança. Segurança Jurídica. Políticas Públicas.*

1 INTRODUCTION

The 1945 Constitution of the Republic of Indonesia lists the constitutional rights of Indonesian citizens, where the welfare of the people is one part of the state's duties. Indonesia has a background of cultural diversity that tends to have different problems in each region. Law is one of the systems used to regulate people's lives. Law was created to regulate and limit various kinds of community activities with the intention of achieving and forming a safe, orderly and just life order. Therefore, the government cannot implement and realize this order of life without public participation. Public involvement in every policy maker, legal decision and power can have an effective effect when a regulation or policy has benefits for the community (Nugroho & Surono, 2018). Apart from the laws that have been recognized through legislation, the government through its authority can also provide public policies to solve problems that occur in society.

Thomas R. Dye, defines public policy as *whatever government chooses to do or* not *to do.* This definition emphasizes that public policy is about the realization of "action" and is not a mere statement of the wishes of the government or public officials. In addition, the government's choice not to do something is also public policy because it has an influence (the same impact as the government's choice to do something).

Public policy making is an important function of a government. Therefore, the ability and adequate understanding of policy makers of the policy-making process is very important for the realization of fast, precise and adequate public policies. The ability and understanding of the policy-making procedures must also be balanced with the understanding of public policy makers of their authority. Thus, public policy is a decision made by the government or government agencies to overcome certain problems, to carry

out certain activities or to achieve certain goals related to the interests and benefits of many people.

In practice, it is often found that public policies made by the government do not achieve the desired goals. Such policies sometimes do not solve existing problems, but instead add new problems that are quite significant and even cause state losses. This is the reason for the author to take a deeper look at a policy based on aspects of *Good Governance* as referred to in Law Number 30 of 2014 concerning Government Administration in connection with the limits of a policy that can or cannot be punished as a form of legal responsibility from the Government to the public for the issuance and implementation of a public policy. So that from this reason, the authors's thinking departs to raise a research topic entitled: Criminalization of A Policy, "Juridical Review Based on Aspects of Good Governance".

Based on the above background, the authors raise two problem formulations, namely: (1) What are the limits of a policy that meets the aspects of Good Governance? (2) Why can a policy be punished? The purpose of this research is to find out the limits of a policy that meets the aspects of Good Governance and the reasons a policy can be punished.

2 LITERATURE REVIEW

2.1 Definition & scope of good governance

Good Governance is the implementation of solid and responsible development management in line with the principles of democracy and efficient markets, the avoidance of misallocation of investment funds and the prevention of corruption both politically and administratively implementing budgetary discipline and the creation of a legal and political framework for the growth of business activities. Good Governance is basically a concept that refers to the process of achieving decisions and their implementation that can be accounted for together (Gamal Thabroni, 2022). As a consensus reached by the government, citizens, and the private sector for the administration of government in a country. The government through its legal instruments provides a legal basis in an effort to improve good governance and as an effort to prevent the practice of corruption, collusion and nepotism, namely Law Number 30 of 2014 concerning Government Administration in Article 10 Paragraph (1) which states: The AUPB referred to in this Law

includes the principles of: a) legal certainty; b) expediency; c) impartiality; d) accuracy; e) not abusing authority; f) openness; g) public interest; and h) good service (Sumarto, 2003).

The scope of Good Governance itself encompasses a wide range of institutional actors at all levels of the State i.e. legislative, executive, judicial, and military as well as the private sector (companies, financial institutions). No institutional actor of good governance should be controlled absolutely. In other words, in good governance, the relationship between the state, civil society and the private sector should be based on the principles of transparency, accountability and public participation, which are necessary prerequisites for the successful formulation and implementation of public policies and fortifications. acceptance of a policy is created, not by the power of ownership, but by the degree of involvement of the actors who draft it (Budiman *et al*., 2022).

2.2 *Good Governance* arrangements in Indonesia

Good Governance is embodied in Law Number 30 of 2014 concerning Government Administration, MPR Decree Number XI/MPR/1998 concerning the Implementation of a State that is clean and free from corruption, collusion and nepotism, and in Law Number 28 of 1999 concerning the Implementation of a State that is Clean and Free from KKN, as stated in Article 3, it contains the principles of state administration which include: (1) principles of legal certainty; (2) principles of orderly state administration; (3) principles of public interest; (4) principles of openness; (5) principles of proportionality; (6) principles of professionalism; and

(7) principles of accountability. The regulation is the first step of reform in the field of good governance.

As a manifestation of the implementation of synergistic relationships in a good governance system, the government seeks to involve community participation in every policy formulation as well as in public services. The role of the community in public services is regulated in Law No. 25 of 2009 concerning Public Services. Based on Article 39 of Law No. 25 of 2009, the role of the community in public services includes: a) Community participation in the implementation of public services starts from the preparation of service standards to evaluation and awarding. b) Community participation as referred to in paragraph (1) is realized in the form of cooperation, fulfillment of

community rights and obligations, and active participation in the formulation of public service policies. c) The community can form public service supervision institutions. d) Procedures for community participation in the implementation of public services are further regulated in government regulations.

In terms of community participation, apart from being regulated in the Law, it is also strengthened in Government Regulation No. 96 of 2012 concerning the Implementation of Law Number 25 of 2009 concerning Public Services. The government regulation has regulated the following:

Article 40: "*Organizers are obliged to include the public in the implementation of public services as an effort to build a fair, transparent and accountable public service delivery system*. Article 41: "*Public participation in the supervision and evaluation of public service delivery, as referred to in* Article 41 letter c *is realized in the form of supervision and evaluation of the implementation of service standards, supervision of policy implementation, and supervision of the imposition of sanctions*

Article 44: "*Public participation in the awarding as referred to in Article 41 letter d is realized in the form of monitoring, evaluation, and assessment of the Organizer's performance*";

Article 45: "*Community participation in the implementation of public services as referred to in Article 41 refers to the following principles directly related to the service user community, has competence in accordance with the type of service concerned and prioritizes deliberation, consensus, and community diversity*";

Article 46: "*Public participation in the implementation of public services as referred to in Article 41 can be carried out individually, representatives of service user groups, representatives of observer groups and representatives of legal entities that have concerns about public services"*.

Article 47: "*The community can independently give awards to organizers or implementers who have good service performance according to their ability or competence"*.

With the government regulations mentioned above, it is emphasized that the government is obliged to include the community in public services. This can be seen from Article 39 of Law No. 25/2009 on Public Services which states that the procedures for community participation in public services will be regulated in government regulations. Government Regulation No 96/2012 is a continuation that regulates that the public must

be included in public services (Julia Ivanna *et al*., 2023).

2.3 Definition of policy and scope of policy

Policy is an effort to achieve predetermined goals and also as a form of solving problems using certain facilities and within a predetermined time. A policy is fundamental, this is because policies can be used as guidelines in achieving goals that have been set together. Policies can come from an individual or group that carries out a series of actions / activities / or programs in achieving certain goals.

According to Jan and Wegrich in the *Handbook of Public Policy Analysis Theory, Politics, and Methods*, Public Policy can also be defined as: (Jann & Wegrich, 2017)1) Actions that aim at the process of achieving goals rather than actions that are carried out by chance; 2) Actions that are interconnected and there are patterns that lead to the achievement of goals implemented by the government and not by self-decision; 3) Activities carried out consciously, deliberately, and directed by the government in a field; 4) Guidance by the government in addressing certain problems and a decision not to take action.

Policy scope is also defined as a system consisting of inputs, processes and outputs. Policy inputs are government agendas and issues that occur. The policy process consists of the policy formulation process and policy implementation. The process of formulating and implementing policies is carried out by pressure groups or what is known as the political elite. The output of a policy is policy performance; therefore, a policy is not permanent. Policies can be born within an indeterminate time span and as a form of problem solving for events that exist in society (Desrinelti *et al*., 2021). The scope of policy implementation consists of three main elements, namely (Desrinelti *et al*., 2021): 1) Detailed program specifications. The specification of program details relates to where and how agencies implement programs and how programs or laws are interpreted; 2) Resource allocation. Relates to financing, personnel and organizations that implement and are responsible for the implementation of the program; 3) Decisions relate to the provisions implemented.

2.4 Policy arrangements in Indonesia

In Indonesia, policy-related regulations are not explicitly regulated in a law. According to Bagir Manan, policy regulations (*beleidsregel*) are regulations that are made both the authority and the content material are not based on statutory regulations, delegations or mandates, but based on the authority arising from *freies ermessen* attached to the state administration to realize a certain goal justified by law (Magnar, 1993). According to Bagir Manan, the characteristics of Policy Regulations are (HR, 2014):

1. A Policy Regulation is not a statutory regulation.
2. The principles of limitation and review of laws and regulations cannot be applied to policy regulations.
3. Policy regulations cannot be tested by wetmatigheid because there is no statutory basis for making the policy regulation decision.
4. Policy regulations are made based on freies ermessen and the absence of the relevant administrative authority to make laws and regulations.
5. The test for policy regulations is left to doelmatigheid and therefore the touchstone is the general principles of good governance.
6. In practice, it is formatted in various forms and types of rules, namely decisions, instructions, circulars, announcements, etc., and can even be found in the form of regulations.

A Public Policy is closely related to Public Services provided by the government to the community. The regulation of Public Services is regulated in Law Number 25 of 2009 concerning Public Services. Public policy is the making of a policy by the government to solve problems that occur in society, either directly or through government institutions, public policy is implemented by state administration which is carried out by the government bureaucracy through public services as a function of government, this is in accordance with Article 3 of the Law on Public Services which states the objectives of the Public Service Law itself are: *"a. the realization of clear boundaries and relationships regarding the rights, responsibilities, obligations, and authorities of all parties related to the delivery of public services; b. the realization of a proper public service delivery system in accordance with the general principles of good governance and corporations; c. the fulfillment of public service delivery in accordance with statutory regulations; and d. the*

realization of protection and legal certainty for the community in the delivery of public services (A. Hamid S.Attamimi, 1993)."

Theoretically, in administrative law, the concept of policy regulations is known as a legal product of discretion. However, policy regulations are not laws and regulations so that their binding implications are not the same as laws and regulations. However, in practice, the binding force of policy regulations has actually been expanded. Policy regulations, according to Bagir Manan, are not directly legally binding although they still contain legal relevance. Its binding force is only for the state administration body or official itself. According to Bagir Manan, examples of forms of policy regulations that have been used in government administration (Bagir Manan, 2008):

1. Policy regulations in the form of regulations. An example of a policy regulation in the form of a regulation is Permendagri No.4 of 1976 concerning Procedures for Implementing the Transfer of Affairs from Level I Regions to Level II Regions.
2. Policy regulations that take the form of decrees. Policy regulations in the form of decisions are not KTUN. Its substance is different from KTUN, which is concrete, individual, and final. An example of a policy regulation in the form of a decree is Presidential Decree No.29 of 1984 concerning the Implementation of the State Budget.
3. Circulars. State administration as part of the implementation of a policy cannot simply ignore circulars. Because, although a circular letter is not a legal provision, it is a manifestation of the freedom of action inherent in state administration. In state administration, the principle of complying with one's own decisions and carrying out policies that are determined hierarchically within the state administration concerned also applies.
4. Instruction. An instruction is a form of hierarchical decision, applicable to the ranks of state administration under the instruction maker. Based on its content, there are instructions that are policy regulations and some are not policy regulations. Instructions on certain concrete (specific) policies cannot be included as policy regulations. Instructions to carry out certain tasks are not policy regulations. An instruction will become a policy regulation if it is accompanied by a general provision.
5. Written announcements. Around 1945-1949, there were many kinds of

announcements or edicts. However, the edicts issued at that time were not always policy regulations. It is necessary to distinguish the position of the President and Vice President when making announcements or edicts, whether as state administrators or holders of state power. Edict Number X of 1945 (October 16, 1945), according to Bagir Manan, must be understood as a state decision, not state administration. Announcements as policy regulations must also be in writing and general in nature.

3 METHODS

This research was conducted using the Normative Juridical method, namely a library research with a statutory approach carried out by examining related rules and regulations related to the problems raised by the author, using relevant and appropriate data sources, namely secondary data sources, consisting of primary legal materials, secondary legal materials and tertiary legal materials.

4 RESULT AND DISCUSSION

4.1 Policy limitations that meet *Good* aspects

In an effort to realize a clean and efficient government, the application of *Good Governance* principles is very important. The government in Indonesia, especially at the local level, has tried to adopt the values of transparency, accountability, fairness and participation as the foundation of public administration. Although regulations such as Law No. 14/2008 on Public Information Disclosure have encouraged data and information disclosure, its implementation is still very diverse. In many regions, constraints in budget and planning transparency mean that available information is not fully accessible to the public. This inhibits the public oversight process and lowers the level of public trust in local government performance.

Accountability is an important pillar of *good governance*, realized through the preparation of annual reports, audits by the Supreme Audit Agency (BPK), and performance evaluation using the Government Agency Performance Accountability System (SAKIP). Although these mechanisms have been implemented nationally, follow-

up on audit findings in some regions remains weak. The lack of prompt and effective responses from local governments indicates a low commitment to the full implementation of accountability. As a result, while information transparency has been pursued, without consistent accountability, improvements in government performance remain stunted and the potential for budget abuse is higher (Bagir Manan, 2008).

Good governance is a concept that has spanned many countries based on literature and practice in the Anglo-Saxon system. These literatures do not make a clear distinction between "government" and "*public administration*"; both are referred to as "*government*" or, more recently, "*governance*", so their use often points to the terminological transition that has taken place. This transition can actually be described as a development from vertical (one-sided) to horizontal (consultative) governance (Marsden, 2011).

The concept of good governance arises from dissatisfaction with the performance of governments responsible for organizing public affairs. The implementation of good governance practices can be done in stages depending on the capacity of the government, civil society and market mechanisms. One of the strategic options for implementing *good governance* in Indonesia is through the provision of public services. The application of *Good Governance* principles is very important in the delivery of public services to improve the performance of the state apparatus. In order for "*Good Governance*" to become a reality and run well, it requires the commitment and involvement of all parties, namely the government and the community. Effective good *governance* requires good "*alignment*" (coordination) and integrity, professionalism and high work ethic and morals. Thus, the application of the concept of "*good governance*" in the exercise of state government power is a challenge in itself (Sedarmayanti, 2004).

A policy itself is a form of realization of Law Number 30 of 2014 concerning Government Administration and is based on the General Principles of Good Government (AAUPB), According to Philipus M. Hadjon AAUPB must be seen as unwritten legal norms, which must always be obeyed by the government, although the exact meaning of AAUPB for each individual situation cannot always be spelled out carefully. It can be said that AAUPB are unwritten legal principles, from which applicable legal rules can be drawn in certain circumstances. In fact, this AAUPB although it is a principle, but not all of them are general and abstract thoughts, and in some cases appear as concrete legal rules or are explicitly stated in the articles of the law and have certain sanctions (Philipus M. Hadjon *et al*., 1993). If the general principles of good governance are understood as

legal principles or joints, then the general principles of good governance can be understood as legal principles that are extracted and found from moral elements, ethics, decency, and propriety based on applicable norms. It can be said that some AAUPB are still legal principles, and others have become legal norms or legal rules (SF, 2001).

AAUPB is used as the basis for administrative assessments and efforts, in addition to being an unwritten legal norm for government actions to make a policy. The government in making a policy must prioritize the interests of the community as mandated by Article 34 of the 1945 Constitution which states that the state develops a social security system for all people and empowers the weak and incapable in accordance with human dignity

A Public Policy that fulfills aspects of Good Governance is a public policy made by the government whose formation fulfills the principles of AAUPB, namely:

1. The Public Policy provides legal certainty for the community;
2. The Public Policy has benefits for the community;
3. The Public Policy is formed with impartiality to anyone;
4. The Public Policy is formed based on the accuracy and prudence of the formers;
5. The Public Policy is formed by not abusing authority;
6. The Public Policy is formed with openness to the community;
7. The Public Policy is formed for the public interest not groups;
8. The Public Policy was formed as a tangible manifestation of good service for the community.

Policy implementation will have an impact on the success of the policy. A public policy is said to be successful apart from its formation based on the General Principles of Good Governance, a public policy can be said to be successful if it has a positive influence on society. This means that the policy is able to direct the community to be more directed and in accordance with the wishes of the government. So, the government has an obligation to oversee policy implementation through program design and structuring the implementation process. So, it can be concluded that policy implementation is an activity, program and activity in implementing policy decisions in order to achieve the objectives set in the policy decision.

4.2 Criminal aspects of a policy

Policy regulations (*beleidsregel*) are born because laws and regulations with a higher hierarchy only regulate basic matters, so that to implement these regulations further elaboration is needed both technically and administratively so that this is where space is needed for policy regulations. In addition, policy regulations (*beleidsregel*) can also fill the legal vacuum in an emergency and urgent situation to suit the interests and needs of the community. The reason that justifies the use and stipulation of policy regulations (*beleidsregel*) by the government lies in the space of consideration (*beoordelingsruimte*) given by the legislator to government officials to take their own initiative in taking a public legal action in the nature of regulation, stipulation or real positive action in terms of solving problems in governance (Pitriyantini, 2019).

The existence of policy regulations cannot be separated from the free authority (*vrije bevoegheid*) of the government which is often called *Freiesermessen* / *Discreation Power*. *Freiesermessen* (discretion), namely the freedom of the government to be able to act on its own initiative in solving social problems. *Freiesermessen* (discretion) is one of the means that provides space for officials or State administrative bodies to take action without having to be fully bound by the law. The freedom of action is a form of wrong implementation of the duties of the government, but the principle of *Freiesermessen* (discretion) is not present as an opponent of the principle of legality, the principle of *Freiesermessen* (discretion) is present as a complement to the principle of legality in the administration of the State. This principle provides a wide space for the government in terms of issuing a policy as long as the policy has a good impact on the welfare of citizens (Pitriyantini, 2019).

According to the 1945 Constitution of the Republic of Indonesia Article 1 paragraph 3, the State of Indonesia is a State of law. In accordance with the principle of the rule of law, every action of the State administration must be based on the law (principle of legality). In addition, the government must protect and guarantee the rights of citizens in accordance with the law. With the *Freiesermessen* authority for the executors of the State administration in carrying out their duties, it is possible that in the implementation of the State administration, State administration officials carry out actions that deviate from the applicable regulations, so that they can cause harm to citizens. This is then what becomes a public concern, namely the abuse of discretionary

authority through policy regulations issued by the government. Thus causing state financial losses and giving rise to indications of a criminal act of corruption as referred to in Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption.

As stipulated in Article 3 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Eradication of Corruption, there is an element that states, Every person who with the aim of benefiting himself or herself or another person or a corporation, abuses the authority, opportunity, or means available to him or her because of his or her position or position which may harm the state finances or the state economy, shall be punished with life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years and or a fine of at least Rp. 50,000,000 (fifty million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah). 50,000,000 (fifty million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah).

The problem that makes every policy-making official fall into the offense of corruption is the discretion exercised by the official in which there is corrupt behavior. Based on the general provisions of Article 1 (point 9) of Law Number 30 of 2014 concerning Government Administration, the definition of Discretion is regulated, namely, Decisions and / or Actions determined and / or carried out by Government Officials to overcome concrete problems encountered in the administration of government in cases of laws and regulations that provide options, do not regulate, are incomplete or unclear, and / or there is government stagnation (Putradinata *et al*., 2017).

According to Gayus Lumbuun, discretion is a policy of state officials from the center to the regions which essentially allows public officials to carry out a policy that violates the law, with three conditions (Maya Septiani, n.d.). These conditions are in the public interest, still within the limits of their authority, and do not violate the General Principles of Good Governance (Maya Septiani, n.d.). When referring to the provisions of the Corruption Law, there are seven classifications of corruption crimes, namely (Hukum Online, n.d.-b):

1. State Financial Losses,

Unlawfully committing an act of enriching oneself or another person or corporation. The perpetrator has the aim of benefiting himself and abusing the authority, opportunity or means available. This type of corruption is regulated in Article 2 and

Article 3 of Law 31/1999 jo. Constitutional Court Decision No. 25/PUU-XIV/2016

2. Bribery

Giving or promising something to a State Civil Apparatus, state administrator, judge, or advocate with the intention of doing something or not doing something in his/her position. Corruption related to bribery is regulated in several articles of Law 31/1999 and its amendments, namely Article 5 of Law 20/2001, Article 6 of Law 20/2001, Article 11 of Law 20/2001, Article 12 letters a, b, c, and d of Law 20/2001, and Article 13 of Law 31/1999.

3. Embezzlement in Office

Embezzlement in office is the act of deliberately embezzling money or securities, falsifying books or lists specifically for administrative checks, tearing and destroying bribery evidence to protect the bribe giver, and others. Meanwhile, provisions related to embezzlement in office are regulated in Article 8 of Law 20/2001, Article 9 of Law 20/2001 and Article 10 letters a, b and c of Law 20/2001.

4. Extortion

Extortion is an act where a service officer actively offers services or asks for rewards to service users to speed up their services, even though it violates procedures. Extortion has an element of promise or aims to get something from the gift Extortion is regulated in Article 12 letters e, f, and g of Law 20/2001.

5. Fraudulent Acts

Fraudulent acts are committed intentionally for personal interests that can endanger others. Based on Article 7 paragraph (1) of Law 20/2001, a person who commits a fraudulent act is punishable by imprisonment for a minimum of 2 years and a maximum of 7 years and/or a fine of at least Rp100 million and a maximum of Rp350 million.

6. Gratuities

Based on Article 12B paragraph (1) of Law 20/2001, every gratification to a civil servant or state organizer is considered a bribe, if it is related to his/her position and contrary to his/her obligations or duties, provided that if the value is Rp.10,000,000, - or more, then the proof that the gratification is not a bribe is carried out by the recipient of the gratification for those with a value of less than Rp.10,000,000, - then the proof that the gratification is a bribe is proven by the public prosecutor.

7. Conflict of Interest in Procurement

A public servant or state organizer directly or indirectly intentionally participates

in contracting, procurement or renting when he or she is assigned to manage or supervise it. For example, in the procurement of office stationery a government employee includes his family company in the tender process and tries to win. This crime is regulated in Article 12 letter i of Law 20/2001.

In connection with public policy, policy-making officials often stumble upon corruption cases as stipulated in the Anti-Corruption Law, this is due to a discretion that is proven to be carried out by policy-making officials, where the policy is detrimental to the state and benefits a person or other person or corporation or because it has abused its authority, opportunity or means available. According to M. Yusuf Jhon, which includes losses to the State is waste in the form of: (M. Yusuf Jhon & Dwi Setiawan, 2009)

a. Unlawful act (PMH) spending money on something that was not planned by the State, not based on a need's analysis, and not budgeted for.
b. Reduced regional rights, due to loss of revenue (which has been included as revenue or potential revenue)
c. Increased obligations (the criterion for determining the increase in this obligation is whether or not there is an Unlawful Act) that are not budgeted for individual officials, not for the benefit of the State
d. Overpayment of value that should have been paid.

A public policy cannot always achieve the target or goal it is intended to achieve, in this case sometimes the public policy can actually cause state losses by increasing an obligation or payment that is more than the previous calculation, this does not necessarily directly criminalize a policy maker. In making a policy, the government must consider whether or not the benefits of the policy are in the public interest it protects. A policy cannot be criminalized as long as the policy fulfills 4 (four) conditions, namely: (Hukum Online, n.d.-a)

1) The country is not disadvantaged,
2) A person or legal entity does not benefit unlawfully as referred to in the Anti-Corruption Law and
3) For public service or public interest.
4) The policy is still within the limits of the policy maker's authority based on the General Principles of Good Governance

In addition to the above, a policy or discretion cannot be punished as long as the policy maker does not have bad faith or a mental attitude that intends to take advantage of

the policy. This is in accordance with the provisions of Law Number 30 of 2014 concerning Government Administration which allows state officials to exercise discretion or take a policy. If in the future the policy taken by state officials is considered to cause state financial losses, this does not mean that it is a criminal offense as long as there is no evidence of malicious intent from the policy maker.

In the realm of criminal law, a criminal act must be proven by the will of the criminal act (*actus reus)* and the state of mind (*mens rea*), the condition of the soul or bad faith that underlies the act. In carrying out the criminalization process against a government official or a person occupying a certain position who is suspected and indicated to have committed a corrupt act in the policy he took so as to cause state financial losses, law enforcement officials must prove that there is *mens rea* from the person, if there is *mens rea*, the law and criminal sanctions for the act must be enforced. However, if the policy taken by government officials turns out to be wrong, even if it is proven that there is a loss of state finances but there is no corrupt behavior, it should not be processed and imposed criminal sanctions. Meanwhile, if the *mens rea* of the person is proven at the time of making a policy to fulfill corruptive elements that have violated or violated the provisions of the general principles of good governance and in the implementation of the policy has harmed the state, then the policy maker can be punished.

5 CONCLUSION

From the analysis above, 2 (two) conclusions can be drawn, namely that a policy taken by government officials must be in accordance with the principles that fulfill aspects of *Good Governance*, where its application must fulfill the general principles of good governance, as regulated in Law number 30 of 2014 concerning Government Administration. A policy that does not achieve the desired goals or even harms the state, cannot necessarily be punished, it must be proven whether the men rea of the policy maker aims to harm the state or benefit himself or other people or groups or corporations.

Meanwhile, a policy that is in fact detrimental to the state cannot necessarily be punished, a new policy can be punished if the policy taken meets the elements of a criminal offense and the policy maker is proven to have committed corrupt actions to benefit themselves as referred to in the Corruption Crime Law, with evidence of the *mens rea* of the policy maker aiming to harm the state or benefit himself or other people or

groups or corporations.

Based on the above conclusions, the author suggests that the government can regulate the regulation of policy making rigidly, from the formulation of a policy until its realization by including the role of the community and several other agencies to ensure the transparency of a policy and carefully analyze it according to the needs of the community as the authority of relevant officials regulated in the laws and regulations in force in Indonesia by paying attention to and applying the general principles of good governance as a form of implementing the principles of *Good Governance*.

In addition, the government must also update the provisions of laws and regulations related to the General Principles of Good Governance and the limits of authority of government officials in terms of public policy making, so that this can provide legal certainty regarding the crime of corruption in a policy taken by an authorized official before it is socialized and promulgated to the public.

REFERENCES

A. Hamid S.Attamimi. (1993). Hukum tentang Peraturan Perundang-undangan dan Peraturan Kebijakan (Hukum Tata Pengaturan). In *Universitas Jakarta* (p. 13).

Bagir Manan. (2008). Peraturan Kebijakan. *Varia Peradilan*, *1*, 16–17.

Budiman, Aditya Ferlan Farhanuddin, Astri Ayulia Putri Setia, & Diella Jauza. (2022). PENERAPAN ETIKA PELAYANAN PUBLIK DALAM MEWUJUDKAN GOOD GOVERNANCE. *Jurnal Dialektika: Jurnal Ilmu Sosial*, *19*(1). https://doi.org/10.54783/dialektika.v19i1.65

Desrinelti, D., Afifah, M., & Gistituati, N. (2021). Kebijakan publik: konsep pelaksanaan. *JRTI (Jurnal Riset Tindakan Indonesia)*, *6*(1). https://doi.org/10.29210/3003906000

Gamal Thabroni. (2022, September 22). *Good Governance: Pengertian, Asas, 3 Pilar, Implementasi & Permasalahan*. Serupa.Id. Diakses pada tanggal 14 Februari 2025. https://serupa.id/good-governance-pengertian-asas-3-pilar-implementasi-permasalahan/

HR, R. (2014). Hukum Adminitrasi Negara. *PT. Raja Gravindo Persada*, *I*(1).

Hukum Online. (n.d.-a). *Akademisi: Pengambil Kebijakan Tak Dapat Pidana*. Diakses tanggal 19 Februari 2025. https://www.hukumonline.com/berita/a/akademisi--pengambil-kebijakan-publik-tak-dapat-dipidana-lt531b60851cc21

Hukum Online. (n.d.-b). *Jenis-Jenis Korupsi dan Hukumnya di Indonesia*. Diakses tanggal 19 Februari 2025. https://www.hukumonline.com/klinik/a/bentuk-bentuk-korupsi-dan-aturannya-di-indonesia-lt5e6247a037c3a/

Jann, W., & Wegrich, K. (2017). Theories of the policy cycle. In *Handbook of Public Policy Analysis: Theory, Politics, and Methods*. https://doi.org/10.4324/9781315093192-11

Julia Ivanna, Sonya Meilini Saragih, & Cindy Eliza Purba. (2023). Penerapan Good Governance Dalam Peningkatan Kualitas Pelayanan Publik di Masyarakat. *Journal of Law & Policy Review*, 152.

M. Yusuf Jhon, & Dwi Setiawan. (2009). *Kiat Memahami Pemeriksaan Laporan Keuangan Pemerintah Daerah di Indonesia*. Gramedia Pustaka Utama.

Magnar, B. M. dan K. (1993). Beberapa Masalah Hukum Tata Negara Indonesia Karya. In *Alumni* (Vol. 1, Issue August).

Marsden, D. (2011). Deconstructing Development Discourse: Buzzwords and Fuzzwords. *Development in Practice*, *21*(7). https://doi.org/10.1080/09614524.2011.590894

Maya Septiani. (n.d.). Diskresi Dalam Penyelenggaraan Pelayanan Publik. *Ombudsman*.

Nugroho, W., & Surono, A. (2018). Rekonstruksi Hukum Pembangunan Dalam Kebijakan Pengaturan Lingkungan Hidup dan Sumber Daya Alam. *Jurnal Hukum Lingkungan Indonesia*, *4*(2). https://doi.org/10.38011/jhli.v4i2.62

Philipus M. Hadjon, R. Sri Soemantri Martosoeignjo, Sjachran Basah, Bagir Manan, H.M. Laica Marzuki, J.B.J.M. ten Berge, PJJ. van Buuren, & F.A.M. Stroink. (1993). *Pengantar Hukum Administrasi Indonesia* . Gadjah Mada University Press.

Pitriyantini, P. E. (2019). PERATURAN KEBIJAKAN YANG MENIMBULKAN KERUGIAN KEUANGAN NEGARA SEBAGAI UNSUR TINDAK PIDANA KORUPSI. *Jurnal Komunikasi Hukum (JKH)*, *5*(2). https://doi.org/10.23887/jkh.v5i2.18332

Putradinata, R., Jaya, N. S. P., & Mulasari, L. (2017). Pertanggungjawaban Pidana Pejabat Pembuat Kebijakan (Policy Maker) Atas Diambilnya Kebijakan yang Menimbulkan Kerugian Keuangan Negara. *Diponegoro Law Review*, *6*(3).

Sedarmayanti. (2004). Good Governance Bagian Kedua Membangun Sistem Manajemen Kinerja Guna Meningkatkan Produktivitas Menuju Good Governance (Kepemerintahan yang baik). In *Mandar Maju, Bandung*.

SF, marbun. (2001). Pembentukan dan Pemberlakuan AAUPPL Melalui Penyelenggaraan Pemerintahan dalam Rangka Menjelmakan Pemerintahan yang

Baik dan Bersih di Indonesia. *Jurnal Hukum IUS QUIA IUSTUM*, *8*(18). https://doi.org/10.20885/iustum.vol8.iss18.art5

Sumarto, H. S. (2003). Inovasi, Partisipasi, dan Good Governance. *ICB Research Reports, 9*.

Authors' Contribution

Both authors contributed equally to the development of this article.

Data availability

All datasets relevant to this study's findings are fully available within the article.

How to cite this article (APA):
Situmeang, T., Sectionardo, W. A., & Berutu, C. A. N. CRIMINALIZATION 'A POLICY' "JURIDICAL REVIEW BASED ON GOOD GOVERNANCE ASPECTS". Veredas Do Direito, e223405. https://doi.org/10.18623/rvd.v22.n3.3405