



## DISCONTINUATION OF CORRUPTION INVESTIGATION AND PROSECUTION: A COMPARISON OF INDONESIA, THE NETHERLANDS, AND HONG KONG

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### ABSTRACT

The discontinuation of the investigation and prosecution of corruption crimes is one of the important substances of the amendment to Law No. 19 of 2019 concerning the Corruption Eradication Commission which then led to debates both among academicians and legal practitioners. The discourse focused on the essence and concerns of transactional practices in the process of law enforcement for corruption crimes in the future. By using the legal comparative method, this paper tries to compare the provisions regarding the discontinuation of the investigation and prosecution of corruption crimes in Indonesia, Hong Kong, and the Netherlands. The results of the study show that the provisions regarding the discontinuation of the investigation and prosecution of corruption crimes in the three countries have differences in their arrangements. Normatively, Indonesia and the Netherlands regulate this matter in several articles, while for Hong Kong, although they do not regulate it in an *expressis verbis* manner in the law, the provisions concerning the discontinuation of investigations and prosecutions of corruption crimes are known in their law enforcement practices as seen in the case handling scheme published by the Independent Commission Against Corruption (ICAC). However, the use of the mechanism for terminating the investigation and prosecution of corruption crimes can be seen as a balancing mechanism against the legal process. Regulations regarding the discontinuation of investigations in corruption crimes must be maintained as a control mechanism against the possibility of errors in law enforcement procedures or for other technical reasons.

**Keywords:** corruption; investigation; prosecution; comparison

### INTRODUCTION

Corruption has been an important object of discussion in Indonesian society for a long time. The impact of massive corruption has become a cause of the nation's decline in various fields of life. In the 1950s Muhammad Hatta stated that corruption had permeated all levels of Indonesian society and infected various government departments<sup>1</sup>. Even today, corruption has become something that is aspired by parties who will enter the scope of the government system. This indication is then strengthened when we observe trials of corruption crimes in which many reveal the fact that there is a misappropriation of Regional Budget and State Budget management as an instrument to return

political costs by regional heads<sup>2</sup>. Corruption has been regenerated to almost all Indonesian people, systematically becoming a force that penetrates the values and norms of this nation. Eliminating one generation is not necessary for eradicating corruption, but breaking the regeneration of corruption is a powerful effort that can be done by the younger generation<sup>3</sup>.

The destruction of existing legal institutions where in fact law enforcement officers are part of the corruption mafia practice is one of the starting points for the birth of the Corruption Eradication Commission. This institution is expected to become an institutional serum that can function

<sup>1</sup> Syed Hussain Alatas, *Korupsi: Sifat, Sebab Dan Fungsi* (Jakarta: LP3ES, 1987), 117.

<sup>2</sup> Marwan Mas, *Pemberantasan Tindak Pidana Korupsi, Pertama*. (Bogor: Ghalia Indoensia, 2014), 192.

<sup>3</sup> Paku Utama, *Deregenerasi Korupsi* (Depok: Lembaga Pengkajian Hukum Internasional Fakultas Hukum Universitas Indonesia, 2010), viii.

extraordinarily<sup>4</sup>. In addition, the inefficiency and ineffectiveness shown by the components of the existing criminal justice system in the context of eradicating corruption<sup>5</sup> as well as the increasingly pressing need for an instrument of eradicating corruption that is designed to have an authority that is comprehensive, independent, and free from any power undeniably become the consideration for the birth of the Corruption Eradication Commission<sup>6</sup>.

Since its establishment through Law Number 30 of 2002, the Corruption Eradication Commission has become one of the spearheads of eradicating corruption in Indonesia. Various breakthroughs were also made considering the enormous authority given to them. However, as an independent state institution that was born after the reform, the Corruption Eradication Commission was a new item that at that time was injected into the Indonesian state administration system without properly measuring the model and its implications. This means that the institution was indeed born pragmatically. Independent state institutions that were born later had to go through a long process when the state also changed immediately the process it went through<sup>7</sup>.

These considerations became the basis for the amendment to Law Number 30 of 2002 concerning the Corruption Eradication Commission which was later ratified on October 17, 2019, by Law Number 19 of 2019. One of the articles that caused debate and substantially negated the provisions in Law Number 30 of 2002 is Article 40 paragraph (1) which states<sup>8</sup>:

“The Corruption Eradication Commission can discontinue the investigation and prosecution

of cases of Corruption Crimes whose investigations and prosecutions are not completed within a maximum period of 2 (two) years.”

The regulation of discontinuation of investigations and prosecutions in corruption crimes is a new thing in Indonesia because previously such a formulation was excluded for corruption crimes. This condition raises many questions about the implications of handling corruption crimes in Indonesia in the future. It is important to see similar provisions in several other countries. To find out how similar or different they are, furthermore, we can also broaden our perspective in looking at this subject matter. As Markus D. Dubber said that cross-jurisdictional comparisons, domestic or foreign, internal or external, promise a new perspective<sup>9</sup>.

Based on this, this paper will provide an analysis of the comparison of the provisions and mechanisms for terminating the investigation and prosecution of corruption crimes in several countries. In this paper, the countries used as objects of comparison are Hong Kong and the Netherlands. The selection of these countries is based on the legal system used. Hong Kong uses a common law legal system<sup>10</sup>, while the Netherlands, like Indonesia, uses a civil law legal system. This difference in legal systems is expected to enrich and bring up interesting perspectives in looking at a problem.

Substantially, this paper uses a legal comparative study to see the comparison of the provisions and mechanisms for terminating the investigation and prosecution of corruption crimes in Indonesia, Hong Kong, and the Netherlands. The study is based on two important issues, **First** How is the Regulation of Corruption Crimes in Indonesia, Hong Kong, and the Netherlands? and **Second** How Are the Provisions and Mechanisms for Terminating the Prosecution of Corruption Crimes in Indonesia, Hong Kong, and the Netherlands?

<sup>4</sup> Denny Indrayana, *Jangan Bunuh KPK Kajian Hukum Tata Negara Penguatan Komisi Pemberantasan Korupsi* (Malang: Intrans Publishing, 2016), 2.

<sup>5</sup> Republik Indonesia, “Undang-Undang Nomor 30 Tahun 2002 Tentang Komisi Pemberantasan Tindak Pidana Korupsi,” 2002 Konsideran Menimbang Huruf b.

<sup>6</sup> Evi Hartanti, *Tindak Pidana Korupsi* (Jakarta: Sinar Grafika, 2005), 67.

<sup>7</sup> Zainal Arifin Mochtar, *Lembaga Negara Independen Dinamika Perkembangan Dan Urgensi Penataanya Kembali Pasca Amandemen Konstitusi*, 1st ed. (Depok: Raja Garafindo Persada, 2016), xiii.

<sup>8</sup> Republik Indonesia, “Undang-Undang Nomor. 19 Tahun 2019 Tentang Perubahan Kedua Atas Undang-Undang Nomor. 30 Tahun 2002 Tentang Pemberantasan Tindak Pidana Korupsi,” 2019.

<sup>9</sup> Markus D. Dubber, “Criminal Law in Comparative Context,” *Journal of Legal Education* 56, no. 3 (2006): 436.

<sup>10</sup> RM Surachman and Jan S. Maringka, *Peran Jaksa Dalam Sistem Peradilan Pidana Di Kawasan Asia Pasifik* (Jakarta: Sinar Grafika, 2015), 31.

## RESEARCH METHOD

The main issues above will be examined using the normative legal research method, namely research that is focused on the study of a norm (that is why it is called normative) such as in the fields of justice, legal certainty, expediency, order, legal efficiency, and others<sup>11</sup>. This study will also use a comparative approach that aims to examine the provisions and mechanisms for terminating the investigation and prosecution of corruption crimes in Indonesia, Hong Kong, and the Netherlands.

Normative research fully uses secondary data (literature materials). This study used primary legal materials, secondary legal materials, and tertiary legal materials. The legal materials were obtained through a literature study. To obtain an overview of the object of the research and to find answers to the problems that have been described previously, the data or information that has been obtained will be processed qualitatively and presented descriptively and explanatory.

Descriptively, this research will describe the legal instruments used by Indonesia, Hong Kong, and the Netherlands in efforts to eradicate corruption. These legal instruments can be in the form of material law and formal law as well as special rules and court decisions related to the eradication of corruption crimes. In an explanatory way, this research will explain how the comparison of provisions and mechanisms for terminating the investigation and prosecution of corruption crimes in Indonesia, Hong Kong, and the Netherlands is.

## DISCUSSION AND ANALYSIS

### A. Legal Basis for Eradication of Corruption in Indonesia, Hong Kong, and the Netherlands

#### 1. Indonesia

From a historical perspective, the eradication of corruption crimes in Indonesia uses several legal instruments. In the period before the 1960s eradication of corruption crimes were based on the Military Authority Regulation which consisted of:

- a. Military Authority Regulation Number PRT/PM/06/1957 dated April 9, 1957
- b. Military Authority Regulation Number PRT/PM/03/1957 dated May 27, 1957

<sup>11</sup> Munir Fuady, *Metode Riset Hukum Pendekatan Teori Dan Konsep*, 1st ed. (Depok: Rajawali Pers, 2018), 130.

- c. Military Authority Regulation Number PRT/PM/011/1957 dated July 1, 1957<sup>12</sup>.
- d. Regulation of the Central War Authority of the Army Chief of Staff Number PRT/PEPERPU/013/1958
- e. Regulation of the Central War Authority of the Naval Chief of Staff Number PRT/z.1/I/17/1958 dated April 17, 1958<sup>13</sup>.

The regulations of the military authority were a form of the will of the rulers at that time to eradicate corruption in Indonesia. After the period of the Military Authority Regulation, the legal instrument for eradicating corruption was carried out by Government Regulation in Lieu of Law (PERPU) Number 24 of 1960 (24/1960) concerning the Investigation, Prosecution, and Examination of Corruption Crimes.

In its development, Law Number 24 PRP 1960 was deemed insufficient to achieve the expected results, therefore it was replaced with Law Number 3 of 1971 concerning the Eradication of Corruption Crimes. Law Number 3 of 1971 concerning the Eradication of Corruption Crimes was once dubbed *undang-undang sapu jagat* (universal law) because it was too broad in scope<sup>14</sup>. In its development, this law itself was considered by some law enforcers to have several weaknesses, so it needed to be replaced.

Law Number 3 of 1971 was later replaced with Law Number 31 of 1999 concerning the Eradication of Corruption Crimes. This last legal instrument, in its development, has also been amended by Law Number 20 of 2001. In the last law, the formulation of corruption has been explained in 13 articles. Of the 13 articles, in general, corruption is classified into 7 forms of action, namely:

- a. State Financial Losses
- b. Bribery
- c. Embezzlement in Occupation
- d. Extortion
- e. Cheating
- f. Conflict of Interest in Procurement
- g. Gratification<sup>15</sup>

<sup>12</sup> Andi Hamzah, *Pemberantasan Korupsi Melalui Hukum Pidana Nasional Dan Internasional*, Revisi. (Jakarta: Rajawali Pers, 2014), 36.

<sup>13</sup> Elwi Danil, *Korupsi Konsep, Tindak Pidana, Dan Pemberantasannya* (Jakarta: Raja Garafindo Persada, 2014), 30–31.

<sup>14</sup> Hartanti, *Tindak Pidana Korupsi*, 3.

<sup>15</sup> Komisi Pemberantasan Korupsi, *Memahami Untuk*

## 2. Hong Kong

In the 1960s, Hong Kong was a society branded with a stigma of corruption culture. Corruption was mushrooming from the grassroots to officials, especially the police. Hong Kong residents were said to accept that “police corruption is commonplace” and even believed that there were no “clean cups” in Hong Kong<sup>16</sup>.

Corruption in the police was rampant, with powerful corruption syndicates institutionalizing bribery. Police officers who are supposed to enforce the law, and to ensure that citizens’ behavior conforms to the law, were involved in massive corruption themselves. In the process, they amassed wealth that was blatantly disproportionate to their legal source of income. It was quite normal for police officers to accept bribes or tolerate the actions of their comrades<sup>17</sup>.

While in the 1960s and 1970s the people of Hong Kong seemed to tolerate acts of corruption, research conducted between 2010-2011 on Hong Kong students showed that Hong Kong students had a low tolerance for corruption. In the survey, only 2% of respondents said they did not want to report, while 27% said they were willing and around 66% stated that they might not do so depending on the actual situation<sup>18</sup>.

In ICAC’s annual survey conducted from June 26 to November 1, 2020, one of the aspects that became the focus was corruption tolerance in Hong Kong. In the survey, 87.6% of respondents considered corruption in Hong Kong to be completely intolerable. This survey was assigned a scale of 0 to 10 points where 0 represented total intolerance and 10 represented total tolerance. The average score was 0.4, reflecting a very low

tolerance for corruption in Hong Kong society.<sup>19</sup>

The eradication of corruption crimes in Hong Kong uses three legal instruments, namely:

a. **Prevention of Bribery Ordinance (POBO) Cap. 201**<sup>20</sup>

The spirit of the Prevention of Bribery Ordinance (hereinafter referred to as POBO) enacted by ICAC is to maintain a just society. Systematically, the POBO consists of five parts, namely: Introduction, Offenses, Power of Investigations, Evidence, and Miscellaneous. This POBO is then divided into Prevention of bribery ordinance in the public sector and Prevention of bribery ordinance in the private sector.

b. **Elections (Corrupt and Illegal Conduct) Ordinance Cap. 554**<sup>21</sup>

Elections (Corrupt and Illegal Conduct) Ordinance applies to the elections specified in the Ordinance. The law regulates all prescribed election-related actions, whether they are carried out before, during, or after the election period, and whether they are carried out in Hong Kong or elsewhere.

c. **Independent Commission Against Corruption Ordinance (Cap. 204)**<sup>22</sup>

Substantially, the Independent Commission Against Corruption Ordinance is an ordinance that contains matters related to ICAC institutionally and the powers granted to eradicate corruption. This includes the ins and outs of the commission, the commission maintenance, arrests, detention and granting of bail, searches and seizures as well as the

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*Membasmi: Buku Saku Untuk Memahami Tindak Pidana Korupsi* (Jakarta: Komisi Pemberantasan Korupsi, 2006), 21.

<sup>16</sup> Ming-Li Hsieh, “A Case Study: Lessons from the Hong Kong Independent Commission Against Corruption,” *International Journal of Criminology and Sociology* 6 (2017): 5.

<sup>17</sup> C. Raj Kumar, “Human Rights Approaches of Corruption Control Mechanisms--Enhancing the Hong Kong Experience of Corruption Prevention Strategies,” *San Diego International Law Journal* (2004): 3.

<sup>18</sup> Ting Gong and Shiru Wang, “Indicators and Implications of Zero Tolerance of Corruption: The Case of Hong Kong,” *Social Indicators Research* 112, no. 3 (2013): 575.

<sup>19</sup> ICAC, *ICAC Annual Survey 2020* (Hong Kong, 2020), 3, <https://www.icac.org.hk/en/survey/finding/index.html>.

<sup>20</sup> Hong Kong, “Prevention of Bribery Ordinance Cap. 201” (Hong Kong, 1971), [https://www.elegislation.gov.hk/hk/cap201!en.assist.pdf?FILENAME=Assisted Monolingual PDF \(English\).pdf&DOC\\_TYPE=K&PUBLISHED=true](https://www.elegislation.gov.hk/hk/cap201!en.assist.pdf?FILENAME=Assisted%20Monolingual%20PDF%20(English).pdf&DOC_TYPE=K&PUBLISHED=true).

<sup>21</sup> Hong Kong, “Elections ( Corrupt and Illegal Conduct ) Ordinance Cap. 554,” 2000, [https://www.elegislation.gov.hk/hk/cap554!en.assist.pdf?FILENAME=Assisted Monolingual PDF \(English\).pdf&DOC\\_TYPE=K&PUBLISHED=true](https://www.elegislation.gov.hk/hk/cap554!en.assist.pdf?FILENAME=Assisted%20Monolingual%20PDF%20(English).pdf&DOC_TYPE=K&PUBLISHED=true).

<sup>22</sup> Hong Kong, “Independent Commission Against Corruption Ordinance Cap. 204,” 1974, [https://www.elegislation.gov.hk/hk/cap204!en.assist.pdf?FILENAME=Assisted Monolingual PDF \(English\).pdf&DOC\\_TYPE=K&PUBLISHED=true](https://www.elegislation.gov.hk/hk/cap204!en.assist.pdf?FILENAME=Assisted%20Monolingual%20PDF%20(English).pdf&DOC_TYPE=K&PUBLISHED=true).



basis of authority to handle other violations disclosed during the corruption investigation process.

The Independent Commission Against Corruption (ICAC) was established in February 1974. Combating corruption is a commitment that has been affirmed since the establishment of this commission. In carrying out its duties, ICAC does not limit its activities to law enforcement but also includes prevention and education. The ICAC's first important task was to bring Godber to court. In early 1975, Godber was extradited from the UK for trial. Godber's extradition and prosecution are a clear statement of ICAC's determination to eradicate corruption<sup>23</sup>.

The establishment of ICAC in 1974 and the commitment to strong governance have shifted Hong Kong's image towards a "clean culture". Like Singapore, the most important reason for Hong Kong's success in fighting corruption is their government's sustainable political will, as well as impartial law enforcement<sup>24</sup>. In addition, public support is also an important factor for its operations and for creating a community where the existence of corruption is considered unacceptable. This is reflected in the number of public complaints in 1974 and 1975 which reached more than 3,000; 2,433 in 1976, and in 1999 the percentage was 36%. It decreased to 17% in 2011, one of which was due to the transition to the complaint mechanism, all of which were carried out at the head office<sup>25</sup>.

The annual ICAC survey published in 2020 also revealed that the majority (81.7%) of respondents stated that they would report if they knew that someone had committed a corruption crime. The percentage is the same as the survey two years earlier and the highest since the question was introduced in 2010. The remaining 11.3% answered that it would depend on the

circumstances, and only 4.4% of respondents said they would not report<sup>26</sup>.

### 3. The Netherlands

The Netherlands uses The Dutch Penal Code/*Wetboek van Strafrecht* (hereinafter referred to as the DPC) as a legal basis for eradicating corruption. Since 2011, many new types of offenses have been added to the DPC and all of them are crimes. The elements of forty types of crimes have been changed and there is an increase in criminal sanctions. One of the changes in the formulation involves corruption, fraud, cybercrime, travel counterfeiting, and others<sup>27</sup>.

In Dutch criminal law, corruption has not been established as a separate crime. The Dutch Criminal Code stipulates that bribery is a corruption crime. In the DPC the provisions regarding bribery are regulated in several articles, namely: Articles 177, 178, 363, and 364. In addition, the Netherlands also regulates bribery (both active and passive) to non-public officials, or called commercial bribery which is regulated in sections 136, 328ter, and 328quater of the DPC. The obligation for public bodies and public officials to report public offenses is also regulated in Article 162 of the DPC.

In anti-corruption activities, the Netherlands is also actively involved in several European and international conventions on corruption, including:

1. The EU Anti-Corruption Treaty (41997A0625(01) Official Journal C 195, 25/06/1997 P. 0002 - 0011) and the additional protocols.
2. The Council Framework Decision 2003/568/JHA on Anti-Corruption 2018 combating corruption in the private sector (32003F0568 Official Journal L192, 31/07/2003 P. 0054 - 0056).
3. The OECD Anti-Bribery Convention dated 17 December 1997.
4. The Criminal Law Convention on Corruption of the Council of Europe (ETS No. 173); and.
5. The United Nations Convention Against Corruption (No. 42146)<sup>28</sup>.

<sup>23</sup> Independent Commission Against Corruption, "About ICAC," accessed October 16, 2021, <https://www.icac.org.hk/en/about/history/index.html>.

<sup>24</sup> Jon S.T. Quah, "Combating Corruption in Asian Countries: Learning from Success & Failure," *Daedalus* 147, no. 3 (2018): 204.

<sup>25</sup> Ian Scott, "Engaging the Public: Hong Kong's Independent Commission against Corruption's Community Relations Strategy," *Research in Public Policy Analysis and Management* 23, no. November 2013 (2013): 87.

<sup>26</sup> ICAC, *ICAC Annual Survey 2020*, 3.

<sup>27</sup> Jeroen Martijn Ten Voorde, "The Dutch Penal Code Under Review," *Indonesia Law Review* 7, no. 3 (2017): 302.

<sup>28</sup> Loyens and Loeff, "Anti Corruption 2018," last modified 2018, accessed October 16, 2021, <https://www.loyensloeff.com/media/477951/publication->

Significant anti-corruption initiatives to improve integrity have also been taken in the Netherlands, such as the White Paper from 2005 on the prevention of corruption and as legal and administrative reforms, most of which are about enhancing integrity. In 2006, the Netherlands also amended the Civil Servant Act and laws governing municipalities to include an obligation to implement an integrity policy<sup>29</sup>.

In addition, in 2013 the Dutch government has also issued the Law on Financing Political Parties and the Government Program Against Financial and Economic Crimes (FINEC) was introduced to prioritize the fight against Fraud, Money Laundering, and Corruption. The focus of FINEC is on prevention, asset recovery, and improving coordination among law enforcement agencies tasked with detecting and investigating these crimes.

In July 2012, the Netherlands announced legislative reform related to eradicating corruption. The reform includes increased penalties for corruption including fines that can reach 10% of the organization's annual turnover. In an evaluation conducted by the Council of Europe Group of States against Corruption (GRECO), the Netherlands' efforts to ensure public trust were commended<sup>30</sup>.

A phase 4 report released by the OECD working group in October 2020, it deals with the implementation of the OECD convention on the eradication of bribery of foreign public officials in international business transactions. The Netherlands has made substantial institutional changes to improve its investigative and prosecution capabilities. The Fiscal Intelligence and Investigation Agency (FIOD) and the Dutch General Prosecutor's Office (*Openbaar Ministerie* (OM)) have formed a special anti-corruption team that includes a special intelligence unit and which works together to detect new cases. The foreign bribery investigation carried out by the FIOD in 2016 led to an exponential increase in the investigation of such cases<sup>31</sup>.

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anti-corruption-2018.pdf.

<sup>29</sup> European Commission, "ANNEX NETHERLANDS to the EU Anti-Corruption Report," 2014, 2, <https://ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/1438>.

<sup>30</sup> Ibid.

<sup>31</sup> OECD, *Implementing the OECD Anti-Bribery*

## **B. Discontinuation of Investigations and Prosecutions of Corruption Crimes in Indonesia, Hong Kong, and the Netherlands**

### **1. Indonesia**

The authority to discontinue investigations and prosecutions is the authority given to the Corruption Eradication Commission after the amendment to Law Number 30 of 2002 with Law Number 19 of 2019, especially in Article 40 with the formulation:

"Article 40"

- 1) The Corruption Eradication Commission may discontinue the investigation and prosecution of corruption cases whose investigation and prosecution are not completed within a maximum period of 2 (two) years.
- 2) The discontinuation of the investigation and prosecution as referred to in paragraph (1) must be reported to the Supervisory Board no later than 1 (one) week since the issuance of the order for the discontinuation of the investigation and prosecution.
- 3) The discontinuation of the investigation and prosecution as referred to in paragraph (1) must be announced by the Corruption Eradication Commission to the public.
- 4) The discontinuation of the investigation and prosecution as referred to in paragraph (2) may be revoked by the Head of the Corruption Eradication Commission if new evidence is found which can invalidate the reason for the discontinuation of the investigation and prosecution, or based on a pretrial decision as referred to in the laws and regulations."

If we look at the formulation of Article 40 paragraph (1) above, the prerequisites for terminating an investigation and prosecution include a time issue, namely for crimes whose investigation and prosecution are not completed within a maximum period of two years. This formulation still raises a question related to when the counting of the time begins. The Constitutional Court through Decision Number 70/PUU-XVII/2019 on April 19, 2021, has stated that the formulation of Article 40 paragraph (1) does not have permanent legal force, and therefore the Court has given a new formulation which states that:

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*Convention Phase 4 Report: Netherlands, 2021, 96.*

“The Corruption Eradication Commission may discontinue the investigation and prosecution of cases of Corruption Crimes whose investigations and prosecutions are not completed within a maximum period of 2 (two) years since the issuance of the Notification of the Commencement of Investigation (SPDP)<sup>32</sup>.”

The mechanism for terminating investigations and prosecutions carried out by the Corruption Eradication Commission also involves the Supervisory Board as one of the organs specifically established to oversee the implementation of the duties and authority of the Corruption Eradication Commission. The results of the supervision will be reported to the President and the House of Representatives according to the duties attached to them.

In addition, there is an affirmation that the policy to discontinue the investigation is not final, because if new evidence is found at a later date, the investigation can be restarted. Therefore, in summary, it can be said that the discontinuation of investigation and prosecution of corruption crimes by the Corruption Eradication Commission can be carried out against crimes:

- a. Whose investigation process is not completed within a maximum period of 2 (two) years since the issuance of the SPDP.
- b. Which have not enough evidence
- c. Which already have a pretrial decision

Meanwhile, the provisions regarding the discontinuation of investigations in corruption crimes by both the police and the prosecutor’s office are based on Article 109 paragraphs (2) and (3) of the Criminal Procedure Code. The discontinuation of investigations carried out by the Police and the Prosecutor’s Office in corruption cases as referred to in Article 109 paragraph (2) provides 3 prerequisites, namely for cases that:

- a. Have not enough evidence.
- b. The event is not a crime
- c. The investigation is discontinued for the sake of the law.

The prosecution can also be discontinued by the prosecutor’s office as regulated in Article 140 paragraph (2) of the Criminal Procedure Code which substantially provides a category of criminal

cases whose prosecution can be discontinued. These cases consist of crimes that do not have sufficient evidence, are not crimes and the case is closed for the sake of the law.

Regarding cases being closed for the sake of law, this is one of the authorities possessed by the public prosecutor<sup>33</sup>. One thing that must be noted is that the waiver of a case is different from the discontinuation of the prosecution. Waiver of cases (Public Interest Drop) is a policy that is taken solely based on the public interest even though the evidence is sufficient. Meanwhile, the discontinuation of prosecution (Simple Drop) is a decision taken by the public prosecutor for technical reasons which may be due to a lack of evidence or because there are grounds to exclude prosecution.<sup>34</sup>

The grounds for eliminating prosecution (*vervolgingsuitsluitingsgronden*) can be found in Book I of the Criminal Code which consists of:

- a. Chapter I, Article 2 to Article 5, and Article 7 to Article 9 of the Criminal Code
- b. Chapter V, Articles 61 and 62 of the Criminal Code
- c. Chapter VII, Article 72 of the Criminal Code
- d. Chapter VIII, Articles 76, 77, 78, and 82 of the Criminal Code
- e. Article 166 of the Criminal Code
- f. Article 221 paragraph (2) of the Criminal Code
- g. Article 284 paragraph (2) of the Criminal Code

## 2. Hong Kong

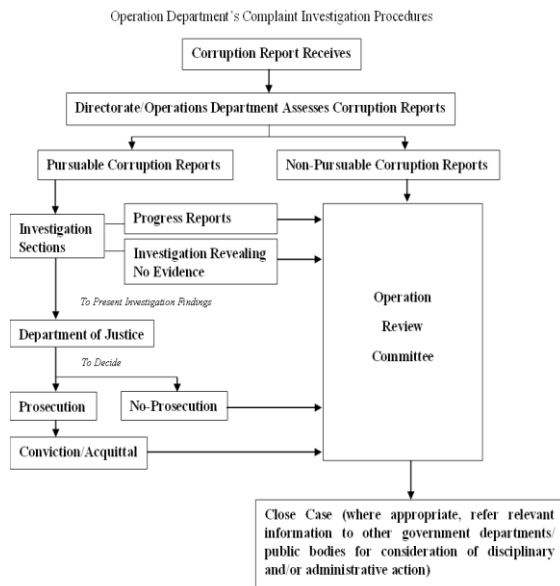
Provisions regarding the discontinuation of investigation can be analyzed from the scheme of investigation procedures published by ICAC. In the organizational structure and working procedures of ICAC, the investigation is a function owned by the operation department in addition to the function of receiving complaints. In a larger framework, both the operation department and the two other departments, namely the corruption prevention department and the community relation department, are part of the report corruption division.

<sup>33</sup> Republik Indonesia, “Undang-Undang Republik Indonesia Nomor 8 Tahun 1981 Tentang Hukum Acara Pidana,” 1981 Pasal 14 ayat (1).

<sup>34</sup> Andi Hamzah and RM Surachman, *Pre-Trial Justice Discretionary Justice Dalam KUHAP Berbagai Negara* (Jakarta: Sinar Grafika, 2015), 209.

<sup>32</sup> Mahkamah Konstitusi, “Putusan Nomor 70/PUU-XVII/2019,” 2021, 349.

The membership of this committee is made up of prominent citizens who are appointed by the Chief Executive to oversee the work of the ICAC. The procedure for investigating cases carried out by ICAC as referred to above is illustrated in the published scheme as follows:



Source: icac.org

The scheme of the investigation procedure above illustrates the order in which a case is submitted to ICAC. For initial information, the settlement of every corruption case that occurs in Hong Kong is not automatically monopolized by ICAC. When a person is caught as regulated in Article 10 of the Independent Commission Against Corruption Ordinance (Cap. 204), there are two possibilities, namely to be taken to the Police station or to be taken to the commission (ICAC).

The above scheme can be considered as the second possibility (a person being handled by ICAC). In the scheme, it is explained that reports on corruption crimes that have been received by ICAC will then be forwarded to the directorate/department of operation which then examines the reports. The results of the examination are then labeled as corruption reports that can be followed up or corruption reports that cannot be pursued.

Reports that can be followed up are then forwarded to the investigation department. At this stage the investigation department then makes a report on the progress or the results of the investigation do not reveal evidence. The results of the investigation are then forwarded to the Department of Justice which then determines

whether the case will be prosecuted or not. If the case is prosecuted, the final outcome will be whether the suspect or defendant will receive a sentence or be acquitted.

All the processes carried out and the results at each stage of the scheme, starting from reports that cannot be pursued, the results of investigations that do not find evidence, or the decision of the department of justice to prosecute or not to prosecute a case as well as the final outcome of the trial whether the suspect is punished or released, all go to the operation review committee.

From the scheme shown above, it can be seen that the operation review committee plays a very central role in the settlement process of a corruption case. Regarding the discontinuation of investigation, the operation review committee is the sole authority to discontinue the investigation. An ICAC investigation is conducted to gather evidence. The authority to adjudicate rests with the Secretary of Justice who decides in each case whether to proceed or not based on the findings of the investigation presented by the ICAC<sup>35</sup>.

The output of the operation review committee's task is the issuance of a letter stating that the case does not have sufficient evidence and the letter can be an important instrument to restore the suspect's good name<sup>36</sup>. ICAC as the Corruption Eradication Agency in Hong Kong does not have the authority to prosecute. Corruption crimes that have gone through the investigation process by the operation department at ICAC will then be prosecuted by the Secretary for Justice. This relationship can normatively be constructed from the formulation of section 13E of the Independent Commission Against Corruption Ordinance Cap. 204.

Regarding the discontinuation of prosecution, the policy to prosecute or not to prosecute is indeed the authority of the Department of Justice. If we look back at the investigation procedures scheme shown above, the conclusion from the department of justice on whether or not to prosecute a corruption case will still be reported to the operation review committee.

<sup>35</sup> Independent Commission Against Corruption, "Operations Department ICAC," accessed October 16, 2021, <https://www.icac.org.hk/en/ops/work/op/index.html>.

<sup>36</sup> Aziz Syamsuddin, *Tindak Pidana Khusus*, 1st ed. (Jakarta: Sinar Grafika, 2011), 208.



When referring to the Magistrates Ordinance (Cap. 227), there is one provision that allows the Secretary for Justice to discontinue the prosecution of crimes. This provision is contained in section 15 which states, “Secretary for Justice may withdraw the case by entering *nolle prosequi*.” However, this provision is limited to crimes regulated in sections 91, 92, and 92 A.

The authority of the Secretary for Justice in submitting a *nolle prosequi* can be exercised either pre-trial or post-trial. Section 91 is a provision that is identical to a brief procedural examination, section 92 is an offense which in essence can be committed by ordinary proceedings with an imprisonment sentence of 2 years and a fine of \$100,000. Meanwhile, section 92A is about the summary of the disposal of the transferred cases. So far, there are no sources of information and provisions that confirm that the corruption crimes as regulated in the 3 ordinances are included in sections 91, 92, or 92A.

### 3. The Netherlands

In the Dutch Criminal Procedure Law, investigation can be carried out by three institutions, namely the Police, The Dutch Public Prosecution Service (*Openbaar Ministerie*), or the Prosecutor’s Office, hereinafter referred to as PPS and examining magistrate (examiner judge)<sup>37</sup>. However, in practice, the Prosecutor as *dominus litis* plays a very big role in determining the handling of cases, especially investigations and prosecutions<sup>38</sup>. It is this very big role that places Public Prosecutors in the Netherlands as Semi Judges (having the authority of half a judge)<sup>39</sup>. In corruption crimes, whether committed at home

or abroad, the investigation is submitted to PPS based on the Judiciary (Organization) Act.

The Dutch Prosecutor’s Office (PPS) is responsible for investigating and prosecuting crimes and the imposition of fines and/or imprisonment sentences imposed by criminal courts. The PPS is also authorized to investigate and prosecute crimes over which the Dutch authorities have jurisdiction on that basis. In carrying out its duties, the PPS cooperates with the Dutch Police, Intelligence, and other investigative institutions such as the Police Internal Investigations Department (*Rijksrecherche*).

In the Dutch Criminal Code Procedure (DCCP), it is not specifically formulated about discontinuation of investigation. Because the investigation and the prosecution are controlled by the prosecutor, the formulation of the discontinuation of the investigation is also attached to the formulation of the discontinuation of the prosecution. Regarding the discontinuation of prosecution, it can be concluded from section 167 of the DCCP which states:

“Section 167 of DCCP

1. If the Public Prosecution Service considers on the basis of the results of the criminal investigation instituted that prosecution is required by the issuance of a punishment order or otherwise, it shall proceed to do so as soon as possible.
2. a decision not to prosecute may be taken on grounds of public interest. The Public Prosecution Service may, subject to specific conditions to be set, postpone the decision on prosecution for a period of time to be set in said decision.”

The formulation of this article does explain the basis for terminating the prosecution, but if the investigation also involves the Prosecutor’s Office, then this provision regarding prosecution can also apply. Several Dutch anti-corruption legal instruments do not clearly stipulate the discontinuation of an investigation and the conditions. However, if we look at the duties and functions of the institutions that are responsible for the process of investigating corruption crimes (the Police and the Prosecutor’s Office), the function of terminating the investigation is also implied.

As stated in section 2 of the Police Act, the main duties of the Police are:

<sup>37</sup> Terkait dengan fungsi penyidikan yang dapat dilakukan oleh examining magistrate dapat dilihat dalam Part III. Investigation by the Examining Magistrate section 181-184 Netherland, “Dutch Code of Criminal Procedure,” 2012, [https://www.legislationline.org/download/id/6416/file/Netherlands\\_CPC\\_am2012\\_en.pdf](https://www.legislationline.org/download/id/6416/file/Netherlands_CPC_am2012_en.pdf).

<sup>38</sup> Ibid. Salah satunya dapat dilihat dalam Chapter Three. Prosecution of Criminal Offences, Section 10(1) yang rumusannya sebagai berikut: “The public prosecutor, who is authorized to conduct any investigation, may also conduct, or have others conduct, a specific investigative act within the area of jurisdiction of a District Court other than the one to which he is attached. In that case he shall timely notify his counterpart attached to the District Court in question”.

<sup>39</sup> Indriyanto Seno Adji, *KUHAP Dalam Prospektif* (Jakarta: Diadit Media, 2011), 95.

- a. To maintain public order;
- b. To investigate crimes;
- c. To assist in an emergency;
- d. To identify safety and security issues and provide suggestions for public authorities, prosecutor's office, and other partners on how to reduce safety and security issues<sup>40</sup>.

When enforcing criminal law and performing judicial services, the Police act under the authority of the Prosecutor's Office. The enforcement of criminal law includes the prevention, discontinuation, and investigation of crimes. The public prosecutor can give instructions to the Police for criminal law enforcement<sup>41</sup>. Therefore, in the context of investigating corruption crimes, the police have a basis for terminating the investigation.

Regarding discontinuation of prosecution, the decision is also taken based on lack of evidence or due to technical consideration (technical or procedural omission). The plaintiff can also decide not to sue based on the principle of expediency. The principle of expediency set out in section 167 of the DCCP authorizes the Prosecutor to waive (further) prosecution for reasons of public interest.

The opinion of the public prosecutor that the act committed is not a crime is also a reason that can be considered not to sue. Another option that can be done for the settlement of the case is that the Prosecutor issues a sentencing order (*strafbeschikking*) or it is resolved through a transaction mechanism.

This description confirms that the process of handling corruption crimes carried out in the Netherlands recognizes the mechanism for terminating prosecution. However, a study confirms that in nine out of ten cases, prosecution of suspects leads to criminal punishment and that most people convicted of corruption crimes are sentenced to probation or fines<sup>42</sup>.

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<sup>40</sup> Alexandra Toorman and Maris den Engelsman, eds., *Policing in the Netherlands* (Den Haag: Police and Safety Regions Department Ministry of Interior and Kingdom Relations, 2009), 8.

<sup>41</sup> Peter J P Tak, *The Dutch Criminal Justice System, Organization and Operation* (Netherlands, 1999), 26.

<sup>42</sup> European Commission, "ANNEX NETHERLANDS to the EU Anti-Corruption Report," 4.

### C. Analysis of Comparison of Discontinuation of Investigation and Prosecution of Corruption Crimes in Indonesia, Hong Kong, and the Netherlands.

Conceptually, Rudolf B. Schlesinger said that legal comparison is not a collection of rules and principles, but a method or way of looking at legal problems<sup>43</sup>. Walther Hug then divided the types of comparative studies into five categories, namely<sup>44</sup>:

- a. Comparison of foreign systems with domestic systems to ascertain similarities and differences
- b. A study that objectively and systematically analyzes solutions offered by various systems for certain legal problems
- c. A study that investigates causal relationships between different legal systems
- d. A study that compares several stages of the legal system
- e. A study that seeks to find or examine the evolution of law in general according to periods and systems

This analysis is substantially in line with the above conception, which will compare the mechanism for terminating the investigation and prosecution of corruption crimes in the three countries both in terms of regulation, implementation mechanism, and related instruments to see the advantages and disadvantages as well as things that might be implemented in Indonesia in the future.

If we look at the practice of eradicating corruption in several countries, the mechanism for terminating investigations is not something new and is well known in the process of eradicating crimes, especially corruption crimes. Hong Kong is one of the countries that recognize the discontinuation of investigations in the handling of corruption crimes. Although normatively it is not formulated in their legal instruments for eradicating corruption, we can observe this mechanism when we look at the investigation procedure scheme as published by the ICAC.

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<sup>43</sup> Rudolf B. Schlesinger, *Comparative Law Cases-Text-Materials*, Second. (London: Stevens and Sons, 1960), 1.

<sup>44</sup> Peter de Cruz, *A Modern Approach to Comparative Law* (Boston: Kluwer, 1993), 5.

This scheme places the operation review committee as an organ of ICAC in a central position in the process of investigating corruption crimes, including deciding whether to discontinue the investigation or not. All the results obtained from the process of receiving reports to court decisions lead to this operation review committee.

When compared to Indonesia, the operation review committee has an identical role to that of the Supervisory Board in the organizational structure of the Corruption Eradication Commission. However, in the context of terminating investigations and prosecutions, normatively the Supervisory Board is only tasked with receiving reports on the discontinuation of investigations or prosecutions carried out by the Corruption Eradication Commission and does not have a control function over this policy. However, in Indonesian legal instruments, there are pretrial institutions whose function is, among others, to check whether or not the discontinuation of investigations and prosecutions is legal.

The discontinuation of the investigation or prosecution of corruption crimes in the Netherlands will be examined by an examining magistrate (examiner judge) or also called a Commissioner Judge (*rechter commissaris*). This commissioner judge has similarities with pretrial institutions in Indonesia<sup>45</sup>. It's just that the *rechter commissaris* has a wider scope of authority. The supervisory system in the Netherlands is carried out in stages, where the Judge Commissioner oversees the execution of the duties of the Prosecutor, and the Prosecutor does the same with the implementation of the duties of the Police<sup>46</sup>. Because in the Netherlands the Eradication of Corruption is controlled by the Prosecutor, the policy of terminating investigations and prosecutions will be controlled by the *rechter commissaris*.

From the point of view of the controlling agency for the discontinuation of investigations or prosecutions of corruption crimes, these three countries have their own characteristics. If we look closely at the process in the ICAC investigation scheme, the supervision is carried out internally and not through a judicial process, while in

Indonesia and the Netherlands, both through the *rechter commissaris* and pretrial institutions, they must go through a process of examining with judicial procedures.

One of the differences between the process that takes place in the Netherlands and Indonesia is in the process of law enforcement, especially corruption crimes. In the Netherlands the Prosecutor can at any time ask the Examiner Judge to assess the case he is handling, whether it is eligible to be brought to the judicial process or not, therefore the function is to carry out a preliminary examination. This has an impact on the handling of cases in the Netherlands. Although the Netherlands can discontinue cases broadly, research results show that nine out of ten cases that go to court are ultimately given sentences<sup>47</sup>.

This context of criminal justice can at least simplify the process and is able to shift the old paradigm towards the new principle that not all criminal cases have to go to court and be sentenced. Cases that go to court are cases that truly meet the requirements and are believed to be subject to the sentence because they have gone through several processes and assessments by investigators, public prosecutors, and examiner judges.

Conceptually, Hong Kong, Indonesia, and the Netherlands have unique characteristics related to discontinuation of the investigation and prosecution of corruption crimes. The use of the mechanism for terminating the investigation and prosecution of corruption crimes can be seen as a balancing mechanism of the legal process.

Hong Kong, Indonesia, and the Netherlands have discontinued investigations and prosecutions as a balance and corrective mechanism for the actions of law enforcement officials in the process of eradicating corruption. The operation review committee itself as a central organ to determine whether a case is discontinued or not structurally within the ICAC organization is placed in the check and balance division which we can interpret as an organ that provides balance to the handling of corruption cases.

Likewise with the Indonesian Corruption Eradication Commission, being given the authority to discontinue investigations and prosecutions must be seen as a correction mechanism for the

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<sup>45</sup> Luhut M.P. Pangaribuan, *Hukum Acara Pidana Surat Resmi Advokat Di Pengadilan*, Revisi. (Jakarta: Papis Sinar Sinanti, 2017), 99.

<sup>46</sup> Andi Hamzah, *Hukum Acara Pidana*, 2nd ed. (Jakarta: Sinar Grafika, 2008), 188.

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<sup>47</sup> European Commission, "ANNEX NETHERLANDS to the EU Anti-Corruption Report," 4.

actions of law enforcement officials. This is also supported by the presence of the Supervisory Board which carries out the control function over the implementation of the authority to discontinue investigations and prosecutions by the Corruption Eradication Commission.

We cannot ignore the fact that in law enforcement carried out by the Corruption Eradication Commission (KPK) so far, it is not free from actions that intersect with the human rights of suspects and defendants of corruption crimes. We can conclude the same thing from the Netherlands, in fact, this mechanism is used by the Netherlands not only as a corrective or control mechanism for the actions of law enforcement officers, but also as a way to empower the mechanism for resolving cases outside the court and reducing the use of sentence as a means of punishment. One of the mechanisms used is the *transactie* mechanism which is based on section 74A of the Netherlands Criminal Code.

The use of such a mechanism, especially in western countries, has become a trend, especially in handling cases of economic crimes involving corporations. One form is the application of the Deferred Prosecution Agreement (DPA). The DPA is a mechanism similar to *transactie* in the Netherlands<sup>48</sup>. This mechanism is conceptually a voluntary collaboration between the offending company and the prosecutor in return for avoiding costs and reputational damage from criminal prosecution. The UK has started to enforce this conception in its legal rules since 2014 through Section 45 of the Crime and Courts Act 2013.<sup>49</sup> Such a mechanism is considered a paradigm shift in the prosecution that is able to create a more efficient and effective means of fighting economic crimes. Once this mechanism is agreed upon, the prosecutor can then discontinue the criminal proceedings<sup>50</sup>.

Like the Netherlands and England, this *transactie* mechanism is also carried out in the United States where in addition to the DPA there is also an additional mechanism, namely the

NPA (Non-Prosecution Agreement). If the DPA mechanism is still accompanied by the filing of prosecution, then the NPA has no prosecution at all. These two mechanisms have become popular instruments, especially in handling crimes committed by corporations<sup>51</sup>. One important note that needs to be considered in the implementation of this mechanism is the high level of urgency for the implementation rules guidelines. This is to minimize disparities in implementation.

In Indonesia itself, in recent times, there is an idea to use mechanisms that are in line with those used by the Netherlands. Especially against corruption crimes, where corruption crimes with certain criteria shall be enough to be resolved by administrative mechanism without having to go through a criminal justice process<sup>52</sup>. The use of this mechanism should begin to be considered as an effort to reform law enforcement in line with the paradigm shift in criminal law towards a more effective and efficient process for both perpetrators (suspects) and efforts to maximize asset recovery.

## CONCLUSION

1. Legal instruments for eradicating corruption in Indonesia Hong Kong and the Netherlands have their own characteristics in eradicating corruption crimes. Nevertheless, these three countries have some similarities in terms of both norm and function of anti-corruption institutions. One of the similarities both normatively and practically is recognizing the mechanism for terminating investigations in corruption crimes. While Indonesia and the Netherlands formulate provisions regarding the discontinuation of investigations in their legal rules normatively, Hong Kong only recognizes this mechanism in legal practice as can be seen in the stages of handling cases published by the ICAC. This is also related to the prerequisites for terminating the investigation, where these countries have different provisions, including in the implementation.

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<sup>48</sup> Febby Mutiara Nelson, *Plea Bargaining Dan Deferred Prosecution Agreement Dalam Tindak Pidana Korupsi* (Jakarta: Sinar Grafika, 2020), 362.

<sup>49</sup> Michael Bisgrove and Mark Weekes, "Deferred Prosecution Agreements: A Practical Consideration," *Criminal Law Review* 2014, no. 1 (2014): 416.

<sup>50</sup> *Ibid.*, 420.

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<sup>51</sup> David Debold and Kyle C Barry, "Consistency in Non-Prosecution and Deferred Prosecution Agreements : A Lesson from the World Of" 20, no. 5 (2022): 333.

<sup>52</sup> Metroonlinentt, "Kasus Korupsi Di Bawah Rp50 Juta Tak Diproses Hukum, Catat Baik-Baik, Ini Alasannya," last modified 2022, <https://metroonlinentt.com/kasus-korupsi-di-bawah-rp50-juta-tak-diproses-hukum-catat-baik-baik-ini-alasannya/>.



2. Regarding the process of prosecuting corruption crimes, Hong Kong and the Netherlands have similarities where prosecution is only the domain of the Prosecutor's Office. Indonesia itself adheres to a dual-prosecution system where in addition to the Prosecutor's Office, the Corruption Eradication Commission can also prosecute corruption crimes. Each of these countries is also familiar with the mechanism for terminating the prosecution of corruption crimes. Similar to the discontinuation of the investigation, the prerequisites for the discontinuation of the prosecution among these three countries are also different where the Netherlands is the country with the most extensive prerequisites when compared to Indonesia and Hong Kong. In addition to technical reasons, the discontinuation of prosecution in the Netherlands is also based on reasons of public interest, which in the Indonesian context is more directed at setting aside cases related to the Attorney General's opportunity principle as regulated in Article 35c of the Prosecutor's Law.

## SUGGESTION

1. To accompany the authority to discontinue investigations as regulated in Article 40, the Corruption Eradication Commission (KPK) either with the Corruption Eradication Commission Regulations or with similar legal instruments, should issue a guideline that substantially contains actions *after* the discontinuation of investigation of corruption crimes. This guideline is a kind of detail of the monitoring duties of the Corruption Eradication Commission (Article 6 letter c of Law Number 19 of 2019). This is important, especially as an instrument of reform and to prevent the recurrence of corruption crimes. The same instrument has been implemented by both the operation review committee in Hong Kong and the BIOS and FINEC in the Netherlands.
2. The Corruption Eradication Commission should also establish a Corruption Eradication Commission Regulation regarding the mechanism for resolving corruption cases with the DPA (Deferred Prosecution Agreement) and NPA (Non-Prosecution Agreement) which are limited to certain corruption crimes as initiated by the Attorney General's Office. This regulation is important as a complement to the Corruption Eradication Commission's authority to discontinue prosecution. By looking at its implementation in several countries such as the United States, the regulation that should be issued by the Corruption Eradication Commission must also contain in detail the mechanism of supervision and accountability and provide a large space for public supervision.

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