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Volume 62 | Issue 11 | November 2023
DOI: 10.5281/zenodo.10279029

Immunity Rights of Financial Services Authorities after the Enactment of Law Number 4 of 2023 Based on the Principle of Equality before the Law

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Abstract

The formulation of Article 45A paragraphs 1 and 2 and Article 48C paragraphs 1 and 2 of Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector/ Undang-Undang Nomor 4 Tahun 2023 tentang Pengembangan dan Penguatan Sektor Keuangan (P2SK Law) provides impunity for every Indonesia's Financial Service Authority/Otoritas Jasa Keuangan (OJK) official and employee, however, It turns out that there has been no explanation of the phrase "good faith" as one of the elements and limits of absolute impunity for the OJK, so this needs to be studied and researched. Furthermore, it is necessary to examine the principle of equality before the law in Indonesia as guaranteed in the constitution to avoid ambiguity. The research problem refers to the impunity of the Financial Services Authority in Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector and the legal consequences of the impunity of the Financial Services Authority on the principle of equality before the law. This research method uses normative juridical data collection techniques through literature study, so that the research data is secondary data. The research results show that the concept of limited impunity is contrary to the 1945 Constitution Article 28D paragraph 1, Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 Articles 2 and 3, Law Number 30 of 2014 Article 19, and Law Number 5 of 1986 Article 1, paragraph 3. Limited impunity is indeed contrary to the principle of equality before the law, but it does not close the scope for bringing the OJK to justice. However, it is still considered difficult because "good faith and conformity with the provisions of laws and regulations must be proven before the Court", plus a sentence indicating that the P2SK Law prioritizes the principle of presumption of innocence for some officials.

Keywords: *Immunity Rights, Financial Services Authority, Equality before the Law.*

INTRODUCTION

Reform in the financial sector has high urgency in increasing the intermediation role of the financial sector, as well as strengthening the resilience of the national financial system. A deep, innovative, efficient, inclusive, trustworthy, strong and stable financial sector will support strong, balanced, inclusive and sustainable economic growth, which is very necessary in realizing a just, prosperous and prosperous Indonesian society based on Pancasila and the 1945 Constitution of the Republic of Indonesia.

Currently, Indonesia's financial sector is still experiencing many fundamental problems. The proportion of assets in the national financial sector is not yet evenly distributed. The banking sector, which is a source of short-term financing, is still very dominant compared to other financial sectors. The portion of assets in the non-bank financial industry, which is a source of long-term funds, which are expected to support development financing, is still relatively small. This condition indicates that the collection of funds by the financial industry

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is still relatively limited, while the potential for deepening the national financial market is still quite large.

In the banking sector, fundamental problems are reflected, among other things, in high loan interest rates, as well as disparities in the number of accounts and savings between small and large customers[1]. The problem is also reflected in the low market capitalization of shares and national bonds compared to other countries, as well as the limited financial instruments for investment and hedging risk management, especially for complex and high-risk financial products[2]. On the other hand, the Indonesian financial sector also faces challenges from the emergence of complex and high-risk financial instruments such as crypto and the assessment of financial sector governance and law enforcement in various recent assessments is also low.

Apart from fundamental problems, the financial sector also faces various external challenges such as technological disruption and the emergence of new financial risks related to climate change and the geopolitical situation. Human resources in the financial sector are also still lagging behind, both in quantity and quality. With a number of problems and challenges, reform is needed in the financial sector. This financial sector reform is expected to deepen and increase the efficiency of Indonesia's financial sector, through efforts to expand reach, products and investor base, promote long-term investment, increase competence to support efficiency, strengthen risk mitigation, and increase investor and consumer protection. This reform in the financial sector is a continuation of comprehensive reform such as in the real sector through Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation, in the field of taxation through Law Number 7 of 2021 concerning Harmonization of Tax Regulations, as well as in the field of balancing finance through Law Number 1 of 2022 concerning Financial Relations between the Central Government and Regional Governments.[3]

From a regulatory perspective, the regulatory legal framework regarding the financial sector is spread across various laws, some of which are quite old so they are not yet optimal in accommodating the regulation and supervision of the latest activities, products and developments in the financial industry which continues to experience rapid and rapid development. Thus, to realize efforts to reform the financial sector as a whole, a legal basis is needed that is in accordance with the latest developments in the financial industry through improvements to legislation that are carried out comprehensively and integrated in 1 law regarding the financial sector using the omnibus method through Law on Development and Strengthening of the Financial Sector.

This law reforms the financial sector by regulating institutions and financial system stability and developing and strengthening the industry. Therefore, this Law regulates strengthening supervisory and regulatory relations between institutions in the financial sector in order to realize Financial System Stability, in this case between the Financial Services Authority, Bank Indonesia, the Deposit Insurance Corporation and the Ministry of Finance. One of them is through the Financial System Stability Committee as a macroprudential and microprudential supervision mechanism in the financial system safety net. Furthermore, strengthening the authorized institutions as regulators and supervisors of the financial sector is carried out to maintain the stability of the financial sector industry and increase public trust.

From the description above regarding the financial sector, Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector has been promulgated by President Joko Widodo. Promulgated by Minister of State Secretary Pratikno in Jakarta on January 12 2023, it is an omnibus law which changes, deletes and/or establishes new

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regulations for 17 laws related to the financial sector. Law Number 4 of 2023 concerning Development and Strengthening of the Financial Sector was formed with the aim of encouraging the financial sector's contribution to inclusive, sustainable and fair economic growth in order to improve people's standard of living, reduce economic inequality and create a prosperous, advanced and dignified Indonesia.

The presence of law in society is to integrate and coordinate interests that usually conflict with each other. Therefore, the law must be able to integrate it so that conflicts of interest can be reduced to a minimum.

To understand the meaning of law, stated by R. Soeroso, that law is a collection of regulations made by the authorities with the aim of regulating social life which has the characteristics of commanding and prohibiting and has a coercive nature by imposing punitive sanctions for those who violate them. According to Mochtar Kusumaatmadja, an adequate understanding of law must not only view the law as a set of rules and principles that regulate human life in society, but must also include institutions or institutions in the processes needed to realize the law in reality.

According to J.C.T. Simorangkir and Woerjono Sastropranoto law is coercive regulations that determine human behavior in the social environment which are made by official authorities. According to Soedjono Dirdjosisworo, the meaning of law can be seen from eight meanings, namely law in the sense of rulers, law in the sense of officers, law in the sense of attitude of action, law in the sense of a system of rules, law in the sense of a network of values, law in the sense of legal order, law in meaning of legal science, law in the sense of legal discipline. Several meanings of law from various points of view put forward by Soedjono Dirdjosisworo illustrate that law is not merely written statutory regulations and law enforcement officials as currently understood by the general public who do not know about the law. But the law also covers things that actually exist in society[4].

In terms of understanding law there is the concept of legal construction. There are three types or three kinds of legal construction, namely, first, legal construction by contrast. The purpose is to interpret the law between the rules in the legislation and the case or problem at hand. Second, narrowing legal construction is limiting the legal interpretation process contained in statutory regulations to the actual situation. Third, expanding legal construction, namely construction that interprets the law in a way that broadens the meaning at hand so that a problem can be ensnared in a statutory regulation. According to Hans Kelsen, law is a normative science and not a natural science[5]. Hans Kelsen further explained that law is a social technique for regulating people's behavior[6].

With this law, legal protection is needed. According to Fitzgerald, citing the term legal protection theory from Salmond, the law aims to integrate and coordinate various interests in society because in a traffic of interests, protection of certain interests can be carried out by limiting various interests on the other side. The legal interest is to deal with human rights and interests, so that the law has the highest authority to determine human interests that need to be regulated and protected. Legal protection must look at the stages, namely legal protection is born from a legal provision and all legal regulations provided by the community which are basically an agreement of the community to regulate behavioral relations between members of the community and between individuals and the government which is considered to represent the interests of the community[1].

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According to Satjipto Rahardjo, legal protection is providing protection for human rights that are harmed by other people and this protection is given to the community so that they can enjoy all the rights granted by law[8]. Furthermore, according to Philipus M. Hadjon, legal protection for the people is a preventive and repressive government action. Preventive legal protection aims to prevent disputes from occurring, which directs government action to be careful in making decisions based on discretion and repressive protection aims to prevent disputes from occurring, including handling them in judicial institutions[9].

In accordance with the 1961 Vienna Convention, the definition of the right of immunity is immunity from civil and criminal jurisdiction that cannot be contested. The right to immunity is not only enjoyed by state officials, but also includes their family members. Immunity and privileges for state officials can be categorized in two terms, namely inviolability and immunity[10]. Inviolability is only intended for immunity against government organs or instruments of power in the recipient country, and immunity against all disturbances that could be detrimental as well as the right to obtain protection from government officials in the recipient country. Meanwhile, immunity is intended as immunity from the jurisdiction of the recipient country's courts, both in the field of criminal law and the field of civil law. The right to immunity itself is not something new in Indonesia. Various individuals in certain positions have been protected by the right to immunity in their work, for example: Legislative Members, Ombudsman, and Advocates. From several things mentioned above, the right to immunity is given to implementers of Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector.

However, the problem is that Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector has an impact on many parties, including the Financial Services Authority of the Republic of Indonesia OJK. One of the new regulations for the OJK which was issued from Law Number 4 of 2023 concerning Development and Strengthening of the Financial Sector is contained in Article 45A paragraphs 1 and 2 in Article 14 of Law Number 4 of 2023 concerning Development and Strengthening of the Financial Sector which amends the Law -The Banking Law as well as Article 48C paragraphs 1 and 2 of Article 15 of the P2SK Law which amends the Sharia Banking Law which reads the same as follows:

The Chairman of the Board of Commissioners of the Financial Services Authority, Deputy Chairman of the Board of Commissioners of the Financial Services Authority, members of the Board of Commissioners of the Financial Services Authority, as well as officials and employees of the Financial Services Authority who are related to the implementation of this Law cannot be prosecuted either civilly or criminally if they carry out their duties based on in good faith and in accordance with the provisions of laws and regulations. All actions, including decisions taken based on this Law, are not the object of a lawsuit that can be submitted to the state administrative court.

The formulation of Article 45A paragraphs 1 and 2 and Article 48C paragraphs 1 and 2 of the Law above is the conceptual framework for the right to immunity for every OJK official and employee. Apart from that, the norms in this article can be interpreted as part of the protection for every OJK official and employee from anything that could interfere with the duties, functions and authority of the OJK, especially in the banking sector.

In Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector, there is also no definition or explanation of the phrase "good faith" which is one of the elements and limits of the absolute and absolute right to immunity from the OJK, so

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this needs to be studied and researched. Further to avoid ambiguity in the OJK immunity rights in question.

Apart from that, it is also necessary to examine what actions and decisions based on the Banking Law and Sharia Banking Law can be the object of a State Administration lawsuit, as well as why the actions and decisions in question can be excluded from being the object of a State Administration lawsuit, especially the Law. The State Administrative Court only mandates exceptions for every policy issued in situations of war, danger, natural disasters, or other urgent and extraordinary circumstances.

This right to immunity from the OJK has only been applied to the banking sector, and through Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector, OJK investigators are the only ones who can carry out investigations into criminal acts in the financial services sector.

According to researchers, this right is being debated because it is considered inconsistent with the principle of equality before the law in Indonesia as guaranteed in the constitution which firmly states that all citizens have equal standing under the law. Equality before the law is one of the most important principles in modern law. This principle is one of the cornerstones of the Rule of Law doctrine which has also spread to developing countries such as Indonesia. The principle of the rule of law teaches that communication and social interaction consisting of various community elements interact and transact to achieve common goals and ideals. That the order of life and communication between individuals in a community refers to the agreed rules of the game and is used as a benchmark and reference for the parties in carrying out legal relations and actions. On the basis of this concept, there is no arbitrariness carried out either by law enforcers or by justice seekers, thus giving birth to a civil society where individuals as people or citizens have the same and equal position before the law, equality before the law, in this case related to the immunity rights of the Financial Services Authority following Law Number 4 of 2023 concerning Development and Strengthening of the Financial Sector.

METHOD

In this research, the type of research used is normative legal research/normative juridical legal research. This research was conducted to examine the immunity rights of the Financial Services Authority after Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector in terms of the principle of Equality before Law. The data used in this research includes primary data and secondary data. Primary data is data collected directly from the main source[11]. Meanwhile, secondary data in this case consists of three legal materials, namely primary legal materials, secondary legal materials and tertiary legal materials.

In this research, data collection was collected based on the problem topic by conducting a literature study, namely the researcher collected data from various laws and regulations used in research, books, articles, scientific journals, papers, research results of legal experts and related newspaper clippings, with the problem under study.[12] The collected data is then classified to facilitate analysis and construction. This research uses the Statute Approach and the conceptual approach[13].

The data that has been obtained is then analyzed using a qualitative analysis approach, namely by observing the data obtained and connecting each data obtained with the legal provisions and principles related to the problem being studied. inductive logic, namely thinking

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from specific things to more general things, using normative tools, namely legal interpretation and construction and then analyzing using qualitative methods so that conclusions can be drawn using a deductive method which produces a general conclusion regarding the problems and objectives study[14].

DISCUSSION

The Urgency of Providing Immunity to the Financial Services Authority

Based on Article 1 of Law Number 21 of 2011, it is stated that the OJK is an independent state institution, free from interference from the government and/or other parties except for matters that are expressly regulated in law.

After the birth of the P2SK Law, OJK was not only independent from government influence but based on the formulation of Article 45A paragraphs (1) and (2) and Article 48C paragraphs (1) and (2) of the P2SK Law, it provided immunity for every OJK official and employee who made a mistake in establish policies as long as they are in line with duties and authority and are carried out in good faith.

The absolute nature of an economic committee similar to the OJK was born in Indonesia in the context of banking restructuring after the 1998 economic crisis, which at that time was formed under the name of the National Banking Restructuring Agency ("IBRA"). One of the duties and authorities of IBRA is to supervise, provide guidance and restore efforts, including the restructuring of banks that Bank Indonesia has declared unhealthy, as well as taking other legal actions necessary to restore unhealthy banks.

Basically, the urgency of granting immunity rights to the OJK can be understood to maintain the independence of the OJK in its function as supervisory independence. The supervisory function in the administration of the financial sector can be said to be a very important and crucial element. This is because the financial sector is a sector that has direct contact with the wider community, which is the essence and principle of financial institutions as intermediaries. On-site inspections and off-site monitoring, regulation of sanctions, and law enforcement (including revocation of permits/licenses) are tools/instruments of supervisory institutions to ensure the stability of the financial system.

Even though independent supervision has a vital role in the stability of the financial sector, it is also very difficult to enforce and guarantee a supervisory system compared to other dimensions of independence. This is because, to create an effective monitoring system, this function is usually carried out invisibly. But on the other hand, this actually results in vulnerability to interference from other parties, both from politics and the industry being monitored.

In certain cases, this will extend the life of the company even though it is insolvent (and will result in unhealthy competition and higher costs for taxpayers at the next level), which on the other hand will of course have implications for stability sector and ultimately leads to systemic problems.

So the urgency of providing immunity to the OJK can be said to ensure the independence of the OJK in its supervisory function, such as the imposition and enforcement of sanctions, because this is difficult, even though the effectiveness of the supervisory aspect is clearly important for the credibility of the supervision process. And to strengthen supervisory

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independence in this aspect, one of the most important things is that supervisory authorities must obtain certainty of legal protection in carrying out their duties.

The fact that the authority's legal decisions will influence will affect the capacity of the company or industry to earn business income. Usually an authority's legal decisions will benefit one party and harm the other party. The consequence is that the injured party will demand legal compensation where they believe that the authority's decision has eliminated their rights. For regulatory and supervisory authorities, it is important to obtain legal protection from losses that may arise as a result of actions taken, as long as these actions are due to national interests or based on good intentions or in accordance with the provisions stipulated in statutory regulations.

Without this protection it will be very difficult for supervisors to determine actions/decisions and of course it will be very difficult to get quality supervisory staff considering that they have to bear very high occupational risks[15].

In many countries, inspectors are still often found to be personally prosecuted for their actions. The absence of guarantees of good legal protection can have implications for a paralyzing effect in the supervisory function. One solution is that guarantees of legal protection for supervisory authorities must be stated firmly in legislation.

The above is in line with Darmin Nasution's opinion in his study of the concept of establishing the OJK in Indonesia, proposing several measures related to OJK independence, one of which is that OJK employees must have immunity from civil lawsuits in carrying out their duties if the implementation of these duties is carried out in good faith and the OJK itself must be protected from civil claims if the implementation has acted in good faith in accordance with the authority of this institution. So that OJK officials and employees in carrying out their duties can avoid objections or counterclaims against supervisory employees so that they can guarantee protection for them as long as it is carried out in good faith in article 45A paragraphs (1) and (2).

Immunity from Criminal and Civil Claims against the Financial Services Authority

Immunity is basically a legal status or condition that makes a person unable to be processed or prosecuted by authorized law enforcement. In criminal law in many countries, the regulation of legal immunity is actually nothing new. Our Criminal Code (KUHP), for example, also regulates this issue of legal immunity as stated in Article 50 of the Criminal Code. This article stipulates that a person who commits an act (which can be punished) to implement the provisions of the law will not be punished.

Based on Article 50 of the Criminal Code, an official has justification for carrying out an act that can be punished if it is not carried out due to statutory regulations. Another article in the Criminal Code that can be used as a basis for immunity is Article 51 of the Criminal Code which regulates that a person cannot be punished for committing an act based on an official order that is valid or believed to be valid from an official authorized to give that order. In addition to what is regulated in the criminal regulations in each country, public international law extends the scope of immunity to diplomatic officials of a country who are carrying out duties in another country. This is regulated in the Vienna Convention on Diplomatic Relations, 1961 and its protocols. The contents of the Vienna Convention also apply in our country after being ratified by Law no. 1 of 1982.

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In legal literature, immunity is divided into functional immunity (ratione materiae) and personal immunity (ratione personae). There is still frequent debate among experts about the differences between these two concepts of immunity[16].

Meanwhile, personal immunity is understood as immunity from legal prosecution given to officials of a state for criminal acts regardless of whether the act was carried out in the name of the state or was a personal act. In terms of the distinction above, the immunity that will be granted by Article 45A paragraphs (1) and (2) of the P2SK Law is categorized as functional immunity because there is a limit to immunity only when carrying out one's duties and authority in good faith.

If there is a potential criminal act, Article 45A paragraph (1) of the P2SK Law provides protection for the OJK to carry out its functions, where a review of the basis provided by the constitution is also required. Articles 50-51 of the Criminal Code explain that specific legal subjects in special circumstances are permitted to waive criminal charges based on the concept of criminal law. Senior officials who carry out laws and orders are legal subjects who are given reasons to justify them.

In fact, Article 51 of the Criminal Code in its elaboration states more or less that an official cannot be prosecuted either civilly or criminally if what he has done is based on statutory provisions or in good faith. If we briefly look at or interpret the provisions of the article which is said to be an article on immunity or legal impunity for officials, then it is not wrong because the editorial language can indeed lead to opinions with various interpretations.

From the explanation above regarding the assumption that there is a provision in the immunity article, basically it is not directly mentioned in any statutory regulations, as in Article 51 Paragraph (1) of the Criminal Code, there is not the slightest mention of an explanation of the immunity provision. However, if it is related to the understanding that there are provisions for legal immunity and so on, then indirectly provisions in other articles in the Criminal Code can be used as restrictions on officials in using the provisions of 51 Paragraph (1) of the Criminal Code as an excuse when faced with a criminal case. relating to office orders or other authority.

We should also be able to interpret the provisions of Article 51 of the Criminal Code, which is called the immunity article, wisely, "actions carried out by officials in good faith in accordance with the orders or mandate of the law", the statement or editorial language in this article alone is clear. It is clear that the actions carried out by state officials are not necessarily based on their personal interests or desires, but must also look at the provisions of the law in actions which according to them are acts of good faith.

The good faith clause apparently has a long history in statutory provisions. It is recorded in the Civil Code that the term "good faith" is used 22 times. In the Criminal Code, good faith appears in Article 50 and Article 51. In several laws, good faith appears in Article 45 of Law Number 23 of 1999 concerning Bank Indonesia, Article 16 of Law Number 18 of 2003 concerning Advocates, and Article 22 of Law Number 11 2016 concerning Tax Amnesty[17].

In the realm of civil law, good faith is formulated in Article 1338 paragraph (3) of the Civil Code which stipulates that "contracts must be implemented in good faith".[18] Apart from that, based on the provisions of Article 1338 paragraph (3) of the Civil Code, it can be said that good faith also refers to honesty which lies in the actions of both parties bound by an agreement, not in the state of mind of each party (objective condition).[19]

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In this case, it is necessary to pay close attention to the phrases "good faith" and "in accordance with the provisions of statutory regulations" in Article 45 paragraphs (1) and (2) of the P2SK Law. The phrase "good faith" cannot be clearly defined unless it refers to "good faith" as defined in state administrative law. In the context of state administrative law, "good faith" means that decisions made by the OJK must refer to the General Principles of Good Government. The General Principles of Good Government (AUPB) include, among others: legal certainty, expediency, impartiality, thoroughness, do not abuse authority, openness, public interest, and good service.

In assessing whether or not the Good Faith embodied in the AUPB is fulfilled, it cannot be assessed until there is actual evidence in court which determines that the decision taken by the OJK and/or OJK members fulfills Good Faith or not.

Furthermore, the phrase "in accordance with the provisions of statutory regulations" stated in Article 45 paragraph (1) of the P2SK Law can be interpreted broadly. Meanwhile, carrying out actions as mandated by the P2SK Law is also an action that is in accordance with the provisions of statutory regulations, even though it turns out that there are provisions in other statutory regulations that are violated by the OJK Decree. So that evidence to assess compliance with decisions taken by the OJK and its members with the provisions of statutory regulations must first be proven in court.

Fakhri Hilmi, Head of the OJK 2A Capital Market Supervision Department, was charged with criminal charges in the 2014-2017 period. The panel of judges at the Corruption Crime Court (Tipikor) at the Central Jakarta District Court on June 17 2021 stated that Fakhri was proven guilty and sentenced him to 6 years in prison and a fine of IDR 200 million, subsidiary to 6 months in prison because Fakhri, who at that time was acting as an investment supervisor, was suspected of knowing there were violations committed by 13 investment management companies, namely investing more than 10 percent in conventional mutual funds and 20 percent in sharia mutual funds in managing Jiwasraya funds which caused losses to state finances worth IDR 16,807 trillion with case number 5/Pid.Sus-TPK/2021 /PN Jkt. Pst.

However, in the Supreme Court's cassation decision, the Panel of Judges handed down an acquittal verdict against Fakhri Hilmi because he was deemed to have carried out the duties and authority of his position in accordance with the Standard Operating Procedure (SOP) based on OJK regulation Number 12/PDK.02/2014, so that in essence the defendant was not proven committing a criminal act in Article 2 paragraph (1) of the Corruption Crime Law as stated in number 1052 K/Pid.Sus/2022 dated March 31 2022.

OJK also often faces civil lawsuits such as those brought by customers of PT Asuransi Jiwa Adisarana Wanaartha (Wanaartha Life/Wal) who filed an Unlawful Act (PMH) lawsuit against 7 (seven) entities including PT Aan, Evelina Larasati Fadil, Soebagjo Hadisepoetro, Sugiharto , Yanes Yaneman Matulatuwa, Daniel Halim and OJK). OJK is considered not to have supervised Wanaartha Life insurance properly and correctly by allowing Wanaartha Life's false financial reports to be accepted by OJK as the supervisor, resulting in defaults which are detrimental to customers. PMH Wanaartha's lawsuit is registered with case number 1039/Pdt.G/2021/PN JKT.SEL. The plaintiffs consist of 42 people who are Wanaartha Life customers[20].

So, after the issuance of the P2SK Law, there is no opportunity to file civil lawsuits, criminal lawsuits or state administration lawsuits. Therefore, all OJK actions as long as they are within their authority under the P2SK Law are absolute decisions that cannot be prosecuted

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criminally, nor can they be sued civilly. So as long as the sound of Article 45A paragraph (1) is not changed or deleted, then OJK employees and officials have absolute legal immunity from civil lawsuits on the basis that there is no unlawful act because they carry out in accordance with their authority, while criminal charges are based on justifiable reasons.

Immunity for Exclusion of Objects of State Administrative Lawsuits against the Financial Services Authority

The formulation of Article 45A paragraph (2) is a conceptual framework for the right to immunity for every OJK official and employee in their actions to be excluded as objects of the TUN.

The State Administrative Court is a forum for all state administrations in resolving various state administrative disputes. This is specifically regulated in the Law concerning the State Administrative Court, as stated in Article 4 of Law No. 9 of 2004 which stipulates that: "The State Administrative Court is one of the actors of judicial power for the people seeking justice regarding State Administrative disputes".

Article 2 Law no. 9 of 2004 concerning Amendments to Law No. 5 of 1986 concerning State Administrative Courts, regulates that what is excluded or not included in the meaning of State Administrative Decisions according to this Law is:

1. State Administrative Decisions which are civil legal acts;
2. State Administrative Decrees which are general regulations;
3. State Administrative Decisions that still require approval;
4. State Administrative Decisions issued based on the provisions of the Criminal Code and Criminal Procedure Code or other statutory regulations of a criminal law nature;
5. State Administrative Decisions issued on the basis of the results of an examination by a judicial body based on the provisions of applicable laws and regulations;
6. State Administrative Decree regarding the administration of the Indonesian National Army;
7. Decision of the General Election Commission, both at the centre and at the regional level, regarding the results of the general election."

Decisions actually issued by the State Administrative Officials mentioned above are excluded based on juridical logic as found in the Elucidation to Article 2 of the Law on State Administrative Courts, which states that "this limitation is made because there are several types of decisions which are due to the nature of or the meaning cannot be classified within the meaning of State Administrative Decrees according to this law." As a result, the State Administrative Decree as intended will not possibly give rise to State Administrative disputes that are within the scope of the State Administrative Court.

From the juridical provisions mentioned above, it can be seen that everything related to dispute State Administrative Decisions is given a judicial forum to enforce the law. However, this provision turns out to have limitation rules. In the State Administrative Law, there is a provision that certain State Administrative Decisions are exempt from being tried or reviewed by the Court or High State Administrative Court.

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Indeed, these provisions are still valid today, but the P2SK Law does not explain the reasons why the actions and decisions in question can be excluded from the object of a State Administrative Court lawsuit, especially as the State Administrative Court Law only mandates exceptions for every policy issued in a state of war or danger, natural disasters, or other urgent and extraordinary circumstances

If you look at Article 45A paragraph (2), it can be interpreted that actions that can be taken by the OJK are protected only if they are directly related to the OJK's function to maintain financial system stability in accordance with the contents of the P2SK Law. Thus, OJK actions outside its authority and OJK decisions that are not based on good faith and are not in accordance with statutory regulations should still be controlled and can be made the object of a lawsuit before the PTUN.[21]

In the realm of state administrative law, especially regarding government administration, good faith is embedded in discretionary requirements. This means that good faith cannot be separated from the context of discretionary government action.

Thus, the provisions of Article 45A paragraph (2) are not related to Article 2 of the PTUN Law which regulates various state administrative decisions which are not included/not considered as state administrative decisions as intended in the PTUN Law. It is explained that there are 7 (seven) state administrative decisions, including: State Administrative Decrees which are civil legal acts; is a general arrangement; still requires approval; issued based on the provisions of the Criminal Code, Criminal Procedure Code or other laws and regulations of a criminal law nature; issued on the basis of the results of an examination by a judicial body based on the provisions of applicable laws and regulations; regarding the administration of the Armed Forces of the Republic of Indonesia; Decision of the Election Committee regarding the results of the general election.

Based on the argument regarding exceptions to government actions in emergencies and connected to Article 2 of the PTUN Law, it can be said that the OJK's exceptions to actions are also not included in emergencies and cannot be included in various types of state administrative decisions which are not included/ is not considered a state administrative decision. So automatically the provisions of Article 45A paragraph (2) which states that OJK actions cannot be used as the object of a state administration lawsuit in the PTUN is contrary to the PTUN Law and the AP Law.

Legal products or decisions issued by the OJK have also often been the object of TUN lawsuits at the State Administrative Court. One of them is the Jakarta State Administrative Court (PTUN) which decided to postpone the decision of the Board of Commissioners of the Financial Services Authority (OJK) regarding the results of the reassessment of PT Bosowa Corporindo as the controlling shareholder of PT Bank Bukopin Tbk on August 24 2020. This decision is a lawsuit filed Bosowa against OJK in September 2020 with case number 178/G/2020/PTUN.JKT.

However, the Jakarta PTUN decision was annulled by the decision of the Jakarta TUN High Court on May 24 2021 number 65/B/2021/PTTUN.JKT. In the decision it was also stated that in exception, OJK as the appellant/defendant had absolute competence in the fit and proper test decision against Bosowa. The PTTUN stated that in the main dispute, the defendant/plaintiff's claim, in this case Bosowa, could not be accepted.

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Impact of Granting Immunity Rights on the Financial Services Authority

Based on the author's research, it turns out that OJK immunity rights are only found in Indonesia. In independent bodies such as financial services authorities who are responsible for regulating the financial sector in their countries and have an important role in maintaining economic stability and protecting consumers from detrimental financial practices in other countries, there is no right to immunity as stipulated in Article 45A paragraphs (1) and (2).). This is not found in the United States/United States Financial Services Authority (USFSA), England/Financial Services Authority (FSA), Germany/BaFin, France, prudentiel et de résolution (ACPR), Australia/Australian Prudential Regulation Authority (APRA), Singapore/Monetary Authority of Singapore (MAS), Canada/Financial Services Regulatory Authority of Ontario (FSRA) and in Japan/Financial Services Agency (FSA).

As a result of Article 45A paragraphs (1) and (2) and Article 48C paragraphs (1) and (2) the P2SK Law provides immunity rights for every OJK official and employee. Apart from that, the norms in this article can be interpreted as part of the protection for every OJK official and employee from anything that could interfere with the duties, functions and authority of the OJK, especially in the banking sector.

However, it turns out that there is no definition or explanation of the phrase "good faith" which is one of the elements and limits on the absoluteness and absoluteness of the right to immunity from the OJK. Further regarding the limitations of "good faith" and to what extent it can be a bulwark for the OJK to carry out its duties, the explanation of letter f regarding "good faith" is that decisions and/or actions determined and/or carried out are based on motives of honesty and based on the AUPB. The explanation regarding the motive for honesty can be interpreted as meaning that government officials must be able to honestly explain for what purpose and within what framework their discretionary authority is exercised.

For government administrators, AUPB is an important principle because it serves as a guideline for TUN institutions and/or officials in carrying out their authority. AUPB provides guidelines or benchmarks for the implementation of state administrators' powers to provide and determine what border agencies and/or TUN officials must pay attention to in making decisions and/or actions. AUPB is basically a code of ethics (written) and/or code of ethics (unwritten) that applies specifically to government administration. An unwritten AUPB is binding when used by a TUN judge to decide a case.

For the public, AUPB functions as a basis for litigation against national administrative decisions made by government agencies or officials. For TUN judges, AUPB is an important principle that must be followed by judges and is a test tool for administrative judges to assess whether the KTUN is effective or not. Generally, AUPB provides guidance or direction to the government or government administrators in order to achieve integrity, stability and good governance.

In the end, good faith, as the final condition of the conditions mentioned in Article 24 UUAP, can be a test tool for whether there is the abuse of authority or not, in the exercise of discretion by government officials. The use of discretion that is not in accordance with the purpose of discretion and the scope of discretionary authority can lead to a situation in the form of abuse of authority, which can bring legal risks. However, if a Government Official who uses his discretionary authority can prove that the decision or action taken is in accordance with the provisions on the use of discretionary authority and meets the requirements for the use of discretion, then the person concerned can certainly be free from legal suspicion.

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Basically, implementation in the form of policy decisions in the form of regulations issued by the government actually does not give rise to legal benefits but can cause problems. Where the article is substantially flawed and violates the Constitution. Article 45A paragraph (2) is said to violate the supervisory function in that it has stripped the PTUN of its supervisory rights over actions carried out by the OJK. This is due to the potential for abuse of power in the P2SK Law.

Referring to Article 45A paragraph (1) of the P2SK Law, it is stated that OJK officials and employees involved in the decision-making process cannot be sued, either civilly, criminally, or through state administrative courts. This article has given the OJK immunity from being sued or corrected through any court institution. Even though Indonesia is a rule-of-law country where government administration should be controlled by law.

The legal consequences of the immunity rights held by the Financial Services Authority are against the principle of equality before the law

The concept of exception is contained in OJK's immunity in exercising its authority in accordance with Article 45A paragraphs (1) and (2) and does not fulfill the conditions that can become conditions that provide exceptions to the norms in Law Number 5 of 1986 in conjunction with Law Number 9/2004 concerning PTUN and Law Number 30/2014 concerning Government Administration which confirms State Administrative Decisions as the object of PTUN disputes.

Equality before the law is a principle that means equality before the law, this principle is often interpreted as meaning that in law enforcement all citizens have the same position before the law, and there is no such thing as selective cutting in its enforcement.[22] Equality means "the condition of being the same or treating everyone equally regardless of their background". Meanwhile, Justice treats people according to their conditions to create balance.[23]

The "misbruik van recht" doctrine developed by L.J. Van Apeldoorn is a concept in law that refers to a situation where a person or party uses their legal rights in a way that exceeds the limits or objectives that should exist in the law, with the intention of pursuing benefits that are not in accordance with the principles of justice.

This doctrine deals with situations where authorities exercise their rights unlawfully or abuse their authority. Immunity entitlement is a mechanism that can be used to protect individuals or entities from legal action that may be taken against them as a result of their lawful actions or related to rights granted by law. In some cases, granting the right to immunity can be a consideration in facing accusations of abuse of rights or misrepresentation of rights.

The granting of immunity rights can be used to avoid legal consequences for actions taken by the authorities if these actions are in accordance with applicable law. However, this does not mean that authorities are free to abuse their rights without consequences. The granting of immunity rights must be in line with the law and must not be used as a shield to protect actions that clearly abuse rights or violate the law.

If we then compare the right to immunity in Article 27 of Law Number 2 of 2020, which has Chapter I on Space, Chapter II on Financial Policy, legal immunity given to policymakers for dealing with Covid-19, Article 27 Paragraph (1) is intended to protect policies from threats. Criminal acts of corruption in Article 2 of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes. In contrast to Article 27 Paragraph (1), Article 27 Paragraph (2) provides legal immunity which is not absolute, so you cannot be prosecuted either civilly or criminally,

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because in this Article there is the phrase good faith. Policymakers in handling Covid-19 must carry it out in good faith, so if there is no benefit in the actions taken and there are losses to the State that arise then they can be sued civilly and criminally, however, legal immunity is of course if it is not used properly then there will be arbitrariness. -authority.

After the publication of Constitutional Court decision no. 37/ PUU-XVIII/2020 the concept of absolute immunity in Law no. 2/2020 changed the meaning to limited immunity because the Constitutional Court added the phrase "carried out in good faith and in accordance with the provisions of statutory regulations". Article 45A paragraphs (1) and (2) have provided limited immunity for absolute law enforcement which closes the criminal, civil and state administrative court space to try unlawful acts that arise as long as they are "carried out in good faith and in accordance with the provisions of statutory regulations". This limited immunity concept is contrary to the 1945 Constitution Article 28D paragraph (1), Law no. 31/1999 in conjunction with Law no. 20/2001 Articles 2 and 3, Law no. 30/2014 Article 19, as well as Law no. 5 of 1986 Article 1 paragraph (3). Limited immunity is contrary to the principle of equality before the law, but limited immunity does not close the space for bringing the OJK into the judicial process.

Bringing the OJK to the judicial process is difficult because "it is carried out in good faith and in accordance with the provisions of statutory regulations" must be proven to the court, moreover, the existence of this sentence shows that the P2SK Law prioritizes the principle of presume of innocence for several officials who implement this law. In other words, the various implementing officials are "deemed" to have good intentions, so they cannot be sued or sued. In fact, to determine whether someone has good intentions, they must go through testing in a fair and open judicial process.

On the other hand, OJK employees and officials are also citizens who have the same constitutional rights. OJK employees and officials also have the right to enjoy the right to the presumption of innocence. The decisions taken may give rise to inappropriate policies even though they are based on good intentions. Poor results from policies taken do not necessarily indicate abuse of authority.

Examining the constitutionality of provisions regarding OJK legal immunity will open up opportunities and challenge legal scientists and scholars, both constitutional law and state administration as well as criminal law, to develop discourse and horizons of knowledge on matters that are very rarely discussed in Indonesian legal literature.

CONCLUSION

The right to immunity that the Financial Services Authority has in Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector is that OJK Employees and Officials have immunity from civil lawsuits on the basis that there are no unlawful acts because they carry out their authority in good faith, and criminal charges based on valid reasons according to law, as well as all OJK decisions are not the object of a lawsuit that can be submitted to the state administrative court.

The legal consequence of the immunity rights held by the Financial Services Authority regarding the principle of equality before the law is that the concept of limited immunity is contrary to the 1945 Constitution, Article 28D paragraph (1), Law no. 31/1999 in conjunction with Law no. 20/2001 Articles 2 and 3, Law no. 30/2014 Article 19, as well as Law no. 5 of 1986 Article 1 paragraph (3). Limited immunity is contrary to the principle of equality before

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the law, but limited immunity does not close the scope for bringing the OJK into the judicial process, but it is very difficult. This is because "carried out in good faith and in accordance with the provisions of statutory regulations" must be proven to the court, moreover, the existence of this sentence shows that the P2SK Law prioritizes the principle of presumption of innocence for several officials who implement this law. In other words, the various implementing officials are "deemed" to have good intentions, so they cannot be sued or sued. In fact, to determine whether someone has good intentions, they must go through testing in a fair and open judicial process.

SUGGESTION

There needs to be a revision of article 45A paragraphs (1) and (2) of the P2SK Law, or at least the Implementing Regulations, or by submitting a judicial review to the Constitutional Court to define the limits of immunity rights against OJK. These limitations include, a more detailed explanation of the meaning of "carried out in good faith and in accordance with the provisions of statutory regulations", and the type of violation in question which does not apply to Article 45A paragraphs (1) and (2), so as not to reduce independence and guarantees. legal certainty and protection for OJK Employees and Officials, but also avoiding arbitrary actions that could result from the implications of article 45A paragraphs (1) and (2) of the P2SK Law.

To OJK officials and employees who have received immunity rights after the P2SK Law, the immunity rights granted should not be a tool for doing wrong, but rather a shield for doing what is good and right for the development and strengthening of Indonesia's financial sector.

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