

# PUBLIC CORRUPTION AND HUMAN RIGHTS FOR GOOD GOVERNANCE IN INDONESIA

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## Abstract

*Indonesia has transformed from one of Asean's most repressive and centralized and democratic. Good governance in Indonesia remain limited improvement, obstacle still remain that hinder Indonesia achieving the 'rule of law' and in particular, the country is consistently ranked as having one of the highest levels of public corruption in the world. It is a fact that states with a high public corruption perception are at the same time those with a bad human rights situation. Despite of this, corruption effects the low quality government institutions have tremendous negative effects on the wealth of societies, the criteria for good governance remain far from clear. Illicit enrichment by any public official due to public corruption found in position of inexplicable wealth. This paper explores balancing competing rights of the citizen in combating corruption and the right to a presumption of innocence in due process and due sentence to all accused persons in public corruption. The paper approach to examine and analyze all laws and regulations relevant to human rights protection and crime prevention of Transnational Corruption for Good Governance. The conceptual approach is used to study the views and doctrines that develop within the jurisprudence. The idea is to find legal understanding, concept and principles relevant to the issues the link between human rights and corruption and whether it even makes sense to speak of human rights violations in corruption, to determine State policy, state action in preventing and eradicating public corruption globally towards legal certainty and justice which is the most essential human right of all citizens.*

**Key Words: Indonesia, Good Governance, Public Corruption, Human Rights**

## I. Introduction

In the last decade a new tool has been developed in the global war against official corruption through the introduction of the link between corruption and human rights, in almost every multilateral anti-corruption convention. A major premise of the ongoing research argues that corruption disables a state from meeting its obligations to respect, fulfill, and protect the human rights of its citizens. Unfortunately, the recent spate of international legislation against official corruption provides no clear guidelines on how to proceed in balancing the right of the accused to be presumed innocent against the competing right of society to trace the recapture the criminals acquired national wealth. Corruption and human rights is the relationship between state and citizen.<sup>1</sup>

The quest for good governance during the past decade at one end of the spectrum we find “the eradication of corruption” and “good governance”, law trust government goes with high perception of corruption among officials.<sup>2</sup> Kofi Annan in the Convention against Corruption UNCAC 2002 said, “that corruption hurts the poor disproportionately” and promotes “inequality”.<sup>3</sup> In addition Kumar C. Raj, wrote, “This finding can be expressed in the language of anti-discrimination law. Corruption might potentially violate the prohibitions against discrimination found in the universal and regional human rights conventions”.<sup>4</sup>

The question is now, what is the link between human rights and corruption?, whose human rights and which human rights? And whether it even makes sense to speak of human rights violations in corruption? and what state action?. From a legal standpoint, it is crucial whether we qualify a situation as merely undermining human rights, or whether we qualify it as a true rights violation that must be deemed unlawful and may be addressed with the usual sanction. Prior to answers all of those questions, we have to examine in generally all types of human rights give rise to three kinds obligations, namely the obligations to respect, protect and fulfil human rights.

Despite to the three state obligations, in fact “the 2013 Corruption Perceptions Index Measures the Perceived Levels of Public Sector Corruption in 177 Countries and Territories” and **Indonesia** Rank 144, Index measures 32. The Corruption Perceptions Index ranks countries and territories based on how corrupt their public sector is perceived to be. A country's rank indicates its position relative to the other countries and territories included in the index on a scale from 0 (highly corrupt) to 100 (very clean). No country has a perfect score, and two-thirds of countries score below 50. This indicates a serious, worldwide corruption problem. The world urgently needs a renewed effort to track down on money laundering, clean up political finance, pursue the return of stolen assets and build more transparent public institutions.<sup>5</sup> In 2017 perceptions Index Measures, **Indonesia** has a long way to go in the fight against corruption. However, it too climbed up the index, moving from 32 to 37 in the last five years, an overall increase of five points. This slight improvement could stem from the work of Indonesia's leading anti-corruption agency in taking action against corrupt individuals, despite strong opposition from the government and parliament.<sup>6</sup>

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<sup>1</sup> Olaniyan Kolawole (2016), *Corruption and Human Rights Law in Africa*, Oxford:Hart Publishing, p 55

<sup>2</sup> Pippidi Alina Mungiu (2015), *The Quest for Good Governance How Societies Develop Control of Corruption*, United Kingdom:Cambridge University Press, p 10-12

<sup>3</sup> UN Secretary General Kofi Annan (2003), *Foreword UNCAC* in Figueiredo Andre T.D. (2017) *Corruption and Human Rights Beyond the Link*, The Netherlands:Wolfpublishers, p 1

<sup>4</sup> Kumar C. Raj (2011), *Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance* Oxford: OUP , 36, 46-47

<sup>5</sup> Transparency International, 2013, *Corruption Perceptions Index: Corruption remains A Global Threat*.  
<https://www.transparency.org/cpi>, Accessed 30 March 2018

<sup>6</sup> Ibid.

Ackerman wrote, bureaucratic corruption is a symptom that something has gone wrong in the management of the State. Public institutions govern and interrelationship between the citizen and the state. If corruption is present, such institutions are used, not to further public values, but, instead, for personal enrichment and the provision of the benefits to the corrupt. The price mechanism, so often a source of economic efficiency and a contributor to growth, can, in the form of bribery, undermine the legitimacy and effectiveness of government. Poorly designed government institutions cause economies to stagnate and inequalities to persist.<sup>7</sup>

Labelle Huguette, Chairman of Transparency International said: "Today's results indicate that much remains to be done before we see meaningful improvements in the lives of the world's poorest citizens. It is time to stop those who get away with acts of corruption."<sup>8</sup> As reported by *United Nations Development Programme* (UNDP), in practice across region corruption comes in many forms, but the commonest overall distinction is between grand and petty. *First*, grand corruption typically involves relatively large bribes from contractors or other corporations for example government contracting, arms supply, state budget, generally associated with high level politicians or government officials. *Second*, petty corruption involves smaller amounts but more frequent transactions from lower level public officials for example to allow full access school, hospitals or public utilities also referred to as 'street' or 'retail' corruption involves transactions that are more smaller but usually more frequent. *Third*, Political Corruption, the use of state budget to political organizations and payments made in an attempt to unduly influence present or future activities by a party or its members once they are in power.<sup>9</sup>

The interesting issues is the result of *Corruption Perceptions Index* (CPI) submitted by NGO *Transparency International* and *Control of Corruption Index* (CCI) the targets of corruption involves among members of state institution co-operate with 3<sup>rd</sup> party as their corporation agents. Political patronage creates a vertical system of corruption that functions from top to bottom in all public institutions such as administrative apparatuses, the judiciary and law enforcement. Specifically in the Asia Pacific the law enforcement agencies involvement have the most targets (Police, Prosecutor, Judiciary, Tax Government Officials). Following figure 1 as 'the scheme targets' of transnational organized crime *Grand Corruption*, *Petty Corruption* and *Political Corruption*<sup>10</sup>

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<sup>7</sup> Ackerman Susan Rose (2016), *Corruption and Government Causes, Consequences and Reform 2<sup>nd</sup> Edition*, United Kingdom:Cambridge University Press, p 51

<sup>8</sup> Transparency International, 2006, *Corruption Perceptions Index*, <https://www.transparency.org/research/> accessed 30 Maret 2018

<sup>9</sup> UNDP (2008), *Tackling Corruption, Transforming Lives Accelerating Human Development in Asia and the Pacific*, Srilanka:Macmillan, p 2-18

<sup>10</sup> Center of The Study of Democracy (2010), *Examining the Links between organized Crime and Corruption*, p 14-16 [https://ec.europa.eu/homeaffairs/sites/homeaffairs/files/doc\\_centre/crime/docs/](https://ec.europa.eu/homeaffairs/sites/homeaffairs/files/doc_centre/crime/docs/) Accessed 15 February 2018

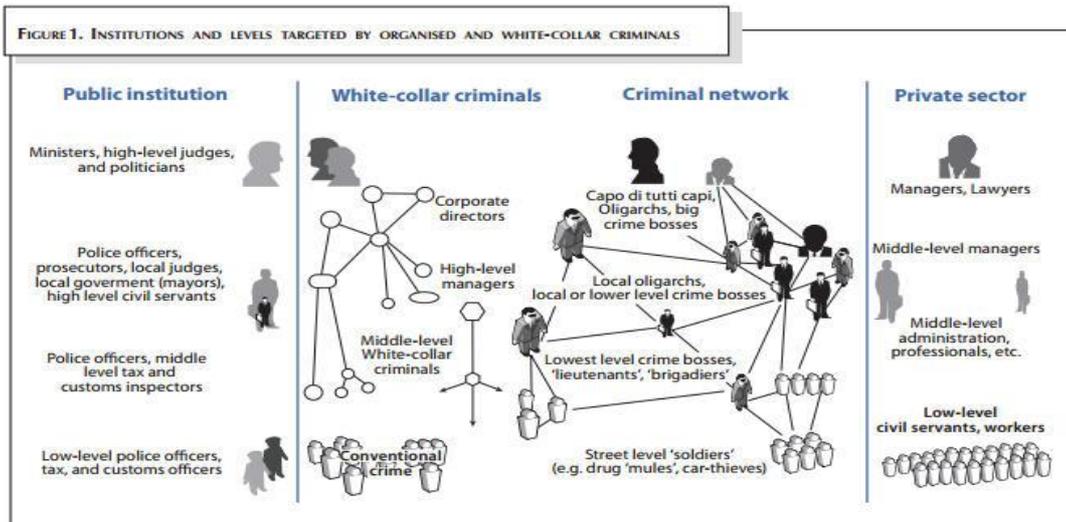


Figure 1 Source: Center of The Study Of Democracy

The above illustration on figure 1; Political corruption are especially strong when governments change and Police have the most targets by the organised crime due to obtain information on investigations, operations, or competitors. Second Targets are the prosecutor and the Judiciary, particularly the courts. White collar criminals exert more pressure on the prosecutor and the judiciary, as they have easier access to social networks that facilitate corruption. The reasons is to avoid *pre-trial detention or to delay court action or influent a trial outcomes*. Other interesting thing is political influence over the law enforcers is a *key factor of judicial corruption especially in countries with high levels of political corruption*.<sup>11</sup> Is it frustrating that corruption is so common and that government official in all parts of the world are not immune from the temptation to exploit their official positions for personal advantage.<sup>12</sup>

In addition to climate global, criminals have learned to take advantage of the globalized economy and the opening of borders in new and dangerous ways. Criminals open borders to transnational organized crime. The challenges of transnational criminality at the millennium are substantial. Unless nation-states become better network and cooperation, they will lose power to transnational criminals who operate in a borderless world. Corruption in Indonesia is systemic and has a long history, even longer than the history of the Unitary State of the Republic of Indonesia itself. In 1970, Hatta in his capacity as a presidential advisor said that corruption was already entrenched in Indonesia. History records that since the Dutch colonial period, corruption was rampant, even the VOC, a Dutch state-owned enterprise tasked with exploiting Indonesia, was forced to go bankrupt in 1779 due to corruption. The VOC was replaced by the Dutch East Indies Colonial Government, where corrupt practices continued to flourish. In the post-independence period, the new order era to the post-reform era, corruption remained rampant.<sup>13</sup>

The relationships of corruption and potential human rights abuses are obvious. Every crime is a form of human rights violation, since every crime is bound to disturb people's lives. The phenomenon of globalization is that all corruptors should be impoverished and the perpetrators should be severely punished without discrimination. Corruption should be eradicated is a necessity, but it becomes interesting when we equate the level of corruption crimes with crimes against human rights. Human rights can be said to be the "sweetest" fruit of the reform. The Amendment to the 1945 Constitution of the State of the Republic of

<sup>11</sup> Ibid. p 15-18

<sup>12</sup> Albanese Jay S (2011), *Transnational Crime and the 21<sup>st</sup> Century*, Oxford: Oxford University Press, p 128

<sup>13</sup> The Head of Indonesian Eradication Commission (2014), *8th Agenda Anti-Corruption for the President 2014-2019*, Jakarta: KPK, p. 9

Indonesia and the establishment of the Human Rights Law and the Human Rights Court are the initial products of post-reform human rights. In addition, Indonesia has ratified two of the most basic human rights instruments: the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights through Law No. 11 and Law No. 12 of 2005<sup>14</sup>. The entire provisions regulate the most basic human rights.

This paper examine the state's obligations to protect human rights and the state's efforts to prevent and eradicate corruption by public official through the role of State Administrative Law, to find how public law, specifically administrative law and national criminal law in general, including the influence of international law, to overcome the problems. In principle, administrative law occupies a dominant position in setting corruption, in the form of both prevention and prosecution of criminal acts of corruption. From the preventive side, administrative law is the main legal instrument comprising three dimensions of administrative law, which are the norms for, by and against the government. From the repressive side, administrative law is very dominant because corruption is only possible in the context of state financial losses caused by maladministration in the use of authority. The most important form of maladministration is abuse of authority.<sup>15</sup>

## II. Identifying the link between Violation of Human Rights and Corruption

The identification of human rights violations in corruption needs to be viewed on two sides, like two sides of the coin; **First** is when a person gives a bribe (gratuity) to a public official and a law enforcement officer to issue or decide on a policy or take a legal action in favor of the bribe giver. **Second** is when a public official uses his/her discretion to make a public decision, and it is further found that the public decision is wrong and results in state losses. On the other hand, it occurs when a law enforcement officer uses his/her discretion to take a legal action contrary to the Corruption Law and the Criminal Procedural Law itself.

In view of the first side, the crime has no direct effect on human rights violations, no direct evidence to justify the statement, despite the fact that there have been state losses, yet not a determinant factor for human rights violations in this context. However, if it comes to the idea that 'if a public policy published by a public official is not wrong, it causes no harm', the state money can be used for the costs of education, infrastructure development that everyone can enjoy and the rights to enjoy education and development are human rights (The rights to Life), so that the 'perpetrators' of corruption are categorized as serious offenders of human rights because they cause human development in a nation to be hampered. When a public official uses the authority granted by law to him/her by making a public policy for private or political purposes, in the concept of administrative law it is called Abuse of Authority, thus resulting in Abuse of Power.

In view of the second side, law enforcement officer exercising the authority granted by law for other purposes contrary to the law containing the legal basis of the given authority is called Obstruction of Process or Abuse of Process. An "extraordinary" effort of a Law Enforcer to combat corruption sometimes involves corruption law and criminal procedural law itself. An act beyond the authority committed by a law enforcer results in gross human rights violations. Muladi said, "The essence of the criminal procedural law itself is

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<sup>14</sup> Indonesia. Act Number 11 for *Ratification of International Covenant on Economic Social and Cultural Rights*, Jakarta 28 October 2005, LNRI 2015 Number 118 and Act Number 12 *International Covenant On Civil and Political Rights* (Jakarta 29 October 2005, LNRI 2005 Number 119

<sup>15</sup> Hadjon Philipus M., et.al (2012), *Administrative law and Criminal Corruption*, Yogyakarta: Gadjah Mada Unviersity Press, p. 2

that the procedural law cannot be imposed on law enforcers not to be act arbitrarily.” Thus, it is a human rights preservation filter.<sup>16</sup>

It is undeniable that current law enforcement practices in corruption eradication, especially in the post-reform era in Indonesia tend to violations of human rights, such as efforts to determine the act of Obstruction of Justice and the act of False Testimony or providing false information in a corruption case. From the point of view of Article 21 of Law No. 31/1999 on Eradication of Corruption, it formulates the legal norms as a behavior of “*deliberately preventing, inhibiting or foiling directly or indirectly*”, the provisions of Article 22 in conjunction with Article 28 paragraph (1) formulates the legal norms as a behavior of “*intentionally not giving information or giving false information*”, the provisions of Article 21 and Article 22 in the legal perspective of proof of formal offense or material offense tend to be “debatable”. In addition, another factor that is not less important is the effectiveness of investigation authority. Which institution is authorized to investigate the crime of obstruction of justice and false testimony. On the one hand, Article 26 of Law Number 31/1999 only specifies: “*investigation, prosecution and examination in court for corruption shall be conducted under the applicable criminal procedural law, unless otherwise provided in the Law*”.

With regard to the foregoing, the Corruption Law does not make any special provisions. Therefore, in accordance with the legal principle adopted, the issue on effectiveness of crime of obstruction of justice and false testimony must be referred to as the provisions of the Indonesian Criminal Code. Other examples are wiretapping during an investigation process potentially violates a person’s privacy rights, prevention of witnesses, unfamiliarity of dismissal of investigation. Such conditions potentially violate the principle of presumption of innocence, as reinforced by the current condition of press freedom, so that a suspect/defendant of a corruption case suffers from degradation of humanity twice when he/she is declared a suspect with the presumption of corruption).<sup>17</sup> And when the right to get an impartial and impersonal legal proceeding (fair trial) becomes violated, the state has three important tasks: to respect the human rights of its citizens, to protect the human rights of its citizens and to protect its citizens.

The principle of presumption of innocence is regulated in the Indonesian Criminal Procedure Code (“KUHP”) point 3 item c: “*Every person who is suspected, arrested, detained, prosecuted and/or brought before a court of law shall be presumed innocent until a court decision declares his/her guilt and obtains a permanent legal force.*” The Indonesian Justice Law article 8 paragraph (1) states:” *Every person who is suspected, arrested, detained, prosecuted, or brought before a court of law shall be presumed innocent before a court decision declares his/her guilt and obtains a permanent legal force.*”<sup>18</sup>

In the International framework, human rights in the sense presumption of innocence (rights of individuals as against states) did not as such feature in the pre-1945 international legal order. Of course, the concept of this can be traced back to the 1215 Magna Carta, The philosophical (Locke and Rousseau), Dan pada tahun 1778 US Constitution and 1789 The French Declartiondes Droits de L’Homme et du Citoyen. The natural law terminology often used in respect of Human rights in the sense of rights of individuals. Constitutional speaks of presumption of innocence is ‘just in hello’ did not grant rights to individuals. The individual was, to use the words of Lauterpacht ‘an object of international compassion’ rather than ‘a subject

<sup>16</sup> Muladi (1995), *Kapita Selekt Criminal Justice System*, Diponegoro University: Semarang, p. 40

<sup>17</sup> Atmasasmita Romli (2014), *The Law of Criminal Business, Theory & Practice in the Era of Globalization*, Jakarta:Prenadamedia Group, p. 66

<sup>18</sup> Indonesia, Criminal Procedure Act Number 8/1981, Jakarta 31 December 1981, LNRI 1991, Number 76 and Indonesia, Judicial Power Act Number 48/2009, Jakarta 29 October 2009, LNRI 2009, Number 5076

of international right'. Before that time there had an occasional attempts to regulate state behaviour that causes human suffering due to the conditions of the law of war and the law of armed conflict.<sup>19</sup>

According to Rosanne Van Alebeek presumption of innocence or the rights of individuals against states; *The Compatibility of Immunity Rules and the Fundamental Rights of Individuals with the right to a fair trial, the right to a remedy and the right to effective protection.*<sup>20</sup> The Rights of individual against states (presumption of innocence) were allocated a prominent position in European Convention on Human Rights. Article 6.1.

Decade before millennium era, high level corruption are associated with poverty, poor health, low life expectancy and an unequal distribution of income and wealth are endemic. Poorly functioning governments mean that outside assistance will not be used effectively because their unable to use their human and material resources effectively.

Ackerman said, Corruption in the public sector, ranging from grand to petty corruption and covering many different types of public/private interactions. Grand Corruption involves a small number of powerful players and large sums of money. The corrupt seek government contracts, privatized firms, and concessions; they pay legislators to pass favorable laws and cabinet ministers and agency heads to enact beneficial regulations. Heads of state manage in outright embezzlement of public funds without the direct involvement of dishonest private firms. While Petty corruption is easier for ordinary citizens to observe and experience. The corrupt seek government contracts is endemic operates in many countries includes certain countries with the least corrupt scored the nordic countries Denmark, New Zealand and Singapore.<sup>21</sup>

### III. Public Official and Corruption Transnational Crime

One of the opening acts of the 21<sup>st</sup> century was the fall of the mega corporation. Corruption transnational called "White Collar Crime" or crime without borders. According to Fichtelber: "globalization is a fundamental part of the modern world, but there is a dark side to globalization. Criminals have learned to take advantage of the globalized economy and the opening of borders in new and dangerous ways".<sup>22</sup>

In 1939 presidential address to the American Sociological Society, Edwin Sutherland first introduced the concept of 'white collar crime' into the vernacular of social science and the general public. Sutherland defined white collar crime as a "crime committed by a person of respectability and high social status in the course of this occupation" and urge others to focus more attention on such hitherto neglected acts of wrongdoing. There are two broad categories of crime that fit Sutherland's formulation, corporate crime and government crime, which dovetail with that others have called "elite deviance" or "corporate and governmental deviance".<sup>23</sup> In addition to Sociological Society, Gerhard O. W. Mueller said: 'transnational crime' is a criminological rather than a juridical term, coined by the UN Crime Prevention and Criminal

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<sup>19</sup> Rosanne Van alebeek (2008), *The Immunity of States And Their Officials In International Criminal Law and International Human Rights Law*, Oxford:Unversity Press, p 301-302

<sup>20</sup> Ibid

<sup>21</sup> Ackerman Susan Rose (2010), *Corruption and Government, Causes, Consequences, and reform* 1<sup>st</sup> Edition, United Kingdom:Cambridge University, p 12-16

<sup>22</sup> Fichtelberg Aaron (2008), *Crime Without Borders An Introduction To International Criminal Justice*, New Jersey:Pearson Prentice hall, p xii

<sup>23</sup> Berger Ronald J (2011), *White Collar Crime The Abuse of Corporate and Government Power*, Colorado: Rienner Publishers, Inc, p xi

Justice Branch ‘in order to identify certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country’.<sup>24</sup>

For example, white collar crime in bureaucratic corruption as abuse of discretion by *official public officer* PERTAMINA. Indonesia authorities said that as part of the global investigation into chemical maker Innospec Inc, two individuals were convicted and sentenced for bribery offenses. A court in Jakarta convicted Suroso Atmomartoyo in late October, according to a case posted by the UK Serious Fraud Office. The court sentenced him to five years in prison. The former director of state-owned oil and gas giant Pertamina was found guilty of accepting bribes from PT Sugih Interjaya, which acted for Innospec. Atmomartoyo took cash bribes of \$190,000 and a paid visit to London as rewards for Pertamina's purchase of Innospec products. Earlier this year, an Indonesia court sentenced Willy Sebastien Lim, the former owner of Innospec's intermediary, PT Sugih Interjaya, to three years in prison for paying bribes.

Innospec's British unit pleaded guilty in the UK in 2010 to bribing Pertamina employees. It paid \$12.7 million in penalties to the SFO. The SFO prosecuted four individuals for the bribery. A jury in London in 2014 convicted Dennis Kerrison, a former Innospec chief executive, and Miltiades Papachristos, a former regional sales director, of conspiracy and bribery. They bribed Indonesian officials to buy Innospec's gasoline additive -- tetraethyl lead, also known as TEL. TEL was known to be harmful to people while Innospec was still trying to sell it in less developed countries. Kerrison was sentenced after appeals to three years in prison and Papachristos to 18 months. Paul Jennings, the former CEO of Innospec's UK operations, pleaded guilty in London in June 2011 to two counts of conspiracy to bribe officials in Indonesia and Iraq. He was sentenced to two years in prison. David Turner, a former business director at Innospec, pleaded guilty in the UK to three counts of conspiracy to corrupt. He was given a 16-month suspended sentence. The SFO said in the case update that it worked closely with Indonesia's Corruption Eradication Commission and shared evidence from a UK cooperating witness. "The convictions in Indonesia bring this global case to a close".

The Honorable Judge Goymer said: “*Corruption in this company was endemic, institutionalised and ingrained... but despite being a separate legal entity it is not an automated machine; decisions are made by human minds.*”<sup>25</sup>

The most common forms of Public Corruption toolkit are bribery, embezzlement, nepotism in public procurement, privatization, and the award of concessions for big contracts is a well known source of large scale corruption, resulting in inflated costs and low quality of the construction that is eventually put in place. Many of these installations are technically very complicated, working against transparency in the procurement process.<sup>26</sup> The quest for good governance is part of inside government departments, where much rule making happened, decision to make rules are not always taken on rational grounds. Rules are ‘bargained over and they are built’; choice is constrained by the political, legal and regulatory context.<sup>27</sup> Bingham T wrote, “Minister and public officers at all levels must exercise the powers conferred on them

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<sup>24</sup> Mueller, ‘*Transnational crime: Definitions and Concepts*’, in P. Williams and D. Vlassis (eds), *Combating Transnational Crime* (2001) 13. in *European Journal of International Law* 14 (2003), <http://www.ejil.org/pdfs/14/5/453> Accessed 10 April 2018

<sup>25</sup> Serious Fraud Office, SFO, Press Release, “*Four sentenced for role in Innospec corruption*” (SFO:London, 4 August 2014), <https://www.sfo.gov.uk/2014/08/04/four-sentenced-role-innospec-corruption/> Accessed 7 Mei 2018

<sup>26</sup> Rothstein Bo (2011), *The Quality Of Government, Corruption, Social Trust, and Inequality in International Perspective*, Chicago:The University of Chiago Press, p 3

<sup>27</sup> Black J (1991), *Which Arrow; Rule type and regulatory policy*, p 94, 95 in Harlow Carole, et.al.(2009), *Law and Administration*, UK:University of Cambridge Press, p 193

reasonably, in good faith, for the purposes for which powers were conferred and without exceeding the limits of such powers”<sup>28</sup>.

To do otherwise in any of these instances, would be to act unfairly as to perpetrate an abuse of power. As Lord Green pointed out in the famous case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) ‘*More precisely, acting for improper purposes, Wednesbury unreasonableness, and bad faith are all instances of acting on irrelevant considerations*’. In addition to improper purposes, Endicott wrote, If a public authority uses a power for some object that the legislation excludes, it is acting on irrelevant consideration. In other words the authority (public official) must not use the power for purposes that are incompatible with the reasons for which it was given the power.<sup>29</sup>

The government official who had made an error in adopting the restriction, because of error in use of discretionary power is called *abuse of discretionary power* or *abuse of power*. Unlawful discretionary power of the public authority must be so unreasonable since it might almost be described as being done in bad faith and it is called unreasonableness. Good Governance without a substantial bureaucracy, the modern regulatory welfare state would be impossible, its services would simply fall apart.

#### IV. State Obligation to Protect The Rights and to prevent Corruption

Costa Antonia, Executive Director United Nations Office on Drugs and Crime said, “for too long, the world has looked the other way while corrupt elites looted their countries of hundreds of millions and even billions of dollars, creating economic chaos and depriving citizens of education, health services, basic infrastructure and functioning public services. Even when good governance is restored or attained, officials can spend years or even decades attempting to retrieve funds that are often critically needed to repair the social and economic damage done by their corrupt predecessors”<sup>30</sup>.

This paper examines two topics *first* ‘Public Corruption’, *second* ‘human rights’, how the state acts in facing the basic dilemma in criminal procedure and how the state obligations in preventing human rights and combating public corruption for people welfare. Its ultimate ends are dual and conflicting of interest. Hall Jerome (1960) argues, “the dilemma consists in the fact that the easier for the state it is made to prove guilt, the more difficult does it become to establish innocence. Lack of appreciation of the dual character of criminal procedure is much of the criminological reform movement in the recent past which reflects hardly any suspicion that law enforcers are not omniscient”<sup>31</sup>. Discrimination on eradication of corruption is also a form of dilemma in corruption and human rights violation. According to Hamzah Andi: “In practice any country would have to practice ‘selective logging’ in the fight against corruption. However, selective logging should be the same as the cutting of teak trees, the oldest the first”.

In corruption cases, the most serious, extraordinary ones should be logged first, such as BLBI corruption case involving trillion rupiahs. This extraordinary corruption case is released and discharged by the previous government and not corrected by the present government. However evil we might think corruption and terrorism cases are, they still must be settled in accordance with due process of law. Law enforcement cannot be done by feeling alone, but it must be by perfect legal control, according to the ratio.”<sup>32</sup> Declaration in Criminal Law World Convention in Beijing on September 2004 states,

<sup>28</sup> Bingham T (2007), *The Rule of Law*, p 66 in Ibid. p 212

<sup>29</sup> Endicott Timothy (2015), *Administrative Law*, 3<sup>rd</sup> Edition, Oxford: Oxford University, p 48-51

<sup>30</sup> Antonia Maria Costa, *Corruption Compendium Of International Legal Instruments On Corruption* 2<sup>nd</sup> Edition, United Nations Office on Drugs and Crime Vienna (New York: United Nations 2005), p 5

<sup>31</sup> Goldstein Abraham, Joseph (1971), *Criminal Law and Society*, London: The Free Press, p 231

<sup>32</sup> Hamzah Andi (2015), *Corruption Eradication through National Criminal Code and International Law*, Jakarta: Rajagrafindo Persada, p. XV.

“Investigation, prosecution and adjudication of corruption and related offences should be free from improper political, economic or other influences”.<sup>33</sup>

As an example of a national corruption case, at the end of the fall of the Soeharto’s regime, a number of businessmen and bankers reaped BLBI (Bank Indonesia Liquidity Assistance). Many of them then fled abroad leaving behind the junk assets as collateral for bailouts. Eddi Tansil aka Tan Tjoe Hong or Tan Tju Fuan in early 1990 of the new order era broke into Bank Pembangunan Indonesia (Bapindo) for a whopping IDR 1.5 trillion when the rupiah exchange rate to the US dollar was around IDR 1,500 per dollar. Now, when the rupiah exchange rate depreciates about 700 percent, it means that the profit of Eddi Tanzil is equal to IDR 9 trillion, higher than the value of Century Bank scandal, which is IDR 6.7 trillion.<sup>34</sup> If we look closely to the criminal process its called an ‘error’, according to Laudan Larry (2006) in related to Truth, Error and Criminal Law, he using the term ‘error’ in a more strictly logical and epistemic sense. Error has occurred, mean either a) in a case that has reached the trial stage and gone to a verdict, the verdict is false OR b) in a case that does not progress that far, a guilty party has escaped trial or an innocent person has pleaded guilty and the courts have accepted that plea. In short, *an error occurs when an innocent persons is deemed guilty or when a guilty person fails to be found guilty*. Laudan call the first sort of error *a false inculpatory finding* and the second *a false exculpatory finding* and the second *a false exculpatory finding*.<sup>35</sup>

The principles of equality and non-discrimination are fundamental principles of human rights law are referred to in all main human rights treaties.<sup>36</sup> According to Nowak,

‘the modern concept of self-determination is not limited to the political sphere. Pursuant to Art. 1 (1), peoples may by virtue of this rights freely (i.e., free of external or domestic interference) pursue their economic, social and cultural development. In contrast to the HRCComm’s draft, which spoke of the “determination of the economic, social and cultural status”, this formulation indicates the continuing character of this right’.<sup>37</sup>

*The Nations Fail* due to the state fail to fulfil its obligations. According to The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), adopted by a group of academic experts meeting in Masstricht, 22-26 January 1997, later reissued as United Nations Doc. E/C.12/2000/13, para. 6, stated that; “The Typology of States obligations are obligations to respect, to protect and to fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. *First*, State obligation to *respect* requires States to regains from interfering with the enjoyment of economic, social and cultural rights, thus to promote the right to adequate food, the right of housing, the right of education, social and cultural right. *Second*, Obligation to *protect* requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labor standards may amount to a violation of the right to work or the right to just and favorable conditions of work. *Third*, The obligation to *fulfil* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.”<sup>38</sup>

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<sup>33</sup> Ibid.

<sup>34</sup> Sindo News, *Mengulas sosok Dan kejahatan Eddy Tansil* <https://nasional.sindonews.com/read/> Accessed 20 May 2018

<sup>35</sup> Laudan Larry (2006), *Truth, Error, And Criminal Law*, New York:Cambridge University Press, p 10

<sup>36</sup> Figueiredo Andre T.D. (2017), *Corruption and Human Rights Beyond the Link*, The Netherlands:Wolfpublishers, p 29

<sup>37</sup> Mandred Nowak (2005), *U.N. Covenant on Civil and Political Rights CCPR Commentary* 2<sup>nd</sup> revise edition, Germany:N.P.Engel, p 24

<sup>38</sup> Oliver De Schutter (2014), *International Human Rights Law* 2<sup>nd</sup> Edition, United Kingdom:Cambridge, p 281

How have the state obligations referred to corruption?, one of state contribute more to fighting corruption in Indonesia is KPK the anti graft agency, established due to the international influence on governance of interest in combating corruption from International law perspective. Indonesia is one of the state participants that signed the United Nations Convention Against Corruption (UNCAC), according to which state parties will take appropriate steps to ensure the realization of the covenant, recognizing to this effect the essential importance of International co-operation. Indonesia have transposed the provisions of UNCAC into national law (Code No. 7/2006), under Article 6 of the covenant specifies:

*Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.*

The KPK appoints and dismisses its own criminal investigators and prosecutors. Virtually all of them are secondments from the ordinary police force and the public prosecution. All of the enforcers are working under one roof called KPK. In combating to corruption and preventing human rights violations, the state's reactions vary. Such reactions are generally based on the considerations of conflict of interests concerning the state's obligation to protect human rights for every citizen as a victim of corruption, and the obligation as a legal state to protect the right of a criminal corrupt due to (presumption of innocence) through criminal policy in legislation and instruments of criminal justice system. The state ends up facing a dilemma, since the fulfilment of the rights of either party will sacrifice the rights of the other. As a developing country Indonesia does not escape from the dilemma.

## V. Conclusion

The connection between good governance, corruption and human rights protection is far from the expectation because the reconceptualization in terms of corruption focuses primarily on petty corruption. While grand corruption is based on loyalty to the in group and not to the larger society, which means that universal social welfare policies are anathema to dishonest governments.

An overview of the human rights that are relevant to criminal justice process and consideration of how potential conflicts between rights might be resolved and should shape Indonesian criminal justice process. Although Indonesia does have a national bill of rights or comprehensive national human rights legislation, accordingly, it is not easy to identify with certainty the role of human rights principles as norm in Indonesian criminal justice process.

Finally while globalization has turned corruption into a global phenomenon in need of a global response, the battlefield upon which this war is won or lost remains national. The more globalized a country is, the better is its control of corruption.

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