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The Essence of *in Absentia* in the Examination of Corruption Cases

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Kejaksaan Tinggi Bangka Belitung

Abstract

The legal vacuum associated with *in absentia* examinations can benefit corruptors. Unprofessional law enforcement officers can help the suspect by providing opportunities or facilities for the suspect to escape in order to suspend the investigation. In the event where the investigation is suspended for this reason, then there would be no legal certainty and fairness in the effort to recover the financial loss of the State. Article 38 of the prevention of corruption (PTPK) Law only applies in the examination of cases without the presence of the defendant in the trial. *In Absentia* is a suspect or defendant whose whereabouts is not known, does not present for the examination of the case or whom cannot be forced to be present in the trial. The general philosophy of *in absentia* examination in corruption cases is that criminal acts of corruption are not justified, as they result in detrimental loss of the country's finances or economy. In the essence, *in absentia* examination is an effort to eradicate corruption in a serious or extraordinary manner because corruption is a serious crime and as an effort to recover the country's financial and economy loss.

Keywords: The Essence of Law; *In Absentia*; Corruption.

Introduction

One of the extraordinary efforts in eradicating corruption is the ability to continue to examine a corruption case without the presence of the requested Defendant. The trial continues, this is affirmed by Article 38 paragraph (1) Law No. 20 of 2001 on the Amendment of Law No 31 of 1999 concerning The Eradication of Corruption (Supplementary State Gazette of the Republic of Indonesia 2001 No 4150) jo Law No 31 of 1999 on the Eradication of Corruption, hereinafter Law on the Eradication of Corruption. This provision is a deviation from the Criminal Procedural Code that obligates the Defendant to be present at the trial. However, the absence of the defendant in the examination of the trial of a criminal act of

corruption does not apply at the prosecution stage, and the trial hearing is conducted based on the applicable criminal procedure law unless otherwise specified by law. The main principle in the Criminal Procedure Code, examination of the defendant in a trial requires the presence of the defendant except for cases of minor criminal offenses as referred to in Article 214 paragraph (1) of the Criminal Procedure Code. This is in line with the Supreme Court Circular No. 9 of 1985 concerning Decisions pronounced outside the Defendant's Presence, in which the Supreme Court is of the opinion that the cases examined by the Quick Examination Program (both cases of minor criminal offenses and cases of road traffic violations) can be decided outside the defendant's presence (*verstek*) and Article 214 of the Criminal Procedure Code applies to all cases examined by a Quick Examination Program.

The investigation process represents an event where there is sufficient evidence and represents a follow-up or not, whether this offense meets the requirements of the court or not, so that the final verdict or judge's verdict is also needed by the process to prove the evidence on the investigation,¹ Investigations, investigations and prosecutions are very important factors in any reporting relating to criminal acts, one of which is the crime of corruption. The process of discussing, investigating, and prosecuting is of utmost concern and continuity in following up on every corruption case.² The investigation of a case without the defendant's presence in the court is not new in the Indonesian criminal justice system before the Criminal Procedure Code has been established, the examination of the case without the defendant's court has been specifically approved in economic crime. In the implementation, *in absentia* trial of a corruption case is not something new. There are 6 (six) corruption cases of BLBI examined through *in absentia*. The latest cases examined and decided in court in absentia are cases of corruption and money laundering with convicted former Bank Century owners namely Hesham

¹ Lintang Tesalonika Natalia Luntungan 'kewenangan Jaksa Dalam Penyidikan Tindak Pidana Korupsi' (2013) II Lex Crimen.[194].

² Frans Wilmat Muskanan 'Kinerja Direktorat Penyelidikan, Penyidikan Dan Penuntutan Komisi Pemberantasan Korupsidalam Menindak Lanjuti Laporan Tindak Pidana Korupsi Periode 2012-2013' (2014) 5 Politika.[6].

Talaat Mohammed Beshar Alwarraq alias Hesham Alwarraq and Rafat Ali Rizvi. Central Jakarta District Court in its ruling Number: 339/PID.B/2010/PN.JKT. PST, sentenced them both, 15 (fifteen) years imprisonment, a replacement money of Rp3,115,889,000,000 (three trillion one hundred and five twelve billion eight hundred eighty nine million rupiah) and a fine of Rp. 15,000,000,000 (fifteen billion rupiah) where the decision has permanent legal force (*Inkracht*). The Corruption Eradication Commission in carrying out its duties and functions also handled cases where the suspect escaped, namely, among others, Anggoro Widjojo in a bribery case related to the procurement of the Integrated Radio Communication System at the Ministry of Forestry which had been wanted since June 2008. This condition resulted in the handling of the case floating and it is not clear at the investigation level. Cases that are directly related to these cases have difficulty when they will be further processed because they are awaiting the arrest of the main perpetrators. In addition, the status of assets allegedly originating from acts of corruption that have been carried out is unclear because there is no legal provision.

The Corruption Eradication Commission is currently facing the same problem in a corruption case allegedly committed by Sjamsul Nursalim and his wife, Itjih Nursalim. Sjamsul Nursalim and his wife, Itjih Nursalim who had been named as suspects had never attended a summons from the investigator, thus hampering the case investigation process. The Corruption Eradication Commission has not yet decided whether to hand over the case without the suspect's investigation because legally the investigation and prosecution without examination or the presence of the suspect is not regulated in Indonesian criminal procedure law. The absence of this regulation has led to the dilemma for law enforcement officials whether to delegate cases or not. This concern is increasingly reasonable given the decisions in corruption cases in recent times have tended to benefit the perpetrators of corruption.

Legally, the investigation of the case without the presence of the defendant in the trial has been regulated in the legislation but in the development of efforts to eradicate corruption, there are a number of cases where the suspect has disappeared or escaped since the investigation. The absence of the suspect in the investigation at

the investigation is an interesting thing to study, where the presence of the suspect at the investigation stage is very important in order to account for his actions. In addition, the suspect's personal information is an important evidence, and is one of the suspect's rights to defend. The main purpose of the principle in the Criminal Procedure Code requires that the defendant present at his trial is so that the defendant understands what is being charged to him, witness statements, expert statements and other evidence used by the public prosecutor in order to prepare his defense including asking questions, providing answers and respond to witness statements.³ A suspect cannot be treated at will by the examiner on the grounds that he has been guilty of committing a crime, as the presumption of innocence is held in the criminal justice process in Indonesia listed in Article 8 of Law Number 48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5067), namely that every person who is suspected, arrested, detained, prosecuted, and/or presented before a court must be considered innocent before a verdict is made and had obtained permanent legal force.

The Indonesian Criminal Procedure Code has placed the suspect as a whole human being, who has dignity, dignity and self-esteem as well as human rights which cannot be taken away from him, among others, related to the right of the suspect to provide information freely, the right to obtain legal assistance or legal counsel, submit sanctions that alleviate and can sue for compensation and rehabilitation as stipulated in the provisions of Articles 51-68 of the Criminal Procedure Code. The legal vacuum associated with *in absentia* examinations can benefit corruptors. Unprofessional investigators can cooperate with the suspect by providing an opportunity or means for the suspect to escape so that the case investigation cannot proceed because the suspect escaped. If the reasons for the suspect's escape cannot be continued with the investigation and delegation of cases by the public prosecutor, there is no legal certainty and justice in efforts to recover the losses of state finances.

³ Mien Rukmini, *Perlindungan HAM Melalui Asas Praduga Tak Bersalah Dan Persamaan Kedudukan Dalam Hukum Pada Peradilan Pidana Indonesia* (Alumni 2007).[89].

In addition, an investigation without a suspect's examination raises legal issues if it is reviewed based on Article 8 paragraph (3) letter b of the Criminal Procedure Code which determines the submission of case files carried out in the event that the investigation is considered to be complete then the investigator hands over the suspect and evidence to the public prosecutor. Referring to Article 8 paragraph (3) letter b of the Criminal Procedure Code, if the suspect escapes, the case transfer cannot be carried out because the investigator cannot submit the suspect.

In addition, investigators in submitting cases to court must meet material and formal requirements. Material requirements are related to the substance of the evidence of the case while formal requirements are related to the completeness of the filing administration. Whereas in the investigation without the presence of the defendant there was no official report on the examination of the suspect and Article 56 of the Criminal Procedure Code which regulates the obligation to appoint a legal advisor in the event that a crime is carried out that is threatened with fifteen years or more. Article 56 of the Criminal Procedure Code must be interpreted legally as a form of absolute protection for the interests of suspects or defendants which may result in the cancellation of the examination of a case if the suspect or defendant is examined or tried without legal counsel. Case examination conducted without the presence of the suspect so that it can be interpreted as not fulfilling the rights of the suspect in the examination can result in the cancellation of the examination if it is not carried out in accordance with statutory provisions. This is increasingly visible legal problems because based on the Supreme Court Circular No. 6 of 1988 concerning Legal Counsel or Attorney Receiving Power of Attorney/Convicted "In-Absentia" which essentially ordered the judge to reject the legal counsel/attorney who obtained power of attorney from the defendant who deliberately did not want to be present at the court hearing so that it could hamper the trial of the court and the implementation of the decision The legal logic established in Circular Letter of the Supreme Court No. 6 of 1988 is appropriate, namely that legal counsel in the examination of criminal cases only accompanies not representing so that if the defendant is absent from the court then the legal counsel is not relevant to be present

at the hearing. Circular Letter of the Supreme Court No. 6 of 1988 emphasized that the examination of absentia had ruled out the rights and interests of the defendant.

Examination of cases of corruption at the level of investigation without the presence of suspects has a high complexity because there is no legal basis for acts of investigation and prosecution without fulfillment of the rights of the suspect. An important issue in investigations without the presence of a suspect is related to whether the investigation file can be used as a basis for examination in court. The principle of the defendant must be present in the examination of his case in the trial not solely for the interests of the defendant in making a defense but because the public prosecutor also requires the defendant's information to make clear of the crime committed so that the public prosecutor and investigator can take legal action in order to ensure the perpetrators of corruption to take responsibility. Case examination without the presence of a suspect or defendant raises two conflicting arguments namely on the one hand making convictions without the presence of the defendant tends to be considered contrary to the principle of fair and impartial trials and on the other hand examining cases without the presence of the defendant is a criminal law policy in the framework to ensure legal protection for the interests of society and the state. The dilemma of law enforcement of corruption in Indonesia through the examination of cases without the presence of the defendant is a legal problem faced by all countries. The legal protection of the rights of suspects and defendants is at odds with efforts to protect the law for the interests of the state and society. Based on the above background, the formulation of the problem to be discussed is the nature of absentia in the examination of corruption cases.

Efforts to Recovery of Financial Losses and the State's Economy

In absentia judiciary was first used in Indonesia in connection with the investigation, prosecution and trial of economic crimes in which many perpetrators of economic crimes have fled or whose whereabouts are unknown. With the reason to confiscate assets obtained in an economic crime in which the culprit is not known or whose perpetrators are not known, a case examination is arranged without the

presence of the defendant. The main reason for using *in absentia* is that there is a financial or economic loss to the country that must be recovered and the perpetrators of criminal acts of corruption shall not be justified if they benefit from actions that are detrimental to the country's finances or economy. State finance in Act Number 17 of 2003 concerning State Finance (State Gazette of 2003 Number 47, Supplement to State Gazette Number 4286) hereinafter referred to as the State Finance Law are all rights and obligations of the state that can be valued in money, as well as everything in the form of money or in the form of goods that can be used as state property in connection with the implementation of these rights and obligations. State Finance is one of the main sources of funding in national development because the State cannot depend on funding sourced from development cooperation with the private sector. The scope of state finances as referred to in Article 2 of the Law on State Finance is the right of the state to collect taxes, issue and circulate money, and make loans; the state's obligation to carry out public service tasks of the state government and to pay third party bills; state revenue; State expenditure; regional revenue; regional expenditure; state assets/regional assets that are managed by themselves or by other parties in the form of money, securities, receivables, goods, and other rights that can be valued with money, including assets that are separated at state/regional companies; the wealth of other parties controlled by the government in the context of carrying out governmental duties and/or public interests; and the wealth of other parties obtained using facilities provided by the government. The scope of state finance in the State Finance Law is very broad because it includes state assets separated in state or regional companies and other parties' wealth obtained using facilities provided by the government.

The scope of state finances regulated in the State Finance Law tends to lead to multiple interpretations because there is no further explanation on what is meant by the wealth of other parties obtained using facilities provided by the government. The ambiguity of interpretation regarding state finances will have an impact on eradicating corruption, especially with regard to the criminal acts of corruption referred to in Article 2 and Article 3 of the Corruption Eradication Act.

The ambiguity in the regulation of the scope of state finances is evident in the case of former Pertamina Finance Director, Ferederick ST Siahaan who was charged with committing a criminal act of corruption. The Supreme Court acquitted the defendant Ferederick ST Siahaan for one of the main reasons that the financials of SOE subsidiaries did not include state finance (vide Constitutional Court Decision No. 01/PHPUPres/XVII/2019), because the capital and shares did not originate from direct placement from the state so that losses experienced by PT Pertamina Hulu Energi as a subsidiary of PT Pertamina (Persero) is not a loss of state finances.⁴

Issues relating to state finances do not only relate to subsidiaries of State-Owned Enterprises because until now there are still inconsistencies in the application of state-owned enterprises' finances. On the one hand, law enforcement officials determine the finances of the State Owned Enterprises as state finances but on the other hand confiscate and even confiscate the assets or assets of the State Owned Enterprises. The inconsistency of law enforcement officers in applying the law to the assets of State-Owned Enterprises adds to the inconsistencies in the legislation relating to state-owned enterprises and state finances as well as the Constitutional Court's decision.

The definition of state finance in the general explanation of the PTPK Law is substantially the same as the understanding in the State Finance Law, that is, all state assets, in whatever form are separated or not separated including all parts of state assets and all rights and obligations arising because:

- a. Being in control, management and accountability of state agency officials, both at the central and regional levels;
- b. Being in control, management and responsibility of the State-Owned Enterprises, Regional-Owned Enterprises, foundations, legal entities, companies that include state capital, or companies that include third party capital based on agreements with the state.

⁴ Andi Saputra, 'MA Lepaskan Eks Direktur Keuangan Pertamina Di Kasus Korupsi Rp 568 Miliar' (DetikNews 2019) <<https://news.detik.com/berita/d-4806791/ma-lepaskan-eks-direktur-keuangan-pertamina-di-kasus-korupsi-rp-568-miliar>>. accessed 10 Januari 2020.

Furthermore, state finances based on Act Number 15 of 2006 concerning the Supreme Audit Board (State Gazette of the Republic of Indonesia Number 85 of 2006, Supplement to the State Gazette of the Republic of Indonesia Number 4654), hereinafter referred to as the BPK Law, are all state rights and obligations that can be valued in money, and everything in the form of money or in the form of goods that can be owned by the state in connection with the implementation of these rights and obligations. The definition of state finance in the BPK Law focuses on the rights and obligations that can be attached to the state as ownership rights. According to M. Ichwan, state finance is a quantitative activity plan (with figures included in the amount of currency), which will be carried out for the future, usually one year later.⁵ The definition of state finance proposed by M. Ichwan above can be understood as APBN or APBD because the planned activities for funding state or regional activities are determined in the APBN or APBD. State finance in a broad sense can be reviewed from the approach of formulating the definition of state finance in the explanation of the State Finance Law as follows:⁶

- a. From the object side, what is meant by state finance covers all rights and obligations of the state that can be valued in money including policies and activities in the field of fiscal, monetary and management of separated state assets as well as everything in the form of money or in the form of goods that can be used as state property in connection with the exercise of these rights and obligations.
- b. From the subject side, what is meant by state finance is to include all the objects as mentioned above are owned by the state, and/or controlled by the central government, regional governments, state/regional companies and other bodies related to state finance.
- c. From the process side, state finance covers the entire set of activities related to object management as mentioned above starting from policy formulation and decision making to accountability.
- d. In terms of objectives, state finance covers all policies, activities and legal relations relating to ownership and/or control of objects as mentioned above in the context of administering the state government.

The position of the state finances is very central in the existence of the Indonesian state and national development requires strong and effective protection

⁵ W. Riawan Tjandra, *Hukum Keuangan Negara* (Grasindo 2006).[1-2].

⁶ Muhammad Djafar Saidi, *Hukum Keuangan Negara* (Rajagrafindo Persada 2013).[12].

efforts through criminal law instruments. Criminal law must be used as a first attempt at protecting state finances. There are three areas in criminal law, namely material criminal law (substantive), formal criminal law (criminal procedural law) and criminal law.⁷ Material criminal law regulates criminalized acts as a criminal act whereas formal criminal law is a criminal law governing how to make material criminal law effective in the event of a crime. While criminal law is essentially part of criminal procedural law, but specifically only regulates how criminal conduct is implemented in prisons. The development of criminal law in Indonesia has developed rapidly following the development of international criminal law, although the Criminal Code and the Criminal Procedure Code have yet to be renewed. There are various types of criminal acts regulated in statutory regulations in Indonesia ranging from ordinary criminal acts to criminal offenses that are qualified as serious crimes. Criminal regulation aims to prevent the community or state from becoming victims of criminal acts.

One type of criminal act that causes harm to society and the State is corruption where corruption is a threat national development and people's efforts to obtain justice and legal certainty. Corruption causes damage to the lives of the people and the country so that efforts to prevent and eradicate corruption must be carried out continuously.⁸ The development of corruption in the history of the founding of the Indonesian state has led to alarming conditions because the modus operandi in conducting corruption is increasingly developing in order to hide assets originating from corruption and avoiding law enforcement efforts in criminal acts of corruption. Many perpetrators of corruption with a very large amount of state losses strolled out of Indonesia before the law could be enforced, so that repayment of state financial losses cannot be carried out. The Law on Corruption Eradication indeed regulates the instrument of examining a defendant's case without the presence of the defendant as referred to in Article 38 paragraph (1) of the Law on Corruption Eradication but there is a legal vacuum in the regulation of that instrument.

⁷ Soedarto, *Hukum Pidana Dan Perkembangan Masyarakat* (Sinar Baru 1983).[60].

⁸ *Konsideran UU Pengadilan Tindak Pidana Korupsi*.

The Law on Corruption Eradication explicitly mention the defendant in Article 38 paragraph (1) so that the in absentia examination is legally valid only in the examination at the trial level while in the investigation and prosecution (including pre-prosecution) does not apply. Article 24 paragraph (3) of the 1945 Constitution of the Republic of Indonesia is expressly stipulated that there are other bodies whose functions are related to judicial authority. Article 24 paragraph (3) of the 1945 Constitution of the Republic of Indonesia has been clarified in the provisions of Article 38 paragraph (2) of the Judicial Power Law which regulates functions related to judicial power including investigation and investigation; prosecution; implementation of the decision; providing legal services; and settlement of disputes outside the court. Specifically in criminal cases, the functions relating to judicial authority directly are investigation and investigation and prosecution. Investigation and investigation and prosecution are stages that must be passed so that a criminal case can reach the court where then the judicial power uses its authority to examine and try the criminal case. If the investigation and investigation and prosecution of a criminal case cannot proceed properly, a criminal case will never reach the authority of the judiciary, so the principles in the examination of the judicial institution carried out by the judicial authority must also apply in the investigation and investigation and prosecution. The examination of a criminal case starting from an investigation and investigation and prosecution up to the court constitutes an inseparable unit so that the intent contained in the in absentia court must be interpreted as an examination of a criminal case starting from the investigation up to the court session. This also applies in the in absentia examination in corruption cases.

Examination *in absentia* in eradicating corruption is one form of state seriousness in the context of recovering state financial losses. The use of criminal law instruments in overcoming a crime, especially corruption, must be in line with the objectives or theories of punishment by paying attention to the spirit of punishment and recovery of state financial losses contained in the formation of the Law on Corruption Eradication. This is important because criminal law is not

justified if it only gives suffering or suffering to the convicted person and vice versa criminal law must not provide benefits for the perpetrators of criminal acts. The fundamental reason for justifying the *in absentia* examination in corruption cases is that the perpetrators of criminal acts of corruption must not benefit from state financial losses. Perpetrators of corruption are obliged to recover state financial losses so that if the perpetrators of crimes flee then the state must have the authority to take legal actions in order to seize assets of perpetrators of corrupt acts of escape.

Corruption perpetrators commit crimes in order to gain profit or wealth practically without making an effort to work but obtain abundant wealth. Based on this, the eradication of corruption must also be oriented to the seizure of assets originating from corruption so that perpetrators of corruption do not benefit from state losses. Confiscation of assets of corruptors in the context of recovering state financial losses must also take precedence in the case of defendants fleeing so their whereabouts are unknown or whereabouts, but law enforcement officials do not have the power or authority to make forced efforts on the defendant. The seizure of assets of corruptors in the context of restoring state financial losses is in line with the spirit of the theory of punishment, namely punishment in retaliation, ie the perpetrators must pay or recover state financial losses under any circumstances or means and rehabilitate or recover state financial losses as a form of balance in eradicating criminal acts of corruption. which must contain a deterrent effect and the recovery or return of state financial losses simultaneously.

The balance in eradicating criminal acts of corruption which must contain a deterrent effect and the recovery or return of state financial losses simultaneously in line with the thinking that develops in the theory of justice. Rudolp Heimanson defines justice as *concept of achieving a rightful result, of satisfying a proper claim, redressing a wrong, finding a balance between legitimate but conflicting interest*.⁹ Perpetrators of corruption as referred to in Article 2 and Article 3 of the Corruption Eradication Law who have fled have 2 (two) crimes, namely causing financial losses

⁹ Rudolf Heimanson, *Dictionary of Political Science and Law* (Oceana Publikations 1967).[96].

to the state and avoiding law enforcement so that efforts to recover state losses are hampered. Punishment and repayment of state financial losses are the only form of justice in corruption. Both elements must be fulfilled in law enforcement of criminal acts of corruption.

In absentia examination is a form of justice in eradicating criminal acts of corruption if a suspect or defendant runs away or avoids law enforcement in corruption. A criminal offender who escapes legally must be deemed to have waived his right to self-defense and violated his obligation to attend the hearing. Thus, in absentia justice is the only way to accelerate the recovery of state losses and the recovery cannot be postponed until the defendant can be present or attend his case examination. Wirjono Prodjodikoro stated that the aim of punishment is to fulfill a sense of justice.¹⁰ Referring to the view of Wirjono Prodjodikoro above, in every conviction must contain the fulfillment of a sense of justice. If it is related to criminal acts in corruption, then criminal acts in corruption must contain punishment and the spirit of returning or restoring state financial losses. Punishment and the spirit of returning or restoring state financial losses must also be met in the punishment of fleeing corruptors. The examination of cases of corruption cannot be postponed on the grounds that the perpetrators of corruption cannot be presented or do not attend the examination.

Perpetrators of criminal acts of corruption will not get a deterrent effect if by running away will stop law enforcement on criminal acts committed and assets obtained in criminal acts of corruption. The spirit of restoring state financial losses based on restorative justice must be used as a basis or philosophy in judicial in absentia in eradicating criminal acts of corruption. A comparative analysis of the law with the Dutch Penal Code shows the politics of Dutch criminal law has shifted from aiming at achieving retributive justice into restorative justice.¹¹ Recovery of circumstances or losses is the main objective in the development of criminal

¹⁰ Wirjono Prodjodikoro, *Asas-Asas Hukum Pidana* (Sinar Grafika 2005).[4].

¹¹ Romli Atmasmita, *Analisis Ekonomi Mikro Tentang Hukum Pidana Indonesia* (Prenadamedia Group 2016).[201].

justice. Recovery of circumstances or losses can accelerate crime prevention efforts because in addition to containing elements of the settlement of criminal cases there are also preventive measures by raising awareness of the perpetrators of crime and increasing community participation so that they are more aware to protect each other. The restorative approach in criminal justice is a development born from human thought based on the judicial traditions of the civilizations of the ancient Arab nations, the Greeks of the Roman nation in resolving criminal acts.¹²

Restorative justice in criminal cases is the answer to the existence of victims who are often ignored in the settlement of criminal cases so that efforts to prevent crime are hampered. Settlement of criminal cases before the emergence of restorative justice prioritizes the punishment approach as a means to provide justice for victims even though justice for victims is not merely fulfilled by punishing the perpetrators of criminal acts. The more important interests of victims to get rehabilitation or recovery are actually set aside so that the punishment does not eliminate the conflict between the perpetrator and the victim. Grammatically, the principle of restorative justice tends to be considered inapplicable in eradicating corruption because in corruption it is difficult to identify with certainty who the victim is and is a serious crime or by some experts considered an extraordinary crime. The settlement of cases of a serious crime with restorative justice tends to be seen as contrary to the spirit of extraordinary efforts in eradicating serious crimes. Restorative justice will be interpreted as providing benefits to perpetrators of criminal acts. Such a view will arise if restorative justice is interpreted as in the Law on Juvenile Justice System, which is to stop investigations and prosecutions. Restorative justice in corruption cannot be interpreted as such because the restorative justice approach in eradicating criminal acts of corruption actually accelerates law enforcement in corruption which contains punishment and restoration of state losses so that judicial *in absentia* can also be justified. Restorative justice is not merely to resolve criminal offenses but is trying to find ways so that similar crimes do not occur in society.

¹² Mark M. Lanier and Stuart Henry, *Essential Criminology* (2nd ed , Westview 2004).[332].

Restorative justice is a form of justice that is centered on the needs of victims, perpetrators of crime and society. In the criminal act of corruption, the parties who become victims are not only individuals, but the State and society are also victims. Braithwaite stated *restorative justice is about healing (restorative) than hurting*.¹³ The view of Braithwaite above is appropriate to justify restorative justice in corruption. Criminal convictions of corruption will be in vain without recovery of state losses, but in the case of perpetrators of corruption escape, the recovery of state losses is not enough because there is no improvement in the perpetrators. Restoration of state losses in the event that the perpetrators of criminal acts of corruption escape are carried out by force through the judiciary in absentia not on the basis of the perpetrators' awareness so that this can be used as a basis to justify the existence of imprisonment in in absentia trials in cases of criminal acts of corruption. In absentia justice in corruption is different from in absentia justice in economic crime which only focuses on the seizure of the assets of the perpetrators who died or were not known or recognized by the perpetrators. This is because in economic crimes the application of criminal sanctions is a last resort while in criminal acts of corruption, criminal sanctions are the first attempt with enthusiasm to provide a deterrent effect and recovery of state losses.

Immanuel Kant through the guarantee theory of human rights and freedoms, which states that the state aims to protect and guarantee legal order so that the rights and independence of citizens are fostered and maintained.¹⁴ Guarantees from the state must also be given in law enforcement against perpetrators of fleeing corruption. The right of perpetrators of criminal acts of corruption to defend cannot be used as a basis to override the requirement for the state to immediately make efforts to recover state losses. In absentia justice is a fair and good regulation in order to accelerate recovery of state losses because the perpetrators have tried to avoid

¹³ Eva Achjani Zulfa, *Disertasi "Keadilan Restoratif Di Indonesia (Studi Tentang Kemungkinan Penerapan Pendekatan Keadilan Restoratif Dalam Praktek Penegakan Hukum Pidana)*(Fakultas Hukum, Program Doktor Ilmu Hukum, Universitas Indonesia 2009).[51]. Quoted from Jhon Braithwaite, *Crime Shame and Reintegration* (Cambridge University Press 1990).

¹⁴ Didi Nazmi Yunas, *Konsepsi Negara Hukum* (Angkasa Raya Padang 1992).[20].

law enforcement efforts. Returning all the results of corruption and profits obtained by the defendant at the time of the examination before the court hearing, then this can be a court decision is to release the defendant from all lawsuits (*onslag van recht vervolging*).¹⁵ The main principle in eradicating corruption is that perpetrators of corruption are not justified if they benefit from actions that are detrimental to the country's finances or economy. If the criminal offender gains from a criminal offense, then criminal law has failed to function as a means of control.

Corruption as a Serious Crime

Corruption in Indonesia is still one of the causes of a systemic and widespread economic downturn that has not only harmed the country's financial condition or the country's economy but has also violated the social and economic rights of the wider community.¹⁶ Corruption aims to get instant profit where the money obtained from corruption is related to public service so that it automatically leads to corruption causing loss or neglect of public services. Public services that are hampered by corruption are a form of violation of the social and economic rights of the people who are supposed to enjoy public services. In the practice of law enforcement in corruption there is a joke, namely solving corruption cases with corruption. This statement which is considered a joke shows how severe the crime of corruption in Indonesia is because in the settlement of cases of corruption is done by violating the criminal provisions in the PTPK Law. Law enforcement in Indonesia is indeed one of the most vulnerable parts for bribery and gratuity corruption. The desire of the parties to be victorious in the case as well as to release, release or alleviate from criminal threats has been made as a commodity in criminal, administrative or criminal law enforcement. Corruption in law enforcement certainly causes losses for justice seekers and at the same time causes loss of public trust in law enforcement officials and the judiciary.

¹⁵ Didik Endro Purwoleksono, *Hukum Pidana: Untaian Pemikiran* (Airlangga University Press 2019).[191].

¹⁶ Departemen Hukum dan HAM Republik Indonesia, *Penelitian Hukum Tentang Aspek Hukum Pemberantasan Korupsi Di Indonesia* (Departemen Hukum dan HAM Republik Indonesia 2008).[1].

The existence of corruption in Indonesia is at an alarming stage. In the preamble, considering that the PTPK Law states that acts of corruption which have been widespread, have not only harmed the country's finance, but have also been a violation of the social and economic rights of the community at large, so that criminal acts of corruption need to be classified as crimes and their eradication must be carried out extraordinarily. People who are accustomed to being corrupt will find it difficult to distinguish which acts are corrupt and which are not corrupt.¹⁷ This customary habit was born because there was justification for any strings attached to law enforcement officers when exercising authority. The custom of strings attached will indirectly create a stigma for the community that to do all matters relating to the government or the judiciary or law enforcement officials must give something. Corruption mindset as development oil is dangerous thinking for a country because the statement is justification or tolerance for corrupt behavior. Tolerance to corrupt behavior is the beginning of the destruction of a State because all elements of society become accustomed to corruption as long as it does not interfere or harm another party or the State.

Susan Roce-Ackerman argues that low-income and low-growth countries are often in trouble because they are unable to use their human and natural resources effectively.¹⁸ Susan Roce-Ackerman's view is a reality that occurs in Indonesia. Indonesia has abundant natural resources but many people still suffer from poverty or other economic problems. This condition occurs because human resources do not support exploration or exploitation independently so that its management is carried out by foreigners. In addition, Indonesian human resources still tend to be apathetic towards the surrounding community so that in conducting exploration or exploitation of natural resources only thinking of economic benefits for individuals or groups only. With an objective to get as much profit as possible, Indonesian human resources tend to justify all means including bribery of the authorized

¹⁷ Arya Maheka, *Mengenal Dan Memberantas Korupsi* (Komisi Pemberantasan Korupsi Republik Indonesia 2006).[4].

¹⁸ Susan Rose-Ackerman, *Korupsi Dan Pemerintahan, Sebab, Akibat Dan Reformasi* (Pustaka Sinar Harapan 2010).[1].

officials to facilitate licensing, provide concessions in conducting business activities and conspiring with authorized parties to avoid payment to the State for exploration or exploitation of natural resources.

Governments that are not functioning properly will not be able to use external assistance effectively. Low-income countries and countries with weak growth are often in trouble because they are unable to use their human and natural resources effectively.¹⁹ Reforming government and maintaining a strong private sector is a more delicate and difficult task so it cannot be simplified into a blueprint that can be engineered.²⁰ Corruption is absolute, but it does not correctly identify the mechanisms that make corruption affect economic performance.²¹ Organized crime groups can use the profits of illegal businesses not only to guarantee the involvement of state officials but also to infiltrate legal businesses. Profits generated from illegal businesses obtained without paying taxes can be reinvested in official business and to obtain open contracts.²² The two main principles that underlie the UN Commission Against Corruption (UNCAC) are:²³

- a. corruption is a social crime that must be eradicated through a criminal justice process; and
- b. for the criminal justice process to be effective, rules must be made both domestically and internationally.

Business actors and holders of authority in the exploration or exploitation of natural resources have a common vision for personal gain. Acts of corruption is an act that is very detrimental to the country. Corruption results in slowing a country's economic growth, decreasing investment, increasing poverty, and increasing income inequality.²⁴ High growth of corruption will create an increase in

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *ibid.*

²² *ibid.*

²³ Ian McWalters, *Memerang Korupsi: Sebuah Peta Jalan Untuk Indonesia* (JPBooks2006).[19].

²⁴ Pusat Edukasi Antikorupsi, 'Kerugian Negara Akibat Korupsi Di Indonesia' (*Pusat Edukasi Antikorupsi*) <<https://aclc.kpk.go.id/materi/bahaya-dan-dampak-korupsi/infografis/kerugian-negara-akibat-korupsi-di-indonesia>>.accessed 30 Agustus 2019.

poverty because development is hampered and efforts to equalize the economy do not work as it should. Corruption is a violation of the social and economic rights of the community at large and endemic that damage the joints of the national economy and also demean the nation in international forums.²⁵

Corruption is identical to the abuse of authority or power attached to his position or position. Power contains rights and authority, rights and authority attached to power give more position when compared to the subject demanded or seek justice.²⁶ Power will have a good impact on the country's economy and benefit society if used properly. Power that is used in an orderly manner will encourage a favorable economic climate because domestic and foreign capital holders do not have concerns to invest in Indonesia. If power is used for negative purposes, power will only have a negative impact on the national economy because capitalists have concerns about carrying out investments. In addition, power will make power holders sought after by parties who need something related to the authority attached to the power. The dependence of the private sector on the holder of authority on a criminal offense is misused to gain an unlawful profit.

Corruption is an extraordinarily complex problem because it not only causes losses to the State treasury but inhibits the source of state revenue so that the country's debt increases. Increasing the country's debt economically will increasingly burden the country's economy and vulnerable to intervention from those who provide loans. Based on the results of a study conducted by the Indonesia Corruption Watch (ICW), state losses as a result of criminal acts of corruption in 2018 reached Rp9,290,000,000,000.00 (nine trillion hundred ninety billion rupiah).²⁷ Corruption of state funds amounting to Rp. 168,000,000,000,000 (one

²⁵ Badan Pembinaan Hukum Nasional, *Laporan Pelaksanaan Asas Oportunitas Dalam Hukum Acara Pidana* (BPHN 2006).[3].

²⁶ Kristian and Yopi Gunawan, *Tindak Pidana Korupsi, Kajian Terhadap Harmonisasi antara Hukum Nasional dan The United Nations Convention Against Corruption (UNCAC)* (Refika Aditama 2015).[25].

²⁷ Dylan Aprialdo Rachman, 'Kerugian Negara Akibat Korupsi Pada 2018 Capai Rp 9,29 Triliun' (Kompas 2019) <<https://nasional.kompas.com/read/2019/04/28/15294381/icw-kerugian-negara-akibat-korupsi-pada-2018-capai-rp-929-triliun?page=all>>. accessed 30 Agustus 2019.

hundred sixty eight trillion rupiah), if the corrupted money is used for construction, it can be used to build 195 new elementary school buildings with fairly complete facilities and finance the education 3,360 (three million three hundred and sixty thousand) people until they graduate.²⁸ This condition causes people to hate criminal acts of corruption because development and public services that are supposed to be enjoyed by the community are hampered.

Many national strategic projects are neglected because the parties involved in the process of budgeting, auctioning and implementing national strategic projects actually commit criminal acts of corruption to benefit from the costs of the project. The profit from the project costs is obtained by increasing the price so that it has an impact on increasing the budget. Corruption creates suffering for the people who depend on national development and government programs. Corruption triggers anger for the community and distrust of the government and law enforcement officers so that people tend to commit crimes to meet their needs. This condition will create a commotion in the community so that the defense and security of a country is vulnerable to attack or intervention by other countries with the reason to protect the rights of citizens who are neglected by government action. Political criminal acts of corruption will be used as a venue for mutual hostage of interests between one party and another. Interlocking political interests as a result of corruption will create political stability in a country. Therefore, there must be a prevention of corruption so that the stability of the State's economy, politics and security can be maintained as it should. Prevention of corruption must be done through criminal legal instruments so that there is a force and deterrent effect for people who have the intention to commit a criminal act of corruption. In addition, corruption that is harmful to the stability of the economy, politics and security of the State is a criminal act of corruption carried out in a gang. Corruption has been considered

²⁸ Pusat Edukasi Antikorupsi, 'Seandainya Uang Yang Dikorupsi Digunakan Untuk Pembangunan' (Pusat Edukasi Antikorupsi) <<https://aclc.kpk.go.id/materi/bahaya-dan-dampak-korupsi/infografis/seandainya-uang-yang-dikorupsi-digunakan-untuk-pembangunan>>.accessed 30 Agustus 2019.

as a very extraordinary crime or “extra-ordinary crime”, so it is often regarded as “beyond the law” because it involves the perpetrators of high-economic “high-level economic” crimes and bureaucracy among the “high-level beurocratic” circles, both economic and government bureaucrats. Proving corruption crimes involving power is very difficult and because it clashes with the interests of the power that involves the bureaucrats, so that corruption is considered as “beyond the law” and is an embodiment of actions that are “untouchable by the law”.²⁹

Corruption as an extraordinary crime still raises the pros and cons. The term extra ordinary crime originally emerged from gross human rights violations. This can be seen in Article 5 of the Rome Statute of 1998 which stipulates that the criteria of the most serious crimes concern to the international community are genocide, crimes against humanity, war crimes, and crimes of aggression.³⁰ Sukardi argued that extra ordinary crime is a crime that has a large and multi-dimensional impact on social, cultural, ecological, economic and political which can be seen from the consequences of an action or act found and studied by various government agencies and non-governmental, national and international institutions.³¹ Corruption is one of the crimes that have a direct or indirect impact on a country’s economy, social and politics. However, not all acts of corruption have such an impact because corruption can also be carried out by holding the lowest power of government so that the impact is not too systematic and widespread.

Corruption because it is a violation of the socio-economic rights of the community will undoubtedly damage the civil society, political system, and sovereignty of a country through the cultivation of violence and bribery, and introducing a cancer of corruption into the political structure. The high crime of corruption will cause an increasing burden on state finances so applying for foreign loans will be the main alternative in overcoming the increase in the country’s financial burden. The

²⁹ Indriyanto Seno Adji, *Korupsi Dan Penegakan Hukum* (Diadit Media 2009).[330-331].

³⁰ Sunarto, ‘Kriminalisasi Dalam Tindak Pidana Terorisme’ (2007) 12 *Jurnal Equality*. [14].

³¹ Sukardi, *Illegal Longging Dalam Perspektif Politik Hukum Pidana (Kasus Papua)* (Universitas Atmajaya Yogyakarta 2005).[34].

greater the country's debt, the country's sovereignty is increasingly threatened and vulnerable from other countries' intervention. Corruption will certainly have an economic impact because of the transfer of money from domestic to foreign countries with the aim of hiding assets originating from corruption. Corruption in the latest developments in Indonesia has made legitimate business and government the main target. The involvement of state-owned enterprises in various criminal acts of corruption is a matter of concern. A crime categorized as a transnational crime based on the UNTOC convention is the following crime committed in more than one region of the country; a criminal offense is committed in a country but the preparation, planning, direction or control of the crime is carried out in the territory of another country; a criminal offense is carried out in the territory of a country but involves an organized criminal offense that commits a crime in more than one territory of the country; and a criminal offense is committed in the territory of a country but the consequences of the crime are felt in another country. As a result, it is felt that in other countries these narcotics crimes usually produce narcotics in their own country but their distribution is directed to other countries or more precisely in the case of the production country and the destination countries for narcotics illicit trafficking are different. Corruption is indeed usually carried out in a country, but for corruption in the form of bribery can be done anywhere such as a bribery case to one of the main directors of a state-owned enterprise which is currently still under investigation by the KPK. UNTOC has firmly stated that the criminal act of corruption is one of the crimes stipulated in this convention so that the criminal act of corruption as a serious and transnational crime is indisputable.

Corruption is one type of crime that does not pay attention to the existence of the victim and the place where the crime was committed because in fact corruption also occurs for religious matters. Corruption is a crime committed by a civil servant and the crime is related to his position so that the crime of corruption meets the criteria as a serious crime. Corruption has resulted in many direct and indirect victims, namely the state and society which are hampered from enjoying national development and public services. The victim is one of the important aspects that

must be considered in the development of criminal law, especially in the criminal justice system because the victim is the party who suffers the most. Economic losses and disruption of rights are a form of loss experienced by the community for the occurrence of criminal acts of corruption. Corruption in certain circumstances can even lead to the loss of property rights of a person because the judge in issuing a decision is not based on what really is but because of the promise or gift. Corruption is an extraordinary crime where corruption is a part of transnational crime, serious crime, white collar crime. Corruption is a violation of the rights of the community and has the potential to cause interference with the country's sovereignty because it is carried out by people who have special abilities or expertise.

Conclusion

Corruption has a tremendous impact on society because corruption causes people to distrust the government, law enforcement officials in court as the last bastion to ensure the fulfillment of justice for the community. The general philosophy of examining in absentia in the resolution of cases of corruption is that the perpetrators of criminal acts of corruption are not justified if they benefit from actions that are detrimental to the country's finances or economy. In essence the in absentia examination is an effort to eradicate corruption in a serious or extraordinary manner in the context of recovering financial losses and the country's economy.

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