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Discretion of Government Officials in the Perspective of Corruption Crime Reviewed from the Theory of Criminal Removal Reason

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ABSTRACT

Providing welfare for all citizens is the goal of the Indonesian state. In government administration, government officials are often faced with concrete social situations urgently to be addressed, while regulations are unclear. To overcome government stagnation, government officials are given the authority to act based on their own considerations, called discretion. The study aims to analyze the discretionary case and find the relationship between discretion in the perspective of corruption and the theory of criminal removal reason. The study finds that Criminal Code regulates Criminal Removal Reasons concerning defending to save on body, soul, or goods of someone/others, not government officials discretion to defend social interest. The Corruption Law does not regulate Criminal Removal Reason. In judicial corruption in Indonesia, Government officials' discretion was not sentenced because the decision/act is based on considerations of urgency, for the public interest, and does not benefit the government officials/others.

Keywords: Corruption Crime, Criminal Removal Reason, Discretion

JEL Classification: D73, K00, K10

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INTRODUCTION

The discretion of government officials is often practiced in Indonesia government administration in which government officials take a policy to deal with an urgent situation in the community amidst a particular risk that can harm state finances. The purpose of defending greater public interest on the one hand but harming the state's finances, on the other hand, is undoubtedly in conflict with the provisions in the law on eradicating corruption due to actions that are against the law, which is the authority abuse (Marbun, 2008). For example, a government official in dealing with the COVID-19 pandemic situation uses development funds to buy the necessary equipment to overcome the pandemic by appointing partners without going through a tender process.

According to Atmosudirjo (1994), discretion is the freedom to act or make decisions from authorized state administration officials. It is needed to complement the legality principle, which states that every act of state administration must be based on the law provisions. However, it is unacceptable for the law to regulate all kinds of position cases of everyday life. This underlines the need for discretion from the state administration consisting of free discretion and bound discretion. Koentjoro (2004) defined discretion as the freedom to act by the state administration or the government (executive) to resolve problems arising in circumstances of compelling urgency, where no regulations are available for resolving them." The main purpose of exercising discretion related to state finances, in general, is to safeguard the greater interest, namely the interests of the public or the state interests. However, should discretion that can harm state finances be punished in criminal law?

Panjaitan (2001) stated that addressing important, urgent issues, at least, involves the following elements:

a. The problems that arise must concern the public interest, namely the interests of the nation and state, the wider community, common people, and development.
b. The problems suddenly emerge outside the preset plan.
c. The state administration has the freedom to resolve on its initiative as the laws and regulations have not regulated it or only regulate it generally.
d. The procedure can not be completed, or less efficiently and effectively established normal administration.
e. If belatedly resolved, it harms the public interest.

This study aims to examine and analyze the regulation regarding the discretion and criminal removal reasons in positive law in Indonesia, the discretion of government officials in the perspective of corruption crime reviewed from the theory of criminal removal reason. This is beneficial to bring legal certainty and justice to the wider community and individuals. The law should be reflected in depth to provide a protection balance to the community and individuals, general defense, and individual defense (Arief, 1996).

LITERATURE REVIEW

Discretion term or discretionary power term are taken from Jermany term: *freies ermessen,* be translated as "free to act" or decision be taken base on individual assessment (iky_ndx, 2010). Therefore, the meaning of *freies ermessen* is the same as discretionary of power (Sadjijono, 2008).

The discretion policy is considered to have fulfilled the formulation of the corruption law. When the government officials commit acts against the formal law and harming state finances, they are threatened with the anti-corruption law. As the foregoing example shows, the appointment of a partner company without a tender process under normal circumstances is an abuse of authority. Another example is using or diverting development funds for other purposes. Such a principle against the formal law seems scary for government officials to take action and make the government's work hampered. Therefore, to ensure flexibility for government officials in carrying out their duties, the discretion principle allows the officials to independently consider and determine the actions to take within the scope of authority granted by legislation.

Criminal law recognizes the criminal removal reasons (*strafuitsluitingsgronden*). They are guidelines for judges not to sentence someone committing crimes despite the actions meeting the requirements of prohibited acts (Sudarto, 1990). According to Remmelink (2003), the criminal removal reasons allow those who commit acts fulfilling a formulation of offense not to be sentenced. Although the current Criminal Code regulates the criminal removal reasons, meaning can only be traced through the history of the formation of the Dutch Criminal Code, *Memori van Toelichting* (MvT). The criminal removal reasons are based on two reasons:

1. Someone cannot be held criminally responsible for his personality; and
2. Someone cannot be held criminally responsible outside his personality.

According to Moejatno (1987), the justification reason is the reason that removes the unlawful character of the act, so that what was done by the defendant then becomes a proper and correct act. The forgiveness reason is the reason where the act committed by the defendant is still against the law, so it is still a criminal act, but he is not convicted because there is no guilt.

Fletcher (2000) proposed three theories of criminal removal reasons: The Theory of Lesser Evils (justification reason); The Theory of Pointless Punishment (forgiving reason); and The Theory of Necessary Defense (justification reason).

In The Theory of Lesser Evils: First, an act that deviates from the rules of norms that have been determined in society can be justified to be carried out to secure interests greater than the danger that occurs. In other words, the danger value is greater than the deviation value. This implies that no act is vindicated unless its benefit oversteps its cost (Fletcher, 2000). In this case, a person who commits acts against the law (crime) can be justified if the acts are carried out on consideration to avoid the threat of greater danger. In other words, the action taken is far less dangerous (or more profitable) than the harm (loss) that will occur if the action is not carried out.

Second, an act that deviates from the rules or norms can be justified if the deviant act is an easy method or tool available to avoid the threat. The deviation is indeed the only way to avoid danger. The conduct is justified only if it is undertaken to avoid the imminent and impending danger of harm (Fletcher, 2000). The action is justified because it is easier to avoid a threat. There is no other action or method to avoid the threat of danger that will befall.

The theory of lesser evils considers the ranking or balance of "more or less" or "benefit" of the action impact. If the act prioritizes a more significant interest or defends a better (more profitable) interest, the act can be justified. The rank or priority of the importance is the measure. Likewise, the act must be carried out through consideration or choice by using a method or tool relatively smaller than the magnitude of the risk. The balance

of the tool also becomes the measure. The act can be justified if a deviation of norms or crime is carried out based on that consideration.

The theory of lesser evils is closely related to the discretion theory. Discretion is carried out because of urgent, important issues. On the one hand, discretion in managing state finances is intended for the public interest to create public welfare. On the other hand, it can state administration officials if it has implications for unlawful acts and/or authority abuse elements.

The discretion of state financial management violates the provisions of Article 3 of Law no. 31 of 1999 concerning the Eradication of Corruption Crime, it fulfills the element of abusing the authority that can harm state finances. However, the discretion in managing state finances is carried out in an urgent situation to overcome government stagnation in the public interest used as a justification. There is a bigger goal: to maintain or save the legal interests of the public/state even though the actions deviate from a statutory provision or are established through nonstandard procedures. When viewed from the perspective of criminal law, such discretion is a justification reason (the reason for eliminating criminals). Nevertheless, there have been no provisions in the Criminal Code or the law on eradicating corruption protecting such actions. There is no provision regarding the discretion of government officials related to the management of state finances as a justification for the corruption law.

RESEARCH METHOD

To conducting this legal research, a normative juridical research type. This research used a statutory law approach, a concept approach, and a case study. The primary legal materials, which consist of various laws and regulations, are:

1. The 1945 Constitution of the Republic of Indonesia;
2. The Criminal Code;
3. Law Number 31 of 1999 concerning Eradication of Corruption Crime in conjunction with Law Number 20 of 2021 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption;
4. Law Number 30 of 2014 concerning Government Administration;
5. Law Number 5 of 1986 concerning State Administrative Court, *juncto* Law Number 9 of 2004 concerning State Administrative Court, *juncto* Law Number 51 of 2009 concerning State Administrative Court;
6. Law Number 17 of 2003 concerning State Finances;
7. Law Number 1 of 2004 concerning State Treasury;
8. Government Regulation in Lieu of Law Number 4 of 2008 concerning the Financial System Safety Net;
9. Decision of the Supreme Court Number 572/K/Pid/2003 Against the Case of Alleged Corruption of Bulog's non-budgetary funds with the Defendant Akbar Tandjung;
10. Decree of The House of Representative of the Republic of Indonesia I63 No. 6/DPR RI/II/2009-2010 concerning Conclusions and Recommendations of the House Questionnaire Committee on the Investigation of Century Bank.

Various reference sources such as scientific reading books about discretionary theory, authority, theories of the criminal removal reason, legal certainty theory, justice theory, statutory theory, criminal theory, legality principles, teachings against the law, and abuse of power, were also studied. In addition, various journals, articles, papers, and other scientific works discussing Bank Century Bail Out policy, criminal law of the criminal removal reason and corruption crime were included.

This study also applied an inductive study to understand something specific to general. The criminal responsibility for the discretion of state financial management starts from an understanding of the criminal removal reason. The Buloggate II case, which the Supreme Court acquitted regarding the alleged corruption case prosecuted under Article (1) sub-b of Law no. 3 of 1971 (currently Article 3 of Law No. 31 of 1999 concerning the eradication of Corruption Crimes), a core element of which is the act of authority abuse, is analyzed by looking at the basic considerations of the Supreme Court, to determine the abuse of authority from the legal aspect of state administration law or to determine the material unlawful in criminal laws. Special circumstances is decided acquittal (not be punished) by the Supreme Court and it is rationale considerations, to build a concept to criminal removal reason in law concerning eradication of corruption crime.

Likewise, the Century Bank bailout case when the Minister of Finance Sri Mulyani and the Governor of Bank Indonesia Boediono as the Financial System Stability Committee (KKSK) based on Government Regulation Lieu of Law No. 4 of 2008 adopted the Century Bank bailout policy, and were examined before the House of Representatives Questionnaire Committee on the Century Bank investigation. The House of representative Questionnaire Committee agreed that the Century Bank Bailout policy could not be criminalized, especially for KSSK, because the policy was taken in an urgent situation based on considerations to save state finances and the country's macroeconomy, which was in a very imminent global financial crisis.

The criminal removal reason can be used to remove the sentence of the perpetrator (the person as the subject), and to remove the sentence of act/behavior (as the object). The criminal removal reason can be distinguished as not be sentenced the perpetrator and not be sentenced the action. Regarding the non-criminalization of actions, this study starts from the theory of lesser evils (Fletcher), "the theory of deviations from norms that are less dangerous".

RESULTS

Indonesian positive law has regulated some types of criminal removal reasons in the Criminal Code of Indonesia. The criminal removal reasons in the Criminal Code just regulates matters relating to defending one’s/other’s body, soul, and/or property individually.

Regulations of Discretion and Criminal Removal Reason in Indonesian Positive Law

Discretionary Regulations

According to Article 1 Number 9 of Law Number 30 of 2014 concerning Government Administration, discretion refers to an action and/or decision that is carried out and/or determined by government officials to defeat concrete problems within the government administration in terms of laws and regulations providing choices, not regulated, incomplete, and/or unclear government stagnation.

Every discretion of government officials must have the purpose regulated in Article 22 paragraph 2 of the Government Administration Law: It is to: 1) facilitate government administration; 2) fill legal voids; and 3) overcom government inactivity in particular circumstances for public interest and benefit. The use of discretion must be based on discretionary reasons regulated in Article 23 of Government Administration Law: 1) based on the provisions of laws and regulations providing choices of decisions and/or

actions; 2) the laws and regulations do not regulate; 3) incomplete or unclear laws and regulations; and 4) government stagnation for the wider interest.

The discretion must also meet the requirements stipulated in Article 24 of the Government Administration Law: 1) under the purpose of discretion; 2) conforming to the provisions of laws and regulations; 3) compatible with the General Principles of Good Governance (AAUPB); 4) on the basis of objective reasons; 5) avoiding a conflict of interest; and 6) established in good faith.

According to Article 15, paragraph 1 of Government Administration Law, the limits of discretionary authority of government officials are 1) within the grace period of authority; 2) within the area where the authority applies; and 3) within the scope of the authority field or material. The procedures for the use of discretion according to Article 25 of the on Government Administration are: 1) the discretion potentially changing budget allocations must obtain approval from the official's superior in accordance with the provisions of the legislation except in an emergency, urgent and/or natural disaster; and 2) the discretion to overcome government stagnation in an emergency and/or natural disaster must provide notifications and reports to the official's superior after the discretion.

According to Article 26 of the Government Administration Law, officials who use discretion with the potential to change budget allocations: 1) must use the intent, purpose, substance, administrative and financial impacts; 2) must submit a written application for approval to the official's superior; 3) within five working days after the application file is received, the official's superior determines approval, improvement instructions, or rejection; and 4) if rejected, the official's superior must establish the written reasons.According to Article 28 of the Government Administration Law, the officials who use discretion in situations of public unrest, emergency, urgent and/or natural disasters: 1)must provide spoken or written notifications to the official's superior along with a description of the intent, purpose, substance, and administrative and financial impacts at the most five working days after discretionary use; and 2) make a report to the official's superior prior to five working days from the use of discretion.

Setting the Criminal Removal Reasons in Positive Law

The justifying reason is based on:

1). Defending forced (*noodweer*), Article 49 paragraph (1) of the Criminal Code
"Not punished, whoever commits an act of forced defense for himself or for another person, honor, decency or property for himself or for another person, because there is an attack or threat of attack that is very close at that time which is against the law."
2) Implementing the provisions of the law, Article 50 of the Criminal Code
"Whoever commits an act to implement the provisions of the law (*wettelijk voorschrift*) will not be punished."
3) Carrying out the order of the position/supervisor, Article 51 paragraph (1) of the Criminal Code
"Whoever commits an act to carry out the order of office given by the competent authority is not punished."

The basis for forgiving reason are:

1) Mental Disorders, Article 44 paragraph (1) of the Criminal Code (see Hamdan, 2012),
"Those who commit acts that cannot be accounted for are not punished because their souls are disabled in growth or their souls are disturbed due to illness."

2) Forced defense that exceeds the limit, Article 49 (2) of the Criminal Code
   "A forced defense that goes beyond the limits, directly caused by a severe mental shock due to the attack or the threat of attack, shall not be penalized."
3) Position order without authority, Article 51 paragraph (2)
   "An order of office without authority does not result in the abolition of the crime unless the one who is ordered in good faith thinks that the order was given with authority and its implementation includes the work environment."
4) Coercion, Article 48 of the Criminal Code
   "Whoever commits an act due to the influence of coercive power (*overmacht*) will not be punished."

Among the criminal removal reasons in the Criminal Code above, none discusses the non-criminalization of the actions of government officials for harming state finances. The criminal reasons in the Criminal Code only regulate matters relating to a person not being convicted for defending one's /other's personal interest; nothing related to the defense of public interests, the general welfare, and/or the state economy in the administration of government.

DISCUSSION

The discretion of government officials in the perspective of corruption, based on the case study of the Akbar Tandjung case. The case was decided free, not be sentenced by the Supreme Court, it can be seen that in judicial practice of corruption, discretionary power has been allowed as a reason to remove the punishment to the defendant on the grounds of the actions taken by government officials.

Discretion of Government Officials in the Perspective of Corruption Crimes

Corruption crime have regulated in Law Number 31 of 1999 concerning Eradication of Corruption Crime in conjunction with Law Number 20 of 2021 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption. There are some types of actions to different some styles of corruption.

Elements of Corruption in the Law on the Eradication of Corruption Crimes Article 3 of Law no. 31 of 1999 stated that every person who with the aim of benefiting himself or another person or a corporation, abuses the authority, opportunity, or facilities available to him because of a position or position that can harm state finances or the state economy, shall be sentenced to life imprisonment or a minimum imprisonment 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) (Law Number 31 of 1999 in conjunction with Law Number 20 of 2001. Article 3)."

The elements of the crime are:
a) everyone,
b) to benefit oneself, or another person, or a corporation
c) misuse the authority, opportunity or facilities available to him because of his position or position, and
d) detrimental to state finances or the state economy.

Article (1) sub-b of Law no. 3 of 1971 stated that punished for a criminal act of corruption, whoever intends to benefit himself or another person or an entity, abuses the authority, opportunity, or means available to him because of his position or position, which can directly or indirectly harm state finances or the state economy..."
The elements of the crime are:

a) whoever,
b) to benefit oneself, or another person, or an entity,
c) misuse the authority, opportunity, or facilities available to him because of his position or position, and
d) may directly or indirectly harm state finances or the state economy.

The elements of a crime in Article 3 of Law no. 31 of 1999 and Article (1) sub-b are similar, where the main element is the abuse of authority, opportunity or facilities available. Implementing the element in the *conditio sine cuanon* from the textual aspect of the Anti-Corruption Law does not contain the formulation or parameter of "abuse of authority". According to Arief (1996), this condition makes the concept and parameters of authority abuse unclear. In judicial practice, the propriety principle drawn from *"materialele wederrechtelijk*" is used as the abuse parameter (Ferry, 2014).

Currently, the notion of "authority abuse" committed by a legal subject has been regulated in Law No. 30 of 2014 concerning Government Administration. However, juridically, the definition of authority abuse does not exist as it only includes a prohibition on abusing authority. As stated in Articles 17 and 18 of Government Administration Law, government agencies and/or officials are forbidden by law from abusing their authority, including: a) exceeding authority (i.e., exceeding the office term or the time limit for the authority validity, exceeding the limits of the enactment authority area, and/or contrary to the provisions of laws and regulations); b) mixing up authority (beyond the granted scope of the field or material and/or contrary to the purpose of the given authority); and/or c) acting arbitrarily (without the basis of authority, and/or at contrary with a court decision with permanent legal force).

The Alleged Corruption Crime of Akbar Tanjung (Buloggate II)

This case occurred when on February 10, 1999, in a limited meeting between B.J. Habibie (the former President of the Republic of Indonesia), Akbar Tandjung as Minister of State Secretary, Prof. Dr. Rahardi Ramelan as the interim official of the Head of Logistics, and Prof. Dr. Haryono Suyono as Coordinating Minister for People's Welfare discussed the distribution of basic necessities to the poor to overcome the food crisis. The president agreed that Bulog's non-budgetary fund budget of Rp. 40,000,000,000 is to be used to fulfill the interests of purchasing and distributing the basic necessities, provided that its use must comply with applicable laws and regulations. He also directly appointed Akbar Tandjung to coordinate the implementation of by involving the relevant ministers (Syamsudin, Ilyas, & Badeona, 2004).

On February 15, less than five days after it was decided that there would be a disbursement of IDR 40,000,000,000 for poverty alleviation, the Raudatul Jannah Foundation had applied to distribute the necessities with the disposition of the Coordinating Minister for People's Welfare (Haryono Suyono). The minister assigned it to Akbar Tandjung. On February 18, Dadang Sukandar and Winfried Simatupang presented the plan to distribute the basic food items before Akbar Tandjung at the State Secretariat. Akbar Tandjung immediately agreed and appointed them as partners to carry out the purchase and delivery. On April 20, Akbar Tanjung received checks of IDR 40,000,000,000 and, on the same day, handed over to Dadang Sukandar. The checks were cashed by Dadang. Several checks dated April 20 cashed in April 1999 contained copies of the ID cards of the people who cashed them, namely Suyanto and Imam Kuncoro. Suyanto, who cashed a check three times, each worth IDR 2,000,000,000, has his address at Mampang, South Jakarta, while Imam Kuncoro, who has withdrawn checks worth IDR 3,000,000,000 three times, has his address at Bekasi.

Akbar Tandjung never gave a receipt of Rp.40,000,000,000, which was given in several terms and several checks (Indonesian Judicial Monitoring Society FHUI, 2015).

This case is recognized by the Supreme Court that there is a discretion that cannot be convicted, which is state administrative law. When the case occurred, the parameters for determining a discretion based on a law not written in state administrative law are based on theories of discretionary authority (discretion). Meanwhile, by criminal law, the parameters used to determine the criminal removal reason so that the act cannot be punished are based on the written provisions in the Criminal Code Article 51 paragraph 1, regarding job order cannot be punished.

Prior to the issuance of the Government Administration Law, the notion of abuse of authority by government officials in the Corruption Crime Act was interpreted directly by judges who tried corruption cases through the opinions of experts, doctrine, or jurisprudence, which explained the elements of abuse of authority by government officials. The Government Administration Act regulates the supervision and assessment of authority abuse through the Government Internal Supervisory Apparatus (APIP). For more details, the Supreme Court issued Supreme Court Regulation No. 4 of 2015 concerning Procedural Guidelines in the Assessment of Elements of Abuse of Authority. The person authorized to receive, examine, and decide on the application for an assessment of authority abuse in the decisions and/or actions of government officials before the criminal proceedings, is the State Administrative Court. This means that if the criminal examination process begins, the State Administrative Court is no longer authorized to receive, examine, assess and decide the abuse in the case concerned. Thus, if a corruption crime case is examined at the Corruption Court, the Court has the authority to prove the authority abuse.

Century Bank Bailout Case

Century Bank Bailout Policy was carried out by the Financial System Stability Committee (KSSK) based on the authority granted by Government Regulation in Lieu of Law Number 4 of 2008 concerning the Financial System Safety Net (JPSK), which took effect on October 15, 2008. This case started around October 2008 when the global financial crisis threatened the world, especially the United States. It began with the maturity of around US$ 56 million of securities belonging to Century Bank eventually failed to pay. The bank also suffered from liquidity issues. At the end of October 2008, its CAR (Capital Adequacy Ratio) was minus 3.52%. The liquidity difficulties continued in the to clear or to pay the funds requested by the customers due to the failure to provide funds (pre-funds), resulting in a rush to the bank. Bank Indonesia held a consultation meeting with the Minister of Finance, Sri Mulyani. On November 20, 2008, Bank Indonesia sent a letter to the Minister of Finance with a notification that Century Bank was declared a failed bank with a systemic impact and required further handling. Bank Indonesia proposed a rescue measure by the Deposit Insurance Corporation (LPS). Bank Indonesia announced that Bank Century's CAR (Capital Adequacy Ratio) was minus 3.52 percent. It was decided to increase the CAR to 8 percent by increasing the capital requirement of IDR 632 billion. Century Bank was handed over to the Deposit Insurance Corporation. After that, the decision was issued to ban Robert Tantular, a shareholder of Century Bank and the seven other board members. On November 23, 2008 (three days after it was decided by the KKSK consisting of the Minister of Finance, Bank Indonesia, and the Deposit Insurance Corporation) the Deposit Insurance Corporation decided to provide a bailout amounting to IDR 2.7 trillion to increase the CAR to 10 %. The Deposit Insurance Corporation also provided funds of IDR 2.2 trillion to meet Century Bank's soundness level in early

December. At the end of 2008, Century Bank was reported to have suffered a loss of IDR 7.8 T during 2008.

In February 2009, the Deposit Insurance Corporation again provided funding assistance of IDR 1.5 Trillion. Finally, in May 2009, Bank Century was released from the special supervision of Bank Indonesia. In July 2009, the House of Representatives of the Republic of Indonesia began to sue for the cost of saving Century Bank, which was deemed too large. However, in the same month, the Deposit Insurance Corporation still provided an injection of IDR 630 Billion. In August 2009, the House of Representatives summoned the Minister of Finance, Bank Indonesia, and the Deposit Insurance Corporation to ask for an explanation regarding the swelling of the capital injection of up to IDR 6.7 Trillion, even though the government only asked for approval of IDR 1.3 Trillion only. Also, in the meeting with the House of Representatives, the Minister of Finance emphasized that there would be a systemic impact on Indonesian banks if Century Bank was closed (Media Indonesia, 2009).

The conclusions of the House of Representatives in option A, approving the Century Bank Bailout:

1. The decision to grant Short Term Funding Facility to Century Bank is the authority of Bank Indonesia in accordance with Government Regulation Lieu of Law Number 2 of 2008 to prevent economic instability. There is an abuse of authority in the mechanism.
2. The determination of Century Bank as a failed bank, which is suspected of having a systemic impact, was based on Government Regulation Lieu of Law 4 Number of 2008 to prevent Indonesia from an economic crisis due to the global crisis.
3. The decision of the Financial System Stability Committee that Century Bank failed to have a systemic impact was to save the national financial and banking system.
4. There are strong indications that the determination of Century Bank as a failed bank is not accompanied by accurate data and the principle of prudence. This is rational since the decisions were made in times of crisis.

This implies that the bailout policymakers cannot be criminalized because the policy was taken to save state finances and the country's economy, which was in danger of the global monetary crisis.

Discretion of Government Officials in the Perspective of Corruption Crime Reviewed from the Theory of Criminal Removal Reasons

Based on the meaning and condition of discretion, the theory of criminal removal reason (Lesser Evils Theory), Table 1 compares Akbar Tandjung case and Century Bank Bailout Case.

Table 1. Summary of Suitability Elements

No	Elements of Discretion according to Marcus Lukman	Elements of Lesser Evils Theory	Elements of action in the Akbar Tandjung Case	Elements of action in the Century Bank Bailout case
1	Must be for the public interest (not for personal/other people's	To secure the greater interest	- The importance of community staples in an area; - The Secretary	- To maintain the stability of the state financial system and prevent a

	interests)		of State (Akbar Tandjung) has no personal gain.	monetary crisis - Bank Century Bailout policymakers (Minister of Finance and Governor of BI) do not get personal benefits
2	The problem appears suddenly.	There is an imminent danger.	The state of emergency is the danger of starvation.	An emergency is the threat of a global monetary crisis with a systemic impact, potentially making customers withdraw their money from banks.
3	The per-law regulations generally regulate, do not regulate, or provide choices.	There is a choice of actions (legal interests) to be carried out.	There are no rules for the use of non-budgetary funds for the procurement of goods and services.	There are two choices of legal interests: the obligation to close Century Bank as a failed bank with a risk of a rush in healthy banks, saving Century Bank to prevent the monetary crisis.
4	The procedure cannot be completed according to normal administration.	There is an act of deviation from the norm (acts against the formal law).	Without going through a tender, they only directly appoint partners distributing the basic necessities without any control.	Creating a new rule to increase the CAR of Century Bank from minus 3.52% to 10%, leading to the loss of state money on a micro basis, is IDR 6.7 T.
5	If the problem is not quickly resolved, it will harm the public interest.	The deviant act is a method or means available to prevent harm/loss.	If groceries are not distributed quickly, many people will starve, get sick, or die.	If the threat of a monetary crisis is not prevented, the money in almost all banks will be wiped out (IDR 600 T) and could harm the state economy.

The elements of the offense in the Akbar Tanjung case and the Century Bank Bailout case meet the elements of discretion and the elements of the criminal removal reason for the Theory of Lesser Evils, as a justification reason. Thus, it can be said that the Akbar Tandjung (Buloggate II) Discretion and the Century Bank Bailout Discretion are the criminal removal reason. Since the Buloggate II Discretion and Century Bank Bailout Discretion are discretion in the field of state financial management, a concept

can be drawn from these two discretions that the discretion of government officials with loss implications of state finances is a criminal removal reason.

CONCLUSION

The regulations regarding discretion in the Government Administration Law facilitate government administration, fill legal voids, and overcome government stagnation. The regulation regarding the criminal removal reason in the Criminal Code does not regulate discretion as to the criminal removal reason. The discretion of government officials in the perspective of corruption is not an element of abuse of authority so that the act cannot be punished. From the perspective of corruption crime, be reviewed from the theory of the criminal removal reason, the discretion is closely related to the theory of Lesser Evils, so it is a criminal removal reason.

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