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RATIO LEGIS OF JUDICIAL POWER INDEPENDENCE IN CORRUPTION CRIMINAL COURTS: A COMPARATIVE STUDY OF INDONESIA AND HONG KONG

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ABSTRACT

In a nation that adheres to the concept of the separation of powers based on the trias politica principle, the state's authority is divided among the executive, legislative, and judicial branches. Regarding the judicial branch, it operates with the principle of judicial independence, which is essential for upholding human rights, the rule of law, and justice. To apply this principle, judges are required to perform their duties in accordance with their oath and the law, without any external interference or directives. In Indonesia's legal framework, Article 24, Paragraph (2) of the 1945 Constitution outlines the exercise of judicial authority by the Supreme Court and various subordinate judicial bodies, including those with general, religious, military, and administrative jurisdiction, as well as the Constitutional Court. This research employs a comparative legal approach, analyzing the legal systems of both Indonesia and Hong Kong to enhance the coherence of national law by evaluating it in relation to another country's legal structure. The findings of this study are as follows: Firstly, the establishment of corruption criminal courts in Indonesia aligns with international agreements such as the United Nations Convention against Corruption (UNCAC) and the Declaration of Human Rights. However, the Indonesian system employs an ad hoc structure and ad hoc judges, which introduce certain vulnerabilities in ensuring the independence of these judges. Secondly, in Hong Kong, the establishment of corruption criminal courts is constitutionally guaranteed and institutionalized. Hong Kong's constitution explicitly prohibits the creation of ad hoc courts, resulting in a permanent and non-ad hoc court structure. As a result, the assurance of judicial independence for judges in Hong Kong is more robust and secure.

KEY WORDS

Corruption, judiciary, independence, Indonesia, Hong Kong.

The application of judicial mechanisms to combat corruption involves a policy aimed at addressing corruption-related offenses through legal verdicts. According to the World Bank, the establishment of specialized anti-corruption courts is an effective and efficient approach to combating corruption. Consequently, the World Bank has recommended the establishment of such courts worldwide to enhance a nation's success in fighting corruption effectively (Klitgaard, 1998). Countries like Uganda, Singapore, Hong Kong, and Chile, which have established such courts, have demonstrated effective policies in reducing corruption rates (Ruzindana, 1997). The philosophy behind creating anti-corruption courts in each country varies based on their respective economic, social, and political analyses.

When it comes to establishing anti-corruption courts, there are several universally applicable guiding principles, including:

- Independence and Impartiality: These principles are fundamental and require judicial institutions to operate without external interference, ensuring that decisions are based solely on the pursuit of justice and free from conflicts of interest;
- Accountability and Integrity: Judicial institutions must be accountable, comply with the law, follow clear procedures, exhibit fairness and propriety, and have effective control mechanisms;
- Adequate Resources: Sufficient financial and human resources are essential to ensure the proper functioning of the courts;



- Proper Recruitment, Appointment, and Training: The selection and training of judges and staff should adhere to high standards to maintain the integrity and competence of the judicial system.

Buscaglia emphasizes the importance of anti-corruption judicial institutions as an effective means of reducing corruption, with tangible results observed in numerous countries at both the judicial and municipal levels. This approach falls within the neo-economic framework, where anti-corruption courts act as overseers of legal institutions to combat corruption within a nation.

In Indonesia, the fight against corruption involves the establishment of Corruption Criminal Courts, as mandated by Law No. 46 of 2009 concerning Corruption Criminal Courts. The creation of these courts must align with the United Nations Convention against Corruption (UNCAC) of 2003, which Indonesia has ratified. This framework aims to ensure a fair, transparent, objective, and accountable judicial process in corruption cases, enhancing the effectiveness and certainty of anti-corruption efforts and providing a sense of justice to the public.

The establishment of corruption criminal courts must also adhere to universally recognized principles of jurisprudence, which include:

- Independence and Impartiality: These principles are foundational and ensure that judicial institutions operate without interference or bias, guaranteeing that decisions are based on the pursuit of justice;
- Simplicity and Promptness: The judicial system should be accessible, straightforward, and swift, ensuring that justice is not delayed or overly complex;
- Transparency: While not absolute openness, transparency provides opportunities for public scrutiny and understanding of court decisions;
- Accountability: Accountability involves compliance with the law, clear procedures, fairness, and effective control mechanisms, ensuring that the judicial system operates effectively.

These principles serve as benchmarks for assessing the effectiveness of the judicial system. Accountability, especially within the framework of inter-subsystem supervision, should involve participatory monitoring mechanisms. All these principles are intertwined with judicial independence and intersect with various forms of accountability, including political accountability, accountability of decisions, and accountability of behavior within the Corruption Criminal Court's administration itself.

METHODS OF RESEARCH

The research methodology utilized in this study employs comparative law as a tool to enhance domestic law and local legal doctrines, aiming to improve national law where its doctrines and application still dominate within a legal system. Over time, comparative law has become an indispensable instrument for achieving legal harmonization (Reid, 1998). According to Patrick Glenn, comparative law serves the following purposes (Glenn, 2006): comparative law as a means of learning and acquiring knowledge; comparative law as a means of evolution and categorization in the realm of knowledge; contributing to the national legal system; facilitating national legal harmonization with the laws of other countries.

In the field of comparative law, the ultimate objective is to enhance a nation's domestic law by juxtaposing it with the legal systems of other countries, thereby enabling national law to align with internationally applicable laws. Consequently, comparative law studies can encompass both the resemblances and distinctions between the legal systems of different nations (Twining, 2007).

RESULTS AND DISCUSSION

In historical context, the concept of ad hoc judges and ad hoc courts was first introduced during significant events. One instance was when the governments of Britain, France, and Russia jointly declared the Armenian massacre by the Turkish government as a



crime against civilization and humanity. They held the Turkish government responsible for crimes against humanity committed against the Armenian people. In response, these nations demanded the establishment of a specialized body to investigate these crimes (Bryl, 2012).

Another occurrence was after World War II when U.S. President Franklin D. Roosevelt accused Nazi leader Adolf Hitler of mass killings committed by Nazi Germany against the Jewish population. In response to Nazi crimes, the Allied nations signed the London Agreement, laying the foundation for the Nuremberg Ad Hoc Tribunal to try war crimes committed by the Nazis (Bassiouni, 2011).

Following the Nuremberg Tribunal, the International Military Tribunal for the Far East was established, where the United States sought to prosecute Japan for war crimes before an international court. This tribunal drew inspiration from the Nuremberg model and categorized crimes into three types (Model A, Class B, and Class C) (Bassiouni, 2011). Ultimately, the Tokyo Ad Hoc Tribunal was established in 1946 to hold Japan accountable for individual war crimes under international law, regardless of any national laws that might protect a head of state (president).

In 1993 and 1994, the United Nations Security Council established ad hoc tribunals, tasked with prosecuting crimes against humanity. The first was the International Criminal Tribunal for the former Yugoslavia (ICTY), created in May 1993 to address war crimes and other violations in Yugoslavia. Later, in November 1994, the UN established the International Tribunal for Rwanda (ICTR), an ad hoc tribunal focusing on violations of international humanitarian law in Rwanda.

Drawing from the experiences gained through these ad hoc tribunals, the Rome Statute of the International Criminal Court (ICC) was adopted in 1998. The ICC serves as a legal framework for establishing ad hoc tribunals within the international legal system to address international crimes defined in the Rome Statute (Lim, 2019). The ICC Statute outlines crimes that can be brought before the international court, including those such as murder, enslavement, torture, and other grave offenses against civilian populations (Rome Statute).

The emergence of international crimes handled by ad hoc courts and judges underscores the philosophy behind establishing such institutions. These crimes involve violations against humanity, which are inherent to human beings and serve as a normative basis for legal prosecution through ad hoc courts and judges (Chen, 2013).

This development stemmed from the post-World War II era, characterized by atrocities committed during the war. These atrocities inflicted severe harm not only on victims but also on society and humanity as a whole, irrespective of the conflict's geographic location. Such atrocities involved violations against humanity, inherent in human beings as living creatures. Therefore, crimes subject to prosecution by ad hoc courts and judges are those that result in atrocities against humanity and relate to the essence of human nature (Macleod, 2010).

The concept of establishing ad hoc courts and judges in Indonesia differs significantly from their international counterparts. In Indonesia, the concept is based on Article 27, paragraph (1) of Law No. 48 of 2009 Concerning Judicial Authority, which defines special courts as including various specialized courts such as child courts, commercial courts, human rights courts, corruption courts, industrial relations courts, and fishery courts (Bagir Manan, 1995).

The establishment of corruption courts in Indonesia is mandated by Article 53 of Law No. 30 of 2002 concerning Corruption Crimes and Constitutional Court Decision No. 012-016-019/PUU-IV/2006. These principles establish that corruption cases cannot be tried in both the Corruption Crime Court in Jakarta and the general court. A new law was enacted to provide the legal foundation for this specialized court, which is unique in its role. It is the only court with the authority to adjudicate corruption cases prosecuted by public prosecutors.

Specialization in the Corruption Crime Court extends to the composition of judges, including career judges and ad hoc judges. Ad hoc judges are appointed differently from regular judges due to the complexity of corruption cases and the broad range of corruption offenses. The inclusion of ad hoc judges aims to restore public confidence in the fight against corruption. However, differences in regulations between ad hoc judges and career judges in



the Corruption Crime Court should be eliminated to ensure judicial independence (Manan, 2014).

The legal system in Hong Kong distinguishes itself from that of other nations. It traces its roots back to the constitution of the Republic of China. In the past, Hong Kong fell under the jurisdiction of the Republic of China and did not have its legal system. Remarkably, Hong Kong operates under two sets of laws: laws originating from the Republic of China and local laws specific to Hong Kong. This dual legal system is a result of the historical practice of employing laws from the Republic of China in dealings between the central government of Hong Kong and the government of the Republic of China in Beijing. Concerning fundamental rights and legal obligations, local laws are applied, which are derived from the customs and practices of the Hong Kong people (Zhu, 2019).

The laws sourced from China are crafted by legal experts from the People's Republic of China with input from Hong Kong officials. Conversely, local Hong Kong laws stem from the Declaration included in the 1984 agreement in which Britain transferred sovereignty over Hong Kong to China. This agreement granted Hong Kong full autonomy as a separate, independent entity from China. Unfortunately, the adoption of the legal system inherited from China introduced socialist legal aspects into Hong Kong's legal framework (Jordan, 2007).

In terms of combating corruption, Hong Kong has been highly successful in reducing corruption rates and maintaining a low corruption index. In 2000, Hong Kong was ranked 11th among 180 countries with a corruption index score of 77/100, indicating its effectiveness in addressing corruption. Prior to the 1970s, Hong Kong faced a high level of corruption, primarily involving bribes to law enforcement officials in cases related to drug smuggling, gambling, prostitution, and traffic violations—crimes mainly handled by the police in Hong Kong (Broadhurst & Wa, 2009).

In the 1970s, public pressure compelled the Hong Kong government to reform its anti-corruption laws. The public demanded the establishment of a dedicated institution to combat corruption in Hong Kong. As part of these legal reforms, the Hong Kong government established the Independent Commission Against Corruption (ICAC), an institution responsible for addressing corruption in Hong Kong (Broadhurst & Wa, 2009).

Over time, the ICAC has proven highly effective in reducing corruption in Hong Kong. It has become a global reference in anti-corruption efforts due to its perceived effectiveness in combating corruption locally. Despite Hong Kong's previous high corruption levels, the ICAC has successfully tackled corruption, swiftly resolved corruption cases, and changed the behavior of the Hong Kong population to reject corrupt practices (Scott, 2018).

The ICAC employs a combination of action and prevention measures against corrupt individuals, effectively countering common corruption practices in Hong Kong, often involving the misuse of political and government power (Scott, 2018).

In fulfilling its mission to combat corruption, the ICAC focuses on three main pillars: prevention, anti-corruption education, and law enforcement. The ICAC operates with a specific organizational structure comprising the Operation Department, Corruption Prevention Department, and Community Relations Department, with the Administration Branch supporting these departments in executing their strategies. The ICAC consistently applies its anti-corruption strategy, which involves building public trust through enacting anti-corruption laws, providing channels for reporting corruption cases, and establishing partnerships with other institutions to prevent and combat corruption. This strategy, in place since 1974, has successfully addressed major corruption cases in Hong Kong and earned the ICAC high levels of public trust (Independent Commission Against Corruption, 2011).

Annually, the ICAC publishes a report detailing its anti-corruption policies, the number of corruption cases uncovered, case outcomes, and future initiatives. This report serves as a transparency mechanism, providing information about the institution's performance in investigating cases involving the community. It allows the public to assess the ICAC's performance and become aware of uncovered corruption cases. The investigative process outlined in the report includes reporting, initial investigation, full investigation, and prosecution (Independent Commission Against Corruption, 2011).



In Hong Kong, corruption offenses are governed by Article 9 of the Prevention of Bribery Ordinance (POBO). Section 9 (1) of the POBO states that it is an offense for an agent to solicit or accept any advantage without lawful authority or reasonable excuse as an inducement or reward for any act related to the agent's principal's affairs or business. Section 9 (2) of the POBO makes it an offense for any person to offer any advantage to an agent without lawful authority or reasonable excuse as an inducement or reward for the agent's acts related to their principal's affairs or business (Wai, 2017).

In the enforcement of corruption cases in Hong Kong, various criminal courts, including district courts, appellate courts, and the Hong Kong Court of Final Appeal, have the authority to examine and adjudicate cases (Wai, 2017). This means that Hong Kong employs a permanent and established court system for deciding corruption-related criminal cases, with no recognition of ad hoc courts or judges for such matters. Therefore, Hong Kong does not utilize ad hoc judges for the adjudication of corruption cases, and there is no distinction in status between ad hoc judges and career judges in corruption-related criminal courts in Hong Kong.

In Hong Kong's judicial system, judges enjoy the principle of absolute judicial independence. This principle applies to judges in both general courts and the Hong Kong Court of Final Appeal. It grants judges the autonomy to make decisions in their case rulings independently. The principle of judicial independence is firmly enshrined in Article 88 of the Hong Kong Constitution, effective since 1997, providing safeguards for the exercise of independent judicial authority by judges. Judges in Hong Kong's courts are selected by the Chief Executive based on recommendations from an independent commission. Judges serving in various capacities act independently and are free from external interference in the cases they adjudicate (Tsang, 2001).

The principle of judicial independence in Hong Kong is fundamental and absolute for judges, constituting a foundational element of their legal framework. While concerns may arise about potential misuse of judicial power, it serves as an assurance that judges can uphold justice impartially. The principle of judicial independence is intended to protect judges from external influence in the execution of their judicial functions. It encompasses several key aspects, including security of tenure, financial security, and institutional independence (Tsang, 2001).

Security of tenure ensures that judges can perform their duties without fear or disturbance. Financial security guarantees judges' income (salary) and retirement benefits in accordance with applicable laws. Institutional independence grants independence in the administration of judicial functions and case adjudication.

In Hong Kong, the concept of judicial independence is both an ideal and a practical necessity for judges. Ensuring its presence in the constitution is crucial, as it forms the foundation for judges' decisions, upholding justice and legal certainty. Without constitutional safeguards, there may be risks of personal ambitions and political control influencing judicial decisions. Judicial independence is not merely a theoretical concept; it is achievable when judges have independence of thought and conscience. Therefore, embedding the fundamental value of judicial independence in the constitution helps preserve judges' independence in their rulings (Malleon, 1999).

CONCLUSION

The guarantee of judicial independence in Indonesia's anti-corruption courts encounters obstacles stemming from the legal framework specified in Law No. 46 of 2009 regarding Corruption Courts. This framework still maintains a distinction between career judges and ad hoc judges, which introduces challenges in upholding the judicial independence of ad hoc judges concerning their welfare, career stability, and retirement benefits. In contrast, Hong Kong's judicial independence is firmly anchored in constitutional provisions that prohibit the establishment of ad hoc courts. Consequently, the assurance of judicial independence in Hong Kong is safeguarded concerning aspects like career advancement, well-being, and retirement benefits.



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