

ANALYSIS OF ELEMENT 'UNLAWFUL' OF CORRUPTION IN THE BANKING SECTOR (STUDY OF THE SUPREME COURT DECISION NUMBER 1812 K / PID.SUS / 2014)

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Abstract

The banking sector as one of the drivers of the national economy plays an important role in funding a business through bank credit distributing activities. In practice, this banking service raises legal problems, not only banking crimes but also corruption. Supreme Court Decision No. 1812 K / PID.SUS / 2014 on behalf of the Defendant Dian Siswanto, S.E. MM., in the case of a corruption shows this. This paper examines the element of unlawful and abuse of authority in cases of corruption in the banking sector. The research method used is normative law which is prescriptive with a statute approach, a conceptual approach, and a case approach. The results show 2 (two) things, first, that the defendant's actions met the unlawful element in the act of corruption as charged in the primary indictment. Second, the judge had wrongly in the application of law based on the subsidiary indictment concerning abuse of authority which was not fulfilled. The judge in this case, was not punctilious in digging up legal facts and was not correct in applying the law. Therefore, in the case of deciding a case, if the charges are of subsidiarity, the judge should prove the primary indictment carefully before deciding based on the subsidiary indictment to

create justice, benefit and legal certainty in law enforcement in general, and especially for the accused.

Sektor perbankan sebagai salah satu penggerak perekonomian nasional berperan penting dalam pendanaan suatu usaha melalui kegiatan penyaluran kredit bank. Pada praktiknya layanan perbankan ini menimbulkan permasalahan hukum, tidak semata-mata tindak pidana perbankan melainkan juga tindak pidana korupsi. Putusan Mahkamah Agung No. 1812 K/PID.SUS/2014 atas nama Terdakwa Dian Siswanto, S.E. MM. dalam kasus tindak pidana korupsi menunjukkan hal tersebut. Tulisan ini meneliti unsur melawan hukum dan penyalahgunaan wewenang dalam kasus tindak pidana korupsi di sektor perbankan. Metode penelitian yang dipergunakan adalah hukum normatif yang bersifat preskriptif dengan pendekatan undang-undang (statute approach), pendekatan konseptual (conceptual approach), dan pendekatan kasus (case approach). Hasil penelitian menunjukkan 2 (dua) hal, yaitu pertama, bahwa perbuatan terdakwa memenuhi unsur delik melawan hukum dalam perbuatan korupsi sebagaimana didakwakan dalam dakwaan primair. Kedua, hakim telah keliru menjatuhkan vonis dengan pertimbangan hukum berdasarkan dakwaan subsidair mengenai penyalahgunaan wewenang yang mana kualifikasi tersebut tidak terpenuhi oleh terdakwa. Dalam perkara ini, hakim tidak cermat dalam menggali fakta hukum dan tidak tepat dalam menerapkan hukum. Oleh karena itu, dalam memutus suatu perkara, apabila tuntutan bersifat subsidiaritas, seyogianya hakim membuktikan dakwaan primair terlebih dahulu dengan seksama sebelum memutuskan berdasarkan dakwaan subsidair sehingga dapat menciptakan keadilan, kemanfaatan, dan kepastian hukum dalam penegakan hukum pada umumnya, dan khususnya bagi terdakwa.

Keywords: Bank Credit, Corruption, Unlawful, Abuse of Authority

Introduction

A stable and sustainable national economic development is not solely based on a balance in all sectors of the economy, but also provides equitable welfare to all Indonesian people.¹ One of the essential components in the national economic system is the financial system and all activities that carry out an intermediary function for various productive activities in the national economy.² One of the actors in the financial system is banking. One of these financial service providers has an essential role as a stimulator of national

¹ World Bank Group, World Development Indicators 2016, World Development Indicators 2016, 2016 <<https://doi.org/10.1596/978-1-4648-0683-4>>.

² A. Demirguc-Kunt and R. Levine, Financial Structure and Economic Growth A Cross-Country Comparison of Banks, Markets, and Development (The MIT Press, 2001) <<https://econpapers.repec.org/RePEc:mtp:titles:0262541793>>.

economic growth. Economic growth is one of the most critical indicators in assessing the performance of an economy, especially for analyzing the economic development results that have been carried out by a country or a region.³

The banking sector as an intermediary institution has a strategic position to support the national economy, especially in carrying out its function of providing bank credit to finance the business interests.⁴ The function of a bank as an intermediary institution is stipulated in Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking Article 1 number 2 which stipulates: "Banks are business entities that collect funds from the public in the form of deposits and distribute it to the public in the form of credit and/or other forms to improve the standard of living of the people at large".⁵

In the banking business related to providing credit, criminal acts might occur because irresponsible parties exploit loopholes to gain profits illegally. Parties who can commit a criminal offence in extending credit are those who in practice come into contact with the bank as a means of committing a crime (either banking crime or banking crime). Parties involved include internal and external parties in the bank, for example, bank employees, members of the board of directors, members of the board of commissioners, shareholders and bank customers.⁶

Irregularities in the provision of credit can be a banking crime, if the bank's board of directors or employees do not heed banking regulations concerning prudential principles and credit principles and do not make a thorough assessment of customers. Sometimes, in practice, irregularities in the credit provision may be subject to criminal acts of corruption. In some cases related to abnormalities in the bank's credit, judges often apply the provisions of the law on corruption in cases related to irregularities in providing credit by banks.⁷ No matter how good the risk management in a

³ Septiatin et al., "Pengaruh Inflasi Dan Tingkat Pengangguran Terhadap Pertumbuhan Ekonomi Di Indonesia," *I-Economic* 2. no.1 (2016): 25

⁴ Toruan, "Implikasi Hukum Pemberian Kredit Bank Menjadi Tindak Pidana Korupsi," *De Jure* 16, no. 1, (2016): 42.

⁵ *Undang Nomor 10 Tahun 1998 Tentang Perubahan Atas Undang- Undang Nomor 7 Tahun 1992 Tentang Perbankan* Pasal 1 angka 2.

⁶ Toruan, *loc.cit.*

⁷ Zein dkk., "Penegakan Hukum Kejahatan Korporasi Di Sektor Perbankan," *Jurnal Living Law* 7, no. 1 (2015): 6.

company is, if it is not balanced with internal control, it will remain weak, especially for banking companies that are vulnerable to risks that may arise.⁸

One of the implementing practices of the provisions related to banking sector of the law on corruption is found in the Supreme Court Decision Number 1812 K / PID.SUS / 2014 dated November 19 2014. The case involved Defendant as Junior Relationship Manager (JRM) of Bank Mandiri Branch MH. Thamrin, which is authorized to disburse investment credit facilities by Bank Mandiri to PT. Prakarsa Betung Meruo Senami (PT. PBMS). In the decision, the Panel of Justices at the Supreme Court decided that the Defendant was legally and convincingly proven guilty of committing the practice of corruption.

In the primary indictment, the person concerned was accused of violating the provisions of Article 2 of Law No. 31 of 1999 jo. UU no. 20 of 2001 concerning the Eradication of Corruption Crime (Anti-Corruption Law) which regulates elements unlawful in criminal acts of corruption. Meanwhile, in the subsidies charge, the provisions imposed are Article 3 of the Company Law, which regulates the abuse of authority. In their verdict, the Panel of judges found the Defendant guilty in the subsidiary charges.

Recent developments show that in practice, the majority of corruption cases are prosecuted and decided based on the 2 (two) provisions of the article above. Empirical facts show that 503 cases prosecuted under Article 3 of the Anti-corruption Law and 147 cases prosecuted under Article 2 of the Anti-Corruption Law.⁹

This legal writing examines the elements of unlawful and abuse of authority by defendants in cases of criminal corruption in the banking sector, particularly in decisions in a quo case. Besides, it is also to examine the application of the law by Panel of judges in a quo case. The purpose of writing this article is to study further the element of unlawful of corruption and provide recommendations for enforcement of criminal law following legal principles, legal tenets, and legislation.

⁸ Clarisa Ayu Yonatama dan Siti Ragil Handayani, "Pengaruh Penerapan Manajemen Risiko Dan Audit Internal Terhadap Kebijakan Pemberian Kredit (Studi pada Bank Umum Milik Negara di Kota Malang)," *Jurnal Administrasi Bisnis (JAB)* 59, no.1 (2018):7.

⁹ Arsil, Bahan Presentasi FGD Studi Tentang Disparitas Putusan Dalam Perkara Korupsi – ICW, Gren Alia, 19 September 2013, sebagaimana dikutip dalam Yuntho, Emerson dkk., *Penerapan Unsur Merugikan Keuangan Negara dalam Delik Tindak Pidana Korupsi* (Jakarta: Indonesia Corruption Watch, 2014), 20.

Methods

In this study writers uses normative legal research that is prescriptive in order to solve legal problems of corruption offences in banking sector.¹⁰ The research approach used by the author includes a statute approach, a conceptual approach, and a case approach that uses primary and secondary legal materials. The collecting of legal materials in this paper uses the literature study. A literature study is useful for obtaining a theoretical basis by examining and studying books, laws and regulations, court decisions, documents, reports, archives and research results related to research problems. The method of analysis in this research is a syllogistic deduction which originates from the preposition of the central premises that the primary indictment should be proven, then proceed with proving the subsidiary indictment and so on, and then the minor premises is that the unlawful element as charged in the primary indictment, from the two premises the author concluded.¹¹

Results and Discussions

A. Defining the banking concept

The circulation of money in the economy occurs through financial institutions framework intermediates interaction between the real sector and the monetary sector is expected to run well to support the development process. The function of the Bank as Agent of Financial service institutions are institutions engaged in more diverse services, in other words, banking activities are not only limited in terms of raising funds and distributing funds among the public.¹²

In Article 1 of Law Number 10 of 1998 concerning Amendment to Law Number 7 of 1992 concerning Banking, defines banking as:¹³

- (1). *Everything concerning banks, including institutions, business activities, methods and processes of carrying out their business activities*
- (2). *defines a Bank as a business entity that collects funds from the public in the form of deposits and distributes them to the public in the form of credit and*

¹⁰ Titik Triwulan Tutik, "Hakekat Ilmu Hukum Ditinjau dari Filsafat Ilmu dan Teori Ilmu Hukum," *Jurnal Hukum dan Pembangunan* 43, no.2 (2013):245.

¹¹ Peter Mahmud Marzuki, *Penelitian Hukum*. Edisi Revisi (Jakarta: Kencana Prenada. Media Group., 2014), 89

¹² Fadli Alanshari, Doni Marlius, 2018, *Prosedur Pemberian Kredit KPR Pada PT. Bank Tabungan Negara (PERSERO) TBK Cabang Pembantu Bukittinggi*, INA-Rxiv Papers, osf.io/dgm6b/. DOI 10.31227/osf.io/rsfhc.

¹³ *Undang-Undang Nomor 10 Tahun 1998 tentang Perubahan Atas Undang- Undang Nomor 7 Tahun 1992 Tentang Perbankan.*

or other forms in the context of improving the standard of living of the people at large.

As a financial institution, the functions of a bank can be classified into 3 (three) groups including¹⁴

1. Bank as an institution that collects public funds in the form of savings, time deposits and current accounts.
2. Banks as institutions that channel funds from the public in the form of credit.
3. Banks as institutions that facilitate trade transactions and money payments.

B. Credit Mechanisms

One of the central bank business activities is the provision of credit. Etymologically, the term credit comes from the Latin *credere*, which means trust. This definition shows that the basis for providing credit by banks to debtor customers is trust.¹⁵ According to Law No. 10 of 1998 concerning Banking Article 1 point 1, "*Credit is the provision of money or equivalent claims, based on a loan agreement between the bank and another party which requires the borrower to pay off its debt after a certain period with interest*".¹⁶

Providing credit to a prospective debtor must meet the requirements known as the 5C principle, as follows:¹⁷

a. Character

Character is data about a prospect's personality such as personal traits, behaviour, lifestyles, circumstances and family background as well as hobbies. The use of the assessment is to find out to what extent the will of the prospective debtor to fulfil his obligations (willingness to pay) following the predetermined promise.

b. Capacity

Capacity is an assessment of prospective debtors regarding the ability to pay off obligations from business activities that they carry out which will be financed by bank credit.

¹⁴ Sinungun, *Management Dana Bank* (Jakarta: Rineka Cipta, 1990), 3.

¹⁵ Djumhana, *Hukum Perbankan di Indonesia*, (Bandung: Citra Aditya Bakti, 2000), 35.

¹⁶ *Undang-Undang No. 10 Tahun 1998 Tentang Perbankan*.

¹⁷ Teguh, *Manajemen Perkreditan Bagi Bank Komersil Edisi 3*, (Yogyakarta: Penerbit BPFE, 2011), 13.

c. Capital

Capital is a condition of wealth owned by the company it manages. The assessment based on the analysis of the balance sheet, income statement, capital structure, profit ratios such as return on equity, return on investment.

d. Condition of economy

The future business prospectus. Problems regarding the Condition of the economy are closely related to political factors, laws and regulations and natural factors.

e. Collateral

Collateral if it turns out that the debtor is unable to fulfil his obligations to settle his credit. Collateral can be both material and intangible, such as personal guarantees (borgtoch), letters of guarantee and recommendations.

C. Unlawful Element of Corruption

Regulating the terminology of an unlawful nature can be found as one of the elements of the criminal act of corruption in Article 2 of Law no. 31 of 1999 jo. Law no. 20 of 2001 concerning the Eradication of Corruption, which reads as follows: "Any person who illegally commits an act of enriching him/herself or another person or corporation which can harm the state finances or the state economy, shall be punished with life imprisonment or imprisonment at the minimum. 4 (four) years and a maximum of 20 (twenty) years and a fine of at least Rp. 200,000,000.00 and a maximum of Rp. 1,000,000,000.00"

From the formulation of Article 2, the elements that exist are:

- a. Each person;
- b. Unlawful;
- c. Enrich him/herself or other people or corporations; and
- d. Can harm the country's finances or the country's economy.

Furthermore, based on the formulation contained in Article 2 paragraph (1), there are several elements of the offence due to the existence of elements that are often of widespread concern among law enforcement

officials, namely elements of "unlawful acts" and "elements of State finance".¹⁸

Unlawful acts as regulated in the explanation of Article 2 paragraph (1), give the meaning that acts against the conceptual law definition as "formal or material". Formal element is meant against formal law because there are prohibitions or orders contained in the criminal law accompanied by the threat of sanctions for anyone who violates or ignores it. Meanwhile, against material law is that even if an act is under statutory regulations whether the act is despicable and deserves to be punished by the creator or not blameless, or too insufficient so that the author does not need to be subject to legal sanctions, but will including other legal terms or other social rules.¹⁹

According to Roeslan Saleh, what against material law defining is not only against written law but also against unwritten law. On the other hand, the tenets against formal law argue that the law is contrary to written law only. So according to the material tenets, in addition to fulfilling formal requirements, namely fulfilling all the elements mentioned in the formulation of offences, actions must be felt by society as prohibited or improper.²⁰

In its development, based on the Decision of the Constitutional Court Number 003 / PUU-IV / 2006 dated July 24, 2006, it was decided that the "unlawful" nature in Article 2 paragraph (1) of the Anti-corruption Law was only limited to the meaning of "formal". The Court believes that the first sentence of the explanation of Article 2 paragraph (1) which states: "What is meant by "unlawfully" in this article includes unlawful acts in both formal and material terms, that is, even though the act is not regulated in statutory regulations. Invitation but if the act is considered a disgraceful act because it is not following the sense of justice or norms of life, social and community, then the act can be punished "is contrary to the 1945 Constitution and therefore has no binding legal force. Besides, in the ruling, following the prevailing practice in the practice of forming good legislation, which is also legally binding, the explanation serves to explain the substance of the norms

¹⁸ Andriawan, Dian, "Penerapan Ketentuan Pemberantasan Tindak Pidana Korupsi Dalam Kasus Kredit Macet Perbankan," *Jurnal Hukum Prioris* 2, no. 4 (2010): 224

¹⁹ Farid, Andi Zainal Abidin, *Hukum Pidana* (Jakarta: Sinar Grafika, 2007), 242.

²⁰ Roeslan Saleh, *Sifat Melawan Hukum Dari Perbuatan Hukum Pidana*, (Jakarta: Aksara Baru, 1987), 7.

contained in the article and does not add new norms, let alone contain any substance at all, contrary to the norms described.²¹

Although the nature of the Constitutional Court's decision is final and binding, the Supreme Court in decision No. 103K / Pid / 2007 dated February 28, 2007, for example, stated that unlawful in Article 2 paragraph (1) must be interpreted in either a formal or material sense. In this decision, among other things, the Court in their consideration stated:²²

"It is not excessive for the Supreme Court to express its position regarding the meaning of "unlawful acts" referred to in Article 2 paragraph 1 of Law No. 31 of 1999, after the issuance of the Constitutional Court decision on July 25, 2006, No. 003 / PUU-IV / 2006 which states that the explanation of Article 2 paragraph 1 of Law No. 20 of 2001 in conjunction with Law No. 31 of 1999 "will contradict the 1945 Constitution of the Republic of Indonesia and has also been declared to have no binding legal force." That in casu the Supreme Court still gives the meaning of "unlawful acts" as referred to in Article 2 paragraph 1 of Law No. 31 of 1999, both in the formal meaning and in the material meaning".

Based on this decision, in practice, the nature of being unlawful in the criminal act of corruption is not solely in the formal sense (based on statutory regulations). Even norms that live in society, in a material sense, are interpreted and remain valid in seeing their nature of unlawful act.

In criminal law, apart from being interpreted formally and materially, the nature of 'Unlawful' is a phrase which has 2 (two) other meanings, as follows:²³

a. Nature unlawful.

The nature of violating the general law as a general condition that an act can be convicted. Every criminal act in it must contain elements unlawful.

b. Specific lawlessness.

The nature of being unlawful is specifically related to the inclusion of the word 'unlawful' explicitly in the formulation of offences conceptual definition. Thus, the nature of being unlawful is a written condition for being convicted of an act.

²¹ Putusan Mahkamah Konstitusi Nomor 003/PUU-IV/2006 Tanggal 24 Juli 2006.

²² Putusan Mahkamah Agung Nomor 103K/Pid/2007 Tanggal 28 February 2007.

²³ Mahrus Ali, *Asas, Teori dan Praktek Hukum Pidana Korupsi* (Yogyakarta: UII Press, 2013), 99.

The position of 'unlawful' in criminal law is unique. Among the jurists, there has been an agreement tacitly that in seeing the nature of being 'unlawful', it must be related to criminal acts. Every criminal act must be unlawful.

Closely related to the concept of violating the law, an act that can be subject to punishment is one that contains an intent (*opzet*) or negligence (*schuld*). Intent includes acting willingly and knowingly accepts a considerable chance that a certain result may ensue (*dolus eventualis*). Negligence includes both conscious and unconscious negligence. The conscious negligence occurs when the offender is aware of a considerable and unjustifiable risk that will result from the act but on unreasonable grounds that the risk will not materialize. Unconscious negligence occurs when the offender was not aware of the risk but should have been aware of it.²⁴²⁵ Thus, liability for criminal fault does not merely arise from the intent of the perpetrator but also negligence.

Another element that often becomes the main attention of law enforcement officials in prosecuting a corruption case is the consequences that included in the element of "state loss". Before further discussing state loss, we should first introduce the concept of 'state finance' based on the provisions of the law in Indonesia.

Based on the provisions of Article 1 of Law No. 17 of 2003 concerning State Finance is: "are all the rights and obligations of the state that can be valued in money, as well as everything in the form of money or in the form of goods that can be made into state property in connection with the implementation of these rights and obligations". In Article 2 of the Law on State Finance, further explained that what is meant by 'state finance' includes:

- a. the right of the state to collect taxes, issue and circulate money, and make loans;
- b. State obligations to carry out state government public service tasks and pay third party bills;
- c. State Revenue;
- d. State Expenditure;
- e. Regional Revenue;
- f. Regional Expenditure;

²⁴ Tak, P.J.P., *The Dutch criminal justice system: Organization and operation* (Nijmegen: Boom Koninklijke Uitgevers., 2003), 42

- g. State assets / regional assets managed by themselves or by other parties in the form of money, securities, accounts receivable, goods, and other rights that can be valued in money, including assets separated from state / regional companies;
- h. The assets of other parties that are controlled by the government in the context of carrying out government tasks and/or public interests;
- i. Other party's assets obtained by using facilities provided by the government.

Based on the formulation of the article above, it is meant by "state finances" is not merely obtain assets contained in central and regional government agencies (Ministries / Agencies). More than that, it also includes assets of in-state companies or regional companies (BUMN / BUMD).

Furthermore, the definition of state finance adopted by the State Finance Law uses a broad approach, with the aim²⁶

- a. to prevent multiple interpretations in terms of budget execution;
- b. to avoid losses of state do not occur as a result of weaknesses in the formulation of laws; and
- c. to clarify the law enforcement process in case of maladministration in state management.

The definition of 'state finance' is in line with what is stipulated in the elucidation of the Anti-corruption law. Wherein the General Elucidation mentions that state finances are all state assets in any form, separated or not separated, including all financial losses of the state and all rights and obligations, as follows:²⁷

- a. under the control, management and accountability of officials of state institutions, both at the central and regional levels;
- b. under the control, management and responsibility of state-owned enterprises/regional-owned enterprises, foundations, legal entities and companies that include state capital, or companies that include third-party capital based on agreements with the State.

The definition of 'state loss' in the law, namely Law No. 1 of 2004 concerning the State Treasury, Article 1 paragraph (22) is: "lack of money, securities, and goods, real and definite amount as a result of unlawful acts,

²⁶, of Ifrani, "Grey Area Antara Tindak Pidana Korupsi Dengan Tindak Pidana Perbankan", *Jurnal Konstitusi* 8, no. 6 (2011): 993-1018.

²⁷ General Elucidation of Law No. 31 of 1999 jo. UU no. 20 of 2001 concerning the Eradication of Corruption Crime (Anti-Corruption Law).

whether deliberately or negligently". Based on this formula, a matter can qualify as a state loss if it meets several elements, namely:

- a. there is a lack of assets (money, securities, and real/actual goods);
- b. there is the number of actual losses (measured/calculative);
- c. arises as a result of an unlawful act (intentional or negligent).

In its development, the risk of criminal acts in the form of activities that harm state finances has always been a fear of BUMN officials in carrying out their duties and responsibilities. Whereas state-owned enterprise's activities are business activities in which financial losses are a business risk as long as the business carried out according to applicable regulations, economical in state-owned enterprises losses are not always correlated with state losses. One of the fundamentals in terms of state financial losses classified into four approaches. First, the reduction/loss of state revenue rights in a definite and tangible way that can be valued in money which happened as a result of public service activities. Second, the emergence of a definite and tangible payment obligation that can be valued in terms of money from the state or regional treasury for an activity or job that should not have occurred. Third, the reduction of state revenue rights in a definite and tangible manner that can be valued in money that occurs in the management of public service assets or the sale of public assets at an unreasonable cost. Fourth, gratuities received by the implementers of public service activities which should be a loss to the state.²⁸

There are several ways in which state losses occur, due to:²⁹

1. Expenditure on a source of state or regional wealth, or state or regional income in the form of money, goods, or other forms that should not (be) excluded, but are excluded.
2. Expenditures on a source of wealth of the state or region, or on the state or regional income that is greater than what it should be.
3. Reduced or lost source of state or regional wealth, or income (or income) of the state or region that should have been received
4. Fewer rights to a country or region than it should be.

There are several methods for calculating state losses, as follows:³⁰

²⁸ Hernold Ferry Makawimbang, *Memahami Dan Penghindari Perbuatan Merugikan Keuangan Negara Dalam Tindak Pidana Korupsi Dan Pencucian Uang*, (Yogyakarta: Penerbit Thafa Media, 2015), 37

²⁹ Audit Investigasi dan Penghitungan Kerugian Keuangan Negara, PUSDIKLATWAS BPKP, Pelatihan KPK, 2013., sebagaimana dikutip dalam Emerson Yuntho dkk., *Op.cit.*, 11.

- a. Total loss with some adjustments;
- b. The difference between the contract price and the cost of goods sold or the cost of goods manufactured;
- c. The difference between the contract price and a specific comparable price or value;
- d. Revenue which is the right of the state but is not deposited into the state treasury;
- e. Expenditures that are not per the budget are used for personal gain or particular parties.

According to Eddy Mulyadi Sopardi, the objectives of calculating state losses in corruption cases are:³¹

- a. To determine the amount of compensation money/claim for compensation that must be settled by the party found guilty if the convict is subject to additional penalties as stipulated in Articles 17 and 18 of the Anti-corruption Law.
- b. As one of the prosecutors' references for prosecuting the severity/lightness of the sentence imposed and for the Judge as material for consideration in determining his decision.
- c. In the case that occurred later was civil or other (lack of treasury or negligence of civil servants), then the calculation of state losses are used as material for a lawsuit/prosecution following the applicable provisions.

Regarding the authorities in calculating state losses, the Constitutional Court in Decision Number 31 / PUU-X / 2012 dated October 23, 2012, decided that:

"in the context of proving a criminal act of corruption, it can also coordinate with other agencies, and can even prove itself outside. the findings of the Development and the Financial and Development Supervisory Board (BPKP) and the Supreme Audit Agency (BPK), for example by inviting experts or by requesting materials from the inspectorate general or bodies having the same function from each government agency, even from other parties. (including from the company), which can show material truth in the calculation of state financial losses and/or can prove the case being handled".

Based on this decision, the agencies authorized to calculate state losses include³²

³⁰ Tuanakotta, Theodorus M., *Menghitung Kerugian Keuangan Negara dalam Tindak Pidana Korupsi*, (Jakarta: Salemba Empat, 2009), 20.

³¹ Eddy Mulyadi Sopardi, 2013, "Penghitungan Kerugian Negara Dalam Perkara Tindak Pidana Korupsi" sebagaimana dikutip dalam Emerson Yuntho dkk., *Op.cit.*, 44.

1. BPKP;
2. BPK;
3. other agencies, for example by inviting experts or by requesting materials from the inspectorate general or bodies having the same function from respective government agencies;
4. other parties (including from companies) who can show the material truth in the calculation of state financial losses and/or can prove the case being handled.

However, after the issuance of the Supreme Court Circular Letter (SEMA) No. 4 of 2016 concerning the Criminal chamber formula number 6 of the Supreme Court Circular, there is a new provision in determining the authorized agency in determining state losses. The document explained that the agency authorized to state whether there is a loss in state finances is the Supreme Audit Agency (BPK) which has constitutional authority. In contrast, other agencies such as the Financial and Development Supervisory Boards (BPKP) / Inspectorate / Regional Work Units are still authorized to conduct audits and audits of state financial management. Still, they are not authorized to declare or declare there is a loss in state finance. In certain cases, the Judge based on the facts of the trial may judge the state finance loss and the amount of the state finance loss.³³ Thus it can be interpreted that the only auditing agency authorized to declare state losses is the BPK. Furthermore, from a constitutional perspective, the author considered the existence of this SEMA provisions actually implements the constitutional mandate as the legal basis of the authority of the Supreme Audit Agency which is clearly and expressly regulated in Article 23E of 1945 Constitution.³⁴ In addition, the existence of this provision can also avoid double standards in determining state losses.

D. Abuse of authority in corruption offences

From the perspective of language (etymology), the definition of abuse of authority is: "acts of abuse of the right and authority to act or abuse the

³² Putusan Mahkamah Konstitusi Nomor 31/PUU-X/2012.

³³ Supreme Court Circular Letter No. 4/2016.

³⁴ Pasal 23E Undang-Undang Negara Republik Indonesia Tahun 1945.

authority that makes decisions"³⁵ Meanwhile, in the legal provisions, the abuse of authority as the core part of the criminal offence (*bestanddeel delict*) of corruption in Article 3 of the Anti-corruption Law states, everyone who is intending to benefit himself or another person or a corporation misuses their authority, opportunity or means that can harm the state finances or the state economy.

According to Marwan Effendy, conceptually abuse of authority is: "abusing the authority, opportunity or means available to him because of his position or position" is the violation/misuse of the authority of the criminal. The formulation of "authority" can be seen from various formal rules governing the authority of a particular officeholder who gives specific authority to a person or group of people to do or not does something in his/her position.³⁶ Meanwhile, according to Komariah Emong Sapardjadja, officials who obtain and exercise authority utilizing attribution and delegation are those who carry out tasks and/or work based on mandates are not those who bear legal responsibility.³⁷ Thus it can be seen that the legal person subject (*natuurlijke person*) who can be assessed as an authorized official is any person based on a regulation carrying out a position and responsibility that has legal implications.

In the Article 2 of the Anti-corruption Law, it has been explained that what an 'official' means in a criminal act of corruption is:

1. State Officials at the highest state institutions;
2. State Officials at State High Institutions;
3. Minister;
4. Governor;
5. Judges;
6. Other state officials following the provisions of the prevailing laws and regulations; and
7. Other officials who have strategic functions concerning state administration following the provisions of the prevailing laws and regulations.

³⁵Muhammad Sahlan, 2016, Unsur Menyalahgunakan Kewenangan dalam Tindak Pidana Korupsi sebagai Kompetensi Absolut Peradilan Administrasi. <https://www.kbbi.web.id/salah%20guna.menyalahgunakan>. (Retrieved 10 Agustus, 2020).

³⁶ Effendy, Marwan, *Penerapan Perluasan Ajaran Melawan Hukum Dalam Undang- Undang Tindak Pidana Korupsi: Kajian Putusan No. 135/Pid/B/2004/PN.Cn. dan Putusan Sela No. 343/Pid.B/2004/PN.Bgr* (Jakarta: 2005), 17.

³⁷ Sapardjadja, K. E., *Ajaran Sifat Melawan Hukum Materiil dalam Hukum Pidana Indonesia: Studi Kasus tentang Penerapan dan Perkembangan dalam Yurisprudensi* (Bandung: Alumni, 2002), 53.

Meanwhile, in the Elucidation, what is meant by "other officials who have strategic functions" are officials whose duties and authorities carry out the administration of a country prone to corruption, collusion and nepotism, which includes:

1. Directors, Commissioners, and other structural officers at State-Owned Enterprises and Regional-Owned Enterprises;
2. Chairman of Bank Indonesia and Chairman of the Indonesian Bank Restructuring Agency;
3. Leaders of State Universities;
4. Echelon I Officials and other equalized officials within the civil, military and National Police of the Republic of Indonesia;
5. Prosecutors;
6. Investigators;
7. Clerk of the Court; and
8. Project leaders and treasurers.

In general, corruption can be defined as the abuse of authority/trust for personal gain. The definition of corruption also includes the behaviour of officials in the public sector, both politicians and civil servants, who enrich themselves inappropriately and violate the law or those who are close to bureaucratic officials by abusing authority entrusted to them.³⁸

Based on the classification of 'official', it can be concluded that other than the parties as mentioned above are not 'officials' Therefore if there is a private legal subject with no right of authority because the position has committed an illegal act, it is not categorized as an act of abuse of authority.

The form of abuse of authority can be classified into 3 (three) forms, as follows:³⁹

1. Abuse of authority to perform actions contrary to the public interest or to benefit personal, group or group interests.
2. Abuse of authority in the sense that the official's actions are adequately intended for the public interest, but deviating from the purpose for which laws or other regulations grant the authority.

³⁸ Muhammad Zainul Arifin dan Firman Muntaqo, 2018, "Penerapan Prinsip Detournementde Pouvoir Terhadap Tindakan Pejabat Bumh Yang Mengakibatkan Kerugian Negara Menurut Undang-Undang Nomor 17 Tahun 2003 Tentang Keuangan," *Jurnal NURANI* 18, no. 2 (2018): 177-194.

³⁹ Seno Adji, Indriyanto, "Perspektif Ajaran Perbuatan Melawan Hukum Terhadap Tindak Pidana Korupsi," *Jurnal Hukum Pro Justitia* 25, no. 4 (2007):290.

3. Abuse of authority in the sense of abusing procedures that should have been used to achieve specific objectives, but have used other procedures to make it happen.

Thus, the form of abuse of authority can be understood as an act of an official with the rights and responsibilities that deviates from the applicable provisions or procedures which are aimed at benefiting a party or contrary to predetermined goals. The result of this action is a violation, and in the context of criminal law it is an unlawful act. Thus, fault or violations of administrative law can be adopted into the unlawful nature referred to in the Corruption Eradication Law.⁴⁰

E. Unlawful Element analysis of corruption in the banking sector

1. Case brief

This case began when the defendant Dian Siswanto, SE.MM, as the Junior Relationship Manager at Bank Mandiri CBC Thamrin received data/documents attached to the credit disbursement application submitted by PT. Prakarsa Betung Meruo Senami (PT.PBMS), both stage I and stage credit disbursements II, not taking steps or not carrying out their duties carefully to verifying data documents on the legality of the company submitted by PT.PBMS, and not checking the ability of PT PBMS in implementing the Technical Assistance Contract (TAC) of the Meruo Senami Betung Oil Field in Jambi, no confirms to PT. Pertamina (Persero) Tbk, the extent to which the implementation of TAC work carried out by PT.PBMS and does not confirm the truth about whether or not it can be pledged to the bank or not, does not confirm the truth of the Drilling Services Volume Agreement No.023 / PBMS / JKT / III / 2003 - 2004 TAC Pertamina PT. PBMS with PT. Khanza Prima Nusa dated March 8, 2004 and the truth about the TAC Pertamina PT. Prakarsa Betung Meruo Senami with PT. Baja Daya Perkasa No.021 / SPK-PBMS / BDP / 03/03 dated March 3, 2004, and the Defendant did not monitor or supervise the use of credit by PT.PBMS.

This Defendant recklessness measures resulting in losses to state finances, in this case, PT. Bank Mandiri (Persero) Tbk. in the amount of USD 11,405,593.00 (eleven million four hundred five thousand five hundred and nine-thirty three US dollars) and has benefited PT.PBMS or Ir.Brahmantyo Irawan Kuhandoko, Ir. Achmad Fachrie and R. Rina Luciana Sasmitawidjaja. Based on the Customer Application Letter No.036.Dirut.PBMSBM / III / 03 dated February 19 2003 signed by R. Rina Luciana Sasmitawidjaja as if as the President Director of PT.PBMS and Ir.

⁴⁰ Abd. Razak Musahib, "Pengembalian Keuangan Negara Hasil Tindak Pidana Korupsi," *e-Journal Katalogis* 3, no. 1 (2015):52.

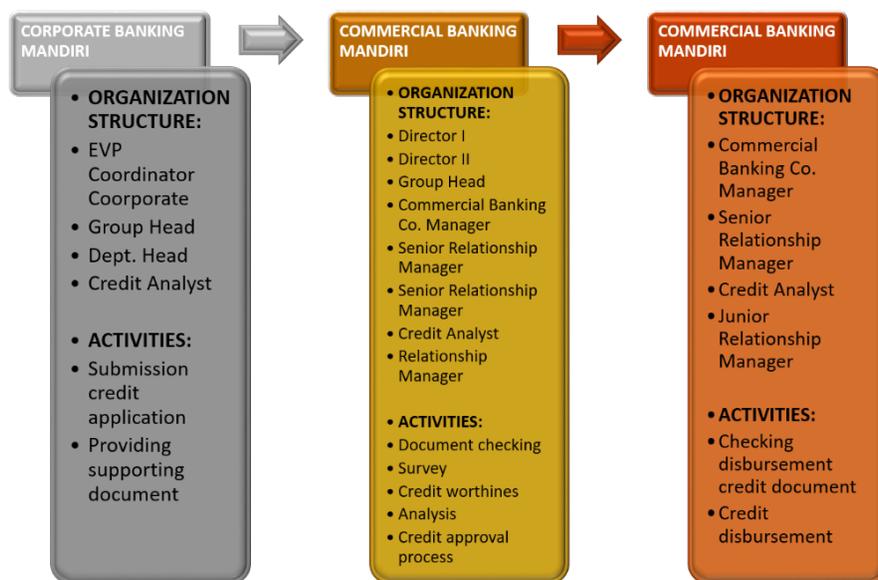
As if Brahmantyo Irawan Kuhandoko as the President Commissioner of PT.PBMS, PT. Bank Mandiri (Persero) Tbk received a credit application letter from PT.Prakarsa Betung Meruo Senami (PT.PBMS), with the aim of applying for credit is financing oil and gas drilling projects (drilling and/or workover) in the Betung and Meruo Senami areas in Jambi along with the construction of production facilities for the 2004 period.

Furthermore, the public prosecutor later charged that the result of the actions of the Defendant, Dian Siswanto as the Junior Relationship Manager of PT Bank Mandiri (Persero) Tbk had enriched Ir. Brahmantyo Irawan Kuhandoko, Ir. Achmad Fachrie, and R. Rina Luciana Sasmitawidjaja or PT.Prakarsa Betung Meruo Senami (PT.PBMS), in the amount of USD. 11,405,593.00 (eleven million four hundred five thousand five hundred ninety-three US dollars) in accordance with the Report on the Calculation of State Financial Losses of the Financial and Development Supervisory Agency (BPKP) dated April 21 2011 Number: SR-482 / D6 / 02/2011. In the primary indictment, the public prosecutor alleges that the defendant's actions are regulated and punishable under Article 2 paragraph (1) jo. Article 18 of Law Number 31 of 1999 concerning Eradication of Corruption as an amendment by Law Number 20 of 2001 concerning Amendment on Law Number 31 of 1999 concerning Eradication of Corruption jo. Article 55 paragraph (1) 1st jo. Article 64 paragraph (1) of the Criminal Code. Whereas in the subsidiary indictment, because the defendant abused his authority as a Junior Relationship Manager, the public prosecutor charged that the defendant's actions were regulated and subject to punishment in Article 3 jo. Article 18 of Law Number 31 of 1999 concerning Eradication of Corruption as an amendment by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption jo. Article 55 Paragraph (1) 1 of the Criminal Code jo. Article 64 Paragraph (1) of the Criminal Code.

However, it was found later in the court that the application for investments credit facilities was first received by. B. Santoso Nugroho as Junior Relationship Manager (JRM), Ferinton as a credit analyst, and Joko Setijo Oetomo as Senior Relationship Manager (SRM), and Subur Hermanto as Commercial Banking Manager (CBC Manager). They are the ones directly related to PT. PBMS to request complete data and documents to support the credit application process and compile the proposed analysis note. The trial acknowledged by the witness by Subur Hermanto as former CBC Manager, Djoko S. Oetomo and Benedictus A. Martubongs as the former Senior Relationship of Bank Mandiri and the witness Mr Achmad Fahri as Director of PT. PBMS stated that the Defendant was never involved in the process of

drafting an analysis note of the application for investment credit facilities on behalf of PT. PBMS because he does not have the authority to compile an analysis note of the credit facility request. The authority lies and owned by Ferinton, in which it required to comprehensively discuss the ability of the credit facility applicant and the contractor or credit applicant partner in working on the PT. PBMS includes discussing and examining the collateral/guarantees submitted by the credit applicant, which will cover the proposed credit facility. Those credit application processes and procedures can be seen in Figure 1 below.

Figure 1. Flow of the application process and credit disbursement of PT. PBMS at Bank Mandiri.⁴¹



Based on **Figure 1** above, it can be seen that the credit application process involves three phases of the process involving different work units. In the first phase, the application is submitted to Corporate Banking Bank Mandiri by attaching a credit investment application along with the required documents. In this phase, application acceptance activities along with supporting documents, are carried out. Then in the second phase, the

⁴¹ Modified from the verdict document: Putusan Mahkamah Agung Nomor 1812 K/PID.SUS/2014.

application is then processed by Commercial Banking Bank Mandiri, which conducts document examination, survey of applicants, credit worthiness, credit analysis, and credit approval process. In the third phase, after obtaining credit approval based on what has been done in the previous phase, the application is processed by Commercial Banking Bank Mandiri. In this last phase, checking credit document disbursement and credit disbursement is carried out, where the Defendant, Dian Siswanto, conducted his duties as Junior Relationship Manager to checking the disbursement credit document, and his position in the organization structure lies at the bottom level.

2. *Contents of the Supreme Court Decision Number 1812 K / PID.SUS / 2014 dated November 19 2014 Jo. DKI Jakarta High Court No. 15 / PID / TPK / 2014 / PT. DKI on April 16, 2014 Jo. Decision of Corruption Court at the Central Jakarta District Court No. 23 / PID.B / TPK / 2012 / PN.JKT.PST dated January 7 2013*

The essential verdict is granted the appeal from the appeal applicant: The public prosecutor at the South Jakarta District Attorney, cancelling the verdict of the Corruption Court at PT Jakarta No. 15 / PID / TPK / 2014 / PT. DKI On April 16, 2014, which changed the verdict of the Corruption Court for the Central Jakarta District Court No. 23 / PID.B / TPK / 2012 / PN.JKT.PST dated January 7 2013 as follows:⁴²

1. Found the Defendant guilty of committing a criminal act of corruption jointly and continuously,
2. Punish the Defendant by imprisonment for 8 years and a fine of Rp. 500,000,000 rupiah, provided that if the fine not payable then it is replaced by imprisonment for 8 months,
3. Establishing evidence ... and so on,
4. To charge the Defendant to pay court fees at all levels of trial and the cassation level it was set at Rp. 2,500, -.

Whereas the Decision on Corruption Crime at the Central Jakarta District Court No. 23 / PID.B / TPK / 2012 / PN.JKT.PST dated 7 January 2013 as follows:⁴³

⁴² Putusan Mahkamah Agung Nomor 1812 K/PID.SUS/2014.

⁴³ Pengadilan Negeri Jakarta Pusat, Putusan Tindak Pidana Korupsi Pada PN Jakarta Pusat No. 23/PID.B/TPK/2012/PN.JKT.PST, 2013.

1. the Defendant was not legally proven and convicted of committing a criminal act of corruption collectively and continuing as regulated and threatened in the primary indictment,
 2. To release the Defendant from the primary charge,
 3. States that the Defendant has legally proven and convicted of committing a criminal act of corruption collectively and continues as in the subsidiary indictment,
 4. Due to this, the punishment imposed on the Defendant with imprisonment of 2 years and a fine of Rp. 50,000,000 provided that if the fine is not payable, it is replaced by imprisonment for 3 months,
 5. Establishing evidence ... and so on,
 6. Charged the Defendant to pay a court fee of Rp. 10,000.
- Meanwhile, the verdict of the Corruption Court at PT Jakarta No. 15 / PID / TPK / 2014 / PT. DKI on April 16 2014 as follows:⁴⁴
1. the Defendant is not legally proven and convicted of committing a criminal act of corruption collectively and continues as regulated and threatened in the primary indictment,
 2. To release the Defendant from the primary charge,
 3. the Defendant legally has proven and convicted of committing a criminal act of corruption collectively and continues as in the subsidiary indictment,
 4. To impose a sentence on Defendant with imprisonment for four years and a fine of 200,000,000 rupiahs, if the fine not payable, it is replaced by imprisonment for three months,
 5. Establishing evidence ... and so on,
 6. Charged the Defendant to pay a court fee of 2,500 rupiahs.

3. *Legal analysis*

As previously explained, the preposition of the central premises of this research is the primary indictment should be proven, then proceed with proving the subsidiary indictment and so on, and then the minor premises is that the unlawful element as charged in the primary indictment. However, the fact is that it does not appear in this case as seen from the legal considerations used by Supreme Court Judges in deciding cases.

Supreme Court Judges are deemed not to have based the consideration of the decision on facts and circumstances along with the

⁴⁴ Pengadilan Tinggi Jakarta, Putusan Pengadilan Tipikor Pada PT Jakarta No. 15 /PID/TPK/2014/PT. DKI, 2014.

means of evidence obtained from the examination at court proceedings as regulated in article 197 paragraph (1) letter (f) of the Criminal Procedure Code which includes:

- a. Whereas in consideration of the decision, the Judge took over the decision of the Judge of the first level and appeal (Judex Factie) because "that the prosecutor's reasons for cassation were justified, Judex Factie was wrong in applying the rule of law in the decision of the a quo case". The prosecution's indictment this issues on a subsidiary basis, but Judex Factie immediately considered the subsidiary charges without first considering the primary charges. Thus, the consideration of the Judge at the cassation level (Judex Juris) does not consider the facts that the defendant did not authority to make a decision or policy. Besides that, the defendant carried out what had been processed, according to internal procedures, previously at another work unit at Bank Mandiri.⁴⁵ It is necessarily that the primary indictment shall prove before proceed to proving the subsidiary indictment and so on. The indictment compiled in subsidiarity cannot be read and considered as an alternative indictment, thus, in this case, the judex factie should first consider Primary indictment, namely Article 2 of Law No. 31 of 1999 which has been amendment by Law No. 20 of 2001.
- b. Judex Juris ignored the facts revealed in court, namely the fact that the Defendant , Dian Siswanto, was never involved in the process of compiling a credit analysis note for an investment credit facility application on behalf of PT PBMS because he did not have the authority to decide credit facilities, disburse credit to debtors. The Defendant only received a delegation of duties from the Senior Relationship Manager and never received letters, data or supporting documents in connection with the investment credit facility application submitted by PT. PBMS and does not participate in the process of drafting an analysis note of the application for the investment credit facility.
- c. The fact is that many credit disbursements went through the process, and the Defendant was in the lowest position in the credit disbursement process.

It fits for an indictment prepared on a subsidiary basis as the prosecutor / public prosecutor in a quo case must first prove. Defendant as the Junior Relationship Manager did not carry out his functions and duties and authorities according to the Circular of PT. Bank Mandiri (Persero) Tbk.

⁴⁵ See Supra Note 39.

No. 024 / KRD / RMN.POR / 2003 dated December 19 2003 in the General Provisions section letter C.1.a.4, "collecting and believing in the accuracy and correctness of data or documents relating to credit applications submitted by customers to be submitted to Credit Analyst/decision maker. This Defendant's action qualifies as 'unlawful' in the context of not applying the prudential principle with the fact that the Defendant did not verify correctly and adequately by the 5C principles of documents and the debtor's bona fide.

As a result of not applying the precautionary principle, the Defendant's actions caused losses to the State / PT. Bank Mandiri, and profitable for PT. Karya Putra Powerin (PT. KPP), represented by the President Director and Principal Commissioner. These losses on the results of investigative audits compiled in the Report on the Calculation of State Financial Losses (LHPKKN) by the Financial and Development Supervisory Board (BPKP) dated April 21, 2011 Number: SR-482 / D6 / 02/2011, where the results of the audit a calculation of state losses for USD 11,100,922.00 (eleven million one hundred thousand nine hundred twenty-two United States dollars).

Based on these legal facts, the authors considers that by ignoring the primary charges, both the *Judex Factie* and *Judex Juris* is wrong to apply the law, because the actions of the Defendants have a causal relationship with the loss of state finances, but not due to an abuse of authority rather, it is caused by not applying the prudential principle which fulfils the unlawful element. Therefore, the Defendant act met the qualifications of the act stipulated in Article 2 paragraph (1) jo. Article 18 of Law No. 31 of 1999 which has been amendment by Law Number 20 of 2001.

Based on the facts of the trial, it is not proven that the Defendant accepted bribery from PT. PBMS, or had the intention to enrich himself for his actions. Actually, the facts appeared in the trial was that the Defendant had done a job that did not heed the prudential principle, which resulted in the beneficial of PT. PBMS and its partner, PT. KKP. Even though, since the Defendant does not apply prudential principle in conducted his duties, it can be seen that the Defendant's actions fulfilled the formal offences (*formele wederrechtelijke*) of unlawful element of corruption which formulate in the Article 2 Para. (1) Anti Corruption Law.⁴⁶ The Defendant had violated the formal offense because the act of being careless was unlawfully and regulations in the banking sector which obliged all banking activities to be

⁴⁶ Compare to Roeslan Saleh. *Op.cit.* See also Putusan Mahkamah Konstitusi 003/PUU-IV/2006 Tentang Pengujian Undang-Undang Nomor 31 Tahun 1999.

based on prudential principles.⁴⁷ Therefore, it can be known that the Defendant fulfilled the element of unlawful because his act committed without any legal basis at all, and without the perpetrator having the right to commit the act.

The Defendant act fulfils the element of 'unlawful' because he realizes that the act takes place and accepts the actual performance, or when he is in the position to take measures to prevent the act but fails to do so and consciously takes the risk that the prohibited act is performed.⁴⁸ Basically, the Defendant should understand that there is a code of conduct or standard operational procedure and regulations in carrying out his duties which oblige the application of the prudential principle. However, by not applying these principles, the Defendant actions have met the qualifications of an unlawful act.

The application of the law based on the subsidiary charges is inappropriate because the Defendant could not possibly commit the act of abuse of authority as the accused because it was not an official in the agency concerned. Based on the classification in Article 2 of the Anti-corruption Law that does not carry out by the Defendant. Legal facts emerge that the Defendant is in the lowest position in the credit extension process. Whereas in the banking legal structure there is a command system in issuing credit so that the Defendant has the only duty of supervising and that the bank is accountable under Law No. 40 of 2007 concerning Limited Liability Companies is the general Director. However, regarding administration, it is all because there is a command system, the decision maker is with the Director, even if there are the commissioners involvement.⁴⁹ If the Board of Directors of a bank applies prudential principles and 5C principles bad credit is unlikely to occur because the decision to extend credit to a debtor has already made a careful assessment of the character, ability, collateral capital, and business projects of the debtor customer. The Defendant, in his capacity as JRM, does not abuse the authority because the Defendant did not have the rights and responsibilities as an decision-maker. Therefore, the Judge's decision to sentence the Defendant on the unsubstantiated subsidiary charge and the Defendant should be free from all these subsidies (*wijspraak*). The Judge had wrongly applied the law because he did not pay close attention and dig up legal facts.

⁴⁷ See Article 2, 29, 37 of of Law Number 10 of 1998 concerning Amendment to Law Number 7 of 1992 concerning Banking.

⁴⁸ Tak, P.J.P. Op.cit, 47.

⁴⁹ See also supra note 39.

Furthermore, to clarify the differences between 'unlawful' and 'abuse of authority', it is necessary to guide the following criteria: (a) an illegal act is an act committed without a legal basis completely, without the perpetrator having the right to commit the said act, while abusing authority is an act committed by the perpetrator within the scope of his / her authority, because of an official or position; (b) in the latter case the judge ought to examine whether the authority was implemented (1) contrary to the legal rules that govern them, (2) contrary to the purpose of granting of authority, and (3) arbitrary; (c) The offender's actions neglect of duties or obligations in a pointed office or position, is not an act of abusing authority, but an unlawful act.⁵⁰ Based on this explanation, it can be seen that there are several fundamental differences between 'unlawful act' and 'abuse of authority' regarding the nature of an act that has implications for the judgment of an act. Related to the a quo case, it can be seen that the Defendant's actions fulfil the element of 'unlawful' rather than 'abuse of authority' because based on the facts at the trial it does not show an assessment of things that are contrary to a scope of authority, including legal basis, its purposes, and arbitrary manner, beside the facts that the Defendant was does not in capacity to made the decision. However, instead of applying the law in accordance with the primary indictment of the elements of unlawful, the Supreme Court Judges even ruled on the grounds that the Defendant had abused his authority.

Concluding Remarks

Based on the analysis and discussion of the above, it can conclude as follows:

1. Whereas the offence of the Defendant fulfils the element of unlawful of the criminal act of corruption as charged in the primary indictment but does not fulfil the element of the offence of abuse of authority as indicated in the subsidiary indictment.
2. Whereas the judges are applying inappropriate legal considerations because it is based on the subsidiary charges. The Judge did not pay close attention and dig up legal facts at the trial as was indicted in the primary indictment. So that the application of the law by judges to cases based on subsidiary charges according to the Supreme

⁵⁰ Agustina, S., et al. *Penjelasan Hukum Unsur Melawan Hukum Penafsiran Unsur Melawan Hukum Dalam Pasal 2 Undang-Undang Pemberantasan Tindakan Pidana Korupsi*. (Jakarta: Judicial Sector Support Program, 2016).

Court Decision Number 1812 K / PID.SUS / 2014 dated November 19 2014 is deemed inappropriate.

3. In deciding a case, if the charge is subsidiarity, the Judge should prove the primary indictment first before deciding based on the subsidiary indictment. This decision is an essential lesson that there is a judge's inaccuracy in exploring the facts of the case and the justification of the legal rules contained in the primary indictment. These considerations should into action in order to create justice, benefit and legal certainty in law enforcement in general, and especially for the accused.

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