

Kriminalisasi terhadap kebijakan aparatur negara dalam tindak pidana korupsi = The criminalization of the state apparatus policy in corruption

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Abstrak

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Tesis ini membahas kebijakan Aparatur Negara dalam dugaan tindak pidana korupsi. Dengan mengkaji konsep dan kewenangan kebijakan Aparatur Negara dalam Hukum Administrasi dan Hukum pidana. Kebijakan tersebut dinilai dari kedua pendekatan ilmu hukum tersebut untuk menilai kebijakan Aparatur yang bagaimana dapat dikriminalisasikan sebagai tindak pidana korupsi. Dalam tesis ini yang ingin didapatkan oleh penulis adalah (1) Apakah suatu kebijakan Aparatur Negara yang melanggar ketentuan peraturan perundang-undangan dapat dimungkinkan untuk dikenakan sanksi pidana; (2) Bagaimana terhadap suatu kebijakan Aparatur Negara yang di dalamnya mengandung unsur perbuatan melawan hukum atau unsur penyalahgunaan wewenang dalam tindak pidana korupsi; (3) Apakah terhadap kebijakan yang dikeluarkan oleh Aparatur Negara yang memberikan keuntungan kepada orang lain atau korporasi dan menimbulkan kerugian negara dapat dikenakan tindak pidana korupsi sedangkan dia tidak ada menikmati hasil tindakannya. Penelitian ini menggunakan metode penelitian dengan pendekatan yuridis normatif dengan menggunakan data sekunder seperti dari buku-buku dan peraturan perundang-undangan yang terkait dengan tindak pidana korupsi, kerugian negara, penyalahgunaan wewenang dan literatur-literatur terkait lainnya. Kebijakan Aparatur Negara harus berdasarkan peraturan perundang-undangan. Seorang pejabat dilarang melakukan penyalahgunaan wewenang yang melanggar ketentuan perundang-undangan. Namun disisi lain pejabat juga diberikan hak kebebasan dalam mengambil kebijakan untuk kepentingan orang banyak bahkan kalaupun undang-undang tidak mengaturnya dapat diterapkan berdasarkan AAUPB. Namun apabila kebijakan tersebut ada unsur mens rea (niat jahat) dan dilakukan dengan sengaja maka kebijakan Aparatur Negara tersebut dapat diminta pertanggungjawab pribadi bukan jabatan atas perbuatannya tersebut. Kalau perbuatan itu tidak ada unsur mens rea maka masuk kedalam ranah hukum administrasi atau hukum perdata. Pada saat ini kebijakan Aparatur Negara telah masuk dalam kategori kriminalisasi. Hal ini terjadi karena adanya kesalahan dalam pemahaman dimana kerugian negara ditempat sebagai bukti utama telah terjadi korupsi atas perbuatannya yang melawan hukum atau menyalahgunakan wewenang tanpa diikuti adanya unsur koruptif. Padahal dalam banyak kasus kerugian negara ini terjadi karena adanya kesalahan administratif atau kecurangan dari pihak pemenang tender yang memanipulasi barang dan data sehingga tidak sesuai spesifikasi yang mana dokumen tersebut dipalsukan dan dibuat seolah-olah sah dan legal. Oleh karenanya, dengan lahirnya Undang-Undang No. 30 Tahun 2014 tentang Administrasi Negara diharapkan dapat memberikan perlindungan akan kriminalisasi terhadap putusan dan/atau tindakan Aparatur Negara yang di dalamnya tidak ada unsur koruptifnya.

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ABSTRACT

This thesis examines the policy of the State Apparatus in alleged corruption. To examines the concept and authority policy of the State Apparatus in Administrative Law and Criminal Law. The such policy is assessed from two approach the science of law to assessing how policies Apparatus which can be criminalized as an act of corruption. In this thesis that want achieved by the author are (1) Does a State Apparatus policies that violate the provisions of the legislation can be subject to criminal sanctions; (2) When is a policy of the State Apparatus can be regarded fulfill the elements of tort or elements of abuse of power in corruption; (3) A State Apparatus policies that provide benefits to another person or corporation and causing state losses while he did not get to enjoy the results of his conduct, whether such conduct may be subject to

corruption. This research uses research methods with normative juridical approach by using secondary data as the basis for this research as from books and legislation relating to corruption, state losses, abuse of power and other related literature and also supported by directly interviews to some of prosecutor in corruption. State Apparatus policy should be based law and legislation. A government official is prohibited do abuse of power that violate the statutory

provisions. On the other hand the government official also granted the right of freedom in making decisions for the public good even if the law does not yet set such, the government official can make policy based on the Good Governance Principles. However, if the such policy has element of mens rea (malice) and there is deliberate and realized then the policies of the State Apparatus may be subject to responsibility in corruption. If the conduct did not have element mens rea then

his conduct entered into the administrative law or civil law. At this time the policy of the State Apparatus has been included in the category of criminalization in corruption. This occurs because of an error in understanding where state losses in place as the primary evidence of corruption has occurred for his conduct against the law or abuse of power while his conduct without being followed by the corrupt elements. Therefore, there are cases of state losses caused to

administrative error or fraud, or because of defective juridical. To publication of Law No. 30 Year 2014 on the State Administration as a form protection to the criminalization of the decision and / or conduct of State Apparatus in which there is no element of corruptive; This thesis examines the policy of the State Apparatus in alleged corruption. To

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