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Legal Analysis of the Waiver of Unlawful Elements in Corruption Cases (Study of the Decision of the Supreme Court of the Republic of Indonesia Number 3968 K/Pid.Sus/2023)

Anrinanda Lubis[1)] & Jawade Hafidz[2)]
[1)]Faculty of Law, Universitas Islam Sultan Agung (UNISSULA), Semarang, Indonesia, E-mail: anrinandalubis.std@unissula.ac.id
[2)]Faculty of Law, Universitas Islam Sultan Agung (UNISSULA), Semarang, Indonesia, E-mail: jawadehafidz@unissula.ac.id

Abstract. *Corruption is a serious crime with wide-ranging impacts, where Article 2 paragraph (1) of the Corruption Eradication Law (UU Tipikor) requires the element of "unlawfully". After the Constitutional Court Decision No. 003/PUU-IV/2006, this element was limited to the formal meaning. However, in practice, there is a disregard for the unlawful element in corruption cases, with a case study of the Supreme Court Decision of the Republic of Indonesia Number 3968 K/Pid.Sus/2023 there was a difference of interpretation between the public prosecutor and the judge, such as in the Juanda Prastowo case where the unlawful element of Article 2 paragraph (1) was disregarded by the judge from the first level to the cassation (Supreme Court Decision No. 3968 K/Pid.Sus/2023 which rejected the Public Prosecutor's cassation and the Defendant was sentenced based on Article 3 of the Corruption Law. of 2018 concerning Government Procurement of Goods/Services which resulted in state losses. However, the Panel of Judges to the Supreme Court set aside this element in Article 2 paragraph (1) with the main consideration of the application of the principle of lex specialis derogate legi generalis. The Defendant's actions carried out in his capacity as a Commitment Making Officer (PPK) and involving abuse of authority, opportunity, or means inherent in his position, are considered more appropriate to apply Article 3 of the Corruption Law. This study also highlights criticism of the decision which is considered less careful because it has the potential to ignore the fulfillment of formal unlawful elements.*

Keywords: *Corruption; Unlawful; Waiver.*

1. Introduction

In the 1945 Constitution it is emphasized that the State of Indonesia is based on law (Rechtstaat), not based on mere power (Machstaat). This means that the Republic of Indonesia is a democratic state of law based on Pancasila and the 1945 Constitution, upholds human rights, and guarantees all citizens equal standing before the law and government and is obliged to uphold the law and government without exception.[1] The law determines what must be done and or what may be done and what is prohibited. The target of the law is not only people who clearly act against the law, but also legal acts that may occur, and to state apparatus to act according to the law. The system of how the law works in this way is one form of law enforcement.[2]

The development process can lead to progress in people's lives, but it can also result in changes in the social conditions of the community that have negative social impacts, especially concerning the problem of increasing criminal acts that disturb the community. One of the crimes that can be said to be quite phenomenal is the problem of corruption. This crime not only harms state finances, but is also a violation of the social and economic rights of the community.[3]

The term corruption comes from one word in Latin, namely corruptio or corruptus which was copied into various languages. For example, it was copied into English to corruption or corrupt in French to corruption and in Dutch it was copied into the term coruptie (korruptie). It seems that from Dutch the word corruption was born in Indonesian.[4]

This definition is certainly not appropriate when viewed from the perspective of existing positive law. There is no definition or understanding of corruption or criminal acts of corruption from the perspective of criminal law, either in laws and regulations that are no longer in force or current positive law. In Law Number 24/Prp/1960 which was once in force, only criminal acts that are included in criminal acts of corruption (Article 1) are mentioned, not formulating the definition or limitations of corruption or criminal acts of corruption. At the beginning of the formulation of Article 1 it states that "what is meant by criminal acts of corruption are: ...". This sentence shows that Article 1 mentions the types of criminal acts of corruption and not the limitations of criminal acts of corruption. Likewise in Law Number 3 of 1971, its successor. However, in Law

[1]Evi Hartanti, 2007, Criminal Acts of Corruption, Second Edition, Sinar Grafika, Jakarta, p. 1
[2]Ibid.
[3]Ibid.
[4]Andi Hamzah, 1991, Corruption in Indonesia, Sinar Grafika, Jakarta, p. 7.

Number 31 of 1999 it was amended by Law Number 20 of 2001 which has a different technical formulation.[5]

Corrupt behavior occurs everywhere, both among relatives, in democratic and communist government systems, both in religious institutions, the phenomenon of corruption can occur. Almost in every country, especially in the early days of the formation of a country, corrupt behavior from state administrators and their cronies is rampant. The function of mutual supervision between state institutions (check and balance) has not run properly. This can be seen from the history of the journey and development of countries whose current level of corruption perception is low which are classified as developed countries.[6]

Corruption cases are difficult to reveal because the perpetrators use sophisticated equipment and are usually carried out by more than one person in a covert and organized manner. Therefore, this crime is often called white collar crime.[7]

Realizing the complexity of corruption problems in the midst of a multidimensional crisis and the real threat that will definitely occur, namely the impact of this crime. Then the crime of corruption can be categorized as a national problem that must be faced seriously through a balance of firm and clear steps by involving all potentials in society, especially the government and law enforcement officers.[8]

Historically, corruption cases in Indonesia have been rampant for hundreds of years since the Dutch colonial era. During the colonial era, the Dutch introduced corrupt practices, such as extortion and bribery, carried out by Dutch government officials and local authorities. These acts of corruption that have been carried out for generations have become deeply rooted in the lives of Indonesian society. So it can be said that this corruption is a legacy, a shameful legacy that must be eradicated.[9]

One of the elements of the crime of corruption (Article 2 paragraph (1) of Law No. 31 of 1999 concerning the Eradication of Criminal Acts of Corruption) is the element of being against the law (wederrechtelijk). The term describes an understanding of the reprehensible nature of an act. A reprehensible or

[5]Ibid.
[6]Hulman Siregar, 2018, Criminal Formulation and Punishment of Corruption Crimes That Harm State Finances and Problems in Their Implementation, Jurnal Daulat Hukum Vol. 1. No. 1, p. 126,https://jurnal.unissula.ac.id/index.php/RH/article/view/2626/1975, accessed on February 16, 2025.
[7]Ibid 2.
[8]Ibid 2.
[9]Nathanael Kenneth, 2024, The Rise of Corruption Cases in Indonesia Year by Year, JLEB: Journal of Law Education and Business E-ISSN: 2988-1242 P-ISSN: 2988-604X Vol. 2 No. 1 April 2024, pp. 335-336

reprehensible act according to Article 2 paragraph (1) is an act of enriching oneself. Therefore, being against the law and an act of enriching oneself are one in the context of the formulation of the crime of corruption in Article 2 paragraph (1).[10]

Many criminal law experts discuss the elements of criminal acts by first dividing the elements of criminal acts into objective elements and subjective elements. Among others, Bambang Poernomo, who stated that the elements of criminal acts can be divided into two parts, namely:

1) the objective part which indicates that a crime/delict consists of an act (een doen of nalaten) and consequences which are contrary to positive law as an unlawful act (onrechtmatig) which results in being threatened with punishment by legal regulations, and

2) the subjective part which is an element of error rather than a crime/strafbaar feit (V. Apeldoorn 1952: 252-253).[11]

According to Adami Chazawi, if seen from the source or from the origin of its prohibited nature, then being against the law is divided into, namely:

1) If what prohibits or condemns is written law, then such unlawful nature is called formal unlawfulness because it is based on written rules or statutory regulations;

2) If the prohibited nature originates from society in the form of social propriety or values of justice that are alive and upheld by society, then such a reprehensible nature is called against material law.[12]

The element of causing harm to state finances is very important in criminal acts of corruption, so that in the explanation of Article 2 paragraph (1) of Law Number 31 of 1999 it is explained that: "what is meant by unlawful in this article includes unlawful acts in the formal sense as well as in the material sense, namely even though the act is not regulated in statutory regulations, if the act is considered reprehensible because it is not in accordance with the sense of justice or norms of social life in society, then the act can be punished.[13]

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[10]Adami Chazawi, Op. Cit., p. 37.
[11]Rony A. Walandouw et al., 2020, Subjective Unlawful Elements in the Crime of Theft Article 362 of the Criminal Code, Lex CrimenVol. IX/No. 3/Jul-Sep/2020, p. 249.,https://ejournal.unsrat.ac.id/v3/index.php/lexcrimen/article/view/30832/29611, accessed on February 12, 2025.
[12]Adami Chazawi, Op. Cit., pp. 37-38.
[13]Ester Sheren Monintja, 2020, Legal Review of Article 2 and 3 of the Corruption Law as a Material Offense According to the Constitutional Court Decision No. 25/PUU-XIV/2016, Lex CrimenVol. IX/No. 2/Apr-Jun/2020, p.

The decision of the Corruption Court at the Medan District Court has been strengthened by the Decision of the Corruption Court at the Medan High Court Number 29/Pid.Sus-TPK/2022/PT MDN dated September 20, 2022, which has obtained permanent legal force as the Supreme Court Decision No. 3968 K/Pid.Sus/2023 which also rejected the cassation application from the Public Prosecutor's Cassation Applicant at the Binjai District Attorney's Office, by amending the Decision of the Corruption Court at the Medan High Court 29/Pid.Sus-TPK/2022/PT MDN dated September 20, 2022 regarding the length of the sentence imposed.

From the decision, it shows that there is a difference in interpretation of the unlawful element, where the public prosecutor considers that the actions carried out by the Convict Juanda Prastowo have been proven to fulfill the unlawful element, while the judges from the first level to the cassation level do not agree with the Public Prosecutor by stating that the unlawful element has not been proven, even though the description of the legal facts has shown the formal unlawful nature of the actions carried out by the Convict Juanda Prastowo which are contrary to the applicable laws and regulations.

2. Research Methods

The research method contains a description of the method or way used to obtain data or information. This research method functions as a guideline and basis for procedures in conducting research operations to write a scientific work that researchers do.[14] The type of research used in writing this law is normative-empirical legal research (applied law research), using normative-empirical legal case studies in the form of behavioral products. Normative-empirical legal research begins with written positive legal provisions that apply to legal events in concreto in society.[15]

3. Results and Discussion

3.1. Unlawful Application of Elements in Article 2 Paragraph (1) of the Corruption Eradication Law

Discussing the application of the unlawful element in Article 2 paragraph (1) of the Corruption Law is discussing how to apply it in a case, where in this discussion the chronology of the case in the Supreme Court Decision of the Republic of Indonesia Number 3968 K/Pid.Sus/2023 will be explained first as follows:

97,https://ejournal.unsrat.ac.id/v3/index.php/lexcrimen/article/view/28557/27906, accessed on February 12, 2025.

[14]Zainuddin Ali, 2009, Legal Research Methods, Sinar Grafika, Jakarta, p. 105.

[15]Abdulkadir Muhammad, 2004, Law and Legal Research, PT Citra Aditya Bakti, Bandung, p. 52.

1) That witness Syahrial, SH served as the Budget User Authority for procurement of goods and services and capital expenditure at the Binjai City Transportation Agency based on the Decree of the Mayor of Binjai Number 188.45-35/K/2019 on January 10, 2019.

2) That in 2019 the Binjai City Transportation Agency will carry out procurement of goods/services whose budget comes from the Binjai City APBD in the form of:

a. Procurement of CCTV PTZ with a contract value of IDR 199,100,000.00 (one hundred and ninetynine million one hundred thousand rupiah).

b. Preparation of land and UPTD BRT office with a contract value of IDR 179,327,500.00 (one hundred seventynine million three hundred twentyseven thousand five hundred rupiah).

c. Purchase of tires and materials for repairing bus safety devices with a contract value of IDR 199,292,500.00 (one hundred and ninety-nine million two hundred and ninety-two thousand five hundred rupiah).

d. Procurement of Video Wall Controller with a contract value of IDR 199,221,000.00 (one hundred ninetynine million two hundred twentyone thousand rupiah).

3) That the Binjai City Transportation Agency in carrying out procurement of goods and services must comply with the following laws and regulations:

a. Republic of Indonesia Law Number 17 of 2003 concerning State Finance;

b. Republic of Indonesia Law Number 1 of 2004 concerning State Treasury;

c. Presidential Regulation of the Republic of Indonesia Number 16 of 2018 concerning Government Procurement of Goods/Services;

d. Government Regulation Number 58 of 2005 concerning Guidelines for Regional Financial Management.

4) That for the four activities, the method of selecting the goods provider was carried out by means of Direct Procurement, for which the witness Syahrial, SH appointed parties to carry out the activities, including:

a. The defendant as the Commitment Making Officer (PPK) in the activities of Procurement of CCTV PTZ, Preparation of land and UPTD BRT office, Purchase of tires and materials for repairing bus safety devices and Procurement of Video Wall Controller according to Decree Number: 900-07/SK/DISHUB/2019 dated January 2, 2019.

b. Witness Dian Amperansyah as the Procurement Officer for the activities of CCTV PTZ Procurement, Land and UPTD BRT office preparation, Purchase of tires

and materials for repairing bus safety devices and Procurement of Video Wall Controller according to Decree Number: 800-269/SK/DISHUB/2020 dated January 24, 2020.

c. Witness Budi Triswoyo as the Technical Implementation Officer (PPTK) for the procurement of CCTV PTZ, purchase of tires and materials for repairing bus safety devices and procurement of Video Wall Controllers according to Decree Number: 900-06/SK/DISHUB/2019 dated January 2, 2019.

d. Witness Sarjiyana as the Technical Implementing Officer for the UPTD BRT land and office preparation activities according to Decree Number: 900-06/SK/DISHUB/2019 dated January 2, 2019.

e. Witness M. Rahmat Aria Darma, SE as the Work Results Receiving Officer (PjPHP) according to Decree Number: 900-04. A/SK/DISHUB/2019 dated January 2, 2019.

f. Witness Monang Sutrisno Sitorus as Director of CV Agatha Inti Mulia on CCTV PTZ activities and Purchase of tires and materials for repairing bus safety devices according to SPK Number: 002/SPK/PPK/DISHUB-BJI/CCTV-PTZ/2019 dated March 11, 2019 and Number: 002/SPK/PPK/DISHUB-BJI/BB-P3B/2019 dated April 8, 2019.

g. Mr. Chandra Surya Atmaja as Director of CV. Tunas Asli Mulia in the Land Preparation and Office activities of UPTD BRT Procurement of Video Wall Controller according to SPK Number: 002 / SPK / PPK / DISHUB-BJI / BB-PTL / 2019 dated November 11, 2019 and Number: 002 / SPK / PPK / DISHUB-BJI / VWC / 2019 dated June 24, 2019.

That by being appointed as PPK, the Defendant has the main duties and functions based on Article 11 of Presidential Regulation of the Republic of Indonesia Number 16 of 2018 concerning Government Procurement of Goods/Services as follows:

a. Prepare Procurement Planning;

b. Establish technical specifications / Terms of Reference (TOR);

c. Establishing a draft contract

d. Determining HPS

e. Determine the amount of down payment to be paid to the provider

f. Propose changes to activity schedule

g. Establish a support team

h. Assign a team or expert

i. Carrying out E-purchasing for a minimum value of more than IDR 200,000,000.00 (two hundred million rupiah)

j. Determine the letter of appointment of goods/services providers

k. Controlling contracts

l. Report the implementation and completion of activities to PA/KPA

m. Submit the results of the work implementation activities to PA/KPA

n. Store and maintain the integrity of all activity implementation documents and

o. Assess provider performance.

That around January 2019 the Defendant met with witness Dian Amperansyah and then the Defendant told witness Dian Amperansyah that witness Dian Amperansyah had been reappointed as Procurement Officer at the Transportation Service.

That witness Syahrial, SH along with witness Sarjiyana, witness Budi Trsiwoyo, and witness M. Rahmat Aria Darma and witness Kerta Sari as the treasurer of Expenditure never saw the handover of goods and witness Syahrial, SH also never received goods from the Defendant but without re-checking witness Syahrial, SH agreed to pay for the procurement work carried out by the Defendant himself.

That apart from not receiving the handover of goods from the Defendant in every procurement process of the goods, witness Syahrial, SH also never checked the administration of the purchase of the goods, but rather witness Syahrial, SH only checked the documents for the work that had been completed.

That Witness Syahrial, SH did not supervise the use of the budget for the procurement of CCTV PTZ, procurement of Video Wall Controllers, purchase of tires and materials for repairing bus equipment, as well as preparation of land and the UPTD BRT office, but rather Witness Syahrial, SH only saw administratively that the procurement activities had been completed.

That the procurement of CCTV PTZ, preparation of land and UPTD BRT office, purchase of tires and materials for repairing bus safety devices and procurement of video Wall Controller.

That based on the Calculation of State Financial Losses by the Financial and Development Supervisory Agency (BPKP) Representative Office of North Sumatra Province, the following results were obtained:

a. Funds disbursed based on SP2D = IDR 776,941,000.00

b. Activity Realization = Rp345,548,500.00

c. Unaccountable activities (ab) = IDR 434,392,500.00

d. Taxes that have been collected and paid for activities that have not been carried out/accounted for

1) VAT = IDR 39,490,227.00

2) Income Tax Article 22= Rp5,923,534.00

3) Subtotal {a)+b)} = IDR 45,413,761.00

e. Remaining unaccounted funds (cd) = IDR 388,978,739.00 (state loss).

Regarding the Defendant's actions, the Public Prosecutor charged the Defendant Juanda Prastowo with subsidiary charges, namely Primary Article 2 paragraph (1) Jo 18 of the Corruption Law Jo Article 55 paragraph (1) Ke 1 of the Criminal Code and Subsidiary Article 3 Jo 18 of the Corruption Law Jo Article 55 paragraph (1) Ke 1 of the Criminal Code.

The application of the unlawful element cannot be separated from seeing the Defendant's actions can be categorized as unlawful elements. The unlawful nature (rechtswidrig, unrecht, wederrechtlijk, onrechtmatig) as one of the elements of a criminal act is an objective assessment of the act, and not of the maker or perpetrator of the act. The position of the unlawful nature as an element of a criminal act is so important that it is said that the main concern of criminal law is only unlawful acts, because these acts are prohibited and subject to criminal penalties.[16]

The application of the material unlawful element in the Corruption Crime Law will create a sense of justice and legal certainty. The view of expanding the understanding of the teaching of the nature of unlawfulness in the formal and material sense has long been applied by the Supreme Court, and this can be seen in its Decision Number 275 K/Pid/1983 dated December 15, 1983 which states: "... it is not appropriate if unlawfulness is only associated with violating regulations that have criminal sanctions, but in accordance with the opinions that have developed in legal science, it should be measured based on general principles according to propriety in society".[17]

[16]cit.
[17]Ibid

Meanwhile, on the other hand, the Supreme Court has also applied the teaching of formal unlawful nature in the corruption case on behalf of the defendant Drs. R. S Natalegawa in decision Number 275 K/Pid/1983 dated December 29, 1983.[18]

Moeljatno stated that the principle of legality, another term for which is nullum delictum, nulla poena sine praevia legi poenali (there is an act that can be punished, other than based on the force of the provisions of the criminal legislation that preceded it), contains three meanings, namely:[19]

1. There is no act that is prohibited and punishable by criminal law if it has not been previously stated in a statutory regulation;

2. To determine the existence of a criminal act, analogy may not be used; and

3. Criminal law rules do not apply retroactively.

The 2001 Corruption Law adheres to the teaching of the material unlawful nature in a positive function, which in determining criminal acts even though the act is not regulated in laws and regulations, but if the act is considered reprehensible because it is not in accordance with the sense of justice or norms of justice or norms of social life, then the act can be punished. This is of course contradictory or contrary to the principle of the legality of criminal law as explained by Moeljatno above.[20]

An act is considered reprehensible because it is not in accordance with the sense of justice or norms of justice or norms of social life in criminal law. Andi Hamzah stated that to determine the meaning of 'contrary to the norms that exist in social interaction', a study must first be conducted; such as the opinions of religious scholars, traditional leaders, and so on, regarding the appropriateness or inappropriateness of an act that is considered to be against the material law. Andi Hamzah's opinion has been stated and considered by the Constitutional Court in the judicial review decision Number 003/PPU-IV/2006.[21]

Thus in this caseshows that the unlawful nature in the sense of the material unlawful nature in the elements of Article 2 paragraph (1) of the Corruption Eradication Law is deemed to be in conflict with the constitution, and only accommodates the formal unlawful nature.

Thus the Public Prosecutor has been rightin his letter of demand statedThe defendant Juanda Prastowo has been proven legally and convincingly guilty according to the law of committing the crime of "jointly unlawfully carrying out

[18]Lilik Mulyadi, 2007, Corruption in Indonesia, Normative, Theoretical, Practice and Problems, Alumni, Bandung, p. 86
[19]Moeljatno, Op. cit., p. 25.
[20]Seno Wibowo and Ratna Nurhayati, Op. cit., p. 357.
[21]Seno Wibowo and Ratna Nurhayati, Op. cit., p. 358.

acts to enrich oneself or another person or a corporation which can harm state finances or the state economy as regulated and threatened with criminal penalties in Article 2 paragraph (1) in conjunction with Article 18 paragraph (1) of the Corruption Eradication Law as in the First Primary Indictment.

3.2. Factors Considered by the Board of Judges in Discarding Unlawful Elements

In the decision of the panel of judges in the case on behalf of the Defendant Juanda Prastowo, there were considerations and views of the judges regarding the unlawful elements as follows:

1) Considering, that according to the explanation of Article 2 Paragraph (1) of the Republic of Indonesia Law Number 31 of 1999 in conjunction with Republic of Indonesia Law Number 20 of 2001 concerning the Eradication of Criminal Acts of Corruption, what is meant by "unlawfully" includes "unlawful acts in the formal sense" as well as "in the material sense", namely even though the act is not regulated in statutory regulations, if the act is considered reprehensible because it is not in accordance with the sense of justice or norms of social life in society, such acts can be punished;

2) Considering, that from the explanation of Law Number 31 of 1999, it is known that the definition of "unlawfully" as regulated in the provisions of Article 2 Paragraph (1) is an unlawful act of a general nature, meaning that it includes all acts which are contrary to applicable laws and regulations (positive law) or acts which are considered reprehensible because they are contrary to a sense of justice or contrary to the norms of social life which exist in society;

3) Considering, that according to the Decision of the Constitutional Court of the Republic of Indonesia in its Decision Number 003/PUU-IV/2006 dated 25 July 2006 which in essence states that the Explanation of Article 2 Paragraph (1) of Law of the Republic of Indonesia No. 31 of 1999 as amended by Law No. 20 of 2001 Concerning the Eradication of Criminal Acts of Corruption throughout the phrase which reads "what is meant by unlawfully" in this Article includes unlawful acts in the formal sense and material sense, namely even though the act is not regulated in statutory regulations, if the act is considered reprehensible because it is not in accordance with the sense of justice or norms of social life in society, then the act can be punished" is declared contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force. So what is meant by "unlawful" according to the explanation of Article 2 Paragraph (1) of Law Number 31 of 1999, after the Decision of the Constitutional Court, the definition of unlawful is limited to only being against formal law;

4) Considering, that the definition of formal unlawful acts is all acts carried out in conflict with applicable laws and regulations;

5) Considering that according to Nur Basuki Minarno, implicitly abuse of authority in haeren (the same) as against the law, because abuse of authority is essentially an unlawful act. The element of against the law is its genus while the element of abuse of authority is its species. The subject of abuse of authority is a civil servant or public official, in contrast to the element of against the law, the subject of the crime is every person. (Nur Basuki Minarno, Abuse of Authority in Regional Financial Management Which Implies Corruption, Laksbang Mediatama, Surabaya 2010, pages 16 and 58);

Considering that by looking at the quality of the subject/perpetrator and the way the act was committed as formulated in Article 2 Paragraph (1) of the Corruption Law in the Public Prosecutor's primary indictment, according to the Supreme Court, the formulation is very general and broad in scope, so that it will ensnare everyone regardless of their quality, as long as they commit the act in the manner formulated in the article, namely "unlawfully". On the other hand, what is formulated in Article 3 of the Corruption Law in the subsidiary indictment is more specific because the subjects/perpetrators who can be ensnared are only people with certain qualities who can commit the act in a certain manner/circumstances, namely in their "position or position";

Considering, that another thing that differentiates the meaning of Article 2 with Article 3 of the Corruption Law is related to the object of the act, namely in Article 2 of the Corruption Law the object is still outside the power/authority of the perpetrator, while in Article 3 the object is already within the power/authority of the perpetrator. The Supreme Court is of the opinion that Article 3 of the Corruption Law is a specialization of Article 2. so that in this case the adage "Lex specialis derogate legi generalis" applies. Therefore, the Supreme Court is of the opinion that for people/legal subjects who commit corruption crimes committed in office or position, it is more appropriate to apply/snare Article 3 of the Corruption Law;

From the description of the panel of judges' considerations above, it is known that the element of unlawful is not appropriately applied in Article 2 paragraph (1) in conjunction with Article 18 paragraph (1) letters b, (2), and (3) of Law of the Republic of Indonesia. No. 31 of 1999 in conjunction with Law of the Republic of Indonesia No. 20 of 2001 concerning the Eradication of Criminal Acts of Corruption due to the abuse of authority, opportunity or means inherent in the Defendant. This consideration is based on the principle of Lex specialis derogate legi generalis where Article 3 of the Corruption Law is a specialty of Article 2 paragraph (1) of the Corruption Law. This is the reason that the element of unlawful is not fulfilled in the description of the judges' considerations.

If this is observed closely, it will appear that the Panel of Judges is insisting that the unlawful element is not fulfilled, even though in its considerations it is clear

that there is an unlawful element, which is a general form of the element of abuse of authority, opportunity or means.

This is in line with what the judge considered before analyzing the unlawful elements in his decision, namely:

However, in analyzing the elements in Article 2 paragraph (1) of the Corruption Law as in the Primary Indictment of the Public Prosecutor, the Panel of Judges was not careful in assessing that the unlawful element was not fulfilled even though in its explanation it had proven that there was an unlawful element committed by the Defendant Juanda Prastowo. This resulted in the failure to fulfill the objectives of the law, namely legal certainty, justice and legal benefits.

Law enforcement and justice are the authority of judges as the organizer of some of the duties of judicial power in court, then in the context of implementing law enforcement purely and consistently by Sudikno Mertokusumo, it is said that there are 3 (three) elements that need to be constantly considered, as follows:[22]

1. Legal Certainty (rechtssicherheit).
2. Expediency (zweckmassigkeit).
3. Justice (justice).

Although judges are given the authority to discover the law as mandated in Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power which states, "Judges and constitutional judges are obliged to explore, follow and understand the legal values and sense of justice that exist in society". However, the discovery of the law must be aimed at certainty, benefit and justice.

"Considering, that referring to the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2020 concerning the Guidelines for Sentencing Article 2 and Article 3 of the Law on the Eradication of Criminal Acts of Corruption, the Panel of Judges considered the Regulation Number 1 of 2020 by considering the magnitude of the state financial loss, the level of error caused is categorized as moderate because the Defendant's role was not significant in committing the crime of corruption either alone or together, the impact caused losses on a city scale and the benefits obtained by the Defendant from the state financial losses caused by the Provider"

From these considerations, it can be seen that the judge also considered the amount of state financial losses which were categorized as moderate so that in order to impose a criminal sentence, Article 3 of the Corruption Law was chosen,

[22]Sudikno Mertokusumo, 1999, Understanding the Law: An Introduction, Liberty, Yogyakarta, p. 145.

which carries a minimum prison sentence of 1 (one) year compared to Article 2 paragraph (1) of the Corruption Law, which carries a minimum sentence of 4 (four) years.

The judge's consideration does not reflect legal certainty, benefit and justice because the fulfillment of the unlawful element cannot be immediately set aside on the grounds that the state's losses are not large. Rather than stating that the unlawful element is not fulfilled, it would be better for the panel of judges in their considerations to analyze whether the unlawful act committed by the Defendant could enrich the Defendant or someone other than the Defendant.

So it is more appropriate if the element of enriching oneself or others is not fulfilled then the next step can be to consider imposing a criminal sentence in Article 3 of the Corruption Law as in the Subsidiary Charge.

3.3. Implications of Unlawful Waiving of Elements in the Decision of the Supreme Court of the Republic of Indonesia Number 3968 K/Pid.Sus/2023

The case in the name of the Defendant Juanda has been decided by the Courtfirst level to cassation, which based on the considerations of the panel of judges at the Medan District Court imposed a criminal sentence with Decision No. 16/Pid.Sus/2022/PN MDN dated July 1, 2022 as follows:

1) Declaring that the Defendant Juanda Prastowo was not proven legally and convincingly guilty of committing the crime of "Corruption" as stated in the Primary indictment;

2) Acquitting the Defendant Juanda Prastowo from the primary charge;

3) Declaring that the Defendant Juanda Prastowo has been proven legally and convincingly guilty of committing the crime of "Corruption committed jointly" as in the subsidiary indictment,

4) Sentencing the Defendant Juanda Prastowo to 3 (three) years in prison and a fine of IDR 100,000,000.00 (one hundred million rupiah) with the provision that if the fine is not paid, it will be replaced with 3 (three) months in prison:

5) Imposing an additional penalty in the form of payment of compensation for state financial losses to the Defendant in the amount of IDR 353,166,850.00 (three hundred fifty three million one hundred sixty six thousand eight hundred and fifty rupiah), with the provision that if the Convict does not pay the compensation within a maximum of 1 (one) month after the court decision has permanent legal force, then his assets can be confiscated by the Prosecutor and auctioned to cover the compensation, and if the Convict does not have sufficient assets to pay the compensation, then it is replaced with imprisonment for 1 (one) year;

6) Determine whether the evidence remains in the case file

7) Determine that the Defendant be burdened with paying court costs of IDR 5,000.00 (five thousand rupiah).

The decision of the Corruption Court at the Medan District Court has been strengthened by the Decision of the Corruption Court at the Medan High Court Number 29/Pid.Sus-TPK/2022/PT MDN dated September 20, 2022, which has obtained permanent legal force as the Supreme Court Decision No. 3968 K/Pid.Sus/2023 which also rejected the cassation application from the Public Prosecutor's Cassation Applicant at the Binjai District Attorney's Office, by amending the Decision of the Corruption Court at the Medan High Court 29/Pid.Sus-TPK/2022/PT MDN dated September 20, 2022 regarding the length of the sentence imposed.

In reality, both of these views are extreme, considering the discretionary tendencies in common law and the extent of the judges' discretion in civil law. In this sense, the perspective of the jurists in the civil law tradition, sees jurisprudence as a concrete form of legal discovery which is then followed by the decisions of other judges as a general rule of law as befits the contents of a law (statute, wet).[23]

The function of jurisprudence in the Indonesian legal system is very important because apart from filling legal gaps, it is also important to realize the same legal standards of legal certainty, benefit and justice.[24]

Therefore, for the sake of developing the practice and theory of legal science, it is necessary to affirm the limits of each jurisprudential position. In this case, it is necessary to consider the qualifications of jurisprudence outside of the cassation decision or Supreme Court PK, considering the many types of cases that do not have to go to the Supreme Court.[25]

If the Supreme Court's decision implicitly or explicitly provides space for this assessment, then the Public Prosecutor needs to further convince the judge that the violation that occurred was not just an ordinary procedural error, but was based on the intention to commit corruption or at least deliberate violations that have the potential to harm the state.

In the Indonesian criminal justice system, the burden of proof fundamentally lies with the Public Prosecutor. This means that the Public Prosecutor has the obligation to prove the defendant's guilt in court, not the other way around where the defendant must prove his innocence.

[23]Ibid
[24]Ibid, p. 100.
[25]Ibid, p. 101.

The basis of the ordinary burden of proof system or according to the Criminal Procedure Code is the principle of "whoever accuses is the one who is burdened to prove that what is accused is true". This principle arises as a result of the application of the principle of presumption of innocence which is upheld in criminal procedure law.[26]

Article 66 of the Criminal Procedure Code explicitly states, "The suspect or defendant is not burdened with the obligation to provide proof." This provision explicitly removes the burden of proof from the shoulders of the defendant and, implicitly, places it on the party accusing him, namely the Public Prosecutor.

In addition to potentially making it difficult for the Public Prosecutor to prove Article 2 paragraph (1) of the Corruption Law, this directly hinders the Prosecutor from carrying out the execution (implementing the judge's decision) because of course there will be legal efforts made by the Public Prosecutor. As we know, this case will start being tried in 2022 and will only have permanent legal force in 2023.

The main implication of the Supreme Court Decision as jurisprudence is the potential for increasing difficulty in proving the element of "unlawfully" in the application of Article 2 paragraph (1) of the Corruption Eradication Law in the future. As a consequence, the Public Prosecutor will be faced with greater challenges and must work harder to prove that the defendant's actions truly meet the higher or specific standard of the element of "unlawfully". This potential difficulty in proving this will not only impact the prosecution process but can also affect the effectiveness and efficiency of the implementation of the execution of court decisions by the Prosecutor.

4. Conclusion

Implementation of Article 2 paragraph (1) of the Corruption Law in the case of Defendant Juanda Prastowo, In its implementation, the Defendant committed a series of acts that deviated from the provisions of government procurement of goods/services (specifically Presidential Regulation Number 16 of 2018) resulting in state financial losses of IDR 388,978,739.00 based on the audit results of the BPKP Representative Office of North Sumatra Province by the Public Prosecutor was deemed appropriate in his charges stating that Defendant Juanda Prastowo was proven legally and convincingly guilty of committing a criminal act of corruption as regulated in Article 2 paragraph (1) of the Corruption Law. The application of the unlawful element in this case is in line with legal developments after the Constitutional Court's decision which emphasizes more on formal aspects for legal certainty.

[26]Lilik Mulyadi, 2012, Indonesian Criminal Procedure Law, A Special Review of Indictments, Exceptions and Court Decisions, Citra Aditya Bakti, Bandung, p. 13.

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