DECISION

Number 003/PUU-IV/2006

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision in a case of petition for judicial review of the Law of the Republic of Indonesia Number 31 Year 1999 regarding the Eradication of Criminal Acts of Corruption as amended by Law Number 20 Year 2001 regarding Amendment to Law Number 31 Year 1999 regarding the Corruption Eradication (hereinafter referred to as PTPK Law) against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

Ir. DAWUD DJATMIKO, Place, date of birth: Surabaya, September 06, 1951, Religion: Islam, Occupation: Employee of PT. Jasa Marga (Persero), Nationality: Indonesian, Address: Perumahan Bumi Mutiara Block JC-7/2, Bojong Kulur Village, Gunung Putri District, Bogor Regency, Tel. 8413630 ext. 260. By Virtue of a Special Power of Attorney dated March 2, 2006, authorizing Abdul Razak Djaelani, S.H. and Partners, who selected their legal domicile at the “JAMS & PARTNERS” Advocate Office, having their address at Jalan Cibulan Number 13-A, Kebayoran Baru, South Jakarta;
Hereinafter shall be referred to as …….. the **Petitioner**;

Having read the petition of the Petitioner;

Having heard the testimony of Petitioner;

Having heard the testimony of the Government;

Having heard the testimony of the People's Legislative Assembly of the Republic of Indonesia;

Having heard the testimony of the Related Parties, Public Prosecutor of the Corruption Eradication Commission and Public Prosecutor of the Team for the Corruption Eradication;

Whereas according to the International Convention, a formal offence is defined as: First, a violation of the Law. Second, enriching oneself, not enriching other persons. Third, inflicting losses to the state finance. There is no reference at all to the word "may". There is no formulation such as "inflicting losses to the State finance" in the International Convention, but the perpetrator must be an official, not "any person";

Whereas the Expert concurred that the word "may" must be construed with the assistance of experts, because we can not simply say "may potentially inflict losses to the state";

Whereas the Indonesian Criminal Code also uses the word "may" in Article 378 which reads "contractors committing a fraud, which may pose danger to the safety of people, or objects or the country in a state of war", the provision of which is also found in Article 7 of the PTPK Law;

Whereas the Expert can accept the use of the word "may", provided that each party may present and accountant in the substantiation process, if

the Justices are still in doubt about the testimony of the accountants presented by the each party, the Justices must issue an acquittal *(in dubio proreo)*.

Whereas the Expert does not question the use of the word “may”, but the Experts is of the opinion that it is useless since enriching oneself must be substantiated, must be concrete. The word “may”, must be less and not more important than the word enriching;

Considering whereas in order to shorten the description of this decision, any and all matters happening in the court hearing shall be contained in the Minutes of Court Hearing and shall constitute an inseparable part of this decision;

LEGAL CONSIDERATIONS

Considering whereas the purpose and objective of the petition of the *a quo* Petitioner are as mentioned above;

Considering whereas that prior to examining the substance or the principal issue of the case, the Constitutional Court needs to first take the following matters into account:

1. Whether the Constitutional Court has the authority to examine and decide upon the petition filed by the Petitioner;
2. Whether the Petitioner has a legal standing to file a petition for the review of the *a quo* law*;*

In respect of the above mentioned two issues, the Constitutional Court is of the following opinion:

AUTHORITY OF THE CONSTITUTIONAL COURT AND THE LEGAL STANDING OF THE PETITIONER

Considering whereas the petition filed by the Petitioner is for the purpose of the review of several Articles of the PTPK Law and the elucidation thereof against the 1945 Constitution. Based on the provision of Article 24C Paragraph (1) of the 1945 Constitution and Article 10 Paragraph (1) of the Constitutional Court Law, the Court has the authority to examine, hear and decide upon the Petitioner's petition;

Considering whereas the parties that can be accepted as having the required legal standing as a Petitioner in a judicial review of law against the 1945 Constitution pursuant to Article 51 Paragraph (1) of the Constitutional Court Law include (a) individual Indonesian citizens, (b) units of customary law communities insofar as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia as set forth in laws, (c) public or private legal entities; or (d) state institutions, whose constitutional rights and/or authorities are impaired by the coming into effect of a law;

Also Considering, following the issuance of Decision Number 006/PUU-III/2005 to date, the Court is of the opinion that any claim of impairment of the constitutional rights/authority must meet the following requirements:

a. the Petitioner must have a constitutional right granted by the 1945 Constitution;

b. the Petitioner deems that his or her constitutional right is impaired by the coming into effect of the law being petitioned;

c. such impairment of the constitutional right is of specific and actual nature or at least potential in nature which, based on logical reasoning, will surely occur;

d. there is a causal relationship *(causal verband)* between the Petitioner's impaired constitutional right and the coming into effect of the law being petitioned for review;

e. if the petition is granted, it is expected that that such impairment of the constitutional right will not or does not occur any longer;

Considering whereas based on the evidence presented by the Petitioner (Exhibits P-1, P-2, P-5, P-6, P-7, P-8 and P-9) which have been examined in the court hearing, the Court is of the opinion that there have been sufficient reasons and evidence to accept the legal standing of the Petitioner in the *a quo* petition;

REGARDING THE INTERLOCUTORY DECISION

Considering whereas in addition to the request as intended in the principal case, the Petitioner also requested for an interlocutory decision in order that the Court passes a decision to "recommend to the Supreme Court (MA) to instruct East Jakarta District Court through DKI Jakarta High Court to temporarily suspend the proceedings for the criminal case Number.

36/Pid/B/2006/PN. JKT.TIM, pending a decision of the Constitutional Court on the *a quo* petition.

In respect of the request, by referring to Article 58 of the Constitutional Court Law, the Court is of the opinion that it is not sufficiently grounded as explained in the court hearing open for the public held on April 8, 2006. Article 58 of the Constitutional Court Law reads as follows: "*Laws reviewed by the Constitutional Court shall remain applicable, before there is a decision stating that the laws concerned are contradictory to the 1945 Constitution of the State of the Republic of Indonesia*". Therefore, the Court does not have the authority to instruct the cessation of, even temporarily, a legal proceeding which is still in progress at a court of a certain jurisdiction under the supervision of the Supreme Court. However, in a petition for judicial review of a law against the 1945 Constitution, the Court may make arrangements for the implementation of its authority, namely in the form of temporary cessation of the examination of a petition for judicial review of a law against the 1945 Constitution or delay of the passing of a decision on such petition to the extent that the petition is concerned with the formulation of a law alleged to be related to a criminal act. Such provisions are set forth in Article 16 of the Constitutional Court Regulation Number 06/PMK/2005 regarding Guidelines on the Procedures for Judicial Review Cases, which reads as follows:

(1) In the event that the Petitioner argues about the existence of an alleged criminal act in the making the laws being petitioned for review, the Court may temporarily cease the examination of the petition or delay the passing of decision;

(2) In the event that the argument about the alleged criminal act referred to in item (1) is completed with evidence, the Court may declare the postponement of the examination and inform the competent authorities to follow up the alleged criminal act as reported by the Petitioner;

(3) In the event that the alleged criminal act as referred to in item (1) has been legally processed by the competent authorities, the Court, for examination and decision making purposes, may inquire the competent authorities conducting the investigation and/or prosecution;

(4) The cessation of the examination of a petition or delay of the passing of a decision as referred to in item (1) shall be stipulated in a Stipulation of the Court pronounced in a hearing open for the public;

Therefore, if the Petitioner deems it necessary to obtain an interlocutory decision to temporarily cease the ongoing legal proceedings, such request should be filed to the court examining the relevant case in accordance with the court level within a court jurisdiction under the supervision of the Supreme Court. Such request can be filed considering that pursuant to the provision of Article 53 of the Constitutional Court Law, the Court always informs the Supreme Court of any petition for judicial review of a law within a minimum period of 7 (seven) working days as from the recording of the petition in the Constitutional Case Register. The authority to grant or reject such request for an interlocutory decision shall be fully the authority of the relevant court, not the authority of the Constitutional Court.

Considering, based on the above considerations, the Court must declare to reject the request for an interlocutory decision filed by the Petitioner in the *a quo* petition.

MAIN ISSUE OF THE PETITION

Considering whereas the principal issue that must be considered by the Court in the *a quo* petition is whether Article 2 Paragraph (1), Elucidation on Article 2 Paragraph (1), Article 3, Elucidation on Article 3 (insofar as it contains the word "may"), and Article 15 (insofar as it contains the word "attempt(ed)") of the PTPK Law are contradictory to Article 28D Paragraph (1) of the 1945 Constitution;

Considering whereas in order to examine the *a quo* petition, the Court has heard the testimony of the Government and the People's Legislative Assembly. In addition, the Court has also heard the testimony of the Corruption Eradication Commission (KPK) and the Team for the Eradication of Criminal Acts of Corruption (*Timtastipikor*) of the Attorney General's Office as the related parties in the hearing who subsequently added their affidavit based on which the following matters have been obvious:

- The elements of Article 2 Paragraph (1) and Article 3 of the *a quo* Law are deliberately intended to cover all forms of criminal acts of corruption which inflict losses to the state finance or otherwise. This is in line with the assumption recognized by the international community that a criminal act of corruption is an "extraordinary crime". Therefore, the handling thereof at the inquiry and investigation stages must also

be conducted in an extraordinary manner. This is aimed at creating a deterrent effect on all community members, including entrepreneurs, officials and all other community members so as not to commit criminal acts of corruption;

- The use of the word “may” in Article 2 Paragraph (1) and Article 3 of the *a quo* Law is actually focused on the deterrence aspect and shock therapy effort for the general public, in addition to its purpose of formulating a formal offence. In addition to the above, the use of the word “may” in Article 2 Paragraph (1) and Article 3 of the *a quo* law is based on the strong desire to eradicate criminal acts of corruption and to warn all people not to commit criminal acts of corruption as well as to minimize qualitatively and quantitatively or to prevent potential losses;

- The word “may” used in the provision of Article 2 Paragraph (1) of the *a quo* Law is also a word that does not stand alone, but constitutes an integral part of the following phrase, namely “inflict losses to the state finance”. Therefore, it must be construed in one integrated. The element of enriching oneself means that the use of the state finance is not intended for the interest of the state administration, but for the interest of the perpetrators of the criminal acts of corruption. Whereas, the word “may” in Article 3 of the *a quo* Law is aimed more at the abuse of power. The definition of “beneficial” in Article 3 of the PTPK Law is not always identical to the increase of assets but may refer to the obtainment of material and/or immaterial benefits or enjoyment in the form of facilities and amenities for undertaking an act.

- Based on the formulation of the formal material offence in Article 2, sanctions may be imposed if the elements of unlawfulness have been met. This is also confirmed in Article 4 of the law which states that the recovery of the state losses shall not expunge the criminal element thereof.

- The criminalization of perpetrators of attempted criminal acts of corruption in Article 15 of the *a quo* law is in line with Article 27 Paragraph (2) of the *United Nations Convention against Corruption, 2003*, ratified by Law of the Republic of Indonesia Number 7 Year 2006. The "attempted" offence as provided in Article 15 of the *a quo* law is categorized as a completed offence. This is in accordance with the opinion of Prof. Sudarto to the effect that an "attempted act shall be deemed as a full and completed criminal act. An attempt is not an incomplete offence but it is a complete or separate offence (*delictum sui generis*), however, it is in a special form.

- Treating an attempted act equally to a completed criminal act is not an unknown practice in the Indonesian criminal law system as evident from various examples of "attempted" offences in the Indonesian Criminal Code (KUHP), such as subversive offences (*aanslag delicten*) in Articles 104, 106 and 107. Equal treatment in terms of criminal sanctions towards attempted offence and completed offence by the lawmakers has provided legal certainty, namely that any person committing an act as referred to in Article 15 of the *a quo* law shall be subject to the same criminal sanction. In accordance with the criminal

law principles as contained either in the Indonesian Criminal Code or in the criminal law doctrines, the inclusion of the provisions on criminal sanctions in a specific manner is justifiable in accordance with the "*lex specialis derogate legi generali*" principle (please refer to Article 103 of the Indonesian Criminal Code);

Considering whereas the Court has heard the testimony of an Expert (**Public Accountant**) presented by the Petitioner, Drs. Soejatna Soenoesoebrata, Ak., who basically explained the following matters:

- The formulation of a criminal act in the articles of the *a quo* law is extremely unclear because the word "may" leads to the question "who can construe the word "may?" Can he be any person, an investigator or a related expert?"

- The state's losses must be defined correctly and accurately because various types of companies have different accounting systems in calculating losses;

- The investigators have never used an accountant's report on the results of investigative audits as a basis for formulating "the element of unlawfulness" or determining the defendants. The tort is fully determined by the investigating public prosecutors. In determining the "unlawfulness", public prosecutors are usually unable to specify the *modus operandi* of the violation;

- As a requirement for the submission of a case to the court, the Investigating public prosecutors ask for the assistance of the BPKP

Accountants to calculate the “state finance losses”, the materials of which are provided by the investigating public prosecutors. However, in calculating the losses, the Accountants can not confirm the data, the accuracy of which is still doubted, to the related officials, so that the results of loss calculations by the Accountants will be similar to those as desired by the investigating public prosecutors. In other words, the results of the calculations made by the Accountants are *pro forma* calculations merely to complete the public prosecutors’ indictment;

Considering whereas the Court has also summoned **Experts: Prof. Dr. Andi Hamzah, S.H., Prof. Erman Rajagukguk, S.H., LL.M., Ph.D., Prof. Dr. Romli Atmasasmita, S.H., LL.M.** who presented their statements verbally and in writing as completely indicated in the description regarding the Facts of the Case, which are basically as follows:

Prof. Dr. Andi Hamzah, S.H.

- The word “unlawfulness” in the elucidation on articles of the *a quo* law is referred to as “*not only contradictory to laws and regulations but also contradictory to other norms applicable within the community*” constitutes a violation of the legality principles, since legality principles state that no one can be subject to criminal sanctions except by virtue of the provisions of the previously existing criminal laws;

- The Expert can accept the words “may inflict losses to the state finance or economy” in the formulation of articles of the *a quo* law provided that each party may present Accountants or Experts in the substantiation

process. In the event that judges are still doubtful about the testimony of the Accountants or Experts presented by the respective parties, they may, based on their own discretion, order the presentation of a Third Accountant or Expert. In the event that following the presentation of the Third Accountant or Expert, the judges are still doubtful, then they must decide an acquittal (*in dubio proreo*):

Prof. Erman Rajagukguk, S.H., LL.M., Ph.D.

- The phrase “may inflict losses to the state finance” used in Article 2 Paragraph (1), Elucidation on Article 1 Paragraph (1), Article 3 and Elucidation on Article 3 of the *a quo* law is contradictory not only to Article 28D Paragraph (1) of the 1945 Constitution regarding the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law, but it is also contradictory to Article 1 Paragraph (3) of the 1945 Constitution, “Indonesia is a constitutional state”;

- The word “may” is only an assumption, while the phrase “may inflict losses to the state finance” means that the losses do not necessarily occur. An act that can be subject to punishment is an act that has definitely occurred;

- The definition of “state losses” which provides legal certainty is the definition set forth in Article 1 Paragraph (22) of the Law of the Republic of Indonesia Number 1 Year 2004 regarding the State Treasury, namely “state/regional losses shall be the shortage of money,

securities and assets, **the amount of which is real and definite** as a result of a tort committed either intentionally and due to negligence";

Prof. Dr. Romli Atmasasmita, S.H., LL.M.

- Article 2 Paragraph (1), Elucidation on Article 2 Paragraph (1), Article 3, Elucidation on Article 3, and Article 15 of the *a quo* law insofar as they contain the word "attempt(ed)", according to the Expert, are still relevant to the development of the current situation in the State of the Republic of Indonesia, wherein some government officials put up strong resistance to the eradication of corruption;

- With regard to the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law [Article 28D Paragraph (1) of the 1945 Constitution], the Expert is of the opinion that the concern is more in the operational application of law, rather than the issue of such formulation in the articles of the law;

Considering whereas the Petitioner argues the word "may" in Article 2 Paragraph (1) and Article 3 of the PTPK Law as well as their respective elucidations are contradictory to Article 28D Paragraph (1) of the 1945 Constitution. Each of the relevant provisions reads as follows:

Article 2 Paragraph (1):

*"Anyone unlawfully enriching himself/herself and or other persons or a corporation that **may** inflict losses to the state finance or the economy, shall be subject to a lifetime imprisonment or a minimum imprisonment of 4 (four)*

years and a maximum of 20 (twenty) years and a minimum pecuniary sanction of Rp.200,000,000.- (two hundred million Rupiah) and a maximum of Rp.1,000,000,000.- (one billion Rupiah)"

Elucidation on Article 2 Paragraph (1):

"*Referred to as "unlawfully" in this Article shall include actions violating the law both in formal and material sense, namely that, even though such actions are not set forth in the law, but if such actions are deemed contemptible, as they are inconsistent with either the sense of justice or social norms, such actions may therefore be subject to punishment. In this provision, the word "may" preceding the phrase "inflict losses to the state finance and economy" indicates that a criminal act of corruption is a formal offense (delicti), namely that the existence of corruption shall sufficiently be proven by the fulfillment of the elements of actions formulated, not by the occurrence of consequences"*

Article 3:

"Anyone with the intention of enriching himself or another person or a corporation, abusing the authority, the facilities or other means at their disposal due to rank or position which ***may*** *inflict losses to the state finance or the economy, shall be subject to a life imprisonment or a minimum imprisonment 1 (one) year and a maximum of 20 (twenty) years and or a minimum pecuniary sanction of Rp.50,000,000.- (fifty million Rupiah) and a maximum of Rp.1,000,000,000.- (one billion Rupiah)";*

Elucidation of Article 3:

“The word ”may” in this provision shall be construed similarly as the word ‘may’ in Article 2”

In respect of the aforementioned arguments of the Petitioner, the Court is of the following opinion:

Concerning the Word “may”

Considering whereas Article 2 Paragraph (1) of the PTPK Law sets forth the following elements:

(a) the element of unlawful act;

(b) the element of enriching oneself or another person or a corporation;

(c) the element of possibility that **may** inflict losses to the state finance or the economy;

Considering whereas in observance of all of the above mentioned arguments conveyed by all parties in relation to the Elucidation of Article 2 Paragraph (1) of the PTPK Law, the main questions that must be answered are as follows:

1. Whether the addition of the word “may” in Article 2 Paragraph (1) of the PTPK Law, which is explained in the Elucidation of Article 2 Paragraph (1), makes the criminal act of corruption in the *a quo* Article 2 Paragraph (1) into a formal offence formulation;
2. Whether based on the explanation as intended in the preceding item 1, the phrase “that may inflict losses to the state finance or the economy”, which is defined as both actual loss and potential loss, constitutes an element that does not need to be proven or that must be proven;

Considering whereas the two questions will be answered with the understanding that as the consequence of the use of the word “may” in Article 2 Paragraph (1) and Article 3 of the PPTK Law, actions subject to prosecution before the Court are not only those “inflicting losses to the state finance and the national economy”. However, actions which “may inflict losses as potential losses, if they have the elements of criminal acts of corruption, can also be prosecuted before the law The word “may” must be construed in accordance with the above mentioned Elucidation of Article 2 Paragraph (1), which states that the word “may” preceding the phrase “inflict losses to the state finance or the economy” indicates that a criminal act of corruption is a formal offense (*delicti*), namely that the existence of corruption shall sufficiently be proven by the fulfillment of the elements of actions formulated, not by the occurrence of consequences. Therefore, the Court can accept the Elucidation of Article 2 Paragraph (1) insofar as it is related to the word “may” preceding the phrase “inflict losses to the state finance and economy”;

Considering whereas the Court is of the opinion that the loss occurring due to a criminal act of corruption, especially in respect of a large scale corruption, is very difficult to be proven in a precise and accurate manner. The required precision will raise doubt as to whether an alleged act, when the amount of loss is presented but can not be proven accurately at all times, although the loss has occurred, can be substantiated. Such a question has encouraged anticipation against the perfect accuracy of substantiation, therefore it is deemed necessary to make such burden of proof easier. In the event that accurate evidence can not be presented with respect to the amount of actual losses can not be presented or the act committed in such a way that

it may inflict losses to the state, it is deemed to have been sufficient to prosecute and penalize the perpetrator, insofar as the other indictment element namely the element of unlawfully enriching oneself and or another person or a corporation (*wederrechtelijk*) has been proven, because the criminal act of corruption is qualified by the *a quo* law as a formal offence. Hence, a criminal act of corruption is qualified as a formal offense, where the elements of an act must have been fulfilled, and not as a material offense, which requires that the consequences of the action in the form of losses must have occurred. The word “may” preceding the phrase “inflict losses to the state finance and economy”, can be seen as having similar meaning to that of the word “may” preceding the phrase “pose danger to the safety of people or objects or the country in a state of war”, as set forth in Article 387 of the Indonesian Criminal Code. Such an offense shall be deemed as proven if the aforementioned elements of criminal act have been fulfilled, and the potential consequences of the aforementioned act which is prohibited and subject to criminal sanction are not required to have actually occurred.

Considering whereas the Court is of the opinion that, the matter does not cause legal uncertainty (*onrechtszekerheid*) which is contradictory to the constitution as argued by the Petitioner. The reason is that the use of the word “may” does not indicate the existence or non-existence of legal uncertainty, which can lead to a condition in which an innocent person is subjected to a criminal sanction for corruption or, reversely, the perpetrator of a criminal act of corruption can not be subjected to a criminal sanction.

Considering whereas in relation to the legal certainty principle (*rechtszekerheid*) in protecting a person's rights, there are two extreme relations between the word between the word "may" and the phrase "inflict losses to the state finance or the economy": (1) inflicting actual losses, the latter is closer to the intention of qualifying a corruption acts or (2) inflicting potential losses. The latter is closer to the meaning of qualifying a corruption offence as a formal offence. In addition to the aforementioned two relations, actually there is another relation that "has not been actually occurred", however, by considering the special and concrete circumstances around the occurring event, it can be logically concluded that a consequence, namely state's losses, will occur. The special and concrete circumstances around the occurring event leading to the logical conclusion whether the state's losses will occur or will otherwise must be considered by an expert in the state finance, state economy, and an expert in the analysis of the relation between a person's act and losses.

Considering whereas with regard to the elucidation which states that the word "may" preceding the phrase "inflict losses to the state finance and economy" which subsequently qualifies the criminal act as a formal offence, so that the existence of losses to the state finance and economy is not a consequence that must actually occur, the Court is of the opinion that the foregoing must be interpreted in such a way that the state's losses must be proven and must be calculable even if it is merely an estimation or although they have not occurred. Such a conclusion must be made by an expert in the relevant field. The factor of losses, either actual or potential, is seen as an aggravating or an alleviating factor in the imposition of a criminal sanction, as

described in the Elucidation of Article 4, to the effect that indemnity for the state's losses can only be considered as an alleviating factor. Hence, the problem with regard to the word "may" in Article 2 Paragraph (1) of the PTPK Law, is more about the problem of practical implementation by the law enforcement apparatus, and not about the constitutionality of the norms;

Considering whereas therefore, the Court is of the opinion that the phrase "may inflict losses to the state finance and economy", is not contradictory to the right to just legal certainty as referred to in Article 28D Paragraph (1) of the 1945 Constitution, insofar as it is interpreted in accordance with the above mentioned Court's interpretation (conditionally constitutional);

Considering whereas because the word "may" as described in the above consideration is not considered contradictory to the 1945 Constitution, and it is in fact required in the context of eradicating criminal acts of corruption, the Petitioner's petition concerning the matter is groundless and can not be granted;

Considering also whereas as the *UN Convention against Corruption* has been ratified by Law Number 7 Year 2006, in which convention it is stated that the state's loss is not an absolute element of a criminal act of corruption (*it shall not be necessary*) but there must be an involvement of public officials, the Court is of the opinion that the element of "anyone" in Article 2 Paragraph (1) must also be interpreted in relation to the act of a public official. Indonesia, as a state party, should forthwith make adjustments by making amendments

to the PTPK Law based on conceptual and comprehensive study in an integrated legal system based on the 1945 Constitution;

Concerning the Element of Unlawfulness (*wederrechtelijkheid*)

Considering whereas the first sentence of the Elucidation of Article 2 Paragraph (1) of the PTPK Law, which is also petitioned for review by the Petitioner as written in his petition must also be taken into attention and comprehensive consideration, although the Petitioner does not focus his argument specifically on the aforementioned section. The aforementioned Article 2 Paragraph (1) expands the category of the elements of "unlawfulness", in the criminal law, not only as a *formele wederrechtelijkheid*, but also as a *materiele wederrechtelijkheid*. The first sentence of the Elucidation of Article 2 Paragraph (1) reads as follows: "*Referred to as "unlawfully" in this Article shall include actions violating the law both in formal and material sense, namely that, even though such actions are not set forth in the law, but if such actions are deemed contemptible, as they are inconsistent with either the sense of justice or social norms, such actions may therefore be subject to punishment.*".

Considering whereas based on such elucidation, although the act concerned is not formally regulated in laws and regulations, namely in an interpretation of *onwetmatig* nature, while according to the standard adopted in the society, namely the social norms considering an act contemptible, because it is considered to have violated the values of propriety, prudence and obligation applied in interpersonal relations in the society, the act concerned shall be deemed to have fulfilled the elements of unlawfulness

(*wederrechtelijk*). The standard applied in this respect is the unwritten law or regulation. The sense of justice (*rechtsgevoel*), norms of decency, or ethics, and moral norms adopted in society are sufficient to serve as the criteria for an act to be unlawful even if it is seen merely in a material sense. The elucidation made by the legislators formulating this law does not actually only explain about Article 2 Paragraph (1) concerning the elements of unlawful act but has also created a new norm, providing for the application of standards that are not firmly set forth in legislation for determining acts that can be penalized. Such an elucidation has led to a condition in which the criteria of an unlawful act (Article 1365 of the Civil Code) recognized in the civil law and developed as jurisprudence concerning unlawful act (*onrechmatigedaad*) have been virtually accepted as the standard for an unlawful act in the criminal law (*wederrechtelijkheid*). Therefore, the standards of morality and sense of justice with respect to propriety are different in each region, with the consequence that what is an unlawful act in one region may not necessarily be an unlawful act in another region;

Considering whereas in relation to the above mentioned consideration, the Court in Decision Number 005/PUU-III/2005 has also stated that in accordance with the common practices in a good law-making process, which are also acknowledged as legally binding, an elucidation has the function of explaining the substance of a norm set forth in an article and not to add any new norm, let alone to include a substance that is completely contradictory to the norm elucidated. The common practices have also been actually confirmed in Item E of the Attachment which is an inseparable part of the Law

of the Republic of Indonesia Number 10 Year 2004 regarding the Formulation of Laws and Regulations which sets forth, among other things, as follows:

a. An elucidation functions as the official interpretation of the legislators on particular norms in the corpus of law. Therefore, an elucidation shall only contain further description or elaboration of the norms regulated in the corpus of law. Hence, an elucidation as a means of clarifying the norms in the corpus of law must not render the norms elucidated ambiguous;

b. An elucidation can not be used as a legal basis for formulating further regulations;

c. In an elucidation, any formulation containing implicit amendment to the provisions of the law concerned must be avoided;

Considering whereas therefore, the Court is of the opinion that there is indeed a constitutionality problem in the first sentence of the Elucidation of Article 2 Paragraph (1) of the PTPK Law, and hence the Court needs to further take the following matters into account:

1. Article 28D Paragraph (1) recognizes and protects the citizens' constitutional rights to obtain definite legal guarantee and protection, which is interpreted in the field of criminal law as the legality principle as provided for in Article 1 Paragraph (1) of the Indonesian Criminal Code, that this principle is a demand for legal certainty whereby a person can only be prosecuted and brought before a court based on the previously existing written laws and regulations (*lex scripta*);

2. The foregoing requires that a criminal act must have the elements of unlawfulness, which must be previously applicable in writing,

formulating what actions or what consequences of a persons actions that are clearly and strictly restricted and can, therefore, be prosecuted and subjected to criminal sanctions with the *nullum crimen sine lege stricta* principle;

3. The concept of formal unlawfulness (*formele wederrechtelijk*), obligating legislators to formulate laws as accurately and as in detail as possible (please refer to Jan Remmelink, *Hukum Pidana* (The Criminal Law, 2003:358) is required to guarantee legal certainty (*lex certa*) or which is also known with the term *Bestimmheitsgebot*;

Considering whereas based on the foregoing, the concept of material unlawfulness (*materiele wederrechtelijk*), referring to unwritten law in relation to propriety, prudence, and accuracy standards in the society, as an equity norm, is an uncertain standard, and is different in each society, so that what is unlawful in one place may be accepted and recognized as something legal and lawful in another place, based on the standards recognized by the local community, as conveyed by the Expert Prof. Dr. Andi Hamzah, S.H. in the court hearing;

Considering whereas therefore, the first sentence of the Elucidation of Article 2 Paragraph (1) of the PTPK Law concerned is contradictory to the just legal certainty protection and guarantee set forth in Article 28D Paragraph (1) of the 1945 Constitution. Therefore, the Elucidation of Article 2 Paragraph (1) of the PTPK Law, insofar as it is related to the phrase ““*Referred to as “unlawfully” in this Article shall include actions violating the law both in formal and material sense, namely that, even though such actions are not set forth in*

the law, but if such actions are deemed contemptible, as they are inconsistent with either the sense of justice or social norms, such actions may therefore be subject to punishment", must be declared as contradictory to the 1945 Constitution;

Concerning "Attempt"

Considering whereas Article 15 of the PTPK Law, which is also petitioned for review, reads as follows: "Any person attempting, abetting or maliciously conspiring to commit criminal acts of corruption, shall be subject to the same penalties as referred to in Article 2, Article 3, Article 5 through and including Article 14". The Petitioner argues that such provision is contradictory to Article 28D Paragraph (1) of the 1945 Constitution because based on such formulation, an attempted to commit a criminal act of corruption as regulated in Article 2 Paragraph (1) and Article 3 of the PTPK Law is subject to criminal penalties which are similar to criminal penalties for a complete offence (*voltoid delict*);

Considering whereas the foregoing, according to the Court, is not contradictory to the legal certainty and justice principle, as this is an exception or diversion justified by the Indonesian criminal law system, as regulated in Article 103 of the Indonesian Criminal Code which reads as follows: "*The provisions in Chapter I through and including Chapter VIII of this book shall also apply for the acts subject to criminal penalties according to other provisions of law, unless determined otherwise by the law*". The wording of Article 15 of the PTPK Law, which reflects the legal policy of the legislators, can be justified, since the practices of criminal acts of corruption in Indonesia

have extensively and systematically taken place, so that extraordinary measures are required to eradicate them;

Considering whereas the qualification of an attempt as a completed offence (*voltoid delict*) is an exception justified according to Article 103 of the Indonesian Criminal Code so that the provisions of Article 15 of the PTPK Law can not be considered contradictory to the just legal certainty principle, as referred to in Article 28D Paragraph (1) of the 1945 Constitution;

Considering whereas based on the above mentioned considerations, the Court has reached the conclusion that the petition, insofar as it is related to the Elucidation of Article 2 Paragraph (1) namely the first sentence thereof, as described above, can be granted, whereas the rest of the petition must be declared as rejected;

In view of Article 56 paragraphs (2), (3), and (5), as well as Article 57 paragraphs (1) and (3) of the Law of the Republic of Indonesia Number 24 Year 2003 regarding the Constitutional Court;

PASSING THE DECISION

- To grant the Petitioner's petition partly;
- To declare that the Elucidation of Article 2 Paragraph (1) of the Law of the Republic of Indonesia Number 31 Year 1999 concerning the Eradication of Criminal Acts of Corruption (State Gazette of the Republic of Indonesia Year 2001 Number 134, Supplement to the State Gazette of the Republic of Indonesia Number 4150) in respect of the

phrase which reads, "*Referred to as "unlawfully" in this Article shall include actions violating the law both in formal and material sense, namely that, even though such actions are not set forth in the law, but if such actions are deemed contemptible, as they are inconsistent with either the sense of justice or social norms, such actions may therefore be subject to punishment.*" **is contradictory to the 1945 Constitution of the Republic of Indonesia**;

- To declare that the Elucidation of Article 2 Paragraph (1) of the Law of the Republic of Indonesia Number 31 Year 1999 concerning the Eradication of Criminal Acts of Corruption as amended by Law Number 20 Year 2001 regarding the Amendment to Law Number 31 Year 1999 concerning the Eradication of Criminal Acts of Corruption (State Gazette of the Republic of Indonesia Year 2001 Number 134, Supplement to the State Gazette of the Republic of Indonesia Number 4150) in respect of the phrase which reads as follows: "*Referred to as "unlawfully" in this Article shall include actions violating the law both in formal and material sense, namely that, even though such actions are not set forth in the law, but if such actions are deemed contemptible, as they are inconsistent with either the sense of justice or social norms, such actions may therefore be subject to punishment*" **does not have any binding legal effect**;

- **To order an appropriate inclusion of this decision in the State Gazette of the Republic of Indonesia;**

- **To reject the rest of the Petitioner's petition.**

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Hence the decision was made in the consultative meeting attended by 9 (nine) Constitutional Court Justices on Monday, July 24, 2006, with one Constitutional Court Justice having a dissenting opinion. This decision was read out in a Plenary Session of the Constitutional Court open for the public on this day, Tuesday, July 25, 2006, attended by 9 (nine) Constitutional Court Justices, namely Prof. Dr. Jimly Asshiddiqie, S.H., as the Chairperson and concurrent Member, and accompanied by Prof. Dr. H.M. Laica Marzuki, S.H., Prof. H.A. Mukhtie Fadjar, S.H., M.S., Soedarsono, S.H., Prof. H.A.S. Natabaya, S.H., LL.M., H. Achmad Roestandi, S.H., Dr. Harjono, S.H., M.CL., I Dewa Gede Palguna, S.H., M.H., Maruarar Siahaan, S.H., respectively as Members, assisted by Makhfud, S.H., as Substitute Registrar and attended by the Attorneys-In-Fact of the Petitioner, the Government, the People's Legislative Assembly of the Republic of Indonesia, and the Directly as well as Indirectly Related Parties;

CHIEF JUSTICE,

SIGNED

Prof. Dr. Jimly Asshiddiqie, S.H.

JUSTICES,

Prof. Dr. H.M. Laica Marzuki, S.H.	**Prof. H. A. Mukthie Fadjar, S.H.,M.S.**
SIGNED	**SIGNED**
Soedarsono, S.H.	**Prof. H. A. S. Natabaya, S.H., LL.M.**

SIGNED	**SIGNED**
H. Achmad Roestandi, S.H.	**Dr. Harjono, S.H., MCL.**
SIGNED	**SIGNED**
I Dewa Gede Palguna, S.H., M.H.	**Maruarar Siahaan, S.H.**

DISSENTING OPINION

Constitutional Court Justice Prof. Dr. H.M. Laica Marzuki, S.H.

A petition for judicial review of the word “may” in the phrase “that may inflict losses to the state finance or the economy” *vide* Article 2 Paragraph (1) and Article 3 of Law Number 31 Year 1999 concerning the Eradication of Criminal Acts of Corruption, as amended by Law Number 20 Year 2001, which is considered contradictory to Article 28D of the 1945 Constitution, is basically related to the judicial review of both the aforementioned articles of the PTPK Law to the extent they contain word “may”, in relation to the corpus of law and the elucidation thereof. The word “may” being questioned by the Petitioner is set forth in both the corpus of law and the elucidation thereof.

Item E of Attachment to Law Number 10 Year 2004 regarding the Formulation of Laws and Regulations, entitled Elucidation, describes that the Elucidation functions as the official interpretation of the legislators of particular norms in the corpus of law. Therefore, an elucidation shall only contain further description or elaboration of the norms regulated in the corpus of law. Hence, an elucidation as a means of clarifying the norms in the corpus of law must not render the norms elucidated ambiguous (item 165). An elucidation can not

be used as a legal basis for formulating further regulations. Therefore, any formulation containing norms in an elucidation must be avoided (item 166).

The *Rapport Wetgevingstechniek (*1948) in the Netherlands describes that if an elucidation is contradictory to the text of articles (corpus of law); the text of articles (corpus of law) concerned shall have binding effect. The People at large (*burgers*) are assumed to be obligated to know the articles (corpus of law) included in the State Gazette *(Staatsblad),* whereas under the *ieder word verondersteld de wet te kennen,* the formulation of ”for public cognizance” is not set forth in the Supplement to the State Gazette (TLN) containing elucidation on the articles.

Whereas therefore, review of the text of the articles (corpus of law) must be conducted simultaneously *(samengaan)* with the review of the elucidation thereof in order that the *wetmatigheid* relationship between both of them can be identified.

With respect to the word “*may*” in the phrase “*that may inflict losses to the state finance and economy*”, the elucidation describes that, “*the word ’may’ preceding the phrase ‘inflict losses to the state finance and economy’ indicates that a criminal act of corruption is a formal offense, namely that the existence of criminal act of corruption shall sufficiently be proven by the fulfillment of the elements of actions formulated, not by the occurrence of consequences*”

Formal offence *(formeel delict)* occurs when the elements of actions *(gedraging elementen)* based on the offence formulation is fulfilled. It does not

require the elements of consequences *(gevolg element)* as required in material offence *(materiel delict).* D. Hazewinkel Suringa (1973:49) stated that, ”*Met formele (delicten) worden die strafbare feiten bedoeld, waarbij de wet volstaat met het aangegeven van de verboden gedraging; met materiele (delicten) die, welke het veroorzaken van een bepaald gevolg omvatten* etc…etc”.

However, the insertion of the word ”*may*” does not constitute a *bestaandeel delict* of the formal offence. Articles with respect to formal offence such as Article 156 of the Indonesian Criminal Code (expresses feelings of hostility, hatred or contempt towards one or several group(s) of people in public), Article 160 of the Indonesian Criminal Code (public provocation), Article 161 of the Indonesian Criminal Code (*opruien*, provocation by broadcasting, presenting or attaching writings in public), Article 163 of the Indonesian Criminal Code (broadcasting, presenting or attaching writings in public containing an offer to provide statements, opportunities or facilities in order to commit a criminal act), Articles 209 and 210 of the Indonesian Criminal Code (bribery), Article 242 paragraph (1) of the Indonesian Criminal Code (*meineed*, perjury), Article 263 of the Indonesian Criminal Code (document counterfeiting), Article 362 of the Indonesian Criminal Code (theft), do not contain the word ”may” as *bestaan voorwaarde* of the formal offence.

In the meantime, the inclusion of the word ”*may*” in the phrase ”*which may inflict to state finance and economy*” in Article 2 paragraph (1) and Article 3 of the PTPK Law contains a meaning *(begrippen)* which is insufficiently

clear and quite broad, not fulfilling the formulation of *in casu* sentence required by the legality principle of a criminal provision, namely *lex certa*, which means that the aforementioned provisions must be clear and unambiguous (containing certainty) and *lex stricta*, which means that the aforementioned provisions must be construed in a narrow sense. Therefore, according to the Expert Prof. Dr. Romli Atmasasmita, S.H., LL.M. before the court hearing, analogy may not be made. The word "*may*" lacerates the principle of *Nullum Delictum Nulla Poena Sine Praevia Lege Poenali* (Article 1 paragraph 1 of the Indonesian Criminal Code) covering all provisions of criminal law, *in casu* the provisions on the eradication of the criminal acts of corruption. The aforementioned practice creates legal uncertainty (*rechtsonzekerheid*) while legal certainty is guaranteed by the Constitution, namely Article 28D paragraph (1) of the 1945 Constitution.

Article 11 (2) of the Universal Declaration of Human Rights (1948) also confirms that "*No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed*".

The scope of the word "*may*" in the phrase "*which may inflict losses to the state finance and economy*" in Article 2 paragraph (1) and Article 3 of the PTPK Law which provide insufficient certainty, along with its quite broad formulation, may capture some people involving in the cases of criminal act of corruption, bears a resemblance to a fishing net made by unbleached cotton which is able to capture even the smallest microbes, as described by Prof. Dr. (Jur.) Andi Hamzah, SH. However, at the end of the day, the investigating

officers and public prosecutors can also extremely disregard several criminal acts of corruption cases in a discriminatorily selective manner under the pretext of "*may not*", "*not proven*", and the like.

Following the application of Law Number 1 Year 2004 regarding the State Treasury, the formulation of "state/regional losses" the meaning has changed *(het begrip)* compared to the formulation of "*which may inflict losses to the state finance or economy*" according to Article 2 paragraph (1) and Article 3 of the PTPK Law. Article 1 Sub-Article 22 of Law Number 1 Year 2004 formulates as follows: "*state/regional losses shall be the shortage of securities and assets, the amount of which is real and definite as a result of a tort committed either intentionally and due to negligence*". The aforementioned formulation has created legal certainty and clarity as well as enables case-per-case examination and calculation, as stated by the Expert Prof. Erman Rajagukguk, S.H., LL.M., PhD. before the court.

Since there are two laws formulating the state losses, the final law (*een latere wet*) shall have binding effect. "*De nieuwste wet moet dus worden toegepast. Deze regel vloeit louter uit logisch redeneren voort*," said I. C. van der Vlies (1987:163).

In fact, omitting the word "*may*" in Article 2 paragraph (1) and Article 3 of the PTPK Law including its elucidation shall deny the existence of legal uncertainty *(*creating *rechtonzekerheid),* while law enforcement in terms of the eradication of the criminal acts of corruption shall proceed legitimately.

Although the word “unlawful” in Article 2 paragraph (1) of the PTPK Law does not become the focus of the Petitioner’s arguments in his petition, the review of the word “unlawful” constitutes a legal necessity since the matter of unlawfulness *(wederechtelijk)* is a *bestaan deel delict* along with the elements of offence which “*may inflict losses to state finance or economy*”. The Elucidation of Article 2 paragraph (1) of the PTPK Law states, “*Referred to as “unlawfully” in this Article shall include actions violating the law in and material sense, namely that, even though such actions are not set forth in the laws and regulations, if such actions are deemed contemptible, as they are inconsistent with either the sense of justice or social norms, such actions may therefore be subject to punishment*”.

Applying a provision of criminal law without being (legitimately) formulated in writing is principally violating the legality principle, including applying a provision of criminal law such as Article 2 paragraph (1) of the PTPK Law under the principle of violation of substantive laws (*materieele wederrechtelijkheid)*. The aforementioned practice violates Article 1 Paragraph 1 of the Indonesian Criminal Code. It is reasonable to omit the principle of violation of substantive laws in the Elucidation on Article 1 paragraph (1) of the PTPK Law, because it creates legal uncertainty, while legal certainty is guaranteed by the Constitution namely Article 28D paragraph (1) of the 1945 Constitution

In the meantime, the Petitioner’s petition for Article 15 of the PTPK Law (insofar as it is related to the word ”*attempt[ed]*”) to be declared not legally binding is groundless because it stipulates similar criminal sanction to both a

criminal act and the attempted criminal act. In addition to that, it is the authority of the lawmakers *(wetgever)* to stipulate a similar criminal sanction, however specifically in the criminal act of bribery, where the perpetrators *(dader)* shall be still punished although the public officials to be bribed refuse to accept the bribe. Actually there is no attempt in bribery (*Het is eigenlijk geen poging tot omkopen*).

The Government of the Republic Indonesia has ratified the United Nations Convention Against Corruption, 2003, with Law Number 7 Year 2006 regarding the Ratification of the United Nations Convention Against Corruption, 2003.

Based on the foregoing, the Petitioner's petition should be granted partly.

To declare that the word "*may*" in the phrase "*which may inflict losses to the state finance and economy*", in Article 2 paragraph (1) and Article 3 of Law Number 31 Year 1999 regarding the Eradication of Criminal Acts Corruption, as amended by Law Number 20 Year 2001, including its elucidation and the sentence, *" …. and material sense, namely that, even though such actions are not set forth in the laws and regulations, if such actions are deemed contemptible, as they are inconsistent with either the sense of justice or social norms, such actions may therefore be subject to punishment*" are not legally binding because they are contradictory to Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia.

To reject the rest of the Petitioner's petition.

SUBSTITUTE REGISTRAR

SIGNED

Makhfud,S.H.