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Reconstruction to Prove Elements of Detrimental to State Finances in the Criminal Act of Corruption in Indonesia*

Firmansyah[1], Topo Santoso[2], Febrian[3], Nashriana[4]
[1, 3, 4] Sriwijaya University Palembang, [2] Indonesia University, Jakarta

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Abstract
State financial loss is one of the elements of the criminal act of corruption in Article 2 paragraph (1) and Article 3 of Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 concerning the Eradication of Corruption Crime. The formulation of the element of detrimental to state finances in the two articles at the level of evidence still raises various obstacles because it is an obscure norm and is multi-interpretative. The results of the research show that proving that the element of detrimental to state finances in the criminal act of corruption is still understood as a formal crime so that the proof is sufficient by fulfilling the act and there is no need for consequences, whether potential loss of state finances or actual loss, the perpetrator can be convicted. After the Constitutional Court through its decision Number 25/PUU-XIV/2016 stated that the word "can" in Article 2 paragraph (1) and Article 3 is unconstitutional and has fundamentally changed the qualification of corruption to become a material crime, but in its application there are different views of law enforcement officials in proving that the element is detrimental to state finances, giving rise to legal uncertainty. In the upcoming reform of the criminal law of corruption, a more appropriate model of proof is to use the concept of state financial loss in the sense of the material crime. Through this concept, a new act can be seen as fulfilling the elements of a corruption crime on the condition that there must be an effect that the state loss is real and occurs (actual loss). The concept of proving state financial losses in a material sense ensures fair legal certainty.
Keywords: Reconstruction, Evidence, State Financial Losses, Corruption Crime.

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[1] **Firmansyah** is a Doctoral Candidate at Law Faculty of Sriwijaya University, Palembang.
[2] **Topo Santoso** is a Professor at Indonesia University. E-mail: santosox@ui.ac.id.
[3] **Febrian** is a lecturer and also Dean Faculty of Law at Sriwijaya University, Palembang. E-mail: febrian_zen@yahoo.com
[4] **Nashriana is** a lecturer at at Law Faculty of Sriwijaya University, Palembang. E-mail: nashriana_zaks@yahoo.co.id
***Corresponding Author:** firmanme1964@gmail.com.

Rekonstruksi pembuktian Unsur merugikan keuangan negara Dalam tindak pidana korupsi di Indonesia

Abstrak
Kerugian keuangan negara merupakan salah satu unsur tindak pidana korupsi dalam Pasal 2 ayat (1) dan Pasal 3 Undang-Undang No. 31 Tahun 1999 Jo Undang-Undang No. 20 Tahun 2001 tentang Pemberantasan Tindak Pidana Korupsi. Rumusan unsur merugikan keuangan negara pada kedua pasal tersebut dalam tataran pembuktian masih menimbulkan berbagai hambatan karena merupakan norma kabur dan bersifat multi tafsir. Hasil penelitian menunjukan, meskipun Mahkamah Konstitusi dalam putusannya Nomor 25/PUU-XIV/2016 telah menyatakan kata "dapat" pada kedua pasal tersebut inkonstitusional, telah merubah secara mendasar tindak pidana korupsi menjadi tindak pidana materiel, namun dalam penerapannya terdapat ketidakseragaman pandangan aparat penegak hukum dalam membuktikan unsur tersebut sehingga telah menimbukan ketidakpastian hukum. Model pembuktian yang lebih tepat adalah menggunakan konsep kerugian keuangan negara dalam arti tindak pidana materiel. Melalui konsep ini, suatu perbuatan baru bisa dipandang memenuhi unsur tindak pidana korupsi dengan syarat harus adanya akibat bahwa kerugian negara benar-benar nyata dan terjadi (actual loss). Konsep pembuktian kerugian keuangan negara dalam arti materiel lebih menjamin kepastian hukum yang adil.
Kata Kunci: Rekonstruksi, Pembuktian, Kerugian Keuangan Negara, Tindak Pidana Korupsi.

Реконструкция Для Доказательства Наличия Элементов, Наносящих Ущерб Государственным Финансам, В Уголовном Акте О Коррупции В Индонезии

Аннотация
Финансовые убытки государства являются одним из элементов коррупции в пункте (1) статьи 2 и в статье 3 Закона № 31 от 1999 г. в сочетании с Законом № 20 от 2001 г. Об Искоренении коррупционных преступлений. Расположение элементов, наносящих ущерб государственным финансам, в двух статьях на уровне доказательств по-прежнему создает различные препятствия, поскольку эта норма расплывчата и имеет множество толкований. Результаты исследования показывают, что доказательства элементов, которые наносят ущерб государственным финансам в преступном акте коррупции, по-прежнему понимаются как формальное преступление, так что доказательства являются достаточными путем совершения действия, и нет необходимости в последствиях, будь то потенциальный ущерб государственных финансов или фактических ущерб, виновный может быть осужден. После того, как Конституционный суд через его решение № 25/PUU-XIV/2016 заявил, что слово «может» в статье 2 (1) и статьи 3 является неконституционным и коренным образом изменил квалификацию коррупции в материальное преступление, но в естественном применении существуют различные точки зрения сотрудников правоохранительных органов в доказательстве того, что эти элементы наносят ущерб государственным финансам , вызывая юридическую неопределенность. В рамках предстоящей реформы уголовного законодательства о коррупции более подходящей моделью доказательства является использование концепции финансовых потерь государства в смысле материального преступления. В рамках этой концепции новый закон может рассматриваться как выполнение элементов преступного коррупционного деяния при условии существования реальных и возникающих потерь государства (фактическая потеря).
Ключевые Слова: Реконструкция, Доказательства, Финансовые Потери Государства, Коррупционная Преступность

A. INTRODUCTION

Corruption is a common human challenge, no culture is truly free from corruption. Corruption is part of the history of human culture creation and is the oldest crime that has a major effect on the economic development of a country (Indrayana, 2016: 1). The 2003 United Nations Convention against Corruption (UNCAC) defines the issue of corruption as a major threat to peace, national and international security, undermining governments, democratic principles, and justice and endangering economic growth and law enforcement (Mulyadi, 2007: 1; Atmasasmita, 2013: 24).

Corruption is not a new phenomenon in Indonesia, since it has been around since the 1950s. And now, corruption is still one of the factors of the slowdown in the economy of Indonesia (Chaerudin, et. all, 2008: 1). The effects of corruption are not only harmful to public finances, but they also have an impact on the lack of regard for community values, in particular the rights to welfare, prosperity, and economic growth that are part of human rights (Mulyadi, 2007: 24). Due to the extent of the effect, the criminal act of corruption is categorized as an extra-ordinary crime (Effendi, 2012: 2), and it is very difficult to show that eradication measures are required that are separate from criminal activities in general.

Statistics show that the Indonesian nation is still struggling with corruption. Transparency International noted that regarding the Corruption Perception Index (CPI) in 2019, Indonesia was ranked 85th with a score of 40 out of the 180 most corrupt countries in the world (www.transparancy.org). This ranking is not yet categorized as good because Indonesia is still below the score of 50. The cause of corruption in Indonesia is still dominated by the high level of corruption in the bureaucracy, state administrators, and law enforcement sectors.

Corruption crimes have continued to increase from year to year, both in terms of the number of cases that have occurred and the number of losses to state finances as well as in terms of the quality of criminal acts that have been committed increasingly systematically as well as in their scope which penetrates all aspects of public life. From the report of the Supreme Audit Agency (BPK), Semester I of 2019, there are 14,965 problems with potential state losses of Rp. 10.35 trillion, and in Semester II 2019 there were 4,904 findings with a potential state loss of Rp. 7.15 Trillion (www.bpk.go.id).

The magnitude of the value of state financial losses can also be seen from the prosecution of corruption cases handled by the Corruption Eradication

Commission (KPK), the Attorney General's Office, and the Police from 2014 - 2018 in the following table:

Table

Corruption Case Enforcement by KPK, Attorney General's Office and Police from 2014 - 2018

Year	Case	Suspect	State Loss
2014	629	1328	5,29 T
2015	550	1124	3,10 T
2016	482	1101	1,45 T
2017	576	1298	6,50 T
2018	454	1087	5,64 T

Source: www: //antikorupsi.org/sites/default/file/tren_korupsi_2018_pdf, Indonesian Corruption Watch, Trend of Corruption Enforcement until 2018.

The data above shows that the state continues to experience very significant financial losses as a result of corruption or irregularities in the management of state finances. Whether the money is not corrupted, it will, of course, be used for public financing for the benefit of the people. Therefore, attempts to eliminate corruption are directed not merely at punishing the offending party, but the most important thing is how to recover the financial damages suffered by the state as a result of the actions of corruption.

State financial losses as an element of corruption in Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Eradication of Corruption (abbreviated as the PTPK Law), are formulated in Article 2 paragraph (1) and Article 3. Types of criminal acts in both articles this is a formal crime. Confirmation as a formal crime *(formeel delicten)* is explicitly stated in the Elucidation of the PTPK Law, although the results of corruption have been returned to the state, the perpetrators of criminal acts of corruption are still brought to court and remain in criminal offenses. In this context, the PTPK Law adopts the concept of state financial loss in the sense of a formal crime. This means that an automatic action is assumed to be adverse to public finances, even though the outcome in the form of a State financial loss has not happened, but it is necessary to have the ability to trigger a State loss on its own, a person will already be taken to court and sentenced to a criminal

offense, given that the other elements of Article 2(1) and Article 3 can be identified in court.

In contrast to Law Number 3 of 1971, the criminal act of corruption is defined as a material crime. With the addition of the word "can" in front of the sentence, "detrimental to state finances or the country's economy", the formulation of a criminal act changes from a material crime in Article 1 paragraph (1) of Law Number 3 of 1971 to a formal crime in Article 2 paragraph (1) and Article 3 of the PTPK Law. The change referred to is to facilitate proof to reach the increasingly sophisticated modus operandi of state financial irregularities (Tuanakotta, 2018: 104).

The strategy to eradicate corruption is not without obstacles. One of these obstacles stems from the formulation of Article 2 paragraph (1) and Article 3 of the PTPK Law which is too broad and has multiple interpretations. Therefore, in its application, it is often misused to reach many acts that are suspected of causing losses to state finances, including discretionary decisions that are urgent for which no legal basis has been found. When this happens, the potential for criminalization in the name of abuse of power often occurs, causing legal uncertainty and injustice.

As illustrated by Erman Rajagukguk, that the formulation of Article 2 paragraph (1) and Article 3 of the PTPK Law which contains the word "can" is using a vague word. How the law should be enacted or a sentence imposed based on an event that has not occurred does not necessarily occur or may not occur. Therefore, the word "can" in practice can mean anything according to the choice of the reader (Rajagukguk, 2016: 10). An act detrimental to state finances is a "criminal act", the principle being measured is "the existence of a formal act violating the law" and the material consequence of a real and definite loss of state finances, which can be calculated with the value of money. If material consequences do not occur, how can someone be said to have enriched himself or another person or a corporation (Toegarisman, 2018: 3).

The weakness of the norms of the two articles was then corrected by the Constitutional Court in its decision Number 25 / PUU-XIV / 2016, by removing the word "can" in Article 2 paragraph (1) and Article 3 because it was deemed unconstitutional and had no binding legal force. This decision has not only changed the paradigm of corruption eradication but also has implications for proving criminal acts of corruption.

Evidence plays an important role in the process of examining criminal cases because it is with this proof that the fate of the perpetrators of the criminal

act is determined. In the context of the criminal act of corruption, proving that the element is detrimental to state finances is the most important part in Article 2 paragraph (1) and Article 3 of the PTPK Law. Moreover, the element of "detrimental to state finances" is explicitly mentioned in Article 2 paragraph (1) and Article 3, therefore it must be proven. This has influenced the views of law enforcement officials in the process of handling corruption crimes. If this element is not proven, then it can have an impact on the freedom of the perpetrator from legal bondage, either because the investigation is stopped or released by a judge in court. For example, major corruption cases handled by the Prosecutor's Office, such as the Procurement of Sisminbakum Access Fee at the Ministry of Law and Human Rights, Procurement of Pertamina Tanker Ship (VLCC), and corruption at PT. Texmaco, the investigation was stopped because there was no element of detrimental to state finances (Indonesia Corruption Watch, 2014: 17). Likewise, there are still corruption cases that have been submitted and tried in court, but the judges have decided to be free for the same reasons, namely the failure to fulfill the elements of detrimental to state finances, for example, the decision of the Supreme Court Decision No.69 K/ Pid.SUS/2013 dated 19 March 2013 and Supreme Court Decision No.2846 K/ Pid-sus/2015 dated 8 August 2015. This means that the evidence of the element of detrimental to state finances is one of the objects that must be proven to conclude to declare a person proven or not to have committed a criminal act of corruption according to both articles.

Prior to the issuance of Decision No.25/PUU-XIV/2016 of the Constitutional Court, Article 2(1) and Article 3 of the PTPK Legislation were deemed to be procedural offenses that did not entail any repercussions in the form of State financial losses. However, after the ruling of the Constitutional Court, Article 2(1) and Article 3 of the PTPK Statute were material offenses, demanding that there should be consequences in the form of damages on public funds. There is also a transition from just a possible loss to a real loss. Legally, the consequence of this decision is that any attempt to apply the corruption law must be taken to show that there is a genuine depletion of state finance before a defendant is named. In the background of the proof, the State's financial losses are an aspect that must be proved from the point of the prosecution. Without an investigation to determine the financial damages of the State, an individual cannot be declared a criminal on the grounds of these two documents.

Following the issuance of Decision No.25/PUU-XIV/16 of the Constitutional Court, the challenges to the regulation of wrongdoing have not been overcome. In judicial experience, judges are not fully applied to their rulings in such a manner that there is a difference in understanding of law

enforcement agencies. This has resulted in legal products, including judges' decisions that do not uniformly interpret elements detrimental to state finances, both in the court of the first instance, the appeal level and the level of cassation, which contradict each other in proving these elements. For example, in the Supreme Court decision No.103K/PID.SUS/2013; Supreme Court decision No.819K/PID.SUS/2017; Supreme Court decision No.3225K/PID.SUS/2018; and decision No.29K/PID.SUS/2019. Of the several decisions concerned with the evidence that the element of detrimental to state finances is still interpreted as either an actual loss or a potential loss and perpetrators of corruption are still convicted.

Other problems faced by law enforcers in applying proof of these elements include different interpretations of state finances, including the question of which party is authorized to calculate state financial losses that can be used as legal evidence. Confusion also occurred after the Supreme Court issued SEMA Number 4 of 2016, which confirmed that the BPK was the only institution authorized to declare state financial losses that could hinder efforts to enforce the law on corruption.

Starting from the existence of different understandings regarding the proof of the element of detrimental to state finances, it will affect law enforcement on corruption. As long as the PTPK Law has not been revised, it can confuse law enforcement on corruption. It is important to re-examine the elements detrimental to state finances, namely as an effort to overcome the different interpretations of each law enforcer and to ensure more legal certainty in the eradication of corruption. Therefore, this paper aims: first, to analyze and explain what is the legal consequence of the formulation of the element of detrimental to state finances for proving the crime of corruption? second, to offer a reconstruction model to prove the elements of detrimental to state finances in criminal acts of corruption with legal certainty and justice.

B. METHODS

This paper uses normative legal analysis approaches, i.e. legal research by analysing library materials or secondary evidence as to the key task. Normative legal analysis is a scientific research method for discovering the facts based on legal scientific reasoning from a normative point of view (Soekanto, 2015: 13-14). Therefore, this research departs from the view of positive legal norms that apply in the national legal system of legislation (Marzuki, 2016: 59). The approaches used are the statute approach and the case approach.

Secondary data mainly comes from laws and regulations on corruption eradication and court decisions as primary legal materials. The data that has been obtained is then analyzed qualitatively.

C. RESULTS AND DISCUSSION

1. Formulation of Elements of State Financial Losses and their Legal Consequences for Proof of Corruption Crime

Law No. 31 of 1999 as amended by Law No. 20 of 2001 concerning the Eradication of Corruption (abbreviated as the PTPK Law), classifies into 8 (eight) groups of corruption crimes (Kristiana, 2016: 56). Of the 8 (eight) groups there are only two articles, namely Article 2 paragraph (1) and Article 3 of the PTPK Law which formulates elements of state financial loss, while the rest does not require an element of state financial loss to prove whether or not there is an act of corruption in the articles. another chapter.

Formulation of Article 2 paragraph (1) of the PTPK Law:

> Every person who unlawfully commits an act of enrichment of himself or another person or a corporation which can cause losses to the state 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). a year and a fine of at least Rp. 200,000,000, - (two hundred million rupiah) and a maximum of Rp. 1,000,000,000, - (one billion rupiah).

Furthermore, in Article 3 of the PTPK Law:

> Anyone who, intending to benefit himself or another person or a corporation, misuses his / her authority, opportunity or means because of his position or position which can cause loss to the state finances or the state economy, shall be punished with life imprisonment or imprisonment of at least 1 one) a year and a maximum of 20 (twenty) years and or at least Rp. 50,000,000, - (fifty million rupiah) and a maximum of Rp. 1,000,000,000, - (one billion rupiah).

When detailed the elements of Article 2 paragraph (1) consist of: against the law; enrich yourself or other people or a corporation; can harm the country's finances or the country's economy. Meanwhile, the elements of Article 3 can be specified: to benefit oneself or another person or a corporation; abuse the power, opportunity, or means available to him because of his position or position; can harm the country's finances or the country's economy.

There is a common element between Article 2 paragraph (1) and Article 3, namely the element "can harm state finances or the state economy". Regarding the subject of criminal acts of corruption, Article 2 means that every person is a legal subject in general without distinguishing certain qualifications. Judging from the point of view of the formulation of criminal sanctions, sanctions are formulated cumulatively in Article 2 paragraph (1) and formulated jointly (cumulatively and alternatives) in Article 3 so that judges can choose one type of sanction or impose both. Meanwhile, from the point of view of the punishment, the sanctions imposed by Article 3 are lighter than Article 2 paragraph (1). Concerning the element "detrimental to the state finances" with the element "detrimental to the country's economy", it is not always necessary, because there is a word "or" which indicates an alternative character. This means that the elements of "state finance" or "state economy" cancel each other out (Minarno, 2009: 48).

Even though they have similarities, the characteristics of the two articles are different, this is influenced by several elements that are characteristic of each act. Article 2 paragraph (1) an act that causes state loss is an act that enriches oneself, another person, or a corporation, and the act has an unlawful nature. Whereas in Article 3, actions that can be seen as causing financial losses are acts of abusing authority, opportunity, or means due to position or position, and to benefit oneself, others, or corporations (Witanto, 2012: 47) Even though, in Article 3 people who abuse their authority, opportunity or means because of their position or position, can also be deemed to have done so illegally (Nelson, 2020: 52).

In the editorial of the two articles, the formulation of state financial loss as a criminal act of corruption has the phrase "can". This means that the element of state financial loss does not necessarily exist (Fathurohman, 2017: 17). Thus proving the element of state loss can be in the potential loss stage, so that the type of corruption is a formal crime. As a formal crime, the emphasis is on an act, without requiring a consequence. In formal criminal acts, certain consequences can only be burdensome or alleviate the crime, but without consequence, the act itself is prohibited and can be punished (Lamintang, 1997: 213).

The legislators realized that in the previous practice based on Law Number 3 of 1971, the criminal act of corruption was difficult to prove because it was formulated as a material crime, so that state losses must occur, resulting in perpetrators of criminal acts of corruption often escaping legal traps. Therefore, in Article 2 paragraph (1) and Article 3 of the PTPK Law, it is

formulated as a formal crime, even though the proceeds of corruption are returned to the state, the perpetrator of the criminal act of corruption is still brought to court and still sentenced to crime, which is expressly stated in Article 4 of the PTPK Law. Seen from the point of view of the process or procedural law, the method of formulating it as a formal crime is intended to make it easier for evidence to ensnare the perpetrators of corruption.

At this point, it can be inferred that it is possible to prove the element of the State financial loss, both in Article 2(1) and Article 3 of the PTPK Rule, utilizing two approaches, namely the actual loss of State finances (true loss) and the probability of causing losses to State finances (potential loss), that the element of the State financial loss is met (Witanto, 2012: 47). In this wording, the PTPK Act adopts the idea of a state financial loss in the context of a structured crime. In other words, automatic intervention is deemed to be harmful to state budgets if the action has the potential to inflict financial harm to the state (Indonesian Corruption Watch, 2014: 31). For a person to be found guilty of committing a criminal act of wrongdoing according to Article 2(1) and Article 3, there is no need for a real injury to the State, but rather a possible loss if the elements of the act are satisfied, a person will now be taken to justice and sentenced to a felony.

The fulfillment of the element of "detrimental to state finances" is important in proving a criminal act of corruption. Moreover, the element of "detrimental to state finances" is explicitly mentioned in Article 2 paragraph (1) and Article 3 of the PTPK Law, therefore, it must be proven. Conceptually, "determining whether or not there is a state financial loss", formulating the corrupt act, and determining the causal relationship between the act against the law and the resulting state loss are the powers of the investigator, investigator, and public prosecutor. Ensuring and calculating the amount of state financial loss is the area of the forensic accountant (auditor). Parties who calculate the amount of state financial losses are qualified as experts as stipulated in the Criminal Procedure Code and according to Article 32 paragraph (1) of the PTPK Law (Tuanakotta, 2018: 175).

The question arises, who calculates and determines the existence of state financial losses, both actual and potential losses which will be used as evidence in a corruption case. The answer, to calculate state financial losses is not the authority of law enforcers (investigators, investigators, and public prosecutors). Law enforcement officials (investigators) can request expert assistance in determining the amount of state financial losses, then the expert as an auditor conducts an investigative audit (Makawimbang, 2014: 201). The

report on the audit results is used by investigators as preliminary evidence to determine a person as a suspect and as a basis for making forced attempts, which later become evidence at court in cases of criminal acts of corruption.

After the issuance of the Constitutional Court decision No. 25 / PUU-XIV / 2016, has fundamentally changed the qualification of corruption in Article 2 paragraph (1) and Article 3 from a formal crime to a material crime. This in itself affects the evidence that the element of detrimental to state finances is a criminal act of corruption. As a material crime, proving that an element of loss to state finances is no longer understood as an estimate (potential loss), but must have occurred or was real (actual loss). With this conception, it puts the element of detrimental to the state as imperative so that the element of criminal acts is fulfilled. That is, to be able to investigate a criminal act of corruption, an actual loss of state finances or actual loss is required as evidenced by the calculation of the state financial loss by the competent agency.

The Constitutional Court takes the opinion that the principle of real loss offers more procedural clarity that is rational and in line with attempts to synchronize and harmonize legal instruments. The Court's opinion refers to the definition of "state loss" in Article 1 number 22 Law Number 1 of 2004 State Treasury and Article 1 number 15 of Law Number 15 of 2006 concerning the Supreme Audit Agency which defines state/regional losses as lack of money, securities, and goods, which are real and definite in number as a result of an act against the law, whether intentionally or negligently. Likewise, the Elucidation of Article 32 paragraph (1) of the PTPK Law states "there has been a loss of state finances which can be calculated by the authorized agency or appointed public accountant."

It's just that after the Constitutional Court decision is seen as not resolving various problems arising from the application of Article 2 paragraph (1) and Article 3 of the PTPK Law. If examined further, the Constitutional Court has not determined which institution is authorized to calculate state financial losses that can be used as evidence in corruption cases. Therefore, the existence of an investigative audit in ensuring state financial losses has a strategic position, namely to provide legal certainty in connection with the unclear authority to calculate state financial losses in the PTPK Law.

So far, many organizations measure the State financial damages, including BPK, BPKP, experts from the Inspectorate General or other bodies with the same purpose, and inspectors themselves, based on decision No. 31/PUU-X/2012 of the Constitutional Court. However, this was countered by the Supreme Court by issuing SEMA No. 4 of 2016 concerning the Enforcement

of the Formulation of the Plenary Meeting Results of the Supreme Court Chamber as a Guideline for the Implementation of Court Duties. The Supreme Court stated that only the BPK has the authority to determine state financial losses, this is an obstacle in the process of proving corruption. This difference becomes an obstacle for law enforcement officials to determine the certainty of the amount of state financial losses as stipulated in Article 18 of the PTPK Law, especially stipulating additional penalties in the form of replacement money.

This non-uniform interpretation is precisely due to the unclear formulation of Article 2 paragraph (1) and Article 3 of the PTPK Law itself. The formulation of criminal acts is needed because of the principle of legality, and because one of the duties of criminal law is to serve the law in a country (Schaffmeister, et. all, 2007: 21). The formulation of criminal acts that are unclear or too complicated will only create legal uncertainty and hinder efforts to successfully enforce the law, which in turn can result in public distrust of law enforcement itself.

In proving the current criminal act of corruption, there are still several problems related to proving the element of detrimental to state finances in Article 2 paragraph 1 and Article 3 of the PTPK Law. Some of these problems;

First, differences in interpretation of state finances. Interpreting the definition of state finance following the principles of criminal law is not easy because it can be found in several laws and regulations. In the context of the PTPK Law, state finances listed in Article 2 paragraph (1) and Article 3 still have different interpretations, although in the General Explanation of the PTPK Law it is stated that state finances are all state assets in any form that are separated, or that are not separated, including in it all parts of state assets and all rights and obligations arising from (a) being under the supervision, management and accountability of officials of State institutions, both at the central and regional levels; and (b) are under the control, management and responsibility of State-Owned Enterprises/Regional Owned Enterprises, foundations, legal entities, and companies that include state capital, or companies that include third-party capital based on agreements with the State.

The definition of State finance can also be found in Article 1 7 of Law No 15 of 2006 on the Supreme Audit Department, which gives the same interpretation as Article 1 1 of Law No 17 of 2003 on State finance, namely 'State finances are all the rights and responsibilities of the State which can be valued in money, as well as anything in the form of money or commodities which can be valued in money.

The issue of understanding and coverage of state finances is often associated with BUMN finance as capital participation from the government. According to Article 1 paragraph (1) in conjunction with Article 4 paragraph (1) of Law Number 19 of 2003 concerning State-Owned Enterprises, it is stated that BUMN is a business entity which is wholly or most of its capital is owned by the state through direct participation from state assets which separated. In this respect, the Fatwa of the Supreme Court: WKMA/Yud/20/VIII/2006 of 16 August 2006 confirms that all laws deciding state assets or regional assets which have been divided as the capital of BUMN, Persero, and Regional Companies in the form of Limited Liability Companies are no longer a state or regional asset (Sutedi, 2018: 35). This fatwa also points out that the aspect that damages state finances as an element of corruption will no longer be placed on BUMN and regional corporations (Effendi, 2011: 106).

The explanation above shows that there is no uniform definition of state finance between the Law on PTPK, the Law on the Audit Board, the Law on State Finance, and the Law on State-Owned Enterprises. The difference in the meaning of state finance between these laws creates difficulties in efforts to eradicate corruption so that it has an impact on legal uncertainty. Therefore, it is necessary to have a clear juridical definition of state finance, this is because the definition of state finance is spread out by several laws, which can hinder law enforcement for criminal acts of corruption.

Besides, the PTPK Law does not provide a rigid definition of the definition of “state financial loss”. The formulation in the articles of the PTPK Law only describes conditions in which there has been a real loss of state finances and can cause losses to state finances. Meanwhile, the calculation of state financial losses is based on the findings of the competent authority or appointed public accountant. Indonesia has its uniqueness in regulating the elements of corruption in the laws and regulations. Even state financial losses are the most important element in the article on the crime of corruption imposed on suspects or defendants of criminal acts of corruption.

In UNCAC 2003 which has been ratified by Indonesia through Law Number 7 the Year 2006, "state loss" is no longer an important element. This can be seen from the sound of Article 3 point 2 UNCAC 2003 regarding the “scope of application” which states that, “To implement this Convention, it shall not be necessary, except as otherwise stated herein, for the offenses outlined in it. to result in damage or harm to State property"(Atmasasmita, 2013: 14). This provision requires an in-depth study when the government adopts the convention into the corruption law, where the elements of state losses should be

reviewed after the convention, as an effort to harmonize to create legal certainty and justice in the enforcement of the criminal law of corruption.

Second, the Unclear Definition of the State Economy. The formulation of the criminal act of corruption in Article 2 paragraph (1) and Article 3 of the PTPK Law, in addition to containing the element of "detrimental to state finances", there is also an element of "detrimental to the country's economy". The element of state economic loss still creates problems in its application, because although the definition of state economic loss has been explained in the General Elucidation of the PTPK Law, it is still not applicable. Actions detrimental to the country's economy, it can be said that there are almost no cases that are decided by the court. This is because the meaning of "detrimental to the country's economy" is not implemented in the realm of law enforcement on corruption, so law enforcers are seldom applied because there are no clear parameters for this definition (Supriyanto, et. all, 2017: 11).

Third, the polemic of the authority to calculate state financial losses. Regarding this, it is always a polemic in the criminal court of corruption, because the PTPK Law does not explicitly regulate it. This issue has generated various and speculative perspectives concerning proving corruption. The elucidation of Article 32 of the PTPK Law only states "that what is meant by state financial losses are losses which have been calculated in number based on the findings of the authorized agency or public accountant". However, no formula can be used to guide in determining which institution has the most authority to determine the existence of state financial losses in corruption cases.

Some entities have so far been able to measure state financial costs, such as BPK and BPKP, but can also collaborate with other departments, and even prosecutors can prove themselves, based on decision No. 31/PUU-X/2012 of the Constitutional Court. Following are examples of cases of calculating state financial losses carried out by public accountants and other institutions, namely: Decision of the Corruption Court at the Medan District Court No. 93 / Pid.Sus / 2016 / PN.Mdn., Dated 16 February 2017, the calculation of state financial losses was carried out by the Public Accountant Office (KAP) Tarmizi Achmad & Rekan (http://mahkamahagung.go.id); Decision of the Corruption Court at the Surabaya District Court No.18/Pid.Sus/2011/PN.Sby, the calculation of state financial losses is based on the "Appraisal Report" prepared by Jhonny & Partners, Public Appraisal Service, Sucofindo Appraisal. The result of this calculation, at the cassation level, was canceled by the Supreme Court in its decision No. 69 K/Pid.Sus/2013. (http://mahkamahagung.go.id); Supreme Court Decision No. 819 K/Pid.Sus/2017, the calculation of state financial losses

is carried out by the Regional Revenue Service of Muara Enim Regency (http://mahkamahagung.go.id); Supreme Court Decision No. 501 K/PID.SUS/2010 dated April 14, 2010, the calculation of state finances is calculated and concluded by the Prosecutor's Investigators (Makawimbang, 2014: 156); and Supreme Court Decision No. 90 PK/PID.SUS/2010 dated 30 November 2010, the calculation of state financial losses was calculated and concluded by the Prosecutor's Investigators (Makawimbang, 2014: 156).

Likewise, after the Supreme Court issued SEMA Number 4 of 2016, which confirmed that the BPK was the only institution authorized to decrypt state financial losses that could hinder law enforcement on corruption. Therefore, to provide legal certainty in proving criminal acts of corruption that harm state finances, the PTPK Law needs to be reformulated. In the upcoming revision of the PTPK Law, it is necessary to consider that the authority to calculate state financial losses in cases of corruption needs to be expanded.

Fifth, the Court is not bound by the calculation results of state financial losses. Before it is declared that they meet the elements of state financial losses following Article 2 paragraph (1) and Article 3 of the PTPK Law, law enforcement officials can ask for assistance from auditors as experts who are tasked with conducting investigative audits and calculating state financial losses. Through investigative audits, it will open the way for gathering facts and presenting evidence that is legally accepted to disclose the occurrence of criminal acts of corruption. The conclusion from the investigative audit is stated in the form of a Report on the Calculation of State Financial Losses (LH-PKKN) which will be used as evidence in court to determine whether or not an act is accused of a criminal act of corruption. In a corruption case, LH-PPKN as evidence can be made by the auditor, either by the BPK, BPKP, APIP or issued by other auditors. The LH-PKKN functions as information regarding whether there is an indication of state financial losses as well as calculating the value of the incurred state financial losses which are used as consideration in corruption trials (Panjaitan, 2018: 125).

When viewed from the juridical framework of the evidentiary aspect, the LH-PPKN prepared by the auditor in a corruption case is included in the category of valid evidence as documentary evidence as stipulated in Article 184 paragraph (1) of the Criminal Procedure Code. The value of the power of proof of a letter from a formal perspective is as perfect evidence, but from a material perspective, the judge is free to evaluate the substance of the letter, on the principle of judge conviction and the principle of minimum limit of proof. Letter evidence as stipulated in Article 184 paragraph (1) of the Criminal

Procedure Code, is not binding evidence but is independent evidence. In other words, the value of the power of proof of letter evidence, as well as the value of proof of witness testimony and expert evidence, have the same value of independent power of evidence *(vrij bewijskrach)* (Harahap, 2005: 310). Judges are not obliged to LH-PPKN, which means that the judge will approve or set aside the proof by citing the reasons. Even in such cases, judges based on the evidence of the trial can judge for themselves the state losses and the severity of the losses suffered by the state.

2. Reconstruction Model Evidence of Adverse Elements of a State Finances with Legal Certainty and Justice

The implementation of Law No. 20 of 2001 on changes to Law No. 31 of 1999 on the Eradication of Corruption Offences is intended to ensure procedural certainty, to prevent the diversity of legal interpretations and to protect the social and economic interests of the population, as well as to ensure fair treatment in the eradication of corruption in criminal activities. Besides, the PTPK Law stipulates a policy that state financial losses must be returned or replaced by the perpetrators of corruption (asset recovery). In other words, that efforts to eradicate corruption should not only punish those who are proven guilty with the most severe punishment, but also so that all state financial losses caused by corruption can be returned.

After the promulgation of the PTPK Act, there have been profound changes to the facts that the aspect that is detrimental to public finances in Article 2(1) and Article 3 of the PTPK Law has undergone in its growth. The move means that Indonesia has ratified UNCAC by Law No. 7 of 2006. Other reforms include a variety of laws regulating state finances, and the presence of a decision of the Constitutional Court correcting the legitimacy of the provisions of Article 2(1) and Article 3 of the PTPK Legislation has shifted the paradigm of the eradication of corruption. All these requirements make it time for the Legislation on Eradication of Corruption to be revised.

It can be said that the formulation of the element of detrimental to state finances in Article 2 paragraph (1) and Article 3 of the current PTPK Law provides room for movement and a wider dimension for law enforcers to interpret the element of state financial loss as an act of corruption. In its application, it is often practiced differently, giving rise to legal uncertainty and contradicting the guarantee of protection of human rights.

After the issuance of the Constitutional Court decision Number 25 / PUU-XIV / 2016, it has not solved the obstacles in law enforcement of corruption, ranging from differences in the interpretation of state finances and losses to state finances to polemics on the authority to calculate state financial losses in corruption cases. The PTPK Law also does not explicitly specify the institution authorized to calculate state financial losses. In practice so far, the calculation of losses can be carried out by the BPK or BPKP, the Public Accountant, or the Investigators themselves. However, the issuance of SEMA No. 4 of 2016, confirms that the BPK is the only institution authorized to hear off state financial losses.

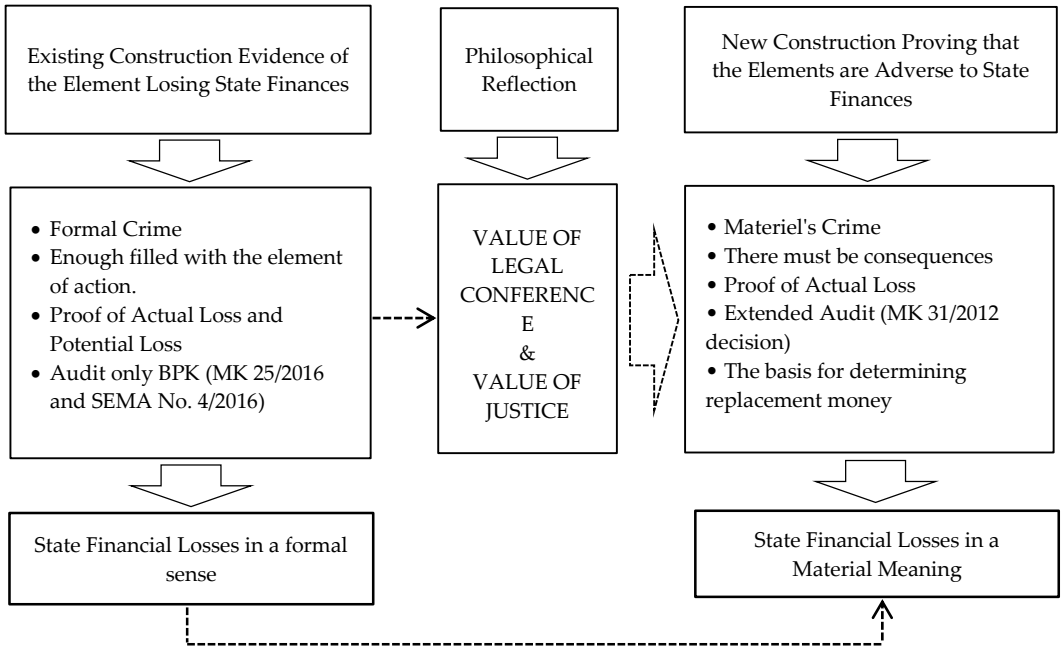
In the court practice of corruption, the Constitutional Court decisions are not fully implemented by judges. This can be seen in the decision of the Supreme Court No.69K/PID.SUS/2013; Supreme Court decision No.103K/PID.SUS/2013; Supreme Court decision No. 819K/PID.SUS/2017; Supreme Court decision No.3225K/PID.SUS/2018; and decision No.29K/PID.SUS/2019. Some of the decisions were related to the evidence that the element of detrimental to state finances was interpreted as either an actual loss or a potential loss and perpetrators of corruption were still convicted. Although the Constitutional Court has removed the word "can" in Article 2 paragraph (1) and Article 3 of the PTPK Law, in practice, the evidence of the detriment of state finances in several decisions is still understood by judges both in terms of formal crimes and material crimes.

Therefore, the best attempts to resolve the numerous problems listed above do not cease once the decision of the Constitutional Court has been taken, but rather the best efforts that can be made are to improve the PTPK legislation and to synchronize it with the various laws governing the scope of state financing so that it is explicitly legitimate to eliminate corruption. The confusion of the laws and rules regulating state budgets and state fiscal deficits is the source of discrepancies in the viewpoint of law enforcement agencies, resulting in legal ambiguity. The legal reconstruction model demonstrates the aspect that is harmful to public finances in the criminal act of corruption proposed by the author, as outlined in the following chart:

Chart

Reconstruction of Evidence of Elements

Losing State Finances in Corruption Crime



Starting from the scheme above, the existing construction proving the element of state financial loss adheres to the concept of state financial loss in a formal sense and after going through the reconstruction process creates the concept of state financial loss in a material sense. This means that a new act can be seen as fulfilling the element of a corruption crime on the condition that there must be an actual state loss and an actual loss. The basic idea of this concept is the strengthening of the Constitutional Court decision no. 25 / PUU-XIV / 2016 which corrected the word "can" in Article 2 paragraph (1) and Article 3 of the PTPK Law so that it became a material crime. The conception of state financial losses in a material sense guarantees fair legal certainty.

The concept of state financial loss in a material sense is in line with the RKUHP 2019. The formulation of elements detrimental to state finances as a criminal act of corruption is regulated in Article 603 of the RKUHP taking over the formulation of Article 2 paragraph (1) and Article 604 of the RKUHP taking

over the formulation of Article 3 of the PTPK Law, but no longer use the phrase "can" before the element is detrimental to state finances so that it is a material crime. Furthermore, in the elucidation of Article 603 of the RKUHP, it is explicitly stated that what is meant by "detrimental to state finances" is based on the results of audits of state financial audit institutions. This means that when there is no crime of corruption, the state financial losses must have occurred (actual loss).

Referring to the 2003 UNCAC which has been ratified by Indonesia with Law Number 7 of 2006, it does not contain any element detrimental to state finances. In UNCAC 2003, the scope of corruption has been described in a limited manner. Therefore, in order not to deviate from the spirit of UNCAC 2003, when including the element of detrimental to state finances in the crime of corruption, the state losses must have occurred or been real.

The conception of state losses in a material sense can also be read in Article 1 number 22 Law Number 1 of 2004 concerning State Treasury and Article 1 number 15 of Law Number 15 of 2006 concerning the Supreme Audit Agency, which provides the same meaning: "State losses/Region is a real and definite lack of money, securities, and goods as a result of an act against the law either deliberately or negligently." This provision is in line with the Elucidation of Article 32 paragraph (1) of the PTPK Law which states that real state financial losses are losses that can be calculated based on the findings of the authorized agency or appointed public accountant. Based on these provisions, an act can be said to be detrimental to state finances on the condition that there must be an actual loss to the state or an actual amount (actual loss).

On the other hand, to address the conflict of understanding concerning the concept of "state finance" in the sense of the *ius constituyenndum*, it would be easier if the language of Article 2(1) and Article 3 of the PTPK Act concerning the meaning of "state finance" and "state financial loss" were synchronized with the meaning of "finance state" relating to Law No. 17 of 2003 concerning State Finance and Law Number 1 of 2004 concerning State Treasury. Thus, it can avoid different interpretations from law enforcers that have occurred so far.

In the event of a state or regional financial loss, the agency or institution authorized to carry out the calculation must be expanded not only to the BPK and BPKP, as long as the person performing the calculation is a competent person. Institutions or parties authorized in calculating state financial losses must be affirmed in the upcoming revision of the Corruption Eradication Law, namely to avoid multiple interpretations and other legal problems in the future. The objectives of calculating the amount of state financial losses are: first, to

determine the amount of replacement money following Article 17 and Article 18 of the PTPK Law; second, if the case that occurs is civil, the calculation of state losses is used as material for determining the compensation and compensation mechanism.

Future legislative policies on the eradication of corruption are required to lay down different laws and regulations on state finances and state financial losses. Reforming laws and rules in a paradigm of procedural clarity and fairness, as well as social and economic gains, in the sense of establishing a solid basis for law enforcement to prosecute criminal acts of wrongdoing. Improvements ranging from synchronization to modification of the PTPK Act, such that there is equal legal clarity in the eradication of corruption.

D. CONCLUSIONS

Based on the review and debate referred to above, it can be argued as follows: first, with the ruling of the Constitutional Court No. 25/PUU-XIV/2016, there has been a shift in the illegal activities of misconduct referred to in Article 2(1) and Article 3 of the PTPK Act as a material crime. As a consequence of the statute, evidence of an aspect that is adverse to public funds is no longer understood as an estimation (potential loss), but it must be understood that there has been a genuine loss (actual loss) such that it can be included in the criminal act of corruption. To overcome the polemic of institutions authorized to calculate state financial losses in corruption cases, it is necessary to expand, not only given to the BPK but referring to the Constitutional Court decision Number 31/PUU-X/2012; and Second, the reconstruction model that is more precise and guarantees more just legal certainty is to use the concept of state financial losses in a material sense. In this concept, a new act can be seen as fulfilling the elements of a corruption crime on the condition that there must be an effect that the state loss is real and occurs (actual loss). The conception of state financial losses in a material sense guarantees fair legal certainty.

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