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Analysis of Criminal Liability Abuse of Authority in the Crime of Corruption on Behalf of Nimrod E Sihombing

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Abstract

Criminal liability related to abuse of authority was still very difficult to target the private sector in relation to corruption in the procurement of goods and services. The purpose of this writing is to find out criminal liability for perpetrators of corruption crimes who borrow companies owned by others without a transfer of work agreement (subcontract) and the application of articles of abuse of authority that will later become the basis of criminal liability for it so that in the future the company's borrowers can be punished according to their crime and create legal justice for the community. This paper presents examples of relevant cases, discusses the issue of abuse of authority by the private sector and how the article on abuse of authority in the corruption law can be used to ensnare the perpetrators and is associated with the criminal role they play. The result of this writing is that criminals in the private sector can be subject to abuse of authority related to the Crime of Corruption because it meets the element of abusing "opportunity or means" because of the "position" that exists in it as stipulated in Article 3 of Law No. 31 of 1999 concerning the Eradication of Criminal Acts of Corruption.

Keywords: *Criminal liability; Corruption; Abuse of Authority*

A. Introduction

Corruption crimes are carried out in various modes which due to the level of complexity sometimes law enforcers cannot fully disclose to fulfill the public's sense of justice. One of the corruption cases that used the mode of "*pinjam bendera" (The act of borrowing the name of another company to participate in the tender for the procurement of goods and services (PBJ) is often also called borrowing the flag of another company)*, the perpetrator used a company owned by someone else to register for the auction and carry out the work without being based on a job transfer agreement (Subcontract) and only based on a verbal agreement. In handling such cases, law enforcers often have difficulty in determining criminal liability against borrowers of companies belonging to other people because there is no written evidence to prove the transfer of responsibility from the owner of the company to the borrower of the company who is in fact the perpetrator of the Corruption Crime.

Identifying the perpetrator's responsibility as a legal subject who is not a civil servant or even a state official (private), and who lacks the authority, opportunities, or facilities offered by his position, it is

difficult to hold him criminally responsible for the article on abuse of authority. Legal advisors frequently argue that private sector actors are exempt from the law for Corruption Crimes, especially the clauses pertaining to the article on abuse of authority.

On October 12, 2010 drg. Roselyne E.H.L Tobing as the Commitment Making Officer (hereinafter referred to as *PPK*) who was appointed based on Decree Number: 79/2010 dated March 1, 2010 issued a PPK Decree Number: 634 which stipulates that PT DIRGASENA with Raya Nainggolen as Director as the winner of the procurement auction for the Development of Inpatient Health Center and Maternity Hospital in Kramat Jati District of fiscal year 2010, which then both parties signed contract No. 6569/-076.342 dated on October 25, 2010. Based on the contract, Raya Nainggolan has "position" of legal rights and obligations in carrying out the work with a contract value of Rp. 3,658,633,000, - with a execution time of 54 days starting from the signing of the contract until December 17, 2010.

Raya Nainggolan as Director of PT DIRGASENA has never registered PT Dirgasena in the auction. PT DIRGASENA was used by the defendant Nimrod E Sihombing who was borrowed from Raya Nainggolan through Liman Marpaung, while Raya Nainggolan's role was only at the time of signing the contract. The execution of the work was not carried out by Raya Nainggolan alone but by the defendant Nimrod E Sihombing without a Power of Attorney or Subcontract Agreement as the basis for the transfer of responsibility.

Even though the contract implemented was in the form of a fixed price, on November 18, 2010 when the work entered the preliminary stage, a contract addendum was added which was not proposed, signed or executed directly by Raya Nainggolan, but all stages were carried out by the defendant Nimrod E Sihombing.

The work cannot be completed until the due date of implementation according to the contract (17 December 2010), which based on the Report of Inspection of Work in the Context of Handover I (PHO) Number 7837/076.342 dated on 17 December 2010 stated that the work has been carried out with an achievement weight of 60.8 %. Even though the work has not been completed, PT DIRGASENA does not continue the additional work, and based on SPP-LS No. 8010/078.1/SPP/LS/2010 dated on 27 December 2010 Dr. Hj. Yenuarti Suaizi as the Proxy of Budget User (PBU) signed a Payment Order (SPM) of Rp. 2.195.179.800,- according to the percentage of work completed.

After receiving a VAT deduction, *Jamsostek* and Income Tax, Raya Nainggolan received a net amount of RP. 1.931.208.244,- through the account of PT DIRGASENA which was then transferred by check to the account of the defendant Nimrod E Sihombing on December 30, 2010 in the amount of Rp. 1.940.000.000,-. The defendant Nimrod E Sihombing then gave Rp. 50.000.000,- to Liman Marpaung, to Bambang Daryono, Slamet and Mad Nuh in the amount of Rp. 100.000,-.

Related with the previous work weight of 60.8%, and its designation has not been able to function, then it is budgeted again for the Continued Development of an Inpatient Health Center and Maternity Hospital in Kramat Jati District in the East Jakarta Region for Fiscal Year 2012 with Wahyudin, SP. as a PPK. After carrying out a series of auction stages for the procurement of goods and services, PT Sung Nichom Technologi with the defendant Nimrod E Sihombing was determined as the winner of the auction based on PPK Decree Number: 881 of 2012 dated September 7, 2012 even though in the registration process PT Sung Nichom Technologi did not meet the technical bidding documents in the form of there is no proof of payment of annual tax of experts in the list of core personnel. Regarding the announcement of the winners, PT Mangun Karya Mandiri as an auction participant had submitted a rebuttal but on December 6, 2012 the Procurement Committee replied that only PT Sung Nichom Technology passed the completeness of the company's administration.

Nimrod E Sihombing as Director of PT Sung Nichom Technologi together with PPK signed a Contract Number: 7641/076.342 dated on September 13, 2012 with a contract value of Rp. 3,373,945,000 whose value is almost the same as the contract value of the same development object in 2010 which is stated to have completed the work weight of 60,8%.

Regarding of work which is carried out on time with a completion weight of 100% based on the Report of Work Inspection in the Context of Handover I (PHO) Number 79966/076,932 dated December 11, 2012. Based on SPP-LS Number 10083/078.1/SPP/LS/2012 dated December 14, 2012 , dr. Safarudin Mars as the Budget User Proxy signed a Payment Order (SPM) on December 18, 2010 amounting to Rp. 3.373.945.000,- After withholding VAT, *Jamsostek* and PPH taxes, the defendant Nimrod E Sihombing received a net payment of Rp. 2.970.975.377,- through the account of PT Sung Nichom Teknologi.

Experts from Civil Engineering Semarang State Polytechnic on March 8, 2014 assessed the Development of Inpatient Health Centers and Maternity Hospital in Kramat Jati District for Fiscal Year 2010 and Follow-Up Activities for Development of Inpatient Health Centers and Maternity Hospital in Kramat Jati District in East Jakarta Region for Fiscal Year 2012 with result:

1. The addendum to the preparatory work is not appropriate for adding less work, because in the tender process in the contract bidding document there is a work method. With the provision of making work methods, the contractor already knows what must be prepared.

2. Based on the type of fixed price contract, everything that arises in the execution of the work is the responsibility of the implementing contractor. What binds the wholesale price is the total price, illustration and technical specifications.

3. There are jobs that do not meet specifications.

The Financial and Development Supervisory Agency (hereinafter referred to as *BPKP*) of DKI Jakarta Province based on Calculation Results No. R- SR-1291/PW09/5/2014 dated December 31, 2014 assessed that the implementation of the Addendum was incorrect regarding the addition of a lack of work on the fixed price contract and for the work for the 2010 Fiscal Year, it was assessed that there was a non-compliance with specifications resulting in a state financial loss of Rp. 382.765.699,- while for Fiscal Year 2012 there is a mismatch of job specifications worth Rp. 242.272.760,- then calculate the losses incurred on the entire work of Rp. 624.937.459,-

During the investigation process, the wife of the defendant Nimrod E Sihombing, Romauli Tobing, was confiscated on March 9, 2014 in the amount of Rp. 600,000,000, - and during the trial process was entrusted to the East Jakarta District Attorney for Rp. 25,000,000. In the trial process the Public Prosecutor charged the defendant with Article 3 in conjunction with Article 18 of Law of the Republic of Indonesia Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption as amended and supplemented by Law of the Republic of Indonesia Number 20 of 2001 concerning Eradication of Criminal Acts of Corruption in conjunction with Article 55 paragraph (1) The 1st KUHP in conjunction with Article 65 paragraph (1) of the KUHP which was later decided by the Judge of the Central Jakarta Corruption Court with articles in accordance with the demands.

Therefore, the Defendant Nimrod E Sihombing was charged with committing a Corruption Crime where the Defendant carried out the work of the company that won the auction owned by Raya Nainggolan. The transfer of work by Raya Nainggolan to the Defendant was not based on a written agreement regarding the transfer of work (Subcontract), so there was no written evidence regarding the transfer of responsibility from the company owner to the company borrower. In this case the Defendant was found to have violated the article on abuse of authority while the Defendant was neither a Civil Servant nor a State Official (private). This study aims to answer on how to determine the application of the article on abuse of authority to the criminal responsibility of the Defendant Nimrod E Sihombing as an actor who is not a Civil Servant or a State Official (private). Next, it also conducted to know whether the Defendant Nimrod E Sihombing who use a company owned by Raya Nainggolan without a job transfer agreement (subcontract) be held criminally responsible for the Corruption Crime.

Hence, this legal paper will examine the criminal liability of those who borrow companies owned by others without a job transfer agreement (subcontract) and the application of the article on abuse of

authority, which will subsequently serve as the basis for criminal liability. The purpose of this paper is to find out criminal liability for perpetrators of Corruption Crimes who borrow companies belonging to other people without a job transfer agreement (subcontract) as well as the application of the article on abuse of authority which will later become the basis for criminal responsibility for it so that in the future corporate borrowers can be punished according to the form of the crime and create legal justice for society.

B. Theoretical Basis

1. Criminal Liability

Criminal responsibility in foreign terms is also referred to as *theorekenbaardheid*, criminal responsibility or criminal liability which leads to the criminalization of the perpetrator with the intention of determining whether or not he can be criminally responsible for the actions he has committed (Sianturi, 1996).

Criminal liability is defined by Pound as an obligation to pay retaliation to be received by the perpetrator from someone who has been harmed, that the responsibility carried out is not only related to legal issues but also concerns the issue of moral values or decency that exist in a society (Atmasasmita, 2000; Pound, 2017). This view is reinforced by the opinion of Prodjohamidjojo, someone has made a mistake if at the time of committing an offense, from the perspective of society, it should be reproached (Prodjohamidjojo, 1997).

Furthermore, Drs. P.A.F Lamintang started the discussion that criminal liability must meet the requirements for an act which is a crime or *Strafbaarfeit* (Lamintang, 2013). In determining whether or not there is *strafbaarfeit* in a person's actions, it must be found that there is an act against/against the law "wederechtelijk" which in carrying it out fulfills "*schuld*" in the form of intentionally or unintentionally (Lamintang, 2013).

Strafbaarfeit in Dutch, it is interpreted as a fact that can be punished which refers to a person's actions. This understanding raises new issue related to the understanding that what can be punished is not a "reality/condition" but a "person". Moreover, Van Hattum argues that an act cannot be separated from the person who has committed the act (Lamintang, 2013).

It is not enough for a person to be convicted of an act that is against the law or is against the law (against formal law) or even if it is deemed to have hurt the community's sense of justice (against material law). Hence, even though his actions meet the formulation of offenses in the law and are not justified by the sense of justice possessed by the community, but it does not necessarily qualify for criminal prosecution. For this reason, punishment still needs a condition, namely that the person who committed the act has a mistake or is guilty (Subjective Guilt). Further, Drs. P.A.F Lamintang, SH. emphasizes that to impose a sentence is not enough if there is only a "*strafbaarfeit*" but there must also be a “*strafbaar persoon*” or someone who can be punished (Lamintang, 2013).

Speaking of mistakes, there is what is called "**NO PUNISHMENT WITHOUT FAULT**" (*keine strafe ohne schhuld* or *geen straf zonder schuld* or *NULLA POENA SINE CULPA*), Culpa here in a broad sense includes intentional. From what has been mentioned above, it can be said that the fault consists of several elements, namely:

a. The existence of the ability to be responsible for the perpetrator (*Schuldfahigkeit* or Zurechnungsfahigkeit): meaning that the mental state of the perpetrator must be normal or it can be interpreted that the perpetrator has the qualifications to be able to account for his actions.
b. The mental relationship between the perpetrator and his actions is intentional (*dolus*) or accidental (*culpa*), these are called forms of fault;

c. There's no excuse to erase the mistakes or there's no excuse for forgiveness.

If these three elements are exist, the person concerned can be declared guilty or has criminal responsibility, so that he can be punished (Hamzah, 2008).

Moreover, Prof. Moeljatno explains that a person who cannot be blamed for violating a criminal offense may not be subject to a criminal offense, even though the person is known to be bad tempered, miserly, does not like to help others, careless, as long as he does not violate the criminal prohibition (Moeljatno, 2002). Likewise, even if a person commits a crime, he cannot always be punished. A child who plays with a match and lights it on the wall of a neighbor's house, causing a general hazard to both goods and people (Article 187 of the Criminal Code). Even if it was the child who burned the neighbor's house or at least because of the child's actions the neighbor's house burned down (article 188 of the Criminal Code), the child cannot be held accountable for his actions.

In the case of the child who burned down his neighbor's house, there was a discussion about his actions that were contrary to the "*strafbaarfeit*" law juxtaposed with the quality of the child's responsibility in the eyes of the "strafbaarpersoon" law. The child's actions are clearly against the law and deserve to be punished, but when we see that a child does not meet the qualifications and can be held criminally accountable, the child cannot be convicted.

Speaking of Strafbaarpersoon van Hattum, criticizing that the tendency when interpreting *Strafbaarfeit* people fixate on the elements of offense as formulated by law and forget the "other conditions" that can make a person punishable, namely the conditions relating to the personality of the perpetrator himself. Terms relating to this person by Lamintang referred to as *Strafbaarpersoon*.

Regarding whether or not a person can be punished, which is then referred to as *Strafbaarpersoon*, Lamintang discusses the connection with a "circumstance" that causes people to be punished or can be abolished. Legal experts refer to this situation as "persoonlijke omstandigheden" or "*persoonlijk bestanddeel*" which is retranslated by Lamintang as "*personal nature*", "*certain characteristics*" or "*personal elements*" relating to circumstances or conditions that explain their role in a criminal act so that it can or not to be punished (Lamintang, 2013).

2. Regarding The Perpetrator and Participation (Daderschap and Deelneming)

In committing a criminal act, it is often found that there are several perpetrators who jointly commit, which is then known as *Deelneming* or Participating in Doing as regulated in Article 55 paragraph (1) 1 of the Criminal Code.

Article 55 of the Criminal Code is established by legislators with the aim of regulating the accountability according to criminal law of each person according to their respective roles based on their involvement in a criminal act. Without such criminal provisions, the people who participated in this could not be punished.

Dader According to Simons, it is an understanding for an actor who intentionally or unintentionally as required by law, has caused an unwanted result by law or has taken a prohibited action or neglected to take action required by law, or in other words is the perpetrator who has fulfilled all the elements of the offense regardless of whether the decision to commit the crime arose from himself or was moved by someone else (Lamintang, 2013).

When *Dader* as the perpetrator consisted of several people in Dutch then he was called according to his formula as "*Als Daders*" which was then regulated in Article 55 paragraph (1) 1 of *Als Daders*, separated according to the role of the act as follows:

a. *Pleger* that is, the perpetrator

b. *Doen Pleger* that is, the one who ordered to do

c. *Medepleger* that is, those who participate in doing

Medepleger are the perpetrators who have committed the crime, so that it can be interpreted that *medepleger* is also a *daderschap* (Lamintang, 2013).

The creation of a Medepleger is determined by the existence of a shared awareness among the participating actors that they have cooperated in a criminal act which was then carried out together. Professor Langemeiyer said that if the awareness of the existence of a collaboration does not exist, then one cannot say that there is an act of doing (Lamintang, 2013).

A question arose in the discussion of the medepleger, whether a person who does not have an *eigenschap* or *persoonlijke hoedanigheid* or "personal nature" can commit a criminal act of participation in doing, if the personal characteristics that will determine a staff member are formulated and required by law? For example, can a person who is not a civil servant participate in a crime that can only be committed by a civil servant?

Regarding this issue, Simons and van Hamel have the same opinion, namely that a person who is not a civil servant by himself cannot participate in a crime of office, because if "anyone" cannot become a perpetrator of a criminal act, then automatically he also cannot participate in committing the crime (Lamintang, 2013).

The opinion of Simons and van Hamel is opposed by Pompe and van Hattum that a person who does not have a personal element as a Civil Servant cannot indeed commit a crime against his position, but can also do it. That the actors are not required that each of them have to meet the personal circumstances. *Medepleger* or Participate in actions is basically only relate to what is called *delichtshandeling*, or only with regard to the act of committing a criminal act, not questioning the conditions that must be met for the "personal nature" of each perpetrator (Lamintang, 2013).

Therefore, Lamintang corroborates this opinion by basing it on the arrests of the HOGE RAAD dated on April 21, 1913 NJ 1913 page 961, W. 9501 which is referred to as *reispas-arrest* and dated June 21, 1926 NJ 1926 page 955, W, 11541 which is referred to as *magazijnbediende-arrest*. Professor van BEMMELEN argue that it is not impossible for a non-civil servant can participate in or may order to commit a crime of office. And it is not impossible that an ordinary citizen can participate in a military offense.

Even in the cassation from the HOGE RAAD regarding *Magazijnbediende-arest* or "arest warehouse steward", even though he does not have an "employment relationship" which in this case means he does not have a work agreement with his superior (manager) who has a "personal nature", based on the arrest it is stated that if the person (*Magazijnbendiende*) has actually committed the crime in question together with another person (manager) who does have such a personal condition, then he can be called a person who has participated in the crime (Hoge Raad dated June 21, 1926 NJ 1926 p. 955, W, 11541 referred to as *magazijnbediende*-arrest).

3. Private Sector Accountability in Corruption Crimes

a. Judging from Legal Subjects

Article 2 of Law Number 3 of 1971 concerning the Eradication of Criminal Acts of Corruption has resulted in differences of opinion regarding the legal subjects of the perpetrators of the Criminal Acts of Corruption. The explanation of the article states "the definition of Civil Servant in this law is the subject of a criminal act of corruption...". Based on this explanation, it can be systematically interpreted that the subject of a criminal act whose material act is formulated in the article is only a civil servant.

The second opinion bases its opinion on the stipulation of “anyone” which can mean anyone. In fact, by linking "anyone" with the interpretation of article 2 and its explanation, it can be interpreted that the private sector can also be the subject of article 1 paragraph (1) sub b, not only the subject of article 1 paragraph (1) sub a.

From the formulation of Article 1 paragraph (1) sub a of Law Number 3 of 1971 concerning the Eradication of Criminal Acts of Corruption, there is not a single word that limits the subject. Anyone can become a subject as long as he commits an unlawful act, enriches himself, another person or an entity that directly or indirectly harms state finances, or is known or reasonably suspected by him that such action is detrimental to state finances or the state economy. Then, if when we see base on Article 1 paragraph (1) sub b, the word authority and position traps us into thinking that "anyone" must have the authority and position which ultimately refers to Civil Servants.

The law must develop in accordance with the demands of the community's sense of justice where the law is treated (Toegarisman, 2016). This development, if not through changes to the law, can also be done through interpretations that are the task of the judge, which is commonly referred to as the discovery of legal arguments (*rechtvising*). The development of anyone who can become a subject also occurs in Article 1 paragraph (1) sub b.

Due to differences in interpretation between legal experts in Law no. 3 of 1971, then in Law no. 31 of 1999 in conjunction with Law no. 20 of 2001 is clarified, when the legal subject can apply to anyone without any particular quality, and also when the legal subject of the article must be a Civil Servant or State Administrator.

Based on Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption in its development, it is clarified by the expansion of "whoever" becomes "everyone" whose meaning is regulated in General Provisions Article 1 point 3 that "every person is an individual or including a corporation". This article answers the previous debates which stated that the perpetrators of Corruption Crimes were only limited to Civil Servants.

Furthermore, Muladi and Dwidja Priyatno in the draft Criminal Code concept, argued that what is meant by a corporation should be limited to those in the form of a legal entity, because if it is one that is not a legal entity, then the prosecution and sentencing is limited to "persons" (Muladi & Priyatno, 1991). Against corporations "legal entities" cannot be prosecuted and punished. This statement confirms that the definition of perpetrators of Corruption Crimes is not limited to Civil Servants but is extended to "everyone" who commits acts that are contrary to the regulations governing Corruption Crimes.

b. Judging from the Abuse of Authority

The author quotes the views of R. Wiyono, which very clearly describes the role of the private sector in the abuse of authority, that in the future this theory can be used as a strategy in the technical determination of private responsibility in Corruption Crimes, especially the Abuse of Authority (Wiyono, 2012).

The definition of "everyone" in Article 3 of Law Number 31 of 1999 cannot be freely assigned to all persons or corporations, the perpetrators of the crime of corruption in question must hold a "position". Due to the requirement to hold "position", only individuals can commit Corruption Crimes in this article, while corporations do not meet the qualifications of legal subjects in the crime (Wiyono, 2012).

Article 3 of Law Number 31 of 1999 contains two important elements that are the author's discussion in attracting the participation of the private sector to meet the qualifications of the perpetrators of the Corruption Crime of Abuse of Authority, namely:

- **Position**

According to the Elucidation of Article 17 paragraph (1) of Law Number 43 of 1999, the definition of Position is as follows:

> "*What is meant by Position is a position that shows the duties, responsibilities, authorities, and rights of a Civil Servant in a State organizational unit*."

Thus, it is clear that those who can commit Corruption Crimes for Abuse of Authority related to Position are only Civil Servants who hold certain positions, both structural and functional positions.

However, definition of position is not clearly explained by the Law and its Elucidation, but can be viewed from expert opinion and is implicitly determined by several existing rules. Soedarto (1977) express doubts about the context of “occupation” and “position” contained in Article 3 alternatively by connecting “or”, If occupation is defined as “function” then a private director also has a position in the organization. Soedarto seems to want to explain that the notion of "position" is broader than the notion of "occupation". "Occupation" is seen as a specialty or specialization of "Position held by Civil Servants, while "Position" itself has a broad meaning in terms of "functions" that are recognized in an organization in general.

Pairing Article 52 of the Criminal Code which regulates the types of criminal acts for officials (State Officials-*Ambtenaar*) states that:

> *"...who, because of committing a crime, violates a special obligation from his position or when committing a crime uses the power, opportunity or means given to him because of his position."(Pramono, 2016)*

The author sees that this provision does not contain the "position or function" editorial.

Jurisprudence Decision of the Supreme Court of the Republic of Indonesia dated December 18, 1984 Number 892 K/Pid/1983 (Hamzah, 1986) in its legal considerations stated that:

> *“... Defendant I and Defendant II, by abusing the opportunity, because of their respective positions as Director of CV and executor of CV, have been declared proven guilty of committing a Corruption Crime as referred to in Article 1 paragraph (1) letter b of Law Number 3 1997...".*

This Supreme Court decision becomes jurisprudence in terms of determining that the private sector can abuse its authority related to Corruption Crimes by taking the meaning of "position" (Wiyono, 2012).

- **Abusing authority, opportunity or means.**

Authority, opportunity or means are ways for the perpetrators of Corruption Crimes to abuse their authority. The editorial used by the law in determining the ways of abuse of authority also uses the word "or" which gives an alternative meaning in which the application may be chosen one or the whole.

Some experts provide an understanding of authority which in essence all argues that the notion of authority is attached to public officials or civil servants. Philipus M. Hadjon states that authority or right is a concept in public law (Hadjon, 2000).

Meanwhile, SF. Marbun (2004) interpreting according to administrative law, authority (authority, *gezag*) is formalized power either against a certain group of people or a field of government originating from legislative or government (executive) power, while authority (Competence, *Bevoegdheid*) is the

ability to carry out a public legal action given by law to carry out certain legal relationships (Atmasudirjo, 1991).

Base on these definitions, the position of the private sector is difficult to define as fulfilling the context of authority or right. R. Wiyono, SH. provides the meaning of "Opportunity" and "Means" separately which in its understanding explains that opportunity is an opportunity that can be exploited as a result of the void or weakness of the provisions, while means is defined as a condition, method or medium. If it is related to the definition of "position" as discussed previously, the private sector because of its position can use opportunities or facilities that meet the elements of article 3 as exemplified in the jurisprudence of the Decision of the Supreme Court of the Republic of Indonesia dated December 18, 1984 Number 892 K/Pid/1983 (Wiyono, 2012).

4. Legal Provisions Regarding Subcontracts for the Procurement of Goods and Services

In many cases of borrowing and borrowing companies belonging to other people, law enforcement always postulates that the perpetrator has committed an unlawful act of job transfer or subcontracting. There are facts on the ground that job transfers are no longer part of a job but entirely based on the needs of specialist goods and services providers but rather a company borrowing and borrowing mode which in the end is always full of Corruption Crimes.

Article 87 paragraph (3) of the Presidential Regulation of the Republic of Indonesia Number 70 of 2012 concerning the Second Amendment to the Presidential Regulation Number 54 of 2010 concerning the Procurement of Goods/Services The government allows the existence of a sub-contract related to the transfer of part of the work due to the part of the work that requires specialist goods and services providers.

The definition of a subcontract cannot be interpreted simply in terms of the actor having actually used a company owned by another person to be registered and used in carrying out the work of the Procurement of Goods and Services. The transfer of work must be proven to meet the qualifications as a Subcontract, namely by an agreement, if it is not based on an agreement, one party will only be considered as a "worker" working for another party, without a legal transfer of responsibility.

In a work contract between the Government and a contractor or contractor, it is possible that the winning company may submit the work to another company which is a sub-contractor based on a special agreement between the winning bidder and the sub-contractor. The existence of such a sub-contractor in the contracting agreement must be with written permission from the user of goods and services in this case represented by the PPK, because basically the agreement between the auction winner and the sub-contractor is outside the main agreement/contract made between the assignor and the auction winner. So legally, the sub-contractor's legal relationship is only with the winner of the auction, which is stated in the Sub-contract agreement.

Article 19 paragraph (1) f states that:

> *"In the event that the goods/services provider will enter into a partnership, the goods/services provider must have an operating cooperation/partnership agreement that contains the percentage of the partnership and the company that represents the partnership"*

This article implies that the transfer of work or what is later known as a Subcontract is part of a form of partnership or Joint Operation (hereinafter referred to as KSO), so that an agreement must be made on it. The legal relationship that arises because of the agreement binds both parties who make the agreement, as is the binding power of the law. This is in accordance with Article 1338 paragraph (1) of the Civil Code which reads: "All agreements made legally apply as law for those who make them". The bond that arises from such an agreement is called an engagement. Hence, it can be said that the agreement creates an agreement between two people who make it.

In the event that the provider of goods and services performs a Subcontract, the agreement that regulates the Subcontract contains, the responsibilities of the parties and the percentage of job transfer, which must be agreed upon and made prior to the submission of bids. Even Article 89 paragraph (3) states that:

"Requests for payment to PPK for Contracts using subcontracts must be accompanied by proof of payment to all subcontractors in accordance with the progress of their work."

Therefore, when the owner of the company wants to apply for disbursement of payments, the PPK is obliged to ask for complete proof of payment to all Sub-contractors.

In the event that there is a sub-contract work or Joint Operation (KSO), then in carrying out the work it must be accompanied by a contract signed by the parties (provider and employer). If the work is not supported by the contract and/or proof of payment of taxes from the work, then the data is declared invalid. By not including the agreement when registering the auction, it is declared that it does not meet the qualification requirements (disqualified). KSO work is carried out whenever the responsibilities of each party are required based on the scope of work in a cooperation work scheme.

Without a subcontract agreement, the work responsibility or liability in the eyes of the law remains with the owner of the company that wins the auction for the procurement of goods and services and signs the work contract. Sub-contractors who are not based on an agreement will be considered only as "workers" and not as parties who stand equal before the law in being responsible for work in the eyes of the law, but the owner of the winning company is the only person in charge in the eyes of the law while the Sub-Contractor is only work under the responsibility of the owner of the company.

C. Discussion

a. Criminal Liability of the Defendant Nimrod E Sihombing as an actor who is not a civil servant or a state official (private)

Based on the Juridical Review which reviews criminal liability both the status of the defendant's "position" who carries out work using a company owned by another person without being based on a Power of Attorney or Subcontract Agreement as well as a review of the responsibility of the Private Sector for Corruption Crimes related to abuse of authority, then based on facts actions in the case of the defendant Nimrod E Sihombing, the author will explain the Juridical Analysis of him. This juridical analysis will review the criminal liability of the defendant Nimrod E Sihombing, which is limited to the formulation of the problem in this individual working paper.

To answer the application of the article on abuse of authority over the private sector, article 3 Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption as amended and supplemented by Law Number 20 of 2001 concerning the Eradication of Criminal Acts of Corruption states that there is a context of "occupation" and "position" which is clearly explained by R. Wiyono, SH. and Soedarto that the word "occupation" refers to a civil servant who has authority which is then misused in a case of abuse of authority, while "position" has more meaning than "position" which is more to a function within an organization including private organizations that legitimate (Soedarto, 1977; Wiyono, 2012).

Adami Chazawi also explained that the element of "opportunity or means" can apply when the "occupation" is legally obtained and includes how the private sector legally obtains the right to be able to legally carry out work related to the procurement of goods and services (Chazawi, 2016).

Apart from the definition of the elements based on Article 3, there is a Jurisprudence in the Supreme Court Decision which decides that the Private Sector can be held criminally responsible for Corruption Crimes related to Abuse of Authority, namely the Decision of the Supreme Court of the Republic of Indonesia Number 892 K/Pid/1983 dated December 8, 1984 which criminalizes the sector private sector because of their “position” as Director and executor for committing Corruption Crimes.

Therefore, Raya Nainggolan and Nimrod E Sihombing both who have non-civil servant status have the potential for criminal liability for the abuse of authority article, of course it must be re-examined whether they have the qualifications to meet the "position" element in Article 3 of Law Number 31 of 1999 concerning Eradication of Acts Corruption Crimes as amended and supplemented by Law Number 20 of 2001 concerning the Eradication of Corruption Crimes.

Based on the PPK Decree Number: 634/2010 dated 2012 and Contract number: 6569/-076,342 dated October 25, 2010, the elements of "opportunities and facilities" to carry out the work have been fulfilled by Raya Nainggolan who because of his "position" as Director of PT DIRGASENA who is the winner of the procurement auction, then Raya Nainggolan as a private sector has legal rights and obligations to carry out the work Development of an Inpatient Health Center and Maternity Hospital in Kramat Jati District for Fiscal Year 2010. So that if in the implementation of the work there is a criminal act of abuse of authority related to the manufacture of an addendum that is not justified and the execution of work that does not meet the specifications as assessed by the Civil Engineering expert at the Semarang State Potitechnic, until resulted in state losses of Rp. 382.765.699,- which can be calculated according to expertise by the DKI Jakarta Provincial BPKP, so even though Raya Nainggolan is not a Civil Servant, he has fulfilled the elements of the article and can be held criminally responsible for Article 3Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption as amended and supplemented by Law Number 20 of 2001 concerning Eradication of Criminal Acts of Corruption.

The same criminal responsibility even though the defendant Nimrod E Sihombing is not a Civil Servant having the same qualifications as Raya Nainggolan for his criminal actions as the "position" of the Director of PT Sung Nichom Technologi who has "opportunities or facilities" based on PPK Decree Number 881/2010 dated 07 September 2012 and Contract Number: 7641/076.342 dated September 13, 2012. The defendant used this "opportunity or means" by doing work that was not in accordance with specifications, causing state losses of Rp. 242.171.760.

This series of criminal events proves that the private sector can be held criminally responsible for abuse of authority as regulated in Article 3 of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes as amended and added to by Law Number 20 of 2001 concerning the Eradication of Corruption Crimes.

b. Nimrod E Sihombing's Criminal Liability Using a Company Owned by Raya Nainggolan Without a Job Transfer Agreement (Subcontract)

In answering the question of the responsibility of the defendant Nimrod E Sihombing who carried out the work that won by PT DIRGASENA belonging to Raya Nainggolan without being based on a Power of Attorney and Subcontract Agreement, the author discusses several applications of articles to describe liability. Van ECK said that "*Men kan het daderschap uit de delictsomschrijving aflezen*" or people can determine who should be considered a perpetrator by reading a formulation of the offense.

First, based on the good deeds of Raya Nainggolan as the owner of the company that won the auction and drg. Roselyne E.H.L Tobing as PPK knew that the party carrying out the work was the defendant Nimrod E Sihombing. The defendant's actions were not given a warning and in the end resulted in a Corruption Crime related to the manufacture of an addendum that was not justified and the work did not meet the specified specifications. The actions of the defendant who took over the entire work that was won by PT Raya Nainggolan even though it was approved by the owner of the winning company was

considered "against the law" Article 87 paragraph (3) of the Presidential Regulation of the Republic of Indonesia Number 70 of 2012 concerning the Second Amendment to the Presidential Regulation Number 54 of 2010 concerning the Procurement of Goods/Services related to the prohibition of subcontracting on the entire work.

Law enforcers are often less careful in assessing the qualifications of “Subcontractors”. It can be proven "against the material law" by witness statements stating that in fact it was the defendant Nimrod E Sihombing who carried out all the work, and the payment check from Raya Nainggolan to the defendant Nimrod E Sihombing was a fact of the flow of funds from the payment for the work. However, if we review "against the formal law" there are facts that limit the qualifications of the defendant's legal subject to fulfill the "position" element in Article 3.

The application of the "position" element of Article 3 must be proven regarding the legal rights or functions of the defendant Nimrod E Sihombing in relation to his relationship with PT DIRGASENA as a legal company implementing the work. The defendant Nimrod E Sihombing does not have a position and function in the organizational structure of Raya Nainggolan's PT DIRGASENA and does not have a legal employment relationship by agreement so that it cannot be formally proven that there is a transfer of responsibility or division of work responsibilities from Raya Nainggolan to the defendant Nimrod E Sihombing.

Article 19 paragraph (1) f Presidential Regulation of the Republic of Indonesia Number 70 of 2012 concerning the Second Amendment to Presidential Regulation Number 54 of 2010 concerning the Procurement of Goods/Services requires the existence ofa joint operation/partnership agreement containing the percentage of the partnership and the company representing the partnership. With a written agreement, it can be formally proven how large a percentage of the work is transferred and the extent of the transfer of responsibility from the owner of the company to the Subcontractor. Without this agreement, the status of the defendant Nimrod E Sihombing is only a "worker" who works on behalf of Raya Nainggolan and all responsibility, both in terms of contract fulfillment and legal liability, is still fully attached to Raya Nainggolan.

Raya Nainggolan as Director of PT DIRGASENA is obliged to organize and supervise the entire course of work until it is completed, if there is a Corruption Crime for the work, the responsibility remains fully with Raya Nainggolen as the "employer". Defendant Nimrod E Sihombing cannot be convicted of a Corruption Crime of Article abuse of authority with a legal subject that stands alone on the individual accused as "*Dader*" because the element of "position" cannot be fulfilled, so that with the loss of that element it cannot be proven that the element of "opportunity or means" (Chazawi, 2016).

In carrying out the work on the construction of the Kramat Jati Health Center, the Defendant Nimrod E Sihombing did not base his function and capacity on the PT DIRGASENA company organization or a power of attorney authorized to him. Defendant Nimrod does not have a "position" in the company, so it is highly unlikely that the defendant will be judged to have a staff member for the abuse of "opportunities and facilities". The defendant Nimrod E Sihombing is also not bound by a Sub-Contract or Partnership agreement with Raya Nainggolan as the owner of PT DIRGASENA which can be proven in writing, so there is no transfer of responsibility or authority from Raya Nainggioan to the Defendant Nimrod E Sihombing.

In connection with the non-fulfillment of the "position" element, it is not possible for the Defendant to misuse "opportunities and facilities", so that the qualifications of Dader for the defendant are not fulfilled with the complete offense element not being fulfilled.

The Public Prosecutor must be able to translate the actions of the defendant with the correct application of the article based on the laws and regulations, that in fact the defendant's actions are implementing work in the field that cause state losses. The definition of *strafbaarfeit* has been fulfilled for

the actions of the Defendant, so it is necessary to reassess how the position of the staff member is. Judging that with the non-fulfillment of *Dader* qualifications for the defendant, taking into account the context of cooperation realized by the Defendant together with PPK and Raya Nainggolan in this corruption crime, the author will direct the discussion of a "personal situation" or "personal nature" relating to with the role and participation of the Defendant in this case.

Even though the execution of the work by the defendant Nimrd E Sihombing was not based on a Subcontract agreement, it was known by Raya Nainggolan as director of PT DIRGASENA and in the disbursement of the payment of 60.8% which was paid to the account of PT DIRGASENA was transferred back through a check to the defendant, so that the cooperation between Raya Nainggolan and the defendant Nimrod E Sihombing has been proven from the start of the work to the completion of the work.

In using PT DIRGASENA, the defendant Nimrod E Sihombing never received a warning from Raya Nainggolan, and the will was shared between them. In practice, both of them let the condition take place without any coercion. The actions of Nimrod E Sihombing have been proven to be "participating in" or *Deelneming* by Raya Nainggolan together with the defendant Nimrod E Sihombing. That on the one hand the fact that Raya Nainggolan as the owner of PT DIRGASENA who does not carry out his duties and functions properly, in carrying out the work has resulted in state losses both in the implementation of the Addendum which was judged to be wrong and the non-conformance of specifications had fulfilled the element of abuse of authority, opportunity and facilities because of "position",

If *Medepleger* qualifications are related to Raya Nainggolan's qualifications as a private sector that can be proven to have abused his authority, then the defendant can be said to have participated in committing together with Raya Nainggolan the abuse of "opportunities and facilities" because of his "position".

With respect to the proposed Addendum to the Contract (Fixed Price) it is not allowed to have additional work, both in terms of price and type of work, however, drg. Roselyne E.H.L Tobing as PPK agreed and allowed the defendant Nimrod E Sihombing to propose and implement the Addendum until it was completed. The actions of Dr. Roselyne EHL Tobing as PPK has abused her authority because of his "position". The actions of the defendant who have proposed and implemented the entire Addendum to completion have fulfilled the elements of Participating together with the PPK. Defendant Nimrod E Sihombing is an executor of work in the field without his participation a criminal act would not have occurred.

Professor van BEMMELEN is of the opinion that it is not impossible that a non-civil servant can participate in or may order to commit a crime of office. And it is not impossible that an ordinary citizen can participate in a military offense. Based on this opinion, the actions of Defendant Nimrod E Sihombing who are not civil servants are able to participate in the abuse of authority committed by drg. Roselyne E.H.L as PPK who has committed a Corruption Crime.

In relation to the Defendant's *Medeplager* for the act of abusing the authority of the PPK, the alleged elements of the article still refer to the qualifications of the PPK as a Civil Servant, so that Participating in the act of abusing his authority may include in its entirety either "authority, opportunity or means" because of "position or "position that is is on him (PPK).

Prof. Dr. Wirjono Prodjodikoro, SH, in his book entitled Principles of Criminal Law in Indonesia, quotes the opinion of Hazewinkel-Suringa, the Dutch Hoge Raad who put forward two conditions for the existence of participating in a criminal act. First, the conscious cooperation between the participants, which is a common will between them. Second, they must jointly carry out the will (Wirjono, 1989).

Pompe argues that:

> *"A person who does not meet the characteristics of a civil servant can move a civil servant to commit an office crime".* (Lamintang, 2013)

The criminal responsibility of the defendant Nimrod E Sihombing as an executor of work that is not based on a Power of Attorney or Subcontract Agreement, cannot be charged to him as a "*dader*" for abuse of authority. Personal nature (personlijke hoedanigheid) (Lamintang, 2013). The defendant did not fulfill the element of "position" because he did not have a legitimate function in the organizational structure of PT DIRGASENA and his participation in a criminal act could not be formally proven based on a Power of Attorney or Subcontract Agreement which transferred or shared responsibility from Raya Nainggolan to the defendant Nimrod E Sihombing (Lamintang, 2013).

The role of the "*dader*" is not fulfilled, so that it can be proven that the role of the defendant who is participate in action that starts from the beginning of the work, the proposal and implementation of the addendum until the end of the work and getting the full disbursement from Raya Nainggolan. The role of the defendant was to cooperate with the common good with Raya Nainggolan as director of PT DIRGASENA and drg. Roselyne E.H.L Tobing as the Commitment Making Officer (PPK) which in its implementation has been proven to have resulted in state losses, the defendant can be accused of being a "*Medeplage*r" for participating in a criminal act so that he is sentenced to the same punishment as Raya Nainggolan and drg. Roselyne E.H.L Tobing in Abuse of Authority. The actions of the defendant Nimrod can be charged with the article on abuse of authority by combining Article 55 paragraph (1) number 1 of the Criminal Code as Participating in action.

Conclusion

a. Conclusion

1. The perpetrators of criminal acts in the private sector may be subject to an article on abuse of authority related to Corruption Crimes because they fulfill the element of abusing "opportunities or facilities" because of their "position" as regulated in Article 3 of Law Number 31 of 1999 concerning Eradication of Corruption Crimes.

2. Nimrod E Sihombing does not have the function and engagement in the organizational structure of PT DIRGASENA which commits the Corruption Crime, so Nimrod E Sihombing cannot be qualified as a "*dader*" in the Abuse of Authority article. However, Nimrod E Sihombing's liability in the abuse of authority can be imposed by using article 55 paragraph (1) to 1 as an act of participating in "*madeplager*" together with drg. Roselyne E.H.L Tobing and Raya Nainggolan who both have "occupation" and "position" in the Abuse of Authority for the Crime of Corruption.

b. Suggestion

1. Law Enforcers must be able to prove that the staff of the private sector are able to fulfill the elements that because of their "position" have abused "opportunities or facilities". The "position" can be proven by examining the function of the perpetrator in a private organization that has committed a Corruption Crime.

2. In determining criminal liability for a person who receives a Subcontract in order to fulfill the element of "position" in the abuse of authority, it must be disclosed that the existence of a function or position in a private organization arising from a power of attorney, agreement or formal transfer of responsibility. This position is the basis for "opportunities and means" which are then used in the abuse of authority for the Crime of Corruption.

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