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Elements of Article 2 of the Corruption Crime Law After the Constitutional Court Decision Number 25/PUU-XIV/2016

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ABSTRACT

This research aims to analyze the implementation of Constitutional Court Decision Number 003/PUU-IV/2006 after Constitutional Court Decision Number 25/PUU-XIV/2016 and to analyze the relationship between the decision of Constitutional Court Decision Number 25/PUU-XIV/2016 on Civil Servants. There is *nebis in idem* between Constitutional Court Decision Number 25/PUU-XIV/2016 and the previous Constitutional Court Decision, namely Constitutional Court Decision Number 003/PUU-IV/2006. The similarity is in the form of the same basis of testing and the material being tested, namely Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law against Article 28D paragraph (1) of the 1945 Constitution. The previous Constitutional Court Decision ruled that the phrase “may harm state finances or the state economy” in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law was not contrary to the 1945 Constitution. But with the latest Constitutional Court Decision, on the contrary, it was declared contrary to the 1945 Constitution. The change in the Constitutional Court's stance in the latest Decision raises inconsistencies in interpretation, which can lead to legal uncertainty and there is no criminalization implication of the State Civil Apparatus (ASN) from the phrase “may harm state finances or the state economy” in the Anti-Corruption Law as feared by the Petitioner. Discretionary policies (*freis ermessen*) have received a legal umbrella in the AP Law, and if based on the principles of good public governance, there will be no criminalization. Because what is wrong is not the discretionary policy, but the evil intent of the policy makers to enrich themselves, others, or corporations that are considered to harm state finances.

KEYWORDS

Corruption;
Civil Servants;
Constitutional
Court



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INTRODUCTION

Corruption is one of the most detrimental crimes to the state. The losses caused by corruption are not only in the form of state financial losses, but also social and economic losses. Therefore, the eradication of corruption is one of the important agendas in national development.¹ One of the efforts to eradicate corruption is through law enforcement. One of the legal instruments used in the eradication of corruption is Law Number 31 of 1999 concerning the Eradication of Corruption (Anti-Corruption Law). Article 2, paragraph (1) and Article 3 of the Anti-Corruption Law regulate corruption offenses that can harm state finances or the state economy.

The element against the law in corruption cases is important and decisive for the existence of a corruption crime that must be accounted for, both official responsibility and personal responsibility.² The consequences of personal responsibility are related to criminal responsibility. According to Philipus M. Hadjon, official responsibility focuses on the legality of actions with the parameters of legislation and general principles of good governance. Personal responsibility, on the other hand, focuses on despicable treatment or actions in the context of criminal responsibility, namely, responsibility for actions that should not be carried out unlawfully, because they are contrary to a sense of justice and social norms that apply in community life.³

Before the issuance of the Constitutional Court decision No. 25/PUU-XIV/2016, in practice, the application of the two articles caused problems. The formulation of Article 2 paragraph (1) and Article 3 of Law No. 31 of 1999, which are almost the same and broad, has caused the two articles to be used as “waste basket” articles for perpetrators who are deemed to have committed corrupt acts. As a result, many civil servants or public officials are afraid to take policies that are categorized as corruption crimes, causing losses to state finances. Similarly, the word “may” in the phrase “harming state finances or the state economy” in Article 2, paragraph (1) and Article 3 of Law No. 31 of 1999, which in practice creates problems. This is seen as causing injustice and legal uncertainty for the defendant.⁴

Against the law in the context of Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning the Eradication of Corruption (UU PTPK), is classified as a criminal offense or formal offense, where the elements of the act must have been fulfilled, and not as a material offense, which requires that the consequences of the act in the form of losses arising must have occurred.⁵ This is interesting to study, because in practice it is still a multi-interpretation for judges or other law enforcement officials on the element of “against the law”.

¹ Novella Janis, Audi H Pondaag & Adi T Koesoemo, “Kerugian Keuangan Negara Menjadi Dasar Penyidikan Perkara Pidana Korupsi Pasca Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016” (2023) 12:4 J Fak Huk Univ Sam Ratulangi Lex Priv 1.

² Yusron Ashalirrohman, “Deontology and Equality in Corruption Law Enforcement” (2025) 1:1 Iuris Philos J 1-10, online: <<https://jurnal.jurisprudenceinsights.com/index.php/Iurisphilosophiajournal>>.

³ Philipus M Hadjon, *Tanggung Jawab Jabatan dan Tanggung Jawab Pribadi Atas Tindak Pemerintahan* (Bogor, 2010).

⁴ Vidya Prahassacitta, “Perubahan Makna Terhadap Pasal 2 dan 3 Undang-Undang Nomor 31 Tahun 1999 Pasca Putusan Mahkamah Konstitusi” (2018) 15:3 J Konstitusi.

⁵ Yusron Ashalirrohman, “Asset Forfeiture for the Offense of Illicit Enrichment: Between Eradication and Deterrence” (2024) 8:1 Lex J Kaji Huk dan Keadilan 1-12.



Since the decision of Case Number 25/PUUXIV/2016, the validity of the offense in Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption (Corruption Eradication Law) has shifted in meaning because it has been declared invalid and contrary to the 1945 Constitution. The shift in meaning towards the applicability of the offenses in Article 2, paragraph (1) and Article 3 of the Anti-Corruption Law stems from a petition filed by 7 Petitioners with civil servant backgrounds and retired civil servants from different regions. Three of the seven Plaintiffs argued that they were victims of the enactment of Article 2(1) and Article 3 of the Anti-Corruption Law because they had been charged under the provisions. Meanwhile, the other Plaintiffs argued that the provisions a quo have the potential to harm their constitutional rights in their position as State Civil Apparatus (ASN). As ASN, the Plaintiffs often issue decisions in terms of implementing policies, in the form of implementing development projects in their respective regions. The policy has the potential to be penalized by the enactment of the provision in question.

The Plaintiffs' objection, in particular, is to the applicability of the phrase "may" and the phrase "or any other person or corporation". The Applicants argue that it is impossible for state officials not to issue decisions aimed at implementing development projects in their respective regions, and it is also impossible for projects won by the project organizers (tender winners) not to benefit from the projects they organize.⁶ So that the applicability of the norms a quo, at any time, can be imposed on the Plaintiffs, even though they are in a position to carry out their duties and functions as ASN as ordered by statutory regulations. In full, the formulation of Article 2, Paragraph (1) and Article 3 of the Anti-Corruption Law reads:

Article 2 Paragraph (1)

"Every person who unlawfully commits an act of enriching himself or herself or another person or a corporation that may harm the state finances or the state economy, shall be punished with life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years and a fine of at least Rp. 200,000,000,000.00 (two hundred million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah)."

Article 3

"Every person who to benefit himself or herself or another person or a corporation, abuses the authority, opportunity or means available to him or her because of his or her position or position which may harm the state finances or the state economy, shall be punished with life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty years) and or a fine of at least Rp. 50,000,000.00 (fifty million rupiahs) and a maximum of Rp. 1,000,000,000.00 (one billion rupiahs)."

Although the Constitutional Court did not grant all of the Petitioners' requests, it ultimately interpreted that one of the elements of the corruption offense is "actual

⁶ Fatkhurohman & Nalom Kurniawan, "Pergeseran Delik Korupsi Dalam Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016" (2017) 14:1 J Konstitusi.



loss” (real state losses) and not “potential loss” (potential state financial losses or estimates of state financial losses) as has been regulated and practiced. This has led to a shift in the meaning of the offense in Article 2, paragraph (1) and Article 3 of the Anti-Corruption Law, which was originally a formal and material offense, to a material offense only.

The use of the word “may” by the Petitioner is considered to have the potential to cause abuse of authority by law enforcement officials to decide cases, so that the element of objectivity is difficult to prove. With the Constitutional Court Decision that abolishes the word “may” in Article 2 paragraph (1) and Article 3 of the corruption law, the corruption offense, which has been a formal offense, has turned into a material offense that requires an effect, namely the element of state financial loss must be calculated in real or certain terms. Regarding the application of the element of harm to state finances, it has shifted to emphasize the existence of consequences (material offense), where the element of harm to state finances is no longer understood as an estimate (potential loss), but must be understood to have occurred (actual loss) in the crime of corruption.⁷

If the offense element “may harm state finances or the state economy” is excluded from Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law, this provides a new challenge to the role and duties of the authority of the Police, the Prosecutor’s Office, and the Corruption Eradication Commission (KPK) in combating corruption.⁸ As the Constitutional Court Decision Number 25/PUU-XIV/2016 which has canceled the phrase “may”, in the sentence “may harm the state finances or the state economy” listed in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law, the offense which was originally a formal offense has changed to a material offense. Because the meaning of state losses is no longer a potential loss, but must be an actual loss. In one of the considerations of its decision, the Constitutional Court was of the view that the application of the element of state loss by using the conception of actual loss provides more just legal certainty and is by efforts to synchronize and harmonize between legal instruments.⁹ If the consideration of this decision is an effort to uphold material law because it prioritizes real losses, then the question becomes whether the consideration of this decision is a form of substantive justice that has been echoed by the Constitutional Court by relying on progressive law to make legal breakthroughs in achieving legal expediency and justice.¹⁰ If this is the case, then the output of this thought is certainly aimed at

⁷ Rio Rinaldi Silalahi, “Penegakan Hukum Pemberantasan Tindak Pidana Korupsi Pasca Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016” (2018) 2:3 LEX Renaiss 304–320.

⁸ Tsuwaibah Abidah et al, “Comparison of the Civil Law System between the Netherlands and Indonesia in the Application of Criminal Law” (2025) 1:1 J Verum Legis Indones 38–44, online: <<https://journal.abhinaya.co.id/index.php/jvli/article/view/41>>.

⁹ Muh Zafri Ramadhan, “Failure of Criminal Sanctions in Law Enforcement Environmental Crime in Indonesia” (2025) 1:1 J Verum Legis Indones 28–37, online: <<https://journal.abhinaya.co.id/index.php/jvli/article/view/31>>.

¹⁰ La Ode Maulidin, “Analisis Putusan MK dalam Menyelesaikan Perselisihan Hasil Pemilu pada Ditinjau dari Perspektif Teori Hukum Progresif (Kajian Terhadap Putusan MK atas Sengketa Hasil Pemilu Kepala Daerah Jawa Timur dan Putusan MK dalam Perkara perselisihan Hasil Pemilihan ” (2011) 4:1 J Konstitusi Widyagama 67.



preventing and eradicating corruption, which is a common enemy to everyone at any time.¹¹

Based on this background, the authors are interested in formulating the problem, namely:

1. How is the implementation of Constitutional Court Decision Number 003/PUU-IV/2006 after Constitutional Court Decision Number 25/PUU-XIV/2016?
2. How is the relationship between the Constitutional Court Decision Number 25/PUU-XIV/2016 on Civil Servants?

METHOD

To solve a problem to be the subject of discussion, this research uses normative legal research, normative legal research is legal research by comparing norms, legal concepts and regulations in both sources of law and analyzing them with the interpretation method.¹² Normative legal research is a study whose data source is secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials.

RESULT & DISCUSSION

I. *No Nebis in Idem* against Constitutional Court Decision Number 003/PUU-IV/2006

Previously, the phrase “may” in Article 2, paragraph (1) and Article 3 of the Anti-Corruption Law was tested in Constitutional Court Decision Number 003/PUU-IV/2006. In that decision, the Constitutional Court stated that the phrase “may” in Article 2, paragraph (1) and Article 3 of the Anti-Corruption Law was not contrary to the 1945 Constitution. Then the Constitutional Court Decision Number 003/PUU-IV/2006 was taken into consideration in Constitutional Court Decision Number 44/PUU-XI/2013, which requested a review of Article 2 paragraph (1) of the Anti-Corruption Law. In the two previous decisions, the Constitutional Court stated that the phrase “may” in Article 2, paragraph (1), and Article 3 of the Anti-Corruption Law is not contrary to the 1945 Constitution. The Constitutional Court emphasized that the phrase “may harm state finances or the state economy” does not conflict with the right to fair legal certainty as intended by Article 28D paragraph (1) of the 1945 Constitution. However, it was later tested again until finally the Constitutional Court, through Decision Number 25/PUU-XIV/2016, stated that the phrase “may” was contrary to the 1945 Constitution.

The legal reason the Constitutional Court granted the review was that there was a different basis for review between Constitutional Court Decision Number 003/PUU-IV/2006, which was considered by Constitutional Court Decision Number 44/PUU-XI/2013 and Constitutional Court Decision Number 25/PUU-XIV/2016. The difference in the basis of this review can be reviewed because of the legal basis in Article 60 paragraph (2) of Law Number 8/2011 Concerning the Amendment to Law Number 24/2003 Concerning the Constitutional Court (Constitutional Court Law), which states that:

¹¹ Bambang Soesatyo, *Presiden dalam Pusaran Politik Sengkuni* (Jakarta: RM BOOKS, PT. Wahana Semesta Intermedia, 2014).

¹² Peter Mahmud Marzuki, *Penelitian Hukum*, 13th ed (Jakarta: Kencana, 2017).



“The provisions referred to in paragraph (1) shall be excluded if the content material in the 1945 Constitution of the Republic of Indonesia, Year 1945, which is used as the basis for testing, is different”.

The same basis of testing between Constitutional Court Decision Number 003/PUU-IV/2006, Constitutional Court Decision Number 44/PUU-XI/2013, and Constitutional Court Decision Number 25/PUU-XIV/2016. Namely, the basis for testing Article 28D paragraph (1) of the 1945 Constitution, which is essentially about recognition, guarantees, protection, and certainty of a fair law and equal treatment before the law. The similarity of the basis of this test is based on the legal basis of Article 60 paragraph (1) of the Constitutional Court Law, which states that:

“The content of paragraphs, articles, and/or sections of the Law that have been tested cannot be reapplied for.”

Both the provisions of Article 60 paragraph (1) and the provisions of Article 60 paragraph (2) UUMK, in the context of judicial review as contained in the table above, in principle, are not normatively implemented. This is seen in the consideration of Decision Number 44/PUU-XI/2013, which reads:

“... Although there are differences in the basis of testing between petition No. 003/PUU- IV/2006 and the petition a quo, namely Article 1 paragraph (3), Article 27 paragraph (1), Article 28D paragraph (2), and Article 281 paragraph (2) of the 1945 Constitution, however, the Petitioner's petition regarding the constitutionality of Article 2(1) and the Explanation of Article 2(1) of the PTPK Law is essentially the same as petition No. 003/PUU-IV/2006 and has been considered by the Court in Decision No. 003/PUU-IV/2006, dated July 25, 2006 so that the petition is *nebis in idem*.”

Although in comparison it is clear that there is a different basis for constitutional testing between Case No. 44/PUU-XI/2013 and Case No. 003/PUU-IV/2006, the Constitutional Court in Case No. 44/PUU-XI/2013 considered the substance of both PUU applications in the two cases a quo. By assessing that the substance of the petition in both cases was similar, the Court used Article 60 paragraph (1) of UUMK and stated that the petition of the Applicant in Case Number 44/PUU-XI/2013 was *ne bis in idem* with Case Number 003/PUU-IV/2006.

But in contrast to Decision Number 25/PUU-XIV/2016, although the Court equally looked at the substance of the petition, the Court specialized in considering the reality of legal conditions in the norms (law in text) with the law that occurs in reality (law in context). In its consideration, the Court stated:

“... there is a fundamental reason for the Court to change the constitutionality assessment in the previous decision, because the previous assessment has proven repeatedly to cause legal uncertainty and injustice in the eradication of corruption.”

Based on this consideration, the Court made an overriding decision on the two previous decisions. However, the problem is that, although there are different constitutional grounds submitted by the Plaintiffs in their petition, the Court emphasizes the consideration of “the existence of legal uncertainty which creates injustice in the eradication of corruption”. Based on this consideration, the Court appears to be very inconsistent in providing an interpretation of Article 28D paragraph (1) of the 1945 Constitution. In fact, what raises the question is, how can



the Court make an overriding decision on two previous decisions based on constitutionality that have been used, but with a different interpretation? This action will violate Article 60, paragraph (1) and paragraph (2) of the UUMK itself.

Even if the train of thought of the consideration of the Constitutional Court's decision is followed, namely looking contextually (law in context) the issue of the constitutionality of the norm as proposed by the Plaintiff, it is difficult to find coherence between the constitutional loss experienced by the Plaintiff, and the constitutionality of the norm that is contrary to the 1945 Constitution. Because in the consideration of its decision, the Court did not at all mention the constitutional loss factually experienced by the Plaintiff as described by the Plaintiff in his petition, contained in the sitting of the case. Thus, the Court's legal considerations that attempt to see the law that occurs in reality become bland. With the basis of the construction of thinking as described above, the author sees the potential for legal uncertainty that occurs in the context of judicial review of laws against the 1945 Constitution, because the Court does not determine the exact size of an interpretation of the constitutionality of the application of Constitutional norms to the validity and sustainability of a norm of law that has been tested several times.

If viewed factually and contextually, the phrase "may" in the sentence "may harm the state finances or the state economy" must be seen as an integral element of the offense in the Anti-Corruption Law. Because in reality, losses to state finances or the state economy are very difficult to determine precisely. Even with the loss of the phrase "may", efforts to save state financial losses or the state economy become impossible to do, because they have to wait for the corruption crime to be fully implemented, which means that state financial losses or the state economy are certain to have occurred. This is where the preventive function against potential losses of state finances or the state economy becomes toothless. With this reality, it is no wonder that former Minister of Law and Human Rights Amir Syamsudin stated, "The above reality is considered by some people to be detrimental to the government's efforts to prevent and eradicate corruption."¹³

II. The Impact of Criminalization of State Civil Apparatus (ASN) Due to *Freis Ermessen*, which is Considered Corruption

One of the legal reasons the Applicant considers the phrase "may" in Article 2, paragraph (1) and Article 3 to be contrary to the 1945 Constitution is the emergence of Law Number 30/2004 on Government Administration (AP Law). The emergence of the AP Law brought affirmation that the State Civil Apparatus (ASN), which erred or made administrative errors in carrying out a state administration, the approach take an administrative approach. The criminal approach is used as the "last weapon" (*ultimum remedium*). This refers to Article 20, paragraph (4) of the AP Law:

Article 20 Paragraph (4):

"If the results of the supervision of government officials are in the form of administrative errors that cause state losses as referred to in paragraph (2), letter c, state refunds shall be made no later than 10 (ten) working days as of the decision and issuance of the supervision results."

¹³ Amir Syamsudin, "Putusan MK dalam Penegakan Hukum Korupsi", (2017), online: *Kompas.com*.



Article 70 Paragraph (3):

“In decisions that result in payments from state money being declared invalid, Government Agencies and/or Officials are obliged to return the money to the state treasury.”

Departing from this argument, two understandings will emerge, namely abuse of authority (*detournement de pouvoir*) and unlawful acts (*onrechtmatigdaat*). Montesquieu mentioned that it is an eternal experience that people who are given power tend to abuse it.¹⁴ According to Supandi, abuse of authority (*detournement de pouvoir*) is a concept of state administrative law that causes a lot of misunderstanding in interpreting it. In practice, *detournement de pouvoir* is often confused with arbitrary actions (*willekeur/abus de droit*), abuse of means and opportunities, against the law (*wederrechtelijkheid, onrechsmatige daad*), or even expanded it with every action that violates any rule or policy and in any field.¹⁵

Article 17 of the AP Law stipulates that what is included in the abuse of authority is an action or decision that exceeds authority, mixes authority, and/or acts arbitrarily (abuse of power). Meanwhile, the legal consequences of abuse of authority are canceled by the administrative court, in this case by the State Administrative Court (PTUN). This court is then obliged to resolve disputes with the object of the decision (*beschiking*). The decision that can be the object of a PTUN dispute by Article 1 point 3 of Law No. 51/2009 is a written decision issued by a state administrative body or official containing state administrative legal actions based on applicable laws and regulations, which are concrete, individual and final, which have legal consequences for a person or civil legal entity.

Based on the provisions in Article 2, paragraph (1) and Article 3 of the Anti-Corruption Law, with Article 20, paragraph (4) and Article 70, paragraph (3) of the AP Law above, there are fundamental differences between unlawful acts and abuse of authority. First, the aspect of intention or the atmosphere of the heart (*mens rea*) is different between the two. For unlawful acts, it can be ascertained that there is an element of guilt in a person who does have the intention to enrich himself or herself or another person or corporation to the detriment of state finances. Meanwhile, in abuse of authority, in general, there tends to be an element of guilt or not. Even if there is an error, there is not necessarily an intention to enrich himself or others or a corporation to harm state finances.

Second, the element of the effect of the act (*actus reus*). Unlawful acts tend to result in losses for other parties; in this context, the occurrence of state financial losses. Meanwhile, abuse of authority tends to lead to personal losses in the category of administrative offenses. So that the phrase “may” in Article 2, paragraph (1) and Article 3 of the Anti-Corruption Law is not appropriate if the content material is included in the interpretation of the AP Law. The considerations that contain the main thoughts of the philosophical, juridical, and sociological elements between the two are also different. So that between the two, there is no relationship because it is built on legal principles that are not the same.

¹⁴ Montesquieu, *The Spirit of Laws* (USA: University of California Press, 1977).

¹⁵ Supandi, “Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan (Relevansinya Terhadap Disiplin Penegakan Hukum Administrasi Negara dan Penegakan Hukum Pidana)” 7.



In the context of this Constitutional Court Decision, the Petitioner builds an argument that criminalization was born because law enforcers indicted many State Civil Apparatus (ASN) officials because they were considered to have issued policies that harmed state finances. Law enforcement actions taken against ASN are pure law enforcement actions carried out for the progress of an institution/agency/region, to prevent irregularities in the state finances that they are responsible for managing. Regarding the criminalization of policies, Indra Perwira said that abuse of authority can occur due to 3 (three) things, namely the source of authority, the substance of authority, and the principle of freedom of action (*freis ermessen*). If there is an administrative error where ASN issues a policy, then the first point and the second point use an administrative approach as stated in the AP Law, which will later be canceled or not by the PTUN. These two points include bound authority, which is based on the principle of legality (laws and regulations).¹⁶ The AP Law was born to avoid abuse of authority, including administrative errors.¹⁷

Meanwhile, the third point, namely the principle of freedom of action (*freis ermessen*), is the privilege of policymakers if a legal norm has not yet been regulated or the rules are unclear, so they can issue a policy, or it is also known as free authority or discretion.¹⁸ Terminologically, *freis ermessen* comes from the word *frei*, which means free, independent, not bound.

The word *freis* means free person, while the word *ermessen* means to consider, judge, surmise, judgment, deliberation, or decision.¹⁹ So that in terms of *freis*, *ermessen* means free to consider or free to judge. This means that it can be seen as a principle that aims to fill the shortcomings or complement the principle of legality so that the ideals of a material law state can be realized. Because the principle of *freies ermessen* provides freedom of action to the government to carry out its duties without being bound by the law.

There are three reasons or conditional circumstances that make the government able to take discretionary action or action on its initiative: first, there is no legislation governing the resolution in concreto of a problem, even though the problem requires immediate resolution. Second, the legislation that is the basis for the actions of government officials has given full freedom. Third, there is a statutory delegation, namely the granting of power to regulate itself to the government, which is owned by a higher-level apparatus.

Law Number 30 of 2014 concerning Government Administration (UU AP) has embraced this expansion of the meaning of discretion. The provisions regarding discretion are regulated in the law from Article 25 to Article 32. The provisions contained in these articles at least provide clearer legal certainty regarding the procedures for using discretion. In addition, it also regulates the limits of the use of

¹⁶ Fathudin, "Tindak Pidana Korupsi (Dugaan Penyalahgunaan Wewenang) Pejabat Publik (Perspektif Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan)" (2015) 2:1 J Cita Huk 126.

¹⁷ Eduard Awang Maha Putra, *Peraturan Kebijakan (Beleidsregel) dalam Hukum Positif Indonesia* (Yogyakarta: Samudra Biru, 2024).

¹⁸ Joice Soraya, Eduard Awang Maha Putra & Lalu Aria Nata Kusuma, "Construction of the Form and Content of Policy Regulations (Beleidsregel) in the Amendment to the Law on Government Administration" (2025) 9:2 Lex J Kaji Huk dan Keadilan 219–237, online: <<https://ejournal.unitomo.ac.id/index.php/hukum/article/view/10307>>.

¹⁹ SF Marbun & Moh Mahfud MD, *Pokok-Pokok Hukum Administrasi Negara* (Yogyakarta: Liberty).



discretion by the Government Administration Agency/Official. This provision certainly a spirit for government officials be able to freely decide to serve and fulfill the interests of the people.

Article 26 of the AP Law regulates the procedures for using discretion, among others: (a) Officials who use discretion as referred to in Article 25 paragraph (1) and paragraph (2) must describe the purpose, objectives, substance, and administrative and financial impacts; (b) Officials who use Discretion as referred to in paragraph (1) must submit a written request for approval to the Superior Official; (c) Within 5 (five) working days after the application file is received, the Supervising Official shall determine the approval, corrective instructions, or rejection; and (d) If the Supervising Official as referred to in paragraph (3) makes a rejection, the Supervising Official shall provide reasons for the rejection in writing (Article 26 of Law Number 20 of 2014 concerning Government Administration).

This means that the AP Law already provides legal protection for ASNs who use their discretion. So, limitatively, there is no need for ASN to worry when issuing a discretion and then being immediately criminalized by law enforcement. In the context of administrative law, there are also fundamental principles that are very important for ASN in administering government, namely the General Principles of Good Public Administration (AAUPB). AM Donner revealed that if the basis for policy regulations is not based on law, then the basis commonly used in making policy regulation decisions must be based on general principles of good governance (*algemene beginselen van behoorlijk bestuur*). AM Donner stipulates that there are five general principles of good governance, which are not only applied in certain cases, but in general issues in administration. These principles are, among others, the principle of honesty (fair play), the principle of accuracy (*zorgvuldigheid*), the principle of purity in purpose (*zuiverheid van oogmerk*), the principle of balance (*evenwichtigheid*), and the principle of legal certainty (*recht zekerheid*).²⁰

Substantively, there is no direct correlation that makes the phrase “may” in Article 2, paragraph (1) and Article 3 of the Anti-Corruption Law justify criminalizing ASNs who issue discretionary policies. Hikmahanto Juwana strongly emphasizes that what needs to be considered is not the wrong and harmful policy, but the malicious intent of the policymaker when making the policy.²¹ This means that it is not the discretionary policy that causes ASN to get into trouble, but the inner intention (*mens rea*) of the policy maker to enrich themselves, others, or corporations that causes them to be charged with the Anti-Corruption Law.

Thus, two restrictions have been debated regarding the administrative approach and the criminal approach if ASN is exposed to corruption crimes. So that a limitation can be drawn that if the policy is wrong, or an administrative error or procedural defect, then the approach uses an administrative approach based on the PTUN. Meanwhile, if the inner intention of the policymaker is wrong, which is obviously to enrich themselves, others, or corporations and can harm State finances, then a criminal approach is used as stated in Article 2, paragraph (1) and Article 3 of the Anti-Corruption Law.

²⁰ AM Donner as cited Amrah Muslimin, *Beberapa Asas dan Pengertian Pokok tentang Administrasi dan Hukum Administrasi* (Bandung: Alumnus, 1985).

²¹ Fathudin, *supra* note 16.



CONCLUSION

There is *nebis in idem* between Constitutional Court Decision Number 25/PUU-XIV/2016 and the previous Constitutional Court Decision Number 003/PUU-IV/2006. The similarity is in the form of the same basis of testing and the material being tested, namely Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law against Article 28D paragraph (1) of the 1945 Constitution. The previous Constitutional Court Decision stipulated that the phrase “may harm state finances or the state economy” in Article 2, paragraph (1) and Article 3 of the Anti-Corruption Law was not contrary to the 1945 Constitution. But with the latest Constitutional Court Decision, on the contrary, it was declared contrary to the 1945 Constitution. The change in the Constitutional Court's stance in the latest Decision raises inconsistencies in interpretation, which can lead to legal uncertainty.

There are no criminalization implications of the State Civil Apparatus (ASN) from the phrase “may harm state finances or the state economy” in the Anti-Corruption Law, as feared by the Applicant. Discretionary policy (*freis ermesen*) has received a legal umbrella in the AP Law, and if it is based on the principles of good public governance, there will be no criminalization. Because what is wrong is not the discretionary policy, but the evil intentions of policy makers to enrich themselves, others, or corporations that are considered to harm state finances.

To improve the way corruption cases are handled after the Constitutional Court Decision, further efforts are needed. Cooperation between law enforcement agencies needs to be strengthened so that the investigation and prosecution process can run more efficiently. In addition, it is important to provide clearer and more accessible information to the public to make the justice system more open and trusted. Good investigations are also needed to better gather evidence related to state financial losses, and legal processes related to corruption offenses need to be evaluated regularly to keep up with changes in legal interpretation.

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