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Foreign Loan Deviation Parameters from a Criminal Law Perspective

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Abstract
Reactions to the effectiveness of foreign loans are both negative and positive. There are initiatives to criminalize governmental financial losses from anomalies in foreign loans. There are elements of criminal behavior that are unique to state financial losses on international loans. Therefore, rules must be established to make behaviors that harm the state's finances when using foreign loans illegal. Through the use of a statutory approach, a conceptual approach, and an approach to Constitutional Court Decision Number 37/PUU-XVIII/2020, this research was carried out utilizing a normative juridical methodology. As for this research, the conclusions that can be drawn are: first, losses to state finances incurred on foreign loans can be categorized as a criminal act if they fulfill two elements cumulatively, namely an act against the law (*wederrechtelijk*) and an abuse of authority. Parameters of irregularities in foreign loans can be carried out using several instruments, including: 1. The legality of authority as stipulated in the provisions of Article 11 paragraph (2) of the 1945 Constitution of the Republic of Indonesia and Article 8 of the State Finance Law; 2. The principles in Article 2 of the Government Regulation concerning Procedures for Procurement of Foreign Loans and Receipt of Grants; and 3. loan planning as contained in the RPPLN, RPJPN, and RPJMN. Second, the idea of negative material law (negative *materiele weterrechtelijk*) should be incorporated into the idea of criminal acts for irregularities in foreign loans. This is consistent with the idea of breaking the law proposed in the 2023 Criminal Code and accommodates the concept of breaching the negative material law (negative *materiele weterrechtelijk*), which contains the principle of legality.
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I Introduction

The amount of foreign loan in Indonesia has dramatically increased. The entire amount of loans owned reached IDR 7,554.25 trillion at the end of 2022.[1] Public attitudes toward the phenomenon of rising total loans in Indonesia have ranged from supportive to critical. Even the Supreme Audit Agency (BPK) has begun to alert the administration to the government's loans, which it believes are becoming more worrisome.[2]

Foreign loans are essentially a tool for achieving economic development objectives. The term "foreign loans" is adapted to the terms used in the provisions of the State Finance Act and Government Regulation No. 10 of 2011 on the Procedure for Obtaining Foreign Loans and Accepting Grants. The State Treasury Act provides the definition of foreign loans with foreign debt. However, as required by the Constitution, the projected economic growth goals must identify welfare and social justice as the primary aims.[3] Therefore, the allocation of these loans is limited by the Foreign Loan Utilization Plan (RPPLN) and the Medium Term Development Plan (RPJM) in order to make foreign loans linear towards development goals based on social welfare and social justice.

The state's finances could suffer if a foreign loan is issued outside the parameters and goals specified in the RPJM or RPPLN. According to Harnold Ferry Makawimbang, this means that when the state incurs expenses that shouldn't be necessary because of loans that aren't compliant with the rules, this is a course of action that is harmful to the state's finances.[4]

Several situations, like the following, provide examples of state spending on foreign loans that are not consistent with the RPJM and RPPLN figures. The first is the fine that the Indonesian government must impose due to the inadequate ingestion of funds, sometimes referred to as zero disburse. zero disbursement is the

[1]https://www.cnnindonesia.com/ekonomi/20230119073814-532-902331/utang-pemerintah-indonesia-tembus-rp7733-t-sepanjang-2022. Last downloaded on March 23, 2023
[2]https://www.mpr.go.id/berita/BPK-ingatkan-Pemerintah-soal-utang,-Wakil-Ketua-MPR-:-Utang-luar-negeri-semakin-mengkhawatirkan Last downloaded on March 23, 2023
[3] Elviandri, Khuzdaifah Dimyati, dkk, *Quo Vadis Negara Kesejahteraan: Meneguhkan Ideologi Welfare State Negara Hukum Kesejahteraan Indonesia*, Mimbar Hukum Volume 31, Number 2, June 2019, p..252
[4] Harnold Ferry Makawimbang, 2014, *Kerugian Keuangan Negara,* Thafa Media, Yogyakarta, p.12-15

absence of a withdrawal of funds on a loan that has been signed does not eliminate the fact that the interest on the loan must remain paid as agreed. (loan agreement) .28 loans were signed in the first quarter of 2010, but no withdrawals were made on them. Only 50.8% of the goal of USD 2,769.7 million was absorbed overall in the third quarter of 2019.[1] The government of Indonesia was liable to sanctions for failing to pay the fees stipulated in the loan agreement as a result of failing to absorb the loan monies.[2] The word "commitment charge (fee)" is used to describe the consequences of not paying commitment fees on unpaid accounts [3] For instance, the government made no payments during the first quarter of 2010 (despite the commitment charge or fee of USD 9.9 million) [4] or 89.1 billion IDR equivalents.[5]

A consequence of taking out foreign loans, in addition to these requirements, is the obligation to pay interest on debt. Indonesia, for instance, will have to pay $441 trillion in interest on its loans in 2023.[6] Since the past several years, there has been an increase in interest, which suggests that Indonesia has entered the Fisher Paradox, in which the amount of foreign debt that is accruing increases in direct proportion to the amount of repayments that are being made on that debt.[7] The existence of such substantial interest payments is still being developed and has both pros and cons. Regarding Harnold Ferry Makawimbang's viewpoint, the element of damaging state finances has, however, been satisfied if the state incurs expenses that are not necessary.

However, not all state losses fall within the category of illegal activity. The act is unlawful in addition to causing the state financial loss. According to Moelyatno, there are a number of requirements between *sculd* (error) and *unrecht* (the act's unlawfulness) that must be met before an act can be classified as a crime,[8] The parameters of unlawfulness come in the form of opportunity (abuse of opportunity) and power abuse. Muladi also added that in order for an act to qualify as a crime, it must also involve dishonesty, manipulation, misrepresentation, or deception, the hiding of facts, a breach of trust, subterfuge, and the evasion of laws (which is prohibited).[9]

There are several significant factors to consider in addition to the criteria listed above for classifying an act as criminal. One of them is the government's right to interfere (*staatsbemoeienis*) in every facet of social life in order to promote the general welfare (*betuurszorg*).[10] In the event that the law does not authorize the government to implement its rules, the government is allowed to take action to operate the government on the basis of its power to exercise regulatory authority. The ability to take independent action, according to Sjahran Basah, does not, however, give the government carte blanche to act irresponsibly; rather, it requires accountability.[11] A few of the criteria used to evaluate government actions are outlined in the General Principles of Good Government.

Regarding state financial losses, when referring to the provisions of Article 3 of Act Number 31 of 1999, along with Act Number 20 concerning the Eradication of Corruption Crimes, which states that a legal entity (person or body) who unlawfully commits an act that is detrimental to the country's or state's economy, criminal sanctions may be imposed on him. However, there is debate over the characteristics of financially destructive behavior that can be classified as crimes when it comes to the classification of foreign loans that affect the state. Nevertheless,it is important to understand who should be accountable for state financial losses from foreign loans. as stated by A.D. Belinfante that "*No powers without responsiblity, no one should have powers to exersice official public authority, unless he or she can be held responsible for the exersice (or non-exersice) of those power; No responsiblity without powers, no one should be held responsible for acts or omissions falling outside the scope of his powers"* [12]

It is vital to identify the traits of financially harmful conduct that can be classified as criminal acts before imposing accountability and sanctions on legal subjects. Given this context, a number of problem formulations will be discussed in this research, *First*, can foreign loan misappropriation be classified as criminal acts? *Second,* what regulatory framework should be used for future criminal prosecutions of foreign loan irregularities?

[1] Kementerian PPN/Bappenas, *Laporan Kinerja Pelaksanaan Pinjaman dan/Atau Hibah Luar Negeri* Triwulan III Tahun 2019, P 1
[2] Directorate General of Debt Management, Ministry of Finance of the Republic of Indonesia, *Laporan Perkembangan Pinjaman Luar Negeri dan Hibah Triwulan I Tahun 2010*, p.82
[3] Directorate of Portfolio and Risk, Directorate General of Debt Management, July 2007, *Daftar Istilah, Singkatan dan Akronim yang berkaitan dengan Pinjaman Luar Negeri,* Jakarta, p 18
[4] Directorate General of Debt Management, Ministry of Finance of the Republic of Indonesia, *Ibid,* P. 82
[5] Kurs on March 31, 2010
[6] LKPP financial report for 2011 in https://djpb.kemenkeu.go.id/portal/images/file_artikel/file_pdf/lkpp/lkpp_audited_2011.pdf
[7] El Mal,Jurnal Kajian Ekonomi & Bisnis Vol 1 No 1 (2018) 1-23 P-ISSN 2620-295 E-ISSN 2747-0490 DOI: 1047467/elmal.v1i1.277 *Analisis Pengaruh Utang terhadap Perekonomian dan Kemiskinan di Indonesia Periode 1949-2017* Dedi Junaed, P 4
[8] Moeljatno, 1985, *Perbuatan Pidana dan Pertanggungjawaban dalam Hukum Pidana* Speech delivered at the Memorial Service Dies Natalies VI Gadjah Mada University, on December 19, 1955, Bina Aksara,Jakarta, p. 23-24
[9] Henny Juliani, *Op.Cit,* p. 49-50
[10] Ridwan HR, 2014, *Hukum Administrasi Negara*, Raja Grafindo Persada,Jakarta, p 229
[11] *Ibid*, p 230
[12] Roel de Lange, "*Political and Criminal Responsibility*," (Journal of Comparative Law, Vol. 6, No. 4, December 2002). p. 309, .

2 Methods of Legal Research

This study falls under the category of legal research that employs new rationales, theories, or concepts as an initial basis for analysi.[1] The approach adopted is a normative juridical approach with prescriptive findings. The legislative approach, the conceptual approach, and the court judgment approach are the approaches used to address the formulation of the issues highlighted. The body of rules and regulations employed in this study are the 1945 Constitution of the Republic of Indonesia often known as the 1944 Constitution, Act number 17 of 2003 concerning State Finance (hereinafter referred to as the State Finance Act), Act number 31 of 1999 in conjunction with Act number 20 of 2001 concerning the Eradication of Corruption Crimes (hereinafter referred to as the Eradication of Corruption Crimes Act), Act number. 24 of 2000 concerning International Agreements (hereinafter referred to as the International Agreements Act), and Act number 30 of 2014 concerning State Administration (hereinafter referred to as the State Administration Act), Act number 2 of 2020 concerning Stipulation of Government Regulations in lieu of Law Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the 2019 Corona Virus Disease (covid-19) Pandemic and/or in the Context of Facing Threats that Endanger the National Economy and/or Stability of the System to Become an Act (hereinafter referred to as Act number 2 of 2020), Government Regulation number 10 of 2011 concerning Procedures for Procurement of Foreign Grants and Loans (hereinafter referred to as Government Regulations for Procurement Procedures, Foreign Grants and Loans).

In this study, the conceptual approach was to define foreign loans, criminal behavior, and losses to state finances. While the court's decision-making process aims to establish a ratio decidendi on the Constitutional Court's ruling number 37/PUU-XVIII/2020 regarding the judicial review of Law No. 2 of 2020 concerning the stipulation of government regulations in place of Law No. 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the 2019 Corona Virus Disease (covid-19) Pandemic.

3 Discussion

3.1 Foreign Loan Deviations from Criminal Law Perspective

The terms "foreign loans" or "national debt" can be found in a number of laws and regulations, such as the State Finance Law, the State Treasury Law, Government Regulation Number 2 of 2006 in conjunction with Government Regulation Number 11 of 2011 concerning Procedures for Procurement and or Acceptance of Grants and Forwarding Loans and/or Foreign Grants, within other laws and regulations. The term "foreign loans" is defined in Government Regulation Number 2 of 2006 concerning Procedures for Procurement and or Receipt of Grants and Forwarding of Foreign Loans and/or Grants as *"state revenue either in the form of foreign exchange and/or foreign exchange in rupiah, or in the form of goods and/or services obtained from foreign lenders that must be repaid under certain conditions."*

Arifin Pellu defines foreign debt as money owed to foreigners by citizens of economic zones.[2] Todaro, meanwhile, claimed that all foreign aid consists of formal grants and soft loans, both in cash and other types of assets, which have historically been shown to move significant sums of resources from developed to developing countries.[3]

Regarding the legality of implementing foreign loans, it is stated in the State Treasury Law's provisions that the government may provide loans and/or grants both domestically and internationally in order to finance and assist the attainment of development goals. Furthermore, Government Regulation number 23 of 2003 concerning Controlling the Cumulative Amount of Deficits of the State Revenue and Expenditure Budget, and Regional Revenue and Expenditure Budgets, as well as the Cumulative Amount of Central Government and Regional Government Loans states that the cumulative amount of APBN and APBD deficits is limited to a maximum of 3% (three percent) of this year's GDP. The cumulative amount of state and regional government loans is limited to a maximum of 60% (sixty percent) of the gross domestic product in the year concerned.

Foreign loans are actually a strategy that is frequently employed for national development, particularly in developing countries like Indonesia. However, foreign loans are viewed as a burden for the government in dealing with fiscal policy. Foreign loans have benefits and drawbacks; therefore, state authorities who have the power to make them are hesitant to decide on a course of action. The provisions of Act number 2 of 2020 reflect and indicate this. The government's legal immunity to oversee the financial system during the COVID-19 pandemic is set down in Article 27 paragraph (1) of Act Number 2 of 2020 as follows:

> *The expenses incurred by the state and/or KSSK member institutions to implement state revenue policies, including taxation policies, state spending policies, regional finance policies, financing policies, financial system stability policies, and national economic recovery programs are part of the economic costs to prevent a state loss.*

[1] Peter Mahmud Marzuki, 2005, *Penelitian Hukum*, Kencana Predana Media Group, Jakarta p. 35.
[2] Bank Indonesia. 2016, *Statistik Utang Luar Negeri Indonesia*. Vol. VII Mei, Bank Indonesia, Jakarta, p. iii
[3] Arifin Pellu, *Utang Luar Negeri; Paradoks Pembangunan Ekonomi Indonesia*, https://scholar.google.com/scholar?cites=5290587803417686093&as_sdt=2005&sciodt=2007&hl=en

Regarding the provisions of this Article, the Constitutional Court, through Decision Number 37/PUU-XVIII/2020, explained in its ruling that it was of the opinion that "will not harm the country's economy" means that as a financing and processing policy, activities to save the economy from a crisis are carried out "in good faith and based on applicable laws and regulations. The government may also face criminal or civil charges if it acts without good faith and in violation of the relevant laws and regulations, according to article 27 paragraph (2) of Act Number 2 of 2020. In accordance with these clauses, the state has legal immunity for state officials managing state finances, in this case foreign loans, as long as they do so in good faith and in compliance with the relevant laws and regulations.

Corruption is one of the crimes connected to state financial losses. The provisions of the Corruption Eradication Act contain one of the rules governing corruption. The requirements of Articles 2 and 3 of the Corruption Eradication Act contain measures governing state losses.

The Corruption Eradication Law's provisions in Articles 2 and 3 differ in a number of legal realms. Contrary to Article 2, which imposes criminal sanctions on general legal subjects, Article 3 of the Corruption Eradication Act only applies to special legal subjects, such as civil servants, officials, or state administrators. According to Article 3 of the Corruption Eradication Law "*every person who, with the intention of rewarding himself, another person, or a corporation, abuses the authority, opportunity, or means available to him because of his position, which can impair public finances or the state economy…"* Article 3 of the Corruption Eradication Act has different characteristics because the subject of the law is a state official who has "*abused the authority, opportunity, or means available to him*".

The provisions of the 1945 Constitution can be used to determine the legal subjects that have the authority to provide foreign loans. Article 11 paragraph 2 of the 1945 Constitution states that in the case of international agreements made by the President that have broad and fundamental consequences for the lives of the people regarding the burden on state finances or it is necessary to amend or establish statutory regulations, then this must be with the approval of the DPR. Based on these provisions, the legal subjects who are given the authority to carry out foreign loans are the President and the DPR.

However, there are several provisions in statutory regulations that affect the authority of legal subjects to carry out foreign loans. Some of them are found in the provisions of the International Treaty Act, where Article 2 uses the phrase "consult" to indicate the position of the DPR in the formation of international agreements. Irfan R. Hutagalung explained that the use of the terms "approval" and "consultation" gives a different position because if you still use the phrase consultation," then the position of the DPR is not crucial. [1]

This conflict of norms occurred because the International Treaty Act was not amended even though there was the third amendment to the 1945 Constitution of the Republic of Indonesia which was carried out in 2001. The broader consequences of differences in phrases in procuring foreign loans caused the President as head of the executive agency to become the subject of legal responsibility.

According to Bagir Manan, the president in a presidential system of government has two powers, namely executive authority and diplomatic authority. Executive authority is the original authority (original power of the executive) to carry out international agreements. Regarding the original power of the executive, the president is given the authority to interpret the meaning "*to cause broad and fundamental consequences for people's lives".*[2] It is acceptable for the President to forego seeking or even setting aside the DPR's consent if he or she believes that a foreign loan deal would not have significant and fundamental effects on people's lives. However, the President should be held legally liable if an error is made in understanding the wide and basic implications for people's lives of international agreements on foreign loans. The provisions of Article 34 of the State Finance Law, which state that Ministers, Heads of Institutions, Governors, Regents, and Mayors who are found to have broken the law and the state budget can be subject to criminal sanctions, list additional legal subjects that can be held legally responsible for foreign loans.

The next element related to the crime of harming state finances in Article 3 of the Corruption Eradication Act is "with the aim of enriching oneself, other people, or corporations", Indriyanto Seno Adji explained that the meaning of "with purpose" contains the meaning of intention (*opzet*). The opzet in question includes *opzet als oogmerk* (deliberate with purpose), *opzet bij zekerhejds bewustzijn* (deliberation with certainty), as well as *opzet bij mogelijkheids bewustzijn* (awareness with possibility).[3]

"*Enriching oneself, others, and the corporation*" is the third component. The losses the state will sustain are correlated with this component. Benefiting oneself, another, or a corporation" must be classified as a behavior that does not predispose to barrehandling (a criminal offense). When the loss was brought on by "*abusing the authority, opportunity, or means accessible to him because of his position*," it would be considered barrehandling.

[1] Irfan R. Hutagalung pada saat dimintai keterangan ahli secara tertulis dalam putusanMK Number 13/PUU-XVI/2018
[2] Bagir Manan dalam Abdul Aziz Zaini, *Problematika Demokrasi Presidensiil PascaPerubahan Undang Undang Dasar,* JSIP, Vol 2 No 1 February 2021, p. 57
[3] Indriyanto Seno Adji, Overheidabeleid & Asas Materiele wedeechtelijkheid" dalam perpektif Tindak Pidana Korupsi di Indonesia, *Jurnal Hukum Internasional*. Vol 2 No 3 April 2005. p.587

[1]

Abusing authority is the next component. Indriyanto Seno Adji explained that the concept of *wederrechtelijk* is different from abuse of authority, both concepts are criteria that are cumulative for the free movement of the state apparatus.[2] The criteria that separate *wederrechtelijk* from abuse of power are as follows, according to Shinta Agustina et al.: [3]

1. *Wederrechtelijk* is a general term for an action that has no legal justification. Although he holds a position, there is a need for abuse of authority when he deviates from his authority
2. The need for abuse of authority can be tested with 3 criteria
   a. Acts committed contrary to applicable regulations
   b. The actions taken were contrary to the purpose of the given authority
   c. There are acts that are done arbitrarily
3. Neglecting duties and authority over a given position is categorized as *Wederrechtelijk*, not the need for abuse of authority
4. Abusing authority, as stipulated in Article 3 of the Law on the Eradication of Corruption Crimes, is a means to achieve the prohibition in that article. The element of abuse of authority correlates with the element of "abusing the opportunity or means available to him because of his position or position"

Acts against the law known as *wederrechtelijk* in Dutch are defined as "*in strijd met het objectief recht, in strijd met het subjectief recht van een ander, zonder het eigen recht, and in strijd met ongeschreven rech*," or interpreted as contrary to objective law, subjective rights of others, and unwritten law. Lamintang explained *wederrechtelijk* as the illegitimate nature of an action or an intention, while Indriyanto Seno Adji explained *wederrechtelijk* as contrary to generally applicable law, the interests or rights of a person, and the rules of positive law.[4] Abusing the authority of the *wederrechtelijk* element in the provisions of Article 3 of the Law on the Eradication of Corruption Crimes, according to Shinta Agustina, et.a, [5] in practice will occur when civil servants, state apparatus, and state officials commit the following actions:

1. Acting based on the authority yet against the applicable rules and laws
2. Doing an act that is contrary to the purpose of the given authority
3. Doing arbitrary acts (*abuse de droit*)

Furthermore, Indriyanto Seno Adji stated that the concept of "abusing the opportunities or facilities available to him due to his position" is a *bestanddeel* delict *bestanddeel delic* (inti delik). ”[6]

The *wederrechtelijk* characteristic adopted by the Corruption Eradication Act, namely positive material unlawful acts (positive *materiele weterrechtelijk*), has been annulled through Constitutional Court Decision Number 003/PUU-IV/2006, which states that the elucidation of Article 2 paragraph (1) is contrary to the provisions of Article 28 of the 1945 Constitution of the Republic of Indonesia concerning the principle of legality so that it must be considered as not having binding legal force. Indriyanto Seno Adji explained that the non-use of positive *materiele weterrechtelijk* is because criminal law cannot be separated from the principle of legality, as follows:

1. If a formal act conforms to the formulation of the article but no abuse of authority is found, then the perpetrator should be acquitted of the accusation and cannot be subject to criminal sanctions
2. Criteria must be applied to be able to implement positive unlawful acts (positive *materiele wederrechtelijk*), namely:
   a. Even though the perpetrator's actions do not fall within the definition of an offense, there are losses for society and the State that are far disproportionate compared to the profits caused by actions that do not violate the law.
   b. Causing disproportionate losses to the country

The last is the detrimental element to state finances. The State Finance Act explains the concept of state finance as "all state rights and obligations that can be valued in money, as well as everything, whether in the form of money or in the form of goods, that can be made property of the state in connection with the implementation of these rights and obligations. [7]It means state financial loss is a reduction in the state's rights and obligations, which can be valued in money, as well as everything, whether in the form of money or goods belonging to the state. Foreign loans will have an impact on the APBN's cash flow. This is reinforced by the

[1] *Ibid*
[2] *Ibid p.568*
[3] Shinta Agustina, et.al, Unsur Melawan Hukum dalam Pasal 2 Undang-Undang Pemberantasan Tindak Pidana Korupsi, LEIP, Jakarta, p. 115
[4] Indriyanto Seno Adji, Overheidabeleid & Asas Materiele wedeechtelijkheid” dalam perpektif Tindak Pidana Korupsi di Indonesia, *Jurnal Hukum Internasional*. Vol 2 No 3 April 2005. p. 565
[5] Shinta Agustina, et.al, Unsur Melawan Hukum dalam Pasal 2 Undang-UndangPemberantasan Tindak Pidana Korupsi, *Op.Cit,* p. 98
[6] Indriyanto Seno Adji, Overheidabeleid & Asas Materiele wedeechtelijkheid” dalam perpektif Tindak Pidana Korupsi di Indonesia, Op.Cit. p 578
[7] See the provisions of Article 1 paragraph (1) of Act No. 17 of 2003 concerning State Finances

Government Regulation on Procedures for Procuring Foreign Grants and Loans. Article 14 states, "The Minister allocates funds in the APBN to pay principal installments, interest, and loan obligations. If this is carried out, then one of the consequences that will be received is related to the loss of state finances. A deeper look at the meaning of deviation can be understood through the formulation of various dictionaries, including the Big Indonesian Dictionary. According to the Indonesian Dictionary, deviance is defined as an action outside the applicable standards or rules. [1] While parameters are defined as benchmarks, limitations, criteria, benchmark; standards and sizes. [2] So what is discussed in this subchapter are standard measures and rules for assessing actions outside the rules (norms) related to foreign loans.

The allocation of foreign loans is regulated in the provisions of Government Regulations Concerning Procedures for Procuring Foreign Loans and Receiving Grants, Article 7 paragraph (1) is used for the following purposes:

1. State Revenue and Expenditure Budget financing
2. Funding priority activities of Ministries/Agencies
3. Debt portfolio management
4. Continued to lend to Local Government
5. Continued to lend to State Owned Enterprises
6. Granted to Local Government

However, regarding deviations from foreign loans, the parameters employed are not only those listed in Article 7 paragraph 1 of the Government Regulations Concerning Procedures for Obtaining Foreign Loans and Receiving Grants but also fit into the following category:

First, as previously mentioned, in the provisions of Article 11 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, the President, in making international agreements that have a broad impact on the lives of the people and which relate to state finances, must have the approval of the Legislative Assembly. These provisions provide both authority and accountability for the president. As head of government, a president has the responsibility of conducting analyses or predictions to evaluate the quality of international credit agreements that have an extensive impact on people's lives and are connected to state finances. The President's acts can be classified as irregularities involving foreign loans if they result in state financial losses and are made intentionally (opzet) while projecting foreign loans that have a significant influence on people's lives and are connected to state finances.

The *second* parameter, found in the provisions of Act Number 23 of 2003 concerning Control of the Cumulative Amount of State Revenue and Expenditure Budget Deficits and Regional Revenue and Expenditure Budgets, as well as the Cumulative Amount of Central Government and Regional Government Loans, is that the total amount of central and local government loans cannot exceed 60% of GDP for the relevant year, and government loans cannot be made in excess of 3% of gross domestic product (hence referred to as GDP). The existence of loan limit parameters based on GDP can only be deviated from in a critical situation, which is done in good faith and based on applicable laws and regulations.

The *third* parameter can be found in the provisions of Article 2 of the Government Regulation concerning Procedures for Obtaining Foreign Loans and Receiving Grants which states that there are several principles that must be fulfilled in carrying out foreign loans, namely:

1. Transparency
2. Accountability
3. Efficiency and effectivity
4. Prudence
5. Free of political ties
6. Has no charges that would interfere with the stability of national security

The following provides an explanation of the principles outlined in Article 2 of the Government Regulations Regarding Procedures for Obtaining Foreign Loans and Receiving Grants;

The principle of transparency or openness is explained in the provisions of Act No. 30 of 2014 concerning state administration. The idea behind the principle of openness is to assist the general public in *obtaining equitable and non-discriminatory access to information and to protect personal, collective, and state secrets. The public has a right to know openly and completely how the government is held accountable for managing the resources entrusted to it and for adhering to statutory regulations*, as stated in Government Regulation No. 17 of 2010 concerning Government Accounting Standards. Meanwhile, the Corruption Eradication Act defines the principle of transparency or openness as the principle of being open to the public's right to receive correct, honest, and non-discriminatory information regarding public administration while paying attention to the protection of human rights for individuals, groups, and state secrets.

[1] Pusat Bahasa Departemen Pendidikan Nasional, 2008, *Kamus Bahasa Indonesia,* Pusat Bahasa, Jakarta. p 1453
[2] *Ibid,* p. 356

The principle of transparency or openness is very important to be applied in the management of state finances, including foreign loans. This is due to the fact that the idea of transparency or openness has the potential to foster certain levels of public confidence in the government. According to Medina and Rufin, this clause states that "*transparency does have both a direct effect on trust and an indirect effect that is mediated by satisfaction.*" [1] The loss of transparency in the management of state finances, in the case of foreign loans, can be identified as irregularities that are attempted to be disguised. Conducting accountability reports using accounting techniques that have been accepted by the government and implemented on schedule is one way to create transparency.[2] According to Augustus, the right to obtain information includes the following. [3]

1. *right to observe* : The public's right to monitor and control the behavior of public officials in carrying out their public duties
2. *public access to information* : The public's right to receive information (the public's right to participate in the establishment (participation rights policy)
3. *free & responsible pers* : Freedom of opinion, one of which is manifested by freedom of the press
4. *right to appeal* : The community's right to submit objections if the rights mentioned above are violated (right of appeal)

Conceptually, public information that is entitled to be obtained may include;[4]

1. The right to supervise public officials who are carrying out their functions
2. The right to access information (public access to information) on the activities and / or policies of public officials
3. The right to participate in policy making or formation (policy right to participate).
4. Freedom of the press which is one of the manifestations of the right to expression (free & responsible press)
5. The right to object, if the rights mentioned above are ignored.

The second principle is accountability, which is defined as the state of being able to be held accountable.[5] The Act No. 28 of 1999 on State Administrators Clean and Free from Corruption, Collusion, and Nepotism defines accountability as *"the principle that determines that every activity and the final result of the activities of the State Organizer must be accountable to the community or the people as the highest sovereign holder of the state in accordance with the provisions of the applicable laws and regulations"* The management of foreign loans must be legally accountable to the people as the highest sovereign holder.[6] The initial mandatory accountability is in the form of an accountability report, which is carried out by reporting financial activities to the principal.[7]

Furthermore, in regards to the principles of effectiveness and efficiency in the implementation of foreign loans, the Indonesian Dictionary provides an understanding of the meaning of effective as bringing results, [8] while efficient is defined as appropriate and appropriate to produce something by not wasting energy, time, and costs [9] Mega F. Syahril, Ventje Ilat, explained that the management of state finances is said to be efficient when the work has been carried out correctly and with all the capabilities possessed.[10] While effectiveness is a comparison of outcomes with outputs that correspond to predetermined targets, The target in question is generally related to the parameters of the ability to achieve certain goals or objectives.[11] Rahardjo, on the other hand, defines efficiency as the requirement to perform a task or piece of labor properly and to the best of one's capacity.[12]

To describe a lack of awareness of the need for foresight, Schaffmeister uses the phrase *nodige voorzichtigheid of voorzorg* in reference to the prudence principle.[13] Schaffmeister asserts that someone who has been cautioned to be careful will be more cautious than someone who has not. A person who has been advised to exercise caution is required to do so since it is assumed that they are more aware of the dangers of acting recklessly.[14]

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[1] Agustinus Salle, *Makna Transparansi Dalam Pengelolaan Keuangan Daerah,* Jurnal Kajian Ekonomi Dan Keuangan Daerah Vol 1 No 1 of 2016 , p. 7
[2] See the provisions of Law No. 17 of 2003 concerning State Finance
[3] Agustinus Salle, *Makna Transparansi Dalam Pengelolaan Keuangan Daerah, Makna Transparansi Dalam Pengelolaan Keuangan Daerah* Jurnal Kajian Ekonomi Dan Keuangan Daerah, p. 7
[4] *Ibid*
[5] Sudarsno, 2005, *Kamus hukum*, Rineka Cipta, Jakarta
[6] See the provisions of Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia
[7] Mengenal Akuntabilitas dalam Sektor Publik https://accounting.uii.ac.id/mengenal-akuntabilitas-dalam-sektor-publik/ last downloaded on March 2023
[8] Pusat Bahasa Departemen Pendidikan Nasional, 2008, *Kamus Bahasa Indonesia,* p 375
[9] *Ibid*
[10] Mega F. Syahril, Ventje Ilat, *Evaluasi Efisiensi Dan Efektivitas Pengelolaan Keuangan Daerah Pada Badan Pengelola Keuangan Dan Barang Milik Daerah (Bpkbmd) Kota Bitung,* Jurnal EMBA Vol.4 No.3 September 2016, h. 643
[11] *Ibid*
[12] *Ibid*
[13] Schaffmeister,Keijzer, Sutorius diterjemahkan oleh Sahetapy, 2011, *Hkum Pidana,* Citra Aditya bakti, Bandung p. 109
[14] *Ibid,* p 109

Regarding foreign loans, the principle of prudence must be applied in achieving their objectives. Some parameters that can be met are mitigating the risks that arise, including exchange rate risk, liquidity risk, and overleverage risk.[1] Normatively, the mitigation of foreign loan risks can be emphasized in the provisions of Article 9 paragraph (2) of the Government Regulation on the Procedures for Procuring Foreign Loans, which states that in order to determine the maximum loan limits, it must pay attention to loan risks. The factors to be taken into account are: a. the actual need for funding; b. the ability to repay; c. the total amount of allowable debt; d. the potential for foreign loans; and e. debt risk.[2] Finally, there must be no political affiliations or actions that could be seen as undermining the state's security stability when foreign loans are made.

The last parameters to determine the existence of foreign loan irregularities are the RPPLN, RPJPN, and RPJMN. Foreign loans must be planned in the plan for the use of foreign loans (hereinafter RPPLN), which is adjusted to the national medium-term development plan (hereinafter RPJMN). The RPJMN is ready to encourage the achievement of development goals in accordance with the national long-term development plan (hereinafter RPJPN). The provision is stipulated in Act No. 17 National Long-Term Development Plan 2005–2025 of 2007 (hereinafter RPJPN Law). The list of medium-term foreign loan plans, hereinafter abbreviated as DRPLN-JM, is a list of planned activities that can be financed with foreign loans in the medium term. The list of foreign loan priority plans, hereinafter abbreviated as DRPPLN, is a list of action plans that have the nature of financing and are ready to be financed by foreign loans within one year.

The realization of SPPN is carried out by systematizing the long-term development system with a period of 20 years through the National Long-Term Development Plan (RPJPN) document, the medium-term through the National Medium-Term Development Plan (RPJMN) with a span of 5 years, and the annual plan in the Government Work Plan (RKP) document. The National Medium-Term Development Plan, or RPJMN, which covers the years 2005 through 2025, includes the following: RPJMN I 2005-2009: focuses on reforming and improving Indonesia in all areas to create a country that is safe and peaceful, just, and democratic, and whose degree of people's welfare has grown; RPJMN II 2010-2014: targeted at bolstering Indonesia's restructuring in all areas by placing an emphasis on actions to raise the caliber of human resources, including enhancing scientific and technological skills as well as boosting economic competitiveness; RPJMN III, which covers the years 2015 through 2019, aims to significantly improve overall development by focusing on establishing economic competitiveness built on excellent natural resources, high-caliber people resources, and ever-expanding scientific and technology capabilities, and RPJMN IV for 2020–2024, which focuses on creating an independent, advanced, just, and prosperous Indonesian society by accelerating development across a variety of sectors and placing a strong emphasis on the creation of an economic structure built on competitive advantages across a number of geographies and supported by competent and well-paid human resources. Based on this explanation, the RPJPN is actually a replacement for the GBHN. The function of the RPPLN, RPJPN, and RPJMN parameters is to fulfill the principle of sustainability in development. The potential violation of the principle of sustainability is an indication of irregularities in foreign loans.

3.2. Regulation Concept of Criminal Actions on Foreign Loan Deviations that Affect Future State Finances

A criminal act (*straftbarfeit*) is an activity that violates the law (*wederrechtelijk*) and that takes place at a specific time, location, or under specific circumstances where it is either forbidden or necessary. The element of fault (*schuld*) in the criminal act (*wederrechtelijk*) committed will be influenced by the concept of unlawful acts (*wederrechtelijk*) adopted. As explained earlier, determining the concept of *wederrechtelijk* for criminal acts committed by legal subjects is very important to do. Because based on the Constitutional Court Decision No. 003/PUU-IV/2006, the concept of positive material tort (positive *materiele weterrechtelijk*) in the Corruption Eradication Act has been revoked. Therefore, it becomes important to formulate the concept of *wederrechtelijk* on the criminal offense of foreign loan irregularities.

Weterrechtelijk must be construed as a negative material tort (negative *materiele weterrechtelijk*) in accordance with the legality principle. From the standpoint of negative *materiele weterrechtelijk*, the perpetrator is only liable for criminal penalties if there are exceptions to the unwritten law's general standards, even when the act has been classified as illegal under the law. Negative material is a justification for negating criminal legislation.[3] According to Von Lizt, if an act is not substantively illegal, it will no longer be considered negative material *weterrechtelijk*. [4]

[1] *Peraturan Bank Indonesia Number 16/21/Pbi/2014 Tentang Penerapan Prinsip Kehati- Hatian Dalam Pengelolaan Utang Luar Negeri Korporasi Nonbank*
[2] See the provisions of Article 9 paragraph (1 Government Regulation No. 10 of 2011 concerning Procedures for Obtaining Foreign Loans. Planned maximum limit for Foreign Loans
[3] Indriyanto Seno Adji, *Overheidabeleid & Asas Materiele wedeechtelijkheid" dalam perpektif Tindak Pidana Korupsi di Indonesia, Op.Cit,* P 567
[4] Von Lizt dalam Hamdan Zoelva, 2014, Impechment Presiden *Alasan Tindak Pidana Pemberhentian Presiden Menurut UUD 1945*, cet. II, Konstitusi Press , Jakarta, P 57

The application of negative *materiele weterrechtelijk* on irregularities in foreign loans is a form of protection for decision-makers who have good intentions to perform government regulatory functions. Van Bamelen noted that negative *materiele weterrechtelijk* happens when the criminal receives no gain and the state is not injured as a result of it. In addition, the benefits obtained from the act must be greater than the losses caused by it.[1] However, Van Bamelen explained that the concept of negative *materiele weterrechtelijk* must be used more strictly, conducively, and casually.[2] According to Komariah Emon Sapardjaja, exceptions to negative *materiele weterrechtelijk* occur when: [3]

1. It has a purpose of providing benefits for legal interests protected by the law.
2. It has greater legal interest to be protected from violations of the rule of law.
3. It has higher societal interest than self-interest

In relation to future criminal crimes, the concept of negative *materiele weterrechtelijk* has been in accordance with the rules of Act No. 1 of 2023 concerning the Criminal Code (hereafter referred to as the 2023 Criminal Code). Article 12 of the 2023 Criminal Code has embraced the concept of negative *materiele weterrechtelijk*, namely that a person is threatened with criminal sanctions that exist in the legislation and also contains the nature of the law that exists in society. Furthermore, according to Barda Nawawi Arief, negative materiele is consistent with the idea of *daad-dader straftrecht* (monodualistic theory), which considers the interests of the act (objective) and the offender (subjective), [4] Based on the foregoing, making negative *materiele weterrechtelijk* on the criminal act of foreign loan irregularities is an alternative that should be examined.

4. Conclusion

The findings that may be drawn from this research are as follows:

1. Foreign loan irregularities are categorized as criminal offenses if the state's financial losses arise from unlawful acts (*wederrechtelijk*), and there has been an abuse of authority. In greater detail, the unlawful act can be determined by these parameters, namely: (1) the legality of authority as stipulated in the provisions of Article 11 paragraph (2) of the 1945 Constitution and Article 8 of the State Finance Law; 2. the principles in Article 2 of the Government Regulation on Procedures for Obtaining Foreign Loans and Receiving Grants; and 3. loan planning as stipulated in the RPPLN, RPJPN, and RPJMN.
2. Since the concept is oriented to the basis of legality following the concept of anti-law embodied in the 2023 Book of Criminal Law, the regulation on criminal acts involving the provision of foreign loans to the detriment of the state's finances in the future must accommodate the concept of negative material law.

5. Suggestion

The legislator must formulate the legal issue of the granting of foreign loans in the form of an amendment (revision) or the drafting of legislation in order to identify the group of factors that govern the deviation from the provision of foreign loans. The future criminal law may punish decision-makers and secure citizens' welfare with the new formula.

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[1] Indriyanto Seno Adji, *Overheidabeleid & Asas Materiele wedeechtelijkheid" dalam perpektif Tindak Pidana Korupsi di Indonesia,Ibid*, P 572
[2] *Ibid ,* P 582
[3] *Ibid,* P 572
[4] *Ibid,* P 580

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