

Proceeding
Andalas International Conference
2014

**Eradicating Corruption :
An Inter-Disciplinary Perspective**

Editor :

**Prof. Dr. Henk Addink
Prof. Dr. Saldi Isra, SH. MPA.
Prof. Dr. Tenneke Lambooy,
Aikaterini Argyrou, PhD
Dr. Shinta Agustina, SH. MH.
Dr. Zainul Daulay, SH. MH
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Eradicating Corruption : An Inter-Disciplinary Perspective



Andalas University
Faculty of Law



Universiteit Utrecht
Faculty of Law, Economic and Governance

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PREFACE

Since Indonesia's struggle to defeat corruption as one of the great enemies of the Indonesian nation is still far from expectation, there should be more sources and parties take part in this 'Holly War'. Recognizing that the eradication of corruption is not an easy task, Faculty of Law, Andalas University feels that it is necessary to actively participate in this effort by holding an **International Conference : Eradicating Corruption : an Inter-diciplinary Perspectives**. The chief goal of this confefence is to find more ways and solutions in supporting the government to eradicate corruption in Indonesia.

In collaboration with the Faculty of Law, Economics, and Governance, Utrecht University, the Netherlands the International Conference we have succesfully held the conference on 5-6 June 2014. The Conference was preceded by the launcing a joint-publication between the two institutions. The book is entitled: "Eradicating Corruption in Indonesia: Inter-Disciplinary Approaches".

This conference has presented more than 50 warking papers, not only from academics from various diciplines but also from practitioners, especially law enforcement agencies. The topic discussed in the conference covers wide-range perspectives and diciplines related to corruption. The participants have also come from both inside and outside of Indonesia, and from various backgrounds, not only academics, but also practisioners, observes and activists on corruption.

With the success of this conference we owe very much to many parties that have been kindly and actively supported this conference, especial to our co-organizer, **Faculty of Law, Economics and Governance, Utrecht University**, the Netherland, that has spent a lot of time and anergy in preparing and conducting this conference. We also owe very much to **The Commission on Corruption Eradication of Indonesia (KPK)** that has kindly provided a great financial contribution that enabled this conference. We also owe much to **The Department of Law and Human Rights of Indonesia**, that has provided and finaced some international invited speaker, from Australia and United State of America to participate in the conference. We should also thak much to two international institutions, **The United Nation Office on Drug and Crime (UNODC), Jakarta, and Transparancy International Indonesia (TII)** that has not only provided financial constribution but has also sent expert to participate as panelist in the conference. At last, we thank very much to parties that has sent their Call Paper, to be presented and discussed in the seminar and to the non-call paper participans that has participated in the seminar.

As the final stage of this conference we gladly present the publication of the proceedings of all of the papers that have been sent and presented in this conference. We really hope that the publication of this proceeding would give contribution to many parties that partcipite in endeavor to eradicate corruption, especiallay in Indonesia.

The Committe of Andalas International Conference

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Term of Reference (ToR)

Andalas International Conference

"Eradicating Corruption: An Inter-Disciplinary Perspective"

Mercure Hotel Padang, Indonesia, 5 - 6 June 2014

A. Background

Indonesia's struggle to defeat corruption is one of the great enemies of the Indonesian nation. It is still one of the main problems. Previous corruption still haunt the nation of Indonesia is reflected in various forms about the corruption. It's still dominates the mass media. Another indication that shows the failure of the Indonesian fighting against corruption is the Corruption Perception Index (CPI) index of Indonesia, which has not shown significant improvement since the commencement of the reform. The movement from the Corruption Perception Index released by Transparency International annually Indonesia was in position 114 out of 177 countries in 2013 with the score of 3.2. The position shows an increase from the previous year position 118 out of 177 countries in 2012. However, Indonesia's involvement in terms of the score, which is categorized as a country with a very high level of corruption. Compared to the previous year and the position of the numbers achieved by the Indonesian cases, it is still far from the efforts and expectations.

It can be seen that corruption does not only harm the nation's economic growth but also the political and administrative stability. The corruption of the 2002 and 2009 Indonesian general election has led to the increasing interest of international community with this issue. The Commission requires cooperation among state parties to seek and find a proper mechanism or arrangement in preventing and combating corruption. Indonesia has attempted hard to develop the new mechanisms to deal with the corruption, but the issue grows faster than the legislative and institutional developments.

Recognizing that the eradication of corruption is not an easy task, Faculty of Law Andalas University has necessary to assist the Government's effort by identifying the hurdles and offering the

SPEAKER

Key-Note Speakers

- Dr. Bambang Widjojanto, SH, LLM., Indonesia Corruption Eradication Commission
- Prof. Dr. Henk Addink, Dean Faculty of Law, Economic and Governance, Utrecht University
- Prof. Denny Indrayana, SH., LLM, Ph.D. Vice Minister of Law and Human Right of Indonesia

Guest-Speaker

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- Prof. Dr. Saldi Isra, SH.MH. Andalas University
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- Terry Kinney, PhD. Department of Justice of the United States of America
- Mark McCormack, PhD. Acting Director International Crime Cooperation Division, Attorney General Department of Australia,
- Aikaterini Argyrou, PhD. Faculty of Law, Economic and Governance, Utrecht University

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ORGANIZATIONAL CORRUPTION

By: Nani Mulyati and Aria Zurnetti

INTRODUCTION

Corruption has existed since ancient times; it is a persistent feature of human societies, with the earliest references dating back to the fourth century B.C.¹ There is unanimous agreement that corruption is wrongful and cannot be tolerated in civilized society.² Corruption has indeed been argued to have a number of negative effects on economic development, health, education, social, and other factors which might constitute the public interest.³ Because of that, corruptions have been a major concern of multidisciplinary field, including psychology, sociology, economics, law, and political science.

There is no one single meaning of corruption up to now, while generally corruption used to imply a wide variety of morally dishonorable acts and a set of actions of a distinctly material character;⁴ Indonesia tends to embrace the meaning of corruption as act of any person who unlawfully, seek to enrich themselves, benefitting himself or someone else or a corporation that harm the state finances.⁵ It appears that Indonesia narrowly defined the meaning of corruption to the loss of the state finances or in other words, the use of public authority for private gain or official malfeasance.⁶ Thus, this paper also limits its discussion within the framework of that definition.

This paper aims to conceptualize and define a phenomenon of corruption in an organization standpoint; why in many cases the attempt to control one form of corruption may unwittingly lead to the creation of the other. This paper also tries to seek the best method to handle and prevent this type of corruption. Ashforth and Anand have urged investigation into the differences between corruption on behalf of the organization and corruption against the organization.⁷ Therefore this paper follow what Ashforth and Anand have investigated and divides corruption in an organization into two categories, first an *organization of corrupt individuals*, which is essentially a form of personally beneficial corrupt behaviors to the organization; and secondly is organization-level corruption, which is typically labeled as *corrupt organization*, in which a group of employees carries out corrupt behaviors on behalf of the organization.⁸ However, this paper will discuss more about the second categories, how the development is and how to cope with this organization-level corruption.

In order to distinguish and classify the organization of corrupt individuals and corrupt organization there are two theories around the most common and fundamental dimensions in the literature, first to determine whether the individual or the organization is the beneficiary of the corrupt activity and secondly whether the corrupt behavior is undertaken by an individual actor or by two or more actors. As Finney and Lesieur asserted that, one of the basic dimensions around

Jonathan Pinto, Carri R. Leana, Frits K. Pil, Corrupt Organizations or Organizations of Corrupt Individuals? Two Types of Organization-Level Corruption, *Academy of Management Review* 2008, Vol. 33, No. 3, 685-709, p. 685.

Peter J. Henning, Public Corruption: A Comparative Analysis Of International Corruption Conventions And United States Law, *Arizona Journal Of International And Comparative Law*, Vol. 18, No. 3, 2001, p. 794.

Luigi P. Mauro, P., Corruption and growth. *The Quarterly Journal of Economics*, 110(3), 1995, 681-712. see also Holmberg, S., Rothstein, J., & Nasiritousi, N., Quality of government: What you get, *Annual Review of Political Science*, 12, 2009, 135-161.

Thomas S. Sikkink, In Murky Waters: a Disentangling of Corruption and Related Concepts, *Crime, Law and Social Change* 60, 2003, 357-374, p. 357.

Indonesia, Law No. 31/1999 Regarding the Eradication of Corruption, article 2.

This narrowed definition also embraces by many other countries like China, India see Andrew Wedeman, The Intensification of Corruption in China, *The China Quarterly*, No. 180 (Dec., 2004), pp. 895-921, 895. Besides, some scholar also adopt this meaning of corruption. Professor Gronbeck, gave a straightforward definition, that "the term 'political corruption' encompasses those acts whereby private gain is made at public expense see Peter J. Henning, above n. 2. p. 802.

Michael E. Ashforth And Vikas Anand, The Normalization Of Corruption In Organizations, *Research In Organizational Behavior*, 25, 2003, 1-52, p. 1. And Jennifer Bussell, 'Varieties of Corruption: The Organization of Rent-Sharing in India', *University of California working paper*, 2013.

This categorization adopted by Pinto, Leana, and Pil, see Jonathan Pinto, Carri R. Leana, Frits K. Pil, above n. 1.

which scholars have sought to distinguish different forms of corruption is whether the offender acts strictly for private benefit or whether the beneficiary includes the organization itself.⁹

The beneficiary of corruption is the actors who get direct and primary benefit from the action. If the agent of the organization do deviance or unethical behavior in his authority given in the organization, and from that act he gets personal benefit, then, we can categorize this as corruption in an organization. Some scholar might identify the difference between cases of fraud, theft and embezzlement, where an officer steals from the state, and cases of corruption where the exercise of power is degraded. Where they suggest corruption is marked by three conditions that are they involve high public office; the expropriation of benefits tends to be substantial and systematic; and, there is a correspondingly significant degree of damage to the public interest.¹⁰ However, from my standpoint deviant behaviors that harm the state financial either it is just a small amount of material would be considered as corruption, those that involve clear financial benefit like stealing, embezzling, accepting bribes, and over-reporting hours or expenses.

Further, regarding the beneficiary of the corruption, we would like to scrutinize the second type of corruption that the beneficiary is the organization itself. As Ashforth and Anand state that an organization may impose processes and structures to inhibit corruption against it, but the same organization may not discourage corruption on its behalf.¹¹ Corruption for the benefit of the organization has been conceptualized as illegal corporate behavior or corporate crime.¹² One important thread from this categorization is that they are carried out by organization members, but the actions directly benefit the organization and/or its owners or shareholders.¹³

Secondly, in order to distinguish collective corruption within organization and corrupt organization, we will observe whether there collusion among organizational members. In collective corruption,¹⁴ many scholars argue that there is no or at least not always there consent among officers to perform the corruption act.¹⁵ While, in *corporate crime* and *organizational crime*, collusion among members is necessary, whether conducted by its top management or a subgroup of organizational members.¹⁶ Baker and Faulkner define organizational crime as a "type of white-collar crime, that is enacted by collectivities or aggregates of discrete individuals in the context of complex relationships and expectations among boards of directors, executives, and managers, and among parent corporations, corporate divisions, and subsidiaries".¹⁷ Therefore, we can conclude that collusion among organizational members is an essential component of corporate corruption but not essential to corruption for individual gain.

⁹Finney, H. C., & Lesieur, H. R., A contingency theory of organizational crime. *Research in the Sociology of Organizations*, 1, 1982. 255-299.

¹⁰Mark Philp, 'Corruption Definition and Measurement' in Arthur Shacklock, Charles Sampford and Carmel Connors (eds), *Measuring Corruption*, Ashgate, 2006, p. 46.

¹¹Blake E. Ashforth And Vikas Anand, above n. 7.

¹²Clinard, M. B., & Yeager, P. C. 1980. *Corporate crime*. New York: Macmillan

¹³Jonathan Pinto, Carri R. Leana, Frits K. Pil, above n. 1, p. 687.

¹⁴The phenomenon of collective corruption is examined by Brief, Buttram, and Dukerich, 'Collective Corruption in the Corporate World: Toward a process model' In Turner, Marlene E. (Ed), (2001). *Groups at work: Theory and research*. Applied social research. (pp. 471-499). Mahwah, NJ, US: Lawrence Erlbaum Associates Publishers, xiv, 552 as being cited from Blake E. Ashforth And Vikas Anand, The Normalization Of Corruption In Organizations, *Research In Organizational Behavior*, Vol. 25, 2003, 1-52. Some other scholars utilize the terminology of collegial corruptions instead of collective corruptions; see Roy Porter, 'Plutus or Hygeia? Thomas Beddoes and the Crisis of Medical Ethics in Britain at the Turn of the Nineteenth Century, *The Codification of Medical Morality*, Volume 45, 1993, pp 73-91, see Nur Syam, Indonesia in the Middle of the Slump: Cutting the Corruption Tradition. (UIN Sunan Ampel, 2007) can be accessed at <<http://eprints.uinsby.ac.id/44/1/INDONESIA%20DI%20TENGGAH%20PROBLEM%20KETERPURUKAN.pdf>>

¹⁵Daniel J. Brass, Kenneth D. Butterfield and Bruce C. Skaggs, 'Relationships and Unethical Behavior: A Social Network Perspective,' *The Academy of Management Review* Vol. 23, No. 1 (Jan., 1998), pp. 14-31.

¹⁶Jonathan Pinto, Carri R. Leana, Frits K. Pil, above n. 1, p. 687.

¹⁷Baker, W., & Faulkner, R. 1993. The social organization of conspiracy. *American Sociological Review*, 58: 837-860.

II. ORGANIZATION OF CORRUPT INDIVIDUALS

What we consider as organization of corrupt individual is when corruption is like an endemic in that organization. For example, in police departments the corruption undertaken by individual officers who personally has corrupt behavior and that behavior can become so prevalent that the department itself can be considered corrupt.¹⁸ In this situation, those individuals are the primary beneficiary of that act, and typically at the cost of the organization or using his power or authority in the organization.¹⁹

Many corruption cases in Indonesia involve the role of two or more individuals in the organization, for example the latest case is corruption that happens in the University of Jendral Sudirman that is in trial. The rector of the university, the rector assistant, head of technical printing division, has been named as suspect in this case; even there will be more university officials will be named as suspects.²⁰ Other cases that engage many members of the organization are corruption committed by Parliament in West Papua in 2014 and West Sumatera in 2004. Both cases have been decided by judges and proved that the parliament members have been doing corruption collectively, almost the whole member of the organization involve in the action, what a shame.²¹

In the theory of social interaction, the unethical decision making and behavior such as corruptive behaviors are more a function of bad apples, where one can attribute organizational unethical behavior to the personal characteristic of individuals.²² Due to uncontrolled spread of the bad apples appear in an organization, it becomes suitable to examine the role of the organization to facilitate or encourage, or sustain such behavior; failing to prevent (if not facilitating) the "rot" from spreading from the few bad apples to the rest of the bushel or triggering unethical behavior in many of its otherwise moral members.²³

Hence, Organization of corrupt behavior is an organization-level phenomenon because the behaviors are sufficiently widespread to characterize the organization as a whole and internal intermediate level processes in the organization are responsible if not for facilitating then at least fail to inhibit the spread of these behaviors.²⁴

There are three criteria that can be used to determine that an organization is the corruption endemic. First, it is difficult to localize the corrupt portions of the organization because these behaviors are usually covert and widespread. Second, even if the corrupt portions are identified, the number of individuals involved is so large as to make firing them en masse difficult. Third, even if the individuals involved are fired, the organization will probably still be corruption endemic because the internal processes or mechanisms responsible for making these behaviors.²⁵

Corruption becomes normalized, that is, become embedded in organizational structures and processes, internalized by organizational members as permissible and even desirable behavior, and passed on to successive generations of members through three mutually reinforcing processes: (1) institutionalization, where an initial corrupt decision or act becomes embedded in structures and processes and thereby routinized; (2) rationalization, where self-serving ideologies develop

¹⁸Several corruption scandals involving the police, auditors, or law enforcement officials, in general, have surfaced in many countries. See Juin-jen Changa, Ching-chong Laib,c, C.C. Yangd, Casual police corruption and the economics of crime: Further results, *International Review of Law and Economics* 20 (2000) 35-51.

¹⁹Jonathan Pinto, Carri R. Leana, Frits K. Pil, above n. 1, p. 688.

²⁰Aris Adrianto, 'Attorney Calls Key Witness in Unsoed Corruption Case' (Tempo, 24 January 2014) <http://www.tempo.co/read/news/2014/01/24/063548104/Kejaksaan-Panggil-Saksi-Kunci-Kasus-Korupsi-Unsoed> accessed 19 May 2014.

²¹IS, 'Corruption Collectively, 44 Parliament Members of West Papua Sentenced Guilty' *Gatra News* (Jakarta, 14 February 2014) <<http://www.gatra.com/hukum-1/47262-korupsi-berjamaah-44-anggota-dprd-papua-barat-dihukum.html>> accessed 19 May 2014. And Saldi Isra, 'Diskriminasi Pemberantasan Korupsi' Kompas (Jakarta, 24 August 2004). Saldi IsraSaldi Isra

²²The theory of bad apples is adapted by many scholars in the deployment of bad behavior because of social interaction. This theory embrace the principle of a box of apple, if there is one rotten apple in the box, it may damage the other apples so it can be easily decay especially the one that is the closest to the rotten apple. See Daniel J. Brass, Kenneth D. Butterfield and Bruce C. Skaggs, above n. 15, p. 14.

²³Jonathan Pinto, Carri R. Leana, Frits K. Pil, above n. 1, p. 688.

²⁴Id p. 688.

²⁵Id p. 689.

to justify and perhaps even valorize corruption; and (3) socialization, where naive newcomers are induced to view corruption as permissible if not desirable.²⁶

The process of institutionalization might happen if an action is committed, and is not criticized, punished, or otherwise labeled as wrong, it becomes "the standard." It may not be criticized, even though many in the organization think that it is wrong, because their insecurity or their lower position in the organizational hierarchy makes them unwilling to say publicly what they really believe, which is that it is wrong. Hence, what is called "pluralistic ignorance." Will appear regarding that bad behavior. It is now the standard for what is allowable in this organizational context.²⁷

Rationalization is the process where the members of the organization try to find plausible reasons to accept the corruptive behavior. Social comparison theory indicates that when actors are experiencing a threat, downward comparisons with others who appear even worse serve to bolster the actor against the threat; because corruption creates at least a tacit threat to the group's moral identity, the group is motivated to find examples of others who are even more corrupt and thereby demonstrate that "we're not so bad."²⁸ Moreover, for reasons of loyalty to the group, loyalty to the person who made the bad decision, and a feeling that the commitment to the course of action is irrevocable, that others in the group will allow or abet the continuation of the actions.²⁹ In this case they value loyalty to colleagues above loyalty to the justice system. Additionally, process of rationalization being wrapped up with the malleability of symbolism in general and of language in particular. For instance, groups may use labels (e.g. facilitating payment instead of bribery).³⁰

The process of socialization involves intimate personal groups regarding propagation of corruption values, motives, beliefs, behaviors, on how to do it. As in the beginning of the working period, newcomers learn about values, norms, skills, and how to fulfill their roles and function effectively within the group context.³¹ Senior in the office will create situation where newcomers are influenced to accept the corrupt behavior and support them for displaying corrupt behavior. Moreover, if the newcomers are displaying hesitancy of the corrupt behavior, they will be discouraged and possibly punished. Newcomers at first are induced to engage in small acts that seem relatively harmless, visible, explicit and irrevocable.³²

The example of this situation is like this: "The senior police partner stops at a bar, comes out with some packages of cigarettes. He does this several times. He explains that this is part of the job, getting cigarettes free from proprietors to re-sell and that as a part of the rookie's training it is his turn to "make the butts." So he goes into a Skid Row bar and stands uncomfortably at the end waiting for the bartender to acknowledge his presence and disdainfully toss him two packages of butts. The feeling of pride slips away, and a hint of shame takes hold. But he tells himself this is unusual, that he will say nothing that will upset his probation standing. In six months, after he gets his commission, he will be the upright officer he meant to be . . . One thing leads to another for the rookies. After six months they have become conditioned to accept free meals, a few packages of cigarettes, turkeys at Thanksgiving and liquor at Christmas from the respectable people in their district . . . So the rookies say to themselves that this is okay, that all the men accept these things, that it is a far cry from stealing and they still can be good policemen."³³

²⁶Blake E. Ashforth And Vikas Anand, above n. 7, p. 1.

²⁷John M. Darley, The Cognitive And Social Psychology Of Contagious Organizational Corruption, *Brooklyn Law Review*, Vol. 70-4, p. 1186.

²⁸Blake E. Ashforth And Vikas Anand, above n. 7, p. 21.

²⁹John M. Darley, above n. 27, p. 1190.

³⁰Blake E. Ashforth And Vikas Anand, above n. 7, p. 22.

³¹Sutherland, E. H. (1949). *White collar crime*. New York: Dryden Press.

³²Blake E. Ashforth And Vikas Anand, above n. 7, p. 29.

³³Stern, M. (1962). What makes a policeman go wrong? An ex-member of the force traces the steps on way from law enforcement to violating. *Journal of Criminal Law, Criminology and Police Science*, 53, 97-101.

III. CORRUPT ORGANIZATION

The phenomena of Corrupt Organization is usually a top-down trend in which a group of organization members, typically, the organizational elites, or top management team, undertake, directly or through their subordinates, group and coordinated corrupt actions that mainly to benefit the organization. This can be said as an organization-level phenomenon since the organization is not only the primary beneficiary but also the primary entity culpable, even if the officers responsible are individually culpable as well.³⁴

In Corrupt Organization phenomena, or typically being categorized as *corporate crime* or *illegal corrupt behavior*, usually involve a group rather than an individual actor. This approach appears to be driven at least partly by practical considerations. When organizations are being investigated for corruption, the first defense of senior management is often to deny knowledge of, let alone responsibility for, the behavior in question. Senior management often attempts to scapegoat the individual members who have been found to be directly involved in the corrupt behavior. Indeed, according to Ashforth and Anand, organizational structures and processes are often contrived to insulate senior managers from blame.³⁵ It is the combination of persons and situations that is most likely to result in organization-level corruption.³⁶

In Indonesia at the moment, corrupt organization phenomenon can be seen clearly in many corruption cases. However, General Attorney or Corruption Eradication Commission (KPK) who authorized to prosecute the predators of corruption, seems still reluctant to accuse organization criminally responsible for corruption. For example corporate criminals in the forestry sector involving former governor of Riau, Rusli Zainal, which is currently in the process of appeal in High Court, or corporate corruption case in the banking sector, like Century Case, or in the case of some political parties which get high publicity in 2013. All of this case showed a very strong indication that the organization is the one who should serve as the perpetrator of the corruption.

Regarding what kind of organization that can be served as criminal legal subject, drafted Penal Code and some existed regulations use "corporation" term to accommodate the legal definition of organization. These laws explain corporation as "organized group of persons and/or property, either has legal entity or no legal entity."³⁷ This definition gives broader meaning of corporation as it is understood in civil law, because in civil law, corporation is legal entity that has legal personality.³⁸ In this meaning corporation of course not only include profit oriented company, but goes farther than that, it will include states, governmental bodies, political party, unions, non-profit organizations, non-economic orientation public authorities, all types of organizations.

To accommodate this broad meaning, the terminology of corporation is not really appropriate because this term has a philosophical meaning towards profit oriented organization, it would be unsuitable when the term is used to organization like political party, or government bodies. For example, Canada as latest which revised its Penal Code in 2004 using the terminology of organization to refer to non-human legal subject which is described in the interpretation subsection, "*everyone, person, and owner, and similar expressions, include Her Majesty³⁹ and an organization*"; where in the same subtitle define organization as "*(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or (b) an association of persons that (i) is created for common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons.*"⁴⁰

³⁴Jonathan Pinto, Carri R. Leana, Frits K. Pil, above n. 1, p. 690.

³⁵Ashforth and Anand, above n. 7.

³⁶Jonathan Pinto, Carri R. Leana, Frits K. Pil, above n. 7, p. 689.

³⁷Indonesian Ministry of Law and Human Rights, The Draft of National Penal Code, 2012, Article 47 see also Indonesia, Law No. 31/ 1999 on the Eradication of Corruption art 1.

³⁸Sjahdeini, Sutan Remy. *Corporate Criminal Liability*. 2nd ed. Jakarta: Grafiti Pers, 2007.

³⁹In Common Law tradition like United Kingdom, Australia, Canada etc, *Crown* has *Legal personality*, but according to Common Law it is immune from prosecution. The immunity of Crown could also benefit Crown Bodies (such as department or government agency), see Mark Pieth and Radha Ivory, "Emergence and Convergence: Corporate Criminal Liability Principles in Overview", in *Corporate Criminal Liability: Emergence, Convergence and Risk*, Mark Pieth and Radha Ivory (editor), (London: Springer, 2011), p. 15.

⁴⁰Canada, Canadian Criminal Code, s. 2,22.1, 22.2. can be accessed at <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-1.html#h-2>

Besides, does Indonesia really intend to include all organizations as criminal legal person? As in some country, primarily with civil law traditions, they excluded some entities like France in their Penal Code Article 121-2 declares that: "Moral persons (*Les personnes morales*), with the exception of the State, are criminally liable for the offenses committed on their account by their organs or representatives . . . in the cases provided for by statute or regulations."⁴¹ French excludes State as moral person who could be criminally liable and impose special restrictions on local authorities in term of the possibility they would be charged. Italy put more restriction, where it excludes organization that run significant role of the Constitution, such as political party, unions, and public authority with non-economic orientation. In addition, Hungary and Belgium exempt entity without economic orientation,⁴² so only profit oriented organization are considered to be criminally liable before the criminal court. Hence, it is very important for Indonesia to rethink again, whether the term is appropriate, and about the scope of the definition of corporation.

Furthermore, In Indonesia currently regarding law enforcement in corruption matter, seems to put too much attention on public corruption, while in fact, corruption occurs in the realm of public corruption is not an autonomous system that stands alone, it certainly involves the private sector i.e. the corporation. It needs two to tango. The relationship between the corrupt organization and public officials are mutually beneficial relationship. As private organizations or firms who want favorable treatment may be willing to pay to obtain it, they willingly made illegal payments to public agents with the goal of obtaining a benefit or avoiding a cost.⁴³

Some example of corruption cases that involve corporation and the bureaucratic are Katy Industries, a U.S. company, obtained an oil production sharing contract in Indonesia by making payments to high level Indonesian government official. The company has been convicted of violating various provisions of the securities laws, including the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA) and Monsanto case where Monsanto bribed Indonesian Ministry of Environment officials to ease environment regulatory requirements on its genetically modified agricultural products and the false certification of the bribe as "consultant fee" in the company's book and record.⁴⁴ Another example is Baker Hughes Inc, in 2007. Baker Hughes Inc, a supplier of oil field equipment, signed agreements with the Department of Justice (DOJ) and the Securities Exchange Commission (SEC)⁴⁵ in which the company admitted to paying over \$4 million in bribes to officials of a state-owned oil company in Kazakhstan. As part of the agreements, Baker Hughes was required to pay over \$44 million in fines and penalties— the largest monetary sum to date with respect to FCPA violations. These three companies have been convicted for violation of FCPA. The FCPA enacted by the American Congress in 1977 to address the problem of transnational bribery of public officials by American corporations seeking overseas business, provided the framework for the Organization for Economic Co-operation and Development (OECD) Convention against Bribery of Foreign Public Officials in International Business Transaction 1997. Since then, United States has shown serious efforts to enforce the United States' anti-bribery laws against corporations⁴⁶

In Indonesia, so far, there is only one judgment that criminally punish organization for corruption, the verdict of High Court of Banjarmasin No. 04/PID.SUS/2011/PT.BJM, which accepted the verdict of District Court of Banjarmasin dated 9 of June 2011 and impose criminal sanction of fine with the

⁴¹France, Penal Code, 1995, Art. 121-2, can be accessed in English at <http://www.legifrance.gouv.fr>

⁴²Pieth, and Ivory, "Emergence and Convergence: Corporate Criminal Liability Principles in Overview", in *Corporate Criminal Liability: Emergence, Convergence and Risk*, Mark Pieth and Radha Ivory (editor), (London: Springer, 2011), p. 17.

⁴³Peter J. Henning, above n. 2, p. 802.

⁴⁴Press Release, U.S. Dep't of Justice, Monsanto Company Charged with Bribing Indonesian Government Official: Prosecution Deferred for Three Years (Jan. 6, 2005), available at http://www.usdoj.gov/opa/pr/2005/January/05_crm_008.htm.

⁴⁵Securities Exchange Commission has the same function as BapepamLK (Badan Pengawas Pasar Modal & Lembaga Keuangan/ Capital Market Supervisory Agency and Financial Institution) in Indonesia.

⁴⁶Peter J. Henning, above n. 2, p. 797. See also Barbara Crutchfield George et al., 'On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption,' 32 *Vanderbilt Journal of Transnational Law*, 1, 18 (1999)

amount of Rp1,3 billion and additional sanction of the temporary closure of the organization for six months. In this case, PT Giri is guilty of misuse of Pasar Sentra Antasari Banjarmasin in 2010.⁴⁷

Besides this case, actually there are other cases that also convicted a corporation guilty of corruption and obliged to pay compensation that are PT. Indosat Mega Media (IM2), PT. Green Planet Indonesia (GPI) and PT. Sumigita Jaya (SGJ) but these three cases being ruled by Appeal Court. In the case of PT. IM2 District Court of Central Jakarta in Judgment No. 01/Pid.Sus/Tpk/2013/PN.Jkt.Pst declares PT. IM2 guilty of corruption and being charged to pay Rp 1,3 trillion. However the Appeal Court ruled that decision by the reason that corporation is an independent legal subject that cannot be penalized without being convicted independently and initially. In this case, the District Attorney did not convict PT. IM2, but then the judges sanction the corporation with monetary fine as additional punishment in the judgment of the executive of PT. IM2.⁴⁸ While PT. GPI and SGJ, both are involved in the case of bioremediation in PT. Chevron Pacific Indonesia and each are ordered by judges in the District Court of Central Jakarta to pay compensation US\$ 3,089 for PT. GPI and US\$ 6,9 million; But then this decision being ruled by Court of Appeal.⁴⁹

Countries have differed approach in the way organization involved in Corruption. For example in bribery case in America in the case of Monsanto, it entered a Deferred Prosecution Agreement for three years.⁵⁰ Under a Deferred Prosecution agreement, the prosecutor files an indictment against the corporation but agrees to defer prosecuting the charges if the corporation agrees to certain undertakings, such as admission of wrongdoing and rehabilitation through the implementation of a compliance program. If, at the end of the term of the agreement, the prosecutor determines that the company has not breached the agreement, the prosecutor will dismiss the indictment. This agreement very similar with Non-prosecution agreements, but the main difference is that in Non-prosecution agreements an indictment is not actually filed.⁵¹

As in the case of Monsanto, the company agrees to accept responsibility for the conduct of its employees in paying the bribe and making the false books and records entries, adopt internal compliance measures and cooperate with ongoing criminal and Securities Exchange Commission (SEC) civil investigations. An independent compliance expert will be chosen to audit the company's compliance program and monitor its implementation of and compliance with new internal policies and procedures. Monsanto has also agreed to pay a monetary penalty of \$1 million.⁵²

In Indonesia, the treatment given to corporation who allegedly committed crime is very different. For example in the case of Texmaco and Dipasena that are protracted with no clear completion. There is no benefit arising on how Indonesian law treat corporations involved in corruption cases.⁵³ According to Romli Atmasasmita, there is need to change the perspective in Indonesian criminal legal system on how to treat corrupt corporation. Restorative approach should begin to be applied, by treating the corporation as different criminal legal person then natural person or not to be identified with human, so there is no need to treat them in the same way.⁵⁴ It is crucial to save innocent shareholders and workers and the community from the collateral consequences of a conviction.

⁴⁷Putusan Pengadilan Tinggi Banjarmasin No. 04/PID.SUS/2011/PTBJM, Hlm. 150.

⁴⁸Dwi Andi Susanto, 'PT. Indosat Mega Media (IM2) is Free from the Cost of Replacing Damages', *Merdeka*, (Jakarta, Selasa, 7 Januari 2014) < <http://www.merdeka.com/teknologi/pt-indosat-mega-media-im2-bebas-dari-hukuman-uang-pengganti.html>>, accessed 28 April 2014.

⁴⁹Handoyo Prasetyo, 'Corporate's Board of Director, From Civil Responsibility to Criminal Liability', *Hukum Online* (Jakarta, March 19, 2014) < <http://www.hukumonline.com/berita/baca/lt5326a336748d5/tanggung-jawab-pengurus-korporasi-dari-perdata-ke-pidana-broleh-dr-handoyo-prasetyo-sh-mh>> and Lili Hermawan, 'Bioremediation Convicted Slumped in the Last Fortress Justice', *Indonesia Finance Today* (Jakarta, March 04, 2014) < <http://ift.co.id/posts/terpidana-bioremediasi-terpuruk-dibenteng-keadilan-terakhir>>, accessed May 19, 2014.

⁵⁰Press Release, U.S. Dep't of Justice, Above n. 44.

⁵¹Benjamin M. Greenblum, Note, 'What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements', 105 *Columbia Law Review*. 1863, 1864 (2005).

⁵²Press Release, U.S. Department of Justice, above n. 44

⁵³Romli Atmasasmita, 'Corporation as Criminal Legal Subject', *Koran Sindo* (Jakarta, January 31, 2014) < <http://m.koran-sindo.com/node/363220>> accessed May 19, 2014.

Being a corporate criminal carries the heavy weight of adverse publicity and the potential of being barred from doing business with federal, state and local governments. Also, individual citizens might shy away from doing business with convicted companies. Therefore, it is a suitable option to enable deferred prosecution agreement to cope with corrupt corporation. Corporations faced with serious wrongdoing by corporate executives must promptly accept full responsibility, discipline wrongdoers, institute serious institutional reform and fully cooperate with the government. If they do, they may escape institutional indictment. If they do not, they face the risk of indictment, conviction, and corporate death.

In addition, even though corporation is treated equally as natural person, but in carrying out its activities corporations have different characteristic with human. Legal relationship did by corporation with other party rise rights and duties that are more complicated than those rises between natural person.⁵⁵ This can lead to errors in the way law treats corporation. For example, to determine which party that should criminally liable in the case of corrupt organization. Whether the executive alone, the corporation alone or both of them. In making contract business typically directors will always act on behalf of the corporation. Therefore, there must be clear limitation regarding condition about when the directors or the corporation or both of them who bear the criminal responsibility.

Regarding situation when the directors have done fiduciary duty and making business judgment in the best way, but then in the end of the day there is risk that harms the interest of other party, then according to civil law the corporation has to indemnify that lost.⁵⁶ But then, will this principle change if that other party is government or state's financial that being harm, whether will rise criminal liability on behalf of directors or corporation i.e corruption? According to Handoyo Prasetyo, the directors or corporation are not automatically guilty of corruption, because must be proven the existence of criminal offences elements: actus reus or criminal act and guilty mind on behalf of the directors or corporation. Therefore, in handling case like this, there must clear mechanism and with prudence. So it does not cause disparities in treatment and punishment that ultimately lead to injustice, uncertainty and lack of legal benefit for corporation.

It is important to recognize that corruption is not different from other organization misconduct like fraud, discrimination, or violations of environmental regulations. In all cases, wrongdoing is not simply a matter of corporations being "rational profit maximizers" where corporation construct decisions based on a cost-benefit calculation. Cost-benefit calculation in this context is that the decision is made after counting the amount of benefits to be gained by breaking the rules compared with the severity of potential penalties, discounted by the probability of being caught.⁵⁷ Alternately, transgression can become rooted in organization's regulations, traditions, and perceptions. They might not realize that they do crime, in their opinion what they do is just business.

Therefore, any approach that tries to fight corruption need to find ways to develop the ethical culture of corporations engaged in corruption; reform undertakings are an essential matter in this effort.⁵⁸ The purpose of reform undertakings is to encourage corporations to improve their cultures and to develop a better understanding of how those improvements are accomplished in order to develop best practices to be used throughout the industry.

IV. ORGANIZATIONAL REFORM TO COMBAT CORRUPT ORGANIZATION

Solving the problem of corruption needs to employ variety of approaches that address different causes of the problem. These approaches must able to reduce the demand for corruption (which comes from public officials) and limit the supply (which comes from corporations paying the

⁵⁵Gunawan Widjaja, *Legal Risk for Directors, Commissioners and owners* (Forum Sahabat, 2008).

⁵⁶Handoyo Prasetyo, above n. 49.

⁵⁷Timothy F. Malloy, 'Regulation, Compliance and the Firm,' (2003) 76 *Temple Law Review*. 451, 453-455.

⁵⁸David Hess & Thomas W. Dunfee, 'Fighting Corruption: A Principled Approach; The C2 Principles (Combating Corruption)', 33 *Cornell International Law Journal*. (2000), 593, p. 317.

bribes).⁵⁹ This article however will only focus on reducing supply of corruption that comes from corporation. However, the elaboration of the approach which is used to combat corrupt organization also applicable to combat organization with corrupt individual which also can be applied to governmental bodies to do organization reform.

There are many devices offered to reduce the supply of corruption. The most obvious mechanism is by increasing consistently the enforcement of existing criminal laws. As discussed previously, enforcement has been limited. The law enforcement officers have to be more aggressive in approaching the organization as criminal legal subject if there are sufficient evidences that lead to the fact that the organization is guilty as separate legal person from the executives. Besides, there should be clearer definition of what is meant as corporation in Indonesian legal system. Since the current meaning too broad and misuse the term of corporation instead of organization, creates uncertainty and hesitation for law enforcement officers in turning out an institution as criminal offender.

Further, to encourage corporations to band together to declare themselves not to pay bribes is also important as part of corporate social responsibility. Perform principle of good corporate governance as a code of conduct as a dignify organization. They can create anti-corruption campaign, convey it to its supplier, partner, contractor etc, and commit when the transaction occurred, there will be no bribery and corruption in all kind. If it is continuously encourage, then the corruption will be diminished.⁶⁰

Moreover, according to the penal system that currently applies, organization is imposed monetary penalties and incapacitation to the executive when they are convicted of crime. Inflicting monetary penalties to organization may deter companies from engaging in open and obviously illegal conduct, but such punishments are only retributive, there is no purpose of rehabilitation as also part of principle in imposing punishment.⁶¹ And this approach is also unpredictable as tools for effecting large-scale reform of organizational culture. The second one, putting the executive in incapacitation is like removing the "bad apples" from the firm, Even if the senior executives in a public firm are removed, the perverse organizational mindset and practices may remain, for they have become ingrained in the culture of the firm. Significant organizational reform is beyond expelling the executives who pushed the firm down the road of corruption.

Therefore, adopting responsible self-regulation is very important response to the challenge of curbing corrupt practices. Broader societal pressures and the so-called license to operate may be even more important than regulatory action in encouraging corporate compliance with law.⁶² The majority of corporations tend to be law-abiding, not only because the law requires it but also because they believe that the underlying legal requirements are legitimate and that compliance carries rewards within their broader communities.⁶³ However, voluntary self-regulation is insufficient on its own. Many corporate managers in some countries believe that they need to pay bribes to remain competitive or even to conduct business at all.⁶⁴

Depending upon the extent of the corruption, there must be an extensive "top-to-bottom" reform of the affected (one might say "infected") firm's ways of doing business. In the worst case, the organization must be disbanded because it is irretrievably corrupt and beyond reform. Drexel Burnham Lambert in the financial sector, and Arthur Andersen in the accounting industry are prime examples.⁶⁵

⁵⁹Id., p. 316.

⁶⁰Ria Pratiwi, 'GCG Implementation has to Involve all Stakeholder', SWA (Jakarta, May 9, 2014) < <http://swa.co.id/corporate/Implementasi-gcg-harus-libatkan-semua-stakeholders> > accessed May 19, 2014.

⁶¹Singer and Fond, *Criminal Law* (4th ed, Aspen Publishers, 2007), p. 25.

⁶²Neil Gunningham et al., 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance', 29 *Law & Social Inquiry*, (2004), 307, pp. 329- 39

⁶³Id., 336- 37.

⁶⁴David Hess & Thomas W. Dunfee, above n. 58, 608- 09.

⁶⁵James Fanto, Organizational Liability, *Journal Of Law and Policy*, Vol. 19, No. 1, 2010, 45-54, p. 47.

Over time, the use of improper payments can become embedded in a corporation's culture and its day-to-day routines. The organizational actors treat the payment of bribes or the use of agents that the company suspects of paying bribes solely as economic issues, not as legal and ethical issues. Through the Department of Justice's use of deferred prosecution and non-prosecution agreements and the Securities and Exchange Commission's use of settlement agreements, these agencies are attempting to address these root causes of corruption in many corporations. These agreements typically require corporations to adopt more effective compliance programs and to retain independent corporate monitors to oversee the implementation process.⁶⁶

The trend of handling corporate crime with deferred prosecution agreements in America is increasing; deferred prosecution agreements have become the settlements of choice for prosecutors and corporate defense attorneys. The Emphasis is on the authenticity of cooperation that threatened corporations with a choice full cooperation or conviction, and the power to decide this is the prosecutors' discretion.⁶⁷

Nine factors that prosecutors should consider in deciding whether or not to criminally prosecute a corporation – the nature and seriousness of the offense, the pervasiveness of wrongdoing within the corporation, the corporation's history of similar conduct, collateral consequences, and the corporations willingness to cooperate.⁶⁸

V. CONCLUSION

In the standpoint of organization, we can name two kind of corruption, first an organization of corrupt individuals, which is essentially a form of personally beneficial corrupt behaviors to the organization; and secondly is organization-level corruption, which is typically labeled as corrupt organization, in which a group of employees carries out corrupt behaviors on behalf of the organization. The effort to combat corruption in these two contexts will be different; however, in general how to handle corrupt organization can be applicable for organization of corrupt individuals as well.

There are many devices offered to reduce the corruption in organization. The most obvious mechanism is by increasing consistently the enforcement of existing criminal laws. In term of substantive law, there should be clearer definition of what is meant as corporation in Indonesian legal system and set a better mechanism on what condition is corporation or the directors have criminal liability for harming states' financial.

Further, finding ways to encourage the organization to design an effective self-regulation is also a necessity. A voluntary organization principles approach is crucial to encourage organization to make promises and efforts not to pay bribes. Such initiatives are part of a larger and more general focus on social responsibility. There must be an understanding of each person within the organization to combat corruption in any form. Because the organizational actors treat the payment of bribes or the use of agents that the company suspects of paying bribes solely as economic issues, not as legal and ethical issues.

In order to ensure organizational reform, it is also significant to review penalties given to corrupt organization. Imposing monetary fine and put the executive in incapacitation is primarily retributive punishment, this has no rehabilitation purpose here; legal mechanism to ensure organizational reform should be set up formally. Another option is to enable the deferred prosecution agreement between corporations under allegation with the Department of Justice, These mechanisms are attempting to address root causes of corruption in many corporations. These agreements typically require corporations to adopt more effective compliance programs and to retain independent corporate monitors to oversee the implementation process.

⁶⁶David Hess, Cristie L. Ford, above n. 58, p. 346.

⁶⁷Corporate Criminal Reporter, *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements*, (Nat'l Press Club, Wash., D.C.), Dec. 28, 2005, available at <http://www.corporatecrimereporter.com/deferredreport.htm>

⁶⁸Id.

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