

## THE PROBLEM OF CORRUPTION LAW ENFORCEMENT THAT CAUSES STATE LOSSES SINCE THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA NUMBER 25 / PUU-XIV / 2016 DECISION

Muhammad Zaki<sup>1</sup>, Tofik Y Chandra<sup>2</sup>, Hedwig Adiinto Mau<sup>3</sup>

<sup>1,2,3</sup>Program Pascasarjana, Universitas Jayabaya, Jakarta

E-mail: <sup>1)</sup> [rayaszakishma@gmail.com](mailto:rayaszakishma@gmail.com)

### Abstract

*The various forms of acts of corruption and the various factors that cause corruption in their growth are increasingly widespread, so that the boundaries of the characteristics of acts of corruption and the characteristics of acts that are not corrupt but characterized by very detrimental to the state and society become difficult to distinguish, and lead to uncertainty about how to formulate groups. his crime. This research is normative legal research that uses primary and secondary legal sources with library research collection techniques through legislation approach, historical approach and case approach. The results obtained are the legal considerations of the judges of the Constitutional Court of the Republic of Indonesia in the Decision of the Constitutional Court Number 25/PUU/XIV/2016 in Article 2 Paragraph (1) and Article 3 of Law Number 20 of 2001 concerning Eradication of Criminal Acts of Corruption in Decision Number 25/ PUU-XIV/2016 which grants the abolition of the phrase “can” is to create legal certainty for the State Civil Apparatus (ASN) regarding discretionary policies or decisions or the implementation of the Ermessen freies principle which is criminalized as a criminal act of corruption because it is detrimental to state finances.*

Keywords: *Criminal Corruption, Law Enforcement Problems, Evidence, State Losses*

### 1. INTRODUCTION

Eradicating corruption is defined in Law Number 30 of 2002 concerning the Corruption Eradication Commission (refers to KPK) as a “series of actions to prevent and eradicate corruption through coordination, supervision, monitoring, investigation, prosecution, and examination in court with community participation, in accordance with relevant regulations and regulatory requirements”. Consequently, the three key aspects of the corruption eradication strategy are prevention, prosecution, and community engagement (Hermien et al., 2017).

In an attempt to eliminate the causes and possibilities for committing corruption crimes, which are extended offenses, remarkable actions must be implemented in the areas of prevention, prosecution, and community engagement. In keeping with Article 1 Paragraph 3 of the 1945 Constitution, Indonesia is a country built on law (*rechtstaat*) and not on power (*machtsaat*). Consequently, law enforcement is one of the primary means of maintaining order in Indonesia (Hutabarat, Fransisca, et al., 2022).

Efforts through law enforcement can be seen through the historical development of anti-corruption laws and regulations in Indonesia, which have undergone four changes, namely in 1960, 1971, 1999, and 2001, which have been sufficient to demonstrate the existence of

serious government efforts to eradicate corruption in Indonesia (Hutabarat, Delardi, et al., 2022).

In Article 2 Paragraph (1) and Article 3 of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption, the criminal act of corruption is constituted as an unlawful conduct in both the formal and material senses. The phrase "can" underlines that the criminal act of corruption is a formal crime, while the phrase "harmful to state finances" denotes an unlawful nature in a material sense.

The criminal act of corruption as a formal offense means that a perfect act of corruption does not need to wait for state losses to arise, as long as it can be interpreted according to common sense that an act has the potential to cause state losses, then the act can already be categorized as a criminal act of corruption. (Chazawi, 2005) This is in line with the statement of the House of Representatives (DPR) as the legislator (positive legislator). (Asshiddiqie, 2007) in the Decision of the Constitutional Court Number 003/PUU-IV/2006 which states that the elements of Article 2 Paragraph (1) and Article 3 of Law Number 20 of 2001 are all deliberately intended to cover all forms of corruption, whether detrimental to state finances or potentially detrimental to state finances. Sanctions can be given if the elements against the law have been met. This is a form of extraordinary handling of extraordinary crimes of corruption (extra ordinary crime).

A perfect act of corruption does not need to wait for state losses to occur, as long as it can be understood according to common sense that an act has the potential to produce state losses, then the conduct can already be classified as a criminal act of corruption (Chazawi, 2005). This is consistent with the House of Representatives' (DPR) statement as the lawmaker (positive legislator) (Asshiddiqie, 2007) in the Constitutional Court Decision Number 003/PUU-IV/2006, which states that the elements of Article 2 paragraph (1) and Article 3 of Law Number 20 of 2001 are all intentionally intended to cover all forms of corruption, whether detrimental to state finances or potentially detrimental to state finances. Sanctions may be imposed if the elements of the law are satisfied. This is a type of extraordinary handling of extra ordinary crime.

Since there is a strong drive to eradicate corruption as well as to warn everyone not to commit a criminal act of corruption, the word "can" is used in Article 2 Paragraph 1 and Article 3 to emphasize the aspect of prevention (deterrence). After the decision of the Constitutional Court Number 25/PUU-XIV/2016, which states that the phrase "can" in Article 2 Paragraph (1) and Article 3 of Law Number 20 of 2001 concerning the Eradication of Criminal Acts of Corruption does not have binding legal force, these aims and objectives have undergone a shift.

Corruption offenses are no longer predicated on a possible loss (potential or predicted state financial loss), but rather on actual loss (real state financial loss) as outlined in the Constitutional Court Decision Number 25/PUU-XIV/2016, which implies that the expression "can" is no longer binding. When the phrase "can" is used in Article 2 Paragraph (1) of Law No. 20 of 2001 about the Eradication of Criminal acts of Corruption, the Constitutional Court's two opinions on the matter are inconsistent.

In this instance, the following are some examples of incidents that are connected to variations in the findings of the audit of state losses:

1. In the corruption case of PT. Asuransi Sosial Angkatan Bersenjata Republik Indonesia (ASABRI). The judge considered that the calculation of state losses of Rp. 22.788 trillion by the Audit Agency (in this case is BPK) was unproven and had no basis. The judge conclude that the BPK and experts were inconsistent when calculating state losses in the ASABRI case. The method used is total loss, namely recognized receipt of funds before the audit is completed so that the judge decides with money in lieu of state losses of only Rp 12.643.400.946.226.
2. In the case of the mega-corruption of the electronic identity card (e-KTP) project carried out by Setya Novanto. The Supreme Audit Agency (BPK) assessed the total state loss as Rp. 2.5 trillion, while the Development and Finance Supervisory Agency (BPKP) assessed the total state loss as Rp. 2.3 trillion.
3. In the case of corruption in the routine budget of the Lebong Regency DPRD Secretariat for the 2016 Fiscal Year, which was carried out by Teguh Raharjo Eko Purwoto Bin Suroto (late), DKK. The Supreme Audit Agency (BPK) assessed the total state loss as Rp. 1.353.217.500,- (one billion three hundred fifty three million two hundred seventeen thousand and five hundred rupiah) while the Development and Finance Supervisory Agency (BPKP) assessed the total state loss as Rp. 1.029.520.007,- (one billion twenty nine million five hundred twenty thousand seven rupiah)

Based on the aforementioned issue, the main objective of this study is to determine and analyze the decision of the Constitutional Court, which ruled that the word "can" is contrary to the 1945 Constitution of the Republic of Indonesia and has no legal basis in fact, as well as the occurrence of legal uncertainty regarding the institution authorized to calculate Total State Losses and Slowing the Process of Eradicating Criminal Acts of Corruption.

## **2. THEORETICAL BASE**

### **2.1. Judge's Decision**

A judge's decision is a declaration that is issued by a judge in his or her capacity as an official of the state who is allowed to do so. It is stated during a trial and is intended to put an end to or find a resolution to a case or disagreement between the parties (Sutiyoso, 2008). In order to find a solution that is fair and equitable, the court will make a decision.

As stated in Article 14 of Law Number 48 of 2009, which states that a deliberation session of every judge is obligated to submit written considerations or opinions on case that is examined and becomes an inseparable part of the decision, judges are required to take into consideration a number of factors in order to reach a decision that is as fair as possible when making a decision. One of these factors is the method of opinion or judge's consideration. As a result, it is not surprising for a decision to result in diverse opinions being held by various judges.

### **2.2. Law Enforcement Theory**

According to Soerjono Soekanto, law enforcement is an activity to reconcile the relationship of values that are described in norms of action and attitudes as a series of final value translations. To build and sustain a harmonious social environment (Soerjono, 1983).

Enforcement of criminal law is the implementation of criminal law by law enforcement officers. In other terms, criminal law enforcement is the execution of criminal laws. Thus, law enforcement is a system involving the alignment of ideals, regulations, and ordinary human behavior. Ultimately, these norms become guidelines or benchmarks for behavior or behaviors that are deemed acceptable or should be. The conduct or attitude of the act seeks to build, preserve, and ensure peace.

### **2.3 Theory of Judicial Power**

According to what Bagir Manan said, there is a kind of universal opinion that "an independent judicial power is a necessary for the establishment of justice and truth," and as a result, an independent judicial power is an absolute necessity for the community.

As for the meat and potatoes of the power that an independent judiciary possesses (Handoko, 2015), this refers to the power that comes with forming a judiciary, which includes the authority to investigate and make a decision on a particular case or disagreement. It is meant to ensure that the judge is free from the many anxieties or fears that may arise as a result of a judgement or legal provision being made, and that the judge is able to operate in a manner that is objective, honest, and impartial. Legal actions, both routine and extraordinary, taken by and within the context of the judicial power itself are the only means by which an independent court can exercise any form of control over its own operations in the context of judicial supervision. Therefore, any type of interference from power that is not within the competence of the judiciary ought to be prohibited, and any actions taken against judges ought to be carried out only in compliance with the law.

In accordance with Article 24 Paragraph 1 of the Constitution of 1945, the judicial power is an autonomous power to administer justice and uphold law and justice. Thereby, it has been acknowledged that the responsibility of judges is to execute rechtsvinding (participating in finding the law (Kansil, 1989). Accordingly, Article 10 of Law Number 48 of 2009 about Judicial Power prohibits judges from declining to inspect, hear, and rule on a case submitted to them through the court.

## **3. RESEARCH METHOD**

This study uses a normative legal research type focusing on the statute approach, historical approach, and case approach. Primary legal materials are the main legal materials in current research, which involves several relevant regulations such as 1945 Constitution of the Republic of Indonesia, Law Number 31 of 1999 jo. Law No. 20 of 2001 concerning the Eradication of Criminal Acts of Corruption, Law Number 48 of 2009 concerning Judicial Power, Law Number 1 of 2004 concerning State Treasury, Constitutional Court Decision Number 25/PUU-XIV/2016, Constitutional Court Decision Number 003/PUU-IV/2006 Constitutional Court Decision Number 31/PUU-X/2012 as well as Supreme Court Circular Number 4 of 2016.

Furthermore, data collection is done by literature study, where literature study is the single method used in normative legal research (Suratman & Dillah, 2014). Through library research, legal materials are subsequently collected. The collection of legal materials consists of primary legal materials, secondary legal materials and tertiary legal materials classified according to the relevant legal issues. The legal materials are then managed to obtain an

explanation through the management of legal materials that are deductive in nature, namely drawing conclusions that describe the issue in general to specific or more concrete problems.

#### **4. RESULT AND DISCUSSION**

##### **4.1. Comparison Based on the Petitioner's Party and the Petitioner's Statement**

It was submitted as a petition for judicial review on two decisions of the Constitutional Court, specifically the Constitutional Court Decision Number 003/PUU-IV/2006 and the Constitutional Court Decision Number 25/PUU-XIV/2016. The petition began with an analysis of the phrase "can" in Article 2 Paragraph (1) and Article 3 of Law Number 20 of 2001 Concerning Amendments to Law Number 31 of 1999 Concerning Eradication of Criminal Acts of Corruption.

The underpinning for testing the Constitutional Court Decision No. 003/PUU-IV/2006 is Article 28D Paragraph (1) of the 1945 Constitution, whereas the cornerstone for testing the Constitutional Court Decision No. 25/PUU-XIV/2016 is Article 1 Paragraph (3), Article 27 Paragraph (1), Article 28G Paragraph (1), and Article 28I Paragraphs (4) and (5) of the 1945 Constitution. These inconsistencies constitute the foundation for the Court's determination that the petition is not *ne bis idem*, thereby granting the Court the authority to review and rule on the original application. The following is a comparison between the two decisions:

The presence of seven applicants who submitted an application for judicial review of Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning the Eradication of Criminal Acts of Corruption to the Constitutional Court on February 22, 2016 was the impetus for the Constitutional Court to issue its decision Number 25/PUU-XIV/2016. This decision was the result of the Constitutional Court's deliberation. In this particular case, the applicants are as follows:

1. Firdaus, S.T., M.T.
2. Drs. H. Yulius Nawawi
3. Ir. H. Imam Mardi Nugroho
4. Ir. H. A. Hasdullah, M.Si.
5. H. Sudarno Eddi, S.H., M.H.
6. Jamaludin Masuku, S.H.
7. Jempin Marbun, S.H.

According to a decision by the Constitutional Court Number 25/PUU-XIV/2016, each Petitioner who applied for review of Article 2 Paragraph (1) and Article 3 has the following qualifications:

1. Petitioner I, on the other hand, is an individual Indonesian citizen who was convicted based on the Mamuju District Court Decision No. 08/Pid.Sus/TPK/2013/PN.MU as he was found to have violated Article 3 of the Anti-Corruption Law.
2. Whereas Petitioners II and III are both individual citizens of Indonesia who are currently being investigated for possible violations of the Corruption Law's Article 2 Paragraph (1) and/or Article 3 provisions, respectively.
3. Petitioners IV through VII are Indonesian citizens who are currently state civil officials and are possibly liable to the Anti-Corruption Law's Article 2 paragraph (1) and Article 3 provisions.

A petition for judicial review of the Constitutional Court's decision number 003/PUU-IV/2006, which was filed on March 9, 2006, was presented addressing the identical topic. An Indonesian citizen by the name of Dawud Djatmiko is the applicant in this case. At the time, the applicant was in the process of being investigated as a suspect by the Prosecutor's Office. Agung of the Republic of Indonesia in connection with the alleged corruption in the process of land acquisition for the toll road construction project for the Taman Mini Indonesia Indah Cikunir toll road.

Based on this allegation, the applicant was indicted by the Public Prosecutor (JPU) in the trial of the East Jakarta District Court with the primary charges of Article 2 Paragraph (1), Article 18 Paragraph (1) letters a, b of Law Number 31 of 1999 concerning the Eradication of Criminal Acts Corruption jo. Law Number 20 concerning Amendments to Law Number 31 of 1999 jo. Article 55 Paragraph (1) 1st jo. Article 64 Paragraph (1) of Criminal Code (KUHP). Subsidiary indictment Article 3, Article 18 Paragraph (1) letter a, b of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes jo. Law Number 20 concerning Amendments to Law Number 31 Of 1999 jo. Article 64 Paragraph (1) of the Criminal Code (KUHP).

The applicant filed the application for several reasons, according to the Constitutional Court ruling No. 25/PUU-XIV/2016. First, the phrase "can" violates their constitutional rights as state officials who frequently feel worried and concerned since every action in issuing or carrying out policies on their obligations in carrying out their duties is always subject to criminal threats, even though in issuing or carrying out policies they do not intend to act corruptly, but in practice it sometimes suffers unexpected losses due to administrative negligence which has an impact on state financial losses or the state economy.

Considering that, relying on the applicant's experience, administrative negligence is a possibility, yet the law defines administrative negligence as corruption, he is convicted of a crime. Consequently, if individuals maintain a formal offense as described in Article 2 Paragraph (1) and Article 3 of Law No. 20 of 2001 Concerning Amendments to Law No. 31 of 1999 Concerning the Eradication of Criminal Acts of Corruption, it will be contrary to the new legal policies reflected in Law No. 30 of 2014 Concerning Government Administration, in particular Article 20, Article 70, Article 71, and Article 80 pertaining to administrative errors. Administrative errors that formerly focused the criminal approach have shifted to the legal approach of state administration, from a policy with imprisonment to a policy with the punishment of public financial returns.

Furthermore, in reference to the explanation that is based on Article 1 Number (22) of Law Number Number 1 of 2004 Concerning the State Treasury, as well as Article 1 Number 15 of Law Number 15 of 2006 Concerning the Supreme Audit Agency, both of which state that state losses are a shortage of money, securities, and goods that are real and definite in number. Furthermore, Indonesia has ratified the United Nations Convention Against Corruption of 2003, which is based on Law No. 7 of 2006.

On the basis of the Anti-Corruption Convention, the absence of state losses as a corruption offense is deemed reasonable, as the scope of corruption offenses has been clearly outlined, namely bribery in the government sector, bribery in the private sector, embezzlement in office, embezzlement in private companies, trading in influence, abuse of office, public officials who enrich themselves, launder the proceeds of crime, conceal the

existence of crimes, and conceal the existence of corruption. However, Article 2 Paragraph (1) and Article 3 of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 regarding the Eradication of Corruption Crimes do not include a loss to the state element, and the intent is not to punish with corruption the actions of the State Civil Apparatus (ASN) that violate administrative regulations, fail to comply with regulations, or do not comply with the law.

Thirdly, the phrase "can" in the Big Indonesian Dictionary (KBBI) denotes able, willing, intend, and allowed, so the diversity of meanings produces confusion in the implementation of criminal law by law enforcers, which can lead to injustice among citizens.

The application for evaluation of the phrase "can" in the Constitutional Court Decision Number 003/PUU-IV/2006 is based on the fact that the phrase "can" has two meanings, namely as a result of criminal acts of corruption that harm state finances and as a result of criminal acts of corruption that do not harm state finances. The applicant considers the various repercussions to have separate non-criminal punishments and are contained in different paragraphs in order to promote legal certainty. In this matter, the applicant is concerned with the language "can" in Article 2 paragraph (1) and Article 3, because the inclusion of this phrase may entice him or her into committing a criminal act of corruption.

#### **4.2. Comparison Based on Consideration of the Content of Decisions regarding the Elimination of the Phrase "can" and Factors Affecting the Inconsistency of Judges' Decisions**

In the Decision of the Constitutional Court No. 003/PUU-IV/2006, a judge rejected the request for the abolition of the phrase "can" in Article 2 Paragraph (1) and Article 3 of Law No. 20 of 2001 concerning Amendments to Law No. 31 of 1999 concerning the Eradication of Criminal Acts of Corruption for the following reasons:

First, the phrase "can" in Article 2 Paragraph (1) and Article 3 of the status quo Law highlights the prevention (deterrence) and shock therapy efforts for the broader community, which are motivated by a strong desire to eliminate corruption and issue warnings to everyone not to commit illegal acts of corruption and to limit or prevent future damages to the state on a qualitative and quantitative scale (potential loss).

Second, the phrase "can" in Article 2 Paragraph 1 relates to perpetrators of corrupt criminal crimes, whereas in Article 3 it refers more to abuse of power. The description of the offense is formally material, indicating that sanctions can be imposed if the components against the law have been met, even if the amount of state losses is estimated, because the element of state losses is a consequence factor. Nevertheless, if the criteria against the law are not met but the ones resulting in state losses are, criminal sanctions can also be imposed (Article 32 of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption).

Thirdly, regarding the applicant's assessment of the punishment that should be different, the Court concludes that the criminalization of the perpetrators of attempted corruption in Article 15 of Law Number 20 of 2001 Concerning Amendments to Law Number 31 of 1999 Concerning Eradication of Criminal Acts of Corruption is in accordance with Article 27 Paragraph (2) of the United Nations Convention Against Corruption, 2003, which has been ratified by Law of the Republic of Indonesia Number 106 of 2004. According to Article 15 of the status quo statute, "attempt" (poging) offenses are classified as completed offenses.

The Constitutional Court's Decision No. 25/PUU-XIV/2016 granted the request for the abolition of the phrase "can" in Article 2 Paragraph (1) and Article 3 of Law No. 20 of 2001 concerning Amendments to Law No. 31 of 1999 in order to prevent it from being misused to persecute numerous activities that are suspected to be detrimental to state finances, including policies or discretionary decisions or the implementation of the *freies Ermessen* principle that are taken on the basis of an urgent nature. Related businesses that threaten public finances may also be found guilty of doing corrupt activities. Even though there is no element of purpose to jeopardize state finances, this situation makes public officials hesitant to make decisions due to the possibility of being charged with criminal acts of corruption.

A distinct opinion (Disenting Opinion) is presented by one judge, Laica Marzuki, in the Constitutional Court Decision Number 003/PUU-IV/2006. Article 2 paragraph (1) and Article 3 of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption contain the term "can" in the phrase "which can impair state finances or the state economy." The scope of meaning is unclear and rather broad, so it fails to meet the legality principles of a criminal provision, namely *lex certa*, which states that the provision must be clear and not confusing (containing certainty), and *lex stricta*, which states that the provision must be interpreted narrowly, with no analogies allowed.

In keeping with Point E of the Attachment to Law No. 10 of 2004 on the Establishment of Legislative Regulations, entitled Elucidation, it is stated that the Elucidation acts as the official legislative interpretation of certain body standards. The explanation offers just a description or further elaboration of the body's governing rules. Explanation as a technique of elucidating norms in the body must not leave the norms stated unclear (point 165). The explanation cannot serve as a legal basis for the creation of additional regulations. As stated in Articles 176 and 177 of Law No. 12 of 2011 on the Establishment of Legislation, entitled Explanation, this remains valid.

Court Judge Laica Marzuki ruled that the explanation of Article 2 of Law No. 20 of 2001 on Amendments to Law No. 31 of 1999 regarding the Indirect Eradication of Corruption used as a reference as a legal basis due to the vague and expansive reach of Article 2. Nonetheless, the Constitutional Court's Decision No. 003/PUU-IV/2006 was based on the opinion of the majority of constitutional judges, which the Court subsequently considered. The majority of justices in Decision No. 003/PUU-IV/2006 of the Constitutional Court recognized that the emphasis on prevention elements is the most important factor in contributing to the strong desire to remove corruption, which has resulted in significant losses to the state and society. This is the court's primary rationale for rejecting the deletion of the word "can."

According to the findings of researchers, there is a coherence between the judges' considerations in the Constitutional Court Decision Number 003/PUU-IV/2006 and the initial objective of establishing the Corruption Eradication Law, which is formulated as a formal offense based on the General Elucidation and Elucidation of Article 2 Paragraph (1) and Article 3 of Law Number 20 of 2001 Concerning Amendments to Law Number 31 of 1999 Concerning the Eradication of Criminal Act.

The intention of a criminal act of corruption as a formal offense is based on Indonesia's historical experience with corruption laws and regulations. The crime of corruption was earlier constituted as a material offense under Law Number 3 of 1971, based on Article 1



paragraph (1) of Law Number 3 of 1997. The material offense of corruption under Law Number 3 of 1971 is defined as a criminal act that is only considered to exist if it has truly met the elements of causing harm to state finances. The final result is that if the perpetrators of corruption return the state's financial losses or the results of corruption, the aspect of injuring the state's finances is naturally removed, and the offender is not processed or presented to the court for criminal liability (Yuntho et al., 2014).

Moreover, regarding the suspect in the corruption case, the Head of the Finance Section of the DKI Jakarta Regional Government who was examined by the DKI Jakarta High Prosecutor's Office in 1989 was considered completed after the state loss was refunded. The same thing happened in Lampung in a corruption case involving the Head of the Lampung Logistics Depot (DOLOG) in 1992 (Danil, 2021).

On the basis of these issues, efforts to eradicate corruption are still considered ineffective, which led to the amendment of the legislation on corruption crimes. Law Number 31 of 1999 concerning the Eradication of Corruption Crimes was enacted jo Law Number 20 of 2001 with the formulation of a criminal act of corruption as a formal unlawful act (Danil, 2021).

There are inconsistency among the nine Constitutional Justices regarding the decision of the Constitutional Court Number 25/PUU-XIV/2016. Specifically, there are four Constitutional Court Justices who expressed different opinions (dissenting opinion) on the basis of the Constitutional Court's decision Number 003/PUU-IV/2006.

The four judges believe that there has been no fundamental change in academic views regarding the nature of the criminal act of corruption, and thus there is no fundamental reason in empirical-sociological conditions that can be rationally used as a strong reason for the Constitutional Court to abandon its position stated in Decision Number 003/PUU. -IV/2006.

Instead, five judges who had different viewpoints were taken into consideration for the judgment that ultimately served as the foundation for the Constitutional Court's Decision Number 25/PUU-XIV/2016, which granted permission to exclude the phrase "can." The court believes that Law Number 30 of 2014 concerning Government Administration will modify the paradigm of applying aspects of injury to state finances in corruption, and these considerations pertain to that law.

Since the passing of the Law on Government Administration, it is no longer possible for a criminal act of corruption to include causing the state to suffer losses as a result of administrative errors. The decision to take these factors into account was made in order to provide legal protection for the State Civil Apparatus (ASN), which is frequently involved in criminalizing claims of abuse of authority in criminal acts of corruption due to administrative errors or ignorance. In addition, the Court believes that the removal of the phrase "can" will produce and ensure legal certainty. This is due to the fact that the phrase "can" can be interpreted in a number of different ways.

After taking all of these factors into account, the author concludes that there is a significant amount of legal uncertainty as a result of the change in the classification of corrupt offenses for the following reasons:

- 1) There is no relationship between Article 2 Paragraph (1) and Article 3 of Law Number 20 of 2001 concerning the Eradication of Criminal Acts of Corruption with Law Number 30 of 2014 concerning Government Administration The element of real state losses in Law Number 30 of 2014 concerning Government Administration

should not have anything to do with the phrase “can” in Article 2 Paragraph (1) and Article 3 of Law Number 20 of 2001 because it was built on different legal principles. This can be seen from the aspect of the approach. The Government Administration Law certainly uses an administrative approach, while the Corruption Eradication Act uses a criminal approach. In addition, it can also be seen based on aspects of intention or atmosphere (*means rea*), and aspects of the consequences of actions (*actus reus*).

According to Fatkhurohman in a journal entitled "Shifting Corruption Offenses in the Decision of the Constitutional Court Number 25/PUU-IV/2016" said that “abuse of authority in Law Number 30 of 2014 concerning Government Administration based on aspects of intention or atmosphere (*means rea*) in general is an element of error who have no intention to enrich themselves, others or corporations”. Meanwhile, the abuse of authority in Article 3 of Law Number 20 of 2001 in conjunction with Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption based on the aspect of intention or atmosphere (*means rea*) in general is having the intention to enrich oneself, others and corporations. The aspect of the intention is also the same as the unlawful act in Article 2 Paragraph (1).

Misuse of power in Law No. 30 of 2014 pertaining to Government Administration, based on the consequences of the conduct (*actus reus*), is likely to result in personal damages under the category of administrative breaches. Meanwhile, the misuse of authority in Article 3 and unlawful conduct in Article 2 Paragraph (1) of Law No. 20 of 2001 in conjunction with Law No. 31 of 1999 on the Eradication of Corruption Crimes are damaging to third parties, in this case the state (Fatkhurohman & Kurniawan, 2017).

## 2) Criminalization of State Civil Apparatus (ASN) in Issuing Policy

Article 2 paragraph (1) and Article 3 are frequently abused to entangle numerous activities suspected of being harmful to state finances, such as policies or discretionary decisions, or the execution of the *Ermessen freies* concept, which generally arises owing to administrative errors.

Law Number 30 of 2014 concerning Government Administration was born to avoid abuse of authority, including administrative errors. The administrative error uses an administrative approach as stated in the Law on Government Administration which will later be canceled or not by the State Administrative Court (PTUN) (Fathuddin, 2015).

Therefore, the concern regarding the criminalization of the State Civil Apparatus (ASN) in issuing policies is not appropriate if it is related to the Corruption Crime Act, especially the abolition of the phrase "can".

Discretion or action on initiative (*freis ermessen*) can be carried out under three conditions, namely: “first, there are no laws and regulations governing the in concreto settlement of a problem, even though the problem requires an immediate solution. Second, the laws and regulations that form the basis for the actions of government officials have provided complete freedom. Third, there is a legislative delegation, namely the granting of the power to regulate itself to the government which is actually owned by a higher level apparatus” (Ridwan, 2014).

Law Number 30 of 2014 concerning Government Administration, in particular Articles 25 to 32, has regulated the existence of discretion including its limitations.

This provides clearer legal certainty regarding the procedure for the use of discretion. This means that Law Number 30 of 2014 concerning Government Administration has provided legal protection for State Civil Apparatus (ASN) in exercising discretion so there is no need to worry about the phrase "can" in Article 2 Paragraph (1) and Article 3 of the Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption.

- 3) Absence of *Nebis in dem* of Constitutional Court Decision Number 25/PUU-XIV/2016 with Constitutional Court Decision Number 003/PUU-IV/2006 The legal reason for the Constitutional Court to grant re-examination of the Constitutional Court Decision Number 25/PUU-XIV/2016 is because there is a basis different testing. This is based on the legal basis of Article 60 paragraph (2) of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court which states that the material content of paragraphs, articles, and/or parts of the law that has been tested, a re-test may be requested if the contents of the 1945 Constitution of the Republic of Indonesia which are used as the basis for the examination are different.

**Table 1** Comparison of Basic Constitutional Testing Article 2 paragraph (1) and Article 3

| No | Basis for Reviewing the Decision of the Constitutional Court Number 003/PUU-IV/2006 | Basis for Reviewing the Decision of the Constitutional Court Number 44/PUU-XI/2013                                | Basis for Reviewing the Decision of the Constitutional Court Number 25/PUU-XIV/2016  |
|----|---|---|--|
| 1  | Article 28D Paragraph (1)   | Article 1, paragraph 3)<br>Article 27 Paragraph (1)<br>Article 28D Paragraph (1) (2)<br>Article 28I Paragraph (2) | Article 1, paragraph 3)<br>Article 27 Paragraph (1)<br>Article 28D Paragraph (1)<br>Article 28G Paragraph (1)<br>Article 28I Paragraph (4) (5) |

Regarding the absence of *nebis in dem* Constitutional Court Decision Number 25/PUU-XIV/2016, the author refers to the Constitutional Court Decision Number 44/PUU-I/2013, which also examines Article 2 Paragraph (1) and Explanation of Article 2 Paragraph (1) Law Number 20 of 2001 Concerning Amendments to Law Number 31 of 1999 Concerning the Eradication of Criminal Acts of Corruption, as detailed in the table above.

Based on the Court's consideration of the Constitutional Court Decision Number 44/PUU-XI/2013, it is stated that “although there are differences in the basis for testing between petition Number 003/PUU-IV/2006 and the a quo petition, namely Article 1 Paragraph (3), Article 27 Paragraph (1), Article 28D Paragraph (2), and Article 28I Paragraph (2) of the 1945 Constitution, however the Petitioner's petition regarding the constitutionality review of Article 2 Paragraph (1) and the Elucidation of Article 2 Paragraph (1) of the Law on the Eradication of Criminal Acts of Corruption is essentially the same as application Number 003/PUU-IV/2006 so that the application is *ne bis in idem*”.

In Decision Number 25/PUU-XIV/2016, although the Court both saw the substance of the petition, the Court specialized in considering the reality of legal conditions in the norm (law in text) with the law that occurs in reality (law in context) on the grounds that The previous assessment, namely the Decision of the Constitutional Court Number 003/PUU-IV/2006, has repeatedly proven that it has created legal uncertainty and injustice in

eradicating corruption, thus stating that there is no *ne bis in idem*. With the basis of thinking as described above, the author actually sees the potential for legal uncertainty that occurs in the judicial review of the 1945 Constitution, because the Court does not determine a definite measure of the enforceability and continuity of a legal norm that has been tested several times.

After the ruling of the Indonesian Constitutional Court number 25/PUU-XIV/2016, the difficulties experienced by law enforcement in combating corruption-related offences that resulted in financial losses for the state. This will have an effect, albeit an indirect one, of lowering public trust in the constitutional institutions' ability to produce legal certainty and justice. As a result, in order to evaluate the effectiveness of judges in making decisions, it is required to investigate the ramifications of the inconsistent decisions that have been made using knowledge. These consequences include the following:

1) Shifting Formal Offenses to Material Offenses

Based on Article 2 Paragraph (1) and Article 3 of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption, highlight that “initially an action can be said to be a criminal act of corruption if it only fulfills three requirements, namely: 1) Person, group or corporation; 2) Act against the law and/or abuse the authority, opportunity or means; 3) With the aim of enriching oneself, other people or corporations”. The existence of an element of state financial loss or state economic loss is only an element as a result of the three elements of conditions for the occurrence of a criminal act of corruption that have been mentioned. Therefore, a crime has occurred if the elements of the crime have been fulfilled and not the consequences.

The abolition of the phrase “can” in Article 2 Paragraph (1) and Article 3 makes the element resulting from state financial losses a prerequisite for the occurrence of a criminal act of corruption so that an action can only be said to be a criminal act of corruption if it is known in advance the real amount of the nominal state financial loss or loss to the country's economy. It is no longer based solely on an attitude against the law and/or abuse of authority as well as the potential for state financial losses. This, in the author's observation, means eliminating the existence of a probationary act (*poging*) with the same sanctions as the main punishment as the understanding of corruption as an offense is completed in Article 15 of Law Number 31 of 1999.

2) Legal Uncertainty Regarding the Institution Authorized to Calculate the Amount of State Losses

There is a need to know the amount of state losses or real state economic losses as an element of the requirements for the occurrence of criminal acts of corruption, then it should also be known which institution is authorized to calculate the losses. But in reality, the authority of the agency to calculate the amount of state losses still overlaps. Based on the mandate of the 1945 Constitution, in particular Article 23E, it is stated that “the institution authorized to examine the management and responsibilities of state finances is carried out by the Financial Audit Board (BPK), which is independent”.

However, over time, based on the Elucidation of Article 32 of Law Number 31 of 1999 in conjunction with the Decision of the Constitutional Court Number 31/PUU-X/2012, it has added to the gap in the authority of the state loss calculating agency, because the regulation states that an authorized institution other than the Financial Audit Board (BPK) is the Financial and Development Supervisory Agency (BPKP) and other agencies or public

accountants.

The issuance of the Circular Letter of the Supreme Court (SEMA) Number 4 of 2016, further adds to legal uncertainty and at the same time does not accept omnes against the decisions of the Constitutional Court which are final and binding. The Supreme Court Circular (SEMA) states that only the Supreme Audit Agency (BPK) is authorized to audit state finances. However, the circular rule often used as a reference in the court process even though the scope of the SEMA regulation only applies to the internal of the Supreme Court itself.

Differences in legal regulations related to the authority of institutions that have the right to calculate state losses have given rise to a separate polemic regarding certainty in determining the institutions that have the right to calculate and determine the amount of state losses, considering that the Supreme Audit Agency (BPK) and the Financial and Development Supervisory Agency (BPKP) in calculating and determining the amount state losses are often different because of differences in terms of institutional relations, types of audits, objects, nature, as well as authorities and functions.

In the case of corruption in the routine budget of the Lebong Regency DPRD Secretariat for the 2016 Fiscal Year, which was carried out by Teguh Raharjo Eko Purwoto Bin Suroto (late), DKK. The Supreme Audit Agency (BPK) assessed the total state loss as Rp. 1.353.217.500,- (one billion three hundred fifty three million two hundred seventeen thousand and five hundred rupiah) while the Development and Finance Supervisory Agency (BPKP) assessed the total state loss as Rp. 1.029.520.007,- (one billion twenty nine million five hundred twenty thousand seven rupiah).

In addition, in the corruption case of PT. Asuransi Sosial Angkatan Bersenjata Republik Indonesia (ASABRI). The judge considered that the calculation of state losses of Rp. 22.788 trillion by the Supreme Audit Agency (BPK) was unproven and had no basis. The judge was of the view that the BPK and experts were inconsistent when calculating state losses in the ASABRI case. funds before the audit was completed so that the judge decided to pay for state losses of only Rp. 12.643.400.946.226.

Another example also occurred in the case of mega-corruption of the electronic identity card (e-KTP) project conducted by Setya Novanto. The Supreme Audit Agency (BPK) assessed the total state loss as Rp. 2.5 Trillion. Meanwhile, the Financial and Development Supervisory Agency (BPKP) assessed the total state loss as Rp. 2.3 trillion.

The existence of these differences clearly creates legal uncertainty that can be used as a loophole for corruptors as an excuse to choose an institution that benefits them. This will certainly have an impact on even greater state losses.

### 3) Slowing the Process of Eradicating Corruption Crimes

The removal of the phrase "can" has the consequence that an act that only has the potential to harm the state (potential loss) is not a criminal act of corruption, so if law enforcement officials fail to prove that there is a real amount of state financial loss (actual loss), the perpetrators of corruption can be freed. from lawsuits.

Prior to the enactment of the Constitutional Court Decision Number 25/PUU-XIV/2016, in the interest of the investigation, investigator, prosecution and examination process, it is allowed to detain suspects. The detention process has a different time period for each level of the legal process. Based on Article 38 Paragraph 1 of Law Number 30 of 2002 concerning the Corruption Eradication Commission, it is explained that the authority relating to

investigation, investigation and prosecution as regulated in Law Number 8 of 1981 concerning the Criminal Procedure Code also applies to investigators, investigators, and public prosecutors at the Corruption Eradication Commission. This means that the general provisions related to detention contained in Law Number 8 of 1981 concerning the Criminal Procedure Code are also still valid.

- a. For the period of detention at the level of the Public Prosecutor, based on Article 25 the detention period is 50 days;
- b. For the detention period at the District Court level, based on Article 26 the detention period is 90 days;
- c. For the detention period at the High Court level, based on Article 27 the detention period is 90 days;
- d. For the detention period at the Supreme Court Justice level, based on Article 28 the detention period is 110 days;
- e. And this detention period can be increased by 60 days, provided that the suspect experiences severe physical and mental disorders, and is threatened with a minimum sentence of 9 years or more. This provision is regulated in Article 30.

Therefore, efforts made by Investigators and Investigators from the Police, the Prosecutor's Office, or even from detention.

Law Number 8 of 1981 concerning the Criminal Procedure Code states that "the total period of detention is 370 days with the division of the stages of the legal process as follows:

For the detention period at the investigator level, based on Article 24 of the Corruption Eradication Commission, it is not an easy thing to implement, given the limited time in searching for the incident of the crime, seeking sufficient initial evidence when the suspect commits a criminal act of corruption which later on, the initial evidence will be upgraded to status. evidence, and the last is to determine the perpetrators of the corruption.

Moreover, after the enactment of the Constitutional Court Decision Number 25/PUU-XIV/2016, every effort to enforce the law on criminal acts of corruption must have a calculation of state financial losses, a crime of corruption must take a long time, then it is possible that evidence will be lost first. because it was intentionally damaged by the suspect before the investigation was carried out. So determining the amount of real losses in a precise and accurate sense becomes very difficult to do, especially in large-scale losses. If it fails to determine the actual amount of the loss, then the defendant will certainly be free from lawsuits.

The case of an acquittal because it was not proven that the elements could harm state finances occurred in the Surabaya Corruption Court Decision Number 18/Pid.Sus/2011/PN. Sby regarding the Corruption Crime of Procurement of Goods. A defendant named Ir. Gatot Suharto was sentenced to 1 (one) year 6 (six) months in prison by the public prosecutor for violating the provisions of Article 3 of Law No. 31/1999 in conjunction with Law No. 20/2001 on the real eradication of acts before the determination of the suspect. The investigator in this case must first prove the actual amount of the loss before proving the criminal act. Therefore, it is no longer possible for the Corruption Eradication Commission (KPK) to take action as a preventive action.

Calculating how much state losses are caused by the Corruption Crime in conjunction with Article 55 Paragraph (1) to 1 of the Criminal Code. The defendant as Team Leader CV.

Aulia Technical Consultant as Supervisory Consultant for the Surabaya City Government Elevator Works signed the Minutes of Physical Examination of the Work in the Context of Level I (first) submission so that 100% payment was made even though the work result was not 100%. The defendant's actions have caused state financial losses amounting to Rp 2,085,143,465 (two billion eighty five million one hundred forty three thousand four hundred and sixty five rupiah). The loss arises because the payment has been made 100% even though the work has not been 100%. In its decision, the Surabaya Corruption Court of Justice acquitted the Defendant Ir. Gatot Suharto with the consideration that there was no audit of state losses from the BPK or BPKP so that the Public Prosecutor could not prove the existence of state financial losses or the state economy. This decision was later strengthened by the Supreme Court's Decision Number 69K/Pid.Sus/2013 which rejected the appeal from the Public Prosecutor.

In the case of corruption in the procurement of goods, the requirement for calculating state losses in real terms causes investigators to have to wait for the procurement of goods to be completed by the end of the fiscal year to be able to show actual losses, so that the impression that law enforcement officials allow the perpetrators of corruption to cause state losses.

In addition, the law enforcement process in efforts to eradicate corruption will also be slow because investigators must first wait for the results of the calculation of the actual amount of state losses by the authorized institution which in the implementation process takes a very long time so that it hampers the prosecution process, for example in handling Hambalang project corruption case. The KPK's efforts to process the defendants Deddy Kusdinar, Andi Alifian Mallarangeng and Teuku Bagus Mukhamad Noor at the prosecution level at the Corruption Court were hampered because the Corruption Eradication Commission (KPK) was still waiting for the results of an audit by the Supreme Audit Agency (BPK) regarding the calculation of state losses in the Hambalang project (Yuntho et al., 2014).

The handling of a number of corruption cases in the regions is also hampered by waiting for the results of the state financial audit. The report from the monitoring committee for the Investigation and Eradication of Corruption, Collusion and Nepotism (KP2KKN) Semarang stated that in 2013 there were at least 17 corruption cases handled by the Prosecutor's Office and the Police in Central Java which had not been completed because they were still waiting for an audit or calculation of state financial losses from the State Audit Board (BPK) or the Financial and Development Supervisory Agency (BPKP) representing Central Java (Yuntho et al., 2014).

That it can be seen that several factors influence the inconsistency of the Constitutional Court Decision Number 25/PUU-XIV/2016 with the Constitutional Court Decision Number 003/PUU-IV/2006, including:

1. Sociological factors, namely the presence of fear and concern in the midst of society, especially for those who work as State Civil Apparatuses (ASN) who in carrying out their duties make or issue a policy are always under criminal threat because the policy results in state financial losses, even though they do not actually have intention to enrich oneself, others or corporations. In this case, the error made is an act of administrative error or negligence of the State Civil Apparatus (ASN).

2. The juridical factor is the dissenting opinion of judges between decisions because the judge's opinion affects the judge's consideration in deciding the decision case. The existence of dissenting opinions of judges is regulated in Article 14 of Law Number 48 of 2009.
3. There is a philosophical factor, as stated by Montesquieu that the constitution is used as the main basis because of its living and spirited norms (Ali & Heryani, 2012). Therefore, the Court's action is an act to make the law soulful in accordance with the problems that live and develop in society. However, it would be better if the Court also did not forget the initial idea of forming a law with a soul.

Regarding the abolition of the phrase "can", in particular, even though judges are authorized to interpret statutory regulations through legal excavation, according to Logemann, judges must still submit to lawmakers (Utrecht & Mohammad, 1962). The point is that the judge cannot just interpret the words that are read, but must go deeper than that. Judges are obliged to seek the will of the legislators, because they cannot interpret what is not in accordance with the will of the law.

## **5. CONCLUSION**

The constitutional court judges' legal considerations in Decision No. 25/PUU/XIV/2016 of the Constitutional Court on Article 2 Paragraph (1) and Article 3 of Law No. 20 of 2001 Concerning the Eradication of Corruption Is in Decree No. 25/PUU-XIV/2016 which authorizes the elimination of the phrase "can" is to provide legal certainty against the State Civil Apparatus (ASN) against the policy or decision of discretion or execution of the *ermessen freies* principle, which is deemed a criminal act of corruption harmed the nation's finances. In addition, it is to ensure legal certainty against the phrase "can," which is deemed to be open to multiple interpretations, which has been a problem in the past for law enforcement of corruption crimes that result in state losses. In accordance with the Constitutional Court of the Republic of Indonesia's Decision No. 25 / PUU-XIV / 2016, wherein law enforcement must have a calculation of state financial losses, a crime of corruption must be prosecuted within a short period of time, either by the CPC or the BPKP, whose audit results resulted in different calculations of the country's losses.

After the decision of the Constitutional Court of the Republic of Indonesia No. 25/PUU-XIV/2016 in Article 2 Paragraph (1) and Article 3 of Law No. 20 of 2001 Concerning the Eradication of Criminal Acts of Corruption that the phrase "can" be eliminated, problems have arisen in the enforcement of criminal acts of corruption that resulted in state loss. In Article 2 Paragraph (1) and Article 3 of Law No. 20 of 2001 concerning Amendments to Law No. 31 of 1999 for the Eradication of Criminal Acts of Corruption, the previously formal consequences for shifting offenses against criminal acts of corruption became material. The qualification of a criminal act of corruption as a material offense necessitates that law enforcement officials determine the actual amount of state financial losses, despite the fact that the institutions authorized to determine the amount of state losses continue to overlap, causing legal uncertainty and impeding the eradication of corruption.



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**THE PROBLEM OF CORRUPTION LAW ENFORCEMENT THAT CAUSES STATE LOSSES SINCE  
THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA NUMBER 25 / PUU-XIV /  
2016 DECISION**

*Muhammad Zaki, Tofik Y Chandra, Hedwig Adianto Mau*

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