

Research Article

Legal Analysis of the Waiver of Unlawful Elements in Corruption Cases (Study of Supreme Court Decision of the Republic of Indonesia Number 3968 K/Pid.Sus/2023)

Anrinanda Lubis

Master of Law Program, Universitas Islam Sultan Agung (UNISSULA), Semarang, Indonesia

ORCID

Anrinanda Lubis: <https://orcid.org/0009-0009-4991-8094>

Abstract.

Corruption is a serious crime with wide-ranging impacts, where Article 2 paragraph (1) of the Corruption Eradication Law (UU Tipikor) requires the element of “unlawfully”. After the Constitutional Court Decision No. 003/PUU-IV/2006, this element was limited to the formal meaning. However, in practice, there is a disregard for the unlawful element in corruption cases. The case study of the Supreme Court Decision of the Republic of Indonesia Number 3968 K/Pid.Sus/2023 shows differences in interpretation between the public prosecutor and the judge, such as in the Juanda Prastowo case where the unlawful element of Article 2 paragraph (1) was disregarded by the judge from the first level to the cassation, and the Defendant was sentenced based on Article 3 of the Tipikor Law. This study aims to examine the application of the unlawful element in Article 2 paragraph (1) of the Tipikor Law, the judge’s consideration factors in disregarding it, and the implications of the decision. The normative-empirical legal research method was used with a case study and legislation approach, analyzed qualitatively. The results of the study showed that the Public Prosecutor based the indictment of Article 2 paragraph (1) on the fulfillment of formal unlawful elements (violation of the Presidential Decree on Procurement of Goods/Services). However, the judges up to the Supreme Court set it aside with the consideration of *lex specialis* derogate *legi generalis*, assessing that the Defendant’s actions as a PPK were more appropriately charged with Article 3 of the Corruption Law. This decision has the potential to increase the difficulty of proving the “unlawfully” element of Article 2 paragraph (1) of the Corruption Law in the future.

Keywords: corruption, supreme court decision, unlawful, waiver

1. Introduction

Indonesia as a state of law (*Rechtstaat*) emphasizes that all aspects of national and state life must be based on law, not mere power (*Machstaat*) (Evi Hartanti, 2007:1). Law enforcement, including in the eradication of corruption, is crucial. Corruption not only harms state finances but also violates the socio-economic rights of the community (Ibid)

Corresponding Author:

Anrinanda Lubis; email:
andalus.28@gmail.com

Published: 3 November 2025

Publishing services provided by
Knowledge E

© Anrinanda Lubis. This article is distributed under the terms of the [Creative Commons Attribution License](#), which permits unrestricted use and redistribution provided that the original author and source are credited.

Selection and Peer-review under the responsibility of the 8th Legal International Conference and Studies Conference Committee.



and has become a phenomenal problem in Indonesia (Nathanael Kenneth, 2024:335-336). One of the essential elements in Article 2 paragraph (1) of the Corruption Eradication Law (UU Tipikor) is the element of “unlawfully” (*wederrechtelijk*) (Rifyal Ka’bah, 2007:78).

Following the Constitutional Court Decision No. 003/PUU-IV/2006, the interpretation of the element of “against the law” in Article 2 paragraph (1) of the Corruption Law was limited to the formal meaning, namely contrary to written laws and regulations, to guarantee legal certainty (Adami Chazawi, 2017:41). However, in judicial practice, the application and interpretation of this element still shows disparities, especially when judges are faced with acts that also have the potential to fulfill the element of abuse of authority as regulated in Article 3 of the Corruption Law.

This condition is clearly seen in the Supreme Court Decision of the Republic of Indonesia Number 3968 K/Pid.Sus/2023 regarding the Juanda Prastowo case. In this case, the Public Prosecutor charged the Defendant with Article 2 paragraph (1) of the Corruption Law primarily, on the basis of a formal unlawful act in the form of a violation of the Presidential Regulation concerning Government Procurement of Goods/Services. However, the judges at the first level to the cassation level stated that the unlawful element in the primary charge was not proven and sentenced the Defendant based on Article 3 of the Corruption Law, with one of the main considerations being the principle of *lex specialis derogate legi generalis*. The phenomenon of ignoring the unlawful element in Article 2 paragraph (1) of the Corruption Law in the decision raises fundamental legal questions regarding the consistency of the application of the law and its impact on efforts to eradicate corruption.

This article aims to legally analyze the application of the element “unlawfully” in Article 2 paragraph (1) of the Corruption Law in Supreme Court Decision No. 3968 K/Pid.Sus/2023, identify the factors that are considered by judges in setting aside this element, and examine the legal implications of this setting aside for the practice of enforcing corruption laws in Indonesia. The analysis will be based on the theory of legal objectives (justice, certainty, benefit) and the theory of legal discovery.

2. Methods

This study uses a normative legal approach (applied law research). The normative approach is carried out through a study of relevant laws and regulations, including

the 1945 Constitution, the Corruption Law, the Presidential Regulation on Government Procurement of Goods/Services, and criminal law theories related to elements of unlawfulness and legal objectives. Data sources include primary data and secondary data in the form of primary legal materials (laws and regulations, court decisions), secondary legal materials (books, legal journals, doctrines), and tertiary legal materials. The collected data are analyzed qualitatively to answer the research problems.

3. Result and Discussion

3.1. Application of the Element of “Unlawfully” in Article 2 Paragraph (1) of the Corruption Law in the Juanda Prastowo Case (MA Decision No. 3968 K/Pid.Sus/2023)

In the Juanda Prastowo case, the Public Prosecutor based the primary charge on Article 2 paragraph (1) of the Corruption Law. The Prosecutor’s main argument was that the Defendant as the Commitment Making Officer (PPK) in four procurement activities for goods/services at the Binjai City Transportation Agency in 2019 had committed a series of acts that were contrary to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services. These formal violations include the process of appointing providers, the implementation of work that is suspected of being fictitious and/or marked up, and the administration and payment processes that do not comply with the provisions. According to the Prosecutor, these actions have fulfilled the element of “unlawfully” in the formal sense and resulted in state financial losses of Rp. 388,978,739.00.

The application of the unlawful element cannot be separated from seeing the Defendant’s actions can be categorized as unlawful elements. The unlawful nature (*rechtswidrig, unrecht, wederrechtlijk, onrechtmatig*) as one of the elements of a criminal act is an objective assessment of the act, and not of the maker or perpetrator of the act. The position of the unlawful nature as an element of a criminal act is so important that it is said that the main concern of criminal law is only unlawful acts, because these acts are prohibited and subject to criminal penalties. (Sudaryono and Natangsa Surbakti, 2017:136)

The definition of unlawful formal and material nature is that the act is not only contrary to the prevailing laws and regulations, but is also a despicable act and contrary to the sense of justice of the community. This is formulated in the General Explanation of Law

Number 31 of 1999 in conjunction with Law Number 20 of 2001, namely that an act is said to be unlawful, in the formal and material sense, if the criminal act of corruption includes despicable acts which according to the sense of justice of the community must be prosecuted and punished". (Jawade Hafidz, 2011:126)

Following the Constitutional Court Decision No. 003/PUU-IV/2006, the element of "unlawfully" in Article 2 paragraph (1) of the Corruption Law is indeed focused on the formal meaning, namely contrary to written legal principles. In this case, the Public Prosecutor has attempted to prove that there has been a violation of the Presidential Decree on Procurement of Goods/Services which is a written legal principle. Thus, from the perspective of the Prosecutor's indictment, the basis for applying the formal unlawful element has been submitted.

However, the Panel of Judges, both at the District Court, High Court, and Supreme Court levels, have different views. Although the facts of the Defendant's actions that deviated from the procurement procedures for goods/services were revealed at trial, the judges did not immediately qualify the actions as fulfilling the element of "unlawfully" in Article 2 paragraph (1) of the Corruption Law for the purpose of criminalization based on this article.

3.2. Factors Considered by Judges in Setting Aside the Element of "Unlawfully" in Article 2 Paragraph (1) of the Corruption Law

Supreme Court Decision No. 3968 K/Pid.Sus/2023 (which upheld the previous decision with criminal revisions) shows several main factors that were taken into consideration by the judge in setting aside the element of "unlawfully" in Article 2 paragraph (1) and preferring to apply Article 3 of the Corruption Eradication Law:

1. Application of the Lex Specialis Derogat Legi Generalis Principle: This is a central consideration. The Panel of Judges is of the opinion that Article 3 of the Corruption Law is a more specific provision (lex specialis) compared to Article 2 paragraph (1) of the Corruption Law (lex generalis) when the act of corruption is carried out by someone who has a position or position and abuses the authority, opportunity, or means available to him because of his position or position. In the case of Juanda Prastowo, the Defendant was a PPK, whose actions were considered more specific as a form of abuse of authority as regulated in Article 3.

2. Quality of the Subject of the Act and the Way the Act is Carried Out: The judge assessed that the Defendant's quality as a public official (PPK) and the method of the

act committed (abuse of authority in his position) was more in accordance with the formulation of the crime in Article 3 of the Corruption Law. Article 2 paragraph (1) is considered more general and can ensnare “every person” without looking at the quality of the position specifically in the context of abuse of authority.

3. Object of Action: The difference was also mentioned that the object in Article 2 of the Corruption Law is still outside the perpetrator’s control, whereas in Article 3 the object is already within the perpetrator’s power/authority.

Although the consideration of *lex specialis* is the main basis, the decision to set aside Article 2 paragraph (1) as a whole can be controversial. As explained in the abstract of the thesis, there is criticism that the decision has the potential to ignore the fulfillment of the formal unlawful elements that have actually been committed by the Defendant. Abuse of authority (element of Article 3) is basically also a form of unlawful act (element of Article 2 paragraph (1)). The choice to completely set aside Article 2 paragraph (1) rather than, for example, declaring the primary charge proven but with consideration of *lex specialis* in sentencing, is an interesting aspect to be studied further regarding the consistency of law enforcement.

In considering the Medan District Court’s decision (which was upheld by the Supreme Court), the Panel of Judges did indeed quote the expert’s opinion (Nur Basuki Minarno) which stated that abuse of authority is inherently an unlawful act, and the unlawful element is the genus while abuse of authority is the species.

In fact, the emphasis of criminal law authority in terms of abuse of authority lies in the consequences of the abuse, namely; the existence of state losses that give rise to unlawful acts (*wederrechtelijkheid*). In testing the authority held by officials who exercise governmental power, the benchmark is the laws and regulations that regulate the source of authority and the substance of granting such authority to certain officials. (Nicken Sarwo Rini, 2018:265).

A criminal charge that is linked to the element of “authority” or “position” or “status”, then in considering it cannot be separated from the aspect of state administrative law which applies the principle of job responsibility (job liability), which must be separated from the principle of personal responsibility (personal liability) in criminal law. (Ibid)

However, the final conclusion was that the unlawful element in Article 2 paragraph (1) was not appropriately applied because of the abuse of authority inherent in the Defendant, which led to the application of Article 3. This shows the judge’s focus on the special characteristics of the Defendant’s actions related to his position.

Law enforcement and justice are the authority of judges as the organizers of part of the judicial power's duties in court, so in the context of implementing law enforcement purely and consistently, Sudikno Mertokusumo said that there are 3 (three) elements that need to be constantly considered, as follows: (Sudikno Mertokusumo, 1999:145)

1. Legal Certainty (rechtssicherheit).
2. Expediency (zweckmassigkeit).
3. Justice (justice).

Although judges are given the authority to discover the law as mandated in Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power which states, "Judges and constitutional judges are obliged to explore, follow and understand the legal values and sense of justice that exist in society". However, the discovery of the law must be aimed at certainty, benefit and justice.

The judge should analyze all elements of Article 2 paragraph (1) of the Corruption Law in the primary indictment because the element of unlawfully fulfilling has been fulfilled based on the trial facts. For this reason, it is necessary to analyze whether the element of enriching oneself or others and the element of causing state financial loss have been fulfilled or not.

3.3. Implications of the Waiver of the Element of "Unlawfully" in Supreme Court Decision No. 3968 K/Pid.Sus/2023

If Supreme Court Decision No. 3968 K/Pid.Sus/2023 becomes a jurisprudence that is consistently followed, several legal implications may arise:

1. Potential Difficulties in Proving Article 2 paragraph (1) of the Corruption Law by the Public Prosecutor: If cases involving public officials who abuse their authority tend to be directed to Article 3 of the Corruption Law on the basis of *lex specialis*, then the Public Prosecutor may face a greater challenge in proving Article 2 paragraph (1) in similar cases. The Prosecutor must be more careful in formulating the charges and presenting arguments as to why Article 2 paragraph (1) remains relevant even though there is an element of abuse of authority.

The basis of the ordinary burden of proof system or according to the Criminal Procedure Code is the principle of "whoever accuses is the one who is burdened to prove that what is accused is true". This principle arises as a result of the application

of the principle of presumption of innocence which is upheld in criminal procedure law. (Lilik Mulyadi, 2012:13).

Article 66 of the Criminal Procedure Code explicitly states, “The suspect or defendant is not burdened with the obligation to provide proof.” This provision explicitly removes the burden of proof from the shoulders of the defendant and, implicitly, places it on the party accusing him, namely the Public Prosecutor.

2. Shifting Focus of Prosecution in Corruption Cases by Officials: There may be a tendency for prosecutions to focus more on Article 3 of the Corruption Law for cases involving abuse of authority by officials, given this precedent. This could have an impact on the overall anti-corruption strategy.

3. Challenges in Maintaining Consistency and Legal Certainty: Although the principle of *lex specialis* is a recognized legal principle, its application which completely ignores the more general article (Article 2 paragraph (1)) even though its elements (especially against formal law and state losses) also have the potential to be fulfilled, needs to be observed so as not to give rise to legal uncertainty or disparity in interpretation in the future.

4. Impact on the Effectiveness of Execution of Decisions: Lengthy legal debates regarding the application of articles, such as those that occur from the first instance to the cassation instance, can affect the efficiency of the time required to resolve the case and, ultimately, the execution of the decision.

The main implication is the need for caution and very strong arguments from the Public Prosecutor if he wants to continue to charge Article 2 paragraph (1) in cases that have strong elements of abuse of authority by officials. On the other hand, judges also need to provide clear and consistent justification in applying the *lex specialis* principle so as not to appear to ignore the fulfillment of other elements that may have been proven.

4. Conclusion

The application of the element “unlawfully” in Article 2 paragraph (1) of the Corruption Law in the Juanda Prastowo case faces interpretive challenges at the judicial level. Although the Public Prosecutor based the charges on formal violations of Presidential Regulation Number 16 of 2018 which resulted in state losses, the Panel of Judges up to the cassation level chose not to apply this article. The main factor for the judge’s

consideration in setting aside the element of “unlawfully” in Article 2 paragraph (1) of the Corruption Law is the dominant application of the principle of *lex specialis derogate legi generalis*. The Defendant’s actions as a Commitment Making Officer (PPK) involving abuse of authority, opportunity, or means inherent in his position are considered more specific and more appropriate to be prosecuted under Article 3 of the Corruption Law. The exclusion of the element of “unlawfully” in Article 2 paragraph (1) of the Corruption Law through this decision, if it becomes jurisprudence, has the potential to increase the difficulty for the Public Prosecutor in proving this article in the future, especially in cases involving public officials with elements of abuse of authority. This can affect the prosecution strategy and require stronger legal arguments from the prosecutor, as well as consistency in the judge’s considerations to maintain legal certainty.

References

- [1] Hafidz J. Sistem Pertanggungjawaban Perkara Korupsi Dalam Rangka Percepatan Penyelamatan Uang Negara, *Jurnal Dinamika Hukum*. Volume 11. Special Edition. February; 2011.
- [2] Ka’bah, Rifyal, Korupsi di Indonesia, *Jurnal Hukum dan Pembangunan Tahun Ke 37* No. 1. 2007;
- [3] Kenneth N. Maraknya Kasus Korupsi di Indonesia Tahun ke Tahun, *JLEB: Journal of Law Education and Business* E-ISSN: 2988-1242 P-ISSN: 2988-604X, 2024; Vol. 2 No. 1.
- [4] Rini NS. Penyalahgunaan Kewenangan Administrasi Dalam Undang Undang Tindak Pidana Korupsi, *Jurnal Penelitian Hukum DE JURE*, ISSN 1410-5632, 2018; Vol.18 No. 2.
- [5] Chazawi A. *Hukum Pidana Korupsi di Indonesia*. Jakarta: Raja Grafindo Persada; 2017.
- [6] Hartanti E. *Tindak Pidana Korupsi, Edisi Ke-II*. Jakarta: Sinar Grafika; 2007.
- [7] Mertokusumo S. *Mengenal Hukum. Suatu Pengantar* (Yogyakarta): Liberty; 1999.
- [8] Mulyadi L. *Tindak Pidana Korupsi Di Indonesia, Normatif, Teoritis, Praktik dan Masalahnya*. Bandung: Alumni; 2007.
- [9] Sudaryono, et al. *Hukum Pidana Dasar-dasar Hukum Pidana Berdasarkan KUHP dan RUU KUHP*. Surakarta: Muhammadiyah University Press; 2017.
- [10] Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption as amended by Law Number 20 of 2001.

- [11] Law Number 48 of 2009 concerning Judicial Power
- [12] Presidential Regulation of the Republic of Indonesia Number 16 of 2018 concerning Government Procurement of Goods/Services;
- [13] Constitution of the Republic of Indonesia; 1945.
- [14] Warsono, Heliany Ina, Saleh Amin M. Pertanggungjawaban Pelaku Tindak Pidana Korupsi Dengan Tujuan Menguntungkan Diri Sendiri (Analisis Putusan Nomor 29/PID.SUS-TPK/ 2020/PN.SEMARANG. 2021; Volume 1, Nomor 1.
- [15] Wicipto Setiadi, Korupsi di Indonesia (Penyebab, Hambatan, Solusi, dan Regulasi), Jakarta: Jurnal legislasi Indonesia, 2018; vol. 2, No.4.
- [16] Romli Atmasasmita, Analisis dan Evaluasi Hukum tentang Penyelidikan dan Penyidikan Tindak Pidana Korupsi, Badan Penelitian Pembinaan Nasional Departemen Hukum Dan HAM, Jakarta; 2007.
- [17] Rudi Prastowo. Sifat Melawan Hukum Formil/Materiil dan Pertanggungjawaban Pidana dalam Tindak Pidana Korupsi (Kajian Teori Hukum Pidana Terhadap Putusan Mahkamah Konstitusi RI Perkara No. 003/PUU-IV/2006), FH Unpar Bandung, Jurnal Hukum Pro Jusitia, 2006; Vol. 24 No. 3.
- [18] Srimim Pinem. Dinamika Pemberantasan Tindak Pidana Korupsi di Indonesia. Jurnal Yuridis. 2023; Volume 10, Nomor 2.
- [19] R. Wiyono, Pembahasan Undang-Undang Pemberantasan Tindak Pidana Korupsi, Penerbit Sinar Grafika, Jakarta; 2012.
- [20] Evi Hartati, Tindak Pidana Korupsi, Jakarta: Sinar Grafika; 2009.