

# THE REFORM OF CORRUPTION ERADICATION IN INDONESIA: THE PRISMATIC LAW IN THE RECENT CONTEXT\*

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## ***Abstract***

*This paper aims to investigate the reform of corruption eradication in Indonesia from three crucial aspects: the form of the Corruption Eradication Commission (KPK), the formulation of corruption in material and formal aspects, and other additional support system such as asset recovery and the protection of justice collaborator and whistle blower. This paper is a normative-legal research where it dissects secondary data which includes statutory regulations, various legal documents, researches, and other references relevant to corruption eradication in Indonesia. KPK could be strengthened in particular aspects with changes in regards its design of authority and its relationship with other authorities in corruption eradication process.*

**Keywords:** corruption eradication, law reform, prismatic law

## ***Intisari***

Artikel ini bertujuan untuk meneliti reformasi pemberantasan korupsi dari tiga aspek penting: bentuk dari Komisi Pemberantasan Korupsi, perumusan korupsi dalam aspek materiil maupun aspek formil, serta hal-hal pendukungnya seperti pemulihan aset dan perlindungan *justice collaborator* dan *whistle blower*. Tulisan ini merupakan penelitian hukum normatif yang menelaah data sekunder. Data sekunder yang ditelaah antara lain adalah peraturan perundang-undangan, berbagai dokumen hukum, penelitian, dan referensi lainnya yang relevan dengan pemberantasan korupsi di Indonesia. Komisi Pemberantasan Korupsi (KPK) akan diperkuat dalam aspek tertentu dengan diubahnya desain wewenang serta koordinasi hubungan antara KPK dan pihak berwenang lainnya dalam pemberantasan korupsi.

**Kata Kunci:** pemberantasan korupsi, reformasi hukum, prismatika hukum.

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## A. Background

Indonesia is a state based upon the law (*Rechtsstaat*). This is the core principle which is retained through the development of Indonesian constitutional law (*vide* Article 1 (3) of the 1945 Indonesian Constitution).<sup>1</sup> After the amendment of the constitution restates and strengthens this core principle, Indonesia witnesses the creation of supremacy of the highest law or in other words, the supremacy of the constitution. In regards to this, the Indonesian constitution becomes the supreme guideline and laws of the nation. In operational context, the constitution is not only about abstract rules and values, but also about the emphasis on the fulfilment and protection of human rights which are imaginarily transferred as explained in the *du contrat social* theory.<sup>2</sup> That transfer of right automatically translates to the responsibility of the State in guaranteeing the fulfilment of fundamental rights of the people.<sup>3</sup> In protecting people's fundamental rights, law enforcement system is established.<sup>4</sup> The notion of law enforcement system is particularly important. The weak enforcement of anti-corruption law may reduce the protection of fundamental rights.

Corruption is an extraordinary crime because the loss of the state as the effect from corruption will decrease the development of county's economy. Today, there is no significant development of corruption eradication in Indo-

nesia. This statement finds its support in the 2012 Transparency International report which ranked Indonesia's Corruption Perception Index in the 118<sup>th</sup> position out of 176 countries.<sup>5</sup> Moreover, innovations to fortify corruption eradication have not been shown yet. The body which was created to optimise corruption eradication effort fails to give maximum effort in corruption eradication. Furthermore, the institutional form of that body is even problematic because institutional clash and mis-coordination among corruption eradication bodies. These problems arise as the result of lack of developments in three followings fundamental aspects: (a) the design of the authority of corruption eradication commission; (b) the design of the material and formal laws of corruption eradication; (c) the development of supplementary action of corruption eradication, such as asset recovery and the protection of whistle blower and justice collaborator. Therefore, this research will investigate how to develop those aspects to reformulate corruption eradication in Indonesia in optimising corruption eradication.

## B. Research Methods

This is a normative legal research, focusing on document and literature study. The data collected from this study is secondary data. Among the secondary data that this study has dissected are statutory regulations, various legal documents,

<sup>1</sup> Jean-Jacques Rousseau, 1960, *The Social Contract*, Oxford University Press, London, pp. 193-194. Originally published in 1762 with the title *Du Contrat Social ou Principes du Droit Politique*. C.f. the textual transformation in the history of Indonesian constitutions: The General Elucidation to the 1945 Constitution of Indonesia (UUD 1945): "The State of Indonesia shall be based upon law (*Rechtsstaat*), it shall not be based upon mere power (*Machtsstaat*).” In Article 1 (1) of the 1949 Constitution of the United States of Indonesia (KRIS 1949), "The United States of Indonesia is a sovereign and independent state based upon law, a democracy, and a federation." In Article 1 (1) of the 1950 Provisional Constitution (UUDS 1950), "The Republic of Indonesia is an independent and sovereign state, based upon law, a democracy, and a unitary state." See also Article 1 (3) of the 1945 Constitution of the Republic of Indonesia (UUD NRI Tahun 1945), "The State of Indonesia shall be a state based upon law".

<sup>2</sup> Rousseau put forward the concept of the general will (*volonté générale*) to be distinguished from all's will (*singuli ut omnes*), in which the free will of all is not necessarily determined by the sheer number of people (the quantity of the subjects), but must be created by the quality of his will (the quality of the object sought). The transfer of general will gives rise to the restriction of personal freedom or human rights. The general will (*volonté générale*) creates a country that lets people enjoy better freedom than the freedom which may occur under natural conditions.

<sup>3</sup> Janedjri M. Gaffar, "Kewajiban Konstitusional WN", *Seputar Indonesia*, 3 July 2007. Constitutional obligation of citizens covers: the obligation to recognise and respect other people's human rights and constitutional rights; the obligation to recognise and respect the social order, along with those limitations imposed by religious norms, morality standards, and public order; the obligation to comply with and carry out the nationhood and statehood duties as stipulated in the constitution; and any certain obligation specifically mentioned in the constitution.

<sup>4</sup> Dian Agung Wicaksono, "Revitalisasi Sumber Daya Manusia Polisi dalam Upaya Reformasi Birokrasi Melalui Sinkronisasi Pendidikan Polisi dengan Aktor dalam Integrated *Criminal Justice System* untuk Mewujudkan Penegakan Hukum yang Demokratis", *Paper*, Bureaucracy Reform Exhibition, Conference and Stakeholder Meeting 2012, Jakarta, 27-29 August 2012.

<sup>5</sup> Transparency International, "Corruption Perceptions Index 2012", <http://www.transparency.org/cpi2012/results>, accessed 28 December 2012.

past studies, and other references that are relevant with corruption eradication in Indonesia. Secondary data consists of primary legal material, secondary legal material, and tertiary legal material.<sup>6</sup> The research approaches used are including statutory approach, case approach, historical approach, comparative approach, and conceptual approach.<sup>7</sup> The data was analysed using qualitative-descriptive approach, with three basic aspects of analysis: classifying, comparing, and connecting.<sup>8</sup> Deductive reasoning was used to understand the problem statements and eventually to organise the facts in order to reach research conclusion.<sup>9</sup> Aside from that, we used interpretation to understand the prevailing legal instruments.<sup>10</sup> Interpretation was used to analyse the prismatic law in the recent context, especially in the corruption eradication reform in Indonesia.

## C. Research Results and Discussion

### 1. Corruption Eradication in Indonesia

Through the development of corruption eradication in Indonesia, there are several institutions which have authority in corruption crimes, such as the Corruption Eradication Commission (KPK) and the Indonesian National Police (Polri). The KPK is an institution specifically established to eradicate corruption. On the other hand, the Indonesian National Police is an institution formed generally to prevent all crimes, including corruption. The similarity of duty between those two institutions will have effects on the law enforcement in corruption eradication, specifically in integrated criminal justice system. That condition has raised the problem where those institutions conflict in exercising their corruption eradication duty. Therefore, the design of authority of those institutions should be reformulated in order to harmonise

those institutions and to optimise corruption eradication in Indonesia.

The Indonesian National Police is a constitutional body under the executive authority (the President of Indonesia).<sup>11</sup> Furthermore, the Indonesian National Police is a state tool having the duty to preserve the security and safety of the society, to protect and serve the society, and more importantly to enforce the law. Moreover, the Indonesian National Police has the authority to investigate crimes.<sup>12</sup> The KPK, on the other hand, is an independent institution which was formed to optimally eradicate corruption; a function which is presumed has been miserably exercised by other ordinary state agencies. The KPK has the authority to investigate and prosecute. This is the reason why the KPK is coined as a “super body”: because investigators and prosecutors are in one institution, because KPK may conduct an interception without court’s order, and because termination of investigation is not recognised by KPK. Therefore, the process of law enforcement should be organised carefully to maintain the due process of law.

There are at least five fundamental reasons to support the development of KPK in Indonesia. Firstly, other institutions’ credibility suffers from society’s distrust because of the systematic corruption practice in Indonesia. Secondly, other institutions lack of independence because they are under the command of some certain higher authorities. Thirdly, other institutions lack of capacity and credibility to eradicate corruption which is being more and more complicated. Fourthly, there is global influence to establish an extra institution to respond to the growth of corruption. Fifthly, there is an international prerequisite for countries to develop that extra institution in order to protect democracy from crimes, especially cor-

<sup>6</sup> Amiruddin and Zainal Asikin, 2004, *Pengantar Metode Penelitian Hukum*, RajaGrafindo Persada, Jakarta, p. 118.

<sup>7</sup> Peter Mahmud Marzuki, 2005, *Penelitian Hukum*. Kencana, Jakarta, p. 93.

<sup>8</sup> Jujur S. Suriasumantri, 1986, *Ilmu dalam Perspektif Moral, Sosial dan Politik: Sebuah Dialog tentang Keilmuan Dewasa Ini*, Gramedia, Jakarta, pp. 61-62.

<sup>9</sup> Amiruddin and Zainal Asikin, *Op.cit.*, p. 166.

<sup>10</sup> *Ibid.*, p. 164.

<sup>11</sup> Article 30 (2), (4), and (5) of the 1945 Indonesian Constitution.

<sup>12</sup> Article 14 (1) point g Act No. 2 of 2002 on Indonesian National Police.

<sup>13</sup> Yazid T.M. Luthfi, “Komisi-Komisi Negara dalam Konteks Cita-Cita Negara Hukum, *Paper*, Limited Discussion: Existence of State Institutional System After the 1945 Amendment”, KRHN, Jakarta, 9 September 2004, pp. 59-60.

ruption.<sup>13</sup> Hongkong has created an Independent Commission Against Corruption (ICAC) which has been a pilot project for the countries to create a special institution specifically created to eradicate corruption. Indonesia also has such special institution, namely the KPK. The KPK was duly formed based on the law (legislatively entrusted power) and have specific duty to eradicate corruption.<sup>14</sup> Matters concerning KPK is regulated in Act No. 30 of 2002 on Corruption Eradication Commission.

There are several important duties of the KPK: duty to supervise institutions having authorities in corruption eradication, duty to investigate and prosecute certain types of corruption, duty to build a corruption prevention system, and duty to monitor the organisation of the government.<sup>15</sup> To fulfil those duties, the KPK is given several authorities which are: the right to be investigators and prosecutors in corruption cases, the right to monitor, research, and examine institutions, and the right to take over the Indonesian National Police's or the Prosecutors' ongoing investigations and prosecutions.<sup>16</sup>

## 2. Prismatic Law in a Changing Society

Prismatic law is a concept where the best values of social norms are extracted, even though perhaps some of those values are contrary to each other, to be fused together into a combined concept.<sup>17</sup> Prismatic law is needed in Indonesia since the prismatic society has been formed in Indonesia as what Fred W. Riggs states that, "Their central characteristics are a high degree of "formalism", substantial overlapping or reciprocal dependence of structures, and marked heterogeneity."<sup>18</sup> The-

refore, in prismatic law, the concept includes all following points: (1) Heterogeneity where there are differences and combinations between traditionality and modernity; (2) Formalism, where there are the differences between formal rules and the implementation of those rules; (3) The redundancy of life, where there are different and special treatments between formal groups and informal groups.<sup>19</sup>

As the structure of society in Indonesia tends to be a prismatic society, it is reliable that prismatic law is created to cope with the need of society. Riggs suggests that nowadays people in society live in transition from traditionality into modernity, so there is combination between both concepts. In legal aspect, prismatic concept has many influences in law enforcement and bureaucracy, especially in developing countries.<sup>20</sup> Further, Riggs distinguishes society into three groups: modern society, traditional society, and prismatic society where traditionality and modernity exist together.<sup>21</sup> Therefore, the point of Riggs's theory is that prismatic law combines many different elements in order to take the best concept of each element, so new and reliable concept will be created to be implemented. That theory is similar as what Moh. Mahfud MD. states: that prismatic concept embraces many different principles, concepts, traditions, and areas.<sup>22</sup> Prismatic concept is suitable in Indonesia since the basic of Indonesian society is prismatic society.<sup>23</sup>

Prismatic legal framework which is based on Pancasila, for instance the institutional reform of corruption eradication authority, should be based on the idea of belief in one God, so that

<sup>14</sup> Jimly, "Kedudukan Mahkamah Konstitusi dalam Struktur Ketatanegaraan Indonesia", *Paper*, Public Lecture at the Faculty of Law, Universitas Negeri Sebelas Maret, Surakarta, 2 September 2004, p. 1.

<sup>15</sup> Article 6 (b) of Act No. 30 of 2002.

<sup>16</sup> Article 14 of Act No. 30 of 2002.

<sup>17</sup> Mahfud MD., "Politik Hukum dalam Perda Berbasis Syari'ah", *Jurnal Hukum*, Vol. 14, No. 1, January 2007, p. 10.

<sup>18</sup> Fred W. Riggs, 1960, "Prismatic Society and Financial Administration: Administrative Science Quarterly", *Special Issue on Comparative Public Administration*, Vol. 5, No. 1, June 1960, p. 9.

<sup>19</sup> Lutfi Wahyudi, "Netralitas Birokrasi", *Material Course*, Governance Studies Program, Faculty of Social and Political Sciences, Universitas Mulawarman, Samarinda, 6 March 2007.

<sup>20</sup> Zainal Arifin Mochtar, "Panorama Teori Hukum dan Keadilan", *Course Material*, Faculty of Law, Universitas Gadjah Mada, Yogyakarta, 10 January 2009.

<sup>21</sup> *Ibid.*

<sup>22</sup> Moh. Mahfud MD., *Op.cit.*, p. 10.

<sup>23</sup> *Ibid.*

the authority must be interpreted as a weapon in *jihad* in combating corruption, because corruption is prohibited by religious teachings. People who aspire to hold an office in a corruption eradication agency must be someone who has the integrity and devotion to God Almighty, has strong sense of justice, wisdom, and vision of humanity to strengthen efforts to combat corruption. In addition, the reform of institutions of authority corruption eradication should also reflect the value of social justice for all Indonesian people (*Keadilan Sosial bagi Seluruh Rakyat Indonesia*) with the intention of combating corruption which will impact on the provision of justice to the people of Indonesia. The institutional reform of corruption eradication authorities should implement the Unity of Indonesia (*Persatuan Indonesia*) precept, which puts the unity and the interests of the nation as a common interest.

Other prismatic legal framework that must be taken is the essence of the state based upon law doctrine and the constitutionalism underlying Indonesia's state principles. The basis of the state based upon law will bear restrictive notions and require the protection and fulfilment of citizens' constitutional rights. It should describe the material and formal law reform. The reform should be functional enough to eradicate corruption, but still hold the principles of human rights protection. On the other hand, the activation and optimisation of the support element to eradicate corruption is also a central point that must uphold human rights.

### 3. Prismatic Law in the Redesign of Institutional Corruption Eradication

Statutory regulations are futile if they are not accompanied with law enforcement. An effective law enforcement requires at least three basic requirements, namely: the substance of the legislation; its enforcement and its procurement structure; and legal culture that comes to be significant determinants of whether or not the

law is recognised and enforced in daily life.<sup>24</sup> These three things are interlinked and mutually reinforcing. It is erroneous when the attempt to streamline law enforcement only concentrates on working to improve or amend the legislation without fixing the existing organisational structures at the national legal system. It is also erroneous if law enforcement only concentrates on structural strength and ignores the cultural interpretation of the man who seeks justice, and *vice versa*.<sup>25</sup>

Prismatic law in redesigning institutional corruption eradication is interpreted by combining elements of the conflicting elements to look for the good ones in order to resolve conflicts between corruption eradication institutions in Indonesia. In the Indonesian context, there should be changes in institutional design for the KPK and the Indonesian National Police in dealing with corruption. Institutional redesign is done by using systems approach as proposed by Lawrence M. Friedman, as cited by Indriyanto Seno Adji, namely: (a) overhaul of the structure to improve the institutional aspects and the organs that run the judiciary, as a key institutional redesign to prevent overlap in the criminal justice system, (b) managing the substance, the revision of the rules relating to the legal-normative legal basis, and (c) development of legal culture to raise legal awareness for law enforcement itself.<sup>26</sup> A systems approach is done to find the exact formulation of the position of the Indonesian National Police and the KPK in handling cases of corruption in the integrated criminal justice system.

Structural aspects can be addressed by ensuring the legality of the position of KPK. During this time many people often mistakenly refer to KPK as a provisional institution (*ad hoc*), but the fact is, the law never mentions KPK as an *ad hoc* institution. Using a *contrario* interpretation, the absence of any rule stating KPK as an *ad hoc* institution should be interpreted as indication that KPK is a permanent body, or at least be recognized

<sup>24</sup> Soetando Wignjoesoebroto, et al., 2012, *Dialektika Pembaruan Sistem Hukum Indonesia*, Sekretariat Jenderal Komisi Yudisial Republik Indonesia, Jakarta, p. 4.

<sup>25</sup> *Ibid.*

<sup>26</sup> Indriyanto Seno Adji, 2009, *Korupsi dan Penegakan Hukum*, Diadit Media, Jakarta, p. 125.



as an existing institution. The presence of the Indonesian National Police as an instrument of the state is also important in a secured structure of the criminal justice system by taking into account the existence of KPK's intention and its law as *lex specialis*. On the other hand, the Police have a duty and an important function not only in law enforcement, but also in terms of protection and community service. For that, we believe mapping of authority should be conducted to the extent that the police has a right to investigate cases of corruption.

Substantive aspects are the attribution of authority which is clearly divided in proportion to the existence and purpose of KPK as *lex specialis* and the trigger mechanism in fighting corruption without negating the vital role of the Police as the frontline of law enforcement in Indonesia. Substantive approach should be embodied in the authority of KPK as outlined in the legislation setting. Authorities to investigate and prosecute should be maintained to be an integral part of KPK since its function as an institution that requires quick response and breakthrough compared to the authority vested in conventional law enforcement agencies, such as the police and prosecutor. The absence of the possibility of issuance of Letter of Termination of Investigation (*Surat Perintah Penghentian Penyidikan*; SP-3) and Letter of Termination of Prosecution (*Surat Keterangan Penghentian Penuntutan*; SKPP) is also very important to maintain the trust to KPK in handling cases. Authority to intercept without court order is also relevant.

Development of legal culture is also imperative in order to raise the awareness and morale of state apparatus, so that harmony can be maintained. Systems approach is used to minimise the factors that cause deviations in the process of law enforcement, namely greediness, opportunities, needs, and exposures.<sup>27</sup> The reform

will especially aimed at the KPK, simply because the KPK is an institution specifically designed from the beginning to eradicate corruption. Institutional redesign can be attempted in at least two aspects: (a) redesigning the authority, and (b) redesigning the organisation.

#### **a. Redesigning the Authority**

Police and KPK are both law enforcement agencies. The scope of the Police's functions is wider: i.e., in addition to the *pro justitia*, the police also has the function of maintaining security and public order, enforcing the law, protecting, and providing service to the community. In manifesting its *pro justitia* function, the police possesses the authority to enforce law, which covers all criminal offenses: both general and specific, whereas the KPK is a specialised institution specifically established to combat corruption.

It is observed, that the conflict between the Indonesian police and KPK, is actually an excess of the design dualism of authority in Indonesia. This problem is apparent in the Indonesian Act No. 30 of 2002 on the establishment of the Commission for the Eradication of Criminal Acts of Corruption, where there exists an absence of a clear boundary between the authority of the Indonesian police and the authority of KPK. Such problems can be seen in Article 11 of the Act, which provides that:

In performing its tasks as outlined in Article 6 (c), the KPK is authorized to conduct inquiries, investigations, and prosecutions against corruption cases that:

- a. Involve law enforcement officers, government executives, or other parties connected to corrupt acts committed by law enforcement officers or government executives;
- b. Have attracted the attention and dismay of the general public; and/or
- c. Involves a loss to the State of at least Rp 1,000,000,000 (one billion Rupiah).<sup>28</sup>

<sup>27</sup> Kemitraan bagi Pembaruan Tata Pemerintahan di Indonesia, 2004, *Indonesian Police dan KKN*, Kemitraan, Jakarta, p. 11.

<sup>28</sup> Article 11 of Act No. 30 of 2002.

The article above does not explicitly limit the authority of KPK. The *a contrario* understanding of the Article 11 of the KPK Act provides the possibility for KPK to conduct an investigation towards the same case the Indonesian police is already working on. The existence of such provisions then implicates the authority of the KPK to take over investigations which are already handled by other agencies and institutions. Thus it is apparent that such norms could result in seizure of authority and overlap in the law enforcement process. It can also be seen the authority that KPK possesses as encumbered in Article 11 of the Law on KPK, is of a cumulative-alternative character. This should be changed to pure cumulative so as to reinforce the authority of KPK as *lex specialis* and avoid redundancy of authority to investigate in corruption cases.

#### **b. Redesigning the Organization**

The Police and KPK are organizations which both have to carry out law enforcement amongst its functions. However, the Police and KPK have fundamental differences in its institutional status. The Police is an instrument of the state under the President, as it is led by the Chief of Police who is responsible to the President.<sup>29</sup> With this, the police force automatically is a part under the executive power. Furthermore, unlike the police, KPK is designed as an independent state institution.<sup>30</sup>

The position of KPK as an independent state institution influences the mechanisms in the appointment of KPK commissioners, as such appointments is selected by the Parliament from a pool of candidates offered by the President. In the context of organizational redesign, the option to apply a staggered system in filling the leadership positions in KPK

becomes inevitable. Experience in several other countries has shown that elections that are done in a staggered nature shows effectiveness, continuity, and independence, and is also to prevent the appointment of leader to be solely appointed by a body/institution, in this case as a way to ensure that no leader of KPK is solely appointed by the board or the President.<sup>31</sup> This staggered approach changes the leaders gradually and not all at once in order to give a sense of sustainability of the anti-corruption agenda of the government and the KPK.<sup>32</sup>

In the staggered system mechanism, the collective KPK leaders, namely collegial, are selected unequally and gradually at first, but after the first pack of KPK leaders which perform their duties in accordance with the initial term has organized, the term of office of the leadership of KPK can be equally applied. Thus, every year will be the turn of the KPK leaders respectively. The KPK selections which uses a staggered mechanism system has many advantages which may be seen from various aspects. In terms of institutional independence, it reinforces the position of KPK since the leadership is not elected by the same members of House of Representative. In the event of vacancy of one of the leaders, it will be more effective in terms of both performance and budget spent. In terms of continuity, the key institutional as KPK would be better because there will always the continuance of work of previous leaders, thus there is a common thread in the subsequent periods in eradicating corruption.

Furthermore, the organizational redesign of the Commission relates closely towards the supply of adequate resources in terms of its apparatus, especially in relation to the

<sup>29</sup> Article 5 (1), Article 8 (1), Article 8(2) of Act No. 2 of 2002.

<sup>30</sup> Article 3 of Act No. 30 of 2002.

<sup>31</sup> Expert opinion of Todung Mulya Lubis in Constitutional Court Decision No. 5/PW-IX/2011 on the Judicial Review of Act No. 30 of 2002 on the Corruption Eradication Commission towards the 1945 Indonesian Constitution, pp. 28-29.

<sup>32</sup> *Ibid.*, p. 30.

role of the investigator. The resources that KPK needs could be done by revamping its regulations, considering that there are contradictory regulations within the organizational design of KPK. **Firstly** is in relation to the investigators as nomenclature. Here, it is observed that KPK leaders as well as its members. KPK leaders and members are state officials as well as taking on the role of investigator and prosecutor. This would be contrary to the Criminal Procedure Code which provides that investigators are police officers and state officials of the Republic of Indonesia specifically authorized by law,<sup>33</sup> where it is then further upheld by Article 38 of the Act on KPK that the provision contained within Article 7(2) of the Criminal Procedure Code does not apply to KPK. Thus, the Act on KPK shows the Act unilaterally equates the terms of state officials, that is held by KPK leaders, and civil servants as coordinator for investigators amongst KPK's functions.<sup>34</sup>

The provisions regulating the authority and conduct of investigators has shown to be quite unclear. Article 39 paragraph (3) states that KPK does not have its own independent investigator. As an agency that handles extraordinary crimes, the existence of an independent investigator is required. It can also affect the meaning of the independence of the institution, because it will be easy to be intervened by the police or the Attorney General in the execution of their duties, such as the sudden withdrawal of investigators when examining a case.

**Secondly**, in relation to the recruitment of investigators. As stated previously, KPK should have its own independent investigators, this though, is hampered by the Criminal Procedure Code which states that investigators are police officers and officials of the Republic of Indonesia specifically au-

thorized by law. There are at least two possible designs of recruitment, which are:

- a. determining the position of the Act on KPK as a *lex specialis* towards the Criminal Procedure Code. However, this is hampered by the regulation of Article 38 paragraph (1) of the Law on KPK which states that all authority to investigations, indictments, and prosecutions outlined in Act No. 8/1981 on the Law of Criminal Procedure apply to the investigators, indictors and general prosecutors of KPK. However, it certainly does not deviate the Criminal Procedure Code to allow KPK in terms of investigating a matter, as already mentioned in *expressive verbis*.
- b. Based on the provisions of the Criminal Procedure Code relating to the investigation process and how the KPK can hire an independent investigator. Here, KPK shall appoint an employee's status as a civil servant, so they can be assigned as the investigating authority in accordance with Article 6, paragraph (1) Criminal Procedure Code. Government Regulation No. 63/2005 on the KPK Human Resources Management System states that KPK members is not a civil servant employee, but KPK may employ civil servants in KPK.<sup>35</sup> Thus, such interpretation can alter the mechanisms of KPK staffing because the Act on KPK did not expressly mention that it prohibits KPK to hire civil servants. Civil servants can be recruited as independent KPK investigators without having to depend on the police and still work in accordance to the Criminal Code.

#### 4. Prismatic Law in the Reform of the Designs of Crimes Regulated on the Law on the Corruption Eradication

<sup>33</sup> Article 6 (1) of Act No. 8 of 1981.

<sup>34</sup> Jimly Asshiddiqie, 2010, *Perihal Undang-Undang*, Rajawali Pers, Jakarta, p. 373.

<sup>35</sup> Article 3, Government Regulation No. 63 of 2005.



One of biggest aspects on the reform of corruption eradication is the reform of current applicable laws pertaining to corruption. The first focus is on the type of punishment in corruption cases. As von Ferbauch has stated in his *psychologische zwang* theory, the effect of punishment will be stronger by using psychological coercion.<sup>36</sup> Therefore, the punishment should be formed in order to create a psychological coercion, thus preventing people to commit crimes. Furthermore in regards to the objectives of punishment, van Hammel has specified that punishments should be formed in a way in order to prevent criminals from repeating crimes and to prevent people to do crimes. The ways stated by van Hammel are: (a) A punishment must include elements which will prevent people to commit crimes; (b) A punishment must be able to restore the criminals; (c) A punishment must annihilate criminals who cannot be restored anymore; and (d) The greatest objective of punishment is to create a rule of law.<sup>37</sup>

In regards to the reform of corruption eradication laws, the objectives of punishment as stipulated above should be implemented further. Here, all types of corruption should be given a heavy punishment in order to create greater impact in preventing the crime of corruption to occur. For instance, the capital punishment within the Indonesian corruption eradication laws should not be implemented only for crimes which are regulated in Article 2 (2) of Act No. 31 of 1999 on Eradication on Criminal Acts of Corruption, as the crimes stated within the article are not usually committed by corruptors. Therefore the capital punishment which is originally intended for the eradication of corruption and to act as a preventive measure has failed to give its effect. Moreover, it is found that above 50 per cent of corruption cases, that the actions breached Article 2 and/or 3 of the Act. Therefore, in order to achieve the objective of punishment as explained before,

capital punishment should also be implemented for Articles 2 and 3 as a whole. It is undeniable that the act of corruption stipulated in those articles effects badly on the country's wealth. Thus, further considering the harmful effect it has for the country, giving a heavier punishment for those two articles is particularly required in eradicating corruption.

Another matter which should be further developed in the process of reforming corruption eradication laws pertains to the types of corruption, specifically the inclusion of nepotism and collusion as types of corruption. Pursuant to the Act No. 28 of 1990 on the Organization of Government Free from Corruption, Collusion, and Nepotism, there should be a law which covers more about collusion and nepotism as both actions has given many disadvantages.<sup>38</sup> This development is seen as necessary as it is found that many suspected corruptors were not punished because those both actions have not been legally regulated as types of corruption. Therefore, to optimize corruption eradication and to reduce the effect of corruption, nepotism and collusion should be included as type of corruptions.

## **5. Prismatic Law in the Revitalization of Law Enforcement in Corruption Eradication**

Law enforcement has a crucial role in corruption eradication, thus the reform in law enforcement in relation to corruption is particularly important in order to optimize the corruption eradication in Indonesia. Law enforcement in relation to corruption eradication includes the process of inquiry, investigation, and prosecution in court. Here, it is found that there are many things which have effected the affectivity of the system surrounding corruption eradication. Therefore, in order to optimize the law enforcement process in relation to corruption eradication, it is important that the law enforcement pertaining to it should be reformulated.

<sup>36</sup> Andi Hamzah, 2005, *Pemberantasan Korupsi Melalui Hukum Pidana Nasional dan Internasional*, Grafindo Persada, Jakarta, p. 37.

<sup>37</sup> Andi Hamzah, 2008, *Asas-Asas Hukum Pidana*, Rineka Cipta, Jakarta, pp. 35-36.

<sup>38</sup> General Elucidation of Act No. 28 of 1999.

### a. The Investigation Stage

**The detention.** The Indonesian law regulates detentions for suspected criminals under Article 21 of Act No. 8 of 1981 on the Criminal Procedural Code. Article 21 stipulates that there exists a subjective requirement and an objective requirement for an investigator to arrest suspected criminals.<sup>39</sup> The objective requirement is when the suspected criminals are suspected to have been involved in crimes with maximum imprisonment time of 5 years or more.<sup>40</sup> The subjective requirement is when suspected criminals, in the judgment of the investigators, are likely carry out acts which may incriminate the process of investigation.<sup>41</sup> Both requirements should be satisfied in order to allow investigators to arrest the suspected criminals and place them in a detention house. The subjective requirements are likely to raise discriminations as some suspected criminals do not have to live in detention houses during the process of investigation because it is the discretion of the investigators subjectively decide it. That discrimination results in an ineffective investigation for some cases. Therefore, in the process of corruption eradication system reform, subjective requirements should be diminished. The objective requirement is sufficient to allow the investigators the right to arrest suspected criminals. If not, it will result in an effective investigation in each case.

**The search warrant.** Current laws regulates the matter of search warrants under Article 33 of the Criminal Procedure Code.<sup>42</sup> The article states that the investigators are required to have permission from the court. This requirement also reduces the efficiency in law enforcement system. Therefore, to develop a more efficient investigation,

permission from five chiefs of the KPK should be sufficient to entitle investigators from KPK to do an investigation in order to obtain evidence. In corruption cases, inquiries, investigations, and its prosecutions, should be prioritized in order to get the result of cases as soon as required.<sup>43</sup>

**The coordination between investigators.** As explained previously, the clash in the investigation of corruption cases has occurred many times. The one way to diminish the clash all together is to establish coordinations between the Indonesian Police and KPK where the Indonesian Police have a duty to report to KPK in its investigations of corruption cases. As the issuance of the Letter of Commencement of Investigation (*Surat Perintah Dimulainya Penyidikan*; SPDP) is a compulsory requirement for any investigator to commence an investigation,<sup>44</sup> the Indonesian police and also KPK should have a duty to always report other institutions by sending their SPDP to other investigators in the commencement of investigation in corruption cases. Such action could therefore reduce clashes in the investigation of corruption cases between institutions. Furthermore, it should be clear that KPK may not investigate corruption cases which involve the members of KPK. This is done in order to prevent conflict of interest. Similarly, corruption cases involving members of the Indonesian Police Force should not be investigated by the force also. It should be ascertained and made clear that it is the authority of KPK, as an external body outside the Police Force, to investigate corruption cases involving members of the Indonesian Police. Those concepts about the separation of authorities in investigation of corruption cases should be further specified

<sup>39</sup> Article 21 of Act No. 8 of 1981.

<sup>40</sup> Article 21 (4) of Act No. 8 of 1981.

<sup>41</sup> Article 21 (2) of Act No. 8 of 1981.

<sup>42</sup> Article 33 of Act No. 8 of 1981.

<sup>43</sup> Article 30 (3) of the United Nations Convention against Corruption.

<sup>44</sup> Article 109 (1) of Act No. 8 of 1981.

in the Indonesian laws, so the redundancy of authorities will be minimized.

In short, in relation to the process of investigation and the coordination between KPK and the other investigators from other institutions, should be formulated in a specific law (*lex specialis*). The specific law refers to the Indonesian Act on the Eradication on the Criminal Acts of Corruption. It means that the Act on the Eradication on the Criminal Acts of Corruption cannot only state about KPK. In order to maximize the corruption eradication system, the Act on the Eradication on the Criminal Acts of Corruption should also regulate the other authorities of other investigators. Therefore, the Act on the Eradication on the Criminal Acts of Corruption will be more comprehensive to regulate in relation to investigators and the process of investigation.

#### **b. Prosecution Stage**

Article 110 and Article 138 of the Criminal Procedural Code provides that in the pre-trial process, the prosecutor may check documents of investigation and return it to investigators in the event where there is lack of requirements.<sup>45</sup> The Criminal Procedural Code does not provide certain limit of the time to undergo a pre-trial. It results in the inefficient process of prosecutions. Therefore, providing a certain limit of time to do pre-trials is also required.

#### **c. The Process in the Court**

The reversed burden of proof principle. Article 12 (1) of the Act on the Eradication on the Criminal Acts of Corruption stipulates the reserved burden of proof principle where suspected criminals should prove that the money they own is not from act of corruption.<sup>46</sup> The reserved burden of proof principle is particularly required to prove the judges decisions as having passed the principle of

beyond reasonable doubt. However, that principle is rarely implemented in court due to the judges' lack of knowledge on the matter. Therefore, the guideline of the implementation of the principle should be developed further in order to assist judges in implementing the principle. A strict regulation to implement the principle should also be formed to enforce courts to implement the principle in order to optimize the obtaining of evidences.

Sentencing policy. It is found in the decisions of corruption cases, that the sentences for corruptors varies widely. This even applies for cases that are indicted under the same crime and sections of the law as courts have been found to decide differently to its precedents on many accounts. This could results in the discrimination in law enforcement system. The civil law system, however, recognizes no requirement to use jurisprudences in its decisions. But the use of jurisprudence here is seen as beneficial, as it will reduce the differences of court decisions and also will assist judges to give a deciding for similar cases. Therefore, the reform of corruption eradication will require the use of jurisprudences to reduce the discrimination of the judgements. The harmonization of the sentencing policy should also be developed more.

### **6. Prismatic Law in the Optimization of Supplementary Elements in Corruption Eradication**

#### **a. Asset Recovery**

Corruption results in the loss of a country's assets, thus asset recovery should be the objective of corruption eradication in order to resurrect a country which have suffered from corruption. Asset recovery, however, has not yet been a focus in the Indonesian law enforcement in relation to corruption eradication. Applicable laws have shown that the responsibility for corruptors to return the money

<sup>45</sup> Article 110 and 138 of Act No. 8 of 1981.

<sup>46</sup> Article 12(1) of Act No. 31 of 1999 *jo.* Act No. 20 of 2001.

<sup>47</sup> Article 18 of Act No. 31 of 1999.

is not a compulsory punishment.<sup>47</sup> The effect from such laws is that there are many assets of the country that have not been returned yet. Therefore, asset recovery as a compulsory punishment is particularly required to reduce the loss caused by corruption. The system of asset recovery where the funds from corruption is put under foreign jurisdiction should be developed too. The relationship between countries in corruption eradication should be built in a Mutual Legal Assistance (MLA) as an international coordination in corruption eradication based on international multilateral or bilateral treaties. In those treaties, the rules how asset should be recovered internationally and other rules in terms of corruption eradication may be formed. Therefore, it will create an effective and efficient law enforcement system to eradicate corruption.

#### **b. Whistle Blower and Justice Collaborator**

Another important matter which should taken as a concern in the process of eradicating corruption is the protection of witnesses. Currently, the protection of witnesses are covered under Act No. 13 of 2006 on the Protection of Witnesses and Victims and Act No. 20 of 2001 on the Eradication on Criminal Acts of Corruption. These regulations, however, are viewed to be insufficient to assist the corruption eradication system. Here, the insertion of special types of witnesses in the current laws is necessary, the special types of witness referred here are namely the whistle blower and the justice collaborator.

The justice collaborator is a witness involved in the crimes investigated. The protection and awards for those types of witnesses will better assist in corruption cases. In the Constitutional Court Decision No. 65/PUU-VIII/2012, these types of witnesses are witnesses who are entitled to obtain more protection. However, it is not sufficient to only follow the contents of a constitutional court decision. The Act on the Eradication on Criminal Acts of Corruption should also cover such matters in order to optimize the corruption eradication.

#### **D. Conclusion**

Based on the proposed review above, it is proper and significant to state that the reform of corruption eradication in Indonesia requires a new perspective. The prismatic law in the recent context of a dynamic society in Indonesia is an alternative perspective to solve recent problems in corruption eradication in Indonesia. Pancasila as *philosophische grondslag* reflects the mystical atmosphere of the nation, which has tried to actualized the fight against corruption, through: (1) the redesign of the institutional corruption eradication; (2) the reform of crimes regulated on the laws pertaining to corruption eradication; (3) revitalization of the Act pertaining to the enforcement in corruption eradication; and (4) optimalization in the supplementary elements of corruption eradication. Thus, with this, Pancasila's values can still inspire the anti-corruption laws in Indonesia. Pancasila is not merely a semantic-symbolic value, but a value of a life by taking a prismatic law in eradicating corruption in Indonesia.

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