Questioning the Meaning of Financial or State Economic Losses in Corruption Crimes After the Constitutional Court Decision Number 25/PUU-XIV/2016

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Abstract

The Constitutional Court Decision Number 25/PUU-XIV/2016 has changed Articles 2 paragraph (1) and 3 of the PTPK Law from a formal criminal act to a material criminal act, so that state losses must be interpreted as actual loss. The actual financial or economic loss of the state is controversial because state losses only include nominal losses that must be calculated and proven. However, if the loss cannot be calculated with certainty and this implies that the charges are not proven, then the perpetrator must be acquitted. The research analyzes the original intent or ratio legis of the word "may" in Articles 2 paragraph (1) and 3 of the PTPK Law and reconstructs the meaning of financial losses or the state economy based on morality. This research is a doctrinal research that uses statute, conceptual and case approaches. The results of this study conclude that the formulation of the word "may" in Articles 2 paragraph (1) and 3 of the PTPK Law is intended to facilitate proof of corruption in the field of finance or the state economy in Indonesia, whose modus operandi is increasingly sophisticated and complicated. Acts of corruption are not only about financial or economic losses that must be proven and can be calculated, but also moral losses that cannot be seen and calculated. Therefore, the reconstruction of the meaning of potential loss in Articles 2 paragraph (1) and 3 of the PTPK Law in the future is very important to save the nation's morals.

I. Introduction

Corruption cases can not only be found in developing countries. But it can also be found in developed countries. This indicates that corruption cases are a disease of power.[1] Apart from that, corruption has an impact on the violation of social rights and economic rights of the community at large. It is on the basis of this immense suffering that extraordinary measures are needed to eradicate it.[2]

Corruption crimes have an impact on the damage to the legal system and democracy of a country, reduce the quality of life, slow down sustainable development, and violate human rights. Corruption can also be said to have transcended the authority of the law, surpassed common sense, and ignored and exceeded the reach of cultural values and morality.[3] Corruption is a crime that can destroy the values of society, nation, and state life,[4] so it is inevitable if acts of corruption are criminalized by the State Law of the Republic of Indonesia Number 31 of 1999 concerning the Eradication of Corruption Crimes as amended by the State Law of the Republic of Indonesia Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Crimes Corruption (hereinafter referred to as '*Undang-Undang Pemberantasan Tindak Pidana Korupsi*' and abbreviated as PTPK Law).

In the PTPK Law there are type of criminal act related to financial losses and the state economy, namely Article 2, paragraph (1), and Article 3 of the PTPK Law. Nowadays, the recovery of state losses by corruption offenders has become a modern trend in law enforcement.[5] Because by returning the loss, the perpetrator is considered to have restored the balance that has been disturbed.[6] This aligns with the fundamental principles aimed at eliminating corruption as outlined in Article 2, paragraph (1), and Article 3 of the existing the PTPK Law, which focuses on the restitution of financial losses to the state. [7]

[1]Muh. Arief Syahroni, "Gratifikasi Pelayanan Seksual Dalam Tindak Pidana Korupsi" (Universitas Airlangga, 2020), 1.
[2]Puteri Hikmawati, "Pengembalian Kerugian Keuangan Negara Dari Pembayaran Uang Pengganti Tindak Pidana Korupsi, Dapatkah Optimal?," *Jurnal Negara Hukum* 10, no. 1 (2019), 91.
[3]Kartono dan Suhendar, "Kerugian Keuangan Negara Telaah Dalam Perspektif Hukum Administrasi Negara Dan Hukum Pidana," *Jurnal Surya Kencana Satu : Dinamika Masalah Hukum Dan Keadilan* 11, no. 2 (2020), 3.
[4]Dedy Saputra, "Pertanggungjawaban Pidana Pejabat Administrasi Negara Atas Kebijakan Yang Merupakan Tindak Pidana Korupsi," *JOM Fakultas Hukum* 1, no. 2 (2014), 1.
[5]Yayan Indriana, "Pengembalian Ganti Rugi Keuangan Negara Pada Perkara Tindak Pidana Korupsi," *Cepalo* 2, no. 2 (2019), 11.
[6]M. Misbahul Mujib, "Eksistensi Delik Adat Dalam Kontestasi Hukum Pidana Indonesia," *Supremasi Hukum Jurnal Kajian Ilmu Hukum* 2, no. 2 (2013), 11.
[7]A.A. Anggy Tryeza Purnama Ningrum et al, "Pengembalian Kerugian Keuangan Negara Berdasarkan Analisis Ekonomi Mikro," *Jurnal Kertha Wicara* 10, no. 3 (2021), 2.

Before the Constitutional Court decision Number 25/PUU-XIV/2016, the element of state loss or the state economy referred to in Article 2 paragraphs (1) and 3 of the PTPK Law was interpreted as a loss (potential loss). This is evident from the phrase "can" harm state finances or the state economy" in Article 2 paragraphs (1) and 3 of the PTPK Law. The use of the word "can" mean that the loss does not have to be real (actual loss), but it is interpreted as the potential for loss (potential loss). Practically, in proving state losses or the state economy, it will be easier to prove if the formulation of formal criminal act, considering that the prohibited consequences do not have to exist, there are enough special circumstances that concretely explain whether state losses occur or not.[8]

Before the decision of the Constitutional Court Number 25/PUU-XIV/2016, there were still problems in its enforcement, namely regarding the differences in understanding related to the return of state loss which had multiple interpretations.[9] On the one hand arguing that the return of state loss does not remove the punishment of the offender and on the other hand arguing that the return of state loss removes the punishment of the offender. In addition, the word "can" before "harming finances or the economy" in Article 2 paragraph (1) and Article 3 of the PTPK Law has been submitted to the Constitutional Court for judicial review as stated in its decision Number 003/PUU-IV/2006. In the decision, the Court only granted a part of it, which only concerns the meaning of "against the law. So, the Court rejected the postulates of the application for the word "can" because the word is not a matter of constitutionality, but concerns the process of law enforcement in practice by law enforcement officials.[10] However, the Constitutional Court was inconsistent[11] and changed its position through the Constitutional Court Decision Number 25/PUU-XIV/2016, namely as many as 5 (five) Constitutional Judges declared the word "can" unconstitutional.

After Constitutional Court decision Number 25/PUU-XIV/2016, the Constitutional Court decided to delete the word "can" harm the country's finances or economy in Article 2 paragraph (1) and Article 3 of the PTPK Law. The Constitutional Judge's considerations, which are in the camp of "granting the petition", believe that the state losses must be real and the amount can be calculated. Therefore, Article 2 (1) and Article 3 of the PTPK Law regarding the

[8]Vidya Prahassacitta, "Perubahan Makna Terhadap Pasal 2 Dan 3 Undang-Undang Nomor 31 Tahun 1999 Pasca Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 15, no. 3 (2018), 7.
[9]Hanafi Amrani et al, "Esensi Keberadaan Pasal 4 Undang-Undang Pemberantasan Tindak Pidana Korupsi Dan Implementasinya Dalam Praktek Penegakan Hukum" (Yogyakarta, 2017), 1.
[10]Lihat Putusan Mahkamah Konstitusi Nomor 003/PUU-IV/2006, 72.
[11]Padahal kaidah berpikir dalam sebuah argumentasi mensyarakatkan adanya konsistensi, yaitu konsistensi dalam premis-premis sehingga sampai pada keputusan sebagai kesimpulan. Dalam Philiphus M. Hadjon dan Tatiek Sri Djatmiati, *Argumentasi Hukum* (Yogyakarta: Gadjah Mada University Press, 2005), 20.

element of state loss must be proven actually. This was also stated by Didik Endro Purwoleksono, that when the state is not harmed, either in terms of finance or the economy, it has not been or cannot be calculated, then the action is not included as a criminal act of corruption.[12] So consequently, if the losses are only potential and not actual or real and cannot be proven legally and convincingly, then the panel of judges must issue an independent verdict. This consequence also applies to the investigation stage. If the loss or the state economy is only limited to the nominal amount that must be actual, then it cannot be blamed if the investigator stops the investigation in a case that is suspected of being a corruption crime when the state loss still cannot be determined with certainty.

Whereas the spirit underlying the construction of the concept of state losses before the decision of the Constitutional Court Number 25/PUU-XIV/2016 was intended to facilitate the proof of corruption cases, considering that corruption has organized and transnational characteristics that are difficult to see, reveal and prove. The concept of state losses that must be actual after the Constitutional Court's decision negates aspects of legal morality that are metaphysical and uncertain or intangible. This is because corruption crimes not only have an impact on the country's finances or economy but also have an impact on all aspects of life, including behavior in society and perceptions of the authority of law and the judiciary.

Law and morality are inseparable and interrelated, both in the law-making process and in decision-making.[13] When faced with a law situation that can no longer be tolerated because it is different from moral values and justice, moral values and justice take precedence.[14] So the principle of "law is a source of morality" must be the basis for the future renewal of the PTPK Law, especially the concept of financial or economic losses that pay attention to the metaphysical aspect of morality, not just limited to paying attention to visible.

This research has a novelty by tracking the original intent or *ratio legis* of Article 2 paragraphs (1) and 3 of the PTPK Law and reconstructing the meaning of financial or economic losses of the state in the formulation of Article 2 paragraphs (1) and 3 of the PTPK Law after the Constitutional Court's decision and in relation to the enforceability of Article 4 of the PTPK Law. The regulation of the eradication of corruption should no longer pay attention to the aspect of nominal losses that are actual and certain, but be reconceptualized potentially following

[12]Didik Endro Purwoleksono, *Hukum Pidana : Untaian Pemikiran* (Surabaya: Airlangga University Press, 2019), 188.
[13]Joko Priyono, *Prinsip Moral sebagai Penentu Validitas Hukum.* Dalam Joko Priyono et al, *Hukum Sebagai Pancaran Moral Dalam Rangka Memperingati 70 Tahun Guru, Sahabat, Dan Bapak Kami Prof. Dr. Peter Mahmud Marzuki, S.H., M.S., LL.M*, ed. Oemar Moechtar, 1st ed. (Jakarta: Prenadamedia, 2019), 13.
[14]Joko Priyono et al, 17.

the spirit of the formation of Article 2 paragraphs (1) and 3 of the PTPK Law. This is because corruption has a detrimental impact on a very wide scale, it is very difficult for the state to prove it precisely and accurately.[15] So that the formulation of potential loss or formal criminal act in the future is seen as an 'early bite' against acts of corruption in the field of finance or the state economy.

Based on the description above, the legal issues in this study are: (1) What is the criminal law policy in formulating the meaning of financial or economic losses of the state in the crime of corruption? (2) How to reconstruct the meaning of financial or economic losses of the state in the crime of corruption after the decision of the Constitutional Court Number 25/PUU-XIV/2016 which is based on legal morality? This study This study aims to analyze criminal law policies in formulating the meaning of financial or state economic losses in corruption crimes with an original intent or *ratio legis* approach and to analyze the reconstruction of the meaning of financial or state economic losses in corruption crimes after the Constitutional Court decision Number 25/PUU-XIV/2016 which is based on legal morality.

2. Research Method

This research is doctrinal legal research that seeks legal definitions, legal concepts, and relevant legal principles according to the legal issues of this research. This research uses statute, conceptual, and case approaches. The research legal materials use primary legal materials such as minutes of draft laws, laws and regulations, court decisions related to corruption crimes, and secondary materials such as books and journal articles collected by library studies as well as non-legal materials related to the Corruption Perception Index in Indonesia.

The analysis of legal materials is 4 (four) stages, the first of which is legal materials are carried out by explaining the legal material as it is without following the researcher's opinion. The second is a comparative analysis, which is to compare the opinion that Article 2 paragraphs (1) and 3 of the PTPK Law should be formulated as a potential loss with an actual loss. The third is evaluative, namely about the attitude of the researcher whether he agrees with the concept of potential loss or actual loss in the formulation of Article 2 paragraph (1) and 3 of the PTPK Law. Fourth and last argumentative analysis technique, the researcher will argue about the legal prescriptions found regarding how to regulate the eradication of corruption crimes related to state losses that are ideal and coherent with legal principle.

3. Results and Discussion

[15]*Dissenting Opinions* Hakim Konstitusi I Dewa Gede Palguna, Suhartoyo, Aswanto, dan Maria Farida Indrati. Dalam Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016, 119.

Criminal Law Policy in Formulating the Meaning of Financial or State Economic Losses in Corruption Crimes

Sudarto argued that implementing criminal law policies means holding elections to obtain the results of the formation of good criminal legislation, in the sense of fulfilling justice and usefulness to overcome crime.[16] In penal means, there are three stages of policy to tackle crime:

a) The stage of drafting or formulating criminal law which is often referred to as the formulation policy stage or legislative policy stage;
b) The stage of application or application of criminal law, which is often called the stage of application policy by the judiciary;
c) The stage of implementing criminal law execution, which is often called the execution policy stage.[17]

If associated with the formulation policy stage or legislative policy stage, criminal law policies in formulating the regulation of corruption crimes need to be carried out in a good and effective way. This is because corruption in Indonesia is always related to politics or power. Therefore, it is necessary to receive special attention or handling both in terms of formulation and law enforcement related to alleged corruption crimes, both from the aspects of the existence of special institutions, special laws (the PTPK Law) and the principle of special burden of proof. The unfamiliarity of this treatment is due to the corruption crimes have an impact on the damage to the country's financial or economic joints as well as social losses.[18] As a result, people who become victims of corruption crimes that concern financial losses or the country's economy are qualified as indirect victims.[19]

Since the colonial era, the proclamation of independence, until now, Indonesia has made arrangements regarding state finances.[20] The regulation of the country's finances is so important that it has been realized very seriously by the founders of the nation for a long time.[21] Therefore, in formulating corruption crimes that concern financial losses or the country's economy, it must be good and effective.

[16]Dey Ravena dan Kristian, *Kebijakan Kriminal (Criminal Policy)* (Jakarta: Kencana, 2017), 125.
[17]Nisa Yulianingsing dan R.B. Sularto, "Kebijakan Hukum Pidana Dalam Tindak Pidana Pengadaan Barang Dan Jasa," *Law Reform* 10, no. 1 (2014), 3.
[18]Mahrus Ali, "Pendekatan Hak Asasi Manusia Pada Sistem Pemidanaan Dan Putusan Perkara Korupsi," *Veritas et Justitia* 6, no. 1 (2020), 25.
[19]Susandhi Sukatma, "Perlindungan Hukum Korban Tindak Pidana Perdagangan Manusia (Human Trafficking) Dalam Perspektif Penegakan Hukum," *National Journal of Law* 6, no. 1 (2022), 8.
[20]Tanjung Nur Ghenasyarifa Albany, "Kausalitas Penegakan Hukum Tindak Pidana Korupsi Terhadap Stabilitas Keuangan Negara," *Jurnal Dharmasisya Program Magister Hukum Fakultas Hukum Universitas Indoensia* 2, no. 3 (2022), 1.
[21]Beni Kurnia Illahi dan Muhammad Ikhsan Alia, "Pertanggungjawaban Pengelolaan Keuangan Negara Melalui Kerja Sama BPK Dan KPK," *Jurnal Integritas* 3, no. 2 (2017), 5.

According to Barda Nawawi Arief, a formulation policy is a plan or program from lawmakers regarding what will be done in dealing with certain problems and how to do or implement something that has been planned or programmed.[22] When determining the policy direction in formulating criminal law, a policy-oriented approach that is more pragmatic and rational is needed and should consider an approach oriented to value factors. In this regard, Roeslan Saleh stated:

> "The necessity of rationality does not mean that ethical considerations in criminal law can be abandoned. A rational condition is a moral condition. In other words, rationality should not be obscured by ethical considerations. Ethical boundaries must be formulated as well and meticulously as possible. Within the limits of what is ethically acceptable, that rational decision must be taken."[23]

Similarly, according to Me. Grath W.T. stated:

> "Rational consideration must be partnered by moral considerations in criminal justice".[24]

This opinion can be used as a reflection that in formulating the direction of criminal law policy, it should not only be limited to rational matters but must also be juxtaposed with ethical and moral values, because morality functions with the law as a source of ethics (values) for the formation of positive laws, especially in the formation of the PTPK Law. Therefore, it is important to know the original intent or in literature also called *ratio legis*, regarding why Article 2 paragraph (1) and Article 3 of the PTPK Law are formulated as formal criminal act.

To be able to know and understand the consideration of reason as a legal reason in the formation of law, it is necessary to know the original intent or ratio of the legis.[25] In addition, understanding the original intent or *ratio legis* is very important to see the reason or purpose of the rule of law (law in *abstracto*), so that it can be helpful when applying a law (law in *concreto*).[26]

The following is the intention of the lawmaker (original intent or *ratio legis*) to formulate Article 2 paragraphs (1) and 3 of the PTPK Law as a formal criminal act:
FPP (H. Zain Badjeber):

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[22]Dey Ravena dan Kristian, *Kebijakan Kriminal (Criminal Policy),* 147.
[23]Teguh Prasetyo, *Kriminalisasi Dalam Hukum Pidana*, Edisi Kedu (Bandung: Nusa Media, 2019), 47-48.
[24]Teguh Prasetyo.
[25]Gatot Triyanto, "Ratio Legis Perbedaan Rumusan Delik Pasal 2 Dan Pasal 3 Undang-Undang Nomor 31 Tahun 1999 Jo. Undang-Undang No. 20 Tahun 2001 Tentang Pemberantasan Tindak Pidana Korupsi," *Jurnal Rechtens* 6, no. 1 (2017), 4.
[26]Firna Novi Anggoro, "Penyalahgunaan Wewenang Oleh Pegawai Negeri Sipil (Ratio Legis Pasal 36 Peraturan Pemerintah Nomor 94 Tahun 2021 Tentang Disiplin Pegawai Negeri Sipil)," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 11, no. 2 (2022), 2.

" The explanation of the law itself will say that it is against the law in the sense as intended by this law, so that there is no difficulty in proving whether it is against the law or contrary to the propriety of the community. The government's statement that it is detrimental to the country's economy or state finances in the current criminal act is made as a formal criminal act. So, it is no longer a material criminal act. Without proving the consequences of the state being harmed or the country's economy being harmed by this formal criminal act, the elements of the criminal act in question are fulfilled".[27]

Statement from the Government, Minister of Justice of the Republic of Indonesia (Prof. Dr. H. Muladi, S.H.):

"The desire to be able to reach the eradication of corruption against the modus operandi of financial irregularities or the state economy is increasingly sophisticated and complicated. For this reason, the norms regarding criminal acts regulated in this bill are formulated in such a way that they include the act of enriching oneself or another person or a corporation "unlawfully" in a formal sense. In addition, the formulation "unlawfully" which contains a formal formulation, is also intended to make it easier to obtain proof of acts that can be punished, namely acts of enriching oneself or other people or corporations. The formal criminal act formulation adopted in this law is that even though the proceeds of corruption have been returned to the state, the perpetrators of corruption crimes are still submitted to the court and can be punished. Meanwhile, the return of the proceeds of corruption can be a mitigating factor in criminal imposition".[28]

The intention of the legislator is coherent with the consideration of 4 (four) Constitutional Judges (I Dewa Gede Palguna, Suhartoyo, Aswanto[29] and Maria Farida Indrati) who in their different opinions (dissenting opinion) stated that the application in decision number 25/PUU-XIV/2016 should be rejected, with one of the following reasons:

"Considering that the Court believes that losses incurred in corruption crimes, especially large-scale ones, are very difficult to prove precisely and accurately. The accuracy demanded in such a way will raise doubts, about whether if a single figure of the amount of loss is submitted and cannot always be proven accurately, but the loss has occurred, it will result in whether the act charged is proven or not.

[27]Risalah Rapat Panitia Khusus RUU Pemberantasan Tindak Pidana Korupsi pada Pembicaraan Tingkat III di Komisi III DPR-RI, Rapat kerja ke-4, 21 April 1999, 28.

[28]Keterangan Pemerintah di Hadapan Rapat Paripurna DPR-RI mengenai RUU tentang Pemberantasan Tindak Pidana Korupsi, 1 April 1999, 7.

[29]Aswanto merupakan satu-satunya Hakim Konstitusi pemutus pemutus perkara yang latar belakang keilmuannya Guru Besar di bidang hukum pidana dan hak asasi manusia. Sehingga menurut penulis Aswanto sangat memahami politik hukum perumusan ketentuan Pasal 2 ayat (1) dan 3 UU PTPK dalam kaitannya dengan kondisi korupsi di Indonesia yang mengakar kuat.

> This is important to encourage anticipation of the accuracy of the perfection of proof so that it is considered necessary to simplify the burden of proof".[30]

In addition to the dissenting opinion of the Constitutional Judge above, the word "can" which is the embodiment of the formal criminal act in Article 2 paragraphs (1) and 3 of the PTPK Law had previously been submitted for judicial review in the decision of the Constitutional Court 003/PUU-IV/2006, which stated that the issue of actual loss and possibility (potential loss) is a problem in the practice of law enforcement by law enforcement officials, and not related to the constitutionality of norms. Therefore, the postulates and applications should be rejected.[31]

Constitutional Judges who are in the "reject the petition" camp have actually made a teleological interpretation, namely interpreting the word "can" in the provisions of Article 2 Paragraph (1) and Article 3 of the PTPK Law which emphasizes the prevention aspect and as an effort of shock therapy. This action is a response to the crime of corruption, which is recognized as an extraordinary crime by the international community. For this reason, extraordinary measures are needed in prevention. Thus, the formulation as a formal criminal act is intended to avoid potential losses.[32] This teleological interpretation focuses on purpose the formulation of Article 2 Paragraph (1) and Article 3 of the PTPK Law,[33] namely the purpose as stated in the minutes of the discussion meeting of the Draft PTPK Law earlier.

However, the composition of the Constitutional Judges' camp in Case Number 25/PUU-XIV/2016 was unbalanced, with 4 Judges rejecting the petition and 5 other Judges granting it, so that the petition is granted and the applicant wins. The ruling that approves the petition is founded on the principle that state financial losses need to be demonstrated real and certain.[34] The loss in question must be measurable and not just an estimate (potential loss). If proof of loss is not presented accurately, then the logical consequence is that the defendant must be acquitted (*vrispraak*), in accordance with the principle of proof in the criminal law procedure.[35]

The verdict is free against the perpetrators of corruption because it cannot be proven accurately and definitely state losses, but the perpetrators should be sentenced to a

[30]Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016, 119.
[31]Putusan Mahkamah Konstitusi 003/PUU-IV/2006, 72. Lihat juga Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016, 120.
[32]Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Jakarta: Kencana, 2015), 296.
[33]Peter Mahmud Marzuki, 295.
[34]Kusnadi Umar, "Pasal Imunitas Undang-Undang 'Corona' Dan Kewenangan Badan Pemeriksa Keuangan Dalam Menetapkan Kerugian Negara," *El-Iqtishady* 2, no. 1 (2020), 9.
[35]Ryvaldo Vially Korua et al, "Kajian Hukum Putusan Bebas (Vrijspraak) Dalam Perkara Pidana," *Lex Crimen* 9, no. 4 (2020), 2.

criminal verdict if the losses are interpreted as potential losses and all elements of Article 2 paragraph (1) and Article 3 of the PTPK Law are fulfilled, of course, such a free verdict is unfair and ignores the morality aspect. This is because acts of corruption related to the country's finances or economy not only undermine public trust and dignity the judicial, but also undermine people's social rights and other aspects of morality.

However, the decision of the Constitutional Court Number 25/PUU-XIV/2016 which is final and *res judicata proveritate habetur* has ended the cross-opinion between the pros and cons regarding the concept of actual loss and potential loss in the formulation of Article 2 paragraph (1) and Article 3 of the PTPK Law. Regarding the decision of the Constitutional Court No. 25/PUU-XIV/2016 which is *res judicata proveritate habetur*, Herman Kantorowichs, a great jurist of Germany, likened a court decision issued by the court to the same as a doctor who writes medicine on the prescription paper of his patients and is believed to be a truth to cure patients.[36] However, according to the author, the analogy made by Herman Kantoro which is not correct. Because patients who are sick and seek treatment from a doctor are essentially trying to get a cure for the disease as expected. However, it is not uncommon for the prescription of drugs given by doctors not to bring healing or it is possible for a doctor to commit malpractice so that the patient continues to suffer from pain or even gets sicker. Therefore, the patient has the right to seek other efforts to get the expected recovery and has the right not to use any further prescription from the doctor.

The same is true of the decision of the Constitutional Court Number 25/PUU-XIV/2016 which according to the author's stance is not correct by changing the formulation of Article 2 paragraph (1) and Article 3 of the PTPK Law which was originally designed as a potential loss to an actual loss, while the Constitutional Judge in the camp of "granting the petition" does not understand the legal politics of eradicating corruption crimes Article 2 paragraph (1) and Article 3 of the PTPK Law by digging original intent or *ratio legis* the provisions of the Article.[37] Therefore, even though the decision of the Constitutional Court Number 25/PUU-XIV/2016 is final and

[36]Zainal Arifin Mochtar dan Eddy O.S. Hiariej, *Dasar-Dasar Ilmu Hukum: Memahami Kaidah, Teori Asas Dan Filsafat Hukum* (Jakarta: Red and White Publishing, 2021), 169.

[37]Keterangan DPR dalam Putusan Nomor 25/PUU-XIV/2016 masih konsisten dan selaras dengan risalah rapat Pansus RUU PTPK sebagaimana diuraikan sebelumnya, bahwa penambahan kata “dapat” dimaksudkan untuk mempermudah pada pembuktian. Dalam Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016, 84. Demikian juga dengan keterangan Presiden dalam Putusan Nomor 25/PUU-XIV/2016 masih konsisten dan selaras dengan keterangan Menteri Kehakiman Prof. Muladi dihadapan DPR-RI pada Rapat Paripurna sebagaimana diuraikan sebelumnya, bahwa kata “dapat” untuk menjangkau berbagai macam modus operandi penyimpangan keuangan atau perekonomian negara yang semakin canggih dan rumit, sehingga dengan begitu mempermudah pada pembuktian. Dalam Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016, 69.

valid in terms of authority and procedure. However, in substance,[38] decision the Constitutional Court is not correct, so the decision has no validity and is not required to be obeyed because "in violation of common right and reason".[39] Therefore, in reading and understanding the principle of *res judicata* in the Constitutional Court's decision, must be read in frame of the justice and fairness principle.

However, in terms of its positive role, the Constitutional Court has an important role in considering "counterweighing" decisions taken by other branches of power, especially legislative and executive branches of power. This role is part of constitutionalism which has the purpose of avoiding abuse of power, namely with the authority it has to cancel an act that is contrary to the constitution. In other words, the Constitutional Court has a role to prevent tyranny and abuse of power.[40] The Constitutional Court's decision, if associated with Article 10 paragraph (1) letter d of Law Number 12 of 2011 concerning the Establishment of Statute determines that the content material that must be regulated by the Law contains a follow-up to the Constitutional Court's decision, then this further clarifies the Constitutional Court and the decision issued has implications in the formation of a Law. Therefore, the Constitutional Court's decision in testing the constitutionality of a law must be consistent so that there is no disparity in decisions that leads to injustice.

Reconstruction of the Meaning of Financial or State Economic Losses in Corruption Crimes After the Constitutional Court Decision Number 25/PUU-XIV/2016

Corruption is essentially a dishonest act, so it is considered reprehensible or also considered an act of immorality, so that it is not only prohibited by legal norms, but also by religious norms. The Qur'an has taught the principle of "*La tho'ata li makhluqin fi ma'syiati al-khaliq*", that there is no obedience among fellow creatures in committing sins against Allah. It can also be understood that every human being should not obey anyone in sinful acts, such as corruption. Humans can only obey if that obedience is in accordance with good and right principles and rules.[41]

[38]Tidak semua putusan Mahkamah Konstitusi benar dan sah secara substansi maupun prosedur. Demikian halnya putusan Nomor 25/PUU-XIV/2016 yang cacat substansi. Salah satu contoh putusan Mahkamah Konstitusi yang sangat jelas cacat substansi dan prosedur ialah putusan Mahkamah Konstitusi 90/PUU-XXI/2023 yang menjadi gerbang utama bagi Gibran Rakabuming Raka (putra sulung Joko Widodo) terpilih menjadi Wakil Presiden 2024-2029.

[39]Peter Mahmud Marzuki, *Teori Hukum* (Jakarta: Kencana, 2020), 183.

[40]Elva Imeldatur Rohmah dan Zainatul Ilmiyah, "Dinamika Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 Tentang Persyaratan Usia Calon Presiden Dan Wakil Presiden," *Progresif: Jurnal Hukum* 18, no. 1 (2024), 105.

[41]Jimly Asshiddiqie, *Perkembangan-Perkembangan Baru tentang Konstitusi dan Konstitusionalisme.* Dalam Jimly Asshiddiqie et al, *Dinamika Perkembangan Hukum Tata Negara dan Hukum Administrasi Pasca Reformasi Di Indonesia Persembahan Bagi 75 Tahun Dr. Harjono, S.H., MCL* (Jakarta: Petromindo, 2023), 35.

In addition to personal awareness not to commit corruption, obedience and seriousness can also be shown by a person *ulil albab* or statesman when trying to develop and reformulate principles and rules for eradicating corruption that are good and effective, for the realisation of an Indonesian state that is '*baldatun toyyibatun warobbun ghofur*', a country that is clean or at least almost clean from corruption, collusion and nepotism that brings prosperity to all mankind. This effort is of course intended to eradicate corruption, both repressively and preventively.

Efforts to preventively counter corruption crimes in Indonesia are inseparable from the anti-corruption legal culture, namely by changing the mentality and morals of the state financial organizers and managers, improving and perfecting national bureaucratic reform from the regional level to the central level as well as strengthening the anti-corruption culture towards the community.[42] However, if people are allowed to commit corrupt acts, then it will be very difficult for people to be able to distinguish between corrupt acts and non-corrupt acts.[43] Therefore, it can be understood that acts of corruption can no longer be limited by public and private limitations,[44] so in the context of this research, an extraordinary way is needed to eradicate corruption in Indonesia through legal substance instruments for the renewal of the PTPK Law, not through the legal structure or legal culture.

One of the 3 (three) indicators of the success of corruption eradication in Indonesia is the Corruption Perceptions Index which measures corruption in the public sector against a country with a score scale of 1-100. The Corruption Perception Index is international and has credibility recognized by the world, so the higher the Corruption Perception Index score, the cleaner the country is from corruption. Conversely, if the score gets closer to zero, then the country is getting more corrupt. In addition, it is also a pride for the country if it is in the top ranking. But on the other hand, it is a shame if a country is at the bottom of the ranking.[45] In the last 10 years, at least the world has shown how the perception of corruption in Indonesia is by the Corruption Perception Index as follows:

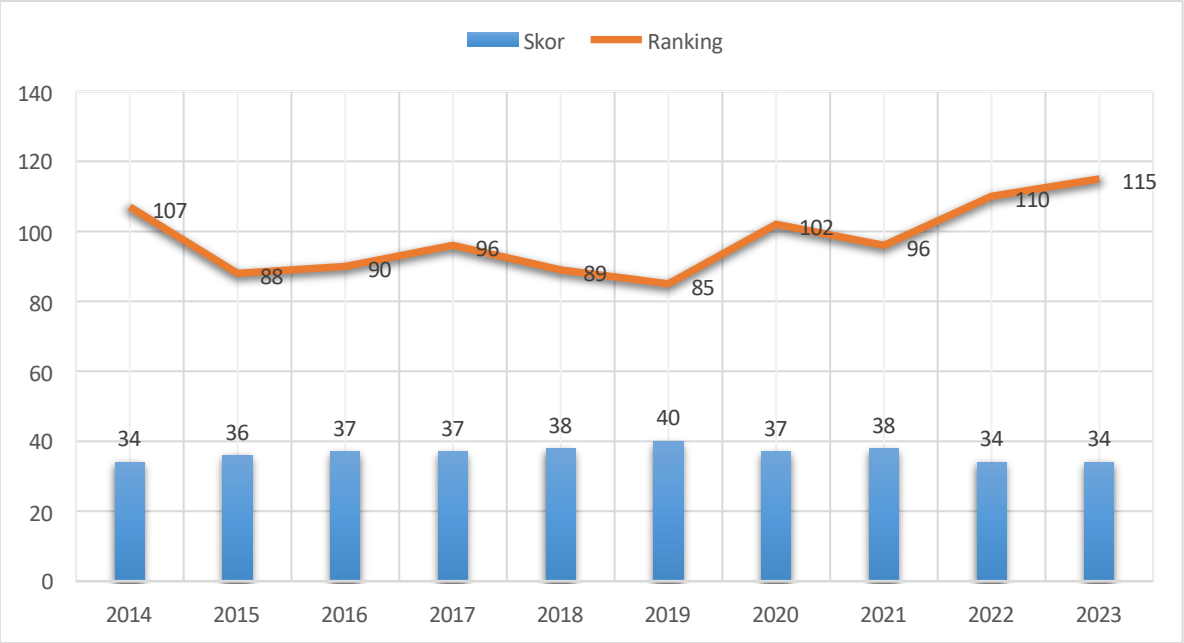
Figure 1: Graph of the Corruption Perception Index in Indonesia in 2014-2023

[42]Supriardoyo Simanjuntak dan Kornelius Benuf, "Relevansi Nilai Ketuhanan Dan Nilai Kemanusiaan Dalam Pemberantasan Tindak Pidana Korupsi," *Diversi Jurnal Hukum* 6, no. 1 (2020), 21

[43]Arya Naheka, *Mengenali Dan Memberantas Korupsi* (Jakarta: Komisi Pemberantasan Korupsi, 2005), 4.

[44]Safitri Hariyani, "Kriminalisasi Suap Di Sektor Swasta Sebagai Tindak Pidana Korupsi" (Universitas Airlangga, 2023), 16.

[45]Tanpa Penulis, "Tiga Indikator Keberhasilan Pemberantasan Korupsi," Pusat Edukasi AntiKorupsi, 2022, https://aclc.kpk.go.id/aksi-informasi/Eksplorasi/20220522-tiga-indikator-keberhasilan-pemberantasan-korupsi. diakses 8 Agustus 2024.



Source: Transparency International[46]

From the Corruption Perception Index graph above, it can be understood that corruption in Indonesia is still an acute disease and there has been no significant good change. It is also understandable that Indonesia is increasingly failing to eradicate corruption, this is shown by the decline in the Corruption Perception Index score from 2019 to 2023 on average. This also indicates that the legal substance (the PTPK Law) has not been able to become a legal instrument that has extraordinary influence in eradicating corruption in Indonesia. Lagging by being ranked 115th in 2023 should be made something of an embarrassment for all Indonesian people, especially for lawmakers in evaluating and updating the PTPK Law.

In the context of the construction of Article 2 paragraph (1) and Article 3 of the PTPK Law after the decision of the Constitutional Court Number 25 / PUU-XIV / 2016 related to the meaning of financial losses or the state economy which is interpreted as a actual loss or a material criminal criminal act qualification, an extraordinary way is needed in combating corruption, namely by reconstructing the meaning of financial losses or the state economy into potential losses or formal criminal criminal act. Urgency of such changes is due to the fact that Indonesia is a developing country that is very vulnerable to corruption and various financial irregularities. According to author, Indonesia is currently not at the right time to have legal instruments Article 2 paragraph (1) and Article 3 of the PTPK Law with the concept of state losses that must be actual, if corruption is so high and so massive in quantity.

[46]Tanpa Penulis, "Corruption Perceptions Index," Transparency International, accessed August 8, 2024, https://www.transparency.org/en/cpi/2023?gad_source=1&gclid=Cj0KCQjwtsy1BhD7ARIsAHOi4xYezCRXBEE_e3npw7Pvg0oYeoKkoPhlkP5pze9kf4AN-SYACjVamPwaAixKEALw_wcB. diakses 8 Agustus 2024.

The same thing was also stated by 4 (four) Constitutional Judges who submitted dissenting opinions, that there is no fundamental reason in empirical-sociological conditions (data-based) that can be rationally used as a strong reason for the Court to change its position to interpret potential losses into actual losses.[47] Based on the empirical-sociological conditions of corruption in Indonesia, it must be understood that amending Article 2 paragraph (1) and Article 3 of the PTPK Law with the qualification of a formal criminal act or using the concept of potential loss is equivalent to 'one of the efforts' eradicate corruption which is an acute disease in Indonesia.

The formulation of potential losses before the enactment of the Constitutional Court decision Number 25/PUU-XIV/2016 is seen as an extraordinary measure in eradicating acute disease corruption in Indonesia, including corruption in the financial sector or the state economy. So even though the perpetrator returns state losses, either partially or completely, does not remove the unlawful nature and criminal liability of the perpetrator for the enforcement of Article 4 of the PTPK Law. Because based on explanation of Article 4 of the PTPK Law, return of the loss is only used as a clemency (things that relieve) in the imposition of a criminal penalty.

However, precedent practices are not always the same as rules. Recognition the material lawlessness in its negative function in the precedent of the Machroes Effendi case is usually used by jurists to exempt corruption defendant from punishment, provided that the defendant returns the losses or the state economy obtained. Machroes Effendi case in decision Number 42K/Kr/1965 states that the elimination of the unlawfulness of an act is not due to a provision in the law, but based on the principle of justice or legal principles that are unwritten and general. In the case of for example the following factors: (1) the state does not suffer losses; (2) the public interest is served; and (3) there is no profit obtained by the defendant.[48] So if it is based on this theory, the nature of material lawlessness in its negative function becomes lost or no longer constitutes a 'criminal act'.[49]

According to the author, referring to this theory in the application of Article 2 paragraphs (1) and 3 of the PTPK Law is inappropriate. Considering that all corruption crimes, including corruption that concerns financial or economic losses of the state, are immoral acts. So that according to the author, the applicability of Article 4 of the PTPK Law cannot be deviated from and the perpetrator must still be held criminally responsible for his immoral actions. The precedent of the corruption case of Machroes Effendi in the Supreme Court's decision is inappropriate if it is used as a reference in decision-making in the same case.[50] Because Indonesia is a country that adheres to the civil law system, the syllogism of

[47]Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016, 121-122.
[48]Komariah Emong Sapardjaja. Dalam Didik Endro Purwoleksono, *Hukum Pidana : Untaian Pemikiran,* 38.
[49]Didik Endro Purwoleksono, 184.
[50]Putusan dalam kasus Machroes Effendi dan Bank Bumi Daya terjadi pada tahun 1965 dan 1983, yaitu jauh sebelum adanya Pasal 4 UU PTPK yang diundangkan pada tahun 1999. Karakterstik sifat melawan hukum Pasal 2 ayat (1) UU PTPK yang bermakna melawan hukum formil dan materiil telah dimaknai melawan

a judge is not "based on precedent", but "based on rules" as a consequence of adhering to the principle of the supremacy of legislative power,[51] namely by originating from Article 4 of the PTPK Law, not based on the case of the decision of Machroes Effendi. This is also because statute is placed as a source of formal law that is primary and is used as the first reference.[52] Meanwhile, court decisions are placed as a formal source of law that is secondary in decision-making.[53]

The shift in the meaning of financial or economic losses of the country which originally meant potential to actual (formal criminal act into a material criminal act) through the Constitutional Court decision Number 25/PUU-XIV/2016, the author believes that the Constitutional Court's decision does not emit morals. Potential state losses must be proven and calculable, even if they are estimated or even if they have not yet occurred. However, actual or possible losses are only used as aggravating or mitigating circumstances in punishment as explained in Article 4 of the PTPK Law.[54] Meanwhile, on the other hand, at the same time, acts of corruption not only have an impact on the physical and existential aspects of mankind but also damage the noble ideals that are associative-cooperative with the desire to be able to carry out a community life full of love and an attitude of togetherness through direct or indirect benefits from the country's finances or economy. This sense of love and togetherness is what Peter Mahmud Marzuki calls moral. The Court's decision that has implications becomes a rule and if the rule is contrary to the essence of humanity, then the rule is immoral and does not deserve to be called a "law".[55]

Even before it is known that the (material) consequences of the country's financial or economic losses are real and definite amounts, even before, corruption has damaged love and does not reflect an attitude of togetherness. Because harming the country's finances or economy which is carried out illegally for the benefit of oneself, others, or corporations by harming one's finances or the country's economy is an attitude of selfishness or its cronies, not an attitude of loving togetherness. Therefore, it is natural that corruption is positioned as a common enemy of humanity (*hostis humanis generis*)[56] and its eradication requires a comprehensive approach and extraordinary measures.[57]

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hukum secara formil sejak adanya putusan Mahkamah Konstitusi Nomor 003/PUU-IV/2006. Lihat putusan Mahkamah Konstitusi Nomor 003/PUU-IV/2006, 74, 77-78.

[51]Philiphus M. Hadjon dan Tatiek Sri Djatmiati, *Argumentasi Hukum,* 36-37.

[52]Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, 259.

[53]Hakim di negara *civil law system* tidak serta-merta terikat pada preseden, hal ini karena preseden dapat di modifikasi atau dianulir setiap saat. Dalam Peter Mahmud Marzuki, 281.

[54]*Dissenting Opinions* 4 (empat) Hakim Konstitusi. Lihat Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016, 120.

[55]Kata sambutan yang disampaikan Peter Mahmud Marzuki. Dalam Joko Priyono et al, *Hukum Sebagai Pancaran Moral Dalam Rangka Memperingati 70 Tahun Guru, Sahabat, Dan Bapak Kami Prof. Dr. Peter Mahmud Marzuki, S.H., M.S., LL.M,* X.

[56]Dadin E. Saputra dan Afif Khalid, "Impilkasi Hukum Atas Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016 Terhadap Pemberantasan Tindak Pidana Korupsi," *Syariah: Jurnal Hukum Dan Pemikiran* 18, no. 1 (2018), 9.

[57]Srimin Pinem et al, "Dinamika Pemberantasan Tindak Pidana Korupsi Di Indonesia," *Jurnal Yuridis* 10, no. 2 (2023), 92.

On that basis, futuristically, the meaning of financial or economic losses of the state in Article 2 paragraphs (1) and 3 of the PTPK Law must be returned in the formulation of formal criminal act that underlies the spirit of the formation of the Article, namely to overcome various modes of corruption crimes that are increasingly sophisticated and complicated by making it easier for law enforcement to prove it. This policy to facilitate proof is of course coherent and inherent with the concept of reversing the burden of proof in a balanced manner (*omkering van bewijslast*) which is also intended to facilitate proof.

The reconstruction of the meaning of financial or economic losses of the state also must be interpreted systematically to the purpose of the establishment of the state of the Republic of Indonesia in the preamble of the 4th paragraph of the Constitution, which is to promote public welfare, educate the life of the nation, and participate in implementing a world order based on independence, lasting peace, and social justice. Teleological and systematic reconstruction of the meaning of financial or economic losses of the state in Article 2 paragraphs (1) and 3 of the PTPK Law is certainly full of moral hope, namely to ensure the creation of a community life full of love and an attitude of togetherness through direct or indirect benefits from the country's finances or economy.

Change from material criminal act to formal criminal act is very important because corruption not only eats away at the real state finances but also violates very serious morals, namely the destruction of the joints of the life of the nation and the state. Starting from the behavior of people who tend to contribute to corruption, damage to public services, inadequate public facilities, and damage to other social rights. Corruption is a criminal act that can endanger the stability and security of society, endanger social, economic, and political development, and can damage democratic values and morality because gradually this act seems to become a culture so the problem of corruption is a very serious problem for a country.[58]

However, the perpetrators of corruption crimes are not left alone. The perpetrator has the right to receive corrective justice for his actions. Actual and potential, small or large nominal state financial losses of the state that are corrupted, and partially or wholly returned state financial losses that are corrupted, the perpetrators of corruption must be punished proportionally following the enactment of Article 4 of the PTPK Law which is full of normative expectations and full of value. Regarding the perpetrators of the crime of corruption, Thomas Aquinas views them as a sick person who must be treated to return to society (*poenae ut medicine*).[59] Therefore, the criminalization of the perpetrators of corruption crimes has a philosophy of liberation, namely freeing oneself from the thoughts, natures, habits, or level of evil behavior in the perpetrator. Liberation also instills and

[58]Bandaharo Saifuddin, "Dampak Dan Upaya Pemberantasan Tindak Pidana Korupsi Di Indonesia," *Jurnal Warta Dharmawangsa*, no. 52 (2017), 2.
[59]Zainal Arifin Mochtar dan Eddy O.S. Hiariej, *Dasar-Dasar Ilmu Hukum: Memahami Kaidah, Teori Asas Dan Filsafat Hukum,* 164-165.

fosters a sense of love for the homeland, the archipelago, and the nation towards the perpetrator.[60] So that the punishment of the perpetrators of corruption at this time is no longer retaliatory and is not intended to degrade human dignity,[61] but is intended to socialize the perpetrators to become good and useful people and foster a sense of regret and release guilt in the perpetrators by providing coaching and guidance.[62]

Punishment for perpetrators of corruption crimes as referred to is also in line with the paradigm of modern corruption law enforcement in the current era. By referring to the United Nations Convention Against Corruption (UNCAC) or the United Nations Convention on Anti-corruption which has been ratified through Law Number 7 of 2006 concerning the Ratification of the United Nations Convention Against Corruption (2003), implicitly, the paradigm adopted including corrective, rehabilitative and restorative justice no longer refers to retributive justice.[63] Corrective justice is related to the punishment imposed on corruption convicts which aims to provide a deterrent effect. Rehabilitative justice aims to improve corruption convicts and restorative justice related to the return of corrupt state assets.[64] Therefore, the follow-the-suspect approach, which is put forward in handling cases, should also be followed by the follow-the-money and follow-the-asset approach,[65] namely returning as much state money (asset recovery) as possible and providing a deterrent effect for the perpetrators at the same time.[66]

4. Conclusion

If viewed from the original intent or *ratio legis* of Article 2 paragraphs (1) and 3 of the PTPK Law, the criminal law policy in formulating the meaning of financial or economic losses of the state in Article 2 paragraph (1) and Article 3 of the PTPK Law is intended to eradicate corruption and can overcome various kinds of increasingly sophisticated and complicated modus operandi in Indonesia related to financial irregularities or the state economy. So, an extraordinary way is needed to make it easier to prove the crime of corruption by formulating the word "can" or formulating it in the form of a formal criminal act, which is enough with the fulfillment of the elements of Article 2 paragraph (1) and 3 of the PTPK Law. This is also intended to overcome large-scale corruption cases that are very difficult to prove precisely and accurately state losses, so extraordinary measures are needed by formulating them as formal criminal act to facilitate proof.

[60]J.E. Sahetapy, *Ancaman Pidana Mati Terhadap Pembunuhan Berencana* (Bandung: Alumni, 1979), 219.
[61]Pasal 52 Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana.
[62]Lihat Pasal 51 Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana.
[63]Eddy O.S. Hiariej, "Menyoal Putusan Pengadilan Tindak Pidana Korupsi," *Masalah-Masalah Hukum* 42, no. 1 (2013), 57.
[64]Eddy O.S. Hiariej.
[65]Muhammad Yusni, *Keadilan Dan Pemberantasan Tindak Pidana Korupsi Perspektif Kejaksaan* (Surabaya: Airlangga University Press, 2019), 19.
[66]July Wiarti, "Non-Conviction Based Asset Forfeiture Sebagai Langkah Untuk Mengembalikan Kerugian Negara (Perspektif Analisis Ekonomi Terhadap Hukum)," *UIR Law Review* 1, no. 1 (2017), 102.

The reconstruction of the meaning of financial or economic losses of the state in Article 2 paragraphs (1) and 3 of the PTPK Law after the decision of the Constitutional Court Number 25/PUU-XIV/2016 is to restore the meaning of financial losses or the state economy with the formulation of formal delik or potential loss as the spirit underlying the formation of the Article. The meaning of state financial losses or the state economy Article 2 paragraphs (1) and 3 of the PTPK Law is potentially must be understood that before it the real and definite amount of financial or economic losses of the state, corruption related to state finance or economy has damaged love and at the same time damaged the attitude of togetherness to be able to carry out community life in an associative-cooperative manner. In addition, acts of corruption related to the country's finances or economy have damaged the noble ideals of the establishment of the state of Indonesia, namely advancing public welfare, educating the nation's life, and participating in the implementation of a world order based on independence, lasting peace, and social justice as a manifestation of morality that cannot be assessed, measured or assessed. Because every act of corruption related to state finance or the state economy is immoral and must be punished proportionately.

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