

# Category of Unlawful Acts That Are Not Corruption Crimes for the Sake of Achieving Legal Certainty

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## Abstract

Act of corruption, an act that already exists at an alarming level in Indonesia. The element against the law in corruption cases is essential and determines the existence of a criminal act of corruption that must be accounted for, both positional responsibility and personal responsibility. The consequences of personal responsibility are related to criminal responsibility. This research will be carried out to see how the form of unlawful acts does not meet the elements of corruption and how the concept of legal certainty for unlawful acts does not meet the elements of corruption. This research will be carried out using normative juridical research. This research will then be carried out using the Statute Approach and Case Approach. The results of this study then found at least seven types of formulations in criminal acts of corruption in Law No. 31 of 1999 in conjunction with Law No. 20 of 2001. Suppose an act is considered to have violated the law and can be subject to criminal sanctions. In that case, two elements must be fulfilled: the actus reus (physical element) and mens rea (mental element) elements. The element of actus reus is the essence of the crime itself or the act committed, while the element of mens rea is the inner attitude of the perpetrator at the time of committing the act.

**Keywords:** *Unlawful Acts, Corruption, Legal Certainty.*



## A. INTRODUCTION

The term corruption comes from the Latin word corruption. In English, it is corruption or corrupt, in French, it is called corruption, and in Dutch, it is called *corruptie*, and the word corruption in Indonesian. Corruption shows corrupt, rotten, depraved, dishonest actions related to financing. Corruption also severely threatens stability and security, weakening democratic institutions and values, ethical values, and justice and endangering sustainable development and upholding the rule of law (Firman et al., 2021).

Corruption in Indonesia has reached a very alarming level and affects almost all sectors of life. In fact, it has penetrated into law enforcement institutions and government apparatus in the Indonesian context. From the village, and city, to central government agencies, you could say that corruption has become entrenched in Indonesia. But making efforts to eradicate corruption is not something in vain. The corruption settlement is still selective, and the law's implementation is not optimal (Kadarisman et al., 2022).

The consequences of corruption have a very broad impact, not only concerning state finances but also being able to damage the government system, the economy,

and development. The ongoing downturn in the economy and development in Indonesia has affected all aspects of life in society, as a nation, and as a state (Incaltarau et al., 2020).

This guideline on the Implementation of a State that is Clean and Free from KKN is essential and very necessary to avoid collusion, corruption, and nepotism practices not only involving the officials concerned but also their families and cronies, which, if left unchecked, the Indonesian people will be in a very disadvantaged position (Handitya, 2019). According to Nyoman Putra Jaya Union, that: "Criminal acts of corruption, collusion, and nepotism are not only carried out by state administrators, between state administrators, but also state administrators with other parties such as family, cronies, and businessmen, thus destroying the foundations of social, national and state life, and endangering the existence of the state" (Yuherawan, 2020).

In line with what Nyoman Putra Jaya's Union said, according to Marzuki Darusman, "The spread of Corruption, Collusion, and Nepotism has been so widespread that it can be said that radicals are corrupt". To further guarantee the implementation of a government that is clean and free of corruption, collusion, and nepotism, Law Number 31 of 1999 was enacted as amended by Law Number 20 of 2001 concerning the Eradication of Corruption Crimes as a substitute for Law Number 3 of 1971. The birth of this law is expected to accelerate the growth of people's welfare, with a countermeasure against the evil nature contained in corruption (Santi & Afif, 2021).

Effective law enforcement against corruption is expected to be able to fulfill two objectives, firstly that the perpetrators of corruption are punished with fair and commensurate criminal sentences and the second is that the losses suffered by the state as a result of the corruption act can be recovered as much as possible (Begum, 2020).

The *wederrechtelijk* teaching in the formal sense has the understanding that an act can only be seen as *wederrechtelijk* in nature if the act fulfills all the elements of an offense contained in the formulation of an offense according to law. Meanwhile, in a material sense, an act is seen as *wederrechtelijk*, which has quite a broad meaning, because the benchmark refers to the principles of general law, including the law that lives in society's unwritten law (Purwoleksono, 2019).

Meanwhile, acts against the law in civil law jurisdictions mean "*onrechtmatige daad*", which can be interpreted broadly as acts that violate the law. An *onrechtmatige daad* is an act that violates other people's rights or is contrary to the legal obligations of the perpetrator (Nurarafah, 2022). Juridically, *onrechtmatige daad* is regulated in Article 1365 of the Civil Code, which contains provisions regarding every act that is against the law and brings harm to another person, obliging the person who caused the loss because of his mistake to compensate for the loss (Hariri et al., 2022).

Humans have known acts against the law since they began to know it. As such, the act is the oldest legal provision in the world, although the recognition of tort as an independent branch of law is still relatively new. In fact, in the world's oldest known

Code of Laws in history, namely Hammurabi's Code of Laws, which was written more than 4,000 (four thousand) years ago, several articles in it regulate legal consequences if someone commits specific actions that are classified as unlawful acts (Chuasanga & Victoria, 2019).

In the study of criminal law, acts against the law in a criminal act of corruption include understanding in the formal and material sense. In particular, acts against material law, both in positive and negative functions, become problematic when examined from the perspective of judicial practice, especially after the Constitutional Court Decision Number 003/PUU-IV/2006 dated 25 July 2006 (Dewantara et al., 2021). In judicial practice, especially in cases of criminal acts of corruption, in several decisions of the Supreme Court of the Republic of Indonesia recently, some did not implement acts against material law as the decisions of the Constitutional Court, and not a few continued to apply and adhere to the dimensions of acts against material law after the decisions of the Constitutional Court (Amusroh & Paserangi, 2022).

In the latest development, acts against the law have also been regulated in more detail in the Constitutional Court Decision Number: 25/PUU-XIV/2016 as the basis for regulations regarding losses categorized as criminal acts of corruption. These losses can be caused by acts that are against the law, such as actions that violate the provisions of laws and regulations in the process of procuring goods and services so that it is reasonable to suspect that there was a criminal act of corruption in the process (Wronka, 2023). Procurement of goods and services is a government activity considered the most vulnerable to corruption, occurring anywhere in the world. From 2004 - 2014, the KPK handled 411 corruption cases, of which 131 or a third cases occurred in procuring goods/services. This places corruption in this field as the second most common case handled by the Commission after bribery (Rimšaitė, 2019).

The definition of procurement of goods and services itself can be understood as the procurement of goods/services by ministries/agencies/regional apparatuses financed by the APBN/APBD, the process of which starts from identifying needs to handing over the results of the work. The process of procuring goods and services is long, so it involves three legal specializations, one of which is state administrative law (Munandar et al., 2020). The first process of procuring goods and services is during the stages of discussion and agreement on the State Budget, the dominant legal science at this stage is Constitutional Law. The second process of procuring goods and services occurs in each public body while planning the procurement of goods and services until the procurement winner is determined. This process is driven based on the specialization of state administrative law. Third, the process starts with signing and executing the contract, in which the dominant legal specialization here is civil law (Parrado & Galli, 2021).

Even so, in procuring goods and services, some individuals may take advantage of loopholes to commit criminal acts of corruption. One of the gaps is during the bidding process in procuring goods and services. However, considering that the bidding process is the scope of state administrative law, there is a problem regarding the procurement of goods and services that is carried out without going

through a bidding process (Amanze et al., 2022). Researchers feel that this process also needs to be seen from the perspective of Law Number 31 of 1999, as amended by Law Number 20 of 2001, concerning the Eradication of Corruption Crimes.

Starting from the background of the problems above, the author wants to examine legal research regarding acts against the law that are not categorized as criminal acts of corruption to achieve legal certainty.

## **B. LITERATURE REVIEW**

### **1. Corruption**

Corruption has spread evenly in this country, acts of corruption are not only detrimental to the state but can also hinder the welfare of society. Wijayanti stated that corruption or *rasuah* (Latin: corruption from the verb *corrumpere*, which means rotten, broken, shaken, turned around, bribed) is an act of public officials, both political and civil servants, as well as other parties involved in the act who improperly and illegally abused the public's trust in public officials to gain unilateral benefits (Adam & Fazekas, 2021). Wibowo explained that corruption is abusing authority in a person, especially officials or civil servants, for personal gain, family, partners, and friends or groups. Based on the description of corruption by two experts, it can be concluded that corruption is an act that is very detrimental to the state, makes people poor, and hinders people's welfare (Safitri et al., 2022).

Corruption has been happening for a long time, from the lower class to the upper class. Acts of corruption start from small actions such as arriving not on time, lying, and accepting gifts. Actions that start small and then become a habit that is often done will have a bad impact (Brody et al., 2022). Alatas describes the types of corruption as follows:

- a. Transactive corruption occurs by agreement between a donor and recipient for the benefit of both parties.
- b. Extortive corruption involves pressure and coercion to avoid harm to those involved or people close to the perpetrators of corruption.
- c. Investive corruption starts from an offer which is an investment to anticipate future profits.
- d. Nepotistic corruption occurs because of special treatment in appointing public offices and granting projects for close relatives.
- e. Autogenic corruption occurs when official benefits because he has insider information about various public policies that should be kept secret.
- f. Supportive corruption, namely protection or reinforcement of corruption, becomes the intrigue of power and even violence.
- g. Defensive corruption, namely corruption committed to defending oneself from extortion (Yapanto, 2021).

Various acts of corruption can harm fellow human beings. Pawiroputro mentioned other types of corruption, including:

- a. Giving or receiving gifts or promises (bribery).
- b. Embezzlement in office.

- c. Extortion in office.
- d. Participate in procurement (for civil servants/state administrators).
- e. Receiving gratification (for civil servants/state administrators/state administrators) (Köbis et al., 2021).

There are various types of corruption, in essence, an act of corruption is an act that is done dishonestly to take the rights of others, which will harm and hinder the welfare of society. Acts of corruption that are often carried out in the world of education are cheating during exams, coming to school always late, skipping school, and not doing homework. These actions, if left alone, will become a habit and, in the future, lead to acts of corruption, therefore, anti-corruption education is needed to prevent, reduce and even eradicate acts of corruption (Suramin, 2021).

### C. METHOD

This type of writing is normative juridical research. Normative juridical research is research that aims to find the truth of coherence, namely by examining whether the legal rules are following legal norms and whether there are norms in the form of orders or prohibitions following existing legal principles, and whether a person's actions are following legal norms (not just legal rules) or principles. This research uses Statute Approach and Case Approach. The Statute Approach in this study is an approach that examines laws and regulations related to the problem under study. While the Case Approach is an approach that will be carried out by examining court decisions in which there are reasons for judges to decide a case until the decision is issued (Diantha & Sh, 2016).

### D. RESULT AND DISCUSSION

#### 1. Forms of Actions Against Corruption Crime Laws

The element against the law in corruption cases is essential and determines the existence of a criminal act of corruption that must be accounted for, both positional responsibility and personal responsibility. The consequences of personal responsibility are related to criminal responsibility. According to Philipus M. Hadjon, positional responsibility is focused on the legality of actions with the parameters of laws and regulations and general principles of good governance. Meanwhile, personal responsibility is focused on disgraceful treatment or actions in the context of criminal responsibility, namely responsibility for actions that are not adequately carried out in a way that violates the law because it is contrary to the sense of justice and social norms apply in people's lives.

Against the law in the context of Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning the Eradication of Corruption Crimes (UU PTPK), classified as a criminal act or formal offense, where the elements of the act must have been fulfilled, and not as a material offense, which requires that the consequences of the act in the form of losses arising must have occurred. This is interesting to study because, in practice, there are still multiple interpretations for judges or other law enforcement officials regarding elements of "against the law", 118 in corruption cases

after the Constitutional Court (MK) Decision regarding the Constitutional Review of the PTPK Law on 24 July 2006 Number 003/PUU-IV/2006. In Article 2, paragraphs (1) and (2) of the PTPK Law, it is stated that:

- a. "Any person who unlawfully commits an act of enriching himself or another person or a corporation that can harm the state's finances or the state's economy shall be punished with imprisonment for life or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years and a fine of at least Rp. 200,000,000.00 (two hundred million rupiahs) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah)".
- b. Capital punishment may be imposed if the criminal act of corruption as referred to in paragraph (1) is committed under certain circumstances.

Furthermore, the elucidation of Article 2 paragraph (1) of the PTPK Law explains that "in this provision, the word "can" before the phrase "harm the state finances or the state economy" indicates that the criminal act of corruption is a formal offense, namely the existence of a criminal act of corruption, it is sufficient to fulfill the elements of action that are formulated, not with the emergence of consequences.

The provisions regarding the criminal act of corruption contained in Article 2 paragraph (1) above are indeed formal offenses; this is also emphasized in the general elucidation of the PTPK Law, which explains: "In this law, the crime of corruption is explicitly defined as a formal crime. This is very important for proof. With the formal formulation adhered to in this law, even though the proceeds of corruption have been returned to the state, the perpetrators of corruption are still being brought to court and punished".

The formulation of the criminal act of corruption as contained in Article 2 paragraph (1) of the PTPK Law as a formal offense, then the loss of state finances or loss of the state's economy does not have to have occurred, because what is meant by a formal offense is an offense that is deemed to have been completed by carrying out an act that prohibited and punishable by law.

When compared to the provisions regarding the criminal act of corruption contained in Article 2 paragraph (1) above with those contained in Article 1 paragraph (1) letter an of Law Number 3 of 1971, it can be seen that the provisions contained in Article 2 paragraph (1) is a formal offense, while the provisions contained in Article 1 paragraph (1) letter an of Law No. 3 of 1971 constitute a material offense, namely an offense deemed proven by the occurrence of consequences which are prohibited and threatened with punishment by law. During the discussion of the element "may cause loss" of Article 263 paragraph (1) of the Criminal Code, by following the opinion of the Hoge Raad decision dated 22 April 2007 and 8 June 1997, stated that the legislators did not require the necessity of losses arising, but only the possibility of such losses arising, even the perpetrators do not necessarily have to be able to imagine the possibility of such losses occurring.

Based on what has been stated by Lamintang as mentioned above, so that a person can be found guilty of committing a criminal act of corruption as stipulated in Article 2 paragraph (1), it is enough if there is evidence that can prove the possibility

of a loss to the State Finances or the State Economy, even the actor does not need to be able to imagine the possibility of a loss to the State Finances or the State Economy.

Elements Harming State Finances At the time of the application for a Constitutional Review of the PTPK Law, because the element “may harm the State Finances or the State Economy” in Article 2 paragraph (1) is contrary to the right to fair legal certainty, as meant by Article 28D paragraph (1) The 1945 Constitution of the Republic of Indonesia (1945 Constitution), the Constitutional Court has rendered its decision by decision dated 24 July 2006 Number 003/PUU-IV/2006 which in its legal considerations states that:

By taking into account all the arguments presented by the Petitioner against Article 2 paragraph (1) of the PTPK Law, the main questions that must be answered are:

- a. What is the meaning of the word “can” in Article 2 paragraph (1) of the PTPK Law, whose meaning is explained in the Explanation of Article 2 paragraph (1) that with the addition of the word “can”, make the criminal act of corruption in Article 2 paragraph (1) a quo a formal offense.
- b. Is it with the understanding as explained in Point 1 above, the phrase “can harm the State Finances or the State Economy”, which means both actual loss and only potential loss or in the form of potential loss, is an element that does not need to be proven or must be proven;

The Constitutional Court answered these two questions with the understanding that the word “can” in Article 2 paragraph (1) and Article 3 of the PTPK Law causes actions to be prosecuted before the court, not only because these actions “harm the state’s finances or the country’s economy in real terms”, however, it only “could” cause harm even as a possibility or potential loss, if the elements of a criminal act of corruption are fulfilled, it can already be brought before the court.

The meaning of the word “can” must be assessed according to the Elucidation of Article 2 paragraph (1) above, which states that the word “can” is before the phrase “harmful to the State Finances or the State Economy”, indicating that the criminal act of corruption is a formal offense; namely the existence of a criminal act of corruption, it is enough to fulfill the elements of the action formulated, not by the emergence of consequences. Therefore, the court can accept the elucidation of Article 2 paragraph (1) in so far as it concerns the word “can” before the phrase “harmful to the State Finances or the State Economy”.

The Constitutional Court is of the opinion that it is extremely difficult to prove precisely and properly losses caused as a result of corruption, particularly large-scale corruption. The precision necessary in this manner will create questions as to whether or not the alleged crime will be substantiated if only a single loss figure is provided. This has stimulated anticipation of proof’s accuracy and perfection, so it is deemed necessary to ease the burden of proof. If accurate evidence cannot be submitted for the number of actual losses or the actions committed are such that state losses may occur, it is deemed sufficient to prosecute and convict the perpetrators as long as the other elements of the indictment are in the form of enriching oneself or another person or a

corporation utilizing opposing law (*wederrechtelijk*) has been proven because the *quo law* classifies the criminal act of corruption as a formal offense.

The category of criminal acts of corruption is classified as a formal offense, in which the elements of the act must have been fulfilled, and not as a material offense, which requires “the consequences of the act in the form of losses arising must have occurred. The word “can” before the phrase “harm the State Finances or the State Economy”, can be seen in the same meaning as the word “can” which precedes the phrase “endangers the security of people or goods, or the safety of the State in a state of war”, as contained in Article 387 of the Criminal Code. Such an offense is deemed proven if the elements of the criminal act have been fulfilled, and the consequences that may occur from the prohibited and punishable act do not need to have occurred.

According to the Constitutional Court, such a matter does not create legal uncertainty (*onrechtszekerheid*), which contradicts the constitution as argued by the Petitioners. Because the existence of the word “can” does not determine whether or not there is a factor of legal certainty that causes an innocent person to be convicted of corruption or, conversely, a person who commits a criminal act of corruption cannot be sentenced to a crime. With the principle of legal certainty (*rechtzekerheid*) in protecting one’s rights, the relationship between the words “can” and “harm the State Finances” is described in two extreme relationships:

- a. is detrimental to state finances and
- b. may cause losses.

The second thing is closer to the intention of qualifying corruption offenses as formal offenses. Between these two relations, there is still a relationship that “has not happened”, but by taking into account the special and concrete circumstances surrounding the events that occurred, the Constitutional Court can logically conclude that an outcome, namely a loss to the state, will occur. To consider the specific and factual circumstances surrounding the events that occurred, which can logically be concluded that state losses occurred or did not occur, must be carried out by experts in state finance and the state economy as well as experts in analyzing the relationship between one’s actions and the loss. Therefore, the court considers that:

There is an explanation that states that the word “can” before the phrase “harm the State Finances or the State Economy” then qualifies as a formal offense so that any loss to the state or the state economy is not a consequence that must occur. The court believes that this is interpreted as meaning that the element of state loss must be proven and calculated, even though it is an estimate or even though it has not occurred.

An expert in the field must determine such conclusions. Loss factors, both real or in the form of possibilities, are seen as aggravating or mitigating things in criminal imposition, as described in the elucidation of Article 4 of the PTPK Law, that the recovery of state losses can only be seen as a mitigating factor. Therefore, the issue of the word “can” in Article 2, paragraph (1) of the PTPK Law is more a matter of implementation in practice (by judges) or other law enforcement officials and not regarding the constitutionality of norms.



The court believes that the phrase “may” harm the State Finances or the State Economy” is not contrary to the right to fair legal certainty as intended by Article 28D paragraph (1) of the 1945 Constitution, as long as it is interpreted according to the court’s interpretation above (conditionally constitutional).

Therefore, the word “can,” as described in consideration of the Constitutional Court set out above, is not considered to be contrary to the 1945 Constitution and is precisely necessary for the framework of dealing with criminal acts of corruption, the Petitioner’s request regarding this matter is groundless and cannot be granted. And from the legal considerations in the Constitutional Court’s decision, it can also be seen that to be found guilty of having committed a criminal act of corruption as stipulated in Article 2 paragraph (1) of the PTPK Law, the State Finance or the State Economy doesn’t need to suffered losses.

Elements Against the Law As perpetrators of criminal acts of corruption contained in Article 2 paragraph (1) of the PTPK Law, it has been determined that “everyone” is “unlawfully”. In Article 2, paragraph (1), there is no stipulated condition, for example, the condition for a Civil Servant who must accompany “everyone” who commits the intended corruption crime. Therefore, according to what “everyone” means in Article 1 point 3 of the PTPK Law.

According to R. Wiyono, the perpetrators of corruption contained in Article 2, paragraph (1) may consist of (a) Individuals and (b) Corporations. If we examine the provisions regarding criminal acts of corruption as contained in Article 2 paragraph (1) of the PTPK Law, three main elements will be found, namely: First, unlawfully; Second, enrich themselves or other people or a corporation; and third, detrimental to state finances or the country’s economy. Elucidation of Article 2 paragraph (1) of the PTPK Law states that what is meant by “unlawfully” includes acts against the law in the formal sense of “or” in the material sense, that is, even though the act is not regulated in statutory regulations if the act is deemed disgraceful because it is not following a sense of justice or the norms of social life in society, then the act can be punished. With the word “nor” in the explanation, it can be seen that the PTPK Law above follows two alternative teachings that are against the law: first, the teaching of nature against formal law, and second, the teaching of nature against material law.

Roeslan Saleh stated, “according to the teachings against the law, what is called against material law is not only contrary to the written law but also to the unwritten law. On the other hand, the teaching against formal law argues that breaking the law is only contrary to written law. So according to the material teachings, in addition to fulfilling the formal requirements, namely fulfilling all the elements mentioned in the formulation of the offense, the community must feel that an act is not permissible or inappropriate”.

In the criminal law literature, there are two functions of the teachings of material lawlessness, namely:

- a. The teaching of material lawlessness in its positive function, that is, an act, even though laws and regulations as unlawful, do not determine it, but if, according

to the opinion of the community, the said act is unlawful, the act in question is still unlawful;

- b. The teaching of material unlawfulness in its negative function, namely an act, even though according to laws and regulations it is an unlawful act, but if according to the public opinion, the act is not unlawful, the act in question is an act which is not against the law.

The elucidation of Article 2 paragraph (1) of the PTPK Law states that what is meant by “unlawfully” in Article 2 paragraph (1) includes actions that are inconsistent with a sense of justice or the norms of social life in society, although these actions are not regulated in statutory regulations, it can be seen that the teaching of material lawlessness followed by Law Number 31 of 1999 is a teaching of material lawlessness in its positive function. The question arises, why is Law Number 31 of 1999 following the teachings against material law.

Law Number 31 of 1999 is stated so that Law Number 31 of 1999 can reach various modus operandi of deviations in state finances and the increasingly sophisticated and complicated state economy. For example, the application of the doctrine of material unlawfulness in its positive function can be put forward by the decision of the Supreme Court of the Republic of Indonesia when Law Number 3 of 1971 was still in force.

“According to Indriyanto Seno Adji, the application of the teaching of material lawlessness in its positive function requires strict conditions, reasons, and criteria and with all situational and casuistic considerations. At the same time, the criteria determining the underlying reasons for implementing the material tort teaching in a positive function include the following.

- a. The perpetrators’ actions that do not include or do not fulfill the formulation of a delict, viewed with legal interests, cause losses that are far unequal to the community or the state compared to the benefits caused by their actions that do not violate laws and regulations.
- b. Causes disproportionate losses for the community/state if a civil servant or state administrator, even though he does not violate regulations with criminal sanctions, receives excessive facilities and other benefits from a person (corporation/legal entity) with the intention that the civil servant or state administrator uses the power or authority attached to his position in an excessive or distorted manner.

The Constitutional Court, in its decision dated 24 July 2006 Number 003/PUU-IV/2006, stated that the first sentence of the elucidation of Article 2 paragraph (1), which states: “What is meant by “unlawfully” in this article includes acts against the law in a sense formally or in a material sense, that is, even though the act is not regulated in laws and regulations but if the act is considered a disgraceful act because it is not following a sense of justice or the norms of life, social and society, then the act may be punished” is contrary to UUD 1945 and therefore does not have binding legal force. The reason is in the decision of the Constitutional Court given legal considerations which in the full state as follows:

With the sound of such an explanation, even though the act is not regulated in formal laws and regulations, namely in the sense that it is *onwetmatig* in nature, if according to the standards adopted in society, namely social norms which view an act as a disgraceful act according to these social norms, where the act is deemed to have violated the decency, prudence, and necessity adopted in the relations of individuals in society, it is deemed that the act has fulfilled the element of being against the law (*Wederrechtelijk*).

The size used in this case is the law or unwritten rules. The sense of justice (*rechtsgevoel*), the norms of decency or ethics, and the moral norms that apply in society are sufficient to become a criterion for an act to be unlawful, even if it is only seen materially. The explanation from the legislature does not only explain Article 2 paragraph (1) regarding elements against the law but has created a new norm, which contains the use of the law but has created a new norm; which contains the use of measures that are not formally written in law to determine acts that can be punished.

Acts against the law Materially in its positive function, the notion of materially unlawful nature in a positive sense is a violation of the principle of legality, in Article 1 paragraph 1 of the Criminal Code. This means that the teaching of unlawful nature has a positive function, that is, even though an act is materially an unlawful act, if there are no written rules in criminal legislation, the act cannot be punished. The teaching on the nature of material lawlessness in its positive function provides the view that an act is still considered a delict or a criminal act, even if the act is not explicitly formulated and is punishable by a crime in the law, if the act is contrary to the law or measures of value that are outside the law, such as moral values, religious values and so on. With such an understanding, the teaching of material lawlessness, in its positive function, recognizes things outside the law.

## **2. Forms of Unlawful Acts That Do Not Meet the Elements of Corruption Crimes**

In this writing, the author tries to present a case study which is a matter of unlawful acts that do not become criminal acts of corruption to achieve legal certainty. In 2006 PT MNA processed the procurement of two units of aircraft type B737 series 400 and 500, although this was not specifically budgeted for in the 2006 RKAP. Acting as the lessor is TALG, in the initial discussion, TALG said it would buy the aircraft that PT MNA wanted if PT MNA was willing to rent it. After going through a long-distance negotiation process (via internet/e-mail and teleconference), PT MNA finally agreed to the terms requested by the TALG as outlined in the LASOT.

In LASOT, PT MNA must pay a Security Deposit of US\$500,000.00 for each aircraft unit. The Security Deposit must be paid in cash no later than one day after the signing of the Purchase Agreement between TALG and East Dover Ltd to the account of Humes & Associates. LASOT also regulates refundable Security Deposits. The Security Deposit will be returned to PT MNA in full if the TALG fails to procure/send the aircraft and the aircraft lease is canceled.

PT MNA commonly makes Security Deposit payments in cash, and there have been no problems so far. The lessor has always returned the Security Deposit if the lessor fails to deliver the aircraft. After all members of PT MNA's board of directors agree to pay the Security Deposit by signing the circular board, the money is transferred to the account of Humes & Associates; after the money was transferred, it turned out that TALG had failed to procure/send the aircraft to PT MNA. PT MNA asked for the Security Deposit to be returned and to cancel the rental agreement with TALG. PT MNA's money designated as a Security Deposit has been disbursed and used for the personal interests of Alan Messner and John Cooper, namely Alan Messner received US\$ 810,000.00 and John Cooper US\$190,000.00.

PT MNA, assisted by JAMDATUN, represented by Yosep Suardi Sabda as the state attorney, filed a civil lawsuit in the "US District Court for the District of Columbia" against Alan Messner and John Cooper, which PT MNA won. Based on a court decision, Alan Messner and John Cooper were convicted of committing a breach of contract and ordered to return PT MNA's money and interest.

On 28 July 2010, Alan Messner returned PT MNA's money, amounting to US\$4,793.63. Until now, PT MNA is still trying to recover the Security Deposit that Alan Messner and John Cooper misused, including criminalizing the two men. The PT MNA Security Deposit Financial Report is recorded as a receivable; To improve PT MNA's financial performance, the GMS mandated that PT MNA's management increase the number of aircraft fleets. Therefore, when TALG offered 2 B737 series 400 and 500, PT MNA immediately followed up. PT MNA has long wanted to rent Boeing classic family series aircraft (300/400/500 series) but has consistently failed.

Following up on the TALG offer, PT MNA agreed to enter a lease agreement for B737 series 400 and 500 aircraft with TALG. Based on the LASOT signed by Tony Sudjiarto representing PT MNA with Alan Messner representing TALG, PT MNA must pay a Security Deposit of US\$1,000,000.00 (one million US dollars) no later than one day after TALG signed a Purchase Agreement with East Dover Ltd to purchase the aircraft to be leased to PT MNA.

Based on the prevailing customs in the aircraft leasing business, placing a Security Deposit is common for companies that rent to Lessors. This Security Deposit guarantees security for the lessor if the aircraft lessee fails to pay the rent. Whether the Security Deposit is paid in cash or by other financial instruments, such as a bank guarantee, depends on negotiations and agreements. PT MNA has attempted to pay the Security Deposit using instruments other than cash. However, TALG does not trust PT MNA, considering that PT MNA's reputation and credibility in the eyes of the lessor are not good. In addition, PT MNA is used to making Security Deposit payments in cash, and so far, it has always been returned when the aircraft leasing agreement is cancelled.

There are seven formulations of criminal acts of corruption contained in Law Number 31 of 1999 in conjunction with Law Number 20 of 2001. However, the criminal act of corruption attracts the most attention, which can harm state finances in Article 2, paragraph (1), and Article 3. Because these two articles are the articles most often

used by law enforcement officials to prosecute suspected corruption, these two articles are often referred to as the “ultimate weapon”.

Article 2, paragraph (1) of Law Number 31 of 1999, in conjunction with Law Number 20 of 2001, reads: “Anyone who unlawfully commits an act of enriching himself or another person or a corporation that can harm the state’s finances or the country’s economy; shall be punished with life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years and a minimum fine of Rp. 200,000,000 (two hundred million rupiahs) and a maximum of 1,000,000,000.- (one billion rupiah) ”.

Article 3 of Law Number 31 of 1999, in conjunction with Law Number 20 of 2001, reads: “Anyone who, intending to benefit himself or another person or a corporation, abuses his authority, opportunity or means because of his position or position which can cause financial harm state or state economy, shall be punished with life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years and or a fine of at least Rp. 50,000,000.00 (fifty million rupiahs) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah)”.

Based on the sound of the two articles, we can see that the actions in the two articles are formulated as formal offenses with the words “can” before the sentence “harm the state’s finances”. This makes the formulation of the two articles broad enough that it is unsurprising that they ensnare many people. Then in applying the two articles, jurists still have ambiguity and disagreement in interpreting them, so what is of concern to the author is whether the people who are ensnared by the two articles are indeed worthy and deserve to be punished.

According to Law No. 31 of 1999 that “state financial losses are reduced state assets caused by an act against the law, abuse of authority/opportunity or facilities that exist in a person because of position or position, negligence of a person and caused by circumstances beyond human capabilities”. Whereas state finances referred to in Law Number 17 of 2003, are “all rights and obligations of the state that can be valued in money, as well as everything in the form of money or in the form of goods that the state can own in connection with the implementation of these rights and obligations”.

So, the criminal acts regulated in Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 are formulated in such a way that they include acts of enriching oneself or another person or an entity (corporation) in an “unlawful” manner in the formal and material sense. With this formulation, unlawful corruption can also include disgraceful acts that must be prosecuted and punished according to society.

As we know, corruption is indeed a humanis generis host or common enemy of humankind, but in applying criminal law, it must remain following the applicable legal corridors. In countries that adhere to the standard law legal system, there is a maxim that provides conditions for granting sorrow or imposing a sentence on a person, namely “Actus Non Facit Reum Nisi Mens Sit Rea”, which means that an act does not make a person guilty; except with the wrong mental attitude. In this case, to

be convicted, two things must be met: *actus reus* (physical element) and *mens rea* (mental element).

We do not find the position of *mens rea* in the Criminal Code (KUHP) or other regulations, such as the principle of legality, but regarding the recognition of *mens rea* or guilt as a condition for imposing a sentence or a basis for criminal responsibility there is no need to doubt it; because it would be very contrary to the sense of justice if there are innocent people and then sentenced.

In the case study that the author analyzes, where the action is based on the prevailing customs in the aircraft leasing business, the placement of a Security Deposit is a common thing done by companies that rent to Lessors. This Security Deposit guarantees security for the lessor if the aircraft lessee fails to pay the rent. Whether the Security Deposit is paid in cash or by other financial instruments, such as a bank guarantee, depends on negotiations and agreements.

So, in the sense that the activities mentioned above can be categorized as an unlawful act without error (without intentional or negligent elements), the error is one of the fundamental elements besides the unlawful nature of the act and must be fulfilled so that a legal subject can be sentenced to a crime. A person's sentence is not enough if that person has committed an act against the law. So even though the maker fulfills the formulation of an offense in the law and is not justified (an objective breach of a penal provision), this does not yet meet the requirements to impose a sentence.

Certainty is an aspect of law that cannot be separated, particularly for written legal regulations. A law devoid of certainty value will lose its significance because it can no longer serve as a direction for everyone's conduct. As one of the goals of the law, certainty is specifically mentioned.

Legal certainty in certain situations requires the availability of clear, consistent, and accessible legal rules issued by state power; that the authorities (government) apply the legal rules consistently and also obey and obey them; that the majority of citizens, in principle, agree with the contents and therefore adapt their behavior to those rules; that independent and impartial (judicial) judges apply the legal rules consistently when they resolve legal disputes and, that judicial decisions are concretely implemented.

These five elements suggest that legal certainty can be attained if the legal substance reflects the demands of the community. The rule of law that can provide legal certainty derives from and reflects the culture of a society. Absolute legal certainty (realistic legal certainty) refers to this type of legal certainty, which involves state and citizen cooperation in orienting and comprehending the legal system.

Legal certainty in law enforcement after the Constitutional Court (MK) in decision no. 003/PUU-IV/2016 dated 25 July 2006, which canceled the material 'unlawful' nature in the elucidation of Article 2 paragraph (1) of Law Number 31 of 1999 concerning the Eradication of Corruption (UU Tipikor) considered to have created legal uncertainty and injustice. Unfortunately, the problem is not yet 'uniform' interpreting elements against the law in handling corruption cases (tipikor), there is no in-depth research from experts that the public can access.

In criminal law, against the law (*wederrechtelijk*) has a broad meaning (formal and materiel *wederrechtelijk*). Against the law, in a broad sense, means acts contrary to written legal regulations and the general principles of applicable law, including unwritten laws. And the authors describe below part of the concept of unlawful acts from the meaning “against the law and detrimental to state finances,” including:

The first element is against the law in a material sense with a positive function. When viewed from its history, ‘unlawful’ existed in the first regulation specifically regulating corruption, namely in Regulation of the Military Authority No. 6 of 1957. A year later, Article 3 of the War Authority Regulations of 1958 defined the element against the law as “other forms of corruption”. However, the element against the law was not found again in Law Number 24/Prp/1960 but used elements of crime or violation. The definition of “against the law” has only recently been explicitly referred to as one of the elements of corruption in Article 1 paragraph (1) sub an of Law Number 3 of 1971 concerning the Eradication of Corruption Crimes.

The formulation of a delict which is not much different and only slightly changed can now be found in Article 2, paragraph (1) of the Corruption Law. Suppose you look at the formulation of Article 2 paragraph (1) of the Corruption Law and its explanation. In that case, it can be interpreted that ‘against the law’ in the formal and material sense has a positive function. This means this article opens up space for criminal acts previously not regulated explicitly in law. Of all the rules except Law Number 24/Prp/1960, the meaning of ‘against the law’ has a broad meaning, both formally and materially.

From the formal point of view, if an act has fulfilled the law’s prohibition, then the position against the law and the nature of the violation already exists, and exceptions exist only in the law. Meanwhile, from a material perspective, not all actions that comply with statutory prohibitions are not necessarily against the law. However, the material view admits that there are exceptions to breaking the law according to written and unwritten laws. “Both those with material and formal views believe that it is against the law that must be proven if it is expressly stated in the elements of the article.

Second, the element against the law as a means. Although “against the law” is an element in the offense of Article 2 paragraph (1) of the Corruption Law, this element is not a *bestandeel delict* (core offense) but only a means for prohibited acts, namely enriching oneself or other people or corporations. This argument refers to the Explanation of Article 1 paragraph (1) sub a of Law Number 3 of 1971 and the General Explanation of the Corruption Law that the function of breaking the law is as a means.

Unfortunately, in practice, the notion of ‘against the law’ is no longer understood as a tool by law enforcers. Law enforcers prioritize proving the fulfillment of the ‘unlawful’ element rather than proving the perpetrator’s actions related to enriching themselves, others, or corporations. The relationship between unlawful behavior and acts of self-enrichment can indicate whether or not there is unlawful nature to the actions committed by the perpetrator. It is necessary to socialize the

results of this research to all law enforcers so that there are common perceptions and guidelines in dealing with corruption related to Article 2, paragraph (1).

Third, the difference between Article 2 paragraph (1) and Article 3 of the Corruption Law. In practice, prosecutors often use Article 2 paragraph (1) together with Article 3 of the Corruption Law, either with a subsidiary or alternative charges. The use of Article 2 paragraph (1) as the primary charge is quite complicated if you want to prove the 'abuse of authority element in Article 3. Related to this, the Supreme Court (MA) in MA Circular Letter (SEMA) Number 7 of 2012 has determined the criteria for the number of state losses as the basis for applying the two articles. If the loss to the state is less than IDR 100 million, then Article 3 is applied, and if it is more than IDR 100 million, Article 2 paragraph (1) is applied.

Fourth, the dualism of the Supreme Court's attitude in the meaning 'against the law' after the Constitutional Court's decision. To answer this, the writing team reviewed several decisions before and after the Constitutional Court's decision. As a result, it turns out that the Supreme Court is still not uniform in applying the notion of 'against the law'. For example, Supreme Court Decision No. 103K/Pid/2007 dated 28 February 2007, where the element of 'against the law' is interpreted in a formal and material sense with a positive function. Other decisions can also be seen in the Supreme Court Decision No. 2608K/Pid/2006. "The unlawful act, in this case, is seen as a means for self-enrichment and not as an offense following Article 2 paragraph (1) of the Corruption Law".

Suppose an act is considered to have violated the law and can be subject to criminal sanctions. In that case, two elements must be fulfilled: the actus reus (physical element) and mens rea (mental element) elements. The element of actus reus is the essence of the crime itself or the act committed, while the element of mens rea is the inner attitude of the perpetrator at the time of committing the act.

In the field of criminal law, exterior acts are referred to as actus reus, while the mental state or intent of the culprit is referred to as mens rea. Hence, actus reus is an external aspect and mens rea is a mental or fault element. A person may be punished for reasons other than the commission of a crime or violation of the law.

So, even though his actions fulfill the formulation of an offense in statutory regulations and are not justified (an objective breach of a penal provision), this does not yet meet the requirements for a criminal conviction. This is because you must look at the perpetrator's inner attitude (intention or purpose) when he acts against the law.

"A person who makes a mistake has violated the law, but a person who violates the law does not necessarily make a mistake", which means that this meaning corresponds to an unlawful act without guilt (without intent or negligence) which the author analyzes in the case study in this research because there is no malicious intent and intentional factors to benefit himself personally or benefit other people at the expense of state finances.

Then it was strengthened by legal efforts undertaken by PT MNA, assisted by JAMDATUN, represented by Yosep Suardi Sabda as the State attorney, filed a civil lawsuit in the "US District Court for the District of Columbia" against Alan Messner



and John Cooper PT MNA won. Based on a court decision, Alan Messner and John Cooper were convicted of committing a breach of contract and ordered to return PT MNA's money and interest.

## E. CONCLUSION

There are seven formulations of criminal acts of corruption contained in Law Number 31 of 1999 in conjunction with Law Number 20 of 2001. However, what attracts the most attention is the criminal act of corruption which can harm state finances in Article 2, paragraph (1) and Article 3. Because these two articles are the articles most often used by law enforcement officials to prosecute suspected corruption, these two articles are often referred to as the "ultimate weapon". Suppose an act is considered to have violated the law and can be subject to criminal sanctions. In that case, two elements must be fulfilled, namely the actus reus (physical element) and mens rea (mental element) elements. The element of actus reus is the essence of the crime itself or the act committed, while the element of mens rea is the inner attitude of the perpetrator at the time of committing the act.

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