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## **The Element of Unlawful in Corruption (A Study of the Court's Decision of Corruption in the District Court Class IA Jayapura)**

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**Abstract:** *The element of unlawful (UMH – Unsur Melawan Hukum) in the Criminal Act of Corruption in the criminal justice practice shows a varied view between the prosecutor and the judge in making the decision to the defendant. The object of this study is related to the element of unlawful in corruption by using normative juridical method. The result shows that there are variations of the view is caused by (1) UMH, both formal and material, especially formal UMH in the criminal act of corruption is always seen as a bestanddeel element that gives character to other elements, with no prove UMH then other elements are considered unnecessary to be proved again, (2) UMH is considered as a stiltwijgend element which views each delict contained in UMH regardless of written or not in the formulation of a criminal article, but this leads to further debate which is necessary or not to be proved by the public prosecutor if UMH is not expressly written (as in article 2 paragraph (1) UUTPK) in the formulation of a criminal article. However, this is channeled by the view that if it is not clearly stated in the criminal article as in article 3 of UUTPK, it can be understood by applying genus-species approach to UMH as meant in article 2 paragraph (1) UUTPK as genus of UMH in TPK, then UMH its species in article 3 of UUTPK is understood from the element of misusing authority, opportunity, and position that existed on the corruptor.*

**Keywords:** *Unlawful; Crime; Corruption*

### **INTRODUCTION**

In Indonesia, the issue of corruption has long existed within various aspects of the society. For several decades, the phenomenon has become a national issue that is

difficult to be dealt with.<sup>1</sup> Article 25 of Act No. 31 of 1999 on the Corruption Eradication as amended

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<sup>1</sup> Danil, E., & Kurniawan, I. (2017). *Optimizing Confiscation of Assets in Accelerating the Eradication of Corruption*. *Hasanuddin Law Review*, 3(1), 67-76. doi: <http://dx.doi.org/10.20956/halrev.v3i1.717>.

by Act No. 20 of 2001 on the amendment of Act No. 31 of 1999 on the Corruption Eradication (hereinafter referred to as UUTPK) stipulates that “investigation, prosecution and examination in the court in the case of corruption should take precedence over another case for immediate solving. “Furthermore, in the elucidation of article 25 of UUTPK explained that “If there are 2 (two) or more cases which by law are determined to take precedence then concern the determination of case priority delivered to authorized institution in each judiciary process.” The provisions of article 25 of UUTPK contains mean that corruption (hereinafter referred to as TPK), including cases that are prioritized in their solving and still refers to the principle of *constantio justitie*, which is a criminal court conducted in a fast, precise, and low cost.

The settlement of TPK at all stages of the criminal justice, especially in the *pre-adjudication* stages (pre-trial stage), and *adjudication* stages (stages at the trial of TPK up to the verdict of judges

with permanent legal force), always faced with one of the essential elements (*bestanddeel element*) of TPK is the unlawful. It is therefore ensured that the criminal justice apparatus in this case the investigator, the prosecutor, the judge including the lawyer who handles the TPK are preoccupied with the proving of unlawful (hereinafter referred to as UMH) in TPK, including in the settlement of TPK in the Corruption Court at the District Court Class IA Jayapura.

The prove of UMH in TPK that is practiced in the Corruption Court at the District Court Class IA Jayapura shows the subsumptive problems between the public prosecutor and the judge to UMH in TPK, namely the difference in matching the material deeds of dependant with UMH in the articles of UUTPK that became the scope of prosecution in TPK trials. The subsumptive differences are reviewed through (1) Decision No. 05/Pid.Sus.Tpk/2015/PN.Jap, and (2) Decision No. 73/Pid.Sus.TPK/2014/PN.Jap. In addition to the difference in applying the subsumptive approach, the prove

of UMH in TPK often conflicts with the views of public prosecutors and judges between UMH as *stilzwijkende elements* that must exist and proven although not formulated explicitly in the criminal section with UMH as *bestanddeel element* that must be proved because it is a core element that characterize other elements in the articles that were prosecuted by the public prosecutor. Differences in viewpoint to applying UMH in TPK is an interesting legal issue to be studied under the title “The Element of Unlawful in Corruption (A Study of the Court’s Decision of Corruption in the District Court Class IA Jayapura).”

## METHOD

The method used of this research is normative-legal research to study the implementation of legal basis and positive norms related to the proving of UMH in TPK. As a normative legal research, then we are setting out to study law materials. The law material used was (a) primary material, (2) secondary material, (3) tertiary material. The primary material includes (1) UUTPK, (2) The

Decision of Corruption Trial at District Court Class IA Jayapura 2014-2015. While, the secondary material is previous research that studying about proving of UMH in TPK, as well the tertiary material is law dictionary and encyclopedia that used to help explains the term of law and concept UMH in TPK. The legal materials is through search the library and analyzed by descriptive technique.

## ANALYSIS AND DISCUSSION

### The Element of Unlawful as a Criminal Element

The element of unlawful in TPK is stated explicitly in article 2 paragraph (1) of UUTPK which is cited fully as follows:

Any person who unlawfully commits an act of enrichment himself or another person or a corporation that may harm the state or economy of the State shall be sentenced to life imprisonment or imprisonment of a minimum of 4 (four) years and a maximum of 20 (twenty) years and a fine of at least Rp. 200.000.000,00 (two hundred million rupiah) and at most Rp. 1.000.000.000,00 (one billion rupiah).

The construction of UMH in article 2 paragraph (1) of UUTPK is further clarified again as stated in the elucidation of article 2 paragraph (1) of UUTPK states:

“What is meant by “unlawful” in this article includes acts against the law in the formal or material senses, although the act is not regulated in legislation but if the act is deemed disgraceful because it is not in accordance with the sense of justice or social norms life in society, then the act can be punished .....”

Thus, as official interpretation of UUTPK above, that in TPK is known 2 (two) forms of unlawful acts, namely (1) acts against the formal law, and (2) acts against the material law.<sup>2</sup> These two forms of unlawful

acts in criminal law are known in the teaching of nature against the formal law and the teaching of nature against the material law.<sup>3</sup>

However, in its development, the material unlawful by the Constitutional Court through its Decision No. 003/PU-IV/2006 dated 25 July 2006 is declared to have no binding force again with 3 (three) reasons, namely (1) not guaranteeing legal certainty, (2) contradictory to article 28D of the 1945 Constitution, and (3) violates the principle of legality in article 1 paragraph (1) of the Criminal Code. This study is not focused to examining the legal

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<sup>2</sup> See Satochid Katanegara, *Hukum Pidana, Kumpulan Kuliah*, Part One, Student Lecture Hall, No year, p. 350-351 which essentially explains the difference between the formal unlawful (*formal wederrechtelijk*) and the material unlawful (*material wederrechtelijk*). There is a *formal wederrechtelijk* if an act is prohibited and threatened with punishment by law. Then there is the *material wederrechtelijk* if an act may be *wederrechtelijk* although not expressly prohibited and threatened with punishment by law that is general principles contained in the field of law or so-called *algemen beginsel*. Further explained by Satochid that *wederrectelijk* is an element of each delict when every time should be proven if there is an act that is prohibited and threatened by law. *Wederrectelijk* is not an element of any delict, the *wederrechtelijk*

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does not need to be proved but it is sufficient if the act is prohibited and threatened by law.

<sup>3</sup> See Komariah Emong Sapardjaja, (2013). *Ajaran Sifat Melawan Hukum Materiil Dalam Hukum Pidana Indonesia, Studi Kasus tentang Penerapan dan Perkembangannya dalam Yurisprudensi*, Alumnus Bandung, p. 25 explains in short the teachings of the nature of formal unlawful saying that if an action has to match all elements contained in the formulation of a crime, the act is a crime. If there are justifiable reasons, then the reasons should also be explicitly stated in the law. The material doctrine says that in addition to fulfilling the formal requirements that is to match all the elements listed in the formulation of delict, the act must really perceived by society as an improper or disgraceful act. Hence, this doctrine recognizes justifications outside the law. In other words, the justification may be in an unwritten law.

reasons for not having binding force against the material unlawful in TPK, but rather on analyzing the application of UMH in TPK. Nevertheless, the studying of UMH in a crime becomes urgent because only by proving the fulfillment of UMH is a clear benchmark on the mistakes of offender.

UMH as stated by most criminal law scholars in Dutch such as Hazewinkel-Suringa tend to be used a term *wederrechtelijkheid*.<sup>4</sup> Furthermore, Hazewinkel-Suringa stated that “*De wederrechtelijkheid is slechts daar, waar de wet haar noemt, element en verder alleen maar het kenmerk van ieder delict.*” (the element of unlawful becomes an absolute element of criminal events only where the law calls it expressly as delict element, where the law does not calls it then the element of unlawful is only a sign of a criminal incident).<sup>5</sup>

Hazewinkel-Suringas “view is in contrast to Vos” views that plead a broader view of the constitutive

elemental boundaries (elements) are not only an element of unlawful, but as an unwritten element, an element against the principles of common law. In Vos’ view there is plead of the same material unlawful to Von Liszt’s view that includes every acts *anti-social wederrechtelijk*.<sup>6</sup> Jonkers also argues that discussing the nature of unlawful is not only a formal unlawful, but also the material unlawful which is not only based on positive statutory statements, but also based on general principles which are the basis of law as well this is derived from unwritten rules.<sup>7</sup>

J.M. Van Bemmelen gives several meanings for unlawful, namely (1) contrary to reasonable accuracy in the social interaction of people or goods, (2) contrary to the obligations established by law, (3) without any right or self-authority, (4) contrary to the rights of others, (5) contrary to objective law.<sup>8</sup> Andi

<sup>4</sup> See E. Utrecht. (2000). *Rangkaian Sari Kuliah Hukum Pidana I*, Pustaka Tinta Mas, Surabaya, p. 269

<sup>5</sup> *Ibid.* p. 267

<sup>6</sup> *Ibid.* p. 268

<sup>7</sup> J.E. Jonkers. (1987). *Buku Pedoman Hukum Pidana Hindia Belanda, judul asli Handboek van het Nederlandsch Indische Strafrecht*, Tim Penerjemah Bina Aksara, PT Bina Aksara Jakarta, p. 101.

<sup>8</sup> J.M. van Bemmelen. (1987). *Hukum Pidana I, Hukum Pidana Material Bagian Umum, diterjemahkan dari judul asli Ons*

Hamzah states that unlawful is the equivalent of the term *wederrechtelijk* in Dutch, and this term in the literature of criminal law is known as *wederrechtelijk* that different as contrary to the law, contrary to the rights of others, without self-right.<sup>9</sup>

The further issue concerning UMH is absolute or not UMH is contained in the formulation of delict which must be proven by the public prosecutor. Utrecht explains that *wederrechtelijkheid* element does not need to be included in the prosecution, because it is a *stilzwijgend element*. The prosecutor is only obliged to prove other elements, and no longer need to prove the existence of such *wederrechtelijkheid* elements, because such element are not included in the prosecution and are considered existing. The presence or not the element of *wederrechtelijk* was no longer examined in court before the judge. If the prosecutor succeeds in

proving the existence of other elements, then the defendant is sentenced.

Furthermore, UMH can be viewed from 2 (two) perspectives, (1) UMH is a requirement of delict, that the delict occurs unlawfully,<sup>10</sup> and (2) UMH is a condition of punishment. As a condition of punishment, the next problem arises that the presence or absence of UMH must be proven by the public prosecutor against a crime charged. It should be noted; however, that Zevenbergen and his followers in the Dutch like Simons argue that unlawful is only an element of delict as long as it is stated explicitly in legislation.<sup>11</sup> This Zevenbergen and Simons' views is in line with *Sifat Melawan Hukum Formil* (SMHF). Consequently, as stated also by van Bemmelen and van Hattum that for delicts that are unlawful in the formulation of delict and other elements not proven, the defendant was acquitted.<sup>12</sup> In this relation, Schaffmeister argues that the

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*Strafrecht 1, Het Materiale strafrecht algemeen Deel*, translated by Hasnan Publisher IKAPI, Bandung, p. 148

<sup>9</sup> Andi Hamzah, (2012). *Pemberantasan Korupsi Melalui Hukum Pidana Nasional dan Internasional*, PT RajaGrafindo Persada, Jakarta, p. 112

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<sup>10</sup> *Ibid*, p. 150.

<sup>11</sup> Eddy O.S. Hiariej, (2014). *Prinsip-Prinsip Hukum Pidana*, Cahaya Atma Pustaka, Yogyakarta, p.195

<sup>12</sup> *Ibid*. p. 196

legislator does not necessarily include the unlawful nature and the errors in the text of law it is a general requirement for the nature of a crime to be punished.<sup>13</sup>

### **The Element of Unlawful In the Decision of Corruption Court**

There are 2 (two) decisions of Corruption Court at District Court Class IA Jayapura as focus of analysis, namely (1) Decision No. 05/Pid.Sus.Tpk/2015/ PN.Jap, and (2) Decision No. 73/Pid.Sus.Tpk/2014/PN.Jap. The two decisions can be differentiated into 2 (two) decisions, namely (1) the decision of punishment; Decision No. 05/Pid.Sus.Tpk/2015/PN.Jap, and (2) the decision of acquit; Decision No. 73/Pid .Sus.Tpk/2014/PN.Jap.

### **UMH in the Decision of Punishment**

The decision of punishment as referred to in article 193 paragraph (1) of the Criminal Procedure Code which states that if the court stated that defendant is guilty of committing the crime charged to him, the court shall impose a criminal sanction.

Such decision of punishment is searched through the Corruption Courts' Decision at District Court of Class Ia Jayapura No. 05/Pid.Sus.Tpk/2015/PN.Jap.

Decision No. 05/Pid.Sus.Tpk/2015/PN.Jap. on behalf of the defendant Drs. Yohosua Awaitau, M.Sc. Place of birth in Jayapura, age 61 year, date of birth 29 July 1952, gender male and nationality is Indonesia, domicile in Jl. Poltekes RT.002/ RW.004 Kel. Hedam District Heram Padang Bulan Abepura Jayapura City, Christian-Protestant, Occupation retired civil servant, Education S2. Subsidized indictment in Primair prejudgment violates article 2 paragraph (1) jo. article 18 of UUTPK jo article 55 paragraph (1) of KUHP jo article 64 of KUHP. While, in Subsidized indictment violates article 3 jo. Article 18 of UUTPK jo. article 55 paragraph (1) KUHP jo. article 64 of KUHP. As a result of the defendants' actions from the audit report in calculating the state financial loss from BPKP Representative of Papua Province No. SR-1762/PW26/5/2013 dated 25 October 2013 on TPK the

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<sup>13</sup> *Ibid.*

cash withdrawal in the Regional Cash Account at Bank Papua Branch Sarmi in 2010 to 2011 there is a deviation of the use and procedures and mechanism of expenditure of funds in the regional cash of Sarmi Rp. 1.401.100.000 (one billion four hundred one million one hundred thousand rupiah).

With the above indictment, the public prosecutor has filed its criminal procedure as follows:

- (1) States the defendant Drs. Yohosua Awaitau, M.Sc. has been proven legally and convincingly guilty of committing a criminal act of corruption as referred to in the primair indictment of article 2 paragraph (1) jo. article 18 of UUTPK jo. article 55 paragraph (1) of KUHP jo. article 64 of KUHP.
- (2) Sentenced imprisonment to defendant Drs. Yohosua Awaitau, M.Sc. during 4 (four) years and 6 (six) months deductible with the defendant in dependant that defendant be detained and a fine of Rp. 50.000.000,- (fifty million rupiah) subsidized 6 (six) months of confinement.
- (3) Sentenced the defendant Drs. Yohosua Awaitau, M.Sc. to pay the substitution money of Rp. 590.000.000, (five hundred and ninety million

rupiah) and if the defendant fails to pay the substitution money no later than 1 (one) month after the decision of the court obtains a permanent legal force, the defendants' property may be seized by the prosecutor and auctioned to cover the substitution money, in the case that the defendant does not have sufficient property to pay the substitution money, it shall be substituted with imprisonment of 9 (nine) months imprisonment.

- (4) Stating evidence from points 1 to 70, used as evidence in the case of on behalf Arnold Penehas Marwa.
- (5) Sentenced the defendant Drs. Yohosua Awaitau, M.Sc. to pay a case fee of Rp. 10.000,- (ten thousand rupiah).

Based on the indictment, the public prosecutor's claim and the facts of the trial, then will be analyzed about the construction of UMH in article 2 paragraph (1) and article 3 of UUTPK in the Consideration of the Panel of Judges. As known UMH in article 2 paragraph (1) of UUTPK is expressly listed UMH while in article 3 UUTPK is not listed UMH. The provisions of article 2 paragraph (1) of UUTPK are cited fully as follows:

*Any person who unlawfully commits an act of enrichment of*

*himself or another person or a corporation that may harm the state finance or the economy of the state shall be imprisoned with life imprisonment or a minimum of 4 (four) years and a maximum of 20 (twenty) years and a fine of at least Rp. 200.000.000,- (two hundred million rupiah) and at most Rp. 1.000.000.000,00 (one billion rupiah).*

According to the Panel of Judges that the provision of UMH in Article 2 paragraph (1) of UUTPK above is a general act of unlawful acts, that is to include all acts contrary to prevailing laws and regulations (positive law) as well as disgraceful acts as opposed to a sense of justice or against the norms of social life that live in society.<sup>14</sup>

Furthermore, the Panel of Judges considers that UMH in article 2 paragraph (1) of UUTPK is *bestanddeel delict* or the core of delict of criminal as regulated in article 2 paragraph (1) of UUTPK, it means an element of delict that determining whether an act shall be punished or not. Whereas, in Article 3 contains elements of “misusing authority, opportunity or facilities available to him because of position,” this element

is *bestanddeeldelict* or core of delict of criminal as regulated in Article 3 of UUTPK, it means also the element of delict that determines whether an act shall be punished or not. Thus, the question arises whether the act of misusing the authority, opportunity, or the facilities available to him/her because the position does not have the same meaning (identical) with the unlawful that determining whether an act shall be punished or not.

If further explored, the view of Panel of Judges on UMH in article 2 paragraph (1) and in article 3 of UUTPK can be explained below: (1) According to the panel of judges of UMH in article 2 paragraph (1) UUTPK is the core element of delict but UMH is general (2) UMH in article 3 of UUTPK, although not explicitly listed in the formulation of article, but can be understood from the element of “misusing authority, opportunity or facilities available due to position” is a special form of UMH referred to in article 2 paragraph (1) of UUTPK. Thus, according to the panel of judges on UMH in article 2 paragraph (1) UUTPK is not fulfilled in the primair indictment. According

<sup>14</sup> The Decision of Corruption Court at the District Court Class Ia Jayapura No. 05/Pid.Sus.-TPK/2015/PN.Jap. p. 104

to the Panel of Judges on UMH in article 3 of UUTPK is an unlawful act committed under special circumstances, namely in the circumstances of misusing authority, opportunity or existing facilities due to position, therefore the panel of judges tends to grant subsidized indictment rather than the primair indictment.

The material deed of defendant that constitutionally is relevant strengthens the consideration of judge in disclosing the UMH is expressed as follows:

Considering that in the hearing based on the statements of witnesses given under oath, as well as the statement of defendant related to the corresponding letter proof, the facts of dependant have been obtained Drs. Yohosua Awoitau, M.Si is Regent Officer of Sarmi based on the Minister of Home Affairs Decree No. 131.91.652 of 2010 dated 2 September 2010 on the legalization of the dismissal of Regent Sarmi of Papua Province and the Minister of Home Affairs Decree No. 131.91.660 of 2011 dated 15 September 2011.

Considering that defendant has been committed in a deviant manner or inconsistent with the intent of giving him the authority or opportunity or facility to him. Therefore, the act committed by

the defendant is not an act which is done unlawfully in a general manner as referred to in the second criminal act of article 2 paragraph (1) of Act No. 31 of 1999 as indicted in the indictment of this primair, but unlawful acts committed under special circumstances as regulated in article 3 of Act No. 31 of 1999 jo. Act No. 20 of 2001 on Corruption Crime.<sup>15</sup>

In reviewed the considerations of the Panel of Judges as mentioned above, it appears that (1) the judges have taken a subsumptive approach and conducted a series of proof *tatbestandmassigkeit*. As stated by Utrecht that what is meant by *tatbestandmassigkeit* is a requirement for the existence of a criminal event, i.e the behavior concerned corresponds to the painting (*omschrijving*) in the concerned criminal provisions.<sup>16</sup> (2) the panel of judges considered that UMH as *stilzwijgend element* means that UMH is called constitutively or not mentioned in the criminal articles, but it is still considered that every delict remains unlawful. (3) the panel of judges have constructed genus and

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<sup>15</sup> *Ibid.* p.106

<sup>16</sup> E. Utrecht, *Op. Cit.* p. 261

species thinking on UMH in TPK, that is according to the panel of judges on UMH in article 2 paragraph (1) UUTPK is UMH which is genus, while in article 3 of UUTPK though not expressly called UMH but can be known from an element of delict stating “misusing authority, opportunity or existing facility due to position,” is simply regarded as UMH in its species nature. Thus, UMH in article 2 paragraph (1) UUTPK that is genus is disregarded by the panel of judges, and tend to recognize UMH in article 3 of UUTPK that is species. (4) Caused by the absence or non-fulfillment of UMH in the primair indictment of the public prosecutor namely article 2 paragraph (1) UUTPK, then the rest of the elements need not be proven again. Such a view is a view which shows that true UMH is a core element of delict (*bestanddeel element*). In article 3 of UUTPK, although it does not mention UMH, it can be understood that UMH remains in the form of its special form or species character in this case is “misusing authority, opportunity or facilities available due to position.”

#### **UMH in the Decision of Acquit**

Decision of acquit as referred to in article 191 paragraph (1) of Criminal Procedure Code stating that if the court states that from the result of examination in the hearing, the wrongdoing of dependant is not legally and convincingly proven, then the defendant is acquitted. This decision of acquit is traced through the Corruption Courts’ Ruling at District Court Class IA Jayapura No. 73/Pid.Sus.Tpk/ 2014/PN.Jap.

Actually, to this acquit decision, the prosecutor in both the indictment letter, the criminal prosecution letter, and its reply still stated the defendant Dr. Drs. Isaiah Buinei, MM has been proven legally and convincingly guilty of committing a criminal act as stipulated and threatened with criminal sanction in article 2 paragraph (1) jo. article 18 paragraph (1), (2) and (3) of UUTPK, jo. article 55 paragraph (1) of the Criminal Code, thus the public prosecutor tends to its primair indictment. However, in its development especially in judge’s consideration rejecting the primair and subsidized indictments with its consideration as revealed and analyzed below.

The decision referred to here is the decision of the Corruption Court at the District Court Class IA Jayapura No. 73/Pid.Sus.Tpk/2014/PN.Jap. on behalf of the dependant Dr. Drs. Isaiah Buinei, M.M, was indicted in a subsidiary in primair indictment violating article 2 paragraph (1) jo article 18 paragraph (1), (2) and (3) of UUTPK. While, in subsidiary indictment violates article 3 jo. article 18 UUTPK.

The panel of judges in this case tends to focus on formal unlawful, which is defined as an act which is done contrary to the prevailing laws and regulations and the element of unlawfulness in the indictment of the public prosecutor. In this case, it is intended to violate the formal unlawful namely the act of the defendant is contradictory to the law as follows: (1) article 54 paragraph (1) of Government Regulation No. 58 of 2008 regarding Regional Financial Management, (2) article 44 paragraph (1), (4), article 132 paragraph (1), article 220 paragraph (8) Domestic

Financial Management, (3) Domestic Affairs Regulation No. 44 of 2007 on Guidelines for the Management of Election of Regional Head and Vice Regional Head.<sup>17</sup>

Further consideration is the panel of judges seeking to consider whether the defendant' actions can comply with or violate the three provisions of the above legislation. Chronology of deeds as follows: (1) Main details of APBD 2010 on DIPA of Regional Finance Manager (DIPA-PPKD) for the implementation of regent election Waropen 2010, Election Commission Waropen receives grant fund of Rp.6.000.000.000,00 (six billion rupiahs), (2) when 4 (four) days entered the General Election, the witness Melina K.K Wonatorei, SE was dismissed with his commissioners and replaced by a new commissioner with chairman Christison Benyamin Mbaubedari, S.E with its members while the grant budget of Rp. 6.000.000.000,00 (six billion rupiah) which is intended for

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<sup>17</sup> The Decision of Corruption Court at the District Court Class IA Jayapura No. 73/Pid.Sus-TPK/PN.Jap, pronounced in a open session to the public on Wednesday, 15 April 2015, p. 63

the implementation of regional head election has been used up by the old chairman of witness Melina K.K. Wonatorei, SE and its commissioners and leave the debts and loans to third parties or partners therefore witness Melina K.K. Wonatorei, SE filed a request for grant disbursement of Rp. 3.000.000.000,00 (three billion rupiah) by letter No. 90/KPUD-KW/IX/2010 dated 16 November 2010 addressed to the defendant as the elected regent of Waropen Regency with the purpose to paying the loan and loan of KPUD Waropen, the letter never reaches the defendant, and the defendant also never calls witness Drs. Paulinus Hallan as head of BPKAD Waropen and also never calls witness Melina K.K. Wonatorei, SE. The defendant in this case has filed a letter blocking the account of the Regional Treasury addressed to BRI Unit Waropen, (3) the judges consider the witness Drs. Paulinus Hallan as the head of BKAD, according to the witness, has mistakenly thought or received an verbal injunction from the defendant through witness Hengky Ramandey and Nathan Simmunapendi, thus

ordering the treasurer Elias Wihyawari, SE to immediately create or issue *Surat Perintah Pencairan Dana* (SP2D) and also Budget Users on behalf Hengki Wonatorei S.Sos M.Si to issue *Surat Perintah Membayar* (SPM) and inventory fund as well as making a payroll and all letters were signed by witness Drs. Paulinus Halan as head of BPKAD.

The series of considerations above, then the panel of judges argues that there is no unlawful is deemed to have committed an unlawful act as the second element in the primair indictment so that the defendant should be legally acquitted from the indictment. Similarly, in the subsidiary indictment that the defendant was not aware of the disbursement of funds, and the defendant never gave a verbal order and was never aware of any request of witness Melina K.K. Wonatorei, SH, then the unlawful elements in this case abusing the authority, power, or position of the defendant shall be deemed not to be proven to be committing an act as in the element of the two subsidiary indictments, article 3 of UUTPK. Therefore, the

dependant must be acquitted from the indictment.

The basic description of the considerations of judges above shows the attitude of judges as follows:

- (1) The panel of judges has constructed the nature of unlawful in this case is tend to the nature of formal unlawful.<sup>18</sup>
- (2) But in the development of consideration cannot avoid from the construction of unlawful especially in conducting subsumptive approach between defendant acts with formulation of criminal article, this is based on the consideration that the defendant did not give verbal or written order, then the defendant never received a letter of request for disbursement of funds, the defendant never called or met with the witness of former head of KPUD Melina KK Wonatorei, SE.

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<sup>18</sup> See Moeljatno, (1983). *Azas-azas Hukum Pidana*, PT Bina Aksara, Jakarta, p. 130, which expresses his view that in criminal law the concern is unlawful acts only, these acts are prohibited and threatened with criminal. Furthermore, Moeljatno quotes Langemeyer's view that to prohibit non unlawful acts, which cannot be taken for granted, is absurd. Therefore, there is a first opinion if the act has been to match the prohibition on the law then there is a mistake. The second, unlawful attributes are out of character of the violation of the provisions of the law, unless including exceptions which have been determined by law as well. For them this against the law means against the law, because the law is the law. Such a stance is called a formal stance.

The defendant ordered the blocking of the Regional Cash Account, and the defendant refused to act before the trial of RAPBD Waropen District. The entire record of the trial facts against the defendant encouraged the judge to believe that UMH was not fulfilled either in the primair indictment (article 2 paragraph (1) of UUTPK) or in subsidiary indictment (article 3 of UUTPK).

- (3) Because this decision is acquit decision (*vrijspraak*), then according to the provision of article 191 paragraph (1) of Criminal Procedure Code that if the court argues that the result of hearing in the trial of defendant for act is not legally and convincingly proven, then the dependant is acquitted.

As the provision of article 191 paragraph (1) of this Criminal Procedure Code and related to the judges' consideration, it is only seen from the absence or non-fulfillment of UMH in TPK, while other elements of TPK both in primair indictment (article 2 paragraph (1) of UUTPK, in subsidiary indictment (article 3 of UUTPK) is not proven again by the panel of judges.

The views or attitudes of judges should be attributed to Jan Rummelink's view<sup>19</sup> that "anyone who commits an act that is prohibited by law (criminal law) means that he commits a crime, and thus he acts unlawfully. Relevant to Rummelink's view in this acquit decision, that as if the defendant Dr. Drs. Yesaya Buinei, MM did not commit TPK because his actions have been proved not to be unlawful act. It must be admitted, however, that both the public prosecutor and the judges in TPK always adhere to the doctrine of formal unlawful as taught by Pompe (in Zamhari Abidin)<sup>20</sup> that the nature of *wederrechtelijk* is essentially not an element of delict, except when explicitly stated in a legislation. This means that the elements of delict as regulated in article 2 paragraph (1) and 3 of UUTPK are all attempted to be proven by the prosecutor and

considered by the judge, although with the construction of its genus and species.

Based on factual and juridical considerations of judges to bring to decision as follows (1) declare the defendant Dr. Drs. Yesaya Buinei, MM is not legally and convincingly proven guilty of committing a criminal act as in the primair and subsidiary indictments, (2) acquitting the defendant as a result of all indictment of the public prosecutor, (3) restoring the dependant's rights in position and dignity, (4) establishing evidence as points 1 to 57 is made evident in another case, (5) charging case fees to the State.

## CONCLUSION

The unlawful in corruption crime which its study focuses on the Decision of Corruption Court at District Court Class IA Jayapura No. 05/Pid.Sus.Tpk/2015/ PN.Jap, which is a form of punishment verdict, and Decision No. 73/Pid.Sus. Tpk/2014/PN.Jap. which is a form of acquit verdict, has revealed a different attitude between the public prosecutor and the judge. Differences in attitude

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<sup>19</sup> Jan Rummelink, (2003). *Hukum Pidana, Komentar Atas Pasal-pasal Terpenting dari Kitab Undang-undang Hukum Pidana Belanda dan Padanannya dalam Kitab Undang-undang Hukum Pidana Indonesia*, Translated by Tristam Pascal Moeliono, PT Gramedia Jakarta, p. 192.

<sup>20</sup> H. Zamhari Abidin, (1986). *Pengertian dan Asas Hukum Pidana Dalam Schema (Bagan) dan Synopsis (Catatan Singkat)*, Ghalia Indonesia, Jakarta, p. 18

to UMH in TPK are mainly due to (1) the subsumptive approach used to match the defendants' material deeds with the formulation of crime in the charged criminal section, (2) the view on the *stilzwingend element* of UMH in TPK as an absolute element that must be proven although not explicitly stated in the formulation of accused criminal section, or based on the view that UMH in TPK is indeed a *bestanddeel element* as long as it is included, so long as it also raises the obligation of the public prosecutor to prove according to the indictment in the *requisitoir*. (3) a view that recognizes UMH as a *bestanddeel element* and relativize UMH as a *stylzwijgend element*, it proves that the other elements of delict as a whole according to the formulation of delict in the relevant criminal article are deemed to have implicitly proved.

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