

APPLICATION OF ARTICLE 51 PARAGRAPH (1) OF THE KUHP IN DETERMINING Fault AND ACCOUNTABILITY FOR CRIMINAL ACTS OF CORRUPTION IN BUREAUCRATIES
(Case Study Decision Supreme Court Number 685 K/PID/2005 and Number 1393 K/Pid.Sus /2014)

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ABSTRACT

This research is motivated by the fact that in recent years, many defendants from Corruption Crime cases have used Article 51 paragraph (1) of the Criminal Code, as evidenced by many Judges in the District Court (first instance) who granted the request, but many were also Supreme Court Judges who annulled it. The problems in this study include (i) What are the provisions of the position order contained in Article 51 paragraph (1) of the Criminal Code that can eliminate errors and accountability for corruption in the bureaucracy? (ii) How is the legal application of the office order in Article 51 paragraph (1) of the Criminal Code determining the guilt and responsibility of corruption crimes in the Supreme Court Decision No. 685 K/PID/2005 and No. 1393 K/ Pid. Sus / 2014. This research is a normative research with a juridical approach and analytical descriptive methods. The data was coming from secondary data, primary legal materials, secondary legal materials, and tertiary with literature data collection. The method of analysis used is a qualitative analysis. The results of the study First, there are (2) two conditions that must be met in order for an executor of an order to escape the noose, namely subjective conditions and objective conditions. Second, in Supreme Court Decision No. 685 K/PID/2005, judges apply the law normatively without judging more deeply and fundamentally, as in Supreme Court Decision No. 1393 K/ Pid.Sus /2014, judges are more deeply assessed regarding the condition that a person can be given Article 51 paragraph (1) of the Criminal Code.

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INTRODUCTION

Bureaucracy ideally is _ something effective and efficient procedures , which are based on theory and applicable rules as well as own specialization in accordance goals that have been agreed (policy) in A organization / agency / agency Government . Bureaucracy illustrated as room deep state machine occupied by people (officials) who are paid and employed by the State and their payroll charged in a manner direct or No direct to the state budget (Budget State Income and Expenditures) or APBD (Budget Regional Income and Expenditures) for give advise and implement policy State politics .

Theoretically, the notion of bureaucracy is understood simply as the state apparatus. Quoting the opinion of Fritz Morstein Marx, Bintoro Tjokroamidjojo argued that bureaucracy is a type of organization used by modern governments to carry out various specialized tasks, carried out in an administrative system, especially by government apparatus. By quoting Blau and Meyer, Dwijowijoto explained that the bureaucracy is a very strong institution with the ability to increase potential capacities for good and bad things in its existence as a neutral rational administrative instrument on a large scale. Furthermore, it was argued that in modern society, where there are so many continuous and steady affairs, only a bureaucratic organization is capable of answering them. Bureaucracy in practice is described as civil servants (Muhammad, 2018) .

In carrying out its duties and functions, the bureaucracy is considered slow in providing public services and is rigid and adheres to strict procedures so that it often does not give satisfaction to the community for the services provided by bureaucrats. This is as formulated by Syafiie regarding bureaucracy and administrative functions, namely work that is strict on regulations (*rule*), specific tasks (*specialization*), rigid and simple (*zakelijk*), official administration (formal), arrangements from top to bottom (hierarchical) which has been determined by the organization/institution, based on logic (rational), centralized (authority), obedient and obedient (*obedience*), does not violate provisions (*discipline*), structured (systematic) and indiscriminately (impersonal) (Rusfiana & Supriyatna, 2021) .

From the characteristics of the bureaucracy put forward by Syafiie, the author can describe the conditions of the bureaucracy, namely the existence of a hierarchy in the position structure (bosses and subordinates) and in carrying out tasks on predetermined policies based on a command system where each bureaucrat has certain main tasks and has authority . to carry out these main tasks and be responsible for each task implementation according to that authority, which results in achieving the goals of the organization's goals (who, what task, has what authority, and is responsible for what).

The rise of corruption in the bureaucracy, often includes corruption in the field of public services in the form of bribes and gratuities as well as in the procurement of goods and services. Syed Hussein Alatas as quoted in ICW (2000) develops and identifies corruption from a definition that is divided into several types, including first, transactive corruption, namely corruption that indicates a reciprocal agreement between parties who give and receive for mutual benefit where both parties are equal. - both actively carry out these actions. Second, extortive corruption, namely corruption that includes certain forms of coercion where the giving party is forced to bribe to prevent harm that threatens himself, his interests, people, or things he values. Third, investive corruption, namely corruption involving an offer of goods or services without any direct connection with certain benefits obtained by the giver, other than the expected benefits to be obtained in the future. Fourth, nepotistic corruption, namely corruption in the form of giving special treatment to friends or those who have a close relationship in order to occupy public office. Fifth, autogenic corruption, namely corruption committed by individuals because they have the opportunity to benefit from their knowledge and understanding of something that only they know alone. Sixth, supportive corruption, namely corruption which refers to the creation of a conducive atmosphere to protect or maintain the existence of criminal acts

of corruption. Seventh, defensive corruption, namely an act of corruption that is forced to be carried out in order to defend oneself from extortion.

Corruption in the bureaucracy is not only carried out by policy makers/rulers but also by administrative officials who are also often carried out jointly by the authorities and administrative officials. This happens considering that the bureaucracy itself is simply a tool of the ruler's power whose job is to carry out the policies that have been previously set in the field of administration. Rulers or state officials as superiors who have the authority obtained based on attribution have the authority to give orders to their subordinate officials to carry out everything within the realm of their powers.

In the practice of corruption, irregularities committed by the authorities in exercising the power and authority that is in them, are often carried out by giving orders to their subordinate apparatus/officials with purposes that are not in accordance with the aims and objectives of the implementation of some of the state power which is under their authority. Authority is different from power, authority comes from the word " *authority* " or " *gezag* " , while power comes from the word " *power* " or " *macht* ". Bagir Manan stated that power only describes the right to act or not to act. In law, authority simultaneously means rights and obligations (*rechten en plichten*) (Alamsyah, 2019) .

The superior's authority in giving an order does not have to be written but often in unwritten or oral form. Jan Rummelink said that the position order does not need to be received directly by the recipient of the order. This order from a superior as an authorized official is certainly not free from allusions to the teachings of authority and the delegation of office authority (Rummelink, 2003b) . Regarding the orders of the authorized superiors, Jan Rummelink also gave his opinion, namely the word "authorized" in its broadest sense does not only include the competence of the person giving the order, but at the same time the validity of the entire order (Rummelink, 2003b) .

Rulers are officials who have authority in administering government, but the word authority must of course be measurable so that it can be distinguished which authority is actually used by the authorities in carrying out actions/actions, namely all rights and obligations in administering government and which deviations of authority from the intent and purpose of giving it this authority is given to officials/rulers by law. Regarding this, Philipus M. Hadjon regarding the scope of the legitimacy of government actions/actions includes 3 (three) things, namely, authority, procedure and substance. The authority referred to is the acquisition of authority by officials based on their sources, be it attributive, delegative or mandate. While the procedure is based on the main foundation of administrative law, namely the principle of rule of law, democracy and instrumental principles (effectiveness and efficiency). Legality based on substance rests on regulating and controlling what (arbitrary/external legality) and for what (abuse of authority, violating laws/internal legality). (Alamsyah, 2019)

The legitimacy of superior orders received by subordinates is inseparable from the ability of subordinates to assess whether the order given is a valid order. Apart from that, of course, subordinates who receive orders can also assess whether the orders they receive are to carry out a task, whether there is a conflict with their duties in office which are also regulated in legislation. The invalidity of an order is a form of arbitrariness or abuse of authority which, if carried out by a subordinate who is also bound by the provisions of the position as stipulated in the law, will result in maladministration which, if the administrative malfeasance causes state financial losses, can be said to have committed an act corruption crime.

However, in criminal law, a person who commits a criminal act is not necessarily sentenced because it must be assessed whether his actions can be reproached/can be blamed for his actions so that the maker can be held criminally responsible.

There are reasons for the elimination of crimes that have been regulated in Article 44, Article 48, Article 49, Article 50 and Article 51 of the Criminal Code. Provisions on articles of criminal abolition (forgiveness and reasons for justification) in the Criminal Code are provisions (articles in the Criminal Code) for exceptions in releasing the

maker from legal bondage. Even though the maker has been proven to have committed a crime and can be blamed for the criminal act, it turns out that the maker cannot be held criminally responsible for his actions if there are justification reasons or excuses or in the form of justification reasons. (Rusianto, 2016)

To focus more on the research, the author chose the formulation of 'position order' (*ambtelijk bevel*) regulated in article 51 paragraph (1) of the Indonesian Criminal Code which states that "whoever commits an act to carry out a position order given by the competent authority, not punished". A position order or *ambtelijke bevel* can be interpreted as an order that has been given by a superior, where the authority to order such is sourced from an *ambtelijke positie* or a position according to position, both from the person giving the order and from the person receiving the order. (Lamintang, 2014). Moeljatno saw the reason for the abolition of this penalty as an example of justification (*rechtsvaardigingsgrond*) (Moeljatno, 2002).

In reality, many defendants argued that the actions they committed were the implementation of an order given by the authorities/authorized officials, or an order from a superior, so that it was an order of office within the meaning of Article 51 paragraph (1) of the Criminal Code. This fact raises questions about the normative regulation of the provisions of Article 51 paragraph (1) of the Criminal Code, as well as questions about court practices with regard to office orders given by the authorities/authorized officials for which discussion will be carried out on a Supreme Court decision, namely a decision Supreme Court Number: 1393 K/Pid.Sus/2014 and Number: 685 K/PID/2005. From the description that has been described by the author above, this study contains the provisions of the position order contained in Article 51 paragraph (1) of the Criminal Code (KUHP) which can erase errors and accountability for criminal acts of corruption in the bureaucracy, as well as the application of law to Article 51 paragraph (1) The Criminal Code in determining guilt and accountability for criminal acts of corruption is bureaucratic in Decision Number: 1393 K/Pid.Sus/2014 and Decision Number 1555 K/Pid.Sus/2019.

Problem Statement

1. How provision order contained positions _ in Article 51 paragraph (1) of the Criminal Code (KUHP) which can delete guilt and accountability follow criminal corruption in the bureaucracy ?
2. How application law from order position in Article 51 paragraph (1) of the Criminal Code (KUHP) in determine guilt and accountability follow criminal corruption bureaucratized in the Judgment Number : 1393 K/ Pid.Sus /2014 and Decision Number 1555 K/ Pid.Sus / 2019?

Order Position

According to understanding language , official is employee holding government _ position important . this _ Enough aligned with understanding officials determined by the Indonesian Dictionary , namely , employees holding government _ position certain . With explanation on so can concluded that official is someone who expands position in one agency or field certain have _ authority on what does it do . While that is meant order position by myself , by literally that is something orders that have been given by one superiors , where authority For Reign sort of That sourced from _ ambtelijke positive or something position according to job , fine from one who gives order nor from the person receiving order (Lamintang, 2014) . Simon himself opinion that order position is A orders that don't need that order That must given to a subordinate course , but can also be given to other people and during order like That has given based on Act . (Remmlink , 2003a)

Eraser Reason Criminal

Talks about reason eraser criminal offenses in the Criminal Code are loaded in Book I Chapter III About things that abolish , subtract or burdensome imposition criminal . Discussion furthermore that is about reason eraser

criminal , that is the reasons that allow people to do it fulfilling act _ formula offense No convicted . Memorie van Toelichting put forward what are called " reasons". No can be held accountable somebody or reasons No can he was punished someone . He mention there are 2 (two) reasons :

1. Reason not can he is held accountable someone who lies in that person _
2. Reason not can he is responsible someone who lies outside that person . _

Authority

Authority theory is related theory _ with source authority from government in do deed related law _ with law public nor in relationship with law private . According to Indroharto , who suggested that there is three type sourced authority _ from regulation legislation . Authority it , covers attribution , delegation and mandate . Attribution is gift authority by the maker Constitution Alone to an organ of government , well that already is There is as well as new ones The same once . Delegation is bestowal authority government from a government organ to government organs other . Mandate happened if a government organ allow authority carried out by other organs on its behalf (Disemadi & Santoso, 2019) .

Accountability Criminal As System

follow term criminal is translation strafbaarfeit introduced by the party government cq Department Justice . In Dutch Wvs and Wvs Dutch East Indies not there is official explanation _ about what is meant strafbaarfeit . The official term used by Indonesia is Strafwetboek or the Criminal Code . _ (Wirjono , 1989)

Temporary in the law book law (KUHP) elements follow criminal grouped be two ie existing violations _ in Book II of the Criminal Code and crime in Book III of the Criminal Code Elements the namely : (Chazawi , 2008)

1. Element Act in demand
2. Element oppose law
3. Element error
4. Element consequence constitutive
5. Element which circumstances _ join
6. Element condition extra you can demanded criminal
7. Element condition aggravating addition _ criminal
8. Element condition additional causes _ can convicted
9. Element object law follow criminal
10. Element quality subject law follow criminal
11. Element condition addition For relieve criminal

follow Criminal Corruption

In the *Black Law Dictionary* , Hary Campbell positions corruption as follows "An act committed with an intention to gain some advantage contrary to official duties and other truths, wrongly using his position or character to gain something for himself or others. , along with its obligations and the rights of other parties" (Marwan, 2013) . The formulation of corruption which emphasizes government positions according to M.Mc.Mullan says that a government official is said to be corrupt if he receives money which is felt as an encouragement to do something that can be done in his duties and positions even though he is not allowed to do such things while carrying out his duties, while JS Nye argues that corruption is behavior that deviates from the normal obligations of a government agency role, due to personal interests (family, group, friends and friends), for the sake of pursuing status and prestige or violating regulations by carrying out or seeking influence for personal gain. (Nurjana, 2010)

Civil Servants _

According to Article 1 letter (a) Law Invite Number 5 of 2014 concerning ASN , Civil Servants is they or someone who has fulfil stipulated conditions _ in regulation applicable laws and regulations , appointed by an authorized official and entrusted task in state office or entrusted other stipulated state duties _ based on something regulation legislation as well as paid according to applicable regulations . _ According to Sastra Djatmika , obligation Public servants are divided become three group , namely :

1. Existing obligations _ connection with something position .
2. No obligations _ direct relate with something task in office , but with position as civil servants in general .
3. Obligations other . (Marsono , 1984)

Status and Position of Civil Servants

position Civil Servants are based on the law Number 5 of 2014, namely Civil Servants as element officers on duty For give service to public in a manner professional , honest , fair and equitable in maintenance the task of the state, governance , and development . Formula position civil servants are based on the main points thought that government No only operate function general government , but also must capable carry out function development in other words the government No only organize orderly government , but also must capable organize and expedite development For interest people many .

RESEARCH METHODS

Study This use method approach normative juridical . Specification study in study This characteristic descriptive analytical . Deep data source study This is Because obtaining secondary data results studies literature that is namely :

- a. Primary legal materials , among others: Criminal Code , Act Number 20 of 2001 concerning Changes to the Law Number 31 of 1999 concerning Eradication follow Criminal Corruption , Law Number 30 of 2014 concerning Administration Governance and Law Number 5 of 2014 concerning Apparatus State Civil .
- b. Legal material secondary , consists from design laws , books scientific journals and articles _ scientific in the field related laws _ with study this .
- c. Legal material tertiary that is giving material _ explanation instruction nor explanation to material primary and secondary laws , such as dictionary law , encyclopedia or for other ingredients complete necessity writer . (Soekanto , 2006)

Deep data collection study This that is with do collection of data obtained from read and understand books literature as well as relevant arrangements _ with problem and have correlation with problem to be discussed . Analysis of the data used in study This use analysis qualitative .

RESULTS AND DISCUSSION

Provision Order Position contained _ in Article 51 Paragraph (1) of the Criminal Code (KUHP) . delete fault and accountability follow Criminal Corruption in the Bureaucracy

In criminal law there are several reasons that can be used as a basis for a judge not to impose a sentence/criminal sentence on the perpetrators or defendants who are brought to court because they have committed a crime. This reason is called the reason for the abolition of punishment. The reason for the abolition of punishment is

that regulations are primarily aimed at judges. This regulation stipulates various conditions for perpetrators who have fulfilled the formulation of offenses as stipulated in the law which should be punished, but are not punished. The judge in this case places authority within himself (in adjudicating concrete cases) as a determinant of whether there has been a special situation within the perpetrator as formulated in the reasons for abolishing a sentence. Thus the reasons for the abolition of this crime are the reasons that allow the person who committed the offense not to be convicted; and this is the authority given by law to judges.

The reason for the abolition of punishment is that regulations are primarily aimed at judges. This regulation stipulates various conditions for perpetrators who have complied with the formulation of offenses as stipulated in the law who should be punished, but are not punished. The judge in this case places authority within himself (in adjudicating concrete cases) as the determining actor whether there has been a special situation within the perpetrator, as formulated in the reasons for abolishing a sentence. In this case, actually the perpetrator or the defendant has fulfilled all the elements of a criminal act formulated in the criminal law regulations. However, there are several reasons that can cause the perpetrators of criminal acts to be exempted from imposing criminal sanctions as formulated in these laws and regulations. Thus the reasons for the abolition of this crime are reasons that allow people who commit acts that actually have fulfilled the formulation of an offense not to be convicted, and this is the authority given by law to judges.

Regarding the basis for the reasons for the write-off, the Criminal Code (KUHP) formulates several conditions that can become the basis for the write-off, namely Article 44 concerning Capability to Take Responsibility, Article 48 concerning Forced Force and Forced Circumstances, Article 49 concerning Forced Defense, Article 50 concerning Carrying out Law Orders and Article 51 concerning Carrying out Superior Orders. However, in this study the focus of the researchers was on Article 51 paragraph (1) of the Criminal Code (KUHP).

In general, the doctrine has distinguished the basic sources of criminal write-offs into two parts, namely the general *strafuitsluitingsgronden bases* and the *specific strafuitsluitingsgronden bases*. On the specific nature, it only concerns a number of criminal acts. The legislators have determined several reasons for the abolition of general crimes in Book I Article 103 of the Criminal Code (KUHP) and through this Article, the reasons for the abolition of crimes also apply to crimes outside the Criminal Code (KUHP), unless the law provides otherwise.

Then, the principles which are corrections to the general nature of the criminal law (KUHP) are:

1. The principle that sees criminals as social ills who need therapy protects society from crime. Thus, the criminal law adapts itself to the character and personal characteristics of the offender. A view that focuses more on the perpetrators of criminal acts than on their actions.
2. The principle of *geen straf zonder schuld* (no punishment without fault). This means that even if a person's behavior is in accordance with the description in the criminal law, a person still cannot be subject to punishment, because a person is innocent (the basis of criminal responsibility is a mistake), the person's actions cannot be held accountable to that person and therefore a person cannot be punished.

The authority of the ruler is another factor that must be considered. That is, the giver of the order must be a person who has authority (*l'authorite legitime*). Therefore, in paragraph (2) of Article 51 of the Criminal Code (KUHP) it is stated that a position order given without authority does not abolish punishment. Accordingly, the recipient and executor of an order must know that the order he receives is given by an authorized official and the order falls within the scope of the official's authority. So, the meaning of the executor of the order must know in this context, the meaning is quite broad, namely based on proper calculations or based on general calculations he should know.

Whereas in Indonesian Laws and Regulations, provisions regarding office orders are regulated in Article 51 of the Criminal Code (KUHP), in paragraph (1) states, "Whoever commits an act to carry out an office order given by the competent authority, not punished." Whereas paragraph (2) states, "An order of office without authority does not

result in the abolition of a sentence unless the person being ordered, in good faith thinks that the order was given with authority and its implementation falls within the scope of his work."

The provisions above show that the position orders regulated in Article 51 paragraph (1) of the Criminal Code (KUHP) imply that the act of carrying out a position order given by the competent authority is justified, because this is a reason that can be eliminate the unlawful nature of an act, if in *the common law* system it relates to *actus reus*. In addition, this Article also contains the phrase "office order given by the competent authority", in this case it emphasizes that the recipient and executor of the order must know that the order received is actually given by the authorized official (l'authorite legitime). and the order includes the scope of authority of the said official.

Basically, the background to the existence of arrangements regarding justification reasons and excuses as the basis for the abolition of punishment as stipulated in the Criminal Code (KUHP) is to avoid possible opportunities for unfair punishment, or in other words the imposition of punishment on people who do not guilty. However, in criminal justice the most important thing is that a person cannot be punished if he has no guilt (*Geen Straf Zonder Schuld*), which is solely aimed at finding material truth.

Application of the Law of Order Position on Article 51 Paragraph (1) of the Criminal Code (KUHP) in determine guilt and accountability follow Criminal Corruption in the Bureaucracy in Decisions Number : 1393 K/PID.SUS/2014 And Decision Number 1555 K/PID.SUS/2019

Criminal law is divided into material criminal law which is better known as criminal law and formal criminal law or known as criminal procedural law. Quoting Andi Hamzah's opinion that criminal procedural law studies the set of legal regulations in which in the event of a criminal violation, the state through its tools carries out the following stages:

1. Seek the truth about the occurrence of violations of the criminal law.
2. Investigate who is the perpetrator of the act (looking for suspects).
3. Arrest the perpetrators and if necessary detain them.
4. Searching for evidence to bring the accused to trial.
5. Make decisions.
6. Legal efforts to fight the judge's decision.
7. Carry out the judge's decision.

Every time the case file is transferred to the Court, it requires the public prosecutor to fill the case file with an indictment. The main function of the indictment in examining cases at court hearings is "to be the starting point for omlamnditastoanus in examining cases". Inspection cases before the Court must be based on the contents of the indictment. It is on the basis of this indictment that the chairperson of the trial leads and directs the course of the entire examination, both concerning the examination of evidence and those relating to evidence. In order for the chairman of the trial to be able to master the proceedings in accordance with the indictment, he must first correctly understand all the constitutive elements contained in the article on the crime against which he was charged, and be skilled at interpreting and interpreting the article on the crime in question. Therefore, before the judge starts examining the case at the trial court, he must first fully understand all the elements of the crime being charged.

The form of the decision handed down by the court depends on the results of the deliberations starting from the indictment with everything that is proven during the examination at the trial court, which can take the following form:

1. Punishment or imposition of a crime, according to Article 193 paragraph (1) of the Criminal Procedure Code, sentencing is carried out if the court is of the opinion that it has been proven legally and is convinced of the guilt of the defendant.

2. Acquittal, acquittal means that the accused was given an acquittal or declared free from lawsuits (*vrij spraak*) or acquittal .
3. The waiver of all lawsuits, this decision is regulated in Article 191 paragraph (2), which reads: "If the court is of the opinion that the act charged against the defendant is proven, but the act is not a crime, then the defendant is dismissed from all lawsuits" .

In recent developments, in a number of cases that were tried at the Corruption Court, it was noted that the defendant often used the excuse that he was only carrying out orders in his position or carrying out orders from his superiors, in this case using Article 51 paragraph (1) of the Criminal Code. As examples of cases that researchers will use in this study, including Decision Number 1393 K/Pid.Sus/2014 and Decision Number 1555 K/Pid.Sus/2019.

In the Supreme Court Decision Number 685 K/PID/2005

In this Cassation Decision , the charges imposed The Public Prosecutor is Article 3 of the Law Number 31 of 1999 which has changed and added with Constitution Number 20 of 2001 jo. Article 55 paragraph (1) to 1 of the Criminal Code (KUHP), which the Supreme Court Judge gave the verdict with consideration that with notice Article 2 paragraph (1) of the Law Number 31 of 1999 as has changed and added with Constitution Number 2 of 2001 jo. Article 55 paragraph (1) 1st Criminal Code, Article 197, Article 191 Criminal Procedure Code and all provision other from all related laws and regulations _ with case this , Defendant has released from all demands law like listed in decision The District Court was indignant more beeps as following :

1. Declare the actions of the Defendant Drs. H. Abdul Shobur, SH.MM as charged by the Public Prosecutor has been proven, but the act is not a crime
2. Release the Defendant from all lawsuits
3. Restore the rights of the Defendant in terms of ability, position and dignity
4. Burden case costs to the state

Consideration Supreme Court is that it turns out Applicant cassation No can prove that decision the is is no exemption _ pure , because Applicant cassation No can submit possible reasons _ made base consideration about Where location characteristic No pure from decision free such and only submit reason solely about evaluation results actual proof _ No is reason For plead cassation to decision free .

That on the side it , the Supreme Court based authority neither is supervision see that decision the imposed by the District Court with has exceeded the limits of his authority and wrong in application law , therefore That application cassation by the Public Prosecutor based on Article 244 Law no. 8 of 1981 (KUHP) must stated No can accepted .

Based on consideration of the judge who applied Article 2 paragraph (1) of the Law Number 20 of 2001 concerning Changes to the Law Number 31 of 1999 concerning Eradication follow Criminal Corruption , then study will try parse especially formerly the elements in Article 2 Paragraph (1) of the Law Number 20 of 2001 concerning Changes to the Law Number 31 of 1999 concerning Eradication follow Criminal Corruption , for understanding related Chapter the can seen more clear namely :

- 1) Everyone _

Refer to subject law or perpetrator follow criminal , element every one of these must proven at a time considered For prove that perpetrator capable responsible for his actions. The ability to take responsibility for the perpetrators of criminal acts is regulated in Article 44 paragraph (1) of the Criminal Code, which confirms that "Anyone who commits an act that cannot be accounted for because of an imperfect mind or because of an illness changing his mind should not be punished". In this case Drs. H. Abdul Shobur, SH., MM is the Secretary of DPRD Prop. South Sumatra who was appointed based on the Decree of the Governor of South Sumatra Number: 821.2/60/BKD/II/2002 dated August 5, 2002 and holds a master's degree in education and while undergoing trial, the

defendant is in good physical and psychological condition, therefore, against his actions are deemed capable of being held accountable as legal subjects. So that everyone's element has been fulfilled.

2) kindly oppose law do deed

In this element, what is meant by "unlawful" is simply against formal law. This is based on the decision of the Constitutional Court Number 003/PUU-IV/2006 which cancels the unlawful nature of the material in the elucidation of Article 2 UUPTK. The defendant namely Drs. H. Abdul Shobur, SH., MM made a Request for Disbursement of Operational Costs, for 75 Council Members @Rp 100,000,000,- = Rp 7,500,000,000,- upon request and to be signed by the Chairman of the DPRD Prop. South Sumatra, namely DR. Adjis Saip, SH. addressed to the Defendant, and after the letter of request was signed by DR. Adjis Saip, SH Chairman of the DPRD Prop. South Sumatra, then the Defendant followed up by making a request letter to the Governor with Number: 921/00221/SETWAN/2003 to issue a Temporary Expense Authorization Decree (SKO), the letter was received by the Karo Finance Pemda South Sumatra. In this case, the Defendant as Secretary did not provide any advice or consideration to the Chairman of the DPRD Prop. South Sumatra to be carried out by the DPRD Rapim first before the DPRD Chair signed the request letter for Operational Costs, and instead the Defendant made and signed/submitted the request letter to the Governor of South Sumatra, which is contrary to Article 151 letter d of the Decree of the Governor of South Sumatra Number 19 of 2002. So with this matter, the element of unlawfully has been fulfilled.

3) Enrich self Alone or someone else or something corporation

In this case, the element that is very clear is where the money in the amount of IDR 7,500,000,000.- (Seven Billion Five Hundred Million Rupiah) was distributed to the 75 members of the Council, with each getting a share of IDR 100,000,000.- (One hundred million rupiah). These actions have enriched other people, namely the Members of the South Sumatra Province People's Legislative Assembly. So from that, the element of enriching oneself or another person or a corporation has been fulfilled.

4) Can be detrimental state finances or country economy

In case this, element harm state finances or The country's economy can be seen from the money that is distributed. These actions have harmed state finances in this case the Regional Government of Prop. South Sumatra in the amount of Rp.7,500,000,000.- (Seven Billion Five Hundred Million Rupiah). Then the element can be detrimental to the State's finances or the State's economy has also been fulfilled.

From the description such, then Already as the judge gave punishment as provisions in Article 2 paragraph (1) of the Law Number 20 of 2001 concerning Changes to the Law Number 31 of 1999 concerning Eradication follow Criminal Corruption. However, the Judge did argue with based that defendant of course proven has do crime, however matter the on order position as provisions in Article 51 paragraph (1) of the Criminal Code (KUHP).

On Verdict Number 1393 K/ Pid.Sus /2014

In this Cassation Decision, the Claims imposed The Public Prosecutor is Article 2 Paragraph (1) jo. Article 18 of the Law Number 20 of 2001 concerning Changes to the Law Number 31 of 1999 concerning Eradication follow Criminal Corruption jo. Article 55 Paragraph (1) 1 of the Criminal Code (KUHP) in which Judges at the District and High Courts have decide with consideration. Then, it comes to the cassation level, where the judge at the Supreme Court is in consideration argue that The decision made by *Judex Facti* has stated that the Defendant has been legally and convincingly proven to have committed acts of corruption which were carried out jointly as indicted by the Public Prosecutor in the subsidiary indictment and *Judex Facti* has considered all of these legal facts correctly and correctly.

Whereas the reason for the cassation objection of the Cassation Appellant/Defendant who stated that the Defendant for all the problems in the case was only as a subordinate/Secretary of Region who carried out the Regent's orders and the Defendant felt in a fait *accomply* to do/sign the documents submitted by his staff, is a reason that cannot

be justified, knowingly or unknowingly, that the actions of the Defendant contributed to the loss of state finances by the *a quo act*.

That without the actions of the Defendant signing the submitted documents, or if the Defendant repaired, or corrected the process/procedure for procurement of goods and services *in casu* which has been regulated as in Presidential Decree Number 80 of 2003 dated 3 November 2003 concerning Guidelines for Implementation of Government Procurement of Goods/Services, or the Defendant survives with all the risks, that the procedure for procuring the goods is contrary to the applicable laws and regulations, the state loss by the Defendant will not occur, or at least the state loss occurs not because of the Defendant's actions.

In order to more clearly examine the Judge's considerations, the research will first try to decipher the elements in Article 2 Paragraph (1) of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, namely:

1. Each person

In this case, referring to the legal subject or perpetrator of the crime, namely Drs. H. Syarifuddin Fadhil. This element of each person must be proven as well as considered to prove that the perpetrator is capable of being responsible for his actions. The ability to take responsibility for the perpetrators of criminal acts is regulated in Article 44 paragraph (1) of the Criminal Code, which confirms that "Anyone who commits an act that cannot be accounted for because of an imperfect mind or because of an illness changing his mind should not be punished". In this case Drs. H. Syarifuddin Fadhil, a civil servant who served as regional secretary, during the trial the defendant was proven to be in good physical and psychological condition so that he could be held accountable for his actions as a legal subject. Therefore, the element of each person has been fulfilled.

2. Unlawfully commit an act

What is meant by "unlawful" in the elements of this article is only against formal law. This is due to the issuance of the Constitutional Court decision No.003/PUU-IV/2006 which canceled the nature of material violations in the elucidation of Article 2 UUPTK. In this case, the defendant Drs. H. Syarifuddin Fadhil together with witness Drs. H. Abdullah Hich and witness Ir. H Suparno, MS, signed Decree Number: 2952/STP-LN/PDN.2/X/2002 dated 31 October 2002 to PT Istana Saranaraya, thus contradicting KEPPRES Number 80 of 2003 dated 3 November 2003 concerning Guidelines for the Implementation of Procurement of Goods/Services The government namely Article 9 Paragraph (4). So with this the element of Unlawfully has been fulfilled.

3. Enrich yourself or another person or a corporation

In this case, the element that looks very clear is how the speakers are not in accordance with what is needed, but the item is still acceded or received as an item that is in accordance with what is needed in all cases. From this, it is clear that the defendant's actions have benefited the corporation, in this case PT Saranaraya Palace. So from that, the element of enriching oneself or another person or a corporation has been fulfilled.

4. Can be detrimental to state finances or the country's economy.

In this case, the element of loss to state finances or the country's economy can be seen from the impact/result of receiving goods needed by the defendant, who in this case was the regional secretary who was instructed by Drs. H. Abdullah Hich as Regent and assisted by Ir. H Suparno, MS as the Head of Bapelitbangda (now Bappeda) of East Tanjung Jabung Regency, has caused a loss of state finances of IDR 651,006,136.00 (six hundred fifty one million six thousand one hundred and thirty six rupiahs) according to the Central BPKP Calculation Report in Jakarta on June 24, 2009. So this element has been fulfilled.

Based on description elements such, then the judge should have given punishment as provisions in Article 2 paragraph (1) of the Law Number 20 of 2001 concerning Changes to the Law Number 31 of 1999 concerning Eradication follow Criminal Corruption. However, the Judge did argue with based that defendant of course proven

has do crime , however matter the on order position as provisions in Article 51 paragraph (1) of the Criminal Code (KUHP).

as consideration The Panel of Judges on the 2 Cassation Decisions that have outlined , Author argue that observations made by the Judge have fail see at a time interpret Article 51 paragraph (1) separately more broad and deep , in fact otherwise Judge only evaluate in a manner normative and narrow . Because if We quote opinion some expert related chapter such , then need rated Far more in to everyone who will given protection on chapter the . For example just quote opinion Hazewinkel Suringa , that No every order position justify the act of the recipient orders , all depending on the method do order or the tools used For carry out command . He add that implacable obedience _ blind That No negate can he blamed something error .

Furthermore There is opinion from Satochid Kartanegara , which he argue that can categorized as as something order legal position _ is implementation government That must balanced , appropriate and not can beyond the limits of decency government . Then There is opinion from JMvan Bemmelen also thinks that Good to order position nor to regulation legislation that one _ subordinate That must critical attitude _ critical the must more Lots He show me to order position from to _ regulation legislation . Attitude critical from a subordinate on policies issued by his superiors can done if issued decision _ indicated deviate from mechanisms that apply and result bad at execution , a subordinate No forbidden For emit attitude the Because protected by law .

Based on a number of opinion expert such , then everyone is entitled get protection based on Article 51 paragraph (1) of the Criminal Code is first , command based on duty , authority or legal obligation _ stated in regulation applicable laws . _ Second , those who are ruled and those who rule must There is sub- ordination relationship (subordinate-superior) . Third , way carry out order position must balanced or not exceed the limit of decency . Then , by more simple , there are 2 (two) conditions that must be fulfilled in order for a executor order can get away from noose law that is condition subjective is maker must with faith Good looked that order That come from the authorities and conditions objective is implementation order must located in scope maker as subordinate .

From the description related someone who is entitled get protection from Article 51 paragraph (1) of this Criminal Code , on the Case Decision Supreme Court Number 685K/PID/2005 deed from defendant namely Drs. H. Abdul Shobur , SH., MM., is A deed participate as well as in do follow criminal corruption (together) p This proven from request letter making Thawing Cost operational on request and for signed The chairman of the DPRD, who later followed up with make a Temporary Expense Authorization Decree (SKO) intended to governor . Furthermore neither did the defendant operate task from a Secretary of Parliament in matter This No provide advice and considerations to Chairman of the DPRD Prof. South Sumatra for the DPRD Rapim is carried out first formerly before The chairman of the DPRD signs handle letter request Cost Operational , and even precisely Defendant create and sign letter mail the above .

Then, regarding the judge's consideration in this case, giving the opinion that the defendant carried out the position order was a mistake. Because the order is only seen as a position order, if it is carried out in accordance with *the procedures and* provisions of the applicable laws and regulations, that is, if the order is given by the DPRD leadership after hearing the considerations of the DPRD leadership meeting, but in fact the meeting has never taken place/conducted.

Furthermore according to opinion Assembly No can separated between task legislative with task accountability in the field finance but is seen task _ as One unit which is not can separated One each other, with reason exists Defendant take responsibility matter finance to Governor No regardless from order beginning exists need finance for the DPRD ordered Leaders of DPRD, because party It was the leadership of the DPRD that took the initiative beginning to all necessary activities _ fulfilled Defendant in the field finance or the funding or in other words no The accused arranged What just DPRD activities , Defendant just facilitate activity That after exists initiative

activity That from DPRD leadership . In case This The Panel of Judges has misapplied task Defendant as DPRD Secretary . Of course right task Council Secretary not can separated between task legislative with task accountability in the field finances , however can and should distinguished between second task the Where task legislative arranged in Article 4 Procedural Regulations DPRD Prop . South Sumatra Number 10 of 2001, namely :

1. Choose the Governor/Deputy Governor
2. Elect Members of the People's Consultative Assembly from Regional Representatives
3. Propose the appointment and dismissal of the Governor/Deputy Governor
4. Together with the Governor, establish Regional Regulations
5. Together with the Governor, determine the Regional Revenue and Expenditure Budget
6. Carry out supervision of:
 - a. Implementation of Regional Regulations and other Legislation
 - b. Implementation of Governor's Decree
 - c. Implementation of Regional Revenue and Expenditure Budget
 - d. Local Government Policy
 - e. Implementation of international cooperation in the Regions;

Whereas task Council Secretary , in field Finance arranged in Article 150 and Article 151 Governor Decree South Sumatra No. 19 of 2002, dated March 28, 2002, concerning description tasks and functions Secretariat of the Council of Prop. Sumsel , which reads : " for carry out task as regulated in Article 150 decision this , section Finance have task :

1. Carry out the management and settlement of Authorization Decrees (SKO), Payment Orders (SPP) and Payment Orders (SPMU) with Regional Government Units
2. Carry out the Receipt, Storage and Payment of Council finances
3. Carry out payment of salaries, overtime pay and other employee benefits
4. Carry out checks on cash position (Cash Hospitalization and making budget accountability)
5. Carry out Financial Bookkeeping Procedures
6. Receive and examine the Financial Accountability Letter (SPJ).
7. Compile and Maintain signs of Financial Evidence
8. Prepare materials for the Board Budget Execution Report and the Council Secretariat
9. Arrange Accountability for the Use and Management of Council Finances and the Board Secretary

Whereas in the Article 151, Decree of the Governor South Sumatra No. 19 of 2002, section finance authorized have function :

1. Preparation of budget plans and financial management for the needs of the Council
2. Execution of all activities related to the planning, appropriation and settlement of the finances of the Council
3. Implementation of the financial administration of the Council
4. Provision of advice and considerations related to finance
5. Preparation of the Board's financial reports and the Board Secretary

That based on description tasks and functions Council Secretary above , obviously that task from function Council Secretary in the field legislative must distinguished with tasks and functions Council Secretary in the field Finance Where tasks and functions in the field finance Defendant as The Secretary of the Board is responsible to Governor South Sumatra which raised it and at the same time as his boss , too tasks and functions Council Secretary in the field legislative responsible to DPRD leaders , however No as boss , because in the Structure DPRD organization is not use term Head of the Council but Chairman of the Council. this _ connotation that if use term Head , mean it's true that the people under him (his staff) have to obey and obey operate order his boss , throughout order the right , meanwhile if use term Chief , no There is term superiors and subordinates . So from description above _ related with

order position, Drs. H. Abdul Shobur, SH., MM is not feasible For given Article 51 paragraph (1) of the Criminal Code, because No fulfil condition subjective and objective.

Then, if We analysis about Drs. H. Syarifuddin Fadhil looks on clear that his deeds No The same very reflect someone who is entitled get Article 51 paragraph (1) of this Criminal Code, where since beginning the accused has education tall, dedicated and have integrity as civil servants, will _ but in case this, he submit without reason with order from Very regent _ seen clear indication No good in matter This lead to follow Criminal Corruption and even participate as well as help launched or smooth every steps /strategies for can do No criminal corruption with method request help from head regional planning agency Good in a manner direct nor in a manner write (memo) and follow sign every necessity required filing. _ So deep Decision Number 1393 K/ Pid.Sus /2014, the researcher agrees with the Judge's considerations that have been correct in applying the law.

Next, if We hook up the actions of Drs. H. Abdul Shobur, SH., MM and Drs. H. Syarifuddin Fadhil with theory accountability criminal, that according to Van Hamel understanding accountability criminal is something psychic normalcy and carrying skills _ _ three type ability, that is First capable For can understand meaning as well as consequence truly from deeds alone. Second, capable realized that deeds That contrary with order society. Third, capable For determine will do. That Drs. H. Abdul Shobur, SH., MM and Drs. H. Syarifuddin Fadhil is one who is educated and also attached to himself A which job title the seriously No direct give authority subject to the law Number 30 of 2014 concerning Administration Governance and Law Number 5 of 2014 concerning Apparatus State Civil. However, precisely _ authority the abused in a manner on purpose by them. Then it looked clear that the 3 (three) elements condition the has fulfilled on deed from Drs. H. Abdul Shobur, SH., MM and Drs. H. Syarifuddin Fadhil in each case.

on the basis description above, then _ _ Already properly actions committed by Drs. H. Abdul Shobur, SH., MM and Drs. H. Syarifuddin Fadhil got reward or appropriate sanctions, because _ If look at the goal cited sentence _ from Wirjono Prodjodikoro is For scare people don't until do crime Good in a manner scare people as well scare certain people already _ do crime in the future day No do crime again and for educate or fix those who do evil in order to become good people his character so that beneficial for society.

Purpose of punishment That Alone expected can become means protection community, rehabilitation and resocialization, fulfillment view law custom, as well aspect psychology For relieve guilt _ for those concerned. Although criminal is something grief but No intended For suffer and humiliate dignity human. At least actions committed by Drs. H. Abdul Shobur, SH., MM and Drs. H. Syarifuddin Fadhil must based on (3) three objective from something punishment, including:

- 1) For repair personal from criminal That Alone
- 2) For make people be wary in do crimes
- 3) For make criminals certain become No capable For do other crimes, ie criminals that with other ways already No can repaired again.

CONCLUSION

Based on findings research, got concluded that:

1. incompatibility between order with work can cause somebody not Can take cover behind Article 51 paragraph (1) of the Criminal Code (KUHP). Not enough until there, debate others appeared _ from a number of circles expert to order position That itself, there opinion that can categorized as as something order legal position _ is implementation government That must balanced, appropriate and not can beyond the limits of decency government or opinion other that Good to order position nor to regulation legislation that one _ subordinate That must critical attitude _ critical the must more Lots He show me to order position from to _ regulation legislation. Attitude critical from a subordinate on policies issued by his superiors can

done if issued decision _ indicated deviate from mechanisms that apply and result bad at execution , a subordinate No forbidden For emit attitude the Because protected by law . because _ that , can concluded that executing civil servants _ _ order legal position , whenever _ first , command based on duty , authority or legal obligation _ stated in regulation applicable laws . _ Second , those who are ruled and those who rule must There is sub- ordination relationship (subordinate-superior) . Third , way carry out order position must balanced or not exceed the limit of decency . With thus , obtained A conclusion that there are (2) two conditions that must be met fulfilled in order for a executor order get away from noose that is condition subjective is maker must with faith Good looked that order That come from the authorities and conditions objective is implementation order must located in scope maker as subordinate . So, one ordered police _ his boss torturing prisoner still Can convicted although He operate order That with faith ok . Because it's torturous prisoner No his job .

2. On Verdict Court Agus against Drs. H. Abdul Shobur , SH . , MM, the observations made by the Judge have fail see at a time interpret Article 51 paragraph (1) separately more broad and deep , in fact otherwise Judge only evaluate in a manner normative and narrow . Because if We quote opinion some expert related chapter such , then need rated Far more in to everyone who will given protection on chapter the . That the Judge has mistaken put connection superiors to the accused with Who is the chairman of the DPRD ? defendant lifted based on Governor Decree . So from That condition subjective and objective For get Article 51 paragraph (1) of the Criminal Code does not fulfilled . While on the verdict Supreme Court against Drs. H. Syarifuddin Fadhil which actions the seen clear that He submit without reason with order from Very regent _ seen clear indication No good in matter This lead to follow Criminal Corruption and even participate as well as help launched or smooth every steps /strategies for can do No criminal corruption with method request help from head regional planning agency Good in a manner direct nor in a manner write (memo) and follow sign every necessity required filing . _ So against decision this , researcher agree with consideration of the Judge who has Correct in apply law . Then if studied based on theory accountability crime , that Drs. H. Abdul Shobur , SH., MM and Drs. H. Syarifuddin Fadhil is an educated and aware person will attached to him A which job title the seriously No direct give authority subject to the law Number 30 of 2014 concerning Administration Governance and Law Number 5 of 2014 concerning Apparatus State Civil . However , precisely _ authority the abused in a manner on purpose by them . Then it looked clear element condition accountability criminal has fulfilled which _ automatic punishment to both of them is A proper reward , remember _ objective from punishment That Alone is expected can become means protection community , rehabilitation and resocialization , fulfillment view law custom , as well aspect psychology For relieve guilt _ for those concerned as well as become pilot for society .

above suggestions findings and conclusions study that is needed something codification law penal code (KUHP) . give clear explanations and explanations _ more carry on about scope from understanding order position as well as the basics the law so that can with clear , firm and precise can applied by each enforcer law .

REFERENCE

- Alamsyah, N. (2019). *Theory and Practice of Government Authority* . UNPAD Press, Bandung.
- Chazawi, A. (2008). Lesson of Criminal Law Part 2 Print IV. *Jakarta: PT Raja Grafindo Persada* .
- Disemadi, HS, & Santoso, B. (2019). Implementation of the Guidance and Supervision Functions of the Financial Services Authority on Sharia Microfinance Institutions in Central Java (Study on the Sunan Gunung Jati Ba'alwy Micro Waqf Bank). *Salatiga: SWCU FH Law Reflection Journal* .
- Lamintang, PAF (2014). *Lamintang, Basics of Indonesian criminal law* . Bandung : PT. Citra Aditya Bakti.

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- Marsono, SD (1984). *Civil Service Law in Indonesia*. Djbatan Publisher, Jakarta .
- Marwan, E. (2013). *Corruption and the National Strategy for Prevention and Eradication*. Jakarta, Reference .
- Moeljatno, SH (2002). *Principles of Criminal Law*. Rineka Cipta, Jakarta .
- Muhammad, D. (2018). *Bureaucracy (Concept Study, Theory Towards Good Governance)*. Lhokseumawe: Unimal Press: October .
- Nurjana, IGM (2010). *The criminal law system and the latent dangers of corruption: the perspective of upholding justice against the legal mafia* . Student Library.
- Remmeling, J. (2003a). *Criminal Law*, translated by Tristam Pascal Moeliono, Jakarta: PT. Main Library Gramedia .
- Remmeling, J. (2003b). *Criminal Law translation by Tristam Pascal Moeliono*. Gramedia Pustaka Utama, Jakarta .
- Rusfiana, Y., & Supriyatna, C. (2021). *Understanding Government Bureaucracy and Development* . Bandung: Alfabet.
- Rusanto, A. (2016). *Crime and Criminal Liability: A Critical Review Through Consistency Between Principles, Theories, and Their Applications* . Prenada Media.
- Soekanto, S. (2006). *Introduction to legal research* . University of Indonesia Publisher (UI-Press).
- Wirjono, P. (1989). *Principles of Criminal Law in Indonesia* . PT. Eresco.