LEGAL PROTECTION PROVIDED FOR THE MANAGEMENT OF BANK INDONESIA IN PROMULGATING THE POLICY REGULATING CRISIS OF FINANCIAL SYSTEM IN INDONESIA

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Abstract

This study examines the legal protection for the management of Bank Indonesia in promulgating the policy regulating crisis of financial system in Indonesia. The liquidity support of Bank Indonesia policy ("BLBI") 1997/1998, the short term loan facility policy ("FPJP") and Century Bank Bail-out policy in 2008 has been processed in the field of criminal law and the management of Bank Indonesia found guilty of corruption. As a form of legal protection, pursuant to Article 45 of the Act Number 23 of 1999 concerning Bank Indonesia, as amended lastly by the Act Number 6 of 2009 (the BI-Act), the provision regulates that the management of Bank Indonesia cannot be punished as he/she has performed his/her tasks based on the given authority and as long as all is done in good faith. The focus of the research relates to preventive and repressive legal protection for The management of Bank Indonesia, to face the court proceedings in corruption cases of policy regulating crisis of financial system in Indonesia.

Keywords: Legal protection, the management of Bank Indonesia, promulgating the policy regulating crisis of financial system.

I. INTRODUCTION

1.1. Background

In a country, financial system stability is very important because it will prevent the crises that happened in Asia, including 1997/1998 in Indonesia, which impacted the high cost of fiscal (Rp144, 5 trillion) which eventually must be faced by the community.[1] In the case of the latest global financial crisis in 2008, Bank Indonesia has provided FPJP and Bail-out to

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[1] Bank Indonesia, *Financial System Stability Booklet (Booklet Stabilitas Sistem Keuangan)*, Jakarta, May 2007, p.2.

Century Bank (Rp6.7 trillion), although this is commonly done by central banks in other countries.[2]

The Lender of Last Resort (*LOLR)*[3] is one of the central bank functions that is very important in maintaining the stability of the financial system and encouraging the national economy.

The policy of LOLR facility from Bank Indonesia in the form of BLBI in 1997/1998 stipulated by the management of Bank Indonesia, was in fact processed in the criminal law and has been found guilty by the Supreme Court of the Republic of Indonesia (No. 979 K/PID/2004), against three former member of The management of Bank Indonesia (member of Board of Directors), is Hendrobudiyanto, Paul Sutopo and Heru Soepraptomo, in the corruption case of misuse of BLBI funds. Members of the Board of Directors of Bank Indonesia is declared to have "Abused Authority" and shall be liability for BLBI's policy to such banks that experiencing liquidity difficulties, which in the end remains get closed.

Similarly, the policy of giving FPJP and Bail-out to Century Bank in 2008, which is determined by collegial collective decision in the Financial System Stability Committee (“KSSK”), chaired by the Minister of Finance and the Governor of Bank Indonesia and the Management of Deposit Insurance Agency (LPS) as a member, it turns out one of the management of Bank Indonesia namely Budi Mulya - former Deputy Governor of Bank Indonesia, is charged of criminal act of corruption by this policy.

The management of Bank Indonesia in performing its duties and authorities is granted legal protection in accordance with Article 45 of the BI-Act, which states:

> *"The Governor, the Senior Deputy Governor, the Deputy Governor and / or a Bank Indonesia official shall not be punished for having made a decision or policy in accordance with his duties and authorities as referred to in this Act as long as it is done in good faith."*

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[2] I Gde Made Sadguna (Advisor) dan Iwan Setiawan (Author), *Juridical Review Functions of The Lender of Last Resort Bank Indonesia: Concepts, Requirements, Mechanisms, Institutional Relation With OJK, And BLBI 1997/98 Case Study And Century Bank Bail-Out 2008” (Tinjauan Yuridis Fungsi the Lender Of Last Resort Bank Indonesia: Konsep, Persyaratan, Mekanisme, Hubungan Kelembagaan Dengan OJK, Dan Studi Kasus BLBI 1997/98 Serta Bail-Out Bank Century 2008), Working Paper,* Jakarta: December 2014, p.5.

[3] The LOLR concept was first elaborated through the doctrines of Henry Thornton (1802) and Walter Bagehot (1873), which emphasized that the LOLR function of the central bank is lending to solvent but illiquid banks under certain conditions. This is as quoted in Jean-Charles Rochet, *Coordination Failures And the Lender of Last Resort: Was Bagehot Right After All,* (Toulouse: Universit´e de Toulouse Institut d’Economie Industrielle, December 2004), p. 2

In the explanation of Article 45 of the BI-Act, it's stated that: [4]

"This provision is intended to provide legal protection for personal responsibility for members of the Board of Governors and / or officials of Bank Indonesia who in good faith on the basis of their authority have made a difficult but necessary decisions in implementing their duties and authorities. Decision making can be considered to have fulfilled goodwill if:

a. Conducted with the intention of not profiting themselves, their families, their own groups and / or other acts indicating corruption, collusion and nepotism;

b. Performed based on in-depth analysis and has a positive impact;

c. Followed by a preventive action plan if the decision is not appropriate;

d. Equipped with monitoring system."

Based on the above description, then there is a problem that needs to be researched: "How is the provided of legal protection for the management of Bank Indonesia in the face of court proceedings in cases of corruption in promulgating the policy regulating crisis of financial system?"

1.2. Research Methods

This research use normative legal research method or doctrinal law research, with the main object is legal substance related to the authority of Bank Indonesia to issue policy of central bank *LOLR* facility and legal protection for The management of Bank Indonesia in promulgating the policy regulating crisis of financial system in Indonesia.

The approach used is statute approach, case approach, and historical approaches related to the rule of law over time, in order to understand the philosophy and development of related legal rules, as well as comparative approaches by comparing law or court rulings in other countries.

II. RESULTS OF RESEARCH AND DISCUSSION

2.1. Legal Protection For Citizens From Legal Actions of Government Officials

According to law experts Wahyu Sasongko, legal protection is governments effort to protect their citizens from the arbitrary acts of law enforcement officials, to ensure the protection of citizens rights are not violated, and for those who not comply with that regulation will be punished. Legal protection can be given in two ways, namely the protection of

[4] See elucidation Article 45 BI-Act

preventive law by means of law (by giving regulation) which aims to guarantee the rights of citizens, prevents violation, provide signs or limitations in performing an obligation, and repressive protection by law enforcement, which aims to provide assurance of citizens rights in the face of the law enforcement process in court.[5]

As the government's role continues to increase in the lives of its citizens, the relationship between Government Officials and their citizens is increasing as well, so the risk of disputes between Government Officials and citizens increases. Therefore, the protection of citizens whose rights or interests are potentially or have been impaired by the exercise of public authority becomes a fundamental right in a law state.[6]

Zotan Szente states that:

"The legal protection of individual rights to unlawful country intervention is a central issue in all modern democracies. There is no doubt that it has become a common concept. However, lawsuits for legal protection will always exist when the exercise of public power affects the rights or interests of the citizens unfavorably." [7]

According to Steven J. Heyman, legal protection has three main elements. *First*, legal protection relates to an individual's position, which means the position of the individual as a free man and a citizen. *Second*, legal protection is linked to substantive rights, which means the law recognizes and guarantees the individual right to live, liberty, and ownership. *Third*, the most basic understanding of legal protection is the enforcement of rights, which is the special way in which the government prevents acts of violation of substantive rights, corrects, and punishes such violations.[8]

2.2. Preventive Legal Protection Arrangements for The management of Bank Indonesia Promulgating the Policy Regulating Crisis Of Financial System

[5] Wahyu Sasongko, *Principal Provisions of Consumer Protection Law, (Ketentuan-Ketentuan Pokok Hukum Perlindungan Konsumen),* University of Lampung, Bandar Lampung 2007, p. 31.

[6] Maria Popescu, *Citizen Protection in Frontof Public Administration: Comparative Analysis*, *Journal of Public Administration, Finance and La,* Issue 4/2013, p. 68.

[7] Zoltan Zsente, *Conceptualising the Principle of Effective Legal Protection in Administrative Law,* dalam Zoltan Zsente dan Konrad Lachmayer (ed), *the Principle of Effective Legal Protection in Administrative Law*, (London and New York: RoutledgeTaylor & Francis Group, 2016), p. 7.

[8] Steven J. Heyman, *the First Duty of Government: Protection*, Liberty and the Fourteenth Amendment, *Duke Law Journal,* Vol. 41:507. p. 350-351

Legal protection for the management of Bank Indonesia is intended for the promulgating of a policy, to act independently, to avoid criminalization and to be exempt from personal liability for policy costs, with the following explanation:

a. Legal protection for the management of Bank Indonesia to be independent

Jimly Asshiddiqie stated that of all state institutions mentioned in the 1945 Constitution, do not fully have constitutional authority or authority given explicitly by the 1945 Constitution. In this context, the central bank may be referred to as a state institution, which has already mentioned its authority that is independent, with more regulation further described in the Act.[9]

The authority of an independent central bank officials is actually limited only to the authorities by which the law or by the government and parliament is agreed to be delegated to central bank officials. The separation of authority is not in political terms, but rather a separation of duties and functions as a central bank, because the central bank is given the task and function specifically about monetary policy and financial system in a country. The separation of authority is merely a delegation of authority in carrying out a specific central bank policy,[10] so that the central bank in prescribing policy can be detached from government intervention to be efficient.[11]

The reasons for supporting the need for an independent central bank are the interests of a sustainable economic program and to avoid the central bank from political interference. Economic independence means that the central bank can use all financial instruments and not limited by the government in determining monetary policy.[12]

In addition to economic reasons, the independence of the central bank is also supported by various political reasons. For those who support the view of the necessity of central bank independence from a political perspective, the central bank must be independent, since the

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[9] Jimly Asshiddiqie, *Indonesian State Structure After the Fourth Amendment of the 1945 Constitution*, Paper presented at the Seminar on Development of National Law VIII, organized by the National Legal Development Board of the Ministry of Justice and Human Rights of the Republic of Indonesia, Denpasar 14-18 July 2003, p. 38.

[10] Laurence H Meyer, *Comparative Central Banking and the Politics of Monetary Policy*, Speech At the National Association for Business Economics Seminar on Monetary Policy and the Markets, Washington , D.C, May 21, 2001, p.2.

[11] Fabio Franchino, *Efficiency or credibility?* Testing the two logics of delegation to the European Commission, Journal of European Public Policy 9:5, October 2002, p. 678.

[12] Robert Elgie, *Democratic Accountability and Central Bank Independence*: *Historical and Contemporary*, *National and European Perspectives,* West European Politics, Vol. 21, 1998, p. 55.

existence of an independent central bank can be exploited by certain political interests that intend to attack the policy monetary and financial government that are considered unpopular.[13]

From the above description it can be concluded that in order to support Bank Indonesia as an independent central bank to support the interests of fimancial system stability, sustainable economic programs, and to avoid the central bank from the interference of other parties, the management of Bank Indonesia needs to be given legal protection in order to prescribe policies and use of all central bank instruments independently and not limited by other parties.

b. Legal protection for the management of Bank Indonesia from criminalization

Policies that are the basis for a number of decisions in the public sector are taken because of the authority possessed by Government Officials, based on legislation. The President, the minister, the governor, the regent, in certain cases are authorized and required to adopt a policy accompanied by a decision. After the adoption policy and decision-making, evaluation can also be done, by the direct superior, the DPR (House of Representative) against the government as in the Bail-out policy to Century Bank, even by the press and the public. When the evaluation of policies and decisions is fair, it should be based on the circumstances in which the policy and decisions are taken. If past policies and decisions are evaluated from today's perspective, then the policies that have been taken could be all wrong.[14]

Vice President Spokesman at the time Yopie Hidayat, said that criminalization of monetary and economic policy making will harm the country in the future and will cause a policy response slower than it have to be when the crisis occurs, said Yopie on behalf of Boediono at the Vice President's Office on Thursday 10/12/2008). Yopie added that the policy regarding the provision of FPJP to Century Bank was due to the amendment of Bank Indonesia Regulation (the PBI) and denied any engineering efforts in the policy making, let alone the existence of corruption, he said. According to him, the PBI changes not only apply to Century Bank, "PBI was the response of monetary authority policy over the crisis," he said. Over the next two months, there are statutory reserve requirements for rupiah and foreign currency, overnight repo reduction, time extension for operations, procurement of long-term and short daily balance limits. Furthermore Yopie said that by criminalizing the policy would dull the

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[13] Rosa Maria Lastra, *Central Banking and Banking Regulation, Financial Markets Group*, London School of Economics Political Science, 1996, p. 19.

[14]Hikmahanto Juwana, *Concerning Criminalization of Policy, https://cakimptun4. wordpress.com/ 2010/01/28/ihwal-kriminalisasi-kebijakan/,* accessed on December 12, 2017, 08.54 a'clock .

response of policy makers in times of crisis. “How they act during a crisis when it comes to policy when there is a threat. "If there is action outside the policy, then the government agrees to be investigated thoroughly. "But if the policy is considered a criminal act, the risk becomes enormous," he said.[15]

c. Legal protection for the management of Bank Indonesia from personal liability for policy costs

In Promulgating the Policy Regulating Crisis of Financial System in Indonesia, policy making of LOLR should be done quickly and accurately to prevent wider impacts. Decision-making officials are often faced with a difficult choice between making a decision and not making a decision, all of which have legal risks to be faced. Legally, the crisis management policy of the financial system is part of the decision of the Government Officials in dealing with the emergency/crisis situation, so that the Government Official must be given legal protection for personal liability in connection with the incurrence of the policy fee charged to the State Budget by law enforcement categorized as state financial loss.

2.2.1. Preventive Legal Protection Arrangements In the BI Act

Article 45 of the BI Act, states that the Board of Governors of Bank Indonesia can not be punished for having made a decision or policy in line with its duties and authorities, as long as it is done in good faith.

When compared to the regulation in the Act No. 30/2014 concerning Government Administration (the GA-Act), good faith is intended as an action based on the motive of honesty and based on Good Governance Principles as stated in the explanation of Article 24 f.

2.2.2. Preventive Law Protection Arrangement in the Act No. 9/2016 Concerning Financial System Crisis Prevention and Treatment

The Code of Good Practices on Transparency in Monetary and Financial Policies alludes to legal protection for central bank officials and staff. In accordance with the principle of transparency then the provision of legal protection must be announced to the public. There are two elements of legal protection: a) protection of possible lawsuits against both the authority and the supervisor; b) legal protection of costs to be borne in the event of a lawsuit.[16]

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[15] tempo.co. december 10, 2009 19:56 a’clock, accessed on december 26, 2017, 20.09 a’clock.

[16] Delston, Ross & Andrew C. 2006. *To Protect or Not to Protect, That is the Question: Statutory Protections for Supervisors - How to Promote Financial Stability by Enacting the Right Laws.*

Furthermore, the legal protection arrangements for the management of Bank Indonesia and/or the Officials of Bank Indonesia as members of the financial system stability committee (KSSK), in accordance with Chapter VI of Other Provisions, Article 48 Paragraph (1) of the Act 9/2016 Concerning Financial System Crisis Prevention and Treatment (PPKSK Act), regulates legal protection to the KSSK members:

"Unless there is an element of abuse of authority, members of the Financial System Stability Committee, the secretary of the Financial System Stability Committee, members of the secretariat of the Financial System Stability Committee, and officials or officials of the Ministry of Finance, Bank Indonesia, the Financial Services Authority and the Deposit Insurance Corporation can not be prosecuted either civil or criminal liability for the exercise of functions, duties and authorities under this Act. "

For the Board of Governors of Bank Indonesia and/or the Officials of Bank Indonesia, the provisions on legal protection as regulated in Article 48 Paragraph (1) of the Act No. 9/2016 Concerning Financial System Crisis Prevention and Treatment are in line with the provisions stipulated in Article 45 of the BI Act.

2.2.3. Preventive Legal Protection Arrangements in the Government Administration Act

Government Administration Act (the GA-Act) is defined as one of the legal basis for Governmental Officials/Officials, citizens and other parties related to government administration in an effort to improve the quality of governance. The GA-Act, among others, aims to provide legal protection to citizens and government apparatus.

The GA-Act contains provisions to provide legal protection to the Agency and/or Government Officials or other State Organizers in performing the functions of government in this case the use of authority. It is hoped that with the birth of the GA-Act, the Agency and/or other Government Officials feel protected from the criminalization (contemporary term) related to the alleged misuse of authority.

In the GA-Act, Article 6 the GA-Act affirms that Government Officials have the right to exercise authority in making decisions and/or actions, using discretion in accordance with their objectives, and obtaining legal protection in carrying out their duties.

Guntur Hamzah, said that the background of the formation of the GA-Act, among others is to overcome the problem of criminalization of the policy, because sometimes Government

Officials only make mistakes that are administrative (not doing corruption of the rupiah), but is considered to take criminal action.[17]

Thus the policy of handling the financial system crisis should be the domain of State Administration Law. The use of Criminal Law in policy issues of Government Officials according to the investigators is due to an imprecise view, which interprets the expenditure of policy costs in regulating of financial system crises qualified as state losses. As a result, administrative errors that arise in the policy-making process are interpreted as "Against the Law" actions that harm the state finances. The corrupt bureaucratic stigma appears to have a profound effect on the views of law enforcers, so that the existence of State Administration Law is not used in assessing the problems that arise in the policy.

2.2.4. Preventive Protection of Legal Protection in the Civil Code

In Articles 1365 up to Article 1380 of the Indonesia Civil Code (KUHPerdata) not only regulates the act of "Against the Law" perpetrated by the perpetrator, but also one of which is the responsibility of a person for the act ("Against the Law") perpetrated by the people who become his dependents. The accountability of "Against the Law" actions committed by others under their control are known as vicarious liability. The theory of accountability is the theory of finding who should be responsible (accepting a lawsuit) for an act of "Against the Law". Generally, the offender is the party who accepts the claim of an act of "Against the Law".

In this study the focus is the accountability of employers, as regulated in Article 1367 paragraph 3 of the Indonesia Civil Code which reads:

> *"employers and persons appointing others to represent their affairs shall be liable for damages incurred by the servants or their subordinates in performing the work assigned to such persons "*

From the above article it can be seen that the liability applies when the employee (subordinate) is carrying out his job duties, he commits the act "Against the Law", so that his employer is responsible. Pursuant to Article 1367 paragraph 3 of the Civil Code, the employer is liable in a civil liability for losses due to the "Against the Law" committed by his

[17] M. Guntur Hamzah, *New Paradigm of Governmental Implementation Based on Government Administration Act, in relation to the State Administration Procedural Law of Court,* Paper presented at one day seminar in the 26th Anniversary of State Administrative Judiciary, Mercure hotel, Jakarta, January 26, 2016.

subordinates. Similarly, the person who gives the order of work against his subordinates, he is responsible for losses due to the actions of "Against the Law" by his subordinates.

The provision is according to the researcher if it is associated with the implementation of the duties and authority of Bank Indonesia, the civil lawsuit against compensation or the act of "Against the Law" submitted by the policy or discretion of The management of Bank Indonesia within the scope of their duties and authorities shall be the responsibility of Bank Indonesia.

2.2.5. Regulating of Preventive Legal Protection in the Criminal Code

In the Indonesia Criminal Code (KUHPidana) committed by Government Officials, it is necessary to sort or investigate whether the act is purely as an act of crime, or whether the action is only related or more dominant as an administrative crime related to his duties as the Government Officials in order to realize the task of the welfare of society, there is an act of "Against the Law" or abuse of power. Such Acts of Government Officials shall be based on certain circumstances, which may be considered as acts permitted by law (Law of State Administration) as a freedom of action (policy or discretion), which may enable Government Officials to release or loosen their legal considerations (rechtmatigheid) consideration for the benefit (doelmatigheid) of public interest.[18]

Thus, if the State Administration Court has proven that the actions of the Government Official have produced decisions contrary to legislation, then the enforcement of the Criminal Law shall be used as a last resort (ultimum remedium). This means that the new Criminal Law is applied after the legal settlement efforts with the Law of State Administration and Civil Law conducted. This is in line with the principle of subsidiarity in criminal law.[19]

1) Principles of Protection of Criminal Law

   In the consideration of Law No. 8 of 1981 on the Criminal Procedure Code, in the chapter weighing the letter a states that the Republic of Indonesia is a legal state based on Pancasila and the 1945 Constitution which upholds human rights and which guarantees all citizens at the same time in law and government and shall uphold such law and government with no exception. Such statements include those for Government Officials or State Organizers.

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[18]Kadri Husin, *Legal Protection of Public Officials, BUMD and Private Leadership in Order to Make People Prosperous*, Papers, Lampung University.

[19] The principle of subsidiarity is the enforcement of criminal law is only done as the last law enforcement effort, after first attempted civil law enforcement administration, Marbun, Rocky, et al, a Complete Legal Dictionary, Jakarta: Transmedia Pustaka, 2012, p. 25.

This means that the government protects the right to the private life of any Government Official or State Administrator and its citizens.

2) The Principle of Subsidiarity (*ultimum remedium*).

The principle of subsidiarity is the enforcement of criminal law is only done as the last law enforcement efforts, after first attempted civil law enforcement and administration. Therefore, the enforcement of criminal law is the last legal effort, if the enforcement of administrative law, civil and other alternative settlement is considered unable to solve the problem. However, such provisions may be disregarded if the degree of serious offender's wrong doing, acts of magnitude, or deeds is noticed and cause public unrest. To verify whether the subsidiarity principle is met or not, there must be a written statement from the relevant government official through consultation and coordination, it cannot be determined by the public prosecutor solely.[20]

3) Criminal Removal.

In the Criminal Code there are several justifications for a person (including the State Administrator) who has normatively fulfilled the criminal element, but the act can not be punished because there is a criminal abolition, namely in the case of a person:

a) Implement a set of laws.

Under article 50 of the Criminal Code it is affirmed that any person committing an act to enforce the provisions of the law shall not be subject to punishment.

b) Carry out the office orders given by the competent authorities.

Based on Article 51 Paragraph (1) of the Criminal Code, it is stipulated that any person committing an act to execute an official order granted by an authorized authority shall not be subject to criminal sanction.

The basis of criminalization (strafuitluitingsgronden) is distinguished by the basis of abolition of prosecution (verval van recht tot strafvordering). The first basis is determined by the judge by declaring the nature of the "Against the Law" of criminal removal or criminal-removal error, because of the provisions of constitutions and laws that justify the acts or the forgiving the maker. In this case the right to prosecute the prosecutor still exist, but the defendant is not sentenced. The base of criminal elimination shall be differentiated

[20] *Ibid.*

and separated from the grounds of the abolition of prosecution or the abolition of the right to prosecute the law because of the provisions of the law.[21]

From the above description it can be concluded that the enforcement of Criminal Law is only done as the last law enforcement effort (ultimum remedium), after first attempted enforcement of Civil Law and State Administration Law, and other settlement alternatives considered unable to solve the problem. However, such provisions may be disregarded if the degree of serious offender's wrongdoing, acts of magnitude, or deeds is noticed and cause public unrest. To prove whether the requirement of subsidiarity principle (ultimum remedium) is met or not, there must be a written statement from the official of the related institution. In the Indonesian Criminal Code, there are several justifications for a person (including Government Officials or State Organizers) who have normatively fulfilled the criminal element, but such conduct can not be criminalized because there is a criminal abolition, a) for the enforcement of the provisions of the law, as governed by article 50 (2) Criminal Code and (b) for carrying out the office orders granted by the competent authorities, as regulated under Article 51 Paragraph (1) of the Criminal Code.

2.3. Regulating of Preventive Legal Protection for the management of Central Bank in Some Countries

2.3.1. Regulating of Legal Protection in Malaysia

There is a provision of legal protection as stipulated in Article 87 of the Central Bank of Malaysia Act 2009, regulating Immunity (Immunity Rights) of the management, officials and employees of Bank Negara Malaysia, which reads as follows:

(1) *No action, suit, prosecution or other proceeding shall lie or be brought, instituted, or maintained in any court or before any other authority against*:
   (a) *any officer or employee of the Bank;*
   (b) any person lawfully acting on behalf of the Bank, or on behalf of any such officer or employee, in his capacity as a person acting on such behalf; or
   (c) any person appointed pursuant to this Act, for or on account of, or in respect of, any act done or statement made or omitted to be done or made, or purporting to be done or made, in pursuance or in execution of, or intended pursuance or execution of, this Act, any order in writing, direction, instruction, notice or other thing issued under this Act:

[21] Moeljatno, *Principles of Criminal (Asas-Asas Hukum Pidana)* Jakarta: PT Rineka Cipta, 1993, p. 127

Provided that such act or such statement was done or made, or was omitted to be done or made, in good faith.

(2) *In this section, the expression "officer" includes the Governor, the Deputy Governors and the other directors.*

2.3.2. Regulating of Legal Protection in Singapore

The provision of legal protection to the Managements and officials and employees of the Monetary Authority of Singapore (MAS), in accordance with the Monetary Authority of the Singapore Act (Chapter 186), which regulates the following:

Immunity of Authority, directors and employees, etc.

22. *No action, suit or other legal proceedings shall lie against -*

(a) *the Authority;*

(b) *any director, officer or employee of the Authority;*

(c) *any public officer;*

(d) *any person who is on secondment or attachment to the Authority; or*

(e) *any person appointed, approved or directed by the Minister or the Authority to exercise the Authority's power, perform the Authority's functions or duties or to assist the Authority in the exercise of its powers or performance of its functions or duties under this Act or any other written law, for anything done (including any statement made) or omitted to be done in good faith in the course of or in connection with -*

(i) *the exercise or purported exercise of any power under this Act or any other written law;*

(ii) *the performance or purported performance of any function or duty under this Act or any other written law; or*

(iii) *the compliance or purported compliance with this Act or any other written law.*

Indemnity for Authority's officers against cost of action to which section 22 applies

22A.—(1) *The Authority must indemnify a person mentioned in subsection (2) against all costs and expenses reasonably incurred by the person in connection with any action, suit or other legal proceedings to which the person is a party by reason of anything done (including any statement made) or omitted to be done in good faith in the course of or in connection with any of the matters mentioned in section 22(i), (ii) or (iii).*

(2) Subsection (1) applies to a person who was a person mentioned in section 22(b), (d) or (e) at the time of the alleged act or omission giving rise to the action, suit or proceeding.

2.3.3. Regulating of Legal Protection in India

The provisions of legal protection to the Central Bank's Board of Directors, officers and employees as stipulated in the Reserve Bank of India Act, 1934 (as amended on 28 February 2009) regulate:

43A. *Protection of action taken in good faith.*

(1) No suit or other legal proceeding shall lie against the Bank or any of its officers for anything which is in good faith done or intended to be done in pursuance of section 42 or section 43 [or in pursuance of the provisions of Chapter IIIA].

(2) No suit or other legal proceeding shall lie against the Bank or any of its officers for any damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of section 42 or section 43 [or in pursuance of the provisions of Chapter IIIA]

From the above arrangement, it appears that some countries such as Malaysia, Singapore and India have provisions that explicitly regulate the provision of legal protection to the Management, officials and employees of the central bank and related parties in the Central Bank Act of the country.

2.4. Provided of Repressive Legal Protection for the management of Bank Indonesia in Cases of Corruption, Regulating of Crisis Financial Syatem Policy

2.4.1. Legal Aid for the management of Bank Indonesia in Implementing Duties and Authority

As a follow-up to the provisions stipulated in Article 45 of the BI Act, Bank Indonesia shall stipulate the implementation regulation as outlined in the Bank Indonesia Board of Governors Regulation (PDG) concerning Legal Protection in the Implementation of Official Duties of Bank Indonesia.

The arrangement of legal aid was initially regulated in PDG Bank Indonesia No. 4/13/PDG/2002 dated October 22, 2002, which has subsequently been amended several times, amended by PDG No. 7/16/PDG/2005 dated July 13, 2005. Subsequently amended again with PDG No. 11/10/PDG/2009 dated December 30, 2009 concerning Legal Aid.

The main objective of providing legal aid to further encourage the creation of a conducive working environment in carrying out its duties and authority, thereby improving performance in official duty to achieve the goals of Bank Indonesia. In addition, the legal aid regulation are intended to provided of legal certainty and provided guarantees for sustainability, consistency and requirements in legal aid.

The duration of provision of legal assistance shall be within the period of examination at the latest until receipt of a decision which has obtained permanent legal force (inkracht van gewijsde), with financing from Bank Indonesia. The Board of Governors of Bank Indonesia may grant approval for extraordinary remedies for decisions which have obtained permanent legal force.

Provision of legal aid for the management of Bank Indonesia as a member of the KSSK, also affirmed in Article 48 Paragraph (1) of the PPKSK Act which regulates legal protection for the KSSK members performing duties and authority pursuant to the PPKSK Act in facing legal problem.

Furthermore, in order to provide optimal legal protection to the management of Bank Indonesia as central bank and member of the KSSK, since the coming into effect of the PPKSK Act the responsibility of final decision on the determination of crisis condition of financial system taken over by the President.

The right to obtain legal protection as regulated in Article 45 of the BI Act and Article 48 of the PPKSK Act is in principle in line with the provisions stipulated in the Law-AP. The enactment of GA Act is intended to provide legal protection to citizens and Government Officials, insofar as they are carried out in accordance with legislation and implement the general principles of good governance (AUPB), and in order to provide the best service to the community.

2.4.2. Implementation of Article 45 of the Bank Indonesia Act as a Form of Repressive Legal Protection for The management of Bank Indonesia in Cases of Corruption Crime Policy in FPJP

Repressive legal protection is provided by enforcing the law/regulation (by the law enforcement), which aims to provide assurance of the rights of citizens as legal subjects in settling disputes or cases in court.

Law enforcement in concrete terms is the enactment of positive law in practice as it ought to be obeyed. Therefore, to provide justice in a case means to decide *in concreto* law in

maintaining and ensuring the obedience of material law by means of procedural means established by formal law.[22]

Satjipto Raharjo argues that law enforcement is an attempt to realize abstract ideas or concepts (justice, truth and benefits) into reality.[23] There are 3 things according to Satjipto Rahardjo involved in the process of law enforcement, namely:

1) Element of lawmakers;

2) Element of law enforcement;

3) Eements of the environment that include private citizens and social.[24]

Because the nature of law enforcement is to realize values or rules that contain justice and truth, then law enforcement is not only a duty of law enforcement that is already conventionally known, but becomes the duty of every citizen.[25]

Abdulkadir Muhammad argues that law enforcement can be formulated as an effort to implement the law as it should be and if there is a violation, then the thing that must be done is to restore the law that was violated to be re-established. Citing the opinion of Notohamidjojo which says that there are at least 4 important norms in law enforcement, namely humanity, justice, decency and honesty.[26]

In the process of law enforcement will involve many factors and its success will be determined by the factors themselves. Soerjono Sukanto argued that in general there are 5 factors that can affect law enforcement, namely: law, law enforcement, facilities and facilities, society and culture. [27]

Rycko Amelza Dahniel, argues that of the above five factors, law enforcement factors have a very central role in law enforcement processes and can be used as a measure of legal work in society, measuring the level of public adherence to law or "level of fear" community to law enforcement officers. Therefore, the strength or weakness of law enforcement conducted by law enforcement officers can be used as a measure to determine the presence or absence of legal work in the community. When law enforcement officers conduct law enforcement

[22] Dellyana,Shant, *The Concept of Law Enforcement (Konsep Penegakan Hukum)*, Yogyakarta: Liberty,1988, p. 32.

[23] Satjipto Raharjo, *Law Enforcement Issues a Sociological Overview (Masalah Penegakan Hukum suatu Tinjauan Sosiologis),* Bandung: Sinar Baru, 1983 p. 15.

[24] *Ibid.*, p. 4-5.

[25] Ridwan HR, *Law of State Administration…. (Hukum Administrasi Negara,……) Op.cit.,* p. 292.

[26] Abdulkadir Muhammad, *Legal Profession Ethics (Etika Profesi Hukum)*, Bandung: Alumni 1995, p. 80.

[27] Soerjono Sukanto, *Factors Affecting Law Enforcement (Faktor-faktor Yang Mempengaruhi Penegakan Hukum)*, Jakarta: Rajagrafindo Persada, Agustus 2016, p.8-9.

operations, then people perceive the existence of law and must be obeyed, but on the contrary when law enforcement officers do not carry out law enforcement operations, it is as if the law does not exist and may be violated. In this condition, the community can be said to be still in the "afraid" society of law enforcement officers, and cannot be categorized as a "law-abiding" society.[28]

From the above description and if it is associated with Article 45 of the BI Act, it can be concluded that the success of law enforcement as a form of repressive legal protection for The management of Bank Indonesia aims to provide assurance of rights for the management of Bank Indonesia in the face of law enforcement process in court.

Furthermore, in relation to the application of Article 45 of the BI Act as a form of repressive legal protection for the Deputy Governor of Bank Indonesia Budi Mulya in the case of the corruption of the policy of giving FPJP, the panel of judges of the corruption court in its consideration states that the provision of FPJP to the Century Bank is not based on **good faith.**

The panel of judges is of the opinion that the defendant Budi Mulya has committed "Against the Law" (indicated corruption), since the provision of FPJP is considered not to be given in good faith vide Article 45 of the BI Act, with the consideration of the defendant having debts to the owner of the Century Bank;

On the basis of the foregoing consideration, the defendant Budi Mulya by the panel of judges of corruption court is deemed to have been found guilty of "Against the Law" in giving FPJP Rp689.394.000.000, - (six hundred eighty nine billion three hundred ninety four million rupiah). The provision of FPJP is the act of the defendant enriching another person or a corporation namely the Century Bank and the owner of the Century Bank.

Furthermore, in relation to the violation of good faith committed by defendant Budi Mulya, because the person has personal debt to the owner of the Century Bank amounting to Rp1.000.000.000, - (one billion rupiah), which is considered by the panel of judges corruption court as an act of "Against the Law", the researcher considers it necessary to analyze further related to the implementation of good faith in the execution of duties and authority of the management of Bank Indonesia as follows:

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[28] Rycko Amelza Dahniel, *Police Discretion in Legal Values (Diskresi Kepolisian dalam Nilai-nilai Dasar Hukum)*, http://polisikita.id/diskresi-kepolisian-dalam-nilai-nilai-dasar-hukum/, accessed on April 22, 2018,24.04 a'clock .

1) Philosophical Thoughts of Good Faith

A German philosopher named Immanuel Kant (1724-1820) argues that something that is absolutely good, is good will itself. In this case the question arises, "how can you identify the good wishes?" Immanuel Kant goes on to say that there is a rational moral law, which can be identified by reason.[29] Thus, the moral law teaches that by reason and rationality, man can distinguish something wrong and right.

Good faith in law is a doctrine or principle derived from the teaching of *bona fides* in Roman Law.[30] *Bona* fides require good faith in treaties made by the Romans.[31] In the Black's Law Dictionary, good faith is defined as:

> "*A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage*."[32]

Theoretically, good faith is divided into 2 kinds, namely subjective good faith and objective good faith, which can be described as follows:

a) Subjective Good Faith

In terms of subjective good faith can be illustrated as a good-faith (bezitter), a buyer of good-faith or other goods, as opposed to bad-tempered people, who are said to be subjective elements. A good-faith buyer is a person who buys goods with full confidence that the seller of goods is truly the owner of the goods he or she buys. He did not know if he bought from an unauthorized person. Therefore, he is called an honest buyer. In this element, good faith has a sense of honesty or clean.[33]

Wirjono Prodjodikoro argues that good faith in subjective elements is as good faith as it is at the start of a legal relationship. Good faith at the time of validity of the legal relationship is usually the expression in the heart of the person concerned, that the conditions necessary for the entry into force of the legal relationship have been fulfilled. If then it turns out that there are actually conditions that are not met, then these good-willed

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[29] Ridwan Khairandy, *Good Faith In Freedom of Contract (Itikad Baik Dalam Kebebasan Berkontrak)*, Jakarta: Pascasarjana UI, 2004, p. 130-133.

[30] Reinhard Zimmerman and Simon Whitttaker, *Good Faith in European Contract Law,* (Cambridge: University Press, 2.000), p. 12.

[31] Ridwan Khairandy, *Good Faith In Freedom of Contract*, *Op. cit.*

[32] Bryan A. Garner, *Black's Law Dictionary, 8th edition*, (Thomson West, St. Paul, 2004), p.713.

[33] Ridwan Khairandy, *Good Faith In Freedom of Contract*, *Op. cit.*, p.181.

parties are considered as if these conditions have been met all. In other words, these good-willed parties should not be disadvantaged as a result of non-compliance.[34]

b) Objective Good Faith

There is a difference in the nature of good faith in the start of legal relations in good faith in exercising rights and obligations in the legal relationship. The first good faith lies in the state of the soul of a human being at a time, that is, when the law comes into force, but in good faith in the exercise of rights and obligations in the legal relationship. Here also the good faith appears on the actions that will be done by both parties, especially the act as the implementation of the agreement. In doing this action good faith must run within one's soul in the form of always remembering that human being as part of a society must be far from the detrimental nature of other party, where this is used at the beginning of people form a covenant. Both parties should always pay attention to this and should not use the negligence of others to benefit themselves. In other words, good faith in exercising rights and obligations in legal relationships is more dynamic, whereas the nature of honesty at the time of validity of the legal relationship is more static.[35]

The principle of good faith, which initially constitutes an understanding of the relationship, which always prevails in the contractual relationship, is subsequently declared applicable in other matters not based on contractual relations. Arest H.R. on November 15, 1957 stipulates that the parties who are in the pre-contractual stage and are negotiating to obtain an agreement, each has a duty based on good faith (propriety) that is:

a. The Obligation to Check (*Onderzoekplicht*);
b. The Obligation to Notify (*Mededeling plicht*).[36]

For example in a sale and purchase agreement, the seller is obliged to provide information about everything important with respect to the object of the agreement, which may assist the purchaser to make a decision to purchase the item. On the other hand the buyer is obliged to examine the object object of the agreement, whether there is a defect or not, whether there is a government plan that will affect the object. The obligation of the seller to notify and examine the object of the agreement must be diluted in good faith.

[34] Wiryono Prodjodikoro, *Principles of Contract Law (Asas-Asas Hukum Perjanjian)*, Bandung: Sumur, 2006, p. 56.
[35] *Ibid.,* p. 61-62.
[36] *Ibid.,* p. 70.

From the above description, in theory it can be argued that the principle of good faith can be distinguished into the principle of good faith intention and the principle of good faith objective. Subjective goodwill can be interpreted as the **honesty** of a person in performing a legal act. Whereas, the objective understanding of good faith objectively is the implementation of a legal act of a agreement which must be based on **propriety** or what is perceived as **appropriate** in society.

In its development, the principle of good faith initially constitutes a principle applicable only in the field of the law of agreement, has evolved and accepted as a principle in other fields or branches of law, in both private and public law. In other words, the principle of good faith has evolved from the principle of special law to the principle of common law.

2) Good Faith Arrangements in the Civil Code

In the Civil Code also uses the term good faith in 2 terms. The first sense of good faith is the notion of good faith in a subjective sense, called honesty. Understanding the subjective good faith is contained in Article 530 Civil Code and so on, which governs the position of power (bezit). Good faith in a subjective sense is an inner attitude or a state of the soul.[37]

Good faith as honesty is also stipulated in Article 1386 of the Civil Code, which states that:

"A payment that is in good faith done to a person who holds the letter of receipt is valid".

The goodwill means here that the paying party does not know that the receiving party is not the creditor. Such a state of the soul is protected by law, so even if the payment is received by a non-creditor but the payment is considered valid.

The second sense of good faith is good faith in the sense of objectivity (propriety). Most jurists based their good faith study in Article 1338 paragraph (3) of the Civil Code, which provides that:

"Approvals (agreements) must be executed in good faith."

However, this verse is not really the only provision in the Civil Code, which regulates good faith. In the Civil Code there is actually a good faith understanding in

[37] P.L. Wery, *Legal Progress of Good Faith in the Netherlands (Perkembangan Hukum Tentang Itikad Baik di Nederland)*, Jakarta: Percetakan Negara RI, 1990), p. 10.

various forms, not just the good faith known in Article 1338 paragraph (3) of the Civil Code only.

Wirjono Prodjodikoro states that:

"Honesty (good faith) in Article 1338 (3) of the Civil Code does not lie in the state of the human soul, but lies in the actions taken by both parties in carrying out the promise, so the honesty here is dynamic, honesty in the sense of dynamic or propriety this is rooted in the nature of the role of law in general, namely the attempt to establish a balance of the various interests that exist in society. In a legal order it is essentially not allowed the interests of others at all pushed or ignored. Society must be a balance sheet that stands in balance." [38]

Subekti states that:

"The meaning of implementing the agreement in good faith is to carry out the review by relying on the norms of propriety and decency." [39]

Good faith in the sense of propriety is also set out in Article 1339 of the Civil Code, which states that:

"A covenant is not only binding on things expressly stipulated therein, but also for everything which by nature of the covenant is required by propriety, custom or law".

Furthermore Article 1965 of the Civil Code provides that:

"Good faith is forever supposed to exist, while whoever points to a bad faith is required to prove it."

In the case of a good faith arrangement contained in the elucidation of Article 45 of the BI Act , stating that decision making by the management of Bank Indonesia is deemed to have fulfilled good faith, if it meets the following elements:

a. Conducted with the intention of not profiting themselves, their families, their own groups and / or other acts indicating corruption, collusion and nepotism;
b. Performed based on an in-depth analysis and a positive impact;
c. Followed by a preventive action plan if the decision is not appropriate;
d. Equipped with monitoring system.

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[38] Wiryono Prodjodikoro, *Principles of Contract Law*, *Op.cit*, p. 87.

[39] Subekti, *Principles of Civil Law (Pokok-Pokok Hukum Perdata)*, Jakarta, PT. Intermasa, 1996, p.41.

The elements in the elucidation of Article 45 of the BI Act as mentioned above, when it is linked to the principle of good faith, it appears that the elements listed in letter a are in good faith subjectively. For the other elements, those listed in letters b to d are good intentions objectively. Thus, the good faith regulated in the Elucidation of Article 45 of the BI Act has both objectively and good intention of good faith in objective way.

Furthermore, if it is related to the existence of legal action in the form of personal loan made by Budi Mulya to the owner of Bank Century amounting to Rp1.000.000.000, - (one billion rupiah), the researcher is of the opinion that the act is a violation of the principle of good faith objectively because Budi Mulya as the management of Bank Indonesia is not appropriate to do the act of borrowing money privately to the owner of Century Bank. This is because the action has the potential to cause a conflict of interest. Nevertheless, the act is in the opinion of the researcher does not violate the principle of good faith in subjectivity that is honesty, because the act of borrowing money is not a criminal act, but is a legal act in the context of civic ties.

The opinion of the panel of judges of the corruption court which stated that the defendant Budi Mulya has committed the act of "Against the Law" (indicated corruption), since the giving of FPJP is considered not given in good faith vide article 45 of the BI Act. This is based on the indictment of the Public Prosecutor's of Corruption Eradication Commission (Jaksa-KPK)

Jaksa-KPK stating that Budi Mulya actions are related to the giving of FPJP and considered as "against the Law" both formally and materially, among other things, the receipt of Rp1,000,000,000.00 (one billion rupiah) from Owner of the Century Bank. There is an obligation for the Board of Governor Bank Indonesia vide Article 42 paragraph (2) BI Act jo. Article 19 PDG No. 9/2/PDG/ 2007 based on the oath of not accepting / giving something that can have conflict of interest with the execution of duty, so based on the opinion of some experts such as Prof. DR. Supanto SH, M.Hum (Criminal Law expert), Prof. DR. Sri Rezeki Hartono SH (Economic Law expert), Hendra Saparini PhD (macroeconomic expert), Prof. Erman Rajagukguk, SH, PhD, acts contrary to such provision can be categorized as an ethical / "Against the Law" violation.

Therefore, from the above-mentioned descriptions, it can be concluded that the success of law enforcement Article 45 of the BI Act as a form of repressive legal protection for Budi Mulya as one of the Heads of Bank Indonesia, the right of the person concerned to face the law enforcement process in court.

III. CONCLUSIONS AND RECOMMENDATIONS

3.1. Conclusions

Legal protection for The management of Bank Indonesia as Government Official is provided in a preventive and repressive manner. The preventive legal protection is regulated in:

a. Article 45 of the Bank Indonesia Act (BI Act);
b. Article 48 Paragraph (1) of the Financial System Crisis Prevention and Treatment Act (the PPKSK Act);
c. Article 6 of the Government Administration Act (the AP Act);
d. Article 1367 Paragraph (3) of the Civil Code (KUHPerdata);
e. Article 50 and 51 Paragraph (1) of the Criminal Code (KUHPidana).

Furthermore, efforts to provide repressive legal protection as an application of Article 45 of the BI Act for the management of Bank Indonesia in performing the duties and authority of Bank Indonesia shall be provided by Bank Indonesia in Legal Aid. Provided of Legal Aid to the management of Bank Indonesia in carrying out its duties and authorities, is intended to:

a. Remain independent and unaffected by any party;
b. No doubt or fear of any criminalization from any party, because with the criminalization of policies will dull the response of policy makers in times of crisis;
c. Protected from personal responsibility for the cost of the policy, as long as it is done in good faith and in accordance with the duties and authorities provided for in the applicable legislation.

3.2. Recommendations

1. In order to obtain optimal legal protection (preventive and repressive), the policy or discretion of the management of Bank Indonesia in the implementation of the LOLR function in the Short Term Liquidity Loans (PLJP) for the regulating of financial system crises, in order to: 1) be consistently guided by the prevailing regulations, namely the BI-Act, the PPKSK Act, the AP Act, Bank Indonesia Regulation concerning FPJP, as well as other legislation such as: the Banking Act, the Financial Services Authority Act, the Eradication Corruption Act, Penal Code and Civil Code; 2) shall be based on objective reasons, taken on the basis of factual, impartial and rasonal conditions; 3) does not create a conflict of interest; 4) is done in good faith, ie decisions and/or policies determined based on the motive of honesty and decency (propriety), as well as for the national interest.

2. It is necessary to refinement of the BI Act related to the regulation of the authority of Bank Indonesia in promulgating regulatory of the financial system crisis, particularly in the provision of central bank LOLR liquidity facility to banks experiencing systemic liquidity difficulties.
3. Based on a decision on the determination of the instability condition (crisis) of the financial system since the coming into effect of the PPKSK Act shall be the responsibility of the President based on recommendations submitted by the KSSK (including the management of Bank Indonesia), it is expected that the President will institutionally provide optimal legal protection to KSSK.

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