VERDICT

Number 25/PUU-XIV/2016

FOR THE SAKE OF JUSTICE BASED ON BELIEF IN THE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Hearing constitutional cases at the first and final levels, has passed a verdict in the case of Judicial Review of Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption as amended by Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption against the 1945 Constitution of the Republic of Indonesia, filed by;

1. Name : **Firdaus S.T., M.T.**

   Occupation : Civil Servant of the Department for Public Works & Public Housing, West Sulawesi Province

   Address : Perumahan Legenda Garden Block Nomor 7 Mamuju, Provinsi Sulawesi Barat

As----------**Petitioner I**;

2. Name : **Drs. H. Yulius Nawawi**

Occupation : Retired Civil Servant

Address : Kebun Jeruk Saung Naga, Kampung III/128 Kecamatan Baturaja Barat, Baturaja, Provinsi Sumatera Selatan

As----------**Petitioner II**;

3. Name : **Ir. H. Imam Mardi Nugroho**

Occupation : Retired Civil Servant (Former Regional Secretary of Bangka Belitung Islands Province from 2008 to 2013)

Address : Jalan HOS. Cokroaminoto Nomor 4 Sungailiat, Bangka, Provinsi Kepulauan Bangka Belitung

As----------**Petitioner III**;

4. Name : **Ir. H. A. Hasdullah, M.Si.**

Occupation : Head of UPTD Bina Marga Region III Makassar, South Sulawesi Province

Address : Bukit Baruga, Jalan Malino Nomor 6 Makassar, Provinsi Sulawesi Selatan

As----------**Petitioner IV**;

5. Name : **H. Sudarno Eddi, S.H., M.H.**

Occupation : Civil Servant (Inspector of Lampung Province)

Address : Jalan Hendro Suratmin, Gg. Bintaro II Nomor 83A Sukarame, Bandar Lampung, Provinsi Lampung

As----------**Petitioner V**;

6. Name : **Jamaludin Masuku, S.H.**

Occupation : Civil Servant

Address : BTN Manusela Blok E Nomor 25 Desa Air Kuning, Ambon, Provinsi Maluku

As----------**Petitioner VI**;

7. Name : **Jempin Marbun, S.H.**

Occupation : Civil Servant

Address : Bumi Intan Permai P-17-18 RT/RW 019/005 Kelurahan Gebang, Kecamatan Sidoarjo, Kabupaten Sidoarjo, Provinsi Jawa Timur

As----------**Petitioner VII**;

Based on the Special Power of Attorney, each dated January 29, 2016 and February 5, 2016, authorizing **Heru Widodo, S.H., M.Hum., Dr. Maqdir Ismail, S.H., LL.M., M. Rudjito, S.H., LL.M., Ignatius Supriyadi, S.H., Supriyadi, S.H., Zainab Musyarrafah, S.H., Andi Ryza Fardiansyah, S.H., Hartanto,**

S.H., M. Ikhsan, S.H., Dhimas Pradana, S.H., Aan Sukirman, S.H., and **Prima Rinaldo, S.H., M.H.,** Lawyers/Legal Consultants at HERU WIDODO LAW OFFICE ("HWL"), *Legal Solution and Beyond*, having its registered address at Menteng Square AO-12 Lantai 3, Jalan Matraman Raya Nomor 30-E, Pegangsaan, Menteng, Jakarta, 10320, their jointly or individually acting for and on behalf of the authorizer;

Hereinafter referred to as ---------- **Petitioners**;

[1.2] Having read the petition of the Petitioners;

Having heard the statement of the Petitioners;

Having heard and read the statement of the President;

Having read the statement of the House of Representatives;

Having heard and read the statements of the Related Parties, in this case Dr. Drs. Yesaya Buiney, MM.;

Having heard and read the statement of the Petitioners' experts;

Having examined the Petitioners' documentary/written evidences;

Having examined the documentary/written evidences of the Related Parties, in this case Dr. Drs. Yesaya Buiney, MM.;

Having read the conclusion of the Petitioners.

2. FACTS OF THE CASE

[2.1] Considering whereas the Petitioners filed an petition dated February 22, 2016 which was received at the Clerk of Constitutional Court (hereinafter referred to as the Clerk of Court) on February 22, 2016 based on the Deed of Receipt of Petition File Number 30/PAN.MK/2016 and has been recorded in the Constitutional Case Registration Book on March 17, 2016 under Number 25/PUU-XIV/2016, which was amended and received by the Clerk of Court on April 5, 2016, in essence outlining the following matters:

A. THE CONSTITUTIONAL COURT AUTHORITIES

1. The provisions of Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia states:

   "*The Constitutional Court has the authority to hear at the first and last instance whose verdicts are final to review the law against the Constitution ...*"

2. The provisions of Article 29 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power states:

   "The Constitutional Court has the authority to hear at the first and last instance whose verdicts are final to:

   a. review the law against the 1945 Constitution of the Republic of Indonesia"

3. Furthermore, Article 10 paragraph (1) point a of Law Number 24 of 2003 concerning the Constitutional Court as amended by Law Number 8 of 2011 concerning Amendment to Law Number 24 of 2003 concerning the Constitutional Court (Constitutional Court Law) states:

"The Constitutional Court has the authority to hear at the first and last instance whose verdicts are final to:

a. review the law against the 1945 Constitution of the Republic of Indonesia ...."

4. The Petitioners file petitions for reviewing of Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption in conjunction with Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption ("TIPIKOR Law"), specifically the phrase "or another person or a corporation" and the complete word "can" read as follows:

Article 2 paragraph (1):

"*Any person who unlawfully commits acts of enriching himself or others or a corporation that can harm the country's finances or the country's economy, is sentenced to life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) year and a minimum fine of Rp. 200.000.000,00 (two hundred million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah)*".

Article 3:

"*Any person who aims to benefit himself or someone else or a corporation, misuse the authority, opportunity or means available to him because of a function or capacity that can harm the country's finances or the country's economy, is sentenced to life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years and or a minimum fine of Rp. 50.000.000,00 (fifty million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah)*".

5. Because the Petitioners' petition is a review of the Law against the 1945 Constitution, the Constitutional Court has the authority to hear this petition.

B. LEGAL STANDING OF THE PETITIONERS

1. Article 51 paragraph (1) of the Constitutional Court Law, states:

"Petitioners are parties who consider their constitutional rights and/or authorities have been impaired by the enactment of the law, i.e.:

Individual Indonesian citizens;

indigenous and tribal peoples as long as it is still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia as provided for in the law;

public or private legal entity; or

state institutions”

2. Explanation of 51 paragraph (1) of the Constitutional Court Law, states:

   “The meaning of 'constitutional rights' are rights that are provided for in the 1945 Constitution of the Republic of Indonesia”.

3. Referring to the provisions of Article 51 paragraph (1) of the Constitutional Court Law along with its explanation, there are two conditions that must be met to review, whether the Petitioner has a legal standing in the case of judicial review, namely the fulfillment of the qualifications to act as a Petitioner, and the existence of constitutional rights and/or authorities of the Petitioner who have been impaired by the enactment of a Law;

4. The qualifications of the Petitioners in this petition are "individual Indonesian citizens".

5. Regarding the parameters of constitutional impairment, the Constitutional Court has provided definitions and limitations regarding constitutional impairment arising from the enactment of a Law, which must meet 5 (five) conditions as outlined in the Verdict Number 006/PUU-III/2005 and Number 011/PUU-V/2007, as follows:

a. there are constitutional rights and/or authorities granted by the 1945 Constitution;

b. whereas the Petitioners' constitutional rights and/or authorities are deemed by the Petitioners to have been impaired by a Law that was reviewed;

c. whereas the impairment of constitutional rights and/or authority of the Petitioners in question is specific and actual or at least potential in nature which according to logical reasoning will certainly occur;

d. there is a causal verband between the loss and the enactment of the Law petitioned for review;

e. there is a possibility that with the granting of the petition, the argued constitutional impairment and/or authority will not or no longer occur.

6. **Petitioner I** is an Indonesian citizen charged with violating Article 3 of the Criminal Acts of Corruption Law, and has been sentenced for 1 year and a fine of Rp. 50.000.000,00 (fifty million rupiah) with a substitute criminal for 1 (one) month confinement based on the verdict of the Mamuju District Court Number 08/Pid.Sus/TPK/2013/PN.MU.

7. **Petitioner II** is an Indonesian citizen charged with violating Article 2 paragraph (1) or Article 3 of the Criminal Acts of Corruption Law.

8. **Petitioner III** is an Indonesian citizen charged with violating Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law based on Indictment Number PDS-05/PKPIN: Ft.1/10/2015 with case register Number 29/Pid.Sus.TPK/2015/PN.Pgp at the Pangkalpinang District Court.

9. **Petitioner IV** is an Indonesian citizen who is currently a state civil apparatus who is currently serving as the Head of UPTD Bina Marga Regional III Makassar, South Sulawesi Province, potentially subject to the provisions of Article 2 paragraph (1) or Article 3 of the Criminal Acts of Corruption Law ".

10. **Petitioner V** is an Indonesian citizen who is currently a state civil apparatus who is currently serving as an Inspector in the Lampung Province Inspectorate who is potentially subject to the provisions of Article 2 paragraph (1) or Article 3 of the Criminal Acts of Corruption Law.

11. **Petitioner VI** is an Indonesian citizen who is currently a state civil apparatus who is currently serving as a civil servant in Maluku Province who is potentially subject to the provisions of Article 2 paragraph (1) or Article 3 of the Criminal Acts of Corruption Law ".

12. **Petitioner VII** is an Indonesian citizen who is currently a state civil apparatus who is currently serving in the jurisdiction of East Java

Province who is potentially subject to the provisions of Article 2 paragraph (1) or Article 3 of the Criminal Acts of Corruption Law".

13. Whereas the phrase "or another person or a corporation" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law is very detrimental and/or potentially damaging to the Petitioners, who in carrying out their duties and authorities in government positions in regional government, cannot avoiding the act of issuing decisions, especially in terms of determining the implementation of government projects, certainly benefit others or a corporation. No individual or corporation is willing to carry out government project work if it does not bring benefits to him, because they are entrepreneurs who work for profit. The Petitioners feel that their constitutional rights guaranteed by the 1945 Constitution are impaired, namely the right to obtain legal certainty, the right to receive equal treatment, the right to obtain guarantees and protection of security with the phrase, because the phrase harms the rights of the Petitioners as state civil apparatus who act in good faith in administering state government.

14. Whereas likewise, the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, results in losses for the Petitioners who are always overwhelmed with worry and insecurity in taking any policy or decision, because every decision adopted will it always risks being declared a corruption crime, even

though the decision is beneficial for the people. The existence of the word "can" contains uncertainty, so that the Petitioners will not get certain and fair legal protection because every decision of the Petitioners relating to the determination of project operators is very potential and can certainly harm state finances even though the decision-making process has been carried out carefully and based on the authority given by the law in accordance with the principles of good governance. As a result of the word "can" in this provision, it is certain that criminalization of the state civil apparatus has occurred because the said loss element is not an essential element in the criminal act of corruption, so that decisions that do not harm state finances and even benefit many people can still be convicted. In other words, based on the two provisions of this article, it can happen that a person of the state civil apparatus makes decisions that are beneficial to other parties but also beneficial to the state and or the people, even though it is not at all beneficial for the relevant state civil apparatus official, the state civil apparatus official is still subject to criminal acts of corruption.

15. Whereas with the enactment of Law Number 30 of 2014 concerning Government Administration ("Government Administration Law"), it has changed the perspective of the law to eradicate corruption which has so far been carried out with an action approach that uses legal means of corruption, becoming an administrative approach by means of resolution based on administrative law. The

Government Administration Law emphasizes that administrative errors that result in state losses that have been subject to corruption due to unlawful acts and state losses must be reviewed. As the regulation in Article 20, Article 70, Article 71 and Article 80 of the Government Administration Law are emphasized, administrative errors must be made through administrative settlement, not by a criminal approach.

16. Whereas in the case of the a quo petition being granted by the Constitutional Court, then the process of sentencing becomes more give legal certainty to the Petitioners, in casu, acts committed by the state civil apparatus allegedly violating administrative regulations, which due to their negligence fulfill the regulations or because they are not appropriate with the new propriety will become a corruption offense after going through the stages of administrative law settlement, and the investigation is no longer just beginning with only the meaning of "can", but will start the process after actually pocketing evidence of a real state loss, not just potential, which is not infrequently the country's loss factor will only be calculated after the determination of the suspect. The investigative action was due to the interpretation of the state's loss or the state's economy "does not constitute a real consequence", (as contained and considered in the Constitutional Court Verdict Number 003/PUU-IV/2006 dated July 25, 2006).

17. Based on these reasons, Petitioners I, II, III, IV, V, VI, and VII have experienced constitutional impairment and/or potential losses, with the enactment of articles petitioned for review, so that, the Petitioners have fulfilled the legal standing requirements as referred to in the Verdict Number 006/PUU-III/2005 and Number 011/PUU-V/2007, to file this petition.

PETITION OBJECTS

1. Whereas the object of the petition of the Petitioners is to petition for the review of Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, specifically the phrase "or another person or a corporation" and the word "can", which fully states as follows:

- **Article 2 paragraph (1) of the Criminal Acts of Corruption Law:**

  “(1) Any person who unlawfully commits acts of enriching himself or others or a corporation that can harm the country's finances or the country's economy, shall be sentenced to life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years and a minimum fine of Rp. 200,000.000,00 (two hundred million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah)”.

- **Article 3 of the Criminal Acts of Corruption Law:**

“Anyone who aims to benefit himself or someone else or a corporation, misuse the authority, opportunity or means available to him because of a function or capacity that can harm the country's finances or the country's economy, shall be sentenced to life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years and or a minimum fine of Rp. 50.000.000,00 (fifty million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah)”.

2. According to the Petitioners the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law contradicts the 1945 Constitution, particularly Article 1 paragraph (3), Article 27 paragraph (1), Article 28G paragraph (1), Article 28D paragraph (1), Article 28I paragraph (4) and Article 28I paragraph (5) of the 1945 Constitution which states:

- **Article 1 paragraph (3) of the 1945 Constitution**

  “The State of Indonesia is a rule of law”.

- **Article 27 paragraph (1) of the 1945 Constitution**

  “All citizens and their position in law and government and must uphold the law and government with no exception”.

- **Article 28G paragraph (1) of the 1945 Constitution**

  “Every person has the right to personal protection, family, honor, dignity and property under his/her authority, and is entitled to a

sense of security and protection from the threat of fear to do or not do something that is a human right".

- **Article 28D paragraph (1) of the 1945 Constitution**

  Every person has the right to recognition, security, protection and fair certainty legal and equal treatment before the law.

- **Article 28I paragraph (4) of the 1945 Constitution**

  "Protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government".

- **Article 28I paragraph (5) of the 1945 Constitution**

  "To uphold and protect human rights in accordance with the principles of a democratic rule of law, the implementation of human rights is guaranteed, regulated and stated in laws and regulations"

3. Whereas Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law have been petitioned for review in case Number 003/PUU-IV/2006, dated July 25, 2006, but this petition has a constitutionality reason and basis that differs from the petition that was severed. Such differences are as follows:

   a. If the petition in case Number 003/PUU-IV/2006 is based on the provisions of Article 28D paragraph (1) of the 1945 Constitution, which only emphasizes the reasons for the right to obtain recognition, guarantee, protection of fair legal certainty, and equal

treatment in law based on Article 28D paragraph (1) of the 1945 Constitution, while this petition emphasizes the importance of the responsibility of the state to run the state government based on the principles of the rule of law as guaranteed in Article 1 paragraph (3) of the 1945 Constitution in conjunction with Article 27 paragraph (1), Article 28I paragraph (4) and Article 28I paragraph (5) of the 1945 Constitution;

b. The previous petition did not base on the existence of a state guarantee that every citizen has the right to a sense of security and protection from the threat of fear of doing or not doing something according to human rights, while this petition also bases his/her petition on the guarantee of sense of security and protection from the threat of fear based on Article 28G paragraph (1) of the 1945 Constitution.

c. There are new progresses in Indonesian legal politics which require adjustments and synchronizations to the existing laws and legislation (as will be explained in the section "Reasons for Petition point 1 letter a to e" and so on below).

Accordingly, this petition, differing in its touchstone and juridical arguments, so that it is not ne bis in idem with the petition in case Number 003/PUU-IV/2006 which was decided on July 25, 2006, so that it is in line with the provisions of Article 60 paragraph (2) of the Constitutional Court Lawm, which states that, "Provisions as referred to in paragraph (1) may

be excluded if the contents contained in the 1945 Constitution of the Republic of Indonesia which is used as a basis for reviewing is different".

C. REASONS FOR PETITION

Regarding the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law

1. Whereas in Court Decision Number 003/PUU-III/2006 dated July 25, 2006, the Constitutional Court refused to grant the abolition of the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, with the main reason that corruption is a formal criminal act, not material criminal act, so that the element of harming state finances is not an essential element. According to the consideration of the Constitutional Court in the decision, the presence or absence of criminal acts of corruption does not depend on the presence or absence of state losses, but it is sufficient to prove that there has been an act against the law, so that the presence or absence of the word "can" no longer matters.

   According to the Petitioner, the consideration is no longer in accordance with the political development of the law on corruption eradication in Indonesia, as described below:

   a. The Government Administration Law has changed the legal perspective on the eradication of criminal acts of corruption which has so far been carried out with a legal approach that uses criminal law tools in this case criminal acts of corruption, to an

administrative approach and a method of resolution based on administrative law. The law wants to emphasize that administrative errors that result in state losses that have been subject to corruption due to unlawful acts and state losses must be reviewed. Administrative errors from mild to most severe must be done through administrative settlement, not by criminal approach. This can be read in Article 20, Article 70, Article 71 and Article 80 of the Government Administration Law which states:

Article 20 paragraph (4):

"*If the results of the supervision of government officials in the form of administrative errors that cause state losses as referred to in paragraph (2) letter c, a state money is returned no later than 10 working days from the date of deciding and publishing the results of supervision.*"

Article 70 paragraph (3):

"*In decisions that result in payments from state funds being declared invalid, the Agency and/or Government Official must return the money to the state treasury.*"

Article 71:

"*(1) Decisions and/or actions can be canceled if:*

a. there is a procedural error; or

b. there is a substance error.

(2) Legal consequences of Decisions and/or Actions as referred to in paragraph (1):

a. not binding from the moment it is canceled or remains valid until the cancellation; and

b. ends after a cancellation.

(3) Decisions on cancellations are made by Government Officials and/or Higher Officials by stipulating and/or making new decisions and/or Government Officials' Actions or based on court orders.

(4) The stipulation of a new decree as referred to in paragraph (3) shall be an obligation of the Government Official.

(5) Losses arising from decisions and/or actions canceled are the responsibility of the Agency and/or Government Official."

Article 80:

"*(1) Government Officials who violate the provisions as referred to in Article 8 paragraph (2), Article 9 paragraph (3), Article 26, Article 27, Article 28, Article 36 paragraph (3), Article 39 paragraph (5), Article 42 paragraph (1)), Article 43 paragraph (2), Article 44 paragraph (3), Article 44 paragraph (4), Article 44 paragraph (5), Article 47, Article 49 paragraph*

(1), Article 50 paragraph (3), Article 50 paragraph (4), Article 51 paragraph (1), Article 61 paragraph (1), Article 66 paragraph (6), Article 67 paragraph (2), Article 75 paragraph (4), Article 77 paragraph (3), Article 77 paragraph (7), Article 78 paragraph (3), and Article 78 paragraph (6) shall be subject to minor administrative sanctions.

(2) Government Officials who violate the provisions as referred to in Article 25 paragraph (1), Article 25 paragraph (3), Article 53 paragraph (2), Article 53 paragraph (6), Article 70 paragraph (3), and Article 72 paragraph (1) shall be subject to moderate administrative sanctions.

(3) Government Officials who violate the provisions as referred to in Article 17 and Article 42 shall be subject to severe administrative sanctions.

(4) Government Officials who violate the provisions as referred to in paragraph (1) or paragraph (2) that cause losses to the state finances, national economy and/or damage the environment shall be subject to severe administrative sanctions."

b. If comparing between the contents of Article 2 paragraph (1) of the Criminal Acts of Corruption Law, which states "Every person who unlawfully commits acts of enriching oneself or another person or

a corporation that can harm the country's finances or the country's economy, is imprisoned with prison ..."; with the contents of the articles in the Government Administration Law as quoted above, all administrative errors that harm the country's finances are certain to have fulfilled the element of corruption.

The Government Administration Law is a law that was issued in 2014, while the Criminal Acts of Corruption Law was issued in 1999 - 2001. That matter indicates that the politics of law in the field of eradicating criminal acts of corruption has changed, from prioritizing the criminal approach to prioritizing the state administrative legal approach, from an approach that prioritizes the punishment of imprisonment to an approach that prioritizes returning state money.

c. In the perspective of the Government Administration Law related to the Criminal Acts of Corruption Law as referred to in Article 2 paragraph (1) of the Criminal Acts of Corruption Law, "administrative errors" under the Government Administration Laware an "act against the law" according to the Criminal Acts of Corruption Law. "Administrative errors" are mistakes caused by violations of laws or administrative regulations, including violations of the General Principles of Good Governance. If "administrative errors" in the perspective of the Government Administration Law, the criminal law approach is used, in this case the Criminal Acts of

Corruption Law, then all administrative errors, both in violation of written administrative regulations and General Principles of Good Governance, can constitute an element of unlawful actions in the perspective of the Criminal Acts of Corruption Law. Thus, if it maintains the definition of formal offense in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, it will be contrary to the new legal politics as reflected in the Government Administration Law.

d. The birth of the Government Administration Law aims to "create legal certainty, and prevent abuse of authority" (refer to Article 3 letter b and c). The law is also intended that the administration of Government Administration is based on the principle of legality and the principle of protection of human rights (vide Article 5 letter a and letter). The affirmation is in response to the misconduct of the criminalization of administrative violations based on Article 2 paragraph (1) of the Criminal Acts of Corruption Law.

e. As confirmed in the clause considering the letter c of the Government Administration Law, "*that in order to realize good governance, especially for government officials, the law on government administration becomes the legal basis needed to base the decisions and / or actions of government officials to meet the legal needs of the community in the administration of government"*. This matter becomes important because as

explained in the Explanation of the Law that the Government Administration Law exists to improve good governance and as an effort to prevent corrupt, collusion and nepotism practices, because it is understood that a bureaucracy that is both transparent and professional will creating justice and legal certainty;

2. Whereas the Constitutional Court in Decision Number 003/PUU-III/2006 made the corruption offense a formal offense by referring to the United Nation Convention Against Corruption, 2003 which Indonesia had ratified by Law Number 7 of 2006, (in this case referred to as the Anti-Corruption Convention). The absence of an element of detrimental to state finances in the Anti-Corruption Convention is reasonable because the scope of the offense of corruption according to the Anti-Corruption Convention has been described very limitatively, that is only related to offense:

a. *Bribery*;

b. *Emblezzlement, missapropriation or other diversion of property by public official*;

c. *Trading influence*;

d. *Abuse of function*;

e. *Illicit Enrichment*;

f. *Bribery in the privat sector*;

g. Embezzlement in private companies;;

h. *Laundering of proceeds of crime*;

i. *Concealing the* corruption crime; and

j. *Obstruction of justice*.

All types of offenses no longer require an element of harm to state finances, because the types of offenses of corruption have been described in such a way. Things are different when referring to Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, so if the state loss element is eliminated or does not become an offense, then the offense of corruption becomes a “waste basket” offense. This means that all acts carried out by the state civil apparatus that violate administrative regulations, neglect to comply with regulations or because they are not in accordance with propriety are corruption offenses. As a result of making corruption offenses [especially in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law] formal, there are many state civil servants who are only negligent or because of a policy discretion in the public interest that is more beneficial to the state or people subject to acts criminal corruption. As a result of this, many state civil servants did not dare to take discretionary policies and were even afraid of taking policies that would actually be detrimental to the country's economic cycle.

3. Whereas based on the description above it is clear that making the criminal act of corruption a formal crime, is no longer relevant, so that the

word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law is contrary to the principles of the constitution as described above. The element of "state loss" is an essential element in criminal acts of corruption because it involves crimes against the state that harm the interests of the people at large. If there is no element of state loss, how could someone be declared corrupt. There is no corruption without state losses, except in the case of bribery, gratuities, and other criminal acts related to criminal acts of corruption which do not require an element of direct state loss.

4. Whereas the shift in the meaningfulness of the articles in the law, which was originally constitutional to become unconstitutional, was once decided by the Constitutional Court in Case Number 14/PUU-XI/2013, which in principle states that the Election is not simultaneously unconstitutional, whereas initially in the Decision Number 51-52-59/PUU-VI/2008, dated February 18, 2009 Elections are not concurrently constitutional.

On legal considerations of the Constitutional Court Decision Number 14/PUU-XI/2013, the Constitutional Court is of the opinion:

"... that the constitutional issue submitted by the Petitioner, namely the petition for constitutionality review Article 3 paragraph (5) of Law 42/2008, has been examined and decided by the Court in Decision Number 51-52-59/PUU-VI/2008, dated February 18, 2009.

... that according to the Court, Decision Number 51-52-59/PUUVI/2008, dated February 18, 2009, which refers to the previous state administration practices referred to as desuetudo or the constitutional convention. This does not mean that the practice of state administration is equal to or constitutional provisions as a basis for decisions to determine the constitutionality of the implementation of the Presidential Election after the Election of Representative Members. The decision must be interpreted as the Court's choice of interpretation of the provisions of the constitution in accordance with the context at which the decision was handed down. The practice of state administration, especially referring to the practice of state administration which occurs only once, does not have binding power as the constitutional provisions themselves. If the constitutional text is either expressly (expresis verbis) or implicitly very clear, then the practice of constitutionality cannot become a constitutional norm to determine the constitutionality of norms in the testing of laws. The binding power of the practice of state administration is nothing more than moral attachment, therefore the practice of state administration is commonly known as rules of constitutional morality, i.e. rules of constitutional morality, create powers and imposed obligations which are not legally enforceable, but which are regarded as binding. In this case, deviations in the practice of constitutionality are constitutionally improper, but do not mean unconstitutional. Even in practice in various common law countries, "constitutional practices" tend to be placed under the rule of law and common law (laws originating from court decisions), and do not bind the

courts because they are not considered legal. Accordingly, according to the Court, the practice of state administration which was considered by the Court in Decision Number 51-52-59/PUU-VI/2008, dated February 18, 2009, does not mean that the holding of the Presidential Election after the Election of Members of Representative Institutions is a matter of constitutionality, but rather is a choice of constitutionality. constitutional interpretation related to the context at the time the decision was made …... "

5. Whereas based on the aforementioned reasons, according to the Petitioners, the Court may change its view of an article or norm that has been tested previously due to consideration of the development of legal politics and changing social situations. The retest is carried out for the reasons outlined below.

6. Whereas in the Great Dictionary of Indonesian Language the word "can" means among others: "capable", "able", "may", "allowed", and "possible". Based on the meaning of the language the word "can" does not have a definite meaning. In terms of language, the phrase "can" harm the financial or economic condition of the country in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law can mean:

- detrimental to the country's finances
- "may" harm the country's finances;
- "potential" is detrimental to the country's finances, as well as

- "must not" be detrimental to the real country's finances.

With various meanings of the word "can" cause uncertainty in the application of criminal law by law enforcers whose implications can lead to injustice for citizens.

7. Whereas in legal practice, the word "can" has caused uncertainty in the application of criminal law by law enforcers whose implications are causing injustice for citizens. Legal uncertainty due to the word can be this, not at the level of implementation, but in the meaning of norms. This is even more pronounced when related to legal practice, especially if it is related to the provisions of Article 55 of the Criminal Code, concerning inclusion. Participation is not interpreted to mean the quality of significant or substantial contributions from participants in the commission of a criminal offense. The inclusion of participants and friends committing a criminal offense is only attached to the indictment even then in a court decision, without any explanation of the qualifications of the fellow participants and cooperation with awareness and intimacy. If we look carefully at the contents of Article 55 paragraph (1) of the Criminal Code, there are three categories of perpetrators, the first to commit; the second is to do it, and the third is to do the deed. In fact in judicial practice there has never been a firm position "as a person who commits an act" and at the same time "orders to do an act" or "participates in doing", as referred to in Article 55 paragraph (1) of the Criminal Code. This is different when compared with the Decision of Hoge Raad on 2 December 2014, ECLI:

NL: HR: 2014: 3474, which basically states that "**a person can be considered to be included in the category together if there is a quality of significant or substantial contribution to the criminal act and the qualifications of the joint, namely the existence of cooperation with awareness and close** (***Voor de kwalificatie medeplegen is vereist dat sprake is van nauwe en bewuste samenwerking***)". This was later proven in the evidence from the beginning, especially with regard to cooperation that was carried out deliberately and consciously. The proof can be seen from the fact of the intensity of the cooperation, the division of tasks, the division of roles in the commission of crime and the presence of the perpetrators at important moments and never stop when the implementation of a criminal act is carried out;

(http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2014:3474)

8. Whereas in interpreting the loss of the state or the country's economy, the Court in the Decision of the Constitutional Court Number 003/PUU-IV/2006 dated July 25, 2006, among others, stated "..***qualify it as formal offense, so that there is a state loss or the state economy is not a result that must be real***".

Such a Court's judgment, in the opinion of the Petitioners, is no longer appropriate with the political development in eradicating corruption, because the qualification for the loss of state finance or the country's

economy is material offense. Because according to Article 1 number 22, Law Number 1 of 2004 concerning State Treasury, is declared, *"The loss of the State/Region is the lack of real, certain amounts of money, securities and goods, as a result of unlawful or deliberate unlawful acts".*

This financial loss or real and definite area, is another word that the loss must really exist and is a real result of an act against the law or abuse of authority, so that it becomes a material offense. Moreover, according to the AP Law that to assess whether or not the act of abusing authority can be tested through the state administrative court as an administrative approach and the method of settlement based on administrative law, because settlement through criminal law is used as a last resort in terms of law enforcement, as an ultimum remedium. This change of view in the eradication of corruption, of course, must be interpreted that those who can be convicted of committing criminal acts of corruption are those who materially commit criminal acts of corruption and materially harm the country's finances or the country's economy, not people considered to commit acts of corruption because of their position, but because of crime.

9. Whereas regarding the emergence of legal uncertainty in norms that use the word "can" has been widely decided by the Constitutional Court as unconstitutional because it contains legal uncertainty and injustice, especially in the following decisions:

   a. Decision of the Constitutional Court Number 18 / PUU-XII / 2014, dated January 21, 2015, which one of the ruling decrees, that the

word "can" in Article 95 paragraph (1) of Law Number 32 Year 2009 concerning Environmental Protection and Management is contrary to 1945 Constitution. Consideration of the Constitutional Court states, that the word can lead to legal uncertainty in environmental law enforcement, namely the existence of the word "can" provide an alternative to coordinate or not coordinate in environmental law enforcement, whereas according to the Constitutional Court the coordination in environmental law enforcement is absolutely done.

b. Decision of the Constitutional Court Number 57/PUU-IX/2011 dated April 17, 2012, on page 61 of the dictum [3.10.4) considers that "As for the Petitioners' argument that the said regulation creates uncertainty and legal injustice as referred to in Article 28D paragraph (1) The 1945 Constitution because of the provisions of the article contained in the Explanation there is the word "can" which means that the Government may or may not hold a "special place for smoking" in the workplace, in public places, and elsewhere, the Court is of the opinion that the Petitioners' argument can be justified. In addition, the Court also believes that the word "can" in Article a quo implies the absence of proportionality in the regulation of "special smoking areas" that accommodate the interests of smokers for smoking and the public interest to avoid the threat of health hazards and for the sake of increasing health status. That is because smoking is an act, which is legally legal or permitted, so that the word "can" means that the government may

or may not establish a "special place for smoking". This will eliminate the opportunity for smokers to smoke when the government in its implementation really does not hold "special places for smoking" at work, in public places, and in other places; ".

c. Decision of the Constitutional Court Number 34/PUU-VIII/2010 dated November 1, 2011 concerning Reviewing of Law Number 36 of 2009 concerning Health. The constitutional court in its decision stated that the word "can" in the Elucidation of Article 114 of Law Number 36 Year 2009 concerning Health is contrary to the 1945 Constitution of the Republic of Indonesia. According to the Court, there is an asynchronous norm whose interpretation has the potential to harm the rights of citizens namely Article 114 of Law 36/2009 and its explanation which states that what is meant by "health warning" is "writing that is clear and easily legible and can be accompanied by pictures or other forms". However, Article 199 paragraph (1) of Law 36/2009 states that, "Anyone who deliberately produces or imports cigarettes into the territory of the Unitary Republic of Indonesia by not including health warnings in the form of pictures as referred to in Article 114 shall be sentenced to prison ..." The word "can" in the Elucidation of Article 114 of Law 36/2009 is an alternative meaning, namely the inclusion of health warnings in the form of clear and easily readable documents which can be accompanied or not accompanied by pictures or other

forms, while Article 199 paragraph (1) of Law 36/2009 can be interpreted as imperative namely health warnings must include in addition to writing also the form of images.

The word "can" in the Elucidation of Article 114 of Law 36/2009 which is associated with the notion of "mandatory health warnings" in Article 114 of Law 36/2009 contains two different meanings at once namely cumulative and alternative. In fact, an explanation of an article is needed precisely to explain with a firm formula so that it can interpret the word "mandatory health warnings" in the provisions of Article 114 of the a quo Law to be clearer and more explicit, so as not to cause other interpretations. Therefore, the elucidation of the Elucidation of Article 114 of the Law a quo which states, "What is meant by" health warning "in this provision is written clearly and easily readable and can be accompanied by pictures or other forms" lead to unclear and unclear interpretation, especially if connected with the provisions of criminal sanctions listed in Article 199 paragraph (1) of Law 36/2009 which refers to Article 114 of Law 36/2009 along with an explanation. Thus, the word "mandatory health warnings" in the provisions of Article 114 of the Law a quo must be interpreted as mandatory to include health warnings in written form that is clear and easily readable and accompanied by pictures or other forms. This can be done by eliminating the word "can" in the Elucidation of Article 114 of Law 36/2009.

d. Decision of the Constitutional Court Number 137/PUU-VII/2009 dated August 27, 2010, the Constitutional Court in its decision stated that the word "can" in Article 68 paragraph (4) of Law Number 18 of 2009 concerning Animal Husbandry and Health is contrary to the 1945 Constitution. The Constitutional Court considers that Article 68 paragraph (4) of Law 18/2009 petitioned for review by the Petitioners states, "*In participating in realizing world animal health through the Siskeswanas as referred to in paragraph (2), the Minister may delegate his authority to the veterinary authority", which according to the Petitioners the word "can" result in violations of the authority rights of the veterinarian profession being reduced to political authority*.

The precautionary principle in the import of fresh animal products which will be included in the territory of the Unitary State of the Republic of Indonesia as stated in considering the reviewing of Article 59 paragraph (2) of Law 18/2009 above is also taken into consideration in the reviewing of a quo article. The role of realizing world animal health through the Siskeswanas in addition to paying attention to the principle of caution, which is no less important is the economic principle that has been universally accepted, namely the placement of humans in positions in accordance with their authority, the right man on the right place which aims, among others, to achieve efficacy and usability. Specialization, typification, or tailorisasi contained in the principle of the right man on the right

place introduced by F.W. Taylor was actually first introduced by the Prophet Muhammad when he said, "If a matter is left to the non-experts, wait for the moment of its destruction".

Based on the principle of prudence and to avoid the risk of loss, the principle of placing humans in positions in accordance with their authority to achieve efficiency and effectiveness which all aim to protect the people of Indonesia and even the world, and to advance public welfare, the Government in this case the Minister delegates the authority of the Siskeswanas to veterinary authority. Thus the word "can" which gives a discretion to the Minister to delegate his authority to officials who do not have veterinary authority is counterproductive with the aim of protecting and improving the welfare of the community, so that it is against the constitution. Thus, Article 68 paragraph (4) of Law 18/2009 becomes, "In participating in realizing world animal health through the Siskeswanas as referred to in paragraph (2), the Minister delegates his authority to the veterinary authority".

10. Whereas the 1945 Constitution requires a guarantee that everyone has the right to security and protection from the threat of fear. The existence of the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, creates fear and worry for everyone who is occupying a position in the government, because every action in issuing a decision or action in his position is always in the context of the threat of

criminal corruption due to State administrators' policies that harm the state even benefit the country or benefit the people can still be punished. In fact, the obligation of state administrators, such as the Petitioners is to issue decisions in carrying out state duties in the interests of the people. As a result of the word "can" in that article every citizen who occupies a government position because of his position at any time issuing a decision or state policy is always filled with insecurity, fear of being subjected to criminal sanctions of corruption. Thus, the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law contradicts Article 28G paragraph (1) of the 1945 Constitution.

11. That the rule of law is one of the most elementary principles in the administration of government in Indonesia. This principle is placed in Article 1 paragraph (3) of the 1945 Constitution, which is the section or chapter that regulates the most elementary matters in the Indonesian constitution. One of the basic principles of the rule of law both in the continental European legal system and in the Anglo Saxon system is the administration of government which must be based on law or in other languages called due process of law. The principle express or implied can be read in Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (4) and Article 28I paragraph (5) of the 1945 Constitution. These articles on one hand guarantee every citizen treated equally before the law and government and on the other hand requires the state to enforce these guarantees in various policies both in the form of laws and concrete actions and policies. This can be explained as follows:

a. From the provisions of Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution, there are guarantees for citizens to be treated equally in law and government, and recognition, guarantees, protections and fair legal certainty.

b. On the other hand, from the provisions of Article 28I paragraph (4) and Article 28I paragraph (5), it is clearly mandatory and is the responsibility of the state, especially the government, to provide protection, promotion, enforcement and fulfillment of human rights. The constitution also requires the state that to uphold and protect human rights in accordance with the principles of a democratic rule of law, the implementation of human rights is guaranteed, regulated and set out in legislation. Thus the 1945 Constitution requires the state to uphold and protect the rights of citizens and make various laws and regulations to ensure that the protection and enforcement of human rights is carried out as well as possible.

12. Whereas according to the Petitioners, the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, provides the opportunity and freedom for the state in this case law enforcement officers to act arbitrarily and ignore their obligations to act on the basis of clear law and certainly because there is no clear rule that requires the state to avoid arbitrary actions. As a result, it is ensured that violations of human rights are one of the fundamental principles of the rule of law. One form of implementation of the rule of law is that there is and

the creation of guaranteed equal rights for everyone to be treated equally before the law and government. Differentiation of this treatment will cause harm to the constitutional rights of citizens guaranteed by the constitution.

13. One of the problems that allows violations of equal treatment before the law and government is the existence of ambiguous and ambiguous provisions of criminal law so that law enforcement officials can implement different actions or policies for the same acts. In this case, the existence of the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law enables law enforcement officials to treat different actions or policies for the same actions. Such matter is contrary to the principle of the rule of law adopted by the Unitary State of the Republic of Indonesia contained in Article 1 paragraph (3) of the 1945 Constitution in conjunction with Article 27 paragraph (1) of the 1945 Constitution.

14. Whereas in Law Number 1 of 2004 concerning the State Treasury, Article 1 number 22, states, "the loss of a state or region is a lack of money, securities and tangible and definite items as a result of unlawful acts intentionally or negligently ''Button. Thus, it becomes clear that the state's losses must be real and certain in number and occur as a result of acts against the law. The word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law raises legal uncertainty because there is a conflict between one law and another, thus violating the principle of fair legal certainty guaranteed in the 1945 Constitution.

15. Whereas in order to fulfill the principles of the rule of law, the Republic of Indonesia in its constitution recognizes and guarantees that everyone has the right to recognition, guarantees, protection and certainty of law that is fair and equal treatment before the law. This recognition and guarantee is reflected in the universal legal principle adopted in Indonesia, namely the principle of legality. According to the principle of legality, no action can be convicted without any regulations that existed before the criminal act was carried out (nulla poena sine lege, nulla poena sine crimine, nullum crimen sine poena legali). This principle is a principle used to limit the power of the state in protecting citizens from injustice in the name of law enforcement.

16. Whereas criminal law concerns the legal relationship between a state which has the power to coerce and punish, with weak citizens. To avoid the arbitrariness of the state (ruler) represented by law enforcement officers, criminal law provides guarantees to citizens through the application of criminal law that universally accommodates the principle or principle of legality. This principle is intended to provide legal certainty in the application of criminal law in order to create a balance and justice between public interests that must be maintained by the state with protection and guarantee of legal certainty and justice for citizens.Whereas the principle of legality contains four main principles namely, lex scripta, lex certa, lex stricta and non-retroactive. Criminal law and criminal law comply with the principle of legality only if it meets the requirements: i) the criminal law must be written (lex scripta), ii) the

criminal law must have a definite formula and does not have a double meaning, iii) the formulation of criminal law must be firm and cannot be interpreted differently (lex stricta), and iv) criminal law must not be retroactive (non-retroactive). If the formulation of the criminal law does not contain one or more of the conditions of the principle of legality, the criminal law Act is contrary to the universal principles of the rule of law. All of these principles and principles are intended so that the application of crime protects citizens from the arbitrariness of the state or law enforcement officers and guarantees legal certainty and justice so that a person is not punished based on the one-sided will of the state (law enforcement officers). The existence of the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, is contrary to one of the main principles of the rule of law as referred to in Article 1 paragraph (3) of the 1945 Constitution, namely the guarantee by the state to provide recognition, guarantees, protection and fair legal certainty and equal treatment before the law (vide Article 28D paragraph (3) of the 1945 Constitution through the principle of legality;

17. Whereas based on all the arguments of the Petitioners mentioned above, the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law has legal grounds to be declared contrary to the 1945 Constitution.

Regarding the phrase "or another person or a corporation" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law

18. Whereas the phrase "or another person or a corporation" contains ambiguous and uncertain meanings, because it will encompass all intentional, unintentional or even acts that begin with good intentions. The formulation of the phrase "or another person or a corporation" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law enables a person to be subjected to a criminal act of corruption even though a state civil apparatus issues a policy in good faith and benefits the state or people and at other times benefit other people or corporations, even though these policies was not an evil deed. The philosophical question is whether we will get someone who sincerely works for the state and the people to jail, just because the formulation of a criminal acts of corruption law is unclear and uncertain.

19. Whereas the inclusion of benefits for other people or corporations in the UN convention is something that should be, because criminal acts of corruption in the UN convention does not include the formulation of criminal acts as referred to in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law.

20. Based on the description above, the phrase "or another person or a corporation" is contrary to the 1945 Constitution.

D. PETITUM

Based on the matters described above and accompanied by the attached evidences and the statements of the experts heard in the hearing of the

case, the Petitioners hereby requested that the honorable Constitutional Court to be pleased to provide the following verdicts:

1. To grant the Petitioner's petition entirely;

2. To state the word "can" and the phrase "or another person or a corporation" in Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 concerning Eradication of Corruption, as amended by Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Corruption Crimes contrary to the 1945 Constitution of the Republic of Indonesia;

3. To state the word "can" and the phrase "or another person or a corporation" in Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 concerning Eradication of Corruption, as amended by Law Number 20 of 2001 concerning Amendment of Law Number 31 of 1999 concerning Eradication of Corruption, does not have binding legal force;

4. To order the proper loading of this decision in the Official Gazette of the Republic of Indonesia.

OR

If the Court has another opinion, we ask for a decision as fair as possible (ex aequo et bono).

[2.2] Considering whereas in order to prove their arguments, the Petitioners have submitted evidence of letters/writings which are marked with Exhibit P-1 through Exhibit P-11 as follows:

1. Exhibit P-1 : Photocopy of Law Number 31 of 1999 concerning Eradication of Corruption Crimes (LN of 1999 No. 140, TLN No. 3874);

2. Exhibit P-2 : Photocopy of Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption (LN of 2001 No. 134, TLN No. 4150);

3. Exhibit P-3 : Photocopy of Law Number 30 of 2014 concerning Government Administration (LN of 2014 No. 292, TLN No. 5601);

4. Exhibit P-4 : Photocopy of the 1945 Constitution of the Republic of Indonesia;

5. Exhibit P-5 : Copy of Corruption Case Decision No. 08/Pid.Sus/TPK/2013/PN.MU on behalf of Defendant Firdaus, S.T., M.T dated July 16, 2013;

6. Exhibit P-6 : Decree of the Governor of South Sulawesi Number 4/I/2015 concerning Appointment of Budget User Officials Budget User Authorities, Officials Authorized

to Sign SPM, Officials Authorized to Ratify SPJ, Revenue Treasurer, Expenditure Treasurer, Treasurer Acceptance of Budget User and Treasurer of Assistant Expenditures in Work Units South Sulawesi Province Regional Apparatus for Fiscal Year 2015, dated January 2, 2015 along with the attachments;

7. Exhibit P-7 : Photocopy of Law Number 1 of 2004 concerning State Treasury (LN 2004 Number 5, TLN No. 4355);

8. Exhibit P-8 : Photocopy of Indictment with Case Reg. Number: PDS-03/N.6.14/Ft.1/2014 dated February 25, 2014;

9. Exhibit P-9 : Photocopy of Indictment with Case Reg. Number: PDS-05/PKPIN/Ft.1/10/2015 dated 19 October 2015;

10. Exhibit P-10 : Photocopy of Excerpt of Decree of the Governor of Lampung Number: PD/281/UP/1980 addressed to Mr. Sudarno Eddi

11. Exhibit P-11 : Photocopy of Excerpt of Decree of the Governor of East Java Number: 821.13/1739/042/1993 addressed to Mr. Jempin Marbun

In addition, the Petitioner also submitted 6 (six) experts whose testimonies were heard under oath/promise during the trial on May 10, 2016, May 24, 2016, and June 7, 2016, in essence explaining as follows:

1. Prof. H.A.S. Natabaya, S.H., LL.M.

- Whereas the word "can" in Article 2 and Article 3 creates legal uncertainty, whereas in a criminal act of corruption the state loss must be certain which in this case is determined by the Supreme Audit Board;

- Whereas there is a shift in the understanding of official accountability with the AP Law. Article 20 paragraph (4) of the Government Administration Law states, "If the results of oversight by government internal apparatuses are administrative errors that result in state financial losses as referred to in paragraph (2) letter c, repayment of the state financial losses shall be made no later than 10 (ten) working days. since the decision and issuance of the results of supervision. "Article 70 paragraph (3) of the Government Administration Law states," In the case of a Decree which results in payment of state funds being declared invalid, the Agency and/or Government Official must return the money to the State treasury". Thus in the completion of criminal acts of corruption which highlighted the existence of prevention;

- Whereas the existence of Supreme Court Regulation Number 4 of 2015 only applies to the internal court, namely how to resolve cases within the Supreme Court. Article 2 paragraph (1) which states, the court is authorized to accept, examine, and decide upon the application for evaluation exists and there is no abuse of

authority in the decisions and/or actions of government officials prior to the criminal process, as if it were an implementing regulation of the Government Administration Law. Therefore, Supreme Court Regulations must not limit a person's right to submit requests for abuse of authority and are a problem because they can only be tested in the Supreme Court;

- Whereas the approach of the United Nations Convention Against Corruption in 2003 is different from the Criminal Acts of Corruption Law which is more offense regarding position, in other words removing articles from the Criminal Code. Even though the United Nations Convention on Corruption even though it has been ratified, it has not been followed up, so there needs to be a change in the law on corruption by referring to the ratification;

- Whereas if the criminal act of corruption is a formal offense then there is no need to use the word "can", whereas now it is a material offense so there must be an element of state loss;

2. Dr. Indra Perwira, S.H., M.H.

First, about the abuse of authority (detournement de pouvoir). In the teachings of Administrative Law or State Administrative Law the notion of "abuse of authority" is often distinguished from "acts against the law by the authorities" (onrechtsmatig overheidsdaat), but in accordance with the

development of teachings against the law, there are experts who include detournement de pouvoir as one form of onrechtmatig overheidsdaat.

The difference between unlawful acts by the authorities and the abuse of authority is in the unlawful acts by the authorities that there is an element of error (intentional or negligent) and there is an element of loss for the other party (person or legal entity). While the abuse of authority may contain an element of error or not, and may result in losses for other parties, there may also be no losses for other parties but losses for the administrative body itself or state losses.

The Abuse of Authority by Officials or Administrative Bodies can be explored from three things, namely from the source of authority, the substance of authority, and the principle of freedom of action (freies ermessen). As it is understood, an authority other than sourced from the law (attribution), can be sourced from delegation (delegation) or assignment (mandate). Where the second and third are usually not as clear as the first, even to the authority of attribution in practice it is not uncommon for the Administrative Officer to misinterpret.

Then from the aspect of the substance of authority, that the development of the tasks of state administration is a necessity. When these tasks are distributed to administrative bodies or officials, they can overlap or coincide with each other. For example, between the tasks of managing drainage and domestic wastewater, between agriculture and plantations, between national parks and tourism, and so on.

Furthermore, since the introduction of the concept of a welfate state which obliges the state to be directly involved in developing public welfare. the principle of freedom of action (freies ermessen) inherent in administrative authority. Even though according to the principle of the rule of law, every authority must be based on law, but in certain situations and conditions where the law has not or is not clearly regulated, the official or administrative body must make an action or decision based on policy (discretionary of power). Sometimes the ermessen freies are outlined in the form of regulations that we know as policy regulations (regulation regulations).

Of the three things, the actions of administrative entities or officials who are freemermen ermessen have the most potential for abuse of authority. In practice since the issuance of the TIPIKOR Law, Officials or Administrative Agencies tend not to dare to make German freies for fear of being caught in a criminal act of corruption. Whereas from the perspective of Administrative Law, Officials or Administrative Agencies who do not act when they should do public service efforts and fulfill people's rights, including in the category of "not carrying out legal obligations" which is one form of acts against the law by the authorities (onrechtmatig overheids).

Second, the legal consequences of abuse of authority.

In Administrative Law, including the abuse of authority if the actions or decisions of officials and/or administrative bodies are carried out without

authority, exceeding the authority, and/or acting arbitrarily (abuse of power). Almost the same as in Article 17 of the Government Administration Law, abuse of authority includes actions or decisions that go beyond authority, mix authority, and/or act arbitrarily.

Whatever form the abuse of authority results from the law is the same, which can be canceled (vernetigbaar or voidable) by an administrative court ruling, both for reasons of formal testing (formale toestzing) or material testing (materiale toestzing). Understandably in administrative law there is a principle which states that every decision and/or administrative action must be considered valid until canceled by the competent authority or by the court. It seems that this is confirmed in the Government Administration Law. An action and/or administrative decision is deemed invalid or null and void based on a court decision having permanent legal force. If a court decision is declared invalid, then the legal consequences arising from the decision and/or administrative action must be returned to the original condition before the issuance of the decision and/or action. Including if the decision and/or administrative action results in state (financial) loss, it must be returned.

The existence of the Government Administrative Law does not cover administrative efforts (administrative rechspraak) as is known in Law Number 5 of 1986 concerning State Administrative Court. Other than by the court, decisions and/or administrative actions can be overturned by an authorized official under the Law.

Thus, although there is a similar term in Article 2 paragraph (1) and Article 3) of the Criminal Acts of Corruption Law, namely the phrase "state loss", but between the two there is no relationship at all because it is built on two different legal principles.

Third, the relationship between administrative errors and illegal acts.

Governance runs in accordance with the management process, starting from the planning stage to the evaluation stage (POAC). In supervision which is an evaluation instrument often found deficiencies and errors, so that with errors or deficiencies steps can be taken to improve in the future. These administrative errors can include errors in administrative order, (such as records, documents and records), financial reporting errors, and errors in performance achievements. For administrative errors, administrative improvements or improvements are made. For example, errors on the findings of financial statements (fiancial audit) must be followed up with improvements to the financial statements. Errors on the findings of performance reports (performance audits) must be followed up with performance improvements.

If in the investigation there is an alleged crime (offense), then at the request of the investigator an examination can be carried out for a specific purpose (investigation audit). So it is a big mistake what happened in practice so far where investigators directly examine administrative officials based only on the results of the examination of the Financial Statements (financial audit).

Administrative errors do not necessarily contain acts against the law (onregmatig overheidsdaat) because actions against the law can be done without any administrative errors. Acts against the law in Administrative Law, in addition to being narrowly contradictory to the law (onwetmatig) are also broadly contrary to one's own legal obligations, the rights of others, morality and fairness. While the AP Law actually connects administrative errors with abuse of authority, especially administrative errors that cause state financial losses.

Fourth, the step of administrative law enforcement in the event of abuse of authority through administrative justice (PTUN).

Initially the competence of administrative justice is limited to concrete, individual and final actions and / or decisions of administrative bodies and/or administrative officials. The competence of administrative justice for the abuse of new authority is given by the AP Law. Between the two there are differences in the aspects of legal standing, events, and decisions. Therefore it is natural that the Supreme Court issues PERMA Number 4 of 2015. With this PERMA, the provisions of the AP Law must be interpreted systematically. Because if you only rely on authentic interpretation it becomes odd. Article 20 states, among other things, if administrative errors are found that cause losses to the state finances due to abuse of authority, then state losses are returned within a maximum period of 10 days after the issuance of the results of supervision. Meanwhile according to Perma Number 4 of 2015, the process starting

from receiving the case, examining, and issuing a court verdict can take three months. Not yet counted if there is an appeal. Therefore, the 10 days in the Government Administration Law can be interpreted as the time period for administrative officials to submit or not request evidence of an element of abuse of authority. This is important to convey so that later it does not happen, once the 10-day period is exceeded and the administrative official has not returned the state financial losses, even though he has submitted an application to the administrative court, then he is investigated by the investigator on the grounds of state loss.

Fifth, Perma Number 4 of 2015

The existence of the phrase "... prior to criminal proceedings" in Article 2 paragraph (1) is understood as an affirmation of the absolute competence of administrative justice, and an affirmation that the element of abuse of authority is in the realm of administrative law. From the perspective of legal politics, the phrase emphasizes what is a common symptom in the Netherlands and in several European countries, namely optimizing the use of administrative law enforcement rather than criminal instruments. criminal law enforcement becomes ultimum remedium. In this case, Crince Le Roy described administrative law as urgent criminal and civil law. The opposite phenomenon occurs in this country, criminal law urges administrative law and civil law. Not a few problems in default changed into an offense of fraud, and not a few administrative mistakes turned into an offense of corruption.

The phrase "... after the results of the supervision of the government internal control apparatus" is understood as an effort to protect the law and officials or administrative bodies from allegations and gratuitous accusations that are often leveled by external parties of the government.

The development of administrative law is truly unique. During the New Order Law Number 5 of 1986 concerning State Administrative Court was published, so that it had formal administrative law, but it did not yet have material administrative law, except for a small portion in the Civil Service Law. Material administrative law was not made during the New Order because the authorities had the interest in using the bureaucracy as a political machine. At that time the general principles of a proper government (algemene begenselen van behorlijk bertuur) only developed in doctrine.

Post-reform, there is a close link between clean government apparatus and corruption eradication. Therefore two Laws were issued, the Criminal Acts of Corruption Law in which there was an offense concerning state losses [Article 2 paragraph (1)], while the state treasury and treasury law was still based on the Indonesian Comptabiliteitwet (ICW) in the State Gazette of 1925 No.448. The ICW was only revoked by Law Number 17 of 2003 concerning State Finance and Law Number 1 of 2004 concerning State Treasury. There is also an offense regarding abuse of authority, while material administrative law concerning the abuse of new authority is born with the Government Administration Law.

When compared with the People's Republic of China, since the cultural revolution it took 20 years to build a clean and authoritative bureaucracy, including increasing employee welfare benefits, after that they only cracked down on corruptors. While we eradicate corruption above the bureaucracy that is still working in a system that is still under repair.

3. Prof. Dr. Eddy O.S. Hiariej, S.H., M.Hum.

In 2009, the expert was asked to conduct a review of research conducted by the Republic of Indonesia's Attorney General's Office of Research and Development regarding the articles used to ensnare perpetrators of corruption. The results of the study show that more than 80% of corruption suspects are always charged under Article 2 paragraph (1) and Article 3 of the Corruption Eradication Law. Why are these two articles often used by law enforcement? First, both articles contain vague norms that can be used to ensnare anyone who commits any Law. Normally blurred norms are contrary to the principle of nullum crimen nulla poena sine lege certa as an absolute requirement contained in the principle of legality. ***Second***, the logical consequences of a vague norm, at trial are easily proven by the public prosecutor. Third, the law on the eradication of corruption as a whole was drafted in an atmosphere of kebatinan reform which demanded to eradicate corruption to its roots so that it uses criminal law as lex talionis or revenge law. The use of criminal law as a lex talionis is no longer in line with the paradigm of modern criminal law as in the UN convention on anti-corruption which implicitly adheres to corrective, rehabilitative and

restorative justice. Corrective justice deals with sentences handed down to convicted persons. Meanwhile, rehabilitative justice is related to efforts to improve the convicted person. While restorative justice is related to the return of corrupt state assets.

In law enforcement practices in Indonesia, the two articles are always charged with the form of primair - subsidair. Article 2 paragraph (1) is a primair indictment, while Article 3 is a subsidair indictment. There are two assumptions about the construction of the indictment. First, the threat of criminal Article 2 paragraph (1) is more severe than Article 3. Second, proving Article 2 paragraph (1) is easier when compared to Article 3. Further consequences, if Article 2 paragraph (1) is not proven, it is expected that proven is Article 3.

Theoretically this is not the case because proving Article 3 is far more difficult than Article 2 paragraph (1). The theoretical argument is as follows. First, the existence of the words "with a purpose" in Article 3 signifies the pattern of intent in the a quo article is intent as an intent. That is, between motivation, actions and consequences must be truly realized. If one of these does not materialize, then the public prosecutor must be deemed to have failed to prove intentionality as intended in article a quo. Second, the logical consequence of the words "with a purpose", the public prosecutor has to go the extra mile to prove the pattern of intentions as intentions and not other patterns of intent That is, the article a quo has closed the chance of intentions as certainty or intentions as possibilities

(van Bemmelen and van Hattum, 1953 pages 256 and 273). This is different from Article 2 paragraph (1) where the public prosecutor is only sufficient to prove the existence of intentionality without having to further prove the pattern of the intentionality. Third, basically the abuse of authority in Article 3 is one of the meanings against the law as referred to in Article 2 paragraph (1) (van Hamel, 1913, page 270). Therefore, it cannot be generally accepted if there is a court decision which states that article 2 paragraph (1) is not proven while Article 3 is proven. Fourth, there must be a causal relationship between the abuse of authority, opportunity or means and the position or position of the perpetrator. In this case the teaching of causality from Brickmayer is "meist wirksame bedingung": the most important condition for determining the effect (Vos, 1950, page 78).

Still in court practice, unfortunately there is no common understanding between law enforcers regarding the two articles. Not infrequently in a case, there is a difference between one law enforcement institution and another law enforcement institution. This has been experienced by Hotasi Nababan, convicted of corruption in Booing aircraft rental cases. The a quo case was stopped by the Bareskrim Police Headquarters, as well as the KPK through the Director of Public Complaints on the grounds that there was not enough evidence. However, the Special Criminal Division of the Attorney General's Office believes that there is sufficient evidence of Corruption. Strangely, the Civil and State Administration Attorney General's Office won the civil suit in the Washington DC Court of America in the same case. It means, in the Attorney General's Office itself there

are disagreements. There are those who claim that the a quo case is a criminal act of corruption and there are those who claim that the a quo case is a civil case.

Likewise, the judge's understanding at the hearing of the two articles. One time, I was listened to as an expert in the bioremediation corruption case by PT Chevron. There was a debate between one of the members of the panel of judges and me. The judge stated that the bioremediation case was appropriately tried using Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, not using the Environmental Law with the argument that the element of state loss was not contained in the Environmental Law. I then refuted the statement by giving the following illustration: A car belonging to Bank Indonesia which is usually used to carry money, was suddenly ambushed by two gunmen and took money in a car which amounted to hundreds of billions of rupiah. Will the two individuals be charged with an article of theft by force or is Article 2 paragraph (1) of the law on corruption eradication? I further state that if a noble judge is consistent, then both persons must be charged with Article 2 paragraph (1) of the Criminal Acts of Corruption Law because in the article of theft with violence there is no element of state financial loss. Only the public prosecutor and the judge who went astray thought would ensnare the two people with Article 2 paragraph (1) of the Criminal Acts of Corruption Law. Hearing my statement, the judge was shocked and did not speak a word.

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The a quo articles that are being tested in this noble trial - as stated above - are articles that do not meet the lex certa principle, are multiple interpretations, thus endangering legal certainty.

FIRST, is an element "against the law". There are at least 3 things related to the phrase "against the law". First, the element is against the law. Always a fundamental question, is the element or element against the law an absolute element of a criminal offense or not? There is no agreement among criminal law experts on this question. There are at least three views related to this unlawful element, each a formal view, a material view and a middle view. According to the formal view, the element of fighting the law is not an absolute element of a criminal offense. Against the law is an element of criminal action if it is explicitly stated in the offense formula. In contrast to the formal view is a material view which states that against the law is an absolute element of every criminal act. Actually the material view which states that against the law is an absolute element of criminal action originates from German criminal law and is not a Dutch criminal law. In addition to the formal and material views of elements against the law, there is still a third view called the middle view. This view was expressed by Hazewinkel Suringa that against the law is an absolute element if it is mentioned in the offense formula, if not, against the law is

only a sign of an offense. Second, understanding against the law. In Memorie van Toelichting or the history of the formation of the Criminal Code in the Netherlands is not found whether what is meant by the word "law" in the phrase "against the law". When referring to the postulate contra legem facit qui id facit quod lex prohibit; in fraudem vero qui, salvis verbis legis, sententiam ejus circumuenit, then it can be interpreted that a person is declared against the law when the act committed is an act that is prohibited by law. At the World Congress of Criminal Law Experts in Berlin in 1934 it was concluded that there were 4 legal notions in the phrase "against the law", each of which was objective law, subjective law, without authority and written law - unwritten law. Third, nature against the law. In criminal law the term "unlawful nature" or wederrechtelijkheid is a phrase that has four meanings. The four meanings are nature against common law, nature against specific law, nature against formal law and nature against material law. Unlawful nature is a general requirement that a criminal is convicted as defined by a criminal act by Ch.J. Enschede as, "een investigating gedraging die valt binnen de grenzen van delictsomschrijving, wederrechtelijk is en aan schuld te wijten" (a criminal act is an act of human beings which is included in the formulation of offense, against the law, and errors that can be harmed to him). The special unlawful nature or special wederrechtelijkheid, usually the word "against the law" is included in the offense formula. Thus the nature of breaking the law is a written requirement for the conviction of an act. Nature against formal law or formeel wederrechtelijkheid means that all

parts (elements) of the offense formula have been fulfilled. The unlawful nature of the material or materiel wederrechtelijkheid has two views. The nature of violating material law is seen from the standpoint of his actions. This implies an act that violates or endangers the interests of the law which would be protected by lawmakers in the formulation of a particular offense. Usually the nature of violating material law is inherently attached to the offenses which are formulated materially. Furthermore, the nature of violating material law from the point of view of the source of the law is still subdivided into the nature of violating material law in its negative function and the nature of violating material law in its positive function. The nature of violating material law in its negative function means that even though the act fulfills the offense but does not conflict with the sense of justice of the community, the act is not convicted. Meanwhile, the nature of violating material law in its positive function means that even though the act is not regulated in the legislation, if the act is deemed disgraceful because it is not in accordance with the sense of justice or the norms of social life in society, then the act can be convicted .

SECOND, the element of "can harm state finances". There are some expert notes about these elements: ***First,*** with the word "can", indicating that the offense is formally constructed (formal offense) which focuses more on actions and not consequences. This means that there is no need for real state losses but there is sufficient potential for state financial losses. On a practical level, state financial losses must be calculated with certainty. ***Second***, there is no synchronization and

harmonization of our laws related to the term "state finance". For example, based on the Limited Liability Company Law and the Law on State-Owned Enterprises, financial resources originating from the state while in a limited liability company or state-owned enterprise are separate assets and do not include state finance. Meanwhile, based on the Law on State Finance and the Law on the State Audit Agency, all revenues originating from state finance are included in the term "state finance". ***Third***, assembled who is authorized to determine the state financial losses? Is it BPK, BPKP, public accountant or ministry inspectorate? Ironically, there are many corruption cases in court, the results of audits conducted by BPK differ in diameter and BPKP, one states there is a loss of state finances while the other does not. ***Fourth***, is there a loss of state finance that necessarily requires corruption? Such an assumption has experienced the misguided thinking of law enforcement officers because there is not always a state financial loss that there must be a criminal act of corruption. State financial losses can occur but in an administrative or civil context. Actually, the legislators in eradicating criminal acts of corruption have anticipated non-corruption state financial losses with the provisions of Article 32 of the a quo Law. However, practically the provisions of this article are almost never used. ***Fifth***, referring to the United Nations Convention Against Corruption, 2000 which has been ratified by Indonesia by Law Number 7 of 2006, the absence of an adverse element of state finances in the Anti-Corruption Convention is reasonable because the scope of corruption

offenses under the Anti-Corruption Convention has been outlined very limitatively which includes bribery , embezzlement in office, trading influence, abuse of office, public officials illegally enriching themselves, bribery in the private sector, embezzlement in private companies, laundering the proceeds of crime, concealing the existence of corruption crimes and obstructing the judicial process.

THIRD, by using the method of comparative interpretation which means implementing the Act by comparing it to other countries on an Act arising from an international convention, the existence of Article 2 and Article 3 of the a quo Law is no longer relevant. In addition to none of the countries in the world that have the formulation of criminal acts of corruption as regulated in Article 2 and Article 3 of the a quo Law, in addition to that the formula distorts the United Nations Convention Against Corruption, 2000 which Indonesia has ratified by the Law Law Number 7 of 2006, specifically related to corruption in the private sector.

FOURTH, Article 2 paragraph (1) and Article 3 construction as such, is like a double-edged sword. On the one hand, it is very effective to ensnare state officials, politicians and business people who individually or collaborate to rob public money with sophisticated modus operandi for the benefit of certain individuals, groups or political parties. On the other hand, it is not uncommon for these two articles to be used by law enforcement officials who fall into the mafia wall of justice to blackmail prospective suspects or are used to get rid of political opponents. In fact,

the two articles can also be used to ensnare anti-corruption activists who have a strong voice with certain law enforcement institutions.

CONCLUSION

Based on the description of the theoretical arguments above, the expert conclusions that Article 2 and Article 3 of the Criminal Acts of Law contradict the 1945 Constitution, specifically Article 1 paragraph (3), Article 28D paragraph (1) and Article 28I paragraph (4) relating to the principles of the rule of law in the form of legal certainty and protection of human rights.

4. Dr. Harjono, S.H., MCL.

- In analyzing the problems raised by the Petitioner, the expert takes a position from the perspective of legal science, namely recht wetenschap. One part of legal science recht wetenschap is what is called the normatie wetenschap or knowledge of the norm. That is from the introduction of his law, Purnadi Purwacaraka and similarly Prof. Suryono Sukanto who supports theories about legal science.

- Speaking of normatieve wetenschap, if related to the article petitioned by the Petitioners, the normatieve wetenschap must start with the sound of the norm in question. Therefore the norm is Article 2 and Article 3 of the Criminal Acts of Corruption Law.

- Norms are written in one language and then the language has a script or understanding, then the normatieve wetenschap approach cannot be separated from the notions that arise from those written

in that article. The normatieve wetenschap norm approach is also having an effect on other norms. Therefore, it is necessary to analyze relations with other norms, because normatieve wetenschap norms do not only understand one norm, but the relationship between one norm and another norm.

- The law applicable to the Petitioners as state administration officials is not an ordinary law, especially civil servants and officials. Because if ordinary law means civil law, but special law. As the definition conveyed by Utrecht concerning state administrative law, that is special law that enables state administration to carry out its duties. So, if the state's capital is only civil law, then the state administration or official cannot carry out his special duties. Therefore, there is a need for state administration law which is referred to as the law that examines special relations so that the state administration can carry out specific tasks, as a feature of the law governing some of the Petitioners is the existence of state administration law.

- State administration has authority which is different in meaning from rights in civil law. Rights can be used or not used depending on the owner of rights, right holders who have full autonomy. While public authority is given because of obligations. The conduct of the state administration is mandatory, therefore the state administration cannot avoid not committing an act of state

administration. So, authority is different from rights. The authority arises because the task and the task must be done.

- In the application of State Administrative Law, there is a presumption of legality as long as the act is still in the legal domain. it means that administrative actions that are not related to the legal environment become its authority to have no binding legal force because they do not have a legal basis. Whereas the act of state administration which is still within the legal environment, the authority applies the principle of the validity of the act or the presumption of legality. So, everything made by the state administration applies presumption of legalities. Considered as valid until the act is revoked by the maker or canceled by the superior officer or declared invalid by a court decision.

- State administrative law regulates the procedures for one state administration action, is decided or procedures to be taken, and determines the areas of substance or objects of administrative action which are under its authority. In the capacity as an administrative official, a person must carry out his obligations and carry out these obligations by using the authority he has to carry out the act in accordance with required procedures.

- As an official, the person in charge of carrying out his/her office in carrying out their obligations may be misused of the authority (misuse of authority), or can also abuse the authority or abuse the

powers, of the two acts there are fundamental differences. Misuse of power arises because of inaccuracy, inaccuracy in making or making decisions with no particular purpose, except for carrying out obligations. Errors in making this kind of decision usually occur in fulfilling the required procedures, which are often referred to as administrative errors. And this error can be repaired with the intention of returning to the proper procedure. So, for this misuse of authority or administrative errors, this can be corrected, internal can be corrected. While officials who often make mistakes can be transferred or even demoted because they are incompetent. Abuse of authority is done intentionally, it can even be done by manipulating as if the procedure has been fulfilled and the perpetrator has a specific purpose that is not in line with the obligations as an official, namely to gain personal property, one of which is to enrich oneself or others causing state losses.

- The concept of administrative actions which then deviates from the procedure, can be caused by misuse of authority, but also due to abuse of power. Abuse of power has a purpose because it enriches oneself, so he can even make manipulations in using his authority.

- The main principle in criminal law is the principle of nonretroactive or also referred to as the principle of legality, which is a principle which states that there is no criminal act before the law prohibits the act. In addition to the prohibition in advance, before a crime is

imposed, an important element in the rule of law is that the prohibition was made by the competent authority to determine the prohibition. So if the prohibition does not come from legislative power, then in the theory of the rule of law, that is not something that can become law, it does not have binding power.

- In relation to the nonretroactive principle or the legality principle, it can be concluded that there is only a criminal act if the legislative authority determines it. Judicial power cannot determine an action is a criminal act. Judicial interpretation, interpretation of the law by judges in the application of the law can not be avoided. Likewise, there are interpretations of the formulation of criminal law provisions in paragraphs and articles of the Act. However, specifically in criminal law, such interpretation is limited that extensive interpretation and analogy are doctrinally prohibited by criminal law. This prohibition certainly has its basis, namely that both extensive interpretation and analogy can create a new criminal offense or offense that was born when an extensive interpretation or analogy was applied to the defendant, and even the legal case arose new that the law arose later. So if there is an extensive interpretation or analogy, then that actually creates a new law. Creating a new law is only known by those who should be subject to the provisions of the law at the time he was sentenced. Therefore, the principles in criminal law will not allow extensive interpretation and analogy interpretation.

- It is ironic if judicial tyranny is born not from a desire to practice, but a misunderstanding of a judge may occur, not an intention but a lack of understanding of a judge can lead to something like that about how not to make an extensive interpretation and analogy because of extensive interpretation and analogy. none other than giving birth to a new criminal act, then if such thing is practiced by the judiciary as the court takes over the legislative role, then based on the principles applicable to the criminal law as mentioned above, a need arises in the application of a legal act is a criminal act in legal certainty in formulating criminal acts must meet the requirements of lex scripta, lex certa, and lex stricta. These are efforts so that the interpretation that gives rise to the new law is hampered by the existence of these three principles.

- The element of Article 2 paragraph (1) which becomes the racology of this article is different from the assumption of nuzul because it is called racial in Islamic law as illat, because it is prohibited by illat. Criminal law has a scope for enactment, has coverage, because if not every person who robbed assets that directly or indirectly the state can be harmed such as the loss of government assets purchased by the state budget because of burglary thieves, loss of money for civil servants' salaries due to robbing, loss of taxes on motorized vehicles because the vehicle was stolen. The issue is already or will the example of the case be examined by the Corruption Court? Whereas Article 5, the Criminal Acts of

Corruption Law, the Criminal Acts of Corruption Court, " Criminal Acts of Corruption Court is the only court that has the authority to examine, try, decide, in corruption cases" by definition. Even though there are provisions in the article that say that the Criminal Acts of Corruption Court is the only one. So this article raises anomalies, leading to legal uncertainty. Up until now, the practice of car theft has never been stated as exemplified by the Corruption Case trial.

- The expert is of the opinion that by observing the practice so far there will be no cases exemplified will be brought to Criminal Acts of Corruption. Corruption is an extraordinary crime and for that the Criminal Acts of Corruption Court was born because it fulfilled Article 2 paragraph (1). Anti-corruption, acts against the law in the example above should be tried by the Criminal Acts of Corruption Court. If up to now there has not been a case that has been exemplified in the Criminal Acts of Corruption Court, it is not caused primarily because there are simply no similar cases, but the police, prosecutors, even judges of the District Court, High Court, and Constitutional Court still consider the three examples of cases to be theft, fraud, and not corruption.

- Legally formal, the case handled above if examined in general court, the decision is invalid if it refers to Article 5 of the Criminal Acts of Corruption Court Law. Because the only one who tried

corruption was the Criminal Acts of Corruption Law. If there is a case that has been decided by the district court, it is actually illegal. Because the formulation is clear and the criminal act was included in the provisions as corruption, all elements were fulfilled. Because there are words that can harm the country. But why not be tried in Criminal Acts of Corruption? If it is not tried in Criminal Acts of Corruption, so far if there is a case like that it is an invalid case because it was decided by a court that was not given the authority to do so. These are matters that in my opinion there are anomalies in the Criminal Acts of Corruption Law.

- Formally, the element of offense Article 3 of the Criminal Acts of Corruption Law is fulfilled if there is an example of a superior taking care of his subordinates to work on the project by giving permission for permission not to enter, even though at the same time the subordinate has to do more important office work, resulting in unlawful acts, manipulation granting permits, the state is disadvantaged. But the question is, will the case be processed as a criminal offense of corruption in the Criminal Acts of Corruption Court? More than that, is this also the original intent of the makers of the Law? What is meant by the makers of the Law? Such Laws? If not, but why do acts like fulfilling elements as acts of corruption? This Article uses the phrase everyone and abuses authority. Opportunities or means available to him. Because it uses the phrase everyone, then this prohibition is not limited to state officials

and administrators, Article 3 of the Criminal Acts of Corruption Law. Thus, the authority, opportunity, or means do not have to be the authority, opportunity, means of the official state administrators. It could be that the authority arises from the social organization budget or the budget of the business entity. Article 3 of the Criminal Acts of Corruption Law does not associate any person with officials. But if everyone is then called position, it is not possible that people are not public officials, but have public power. Everyone has a position, maybe the position arises from the budget of a private legal entity.

- Another example of a violation of the provisions of the Law on Prohibiting Monopolistic Practices and Unfair Business Competition, in fact the definition is corruption. But what is contained in the Law? That is called a violation and the violation is only a fine. If this violation is finite, then finite, such fine. How can that word then cover such broad acts that can be included in economic offenses because Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law? Those problems related to the word can. Another example of a violation of the provisions of the Law on the Prohibition of Monopolistic Practices and Unfair Business Competition, in fact the definition is corruption. But what is contained in the Law? That is called a violation and the violation is only a fine. If this violation is finite, then finite, such fine. How can that word then cover such broad acts that can be included in

economic offenses because Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law? Those problems related to the word can.

- Article 2 and Article 3 of the Criminal Acts of Corruption Law, there are threats to the trial. Trials under Article 2 and Article 3 are regulated in Article 15. No person has ever been charged with attempting a qualification offense. Did anyone go to court, be charged because he was carrying out persecution that could lead to death of people? Surely he stopped at the persecution. People die, can't if it's an experiment. Because of what? Because it's if. But, the provisions of Article 15 of this trial are full trials of Article 2 and Article 3, which can lead to. How an experiment that later offenses can cause offense. Can lead to, it is still a hypothesis, because the experiment by doing Article 15 because of what are called as figments that are filled with prejudice. So, judging colleagues who are prejudiced. Because not all of this has happened yet, in Article 15 and Article 2 this is a direct trial, if it is dropped and the judge says he can be punished because the trial article means that the judge is filled with prejudice which hypothetically and in real terms does not occur, but can be obeyed, because there is a word can be there. This is roughly the norm that can cover acts that should be rationally ecologically illicit are not the objective of the Criminal Acts of Corruption Law itself. If that is to be adjusted with the evidence, so that the explanation of Article

2 and Article 3 must be lost. And words can be removed from the formula according to norm as a norm.

- Now there is an Government Administration Law. There is a difference regarding the abuse of authority regulated in the Criminal Acts of Corruption Law, because the abuse of authority in the Government Administration Law is wrong in using authority or misuse authority. Why? Because then it can be fixed again, it can be canceled.

- The provisions of the Government Administration Law contain misuse of authority, not abuse of authority. With regard to state administration, this process should be considered in seeing whether he is abusing. Do not because he is just a misuse of authority, using the wrong authority, which should be corrected and how to then guarantee the correction. Until this is the only place where materially the official issuing the decision can ask for a fatwa from the State Administrative Court if there is any hesitation in the decision to say the decision will be made valid or not. This is clear, this is an internal mechanism that should be respected, must be considered if you will see whether the state administration will abuse authority. Because there are two different criteria for misuse of authority and abuse of power.

5. Dr. Dian Puji N. Simatupang, S.H., M.H.

- Whereas the phrase associated with the word "can" harm the country's finances and benefit the person or corporation as it creates unstructured norms or instructional problems. In the theory of state administration law and public finance, a form of command norms and prohibitions on regulations for administration and citizens unknowingly creates unstructured problems, unstructured problems according to William N. Dunn in Public Policy Analysis characterized by norms which is applied differently, with unknown value and determined in an inconsistent way. The results cannot be estimated and the level of uncertainty is very high.

- The concepts and norms in the word can and also the norms of other people or corporations actually cause the instruct structure problems, some facts and the decision making of the administrative and financial policies of the state and the regions resulting from the instructional problems in these norms, including:

    1. Unclear norms, conditions and procedures in financial administrative/administrative arrangements, so that they do not meet the norms, conditions and procedures that are considered illegal, (legislation), even if for example the norms are only regulated in an administrative regulation.

    2. Exceeding limits and exercising authority are always considered to be detrimental to the country's finances.

3. A legitimate payment, but based on administrative errors as benefiting another person or corporation, which is detrimental to state finances, but paradoxically the assessment of state losses is carried out by methods and standards for assessing state losses that are not systemized and not standardized, and are not convincingly sufficient - reasonable assurance).

4. The meaning and nature of legal actions in the articles of legislation that are not clear through direct policy making are considered against the law that harms state finances.

- Whereas the legal consequences of the problems mentioned above cause:

1. Legal uncertainty regarding norms which are the limits of acts against the law and elements detrimental to state finances, whether violations of the interpretations norms which in theory apply depending on the situation and conditions when applied, are also considered legal norms, which meet the criteria can harm state finances.

2. There is no guarantee of legal protection, which involves assessments up to the conclusion "can" harm the state finances and arrive at an assessment "benefiting others or corporations". There is no opportunity to provide an

explanation during the inspection process (assertion), because the objectivity of the examination has been carried out by itself, with methods that are far from the system and standards, thus possibly creating conflicts and disputes over audit results.

- Implications that occur for Apparatus Behavior, namely:

    1. If the norm "can" be personified in a subjective way without legal certainty and without guarantee of legal protection, the behavior of the apparatus in managing state finances becomes only fulfilling the requirements and procedures, whereas the purpose of the benefits of the management of state finances is realized by the implementation of the State Revenue and Expenditure Budget/The Regional Revenue and Expenditure Budget is to achieve the objectives of the state, which is increasingly inattent, because the apparatus is only trying to meet the requirements and procedures. Don't think about expediency.

    2. Norms "can" as if limiting actions to terms and procedural limitations as obedience to "law", as if limited to formality, which finally philosophically considered justice and law enforcement is a matter of terms and procedure rules. The law is no longer a tool to support innovation, speed,

convenience and adjustments to the development of services to the community.

- Comparison of legal character systems. Civil law has its system, the concept of the contrarius actus principle stipulates that if a civil settlement is first settled, likewise if there is an administrative legal examination, an administrative examination is carried out. But if a provision states that it is a criminal law, then the provisions of the criminal law become one of the premium remedium but apart from being a principle, the criminal law is an ultimum remedium.

- From the concept of being able to harm the state's finances and benefit others, it should be systematically looked at three motivations to determine the extent of entry into the realm of administrative law or the realm of criminal law. If in the realm of criminal law. The issue of coercion, bribery, and also deception which is proven by the illegal receipt of money is in fact the realm of criminal law. But if misconceptions/dwaling according to Utrecht van der valk. Actually, the settlement is provided by the administration itself, so that the administration can settle it based on the provisions of the applicable laws. The settlement is contained in two Laws that are already available, namely Article 59 of Law Number 1 of 2004 concerning the State Treasury which regulates returns and other administrative sanctions. Secondly, in

Article 20 of Government Administration is related to the return of state finances with a maximum period of 10 working days.

- As for misconceptions based on research that was conducted at the time of the dissertation, 72.7% of several cases that should have been all administratively criminalized. The concept occurs because all misconceptions or dwaling related to one's authority over the rights of a person or legal entity or misconceptions of the laws and regulations, for example after the norm is read the explanation only contains quite clearly then he wrongly applied the law, it was also criminalized.

- Likewise, it is also wrong for the purpose of administrative norms regarding circulars as well as implementing ministerial regulations, for example, also being considered as criminal. Whereas this misconception, according to Van der valk and Utrecht, is part of the settlement of administrative law.

- Since the enactment of the Government Administration Law actually gives strict limits that if indeed an administrative action is based on bribery, threats, deception proven by illegal acquisition, then in fact it will be the competence of general courts or criminal courts. But decision making that goes beyond the authority or abuse of authority on the basis of misconception according to the Government Administration Law, then becomes the competence authority of the State Administrative Court.

- Related to the phrases it can be that in the Criminal Acts of Corruption Law it does give rise to three legal certainty concerning the whole legal system. Even though the settlement provisions are in the Treasury Law and the Government Administration Law. The word can also not give a guarantee of legal protection to the apparatus and/or a legal entity in good faith which is considered detrimental to the state for its negligence and is not a form of intent in the form of threats, bribes, or tricks to accept something illegally.

- If there is an assessment of the abuse of authority, then the settlement is done first by the Government Internal Supervisory Apparatus by evaluating the three assessments. There are no errors, there are administrative errors, or there are administrative errors that harm the country's finances. So, the essence is actually administrative settlement in accordance with the principle of contrarius actus, then given the administrative legal opportunity to resolve first.

- Legal remedies if law enforcement officials or government bodies object to the Government Internal Supervisory Apparatus's assessment, reviewing can be done in the State Administrative Court. The matter that has been regulated by the implementation of the Supreme Court Regulation Number 5 of 2015. Government agencies and/or officials who feel the interests are harmed by the

results of supervision can also submit it to the State Administrative Court.

- Misuse of authority in its development now in administrative law turns out to have been identified by type. So that the abuse of authority as referred to in this Government Administration Law has been expressly regulated and resolved according to the provisions in Article 20 of the Government Administration Law.

- One example is that for example when there is a budget allocation for procurement of goods that does not exist but needs are there and are needed at that time can it be able to buy the goods for the needs that are needed right then, in fact, if the word can still be applied then it is likely that people will not be able to make purchases for fear of being accused of harming the country's finances. When in fact these provisions are in Article 27 of the Law on State Finance. That money can be issued first for later if there is an urgent or unexpected situation which is then included in the State Budget and Revenue for additional changes and/or budget realization reports.

- This is actually, of course if the word "can" may be expanded because according to the provisions of the norm itself. Finally, this is essentially what happens in practice that results from the application of the norm. That is, a system for determining the loss of the country must be preceded by a financial inspection to prove

that there is a real and definite lack of money. After that, if the actual and definite numbers are known, then it will be continued by a performance checker to conclude, whether the shortcomings are due to administrative problems, then return to Article 20 of the AP Law, or constitutes mens rea fulfillment of a person's evil intentions, bribes, deception, and also threats , then it is done by criminal settlement.

- In current practice that occurs from a direct financial inspection to a statement of conclusions against acts against criminal law, the existence of such arbitrariness or the potential for such arbitrariness, in essence, naturally results from the application of these norms, directly or indirectly which will adversely guarantee of legal protection to the citizens and also the legal certainty itself.

6. Dr. Maruarar Siahaan, S.H.

Preliminary

One of the controversies in judicial review (judicial review) is closely related to the context in the interpretation of norms, which is sometimes very far away from the meaning of norms when viewed from the text literally. Therefore, it cannot rely on one method of interpretation on its own, without the help of other methods, to be able to capture meaning in accordance with the spirit and aspirations in the constitution as a source of validity of norms formed based on legal politics that can be formulated

by the Constitutional Court in the choice contained in the ruling. Another thing of concern is whether a position that has been determined by the Constitutional Court in terms of constitutionality norms based on decisions that have been taken in a judicial review of a norm based on certain constitutional test stones at a time, can change its position.

Indeed there are norms derived from the Constitutional Court jurisprudence, that, although a norm has been tested, based on certain constitutional test stones at a time according to the Constitutional Court Law it cannot be tested again, for reasons of different constitutionality, re-examination can be requested. It's just that the relevance of the different constitutionality reasons to change the original position, will largely be determined by fundamental developments and changes that can be put forward to show the importance of adjusting the original position to the new constitutional interpretation.

Review of Norms Article 2 and Article 3 of Law 31 of 1999 with different reasons.

Reviews submitted by the Petitioner in this case are against:

1. Article 2 paragraph (1) of the Criminal Acts of Corruption Law, which states, "... unlawfully, acts of enriching oneself or another person or a corporation that can harm the country's finances or the country's economy, ..."

2. Article 3 of the Criminal Acts of Corruption Law, "... benefits oneself or another person or a corporation, abuses its authority, opportunity or means because of his position or position, which can harm the country's finances or the country's economy ...".

In Case Number 03/PUU-IV/2006 dated July 25, 2006, the Constitutional Court had tested the norm, and on the constitutional reason of the Petitioners at that time, the norm was considered to be in conflict with Article 28D paragraph (1), by granting the application in part with consideration as following:

1. The phrase "may be detrimental to the country's finances or the country's economy" does not contradict Article 28D paragraph (1) of the 1945 Constitution, insofar as it is interpreted that the phrase "may" before the phrase "prejudice state finances or the country's economy" indicates that the offense is a formal offense, namely that the existence of a criminal act of corruption is deemed sufficiently proven by the fulfillment of the elements of action which are formulated, not dependent on the consequences. Such matters are not seen to cause legal uncertainty;

2. The concept of violating material law (materiele wederrechtelijk) which refers to the unwritten law in terms of propriety, caution and care that lives in society, as a norm of justice, is an uncertain measure, and varies from one particular community environment, the environment of other communities, so that what is against the

law in one place may be accepted elsewhere and recognized as something that is legal and not against the law, according to standards known in the life of the local community, so it is not in accordance with the protection and guarantee of fair legal certainty contained in Article 28D paragraph (1) of the 1945 Constitution.

Petitioners' petition in this case, refers to different constitutional reasons, namely by examining Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law against Article 1 paragraph (3) concerning the rule of law, Article 27 paragraph (1) concerning equality in law and government, Article 28G paragraph (1) concerning the right to security and protection from the threat of fear to act or do something that is a human right, and Article 28D paragraph (1) concerning the right to guarantee fair legal certainty and equal legal treatment, and Article 28I paragraph (4), namely the protection, promotion, enforcement and fulfillment of human rights is the responsibility of the state, especially the government. For reasons of constitutionality called the Petitioner, it can indeed be said that the reasons for testing constitutionality are different.

Change in the Position of the Constitutional Court from the Previous Decision.

Changes in the position of the Constitutional Court regarding the constitutionality of norms from the original decision are indeed possible, although Article 60 of the Constitutional Court Law states that a norm that has been tested cannot be

tested again on the same constitutionality grounds. With the constitutional reasons mentioned in the previous decision, there can be a shift due to the following fundamental reasons:

1. Changes in the basic socio-political, economic, and cultural context which caused the interpretations used previously to be inadequate thus causing legal uncertainty and injustice in achieving state objectives. The birth of the Law on the Governing of Aceh which allows individual candidates to advance to become participants in the election of regional heads, has resulted in a shift in the original position of the Constitutional Court which did not justify individual candidates in the elections.

2. The economic crisis which caused recession and depression in the United States in the 1930s forced the United States Supreme Court out of philosophical positions and constitutional principles that maintained a free market economy and freedom of contract, and changed its position, albeit temporarily and casuistically by justifying the intervention of the Government (state intervention) in freedom of contract, especially in the social regulation legislation issued by President Roosevelt's Government. Likewise, socio-political awareness that grew later, changed the meaning of constitutional norms about "separate but equal" in the Plessy vs. Fergusson case as non-discriminatory, radically changed in the Brown vs. Boardof Education ruling that abolished segregation to eliminate discrimination.

3. The occurrence of policy changes in the administration of government and state administration contained in the new legislation, which requires harmonization and synchronization with the laws and regulations previously issued, becomes a matter of context change. The issuance of the Government Administration Law with an administrative approach in resolving state losses that arise, so that it seems to want to emphasize the doctrine that criminal law is a last resort (ultimum remedium), can affect interpretations of the constitutionality of norms. If a situation arises that the Laws that were born did not cause an order (orderly legal system) but a disorder, so that there was a disharmony between one Law and another Law, because the formation of the Law in a different social and political context, there may be unsystematic laws. It is the judge's duty to interpret through the constitutionality of norms with the spirit of the constitution and the principles of legislation to be able to apply them systematically again.

4. The implementation of the Constitutional Court's decision on the unconstitutionality of certain norms that have been decided may not take place effectively, which may arise due to a misunderstanding of constitutional authority, which requires new affirmations and interpretations that can provide clearer meaning. Decision of the Supreme Court Number 2064K/Pid/2006 dated January 8, 2007 states expressly will not follow the interpretation of the Constitutional Court in Decision Number 03/PUU-IV/2006 but will follow the doctrine and jurisprudence of the Supreme Court.

5. The revenue of the budget to drive Indonesia's economic life turned out to be low, also due to the "fear of being criminalized" from the decision makers (Budget User Authority/KPA) because it was not yet clear how the distinction between state losses arising from administrative errors and corruption. This also led to the need to reaffirm the legal certainty of the Corruption formula in Article 2 and Article 3 of the Criminal Acts of Corruption Law.

Fair Legal Certainty and Right to Freedom from Fear Threat

The words "can harm the state finances and or the state economy" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law which are declared not to conflict with the 1945 Constitution in the Constitutional Court's Decision Number 03/PUU-IV/2006, cause an element of state financial losses and the country's economy it does not always have to arise but it is sufficient if only in the form of possibility, because according to the Court this matter is about to say that the crime in the norm is formal offense. The presence or absence of a criminal act of corruption in both articles does not depend on the element of state loss that occurred, but rather if formally the other elements of the crime are fulfilled. The formulation and phrase cause an article which can accommodate many actions (catching all), including if the loss that occurs is a risk of discretion that must be taken in the absence of a clear regulation, or in the case of State-Owned Enterprises, if there is an action which is weighed in business is correct business action according to the "business judgment rule" argument, but when the act is deemed to be detrimental to the state, and meets the element of

breaking the formal category as contrary to applicable laws and regulations, and contrary to the subjective rights of others, and in the jurisprudence of the Supreme Court cited in the decision of the Supreme Court above, also contrary to the propriety and caution required in society.

With norms that can encompass many acts as criminal acts of such corruption (catching all), making the division of the fields of State Administrative law, civil law and Criminal Law, concerning acts against the law from each perspective no longer relevant. But the question raised is whether from the perspective of the constitution with the ideals of the law - protecting the whole nation, promoting public welfare, educating the life of the nation, and participating in carrying out world order based on independence, lasting peace and social justice, then the formulation that returns to the essence of criminal law to affirm the principle of lex scripta, lex stricta, and lex certa, must not also include the Criminal Acts of Corruption Law without reducing the intensity of eradicating rampant corruption, to realize the state's constitutional obligations in respecting, promoting, protecting and fulfilling (to respect, to promote, to protect and to fulfill) these human rights.

Taking into account the formulation of a criminal act of corruption strictly to follow the formulation of the United Nations Convention Against Corruption, 2003 which has been ratified by Indonesia with Law Number 7 of 2006, which does not contain the element "can harm the state finances" in the corruption offenses according to the Anti-Corruption Convention because it described in a very limitative manner as a crime, bribery, embezzlement in office, trading influence,

misuse of office, public officials who enrich themselves illegally, bribery in the private sector, embezzlement in private companies, laundering the results of crimes, hiding the existence of corruption crimes and blocking obstruct the judicial process, whether or not there is a need to revise the Criminal Acts of Corruption Law. This will in fact cause the ongoing debate to be unimportant. That means what must be done is the revision of the Criminal Acts of Corruption Law, taking into account developments in the field of state administration law, the development of the administration of state power in the perspective of economic development and implementing a "comparative study interpretation" by looking at global developments in Indonesia's international obligations according to the UN Convention on Anti Corruption has been received through the ratification of the convention.

The word can objectively refer to something that is uncertain, which requires reformulation without reducing the firmness in eradicating corruption. With all the developments outlined earlier, it is time to harmonize the principles of the constitution in the formulation of norms in the Criminal Acts of Corruption Law.

Conclusion

1. The shift in the Constitutional Court's position in establishing the constitutionality of norms can occur due to fundamental changes socially, economically, politically, psychologically and culturally that cause the need for re-interpretation;

2. Changes to the laws and regulations and the administration of

government require efforts to synchronize and harmonize the norms of relevant laws;

3. Criminal Law still has a place as ultimum remedium, which will be applied when other remediums are no longer appropriate;

4. Elements of fair legal certainty, and the right to be free from the fear of doing and not doing in a changing context, become indicators of the constitutionality of norms that must be reinterpreted to emphasize the meaning under changing conditions

[2.3] Considering whereas with regard to the Petitioners' petition, the President in his hearing on 21 April 2016 submitted verbal statements and written statements received at the Registrar's Office on May 16, 2016 which outlined the following matters:

I. SUBJECT OF THE PETITIONERS' PETITION

1. Whereas the Petitioners in their petition feel disadvantaged by the enactment of Article 2 paragraph (1) and Article 3 in the word "can" and the phrase "or another person or a corporation" of Criminal Acts of Corruption Law contradicts Article 1 paragraph (3), Article 27 paragraph (1), Article 28G paragraph (1), Article 28D paragraph (1), Article 28I paragraph (4), and Article 28I paragraph (5) of the 1945 Constitution.

2. Whereas according to the Petitioners, the Petition of Constitutional Court Verdict Number 003/PUU-IV/2006 against the word "can" which states "whereas a criminal act of corruption is a formal crime, not a material

crime, so the element of harming state finances is not an essential element" is irrelevant with the development of Indonesian legal politics.

3. Whereas the Petitioners consider the word "can" in Article 2 paragraph (1) and Article 3 contrary to the principle of a state of law by stating:

   a. according to the Great Dictionary of Indonesian Language, the word "can" does not have a definite meaning;

   b. the word "can" can also cause uncertainty in the enactment of criminal law;

4. Whereas the phrase "or another person or a corporation" contains ambiguous and uncertain meanings, because it will encompass all intentional, or unintentional actions or even acts that begin with good intentions. The formulation of the phrase "or another person or a corporation" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law allows a person to be subjected to a criminal act of corruption even though a state civilian apparatus issues a policy in good faith and benefits the state or people and at other times benefit other people or corporations, even though these policies are absolutely not an malefaction.

II. *NE BIS IN IDEM PETITION*

The Government objected to the Petitioners 'argument stating that the Petitioners' petition was not ne bis in idem with the Case Number

003/PUU-IV/2006 which was decided on July 25, 2006 with the following reasons:

a. Whereas regarding ne bis in idem is provided for in Article 60 of Law Number 8 of 2011 concerning Amendment to Law Number 24 of 2003 concerning the Constitutional Court (Constitutional Court Law) as follows:

   1) *For the substance of paragraphs, articles and/or parts of the law that have been reviewed, they cannot be repetitioned..*

   2) *The provisions as referred to in paragraph (1) may be excluded if the substance in the 1945 Constitution of the Republic of Indonesia which is used as a basis for reviewing is different..*

b. Whereas the a quo articles that were reviewed have been reviewed and have been decided by the Court on July 25, 2006 in Number 003/PUU-IV/2006 with the injunction rejecting the petition.

c. Whereas the Petitioners argue that the touchstones between both are different. The petition for "003" with the touchstone of Article 28D paragraph (1) of the 1945 Constitution, while the petition in casu with the touchstone of Article 1 paragraph (3), Article 27 paragraph (1), Article 28I paragraph (4) and Article 28I paragraph (5) of the Constitution 1945, therefore the petition is not ne bis in idem.

d. Whereas according to the Government although formally the both touchstones are different but materially the arguments between them have in common and also petitium petition is the same, that is the word "can" be declared contrary to the 1945 Constitution, therefore the petition of the Petitioners is ne bis in idem.

Based on the above arguments, the Government has the opinion that the petition of the Petitioners is ne bis in idem and it is appropriate if the Majesty Panel of Judges of the Constitutional Court declare the petition of the Petitioners cannot be accepted.

III. LEGAL STANDING OF THE PETITIONERS

In connection with the Petitioners' legal standing, the Government is of the following opinion:

1. Based on Article 51 paragraph (1) of the Constitutional Court Law:

   Petitioners are parties who consider their constitutional rights and/or authorities impaired by the coming into effect of the law, namely:

   a) individual Indonesian citizens;

   b) the unity of indigenous and tribal peoples as long as they are still alive and in accordance with the development of the community and the principles of the unitary state of Indonesia as stipulated in the law;

c) public and private legal entities, or

d) state institutions.

2. Based on MK Decision Number 006/PUU-III/2005 dated May 31, 2005 and Number 011/PUU-V/2007 dated September 20, 2007, and subsequent decisions the Court has held that impairment of constitutional rights and/or authorities must meet the 5 (five) conditions, namely:

a. the Petitioners have constitutional rights granted by the 1945 Constitution of the Republic of Indonesia.

b. the Petitioners' constitutional rights are deemed by the Petitioners to have been impaired by an Act being tested.

c. the Petitioners' constitutional impairment in question is specific or special and actual or at least potential in nature which according to logical reasoning can be ensured.

d. there is a causal relationship between losses and the coming into effect of the Law being applied for review.

e. the possibility that with the granting of the petition the postulated constitutional impairment will not or no longer occur.

3. Petitioner I is an individual Indonesian citizen who was charged with violating Article 3 of the Anti-Corruption Law and at the

moment has a convict who has been sentenced to a criminal sentence based on the decision of the Mamuju District Court Number 08/Pid.Sus/TPK/2013/PN.MU and has been convicted for 1 (one) year and a fine of Rp. 50,000,000.00 (fifty million rupiah) with a substitute criminal for 1 (one) month of confinement, Petitioner I in the a quo petition did not explain whether it was true that the cause of Petitioner I was convicted due to the application of the word "can" in Article 2 and Article 3 Anti-Corruption Law, so that Petitioner I feels violated his constitutional rights. With the Mamuju District Court's Verdict, it proves that the actions carried out by Petitioner I have in fact fulfilled the elements contained in the Corruption Act based on court decisions that have permanent legal force.

4. Petitioner II and Petitioner III are individual Indonesian citizens who are currently convicted of corruption,

5. The Petitioners should at the time of the examination and investigation stage, if they feel that their rights have not been granted and / or the determination of the suspect against the Petitioners is not in accordance with the rules, the Petitioners can conduct pretrial through pre-trial institutions in accordance with statutory regulations.

6. Petitioners IV, V, VI, and VII are individual Indonesian citizens who are currently State Civil Apparatuses potentially subject to the

provisions of Article 2 paragraph (1) or Article 3 of the Corruption Law. In the a quo petition, there is no illustration of a causal relationship between the losses suffered by the Petitioners and the coming into effect of the Law being tested. The fear and worry felt by the Petitioners is the reason for making this up as a State Civil Apparatus working based on the applicable regulations and in accordance with the General Principles of Good Governance. Thus, the emergence of fear and worry of the Petitioners, is not a matter of constitutionality but rather the problem of implementing law enforcement, especially enforcement of the eradication of corruption.

7. A quo article is a very important provision in the eradication of criminal acts of corruption, so it is very wrong if a provision that aims to create a state that is clean and free of acts of corruption is considered contrary to the 1945 Constitution.

8. The Government also regrets the Petitioners who are ASN employees, who are unable to understand their duties in the provision of Article 11 of Law Number 5 Year 2014 concerning the State Civil Apparatus where ASN Employees are assigned:

    1) implement public policies made by the Employee Supervisory Officer in accordance with statutory provisions;

    2) provide professional and quality public services; and

3) strengthen the unity and integrity of the Unitary Republic of Indonesia.

9. If the Petitioners whose status as ASN employees carry out their duties in accordance with the provisions of the Law, namely carrying out their duties in accordance with the provisions of the legislation, then with the article a quo the applicant will not cause any harm, especially constitutional losses.

10. The Government also ensures that ASN employees are not worried and do not need to feel insecure subject to corruption from all policies taken or decided as long as ASNs work in accordance with the laws and regulations, the argument of the Petitioners' loss arises as a result of a lack of understanding of the articles the article being tested because what is prohibited in the articles being tested is to enrich oneself or another person or corporation that is against the law, whereas those who enrich another person or corporation by not violating the law are not criminal acts of corruption.

11. Whereas although the Court's decision is in favor of the Petitioners, it will not be able to eliminate the losses of the Petitioners, but what can eliminate the losses of the Petitioners is to work in accordance with the laws and regulations.

Based on the foregoing, the Government is of the opinion that the Petitioners' petition does not meet the qualifications as legal standing and it is appropriate if the Honorable Panel of Judges of the Constitutional Court wisely declares the Petitioner's application unacceptable (niet ontvankelijke verklaard).

IV. THE GOVERNMENT'S EXPLANATION FOR THE CASE OF LAWSUIT OF THE PETITIONERS

1. Whereas before the government provides an explanation related to the subject matter proposed by the Petitioners, the government first reiterates that the a quo Case Material Test has been submitted several times to the Constitutional Court, this is evidenced by the Constitutional Court ruling Number 003/PUU- IV/2006 and case Number 44/PUU-XI/2013. Where in case legal considerations Number 003/PUU-IV/2006 which are then reconsidered in case Number 44/PUU-XI/2013, as follows:

"Considering that Article 2 paragraph (1) of the PTPK Law contains the following elements:

a. The element of tort

b. The element of enriching oneself or another person or a corporation,

c. The element can be detrimental to the country's finances or the country's economy ...

... considering that with the explanation which states the word "can" before the phrase detrimental to the state finances or the economy of the country then qualifies it as formal offense so that with the loss of the state or the state's economy does not constitute a real consequence, the court is of the opinion that such an interpretation is interpreted as an element of loss the state must be proven and must be counted, even as an estimate or even if it hasn't happened yet. Such conclusions must be determined by experts in their fields. The loss factor, whether real or probable, is seen as a burden or mitigation in the criminal prosecution as described in Article 4, that the financial return of the state loss is only seen as a mitigating factor. Therefore the problem can be in Article 2 paragraph (1) of the PTPK Law, it is more a matter of implementation in practice by law enforcers and does not concern the constitutionality of norms.

Considering, therefore, the Court is of the opinion that the phrase may be detrimental to the state's finances or the country's economy does not conflict with the rights and certainty of a just law as intended by Article 28D paragraph (1) of the 1945 Constitution insofar as it is interpreted in accordance with the above interpretation of the Court (conditionally constitutional).

Considering whereas with the ratification or ratification of the United Convention Against Corruption with Law Number 7 of 2006, in which convention where the loss is not absolutely an element of a criminal act of corruption (it shall not be necessary), but must involve public officials,

the court is of the opinion that the element "who "Article 2 paragraph (1) must also be interpreted in relation to public official conduct. Indonesia as a state party, should immediately adjust by making changes to the PTPK Law which is based on a conceptual and comprehensive study in a single legal system based on the 1945 Constitution.

Considering whereas thus the court considered that there was indeed a constitutionality issue in the first sentence in the explanation of Article 2 paragraph (1) of the PTPK Law so that the Court needs to further consider the following matters:

1. *Article 28D Paragraph (1) recognizes and protects the constitutional rights of citizens to obtain legal guarantees and certainty whereby in the field of criminal law is translated as the principle of legality contained in Article 1 paragraph (1) of the Criminal Code, that the principle is a demand of legal certainty whereby people can only be prosecuted and tried on the basis of a written statutory regulation (lex scripta) which has already existed.*

2. *Such matter demands that a criminal act has an element of unlawfulness, which must be in writing in advance already in force, which formulates what acts or consequences of human actions clearly and strictly prohibited so that they can therefore be prosecuted and convicted, in accordance with the nullum principle crimen sine lege stricta;*

3. A formally written concept against the law (formele wederrechtelijk), which requires legislators to formulate as accurately and in as much detail as possible (vide Jan Remmelink, criminal law, 2003: 358) is a condition for guaranteeing legal certainty (lex certa) or which also known as Bestimmheitsgebot;

Considering that based on the description above, the concept of violating material law (materielle wederrechtelijk), which refers to the unwritten law in terms of propriety, caution and care that lives in society, as a norm of justice, is an uncertain, different measure - different from one particular community environment to another, so that what is against the law in one place may be accepted and recognized as legal and not against the law, according to standards known in the life of the local community, as stated by Prof. Dr. Andi Hamzah, SH in the trial;

Considering whereas due to the Elucidation of Article 2 paragraph (1) of the first sentence PTPK Law, it is not in accordance with the protection and guarantee of fair legal certainty contained in Article 28D paragraph (1) of the 1945 Constitution. Therefore the Elucidation of Article 2 paragraph (1)) PTPK Law insofar as the phrase "referred to illegally" in this article covers acts against the law in a formal or material sense, that is, even if the act is not regulated in statutory regulations, if the act is deemed reprehensible because not in accordance with a sense of justice or the norms of social life of the people, then the act was declared contrary to the 1945 Law.

Based on the Consideration of the Court, according to the Court, although there is a basic difference in testing between the application Number 003 / PUU-IV / 2006 with 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, but the Petitioner's petition regarding the constitutionality review of Article 2 paragraph (1) and Elucidation of Article 2 paragraph (1) of the PTPK Law is essentially the same as petition Number 003 / PUU-IV / 2006 and has been considered in Decision Number 003 / PUU-IV / 2006 dated July 25, 2006 so that the request is ne bis in idem.

Whereas in the Elucidation of Article 10 paragraph (1) of the Constitutional Court Law stipulates that the decision of the Constitutional Court is final, which means that it directly obtains legal force since it is said and no other legal remedies can be taken so that in addition to the fiinal nature it also includes binding and final legal force.

That furthermore, in the provisions of Article 60 paragraph (1) of the Constitutional Court Law, "Against the material contained in paragraphs, articles, and / or parts of the law that have been tested, retesting cannot be requested," and Article 60 paragraph (2) of the MK Law states, "The provisions referred to in paragraph (1) may be excluded if the material contained in the 1945 Constitution of the Republic of Indonesia which is used as a basis for testing is different". This provision emphasizes that requests for material paragraphs, articles or parts of the law that have

been tested cannot be re-applied (ne bis in idem) unless the material contained in the 1945 Constitution which is used as a basis for different testing.

Based on the explanation and consideration of case Number 003 / PUU-IV / 2006 which is then reconsidered in case Number 44 / PUU-XI / 2013 above, it is connected with the petition of the Petitioners in the a quo case which makes Article 1 paragraph (3), Article 27 Paragraph (1), Article 28G Paragraph (1), and Article 28D Paragraph (1), Article 28I Paragraph (5) of the 1945 Constitution as a test stone, contains material contained in the 1945 Constitution which is essentially the same as that which was tested in Case Number 003 / PUU-IV / 2006 and has been reconsidered in case Number 44 / PUU-XI / 2013. The contents of material in the same 1945 Constitution are Article 28D paragraph (1). Therefore, the petition of the Petitioners in the a quo case is ne bis in idem, however, the Government fully submits to His Excellency the Chairperson / Constitutional Justice Board to consider and assess whether the a quo Petition submitted by the Petitioners is ne bis in idem or not.

2. Whereas in the a quo petition, the Petitioners submit judicial review of the provisions of Article 2 paragraph (1) and Article 3 of the Corruption Law, which states:

Article 2

(1) *Any person who unlawfully commits acts of enriching oneself or another person or a corporation that can be detrimental to the State's finances or the country's economy ".*

Article 3

"Anyone who aims to benefit himself or someone else or a corporation, misuse the authority, opportunity or means available to him because of his position or position that can harm the country's finances or the country's economy"

The aforementioned provisions are considered by the Petitioners to be in conflict with the provisions of Article 1 paragraph (3), Article 28D paragraph (1), and Article 28I paragraph (4) of the 1945 Constitution, which states that:

Article 1

(3) *The State of Indonesia is a state of law.*

Article 27

(1) All citizens are at the same position in law and government and are obliged to uphold the law and government with no exception.

Article 28G

(1) *Every person has the right to protection of personal, family, honor, dignity and property under his authority, and is entitled to a sense*

of security and protection from the threat of fear to do or not do something that is a human right.

Article 28D

(1) *Every person has the right to recognition, guarantee, protection and certainty in law that is fair and equal treatment before the law.*

Article 28I

(4) *Protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government.*

Article 28

(5) *To uphold and protect human rights in accordance with the principles of a democratic rule of law, the implementation of human rights is guaranteed, regulated and stated in legislation.*

In response to the request, the Government conveys the following matters:

2.1 Whereas in the attachment to Law Number 12 of 2011 concerning Formation of Regulations and Regulations (Law No. 12 of 2011), the preamble contains a brief description of the main points of consideration and reasons for the formation of legislation containing philosophical elements. , juridical and sociological background in the making.

If the consideration of the Anti-Corruption Act is concerned, it can be seen that the considerations of the Anti-Corruption Act have fulfilled the considerations as referred to in Law No. 12 of 2011 because in the Preamble of the Anti-Corruption Law has contained the following elements:

I. Philosophical elements

The Corruption Law was created in order to create a just and prosperous society based on Pancasila and the 1945 Constitution.

II. Juridical element

The Corruption Law was made on the basis of TAP MPR Number XI/MPR/1998 to replace Law Number 3 of 1971 which was considered to be no longer in accordance with the development of legal needs in society.

III. Sociological elements

With the Anti-Corruption Act, it is hoped that efforts to prevent and eradicate corruption can be more effective, because corruption is very detrimental to the country's finances or the country's economy and impedes national development.

2.2. Whereas corruption is an extraordinary crime (extraordinary crime), which has a variety of modus operandi. Corruption has caused huge losses to the state which in turn can have an impact on the emergence of crises in various fields. For this reason, efforts to prevent and eradicate corruption need to be increased and intensified while upholding human rights and the interests of society. In order to be able to reach various modus operandi of irregularities in state finances or the state's economy which is increasingly sophisticated and complicated, the criminal acts regulated in this Law are formulated in such a way that the criminal act of corruption is expressly formulated as a formal crime. This is very important for proof. With the formal formulation adhered to in this Law, even though the proceeds of corruption have been returned to the state, perpetrators of criminal acts of corruption will still be submitted to the court and still be sentenced.

2.3 Whereas in the establishment of the Anti-Corruption Law, the legislator expects the Anti-Corruption Act to be able to meet and anticipate the development of the community's legal needs in order to prevent and eradicate more effectively, any form of corruption that is very detrimental to the country's finances or the country's economy in particular and the community in general.

The said state finance is all state assets in any form, separated or not separated, including all parts of state assets and all rights and obligations arising from:

a) be in the control, management and accountability of state agency officials, both at the central and regional levels;

b) is in 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. Whereas what is meant by the State Economy is economic life compiled as a joint venture based on the principle of kinship or community business independently based on Government policies, both at the central and regional levels in accordance with the provisions of applicable laws and regulations aimed at providing benefits, prosperity , and prosperity to all people's lives.

In order to be able to reach various modus operandi of irregularities in state finances or the state's economy which is increasingly sophisticated and complicated, the criminal acts regulated in the Anti-Corruption Act are formulated in such a way that includes acts of enriching oneself or another person or a corporation in an "unlawful manner".

3. Whereas the Petitioners have questioned the Constitutional Court Decision Number 003/PUU-IV/2006 on the grounds that it is not in accordance with the spirit of Law Number 30 of 2014 on Government Administration (Government Administration Law) which, according to the Petitioners, the approach to eradicating corruption is no longer by conviction. but it becomes the administrative approach and its solution by means of administrative law. The government explains:

a. Constitutional Court Decision Number 003/PUU-IV/2006 to date is relevant and valid.

b. Whereas the Petitioners were mistaken in interpreting the relationship between the Corruption Law and the Government Administration Law. Simply put, the two laws have different specific characteristics, one regulates specific criminal acts, namely corruption, while the other regulates specifically about government administration.

- The basic idea in the formation of the Government Administration Law is that officials and state administration officers in Indonesia carry out their duties more on customs and not on positive laws governing state administration. In such administrative practices there will flourish bureaucratic clicks and patron client relationships, namely the resolution of problems inside and outside the office through non-formal, highly prone to irregularities, misuse of positions

and various other disgraceful acts or administrative malls. For this reason, a clear and firm legal framework is needed that regulates how the state/government apparatus acts, as endeavored to establish impersonal legal rational principles, so that every interaction and problem in the office/service is settled according to law.

- The aim is to improve governance in an effort to improve good governance (good governance) and as an effort to prevent the practice of corruption, collusion, and nepotism and to become a legal basis for recognizing whether a decision issued by a government official is in accordance with his authority, or the action contains administrative errors or abuse of authority. So that the existence of the Government Administration Law is not to change the pattern of approach to resolving corruption or to reduce the Criminal Acts of Corruption law but rather to provide guidelines for government officials not to do what is not their authority in order to prevent the occurrence of corruption, collusion and nepotism. The Government Administration Law specifically regulates preventing acts of corruption within government officials, while the Criminal Acts of Corruption Law regulates the eradication of corruption in general.

- Regarding petition for a qou comparing Article 20, Article 70, Article 71 and Article 80 of the Government Administration Law and Article 2 of the Criminal Acts of Corruption Law the government explains:

    a. Article 20, Article 70, Article 71 and Article 80 of the substance of the Government Administration Law substantial substance is procedural administration and abuse of authority, the settlement in the State Administrative Court in the case of State Administrative Court decides related to procedural administrative errors in the form of refunds, but if it is not a procedural administrative error and is an error in the misuse of the authority of the settlement submitted in general court. While the main substance of Article 2 of the Criminal Acts of Corruption Law is the act of enriching oneself or another person or corporation which is carried out unlawfully. The element of violation of the law referred to in article a quo is a means to carry out acts of enriching oneself, another person or corporation. Thus, as a legal consequence of the formulation of the provisions of article a quo, even though an act has harmed the country's finances or the country's economy, but if it is not done unlawfully,

the act of "enriching oneself or another person or a corporation" is not a criminal offense corruption as referred to in article a quo.

b. So that the substance of the two provisions is very much different, and if the way to understand the two provisions in the manner of the Petitioners is very ironic, which implies that the Government Administration Law replaces the Criminal Acts of Corruption Law if so then the hope of the state to be a clean state of Corruption, Collusion and Nepotism will disappear, which in the end will change the principle of the rule of law into a power state.

4. Whereas according to the Petitioners the word "can" in Article 2 paragraph (1) and Article 3 is contrary to the rule of law and criminal law principles which postulate various decisions of the Constitutional Court, the government explains as follows:

a. The Petitioners' view of the word "can" in Article 2 paragraph (1) and Article 3 is contrary to the rule of law state, the Government explains that the rule of law principle is the existence of equal protection or equality before the law. In the rule of law, the position of the authorities and the people in the eyes of the law is the same (equal), the only difference being the function, namely the government functions to regulate and the people are regulated.

Actions of the authorities must be based on the law or apply the principle of legality, then in a material state law the actions of the authorities in matters of urgency in the interest of citizens are justified in deviating from the law or in applying the principle of Opportunity. The assumption of the Petitioners who postulate the word "can" contradict the rule of law is very wrong because the state in the interests of its citizens can not only carry out the principle of legality but is also justified in carrying out the principle of Opportunity. So if the Petitioners argue that the word "can be" contrary to the rule of law state of the Petitioners is very incorrect in understanding the meaning of the rule of law.

b. Whereas the Petitioners postulated the word "can" towards several decisions of the Constitutional Court's decision, the government explained that the Constitutional Court had the authority and consideration in examining the material of the Law. This means that the word "can" in the application of various rules can have different meanings and meanings, depending on how the word "can" be used. So if the Constitutional Court decides the word "can" be different from various other laws is very reasonable and true, with the reason for its consideration in testing the material is also different. It would be wrong if the Constitutional Court had decided on the word "can" in one Act and then immediately gave the same decision in various other Laws, which if this happened meant the Court no longer tested the material but only tested the word.

c. Whereas with respect to the word "may", the Petitioners also considered that they were contrary to the legality principle of criminal provisions (lex scripta, lexcerta, lex stricta and non rextroactive), the government explained, that in the technical process of forming legislation and besides making good formulations it also took into account the enactment (implementation) whether or not the regulation can be implemented. With the principles of the Law made must be implemented (can be implemented). The word "can" is not a dead word, but serves to provide a solution to the validity of a formula. If all formulations are forced by necessity it can affect the enactment of a law, so the word "can" is often applied in the formulation of a regulation. the word "can" can be interpreted as a choice, and the word "can" can also be interpreted as not an option.

Examples of formulation:

Article 25 of the Higher Education Law

Specialist programs are advanced skills education that can be graded and intended for graduates of professional programs who have experience as professionals to develop their talents and abilities to become specialists.

(the formulation above the word "can" is not an option because it causes an effect preceded by the word "yang")

Article 90 of the Higher Education Law

Other state institutions can carry out higher education in the territory of the Unitary Republic of Indonesia in accordance with statutory provisions.

The above formulation, the word "can" is an option can be held or not.

d. The Petitioners also considered the word "can" be contrary to the principles of criminal law lex scripta, lex certa, lex stricta and non rectroactive, the government explained that even though criminal law is a provision that must be strict but the nature of its validity must still be taken into account. In practice the formation of laws and regulations the word "can" can be applied in various settings both in general law, criminal law, civil law and so forth. In formulating the criminal law provisions forming a law in general still consider the principles, legal theories and substance of interest (legal politics). In determining the legal politics of the Law, the forming of the Law can adjust the characteristics of the regulated community, so that in the formation of the Law a synergy formation system is needed by considering various things. To use the word "can" in a formulation of the Law there is no prohibition in theory or from a technical point of view, the word "can" still can still be used according to the needs and ways of its placement. This means that the article being tested is lex sripta, lex certa, lex stricta, and non rectroactive.

e. Whereas one of the mandates of the 1945 Constitution is to obtain professional, integrity and disciplinary officials and law enforcement officials that support legal facilities and infrastructure as well as community legal behavior or in other words law enforcement and justice. Law enforcement can be interpreted as the process of making efforts for the establishment or functioning of legal norms as a real guideline for behavior in traffic or legal relations in social and state life, as conveyed by Jimly Asshiddiqie in Legal Development and Law Enforcement in Indonesia, in Indonesia Seminar on "Questioning Moral Law Enforcement" in the context of Lustrum XI Faculty of Law, Gadjah Mada University in 2006, while Karen Lebacqz, in his book "Theories of Justice", Nusa Media, Bandung, 15th Year, page 61, explains that the value of justice one does not have to risk his welfare or rights for the good of others, and conditions for justice are achieved if individuals who are not in the same interest make conflicting claims about the distribution of social benefits under conditions of moderate scarcity. The problem of justice arises, if there is a situation of scarcity and conflict of interest, and the principles of justice are obtained, not by evaluating the usefulness of actions (or tendency of action), but from rational choice under fair conditions. Correspondingly, Soerjono Soekanto in his book "factors affecting law enforcement", Raja Grafindo, Jakarta, 2011, page 5 provides an explanation that law and law enforcement, conceptually the core and meaning of

law enforcement lies in harmonizing activities, the relationship of values that collide in the rules of solidity and attitude to act as a series of translation of the final stage of value, to create, maintain, and maintain peace of life and is a part of law enforcement factors that cannot be ignored, because if ignored will lead to not achieving the expected law enforcement. Jimly Asshiddiqie and Ali Safa'at, in his book "Hans Kelsen's Theory of Law", Constitution Press, Jakarta 2012, page 13 defines law as, rules as a system of rules about human behavior, thus the law does not refer in a single rule (rule), but a set of rules that have a unity so that it can be understood as a system, the consequence is it is impossible to understand the law if only pay attention to one rule. Satjipto Rahardjo in his book "Legal Studies", PT. Citra Aditya Bakti, Bandung, 2000 pages 5 to page 6, argues that law is abstract norms that can regulate society, and the law is formed due to considerations of justice (gerechtigkeit), in addition to legal certainty (rechtssicherheit) and expediency (zweckmassigkeit) and renewal, while the positive legal flow equates the law with the law, there is no law outside the law. So it must be recognized that one source of law is the Law (legism).

f. Whereas besides that in the process of handling corruption cases, which are categorized as extraordinary crimes with the principle of "actus nonfacit reum, nisi men sit rea" which teaches, not a person can be held liable in a criminal manner even though his actions

have fulfilled the offense formula , except in the act there is evil intentions or the inner attitude of the offender who can be criticized. "Men sit rea" or bad intentions or disgraceful mental attitude of the perpetrators in a criminal act of corruption is if an act against the law committed by the perpetrator is intended or intended to benefit or enrich oneself, another person or a corporation and the perpetrators realize that the act could harm state finances or the country's economy.

5. For the phrase "or another person or corporation" according to the government, the phrase does not contain ambiguous meaning but instead provides legal certainty, provided that the meaning of the phrase is interpreted in a series of entire verses or articles.

In this case the Government explains:

a. Whereas the language of the legislation has a distinctive style or style that is characterized by clarity of understanding, frankness, finesse, and harmony so that in interpreting the article a rule must be straightforward which cannot be interpreted by words or sentences per sentence but must be interpreted as a whole paragraph or article so that gain clarity of understanding.

b. With regard to the formulation of article a quo which reads: "Everyone who unlawfully commits acts of enriching oneself" or

another person or a corporation "that can harm the country's finances or the country's economy, is imprisoned ..."

The government explains:

- Whereas the formulation of Article 2 paragraph (1) of the Anti-Corruption Law consists of:

  1) everyone

     As stated in Article 1 number 3, what is meant by every person is an individual and/or corporation.

  2) against the law

     Before the Constitutional Court Decision Number 003/PUU-IV/2006, the concept of violating the law still referred to 2 (two) teachings against the law, namely: against the law in the formal sense and in the strict sense.

     According to Roeslan Saleh in his book "Legal Against the Laws of Criminal Law", arguing against material laws is not only contrary to written law, but also contrary to unwritten law. Conversely, against the law in the formal sense is contrary to written law only.

Whereas after the decision of the Constitutional Court Number 003/PUU-IV/2006, the Court interprets the element against the law article 2 paragraph (1) of the Anti-Corruption Law is no longer allowed to use teachings or concepts against material law in its positive function, but must use doctrine or concepts against formal law.

3) enrich yourself or others or a corporation

"Enriching oneself or another person or a corporation" in the formulation of words or having the same elements as either corrupt acts to "enrich oneself" or "others" or a "corporation" is an act of corruption ".

4) which can be detrimental to the country's finances or the country's economy.

"Whereas can harm the state finances or the economy of the State" in this formulation cannot only be interpreted as "can" but must be interpreted with the word "which can" because the meaning of "that can" in the formulation has the meaning of having an effect, the effect of which is carried out to enrich oneself or another person or a corporation is

detrimental to the country's finances or the country's economy".

c. Whereas the mode of criminal acts of corruption in general cooperates with others, in fact many have been found against corruptors who have been caught, whose corrupt results have been entrusted or on behalf of children, wives, friends or other people or in foundations, companies, or business entities and others- others, with a view to obscuring evidence. In the case of a criminal act of corruption very strong evidence is the result of corruption, so that corruptors will be very adept at hiding it with the aim that law enforcement officials cannot find evidence.

d. If the phrase "or another person or corporation" is omitted, the risk is in the case of a criminal act of corruption where the corrupt results are entrusted by another person or corporation is no longer a criminal offense because the proof is only the result of corruption in itself.

e. the phrase "enriching oneself or another person or corporation" has the same weight of criminal offense the three phrases "self" "other people" and "corporation" are one entity that must not be eliminated.

f. If the application is granted, it will not only decrease or weaken efforts to eradicate corruption, but will eliminate the spirit of

corruption offenses. Where the phrase "or another person or corporation" as the legal basis for pursuing and returning corrupt state assets, is lost. As a result, corruptors may be jailed but the results of corruption cannot be returned to the state because the corrupted wealth is not within the power of the corrupt.

V. PETITUM

Based on the explanation and argument above, the Government requests the Honorable Panel of Judges of the Constitutional Court to examine, hear and decide upon the petition for review of Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning Eradication of Corruption Crimes against The 1945 Constitution of the Republic of Indonesia provides the following decisions:

1. Refusing the petition of the Petitioners in whole or at least declaring the petition of examining the Petitioners is not acceptable (niet ontvankelijk verklaard);

2. Receive a statement of the Government as a whole;

3. Declare the Petitioners do not have a legal position (Legal Standing);

4. Stating the provisions of Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning Eradication of Corruption, does not conflict with Article 1 paragraph (3), Article 27 paragraph (1), Article 28G paragraph

(1), Article 28D paragraph (1), Article 28I paragraph (4), and Article 28I paragraph (5) of the 1945 Constitution of the Republic of Indonesia.

However, if the Majesty Chairperson/Panel of Judges of the Constitutional Court has another opinion, ask for a wise and fair decision.

[2.4] Considering whereas with regard to the Petitioner's petition, the House of Representatives submitted a written statement received at the Registrar's Office of the Court on July 22, 2016 which outlined the following matters:

1. Legal Standing of the Petitioners

Qualifications that must be fulfilled by the Petitioner as a party are regulated in the provisions of Article 51 paragraph (1) of Law Number 24 of 2003 in conjunction with Law Number 8 of 2011 concerning the Constitutional Court (hereinafter referred to as Law on the Constitutional Court), which states that "Petitioners are parties who consider their constitutional rights and/or authorities impaired by the coming into effect of the law, namely:

a. individual Indonesian citizens;

b. customary law community unit as long as it is still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia as stipulated in the law;

c. *public or private legal entity; or*

d. *state institutions".*

The constitutional rights and / or authorities referred to in the provisions of Article 51 paragraph (1), are emphasized in their explanation, that what is meant by "constitutional rights" are "rights stipulated in the 1945 Constitution of the Republic of Indonesia." Article 51 Paragraph (1) confirms that only rights explicitly regulated in the 1945 Constitution are included as "constitutional rights".

Therefore, according to the Law on the Constitutional Court, so that a person or party can be accepted as an Petitioner who has a legal standing in the petition for judicial review of the 1945 Constitution, then it must first explain and prove:

a. His qualifications as Petitioner in the a quo petition as referred to in Article 51 paragraph (1) of the Constitutional Court Law;

b. His constitutional rights and/or authorities as referred to in "Explanation of Article 51 paragraph (1)" are deemed to have been impaired by the enactment of the a quo law.

Regarding the constitutional impairment limitation, the Constitutional Court has provided an understanding and limitation regarding constitutional impairment arising from the enactment of a Law must fulfill 5 (five) requirements (vide Decision Number 006/PUU-III/2005 and Number 011/PUU-V/2007) are as follows:

a. the Petitioners have constitutional rights and / or authorities granted by the 1945 Constitution;

b. whereas the Petitioner's constitutional rights and / or authorities are deemed by the Petitioner to have been impaired by an Act that is tested;

c. the impairment of the Petitioners' constitutional rights and / or authorities referred to is specific (special) and actual or at least potential in nature which according to logical reasoning will certainly occur;

d. a causal verband between the loss and the coming into effect of the Law petitioned for review;

e. it is possible that with the granting of the petition, the argued constitutional impairment and/or authority will not or no longer occur.

If the five conditions are not fulfilled by the Petitioners in the judicial review of the a quo Law, then there is actually no constitutional rights and/or authority of the Petitioners who have been impaired by the enactment of the provisions of the a quo Laws petitioned for review.

With regard to the legal standing, the Indonesian Parliament surrenders fully to the Chairperson / Panel of Judges of the Constitutional Court who initially begins to consider and assess whether the Petitioner has a legal standing or not as stipulated by Article 51 paragraph (1) of the Law

concerning the Constitutional Court and based on the Constitutional Court Decision Number 006/PUU-III/2005 and Number 011/PUU-V/2007.

2. JUDICIAL REVIEW OF ARTICLE 2 PARAGRAPH (1) AND ARTICLE 3 ON THE ERADICATION OF CORRUPTION

1) Whereas Article 1 paragraph (3) of the 1945 Constitution confirms that Indonesia is a state of law, meaning that the state and the government in organizing the state and government must necessarily be based on laws and regulations. That if it is related to Article 1 paragraph (3) of the 1945 Constitution, then the law is a law that must be upheld and obeyed in the life of the nation and state. The idea of a constitutional state adhered to by the 1945 Constitution confirms the existence of normative and empirical recognition of the principle of the rule of law (Supremacy of Law), namely that the law is a juridical basis in solving the problems of the nation and state.

2) That the normative recognition of the rule of law is an acknowledgment reflected in the formulation of laws and/or legislation. While empirical recognition is recognition that is reflected in community behavior that obeys the law. That in addition to the principle of rule of law in the concept of the rule of law as adopted in the 1945 Constitution, the principle of legality (Due Process of Law). In the concept of the rule of law, the principle of legality is required in all its forms, namely that all actions of state

and government administrators must be based on laws and regulations. Thus every action or administrative action must be based on the rules or "rules and procedures" (regels).

3) Whereas Article 28D paragraph (1) of the 1945 Constitution mandates that "every person has the right to recognition, guarantees, protection, and legal certainty that is just and equal treatment before the law", this provision implies that the constitution has provided guarantees, protections, and legal certainty that is fair to every citizen from the actions of government / law enforcement officials. Whereas in addition to that, every citizen also has the right to get protection from the threat of fear to do or not do something as regulated in Article 28G paragraph (1) of the 1945 Constitution which mandates, that "Every person has the right to protection of personal, family, honor, dignity, and property under his authority, and are entitled to a sense of security and protection from the threat of fear to do or not do something that is a human right."

4) Whereas corruption in Indonesia occurs systematically and extends so that it not only harms the country's finances, but also has violated the social and economic rights of the community at large, then the eradication of corruption needs to be done in extraordinary ways. Thus, the eradication of corruption must be done in a special way, including the application of a reverse proof

system that is proof that is charged to the defendant. To achieve legal certainty, eliminate diversity of interpretations, and fair treatment in eradicating criminal acts of corruption, the National Development aims at realizing fully Indonesian people and Indonesian people who are just, prosperous, prosperous, and orderly based on Pancasila and the 1945 Constitution. A just, prosperous and prosperous Indonesia needs to be continuously improved in efforts to prevent and eradicate criminal acts in general and corruption in particular. In the midst of national development efforts in various fields, the aspirations of the people to eradicate corruption and other forms of irregularities have increasingly increased, because in reality the existence of acts of corruption has caused enormous state losses which in turn could have an impact on the emergence of crises in various fields. For this reason, efforts to prevent and eradicate corruption need to be increased and intensified while upholding human rights and the interests of society.

5) Whereas the a quo Law is expected to be able to meet and anticipate the development of the legal needs of the community in the framework of preventing and eradicating more effectively any form of criminal acts of corruption which is very detrimental to the country's finances or the country's economy in particular and the community in general. In order to be able to reach various modus operandi of irregularities in state finances or the state's economy

which is increasingly sophisticated and complicated, the criminal acts stipulated in the a quo Law are formulated in such a way that includes acts of enriching oneself or another person or a corporation in an "unlawful manner" "In formal and material terms. With this formulation, the understanding against the law in corruption can also include disgraceful acts which according to the sense of justice the community must be prosecuted and convicted.

6) Whereas in the a quo Law, corruption is formulated expressly as a formal crime. This is very important for proof. With the formal formulation adhered to in this Law, even though the proceeds of corruption have been returned to the state, perpetrators of criminal acts of corruption will still be submitted to the court and still be sentenced. The new developments regulated in this Law are corporations as subject to corruption that can be sanctioned. This is not regulated in Law Number 3 of 1971.

7) Whereas the word "can" has been explained and has been in line with the Constitutional Court Decision Number 003/PUU-IV/2006 page 15 precisely to provide justice because the Constitutional Court refuses to grant the abolition of the word "can" in Article 2 paragraph (1) and Article 3 The a quo law, with the main reason that the criminal act of corruption is a formal crime, not a material crime, so that the element of harming state finances is not an essential element. in the Elucidation of Article 2 paragraph (1) and

the Elucidation of Article 3 of the Act a quo shows that corruption is a formal offense, namely the existence of a criminal act of corruption is sufficient by fulfilling the elements of the act that have been formulated not with arising consequences. That the legislator anticipates the possibility of the word "can" by providing an explanation in the explanation article by article. The criminal acts specified in Article 2 paragraph (1) and Article 3 of the Law a quo constitute a criminal act that has been completed, not containing the provisions of the criminal act of probation.

8) Whereas the Petitioners erroneously contradicted the a quo Law with Law Number 30 of 2004 concerning Government Administration (hereinafter referred to as the Government Administration Law), because in the petition for judicial review, what was tested was the law against the 1945 Constitution, not testing the law against the law.

9) Whereas the word "can" in Article 2 paragraph (1) and Article 3 of the U a quo Law petitioned for review by the Petitioners is in accordance with the principle of criminal law, namely "personal responsibility" which means that criminal responsibility is personal responsibility. In Article 2 paragraph (1) and Article 3 of the Act a quo carried out by the state civil service with unjustified purposes and specifically for criminal acts of corruption that result in losses to the state or the economy of the country then it is an act against

the law that is guaranteed answer privately and enter the scope of criminal law.

10) Whereas the phrase "or another person or a corporation" in Article 2 paragraph (1) and Article 3 of the a quo Law petitioned for review by the Petitioners aims to reach various modus operandi of deviations of state finances or increasingly sophisticated state economies and complicated, then the criminal acts regulated in the Act a quo this Law is formulated in such a way that includes acts of enriching oneself or another person or a corporation in an "unlawful manner" in a formal and material sense. With this formulation, the understanding against the law in corruption can also include disgraceful acts which according to the sense of justice the community must be prosecuted and convicted. That the feeling of justice can look at the theory of justice by John Rawls in his book a theory of justice explains the theory of justice as the difference principle of fair equality of opportunity. The essence of the difference principle is that social and economic differences must be regulated so that it provides the greatest benefits for those who are most disadvantaged. John Rawls further asserted that the program of justice for a populist dimension must pay attention to two principles of justice: first, giving equal rights and opportunities to the most broadest basic freedoms of equal freedom for everyone. Second, being able to re-regulate the socio-economic disparities that occur so as to provide reciprocal benefits for everyone. (John

Rawls, A Theory of Justice, Oxford University Press, 1973, Indonesian translation by Uzair Fauzan and Heru Prasetyo, Justice Theory, Yogyakarta, Student Library, 2006).

11) Whereas in Article 2 paragraph (1) of the Act a quo regulates that the term corruption is interpreted as any person, either a government official, the civil apparatus, or the private sector who unlawfully commits acts of enriching oneself or corporation which can harm state finances or country's economy. The a quo provision can be understood that the elements contained in this article and must be proven related to a criminal act of corruption are First, the existence of the perpetrators in this case everyone; Secondly, there are acts which are against the law; Third, the purpose of the act is to enrich oneself, another person or corporation; Fourth, the effect of these actions is that it can harm the country's finances or the country's economy. These elements must be fulfilled as a whole and not only understood by just taking the word "can" only.

12) Whereas similarly the provisions of Article 3 of the a quo Law, related to the phrase "or another person or a corporation" must be comprehensively understood with the contents of Article 3 of the a quo Law and not only to take one phrase which would obscure the contents of that Article .

13) Whereas based on this view, the House of Representatives views the provisions of Article 2 paragraph (1) and Article 3 of the

Corruption Eradication Act not in conflict with Article 1 paragraph (3), Article 27 paragraph (1), Article 28D paragraph (1), Article 28G paragraph (1), Article 28I paragraph (4), and Article 28I paragraph (5) of the 1945 Constitution.

Whereas based on the aforementioned arguments, the Indonesian House of Representatives requests that the Chairperson of the Constitutional Judge Panel give the following injunctions:

1. Stating that the Petitioners do not have a legal standing (legal standing) so the a quo petition must be declared unacceptable (niet ontvankelijk verklaard);

2. To declare that the a quo request is rejected in whole or at least the a quo request cannot be accepted;

3. Declares the statement of the Indonesian House of Representatives received in its entirety;

4. Stating Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 concerning Eradication of Corruption Crimes as Amended by Law Number 20 of 2001 does not contradict the 1945 Constitution of the Republic of Indonesia;

5. Stating Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 concerning Eradication of Corruption Crimes as Amended by Law Number 20 of 2001 retains binding legal force.

If the Majesty Chairperson/Panel of Judges of the Constitutional Court has another opinion, we request the fairest possible verdict (ex aequo et bono).

[2.5] Considering whereas the Related Party Dr. Drs. Yesaya Buiney, MM delivered oral statements and written statements in the hearing on June 20, 2016 which stated the following matters:

A. CONSTITUTIONAL COURT AUTHORITIES

1. The provisions of Article 24C paragraph (1) of the 1945 Constitution state: "The Constitutional Court has the authority to adjudicate at the first and last level whose decisions are final to review the law against the Constitution ..."

2. The provisions of Article 29 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power states: "The Constitutional Court has the authority to adjudicate at the first and last level whose decisions are final for:

   a. *Regarding the law on the 1945 Constitution of the Republic of Indonesia "*

3. Furthermore, Article 10 paragraph (1) letter a of Law Number 24 of 2003 concerning the Constitutional Court as amended by Law Number 8 of 2011 concerning Amendment to Law Number 24 of 2003 concerning the Constitutional Court states: "The Constitutional Court has the authority to

adjudicate at the first and the last one whose decision is final is to: a. test the laws against the 1945 Constitution of the Republic of Indonesia, ... "

4. Relevant Parties submit petition for review of Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 concerning Eradication of Corruption in conjunction with Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Acts Criminal Corruption ("Criminal Acts of Corruption Law"), specifically the phrase "or another person or a corporation" and the complete word "can" reads as follows:

Article 2 paragraph (1):

"Any person who unlawfully commits acts of enriching himself or others or a corporation that can harm the country's finances or the country's economy, is sentenced to life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years and a minimum fine of Rp. 200.000.000,00 (two hundred million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah) ".

Article 3 :

"Any person who has the purpose of benefiting himself or another person or a corporation, misusing the authority, opportunity or means available to him because of his position or position that could harm the country's finances or the country's economy, is convicted with life imprisonment or imprisonment for at least 1 (one) year and a maximum of 20 (twenty) years

and or a minimum fine of Rp. 50.000.000,00 (fifty million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah) ".

5. Because the Related Party's request is a judicial review of the 1945 Constitution, the Constitutional Court has the authority to hear this request.

B. LEGAL STANDING OF THE RELATED PARTIES

1. Whereas the Related Party is an Indonesian citizen who has been a Defendant in the Corruption Case Register Number 73/Pid.Sus-TPK/2014/PN JAP dated 1 December 2014 which was tried at the Klas 1A Corruption Court in Jayapura-Papua and then was declared not proven legally and convincingly in violation of Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 concerning Eradication of Corruption in conjunction with Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Corruption where according to the mandate of Article 27 paragraph (1) of the 1945 Constitution, which reads, "All citizens are at the same position in law and government with no exception".

2. Whereas the chronological problems experienced by the Related Party are as follows:

   a. Whereas the Related Party is the Elected Regent of Papua's Waropen Regency for the 2010-2015 Period which was installed on November 15, 2010.

b. Whereas on November 19, 2010 the Related Party issued a Disposition to start on November 22, 2010 blocking the Regional Cash Account of Waropen Regency in the Bank BRI km 7 Waropen with the aim of orderly financial administration during the transition period.

c. Whereas during the blocking period it turned out that the Head of the Waropen District Management and Asset Agency was on behalf of Drs. PAULINUS HALLAN personally ordered the Waropen Regency BRI Unit Head to disburse funds of Rp. 3,000,000,000 (three billion rupiah) to settle the Waropen Regency General Election Commission debts.

d. Whereas from the Trial Facts it was not revealed the role of the Related Parties to order the disbursement of these funds both verbally and in writing, but the District Court initially was acquitted by the Jayapura District Class District Court finally on April 25, 2016 by the Supreme Court convicted with a very fantastic sentence of 5 (five) Years and 6 (six) months and a fine of Rp.200,000.00 (two hundred million rupiah).

e. Whereas the phenomenon of Public Officials in Papua is very interesting because it is a symbol of the "Chieftain" who protects all people. Because of this symbol, Public Officials take care of all the interests of the community from birth to death.

3. Whereas the Petitioner as a Related Party has a direct or indirect interest in the submission of a request for a material test in the Aquo case, as stipulated in the provisions of Article 14 of the Constitutional Court Regulation Number 06/PMK/2005 concerning Guidelines for Lawyers in Case Testing of Law, shall read:

paragraph (1) : "*Related Parties as referred to in Article 13 paragraph (1) letter g are parties who have a direct or indirect interest in the subject matter of the petition".*

paragraph (2) : "*Related Parties with direct interests are parties whose rights and/or authorities are affected by the principal of the petition."*

4. Whereas with the submission of the a quo test application, the legal interests of the Related Party Petitioner in exercising their rights to carry out the legal process transparently as appropriate, directly or indirectly have the potential to be harmed or affected, if the Law being tested is declared contrary to the 1945 Constitution and is declared not to have binding legal force;

C. PETITION OBJECTS

1. That the object of the application of the Related Party is to request the review of Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law specifically the phrase "or another person or a corporation" and the word "can", which fully states as follows:

- **Article 2 paragraph (1) of the Criminal Acts of Corruption Law**

  “(1) Any person who unlawfully commits acts of enriching himself or someone else or a corporation that can harm the country's finances or the country's economy, is sentenced to life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years and a minimum fine of Rp. 200.000.000,00 (two hundred million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah)”.

- **Article 3 of the Criminal Acts of Corruption Law**

  “Any person who has the purpose of benefiting himself or another person or a corporation, misusing the authority, opportunity or means available to him because of a position or position that could be detrimental to the country's finances or the country's economy, is liable to life imprisonment or imprisonment for at least 1 (one) year and a maximum of 20 (twenty) years and or a minimum fine of Rp. 50.000.000,00 (fifty million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah)”.

2. According to the Related Party the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law contradicts the 1945 Constitution, particularly Article 1 Paragraph (3), Article 27 paragraph (1),

28G paragraph (1), Article 28D paragraph (1), Article 28I paragraph (4) and Article 28I paragraph (5) of the 1945 Constitution which states:

- **Article 1 paragraph (3) of the 1945 Constitution**

  "The State of Indonesia is a State of Law".

- **Article 27 paragraph (1) of the 1945 Constitution**

  "All citizens are at the same position in law and government and are obliged to uphold the law and government with no exception".

- **Article 28G paragraph (1) of the 1945 Constitution**

  "Every person has the right to protect themselves, family, honor, dignity and property under his control, and is entitled to a sense of security and protection from the threat of fear to do or not do something that is a human right".

- **Article 28D paragraph (1) of the 1945 Constitution**

  Every person has the right to recognition, guarantees, protection, and certainty of law that is fair and equal treatment before the law.

- **Article 28I paragraph (4) of the 1945 Constitution**

  "The protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government".

- **Article 28I paragraph (5) of the 1945 Constitution**

  “To uphold and protect human rights in accordance with the principles of a democratic rule of law, the implementation of human rights is guaranteed, regulated and outlined in laws and regulations”

3. Whereas Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law have been petitioned for review in case Number 003/PUU-IV/2006, dated July 25, 2006, but this petition has a constitutionality reason and basis that differs from the petition that was severed. The differences referred to are as follows:

   The previous petition did not base on the existence of a state guarantee that every citizen has the right to a sense of security and protection from the threat of fear of doing or not doing something according to human rights, while this petition also bases his request on the guarantee of security and protection from the threat of fear based on Article 28G paragraph (1) of the 1945 Constitution.

   Therefore this petition *has different legal arguments*, so it is *not categorized as ne bis in idem* with the petition in case Number 003/PUU-IV/2006 which was decided on July 25, 2006, so that it is in line with the provisions of Article 60 paragraph (2) of Law Number 8 of 2011 concerning Amendment to Law Number 24 of 2003 concerning the Constitutional Court, which states that, *"Provisions as referred to in*

paragraph (1) may be excluded if the material contained in the 1945 Constitution of the Republic of Indonesia is used as a basis for different reviewing".

D. THERE ARE THINGS THAT BECOME THE REASONS FOR PETITION

Regarding the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law.

1. Decision of the Court Number 003/PUU-III/2006 dated July 25, 2006, the Constitutional Court refused to grant the abolition of the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law. According to the Related Parties, such considerations no longer compatible with the laws of political development to eradicate corruption in Indonesia today because:

   a. Law Number 30 of 2014 concerning Government Administration stipulates that the settlement of alleged Corruption Acts must begin with a settlement based on Administrative Law, including:

      a) Article 20 paragraph (4)

      "*If the results of oversight by the government are in the form of administrative errors that result in state losses as referred to in paragraph (2) letter c, a return of state money will be made no later than 10 working days from the date of decision and issuance of supervision results.*"

b) Article 70 paragraph (3)

"*In decisions that result in payments from state funds being declared invalid, the Agency and/or Government Official must return the money to the state treasury.*"

c) Article 71

"*(1) Decisions and/or actions can be canceled if:*

a. there is a procedural error; or

b. there is a substance error.

(2) Legal consequences of Decisions and/ r Actions as referred to in paragraph (1):

a. not binding from the moment it is canceled or remains valid until the cancellation; and

b. ends after a cancellation.

(3) Decisions on cancellations are made by Government Officials and/or Official Bosses by stipulating and/or making new decisions and/or Acting Government Officials or based on court orders.

(4) The stipulation of a new decision as referred to in paragraph (3) shall be an obligation of the Government Official.

(5) Losses arising from decisions and/or actions canceled are the responsibility of the Agency and/or Government Official."

d) Article 80

"*(1) Government Officials who violate the provisions referred to in Article 8 paragraph (2), Article 9 paragraph (3), Article 26, Article 27, Article 28, Article 36 paragraph (3), Article 39 paragraph (5), Article 42 paragraph (1)), Article 43 paragraph (2), Article 44 paragraph (3), Article 44 paragraph (4), Article 44 paragraph (5), Article 47, Article 49 paragraph (1), Article 50 paragraph (3), Article 50 paragraph (4), Article 51 paragraph (1), Article 61 paragraph (1), Article 66 paragraph (6), Article 67 paragraph (2), Article 75 paragraph (4), Article 77 paragraph (3), Article 77 paragraph (7), Article 78 paragraph (3), and Article 78 paragraph (6) are subjected to minor administrative sanctions.*

(2) Government Officials who violate the provisions referred to in Article 25 paragraph (1), Article 25 paragraph (3), Article 53 paragraph (2), Article 53 paragraph (6), Article 70 paragraph (3), and Article

72 paragraph (1) subject to moderate administrative sanctions.

(3) Government Officials who violate the provisions referred to in Article 17 and Article 42 are subject to severe administrative sanctions.

(4) Government Officials who violate the provisions as referred to in paragraph (1) or paragraph (2) which cause losses to the state finances, national economy, and/or damage the environment are subject to severe administrative sanctions."

b. Whereas if comparing between the contents of Article 2 paragraph (1) of the Criminal Acts of Corruption Law, which states "*Any person who unlawfully commits acts of enriching oneself or another person or a corporation that can be detrimental to the country's finances or the country's economy, is sentenced to prison with imprisonment …"*; with the contents of the articles in the AP Law as quoted above, all administrative errors that harm the country's finances are certain to have fulfilled the elements of criminal acts of corruption.

2. Whereas based on the description above it is clear that making the criminal act of corruption a formal crime, is no longer relevant, so that the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of

Corruption Law is contrary to the principles of the constitution as described above. The element of "state loss" is an essential element in criminal acts of corruption because it involves crimes against the state that harm the interests of the people at large. If there is no element of state loss, how could someone be declared corrupt. There is no corruption without state losses, except in the case of bribery, gratuities and other criminal acts related to criminal acts of corruption which do not require the existence of an element of state loss directly.

3. Whereas in the Great Dictionary of the Indonesian Language, the word "can" means among others: "capable", "able", "may", "allow", and "possible". Based on the meaning of the language the word "can" does not have a definite meaning. In terms of language, the phrase "can" harm the financial or economic condition of the State in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law can mean:

- detrimental to the country's finances
- "may" harm state finances;
- "potential" is detrimental to the country's finances, as well as
- "must not" be detrimental to real state finances.

With the various meanings of the word "can" cause uncertainty in the application of criminal law by law enforcers whose implications can lead to injustice for citizens.

4. Whereas in interpreting the loss of the state or the country's economy, the Court in the Constitutional Court Decision Number 003/PUU-IV/2006 dated July 25, 2006, inter alia stated, ".. ***qualify it as formal offense, so that the loss of the state or the country's economy does not constitute a real consequence*** ".

Such a Court's judgment, in the opinion of the Related Party, is no longer appropriate with the political development in eradicating corruption, because the qualification of the state financial loss or the country's economy is material offense. Because according to Article 1 number 22, Law Number 1 of 2004 concerning the State Treasury, is declared, ***"The loss of the State/Region is the lack of real, certain amounts of money, securities, and goods as a result of unlawful or deliberate illegal acts"***.

5. Whereas the emergence of legal uncertainty in norms using the word "can" has been widely decided by the Constitutional Court as unconstitutional because it contains legal uncertainty and injustice, especially in the following decisions:

a. Decision of the Constitutional Court Number 137/PUU-VII/2009 dated August 27, 2010, the Constitutional Court in its decision stated that the word "can" in Article 68 paragraph (4) of Law Number 18 of 2009 concerning Animal Husbandry and Health is contrary to the 1945 Constitution. The Constitutional Court considers that Article 68 paragraph (4) of Law 18/2009 petitioned

for reviewing by the Related Party states, "In participating in realizing world animal health through the Siskeswanas as referred to in paragraph (2), the Minister may delegate his authority to the veterinary authority", which according to the Related Party said, "can" result in violation of the authority rights of the veterinary profession to be reduced to political authority.

The precautionary principle in the import of fresh animal products which will be included in the territory of the Unitary State of the Republic of Indonesia as stated in considering the testing of Article 59 paragraph (2) of Law 18/2009 above is also taken into consideration in the reviewing of a quo article. The role of realizing world animal health through the Siskeswanas in addition to paying attention to the principle of caution, which is no less important is the economic principle that has been universally accepted, namely the placement of humans in positions in accordance with their authority, the right man on the right place which aims, among others, to achieve efficacy and usability. Specialization, typification, or tailorisasi contained in the principle of the right man on the right place introduced by F.W. Taylor was actually first introduced by the Prophet Muhammad when he said, "If a matter is left to the non-experts, wait for the moment of its destruction".

Based on the principle of prudence and to avoid the risk of loss, the principle of placing humans in positions in accordance with their

authority to achieve efficiency and effectiveness which all aim to protect the people of Indonesia and even the world, and to advance public welfare, the Government in this case the Minister delegates the authority of the Siskeswanas to veterinary authority. Thus the word "can" which gives a discretion to the Minister to delegate his authority to officials who do not have veterinary authority is counterproductive with the aim of protecting and improving the welfare of the community, so that it is against the constitution. Thus Article 68 paragraph (4) of Law 18/2009 becomes, "In participating in realizing world animal health through the Siskeswanas as referred to in paragraph (2), the Minister delegates his authority to the veterinary authority".

b. Decision of the Constitutional Court Number 34/PUU-VIII/2010 dated November 1, 2011 concerning Testing of Law Number 36 of 2009 concerning Health. The constitutional court in its decision stated that the word "can" in the Elucidation of Article 114 of Law Number 36 of 2009 concerning Health is contrary to the 1945 Constitution of the Republic of Indonesia. According to the Court, there is an asynchronous norm whose interpretation has the potential to harm the rights of citizens, Article 114 of Law 36/2009 and its Elucidation which states that what is meant by "health warning" is "clear and easily legible writing and can be accompanied by images or other forms". However, Article 199 paragraph (1) of Law 36/2009 states that, "Anyone who

deliberately manufactures or imports cigarettes in the territory of the Unitary Republic of Indonesia by not including health warnings in the form of pictures as referred to in Article 114 shall be sentenced to prison ...". The word "can" in the Elucidation of Article 114 of Law 36/2009 is an alternative meaning, namely the inclusion of health warnings in the form of clear and easily readable documents which can be accompanied or not accompanied by pictures or other forms, while Article 199 paragraph (1) of Law 36/2009 can be interpreted as imperative namely health warnings must include in addition to writing also the form of images.

The word "can" in the Elucidation of Article 114 of Law 36/2009 which is associated with the notion of "mandatory health warnings" in Article 114 of Law 36/2009 contains two different meanings at once, namely cumulative and alternative. In fact, an explanation of an article is needed precisely to explain with a firm formula so that it can interpret the word "mandatory health warnings" in the provisions of Article 114 of the a quo Law to be clearer and clearer, so as not to cause other interpretations. Because the formulation of the Elucidation of Article 114 of the Law a quo which states, "What is meant by" health warnings "in this provision is writing that is clear and easy to read and can be accompanied by pictures or other forms" gives rise to unclear and unambiguous interpretation, especially if connected with the provisions of criminal sanctions listed in Article 199 paragraph (1) of Law 36/2009 which refers to

Article 114 of Law 36/2009 along with an explanation. Thus, the word "mandatory health warnings" in the provisions of Article 114 of the Law a quo must be interpreted as having to include health warnings in written form that is clear and easy to read and accompanied by pictures or other forms. This can be done by eliminating the word "can" in the Elucidation of Article 114 of Law 36/2009.

c. Decision of the Constitutional Court Number 57/PUU-IX/2011 dated April 17, 2012, on page 61 of the dictum [3.10.4) considers that "As for the argument of the Related Party that in the regulation raises legal uncertainty and injustice as referred to in Article 28D paragraph (1) The 1945 Constitution because of the provisions of the article contained in the Explanation there is the word "can" which means the Government may or may not hold "special places for smoking" at work, in public places, and elsewhere, the Court is of the opinion that the argument of the Related Party can be justified. In addition, the Court also believes that the word "can" in article a quo implies the absence of proportionality in the regulation of "special smoking areas" that accommodate the interests of smokers for smoking and the public interest to avoid the threat of health hazards and for the sake of increasing health status. That is because smoking is an act, which is legally legal or permitted, so that the word "can" means that the government may or may not establish a "special place for smoking". This will eliminate the

opportunity for smokers to smoke when the government in its implementation really does not hold "special places for smoking" at work, in public places, and in other places;".

d. Decision of the Constitutional Court Number 18/PUU-XII/2014, dated January 21, 2015, which one of the ruling decrees, that the word "can" in Article 95 paragraph (1) of Law Number 32 of 2009 concerning Environmental Protection and Management is contrary to 1945 Constitution. Consideration of the Constitutional Court states, that the word can lead to legal uncertainty in environmental law enforcement, namely the existence of the word "can" provide an alternative to coordinate or not coordinate in environmental law enforcement, whereas according to the Constitutional Court the coordination in environmental law enforcement is absolutely done.

6. Whereas the 1945 Constitution requires a guarantee that everyone has the right to security and protection from the threat of fear. The existence of the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, creates fear and worry for everyone who is occupying a position in the government, because every action in issuing a decision or action in his position is always in the context of the threat of criminal corruption due to State administrators' policies that harm the state even benefit the country or benefit the people can still be punished. In fact, the obligation of state administrators such as Related Parties is to issue decisions in carrying out state duties in the interests of the people. As a

result of the word "can" in that article every citizen who occupies a government position because because of his position at any time issuing a decision or state policy is always filled with insecurity, fear of being subjected to criminal sanctions of corruption. Thus the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law contradicts Article 28G paragraph (1) of the 1945 Constitution.

7. Whereas the rule of law state is one of the most elementary principles in the administration of government in Indonesia. The principle is placed in Article 1 paragraph (3) of the 1945 Constitution, namely in the section or chapter that regulates the most elementary things in the Indonesian constitution. One of the basic principles of the rule of law both in the continental European legal system and in the Anglo Saxon system is the administration of government which must be based on law or in other languages called due process of law.The principle express or implied can be read in Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (4) and Article 28I paragraph (5) of the 1945 Constitution. These articles on one hand guarantee every citizen treated equally before the law and government and on the other hand requires the state to enforce these guarantees in various policies both in the form of laws and concrete actions and policies. This can be explained as follows:

a. From the provisions of Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution, there are guarantees for

citizens to be treated equally in law and government, and recognition, guarantees, protection and fair legal certainty.

b. On the other hand, from the provisions of Article 28I paragraph (4) and Article 28I paragraph (5), it is clearly mandatory and is the responsibility of the state, especially the government, to provide protection, promotion, enforcement and fulfillment of human rights. The constitution also requires the state that to uphold and protect human rights in accordance with the principles of a democratic rule of law, the implementation of human rights is guaranteed, regulated and set out in laws and regulations. Thus the 1945 Constitution requires the state to uphold and protect the rights of citizens and make various laws and regulations to ensure that the protection and enforcement of human rights is carried out as well as possible.

8. Whereas according to the Related Party, the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, provides the opportunity and flexibility for the state in this case law enforcement officials to act arbitrarily and ignore their obligations to act on the basis of clear law and certainly because there is no clear rule that requires the state to avoid arbitrary actions. As a result, it is ensured that violations of human rights are one of the fundamental principles of the rule of law. One form of implementation of the rule of law is that there is and the creation of guaranteed equal rights for everyone to be treated equally

before the law and government. Differentiation of this treatment will cause harm to the constitutional rights of citizens guaranteed by the constitution.

9. Whereas the experience of the Related Party as a victim of the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law enables law enforcement officials to treat different actions or policies for the same actions. Such matter is contrary to the principle of the rule of law adopted by the Unitary State of the Republic of Indonesia contained in Article 1 paragraph (3) of the 1945 Constitution in conjunction with Article 27 paragraph (1) of the 1945 Constitution.

10. Whereas in Law Number 1 of 2004 concerning the State Treasury, Article 1 number 22, states, "state or regional loss is the lack of money, securities and tangible and definite items as a result of unlawful acts, intentionally or negligently. Thus, it becomes clear that the state's losses must be real and certain in number and occur as a result of acts against the law. Whereas in Law Number 1 of 2004 concerning the State Treasury, Article 1 number 22, states, "the loss of a state or region is a shortage of real and definite amounts of money, securities and goods as a result of unlawful acts, either intentionally or negligently". Thus, it becomes clear that the state's losses must be real and certain in number and occur as a result of acts against the law. The word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law raises legal uncertainty because there is a conflict between one Law and other laws, thus violating the principle of fair legal certainty guaranteed in the 1945 Constitution.

11. Whereas based on all the arguments of the Related Parties above, the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law has legal grounds to be declared contrary to the 1945 Constitution.

12. Whereas the phrase "or another person or a corporation" contains ambiguous and uncertain meanings, because it will capture all intentional, unintentional or even acts that are started with good intentions. The formulation of the phrase "or another person or a corporation" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law enables a person to be subjected to a criminal act of corruption even though a state civilian apartment issues a policy in good faith and benefits the state or people and at other times benefit other people or corporations, even though these policies are not evil at all. The philosophical question is whether we will get someone who sincerely works for the state and the people to jail, just because the formulation of a corrupt criminal law is unclear and uncertain.

13. Whereas the inclusion of benefits for other people or corporations in the United Nations convention is something that should be, because corruption in the UN convention does not include the formulation of criminal acts as referred to in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law. All types of criminal acts referred to in the convention only relate to bribery, misuse of office, misuse of influence and others as described above. The inclusion of the phrase "or another

person or a corporation" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law makes a criminal act of corruption to encompass state civil servants who work in good faith. The formulation of such criminal norms clearly violates the principle of fair legal certainty guaranteed by the constitution.

14. Based on the description above, the phrase "or another person or a corporation" is contrary to the 1945 Constitution.

E. PETITUM

Based on the things we have described above, the Related Parties request the Majesty Constitutional Court Judges to give the following verdicts:

1. To grant the application of the Related Party for all;

2. Stating the word "can" and the phrase "or another person or a corporation" in Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 concerning Eradication of Corruption, as amended by Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Corruption Crimes contrary to the 1945 Constitution of the Republic of Indonesia;

3. Stating the word "can" and the phrase "or another person or a corporation" in Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 concerning Eradication of Corruption, as amended by Law Number 20 of 2001 concerning Amendment to Law Number

31 of 1999 concerning Eradication of Criminal Acts of Corruption does not have binding legal force;

4. Order the loading of this ruling in the Official Gazette of the Republic of Indonesia as it should.

OR

If the Constitutional Court has another opinion, we request the fairest possible verdict (ex aequo et bono).

[2.6] Considering whereas in order to prove its arguments, the Related Party Dr. Drs. Yesaya Buiney, MM has submitted letter/written evidence that has been given exhibit PT-1 to exhibit PT-5 as follows:

1. Exhibit P-T1 : Photocopy of Excerpt of Criminal Decision Number 73/Pid.Sus-TPK/2014/PN.Jap dated April 15, 2015;

2. Exhibit PT-2 : Photocopy of Decision Number 73/Pid.Sus-TPK/2014/PN.Jap dated 15 April 2015;

3. Exhibit PT-3 : Photocopy of Excerpt of Supreme Court Decision Article 226 of Criminal Code Number 2011 K/PID.SUS/2015, dated April 25, 2016;

4. Exhibit PT-4 : Photocopy of Cover Letter to the Chairman of Jayapura District Court Number 922/TU/2016/2011K/PID.SUS/2015 dated May 4, 2016;

5. Exhibit PT-5 : Copy of the Deed of Notification of Court Decision Model 61/Pid/PN, Number 13/Deed.Pid.Sus-TPK/2015/PN.Jap, dated June 9, 2015;

[2.7] Considering whereas the Petitioners submitted written conclusions which remained essentially the basis of their establishment;

[2.8] Considering whereas to shorten the description in this decision, everything that happens in the trial is sufficiently appointed in the Minutes of the Trial, which is an inseparable part of this decision;

3. LEGAL CONSIDERATIONS

Court Authorities

[3.1] Considering whereas based on Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), Article 10 paragraph (1) letter a of Law Number 24 of 2003 concerning the Constitutional Court as amended by the Law Number 8 of 2011 concerning Amendment to Law Number 24 of 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia of 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226, hereinafter referred to as Constitutional Court Law), and Article 29 paragraph (1) letter a Law Number 48 of 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia of 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076), the Court has the authority to

adjudicate at the first and last level whose decisions are final to test the Law against the 1945 Constitution;

[3.2] Considering whereas because the Petitioners' petition is an examination of the constitutionality of the norms of the Law, in casu the phrase "can" and the phrase "or another person or a corporation" in Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 concerning Eradication Corruption Crime as amended by Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Corruption (hereinafter referred to as the Anti-Corruption Law) of the 1945 Constitution, the Court has the authority to adjudicate the petition of the Petitioners;

Legal Standing of the Petitioners

[3.3] Considering whereas based on Article 51 paragraph (1) of the Constitutional Court Law and its Elucidation, those who can submit applications for judicial review of the 1945 Constitution are those who consider their constitutional rights and/or authorities granted by the 1945 Constitution impaired by the enactment of a Law, namely:

a. individual Indonesian citizens (including groups of people who have the same interests);

b. customary law community unit as long as it is still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia as stipulated in the Law;

c. public or private legal entity;

d. state institutions;

Therefore, the Petitioner in examining the Law against the 1945 Constitution must first explain and prove:

a. his position as Petitioner as referred to in Article 51 paragraph (1) of the Constitutional Court Law;

b. impairment of constitutional rights and/or authorities granted by the 1945 Constitution resulting from the coming into effect of the Law petitioned for review;

[3.4] Considering also that the Court since Decision of the Constitutional Court Number 006/PUU-III/2005 dated May 31, 2005 and Decision of the Constitutional Court Number 11/PUU-V/2007 dated September 20, 2007, and subsequent decisions have the opinion that the loss of rights and/or authority constitutional as referred to in Article 51 paragraph (1) of the Constitutional Court Law must meet five conditions, namely:

a. there are constitutional rights and/or authorities granted by the 1945 Constitution;

b. the constitutional rights and/or authorities are considered by the Petitioner to be impaired by the coming into effect of the Law petitioned for review;

c. the constitutional impairment must be specific and actual or at least potential which according to logical reasoning will certainly occur;

d. there is a causal verband between the intended loss and the enactment of the Law petitioned for review;

e. there is a possibility that with the granting of the petition the constitutional impairment as argued will not or no longer occurs;

[3.5] Considering whereas based on the description as referred to in paragraph [3.3] and paragraph [3.4] above, then the Court will consider the legal standing of the Petitioners in the a quo petition which in principle postulates as follows:

[3.5.1] Whereas Petitioner I was an Indonesian citizen who had been sentenced based on the decision of the Mamuju District Court Number 08/Pid.Sus/TPK/2013/PN.MU because he was charged with violating Article 3 of the Criminal Acts of Corruption Law [refer to exhibit P-5];

[3.5.2] Whereas Petitioner II and Petitioner III are Indonesian citizens who are currently charged with violating Article 2 paragraph (1) and/or Article 3 of the Criminal Acts of Corruption Law [refer to exhibit P-8 and exhibit P-9];

[3.5.3] Whereas Petitioner IV up to Petitioner VII are Indonesian citizens who are currently State Civil Apparatuses potentially subject to the provisions of Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law [refer to exhibit P-6, exhibit P-10 and exhibit P-11];

[3.5.4] Whereas the Petitioners argue that they have constitutional rights guaranteed by the 1945 Constitution. According to the Petitioners, these constitutional rights have been impaired by the enactment of Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, on the grounds that

based on the two provisions of the article can occur a State Civil Apparatus makes decisions that benefit other parties and even benefit the state or people, but the State Civil Apparatus concerned is still subject to corruption, even if it is not beneficial to the State Civil Apparatus concerned;

[3.6] Considering whereas based on the description in paragraph [3.3] and paragraph [3.4] related to the petition of the Petitioners' petition above in paragraph [3.5], according to the Court, the Petitioners have explained their qualifications as individual Indonesian citizens. Regardless of whether the Petitioners' argument is true or not regarding the unconstitutionality of the norms of the Law petitioned for review in the a quo petition, it is clear to the Court that the Petitioners have explained specifically and actually or at least the potential regarding impairment of their constitutional rights, which is causally caused by the entry into force of Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law. The constitutional impairment has the possibility that it will not or will no longer occur if the Court grants the Petitioner's petition to state the phrase "can" and the phrase "or another person or a corporation" in the two articles a quo is contrary to the 1945 Constitution and does not have binding legal force [refer to petitum of the petition of the Petitioners]. Accordingly, according to the Court the Petitioners have the legal standing (legal standing) to submit the a quo petition;

[3.7] Considering whereas since the Court has the authority to hear the a quo petition, and the Petitioners have a legal standing to submit the a quo petition, the Court will then consider the principal of the petition;

Principal Petition

[3.8] Considering whereas the principal petition of the Petitioners is the constitutionality review of Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, each of which states

Article 2 paragraph (1)

Any person who unlawfully commits acts of enriching oneself or another person or a corporation that can harm the country's finances or the country's economy, is sentenced to life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) year and a minimum fine of Rp. 200.000.000,00 (two hundred million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah).

Article 3

Any person who has the purpose of benefiting himself or another person or a corporation, misusing the authority, opportunity or means available to him because of a position or position that could be detrimental to the country's finances or the country's economy, is liable to life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years and or a minimum fine of Rp. 50.000.000,00 (fifty million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah) ".

against Article 1 paragraph (3), Article 27 paragraph (1), Article 28D paragraph (1), Article 28G paragraph (1), and Article 28I paragraph (4) and paragraph (5) of the 1945 Constitution, each of which states,

Article 1 paragraph (3) of the 1945 Constitution

The country of Indonesia is a country of law.

Article 27 paragraph (1) of the 1945 Constitution

All citizens are at the same position in law and government and are obliged to uphold the law and government with no exception.

Article 28D paragraph (1) of the 1945 Constitution

Every person has the right to recognition, guarantees, protection, and certainty of law that is fair and equal treatment before the law.

Article 28G paragraph (1) of the 1945 Constitution

Every person has the right to protect themselves, family, honor, dignity, and property under his authority, and is entitled to a sense of security and protection from the threat of fear to do or not do something that is a human right.

Article 28I of the 1945 Constitution

(1) ...

And so on

(4) Protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government.

(5) To uphold and protect human rights in accordance with the principles of a democratic rule of law, the implementation of human rights is guaranteed, regulated, and set forth in legislation.

[3.9] Considering whereas the Petitioners filed a constitutionality review of the norms of the a quo Law as mentioned in paragraph [3.8] above with the reasons as follows:

1. Whereas the Court in Decision Number 003/PUU-III/2006, dated July 25, 2006, which has considered the existence or absence of a criminal act of corruption does not depend on the presence or absence of state losses but is sufficiently proven to have been committed against the law so that there is or not there is a word "can" no longer important, according to the Petitioners no longer in accordance with the political development of corruption eradication law, namely with the birth of Law Number 30 of 2014 on Government Administration (Government Administration Law) which prioritizes the criminal approach into the administrative law approach and of imprisonment becomes the return of state money;

2. Whereas the Court in Decision Number 003/PUU-III/2006 made the corruption offense a formal offense by referring to the United Nations Convention Against Corruption, 2003 which had been ratified by Indonesia through Law Number 7 of 2006. The Anti-Corruption Convention did not include elements detrimental to state finances because the scope of the corrupt offense has been described in a limitative manner. In contrast to Article 2 paragraph (1) and Article 3 of the

Criminal Acts of Corruption Law, which when eliminating an element of state loss as an offense becomes an “waste basket” offense, meaning that all acts committed by the State Civil Apparatus (ASN) that violate, are negligent or do not comply with propriety is a corruption offense. As a result, many ASNs do not dare to take policies that are detrimental to the country's economy;

3. Whereas making the criminal act of corruption a formal crime is no longer relevant, so the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law contradicts Article 1 paragraph (3), Article 27 paragraph (1), Article 28G paragraph (1), Article 28D paragraph (1), Article 28I paragraph (4), Article 28I paragraph (5) of the 1945 Constitution. According to the Petitioners, the element of state loss is an essential element in a criminal act of corruption, there is no corruption without loss country;

4. Whereas according to the Petitioners, the Court may change its view of an article or norm that has been tested previously due to consideration of the development of legal politics and changing social situations;

5. Whereas the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law raises fear and worry for everyone who is occupying a position in government, because every action he takes in issuing decisions or actions in his office is always in the context of the threat of criminal corruption.

6. Whereas according to the Petitioners, the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, provides the opportunity and freedom for the state in this case law enforcement officials to act arbitrarily and ignore their obligations to act on the basis of clear law and certainly because there is no clear rule that requires the state to avoid arbitrary actions. In addition, it allows law enforcement officials to treat different actions or policies for the same actions.

7. Whereas the phrase "or another person or a corporation" contains ambiguous and uncertain meanings, because it will capture all intentional, unintentional or even acts that are started with good intentions. The formulation of the phrase "or another person or a corporation" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law allows a person to be subjected to a criminal act of corruption even though a state civil apparatus issues a policy in good faith and benefits the state or people and at other times benefit other people or corporations, even though these policies are not evil at all.

[3.10] Considering whereas after the Court has carefully examined the petition and evidence of letters/writings submitted by the Petitioners, expert statements from the Petitioners, Presidential statements, written statements of the House of Representatives, statements and evidence of letters/writings of Related Parties Dr. Drs. Isaiah Buiney, MM, and the Petitioners' written conclusions, which are fully contained in Seated Case, then the Court is of the following opinion.

[3.10.1] Whereas Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law have been petitioned for judicial review and have been decided by the Court in Decision Number 003/PUU-IV/2006, dated July 25, 2006, so that in this case the provisions of Article 60 of the Constitutional Court Law are applied, namely that the material the contents of paragraphs, articles, and/or parts of the Law that have been tested, cannot be re-examined, except if the material contained in the 1945 Constitution which is used as a basis for reviewing is different. For this reason, it is necessary to consider whether the application for a quo ne bis in idem or not.

Whereas the reviewing basis used for petition Number 003/PUU-IV/2006 is Article 28D paragraph (1) of the 1945 Constitution, whereas in the a quo petition also uses Article 1 paragraph (3), Article 27 paragraph (1), Article 28G paragraph (1), and Article 28I paragraph (4) and paragraph (5) of the 1945 Constitution, so that there are differences in the basis of constitutionality testing with petition number 003/PUU-IV/2006. Based on these considerations and related to Article 60 paragraph (2) of the Constitutional Court Law, the Court considered that the a quo petition was not ne bis in idem so that the Court further examined the principal of the a quo petition.

[3.10.2] That the word "can" in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law as mentioned above has been decided by the Court in Decision Number 003/PUU-IV/2006, dated July 25, 2006, stating that it does not conflict with the right to legal certainty which just as intended by Article 28D paragraph (1) of the 1945 Constitution insofar as it is interpreted in accordance with the

interpretation of the Court (conditionally constitutional), namely that the element of state loss must be proven and must be calculated, even as an estimate or even if it has not yet occurred.

[3.10.3] Whereas after the Decision of the Court Number 003/PUU-IV/2006, the legislators enacted Law Number 30 of 2014 concerning Government Administration (the Law on Government Administration) which contained provisions including; Article 20 paragraph (4) concerning the return of state losses due to administrative errors that occur due to an element of abuse of authority by government officials; Article 21 concerning the absolute competence of the state administrative court to examine the presence or absence of alleged abuse of authority by a government official; Article 70 paragraph (3) concerning returning money to the state treasury because decisions that result in payments of state money are declared invalid; and Article 80 paragraph (4) regarding the granting of severe administrative sanctions to government officials for violating provisions that cause state losses. Thus based on these provisions, then with the Government Administration Law, administrative errors that result in state losses and the element of abuse of authority by government officials are not always subject to criminal acts of corruption. Likewise, the settlement is not always by applying criminal law, it can even be said in the settlement of state losses, the Government Administration Law seems to want to emphasize that the application of criminal sanctions as a last resort (ultimum remedium);

[3.10.4] Whereas the existence of the Government Administration Law is associated with the word "can" in Article 2 paragraph (1) and paragraph (3) of

the Criminal Acts of Corruption Law according to the Court, causing a paradigm shift in the application of the elements detrimental to state finances in criminal acts of corruption. During this time, based on Court Decision Number 003/PUU-IV/2006, the understanding of the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law causes acts to be prosecuted before the court not only because these acts "harm state finances or the economy the state actually "but only" can "cause any loss as a possibility or potential loss, if the elements of corruption are fulfilled, it can be submitted before the court. In its development with the issuance of the Government Administration Law, the state loss due to administrative errors is not an element of corruption. State loss becomes an element of corruption if there are elements against the law and abuse of authority. In the case of abuse of authority, a new act can be classified as a criminal act of corruption if it has implications for state losses (except for bribery, gratuity or extortion), the offender benefits unlawfully, the community is not served, and the act is a despicable act. Therefore, if it is related to Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, the application of the element of detrimental to the country's finances has shifted by emphasizing the consequences, not just acts. In other words, state loss is the implication of: 1) illegal acts that benefit oneself or another person or a corporation as referred to in Article 2 paragraph (1) of the Criminal Acts of Corruption Law and 2) abuse of authority with the aim of benefiting oneself or another person or a corporation as referred to in Article 3 of the Criminal Acts of Corruption Law. Based on that, according to the Court, the element of detrimental to state finances is no longer

understood as an estimate (potential loss) but must be understood to have actually happened or actual (actual loss) to be applied in corruption;

[3.10.5] Whereas the inclusion of the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law makes offenses in both articles become formal offenses. That according to the Court in practice is often misused to reach many acts that are allegedly detrimental to state finances, including the policy or decision of the discretion or implementation of the Ermessen freies principle taken urgently and have not found a legal basis, so that criminalization often occurs with alleged abuse of authority. Likewise with policies related to business, but seen as detrimental to state finances, understanding the two articles as formal offenses is often subject to corruption. Such conditions can certainly cause public officials to be afraid of taking a policy or worry that the policy taken will be subject to criminal acts of corruption, so that among others will have an impact on the stagnation of the state administration process, low budget absorption, and disruption of investment growth. The criminalization of policies occurs because there are differences in the meaning of the word "can" in the element of detrimental to the country's finances in criminal acts of corruption by law enforcement officials, thus often causing problems ranging from calculating the actual amount of state losses to which institutions are authorized to calculate state losses. Because it is practiced differently according to the Court the inclusion of the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law creates legal uncertainty and has clearly contradicted the guarantee that everyone has the right to security and protection from the threat of fear as determined in Article 28G paragraph (1) of the 1945

Constitution. In addition, according to the Court the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law also contradicts the principle of formulating a criminal act that must meet the legal principle must be written (lex scripta), must be interpreted as read (lex stricta), and not multiple interpretations (lex certa), therefore contrary to the principles of the rule of law as stipulated in Article 1 paragraph (3) of the 1945 Constitution.

[3.10.6] Whereas the application of financial detrimental elements by using the concept of actual loss according to the Court provides more legal certainty that is fair and in accordance with efforts to synchronize and harmonize national and international legal instruments, such as the Government Administration Act as described in paragraph [3.10.2] and paragraph [3.10. 3] above, Law Number 1 of 2004 concerning the State Treasury (Law on the State Treasury) and Law Number 15 of 2006 concerning the Supreme Audit Board (BPK Law) and the United Nations Anti-Corruption Convention, 2003 (United Nation Convention Against Corruption, 2003) which has been ratified by Indonesia through Law Number 7 of 2006. Article 1 number 22 of the State Treasury Law and Article 1 number 15 of the BPK Law defines, "State/Regional losses are lack of money, securities, and goods, which real and certain numbers as a result of unlawful acts intentionally or negligently ". Based on these provisions the conception of state losses adopted is the conception of state losses in the sense of material offense, that is, an act can be said to be detrimental to state finances provided that there must be state losses that are truly real or actual. The conception is actually the same as the explanation of the sentence "in fact there has been a state loss" contained in Article 32 paragraph (1) of the Corruption Law as

explained in the Explanation which states that the amount of loss can be calculated based on the findings of the authorized agency or appointed public accountant . In addition, in order not to deviate from the spirit of the United Nations Anti-Corruption Convention, when incorporating the state's loss in the offense of corruption, the state's loss must actually have occurred or is real. This is because the corruption offenses contained in the United Nations Anti-Corruption Convention have been clearly described including bribery, embezzlement in office, trading influence, abuse of office, public officials illegally enriching themselves, bribery in the private sector, embezzlement in private companies, money laundering proceeds crime, hiding the crime of corruption, and obstructing the judicial process.

[3.10.7] Whereas based on Article 1 paragraph (3) and Article 28G paragraph (1) of the 1945 Constitution and taking into account developments in the regulation and application of elements detrimental to state finances as described above, there is a fundamental reason for the Court to change the constitutionality assessment in the previous decision, because the previous assessment has manifestly repeatedly creates legal uncertainty and injustice in eradicating corruption. Thus the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Act contradicts the 1945 Constitution as argued by the Petitioners, having legal grounds;

[3.10.8] Whereas the phrase "or another person or a corporation" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law according to the Court is different from the word "can" in Article 2 paragraph (1) and Article 3

of the Corruption Law because it is an alternative formulation in the framework to reach also the mode of criminal offense in terms of the results of corruption for example being hidden to another person or a corporation. Therefore, although the perpetrators do not enrich themselves or benefit themselves, if they commit acts against the law or abuse authority that is detrimental to the country's finances and in this case another person or corporation benefits or increases its wealth, subject to corruption. In this regard, the Court needs to emphasize that apart from the use of proceeds of corruption for the benefit of the perpetrators themselves or other people or a corporation, but in fact corruption is not only detrimental to state finances but is also a violation of the social and economic rights of the wider community and the impact of the magnitude of the value of state losses that greatly affects the disruption of development and the economy of the country/region, therefore every criminal act of corruption is classified as a crime whose eradication must be carried out in extraordinary or commonly referred to as acts that are extra ordinary crime. Based on this, the Petitioners' argument against the phrase "or another person or a corporation" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law is groundless according to law.

[3.11] Considering whereas based on the entire description of the aforementioned considerations, according to the Court the arguments of the Petitioners have legal grounds for part.

4. CONCLUSION

Based on an evaluation of the facts and laws as described above, the Court concluded:

[4.1] The Court has the authority to adjudicate a quo petition;

[4.2] The Petitioners have a legal standing to file the a quo petition;

[4.3] The principal petition of the Petitioners is grounded according to the law in part.

Based on the 1945 Constitution of the Republic of Indonesia, Law Number 24 of 2003 concerning the Constitutional Court as amended by Law Number 8 of 2011 concerning Amendment to Law Number 24 of 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia 2011 Number 70, Supplement to State Gazette of the Republic of Indonesia Number 5226), and Law Number 48 of 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Number 157 of 2009, Supplement to State Gazette of the Republic of Indonesia Number 5076).

5. INJUNCTION

Adjudicating,

1. To grant the Petitioner's petition in part;

2. To declare the word "can" in Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption, as amended by Law Number 20 of 2001 concerning Amendment to Law

Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption (State Gazette of the Republic of Indonesia Number 134 in 2001, Supplement to the State Gazette of the Republic of Indonesia Number 4150) is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force;

3. To reject the petition of the Petitioners for besides and the rest;

4. To order the proper containing of this Decision in the State Gazette of the Republic of Indonesia;

6. DISSENTING OPINIONS

Against the Court's decision as long as the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law there are 4 (four) Constitutional Justices, namely I Dewa Gede Palguna, Suhartoyo, Aswanto, and Maria Farida Indrati have dissenting opinions, as follows:

The Petitioners argue that, in legal practice, the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law (Law Number 31 of 1999 concerning Eradication of Corruption, as amended by Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Corruption Crimes) has created uncertainty in the application of criminal law by law enforcement officials whose implications cause injustice to citizens so that they must be declared contrary to the 1945 Constitution and have no binding legal force. Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, respectively, read as follows:

Article 2:

(1) Any person who unlawfully commits acts of enriching himself or others or a corporation that can harm the state finances or the economy of the country, is sentenced to life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years and a minimum fine of Rp.200.000.000,00 (two hundred million rupiah) and a maximum of Rp.1.000.000.000,00 (one billion rupiah).

Article 3:

Any person who has the purpose of benefiting himself or another person or a corporation, misusing the authority, opportunity or means available to him because of a position or position that could harm the country's finances or the country's economy, is liable to life imprisonment or imprisonment for at least 1 (one) year and a maximum of 20 (twenty) years and or a maximum fine of Rp.50.000.000,00 (fifty million rupiah) and a maximum of Rp.1.000.000.000,00 (one billion rupiah).

We have an opinion that the existence of the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law does not contradict legal certainty, as argued by the Petitioners. With regard to the word "can", in the Elucidation of Article 2 paragraph (1) of the Criminal Acts of Corruption Law it is said, among others, *"…In this provision, the word 'can' before the phrase "detrimental to the country's finances or the country's economy" shows that*

corruption is a formal offense, that is, the existence of a criminal act of corruption is sufficient by fulfilling the elements of the act that have been formulated not by the arising of consequences ". Meanwhile, in the Elucidation of Article 3 of the Criminal Acts of Corruption Law *it is said, "The word" can "in this provision is interpreted the same as the Elucidation of Article 2"*. Thus, abolishing the word "can" from the formulation of the two norms of the article will fundamentally change the offense qualifications of criminal acts of corruption, from formal to material offenses. Consequently, if the prohibited effect, namely "detriment of the country's finances or the country's economy" has not or did not occur even though the element "unlawfully" and the element of "enriching oneself or or another person or a corporation" have been fulfilled, then that means there has not been a crime corruption.

Actually, the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law has been petitioned for review and has been declared rejected, as stated in the Decision of the Constitutional Court Number 003/PUU-IV/2006. In the legal consideration of the Court's decision said, including:

> *Considering whereas by taking into account all the arguments submitted by all parties as mentioned above are related to the Elucidation of Article 2 paragraph (1) of the Non-Taxable Income Law, the main issues that must be answered are:*
>
> *1. Does the definition of the word "can" in Article 2 paragraph (1) of the Non-Taxable Income Law whose understanding is explained in the Elucidation of Article 2 paragraph (1) that by adding the word "can"*

make the criminal act of corruption in Article 2 paragraph (1) a quo be formulation of formal offense;

2. *Whether with the understanding as explained in point 1 above, the phrase "can be detrimental to the country's finances or the country's economy", which means both actual loss and only potential or potential loss, is elements that do not need to be proven or must be proven;*

Considering that the two statements will be answered with the understanding that the word "can" in Article 2 paragraph (1) and Article 3 of the Non-Taxable Income Law causes acts to be prosecuted before the court, not only because these actions "seriously harm the country's finances or the country's economy" However, only "can" cause any loss as a possibility or potential loss, if the element of corruption is fulfilled, it can be submitted to the court. The meaning of the word "can" must be assessed according to the Elucidation of Article 2 paragraph (1) above, which states that the word "can" before the phrase "detrimental to the country's finances or the country's economy", indicates that the crime is a formal offense, namely the existence of criminal acts of corruption, it is enough only to fulfill the elements of the act that are formulated, not by the arising of consequences. Therefore the Court can accept the explanation of Article 2 paragraph (1) insofar as it involves the word "can" before the phrase "detrimental to the country's finances or the country's economy";

Considering whereas the Court is of the opinion, the losses incurred in criminal acts of corruption, especially those on a large scale, are very difficult to prove accurately and accurately. The accuracy that is demanded in such a manner will raise doubts, whether if a number of the amount of the loss is submitted and not always be proven accurately, but the loss has occurred, will result in the proven absence of the act being charged. Such matter encourages anticipation of the accuracy of proof of perfection, so that it is deemed necessary to ease the burden of proof.In the event that an accurate evidence cannot be submitted for the amount of real loss or an act committed is such that state losses can occur, it has been deemed sufficient to sue and convict the perpetrators, as long as the other elements of the indictment are in the form of enriching oneself or another person or a corporation by means of violating the law (wederrechtelijk) has been proven. Because corruption is classified by the a quo law as formal offense. Accordingly, the category of criminal acts of corruption is classified as formal offense, where the elements of the act must be fulfilled, and not as material offenses, which requires that the consequences of the consequences of the loss incurred have occurred. The word "can" before the phrase "harms the country's finances or the country's economy", can be seen in the same sense as the word "can" which precedes the phrase "endanger the security of people or goods, or the safety of the state in a state of war", as contained in Article 387 of the Criminal Code. Such offense is deemed proven, if the element of the criminal act has been fulfilled, and the consequences that may occur from the prohibited and threatened criminal act, it does not necessarily have to have occurred;

Considering whereas according to the Court such matter does not cause legal uncertainty (onrechtzekerheid) which is contrary to the constitution as argued by the Petitioner. Because, the existence of the word "can" does not at all determine the factor of the existence or absence of legal uncertainty that causes an innocent person to be convicted of corruption or on the contrary the person committing a criminal act of corruption cannot be convicted of a crime;

Considering whereas with the principle of legal certainty (rechtszekerheid) in protecting one's rights, the relationship between the word "can" and "detrimental to state finances" is illustrated in two extreme relations: (1) obviously harming the state or (2) possibly causing harm. This last thing is closer to the intention of qualifying the offense of corruption into formal offense. Between the two relations there is actually a relationship that is "not yet real", but taking into account the specific and concrete circumstances surrounding the event, logically it can be concluded that a consequence is that state losses will occur. To consider specific and concrete circumstances around events that occur, which can logically be concluded that state losses occur or do not occur, must be done by experts in state finance, state economics, and experts in the analysis of the relationship of actions with losses;

Considering whereas with the explanation which states that the word "can" before the phrase "detrimental to the country's finances or the country's economy", then qualifies it as formal offense, so that state losses or the

state's economy are not a consequence that must be real, the Court has an opinion that such a matter interpreted that the element of state loss must be proven and must be calculated, even as an estimate or even if it has not yet occurred. The loss factor, whether real or probable, is seen as a burden or mitigation in the conviction of crimes, as outlined in the Elucidation of Article 4, that restoring state losses can only be seen as mitigating factors. Therefore the issue of the word "can" in Article 2 paragraph (1) of the Non-Taxable Income Law, is more a matter of implementation in practice by law enforcement officials, and does not concern the constitutionality of norms;

Considering that the Court has the opinion that the phrase "may harm the state finances or the economy of the state" does not contradict the right to fair legal certainty as referred to in Article 28D paragraph (1) of the 1945 Constitution, as long as it is interpreted in accordance with the above interpretation of the Court (conditionally constitutional).

Until now, there has been no fundamental change in the academic view regarding the nature of acts of corruption which, if allowed to be firmly rooted, on a large scale they have not only metamorphosed into extraordinary crimes but also can be positioned as hostis humani generis, enemies together with humanity, given its proliferation which does not look at the state, both developed and developing countries, and its destructive power to the mentality of humans and the ability of the state to fulfill its constitutional obligations for the fulfillment of the economic and social rights of its citizens. Therefore, the statement of the former Secretary General of the United Nations, Kofi Annan, who views corruption as a "dangerous plague

with enormous damaging effects on society" is not at all an exaggeration. In his introduction to welcome the presence of the United Nations Convention Against Corruption, Kofi Annan said among others:

> *Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive.*
>
> *Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.*
>
> *I am therefore very happy that we now have a new instrument to address this scourge at the global level. The adoption of the United Nations Convention against Corruption will send a clear message that the international community is determined to prevent and control corruption. It will warn the corrupt that betrayal of the public trust will no longer be tolerated. And it will reaffirm the importance of core values such as honesty, respect for the rule of law, accountability and transparency in promoting development and making the world a better place for all.*

Thus, although based on the rules of teleological or sociological interpretation in interpreting the law in general and constitutional interpretation in particular, there is justification for the Court to change its position, we have an opinion, in the context of the a quo problem there are no fundamental reasons in empirical-sociological conditions that can rationally rationally is used as a strong reason for the Court, so that it needs to leave its position as stated in the above Decision.

Furthermore, with the enactment of Law Number 30 of 2014 concerning Government Administration (Government Administration Law) concerns that the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law have the potential to make a government official, including the Petitioners, can be convicted without error in the form of state losses, in our opinion is unwarranted. The Government Administration Law has provided protection for government officials if the person concerned is suspected of misusing authority that is detrimental to state finances. Because, according to the a quo Law, against the alleged abuse of authority, a testing mechanism can be carried out through the State Administrative Court, while the presence or absence of abuse of authority that is suspected to cause state losses, it will be decided based on the results of supervision of government internal apparatus [vide Article 19 and Article 20 of the Government Administration Law). Such provision is clearly an affirmation of the existence of a form of protection for government officials because with the existence of this mechanism the law enforcement apparatus cannot immediately postulate the abuse of authority by government officials, including the presence or absence of state losses.

Based on all of the above considerations, we have an opinion that with regard to the petition of the Petitioners, as far as the word "can" in Article 2 paragraph (1) and Article 3 of the Criminal Acts of Corruption Law, the Court should reject the a quo petition.

Thus was adjudicated at the Judicial Consultative Meeting by nine Constitutional Justices, namely Arief Hidayat as Chairman concurrently serving as Member, Anwar Usman, Maria Farida Indrati, I Dewa Gede Palguna, Suhartoyo, Aswanto, Manahan M.P Sitompul, Patrialis Akbar, and Wahiduddin Adams, respectively as Members, on Thursday, the eighth day of September, two thousand and sixteen, and on Monday, the fifth day of December, two thousand and sixteen, which was pronounced in the Plenary Session of the Constitutional Court open to the public on Wednesday, the twenty-fifth day of January, two thousand and seventeen, completed pronounced at 13.56 WIB, by nine Constitutional Justices, namely Arief Hidayat as Chairman concurrently serving as Member, Anwar Usman, Maria Farida Indrati, I Dewa Gede Palguna, Suhartoyo, Aswanto, Manahan M.P Sitompul, Patrialis Akbar, and Wahiduddin Adams, respectively as Members, accompanied by Syukri Asy'ari as Subtituter Clerk, presented by the Petitioners and/or their proxies, Government or those representing, and the House of People's Representatives or those representing, and Related Parties.

CHAIRMAN,

[Signature]

Arief Hidayat

MEMBERS,

[Signature]	**[Signature]**
Anwar Usman	**Maria Farida Indrati**
ttd.	**[Signature]**
I Dewa Gede Palguna	**Suhartoyo**
[Signature]	**[Signature]**
Aswanto	**Manahan M.P Sitompul**
[Signature]	**[Signature]**
Patrialis Akbar	**Wahiduddin Adams**

SUBSTITUTER CLERK,

[Signature]

Syukri Asy'ari