



## The Principle of Legality at the Crossroad: State Loss as a Requirement for Corruption Suspect Designation in Indonesia



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### Abstract

The principle of legality (*nullum crimen sine lege, nulla poena sine lege*) stands as a foundational safeguard within contemporary criminal justice, ensuring legal certainty, predictability, and protection against arbitrary state action. In Indonesia, it is codified in Article 1(1) of the Penal Code (KUHP) and procedurally reinforced by the Criminal Procedure Code (KUHP). Its doctrinal trajectory, however, shifted markedly after Constitutional Court Decision No. 25/PUU-XIV/2016, and Constitutional Court Decision No. 28/PUU-XXIV/2026 which annulled the phrase “may cause” in Article 2(1) of the Anti-Corruption Law. This ruling reclassified corruption from a formal offense to a material offense, thereby requiring proof of actual and quantifiable state financial loss. While this development enhances legal certainty and provides stronger protection against speculative or politically driven prosecutions, it simultaneously creates significant enforcement challenges. Establishing state financial loss necessitates protracted audit processes by institutions such as the Audit Board of Indonesia (BPK) or the Financial and Development Supervisory Agency (BPKP). Moreover, corruption produces diffuse, non-pecuniary harms – including diminished public trust, market distortions, and weakened democratic governance – that elude monetary quantification. Comparative analysis underscores divergent approaches. Civil law jurisdictions such as Germany and the Netherlands recognize the necessity of harm yet permit provisional measures prior to final quantification. Conversely, common law systems, including the United States and the United Kingdom, criminalize corrupt conduct irrespective of measurable loss, as exemplified by the FCPA and the Bribery Act 2010. International conventions (UNCAC, OECD Anti-Bribery Convention) similarly advocate flexible approaches that reconcile legal certainty with enforcement effectiveness. This research advances a two-tiered evidentiary framework: suspect designation should be permissible upon credible indications of corrupt conduct supported by provisional evidence of harm, with precise quantification deferred to trial. Such a model preserves the constitutional demand of legality while ensuring the practical efficacy of anti-corruption enforcement.

**Keywords:** Principle of Legality; State Loss; Corruption

## I. Introduction

The principle of legality has deep historical roots, tracing back to classical Roman law and gaining prominence during the Enlightenment. Cesare Beccaria, in *Dei delitti e delle pene*<sup>1</sup>,

<sup>1</sup> Cesare Beccaria, *On Crimes and Punishments*. Indianapolis: Hackett Publishing, 1986.

emphasized that laws must be clear, public, and prospective to prevent arbitrariness by rulers. This foundational idea was further developed by Paul Johann Anselm von Feuerbach through the maxim *nullum crimen sine lege, nulla poena sine lege*, which became a central tenet of European criminal law. In modern times, the principle is codified in major human rights instruments, including Article 11 of the Universal Declaration of Human Rights (UDHR) and Article 15 of the International Covenant on Civil and Political Rights (ICCPR). The European Court of Human Rights (ECHR) has consistently reinforced legality as a non-derogable right under Article 7 of the European Convention on Human Rights, thereby affirming its universal character.<sup>2</sup>

Indonesia inherited this principle through its adoption of the Dutch Penal Code (*Wetboek van Strafrecht*), later incorporated into the national KUHP. Article 1(1) KUHP clearly stipulates that “no act shall be punishable except on the basis of a prior statutory provision,” thereby embedding legality within the constitutional framework. The Criminal Procedure Code (KUHAP) extends this principle procedurally, requiring that all investigative and prosecutorial acts be grounded in statutory authority.<sup>3</sup> Corruption poses a unique challenge to the application of legality. Unlike conventional crimes, corruption often involves complex financial transactions, networks of collusion, and systemic abuse of discretion. As such, its harms extend beyond immediate financial losses, encompassing diminished public trust, weakened institutions, and impaired governance capacity.<sup>4</sup>

In Indonesia, the Anti-Corruption Law (Law No. 31/1999 jo. Law No. 20/2001) criminalizes acts of corruption under Articles 2 and 3, which initially allowed prosecution based on conduct that “may cause” state loss. However, the Constitutional Court’s Decision No. 25/PUU-XIV/2016 invalidated this clause, requiring proof of actual loss. This decision effectively transformed corruption into a *material offense*, necessitating quantifiable damage to state finances as a prerequisite for prosecution. While this change enhances legal certainty and aligns with strict interpretations of legality, it also risks constraining anti-corruption efforts. Investigators often depend on audit institutions to quantify losses, a process that can take months or years. During this period, suspects may tamper with evidence, intimidate witnesses, or otherwise obstruct justice.<sup>5</sup> Moreover, not all corrupt acts result in immediate financial losses; some produce institutional or governance harms that are equally damaging but not easily monetized.<sup>6</sup>

The practical implications of this doctrinal shift are evident in several high-profile corruption cases. For instance, in the *e-KTP* (Electronic ID) case, the quantification of losses reached trillions of rupiah, but the auditing process created delays that hindered swift prosecution. Similarly, in the *BLBI* and *Jiwasraya* scandals, the scale of financial harm was contested, raising questions about the sufficiency of evidence at the suspect designation stage.<sup>7</sup> These cases illustrate a broader tension between protecting defendants’ rights through legality and ensuring effective enforcement against systemic corruption. The requirement of actual loss may inadvertently embolden corrupt actors, who exploit legal technicalities to avoid accountability. This concern has been voiced by scholars and practitioners alike, noting that rigid application of legality in corruption cases risks undermining public trust in the justice system.

Despite extensive scholarship on the principle of legality, few studies have examined its specific application in corruption cases requiring state financial loss. Most comparative analyses focus either on doctrinal interpretations of legality or on anti-corruption enforcement strategies, but seldom on the intersection of the two. Indonesia’s Constitutional Court ruling creates a unique case study that highlights this intersection, offering lessons not only for domestic law but

<sup>2</sup> Kai Ambos, “The Principle of Legality in International and Comparative Criminal Law.” *Criminal Law Forum* 21 (2), 2010: 193–224. <https://doi.org/10.1007/s10609-010-9111-7>

<sup>3</sup> Andrew Ashworth, and Jeremy Horder. *Principles of Criminal Law*. 7th ed. Oxford: Oxford University Press, 2013.

<sup>4</sup> Susan Rose-Ackerman, and Bonnie J. Palifka, *Corruption and Government: Causes, Consequences, and Reform*. 2nd ed. Cambridge: Cambridge University Press, 2016. <https://doi.org/10.1017/CBO9781139962939>

<sup>5</sup> Matthew C. Stephenson. “Corruption as a Systemic Problem: On the Relevance of Collective Action Theory.” *Governance* 33 (2), 2020: 285–301. <https://doi.org/10.1111/gove.12485>

<sup>6</sup> Michael Johnston, “Corruption, Contention and Reform: The Power of Deep Democratization.” *Governance* 27 (4), 2014: 723–742. <https://doi.org/10.1111/gove.12054>

<sup>7</sup> Ester Lalola, “Audit Politics and Corruption Trials in Indonesia.” *Jurnal Hukum IUS QUIA IUSTUM* 30 (1), 2023: 15–36.

also for jurisdictions facing similar dilemmas. This study fills that gap by situating Indonesia's experience within broader comparative and theoretical frameworks. It argues that the principle of legality should be interpreted dynamically: as a safeguard against arbitrariness, but not as a rigid requirement that paralyzes enforcement. The urgency of this analysis lies in Indonesia's ongoing struggle against corruption, where effective legal tools must be balanced with the protection of individual rights.<sup>8</sup>

The principle of legality has been extensively examined within Criminal Law scholarship, particularly in relation to its philosophical foundations, historical development, and its function as a safeguard against arbitrary state power. Classical works such as *On Crimes and Punishments* emphasize the necessity of clear, prospective laws, while later doctrinal developments reinforce legality as a cornerstone of legal certainty and individual protection.<sup>9</sup> Contemporary analyses further situate legality within international human rights frameworks, including the International Covenant on Civil and Political Rights, highlighting its non-derogable character and universal applicability.<sup>10</sup>

However, despite this extensive body of scholarship, several critical gaps remain. First, existing research tends to treat legality and anti-corruption enforcement as analytically distinct domains. Legal scholars primarily focus on the normative and doctrinal dimensions of legality, while corruption studies emphasize institutional, political, and economic factors.<sup>11</sup> As a result, there is limited scholarship that systematically examines how strict legality requirements – particularly the need for clearly defined material elements – affect the effectiveness of corruption law enforcement in practice.<sup>12</sup> Second, there is insufficient attention to the transformation of corruption offenses into material offenses requiring proof of actual state financial loss. While doctrinal analyses of legality stress the importance of certainty and foreseeability,<sup>13</sup> few studies explore how this requirement reshapes evidentiary burdens and prosecutorial strategies in corruption cases. This gap is particularly relevant in jurisdictions such as Indonesia, where legal reforms have altered the structure of criminal liability without sufficient accompanying theoretical analysis.<sup>14</sup> Third, the dominant legal approach continues to equate corruption harm with quantifiable financial loss, thereby overlooking broader forms of harm such as institutional degradation, governance failure, and erosion of public trust. Although governance and political economy literature recognize these systemic effects,<sup>15</sup> there is a lack of doctrinal integration explaining how such non-material harms can be accommodated within the framework of legality without undermining its protective function. Fourth, comparative scholarship remains limited in addressing context-specific applications of legality in corruption cases, particularly in non-Western jurisdictions. Much of the existing literature focuses on European or international legal systems, leaving countries such as Indonesia underrepresented despite their unique legal and institutional dynamics. Indonesia's post-constitutional review framework offers a distinct case

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<sup>8</sup> Anna Persson, Bo Rothstein, and Jan Teorell, "Why Anticorruption Reforms Fail: Systemic Corruption as a Collective Action Problem," *Governance* 26 (3), 2013: 449–471. <https://doi.org/10.1111/gove.12010>

<sup>9</sup> R. A. Duff, "In Defence of Legality," *Journal of Applied Philosophy* 18, no. 3 (2001): 263–275; Kai Ambos, "The Principle of Legality in International and Comparative Criminal Law," *Criminal Law Forum* 21, no. 2, 2010: 193–224.

<sup>10</sup> Paul H. Robinson, "Fair Notice and Fair Adjudication: Two Kinds of Legality," *University of Pennsylvania Law Review* 154, no. 2, 2005: 335–397

<sup>11</sup> Susan Rose-Ackerman and Bonnie J. Palifka, *Corruption and Government: Causes, Consequences, and Reform*, 2nd ed. (Cambridge: Cambridge University Press, 2016); Bo Rothstein and Aiysha Varraich, "Making Sense of Corruption," *Governance* 30, no. 1, 2017: 15–31.

<sup>12</sup> Anna Persson, Bo Rothstein, and Jan Teorell, "Why Anticorruption Reforms Fail: Systemic Corruption as a Collective Action Problem," *Governance* 26, no. 3 (2013): 449–471; Matthew C. Stephenson, "Corruption as a Systemic Problem: On the Relevance of Collective Action Theory," *Governance* 33, no. 2, 2020: 285–301.

<sup>13</sup> Ambos, "The Principle of Legality"; Robinson, "Fair Notice and Fair Adjudication."

<sup>14</sup> Ester Lalola, "Audit Politics and Corruption Trials in Indonesia," *Jurnal Hukum IUS QUIA IUSTUM* 30, no. 1, 2023: 15–36.

<sup>15</sup> Michael Johnston, "Corruption, Contention and Reform: The Power of Deep Democratization," *Governance* 27, no. 4 (2014): 723–742; Paolo Mauro, "Corruption and Growth," *Quarterly Journal of Economics* 110, no. 3, 1995: 681–712.

that highlights tensions between legal certainty and enforcement effectiveness, yet it has not been sufficiently explored in comparative legal studies.<sup>16</sup>

## II. Research Problems

The central problem addressed in this study concerns the interpretation and application of the principle of legality within Criminal Law, particularly in corruption cases where the existence of state financial loss remains uncertain. The issue arises following Constitutional Court Decision No. 25/PUU-XIV/2016 and Constitutional Court Decision No. 28/PUU-XXIV/2026, which invalidated the phrase “may cause” in Article 2(1) of the Anti-Corruption Law and required proof of actual loss. This doctrinal shift reflects a stricter interpretation of legality, emphasizing certainty and foreseeability as fundamental safeguards against arbitrary prosecution.<sup>17</sup>

At its core, the problem presents a legal and practical dilemma. On the one hand, the principle of legality requires that criminal liability be grounded strictly in statutory provisions, thereby ensuring legal certainty and protecting individual rights.<sup>18</sup> This view is strongly supported in doctrinal literature, which emphasizes that legality serves as a barrier against retroactive punishment and vague criminal norms.<sup>19</sup> On the other hand, corruption is widely recognized as a complex and systemic crime, often involving concealed transactions, abuse of discretion, and harms that extend beyond immediate financial loss.<sup>20</sup> In many cases, the detrimental effects of corruption manifest in weakened institutions, erosion of public trust, and long-term governance failures, which are not easily quantifiable in monetary terms.<sup>21</sup>

The requirement to prove actual state financial loss as a precondition for suspect designation introduces significant practical challenges. Law enforcement authorities frequently depend on audit institutions to calculate losses, a process that may delay investigations and create opportunities for obstruction of justice.<sup>22</sup> Comparative legal studies indicate that other jurisdictions do not always require precise quantification of loss at the early stages of prosecution; instead, liability may attach to the corrupt act itself or allow provisional measures pending full assessment.<sup>23</sup> This contrast raises critical questions regarding whether Indonesia’s current approach aligns with effective anti-corruption enforcement practices.

Moreover, the rigid insistence on quantifiable loss risks narrowing the scope of corruption law and may inadvertently weaken its deterrent function. Scholars have argued that anti-corruption frameworks must address corruption as a systemic problem, requiring flexible legal tools capable of responding to complex and evolving forms of misconduct.<sup>24</sup> In this context,

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<sup>16</sup> Topo Santoso, “Corruption, Audit Politics, and Enforcement Gaps in Indonesia,” *Asian Journal of Comparative Law* 16, no. 3 (2021): 451–472; Marcus Mietzner and Edward Aspinall, “Indonesia’s Democratic Regression: Structural Constraints and Political Choices,” *Contemporary Southeast Asia* 42, no. 1, 2020: 1–28.

<sup>17</sup> Kai Ambos, “The Principle of Legality in International and Comparative Criminal Law,” *Criminal Law Forum* 21, no. 2, 2010: 193–224, <https://doi.org/10.1007/s10609-010-9111-7>

<sup>18</sup> Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law*, 7th ed. (Oxford: Oxford University Press, 2013), <https://doi.org/10.1093/he/9780199657083.001.0001>

<sup>19</sup> R. A. Duff, “In Defence of Legality,” *Journal of Applied Philosophy* 18, no. 3, 2001: 263–275, <https://doi.org/10.1111/1468-5930.00167>; Paul H. Robinson, “Fair Notice and Fair Adjudication: Two Kinds of Legality,” *University of Pennsylvania Law Review* 154, no. 2, 2005: 335–397, <https://doi.org/10.2307/40041242>

<sup>20</sup> Susan Rose-Ackerman and Bonnie J. Palifka, *Corruption and Government: Causes, Consequences, and Reform*, 2nd ed. (Cambridge: Cambridge University Press, 2016), <https://doi.org/10.1017/CBO9781139962939>

<sup>21</sup> Michael Johnston, “Corruption, Contention and Reform: The Power of Deep Democratization,” *Governance* 27, no. 4, 2014: 723–742, <https://doi.org/10.1111/gove.12054>

<sup>22</sup> Ester Lalola, “Audit Politics and Corruption Trials in Indonesia,” *Jurnal Hukum IUS QUIA IUSTUM* 30, no. 1, 2023: 15–36, <https://doi.org/10.20885/iustum.vol30.iss1.art2>

<sup>23</sup> Michael Kubiciel, “Core Criminal Law Provisions in the Fight Against Corruption,” *Nordic Journal of International Law* 78, no. 3 (2009): 287–317, <https://doi.org/10.1163/157181009X12438602541333>; Philip M. Nichols, “The Business Case for Complying with Bribery Laws,” *American Business Law Journal* 49, no. 2, 2012: 325–368, <https://doi.org/10.1111/j.1744-1714.2012.01163.x>

<sup>24</sup> Anna Persson, Bo Rothstein, and Jan Teorell, “Why Anticorruption Reforms Fail: Systemic Corruption as a Collective Action Problem,” *Governance* 26, no. 3, 2013: 449–471, <https://doi.org/10.1111/gove.12010>; Matthew C. Stephenson, “Corruption as a Systemic Problem: On the Relevance of Collective Action Theory,” *Governance* 33, no. 2, 2020: 285–301, <https://doi.org/10.1111/gove.12485>

the strict application of legality may create tension between the protection of individual rights and the need to ensure effective enforcement against corruption.

Based on this dilemma, the study formulates the following research questions:

1. How is the principle of legality applied in Indonesian corruption cases where state financial loss is not definitively proven?
2. Should proof of state financial loss be treated as an absolute requirement for suspect designation in corruption cases?

### III. Research Methods

This study adopts a normative legal research methodology, which focuses on doctrinal, statutory, and theoretical analysis rather than empirical fieldwork. Such an approach is commonly used in Legal Research Methodology to uncover legal meaning through the interpretation of norms, principles, and authoritative texts.<sup>25</sup> The methodology is designed to analyze the principle of legality in corruption law by examining statutes, jurisprudence, and scholarly writings. The statutory approach is employed to examine relevant provisions of Indonesian law, including Article 1(1) KUHP, which codifies the principle of legality; Articles 2 and 3 of the Anti-Corruption Law (Law No. 31/1999 jo. Law No. 20/2001), which define corruption offenses in terms of unlawful conduct and state financial loss; and Article 1(14) KUHP, which defines the threshold for suspect designation (“sufficient preliminary evidence”). This analysis situates the Constitutional Court’s interpretation within Indonesia’s statutory framework and evaluates whether requiring actual state loss is consistent with broader principles of criminal law.<sup>26</sup>

The case approach focuses primarily on Constitutional Court Decision No. 25/PUU-XIV/2016 and Constitutional Court Decision No. 28/PUU-XXIV/2026, which transformed corruption into a material offense. It also considers major corruption cases such as the e-KTP scandal, the BLBI case, and the Jiwasraya case, highlighting how the requirement of proven state loss has affected prosecutorial strategies and outcomes.<sup>27</sup> Judicial interpretations from the Supreme Court are also reviewed to understand how lower courts have applied the Constitutional Court’s ruling in practice.

Comparative legal analysis is used to contextualize Indonesia’s experience within broader international practices. In civil law jurisdictions such as Germany, the Netherlands, and Italy, harm is often considered an element of the offense, but provisional enforcement measures may be undertaken prior to full quantification.<sup>28</sup> In contrast, common law jurisdictions such as the United States and the United Kingdom generally attach liability to the corrupt act itself, regardless of whether financial harm has been precisely calculated.<sup>29</sup> Meanwhile, in Asian jurisdictions such as Singapore and Hong Kong, anti-corruption frameworks emphasize conduct-based liability, supported by strong institutional enforcement mechanisms such as the ICAC model.<sup>30</sup>

The study employs a qualitative-deductive analysis, beginning with general principles of legality and narrowing to the specific issue of state financial loss in corruption cases. Comparative insights are used to test Indonesia’s approach against international standards, while case studies illustrate practical implications. The analysis ultimately provides normative recommendations for doctrinal clarification and legislative reform.

<sup>25</sup> Peter Mahmud Marzuki, *Penelitian Hukum*. Jakarta: Kencana, 2005.

<sup>26</sup> Andrew Ashworth and Jeremy Horder. *Principles of Criminal Law*. 7th ed. Oxford: Oxford University Press, 2013. <https://doi.org/10.1093/he/9780199657083.001.0001>

<sup>27</sup> Lalola, Ester. “Audit Politics and Corruption Trials in Indonesia.” *Jurnal Hukum IUS QUIA IUSTUM* 30, no. 1, 2023: 15–36. <https://journal.uui.ac.id/IUSTUM/article/view/>

<sup>28</sup> Michael Kubiciel, “Core Criminal Law Provisions in the Fight Against Corruption.” *Nordic Journal of International Law* 78, no. 3, 2009: 287–317. <https://doi.org/10.1163/157181009X12438602541333>

<sup>29</sup> Mike Koehler, “The Story of the Foreign Corrupt Practices Act.” *Ohio State Law Journal* 73, no. 5, 2012: 929–1014. <https://kb.osu.edu/handle/1811/71895>

<sup>30</sup> Quah, Jon S. T. “Curbing Corruption in Asian Countries: Lessons from Singapore and Hong Kong.” *Asian Journal of Public Administration* 33, no. 2, 2011: 141–170. <https://doi.org/10.1080/23276665.2011.10779389>

## IV. Result and Discussion

### 1. Application of the Principle of Legality in Suspect Designation

The principle of legality has been universally recognized as a cornerstone of Criminal Law, rooted in Enlightenment thought and designed to safeguard individuals against arbitrary state power. Cesare Beccaria, in *Dei delitti e delle pene* (1764), insisted that punishment must be based only on clear, previously enacted laws, warning that judicial discretion invites tyranny.<sup>31</sup> Building upon this foundation, Paul Johann Anselm von Feuerbach formulated the maxim *nullum crimen, nulla poena sine lege*, which remains the doctrinal core of legality in continental legal systems.<sup>32</sup>

Legality embodies four essential dimensions—*lex scripta*, *lex certa*, *lex praevia*, and *lex stricta*—which collectively ensure that criminal liability is grounded in written, clear, prospective, and strictly interpreted law.<sup>33</sup> These principles are firmly embedded in international human rights law. Article 15 of the International Covenant on Civil and Political Rights affirms that no one shall be held guilty of a criminal offense for conduct that was not criminal at the time it was committed. Similarly, the jurisprudence of the European Court of Human Rights consistently emphasizes foreseeability and legal certainty as essential components of legality.<sup>34</sup>

International human rights instruments enshrine this principle as non-derogable. Article 15 of the ICCPR affirms that no one shall be held guilty of any criminal offense on account of an act not constituting a crime at the time it was committed. Similarly, the European Court of Human Rights (ECHR) has consistently reinforced legality under Article 7 of the European Convention, emphasizing predictability and foreseeability of the law (*Kokkinakis v. Greece*, 1993; *Case of Scoppola v. Italy*, 2009). Thus, legality is both a doctrinal shield and a practical guarantee, ensuring fairness and restraint in state power. Yet, in the context of corruption, its application faces unique complexities due to the nature of the crime. International conventions acknowledge the necessity of legality but caution against allowing it to become an obstacle to enforcement. The United Nations Convention against Corruption (UNCAC, 2003)<sup>35</sup> obligates states to criminalize a wide range of corrupt practices, including bribery, embezzlement, illicit enrichment, and obstruction of justice. Importantly, UNCAC emphasizes criminalization of conduct rather than insistence on proven financial harm. Similarly, the OECD Anti-Bribery Convention (1997) requires member states to criminalize the bribery of foreign public officials without conditioning liability on measurable state loss. This reflects a recognition that corruption undermines governance and markets even absent direct financial damage.<sup>36</sup>

Regional mechanisms echo this approach. The Inter-American Convention Against Corruption (1996) and the Council of Europe Criminal Law Convention on Corruption (1999)<sup>37</sup> both frame corruption as a conduct-based offense. They emphasize the need to sanction bribery, trading in influence, and abuse of functions regardless of quantifiable losses. Comparative literature shows that international anti-corruption regimes encourage states to adopt conduct-oriented criminalization. This framework contrasts with Indonesia's current model, which after the Constitutional Court ruling effectively requires measurable loss before suspect designation.

Indonesia presents a distinctive case study. Articles 2 and 3 of the Anti-Corruption Law originally criminalized acts that “may cause” state loss, reflecting a formal offense structure. However, the Constitutional Court, in Decision No. 25/PUU-XIV/2016, struck down this formulation, reasoning that it created uncertainty and violated legality by allowing speculative

<sup>31</sup> Cesare Beccaria, *On Crimes and Punishments* (Indianapolis: Hackett, 1986).

<sup>32</sup> Kai Ambos, “The Principle of Legality in International and Comparative Criminal Law,” *Criminal Law Forum* 21, no. 2, 2010: 193–224, <https://doi.org/10.1007/s10609-010-9111-7>

<sup>33</sup> Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law*, 7th ed. (Oxford: Oxford University Press, 2013), <https://doi.org/10.1093/he/9780199657083.001.0001>

<sup>34</sup> Paul H. Robinson, “Fair Notice and Fair Adjudication,” *University of Pennsylvania Law Review* 154, no. 2, 2005: 335–397, <https://doi.org/10.2307/40041242>

<sup>35</sup> United Nations, *United Nations Convention Against Corruption* 2003, <https://www.unodc.org/unodc/en/corruption/uncac.html>

<sup>36</sup> Mark Pieth, Lucinda Low, and Peter Cullen, *The OECD Convention on Bribery* (Cambridge: Cambridge University Press, 2007), <https://doi.org/10.1017/CBO9780511494416>

<sup>37</sup> Council of Europe, *Criminal Law Convention on Corruption*, 1999, <https://www.coe.int>

prosecutions. Consequently, corruption is now a material offense, requiring proven and quantifiable state loss (*kerugian keuangan negara*). This doctrinal shift has profound implications:

1. Investigative dependency on audits, only authorized institutions such as BPK and BPKP may quantify state losses, often through lengthy processes.
2. Delay in suspect designation, prosecutors and the KPK must await audit results, limiting their ability to act swiftly.
3. Risk of evidentiary tampering, suspects may exploit delays to destroy evidence or influence witnesses.
4. Selective justice concerns, political actors may leverage audit institutions to obstruct prosecutions.

Moreover, first, the requirement of proven loss creates dependency on audit institutions, delaying investigations and complicating suspect designation.<sup>38</sup> Second, it introduces evidentiary rigidity, shifting focus from unlawful conduct to technical accounting disputes.<sup>39</sup> Third, it risks weakening enforcement by allowing suspects to exploit procedural delays.<sup>40</sup> Cases such as *e-KTP* and *BLBI* illustrate these dilemmas. In the *e-KTP* case, losses were eventually quantified at over Rp 2.3 trillion, but delays in audit reports prolonged investigations and created opportunities for interference. Similarly, in the *Jiwasraya* scandal, contestation over audit methods complicated prosecutions, raising questions about whether legality is being interpreted too rigidly to the detriment of justice.<sup>41</sup> The requirement of actual loss introduces multiple challenges:

1. Technical complexity – Calculating state loss in corruption often requires forensic accounting, valuation of public assets, and assessment of opportunity costs.
2. Institutional bottlenecks – Audit institutions face resource constraints, backlogs, and potential political pressure.
3. Diffused harms – Not all corrupt acts produce immediate or measurable losses. For example, abuse of discretionary power or favoritism in public procurement may distort governance without direct quantifiable damage.
4. Risk of impunity – Requiring definitive proof of loss at the suspect designation stage risks letting perpetrators escape accountability, particularly in cases involving complex financial schemes.<sup>42</sup>

These challenges suggest that Indonesia's approach, while doctrinally faithful to legality, may undermine the practical goal of corruption prevention. A comparative lens highlights alternative approaches across legal systems. In civil law jurisdictions, enforcement frameworks tend to balance legality with practical flexibility. In Germany, corruption and fraud offenses generally require proof of harm, but investigative authorities are permitted to adopt provisional measures before losses are fully quantified.<sup>43</sup> Similarly, broader European scholarship demonstrates that continental systems increasingly emphasize the protection of public integrity rather than strict financial loss as the sole determinant of liability.<sup>44</sup> In Italy, particularly during the *Mani Pulite* investigations, jurisprudence treated bribery as inherently harmful conduct, with financial consequences often considered only at the sentencing stage.<sup>45</sup>

By contrast, common law systems adopt even broader conduct-based models. In the United States, the Foreign Corrupt Practices Act criminalizes bribery based on the provision of

<sup>38</sup> Indriyanto Seno Adji, "Problematika Pembuktian Kerugian Negara," *Jurnal Hukum dan Pembangunan* 50, no. 2, 2020.

<sup>39</sup> Topo Santoso, "Corruption, Audit Politics," *Asian Journal of Comparative Law* 16, no. 3, 2021: 451–472, <https://doi.org/10.1017/asjcl.2021.17>

<sup>40</sup> Matthew C. Stephenson, "Corruption as a Systemic Problem," *Governance* 33, no. 2, 2020: 285–301, <https://doi.org/10.1111/gove.12485>

<sup>41</sup> Ester Lalola, "Audit Politics," *Jurnal Hukum IUS QUIA IUSTUM* 30, no. 1, 2023: 15–36, <https://doi.org/10.20885/iustum.vol30.iss1.art2>

<sup>42</sup> Stephenson, Matthew C. "Corruption as a Systemic Problem: On the Relevance of Collective Action Theory." *Governance* 33 (2), 2020: 285–301. <https://doi.org/10.1111/gove.12485>

<sup>43</sup> Michael Kubiciel, "Core Criminal Law Provisions in the Fight Against Corruption," *Nordic Journal of International Law* 78, no. 3, 2009: 287–317, <https://doi.org/10.1163/157181009X12438602541333>

<sup>44</sup> Valsamis Mitsilegas, *EU Criminal Law* (Oxford: Hart Publishing, 2009), <https://doi.org/10.5040/9781847315140>

<sup>45</sup> Donatella della Porta and Alberto Vannucci, *Corrupt Exchanges: Actors, Resources, and Mechanisms of Political Corruption* (New York: Aldine de Gruyter, 1999), <https://doi.org/10.4324/9780203984563>

improper advantage, without requiring proof of financial harm.<sup>46</sup> Likewise, the United Kingdom's Bribery Act 2010 treats bribery as an offense per se, emphasizing the act of corruption rather than its quantifiable consequences.<sup>47</sup> In Asia, jurisdictions such as Singapore and Hong Kong also prioritize conduct-based enforcement. Singapore's Prevention of Corruption Act criminalizes gratification irrespective of measurable harm, while Hong Kong's Independent Commission Against Corruption (ICAC) operates under a similar framework emphasizing integrity in public administration.<sup>48</sup>

Comparative insights suggest that Indonesia's model is unusually restrictive and may hinder effective anti-corruption enforcement when measured against international best practices. Over the past three decades, anti-corruption law has evolved from a matter of domestic policy into a global legal regime. This globalization is driven by conventions, treaties, and transnational enforcement mechanisms aimed at harmonizing criminalization standards. Central to these developments is the challenge of reconciling the principle of legality with the practical demands of combating corruption, which frequently involves complex financial structures and produces harms not easily quantified.<sup>49</sup>

The United Nations Convention Against Corruption represents the most comprehensive international framework, mandating the criminalization of bribery, embezzlement, abuse of functions, and illicit enrichment. Notably, UNCAC adopts a conduct-oriented approach, focusing on the wrongful nature of corrupt acts rather than conditioning liability on proof of actual loss.<sup>50</sup> This reflects a broader international consensus that legality must be preserved without allowing it to obstruct effective enforcement.<sup>51</sup> The United Nations Convention Against Corruption reflects a nuanced balance between legality and effectiveness. Article 15 requires states to criminalize the bribery of national public officials without reference to state financial loss, while Article 17 mandates the criminalization of embezzlement of public property, likewise without conditioning liability on loss quantification. Article 20 on illicit enrichment is particularly controversial, as it appears to challenge traditional legality by allowing liability to be inferred from disproportionate wealth, raising debates about its compatibility with the principle of *nullum crimen sine lege*.<sup>52</sup>

The drafters of UNCAC were aware of this tension but emphasized that effective anti-corruption enforcement requires a degree of functional flexibility. Consequently, UNCAC promotes conduct-based criminalization while maintaining procedural safeguards for defendants, thereby representing a pragmatic compromise between strict legality and enforcement needs.<sup>53</sup> Empirical research supports this approach, demonstrating that jurisdictions adopting conduct-based anti-corruption frameworks achieve broader enforcement coverage,

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<sup>46</sup> Mike Koehler, "The Story of the Foreign Corrupt Practices Act," *Ohio State Law Journal* 73, 2012: 929-1014, <https://kb.osu.edu/handle/1811/71895>

<sup>47</sup> Philip M. Nichols, "The Business Case for Complying with Bribery Laws," *American Business Law Journal* 49, no. 2, 2012: 325-368, <https://doi.org/10.1111/j.1744-1714.2012.01163.x>

<sup>48</sup> Jon S. T. Quah, "Curbing Corruption in Asian Countries: Lessons from Singapore and Hong Kong," *Asian Journal of Public Administration* 33, no. 2, 2011: 141-170, <https://doi.org/10.1080/23276665.2011.10779389>

<sup>49</sup> Tina Søreide, "Drivers of Corruption - A Brief Review," *Crime, Law and Social Change* 62, no. 2, 2014: 115-128, <https://doi.org/10.1007/s10611-013-9484-0>; Matthew C. Stephenson, "Corruption as a Systemic Problem," *Governance* 33, no. 2, 2020: 285-301, <https://doi.org/10.1111/gove.12485>

<sup>50</sup> United Nations, *United Nations Convention Against Corruption* 2003, <https://www.unodc.org/unodc/en/corruption/uncac.html>

<sup>51</sup> Mark Pieth, *International Anti-Corruption Law* (Oxford: Oxford University Press, 2016), <https://doi.org/10.1093/law/9780198715418.001.0001>; Marie Chêne, "The Role of the UNCAC in Preventing Corruption," U4 Anti-Corruption Resource Centre 2019, <https://www.u4.no>

<sup>52</sup> Brian D. Boles, "Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations," *New York University Journal of Legislation and Public Policy* 17 (2014): 835-885, <https://nyujlpp.org>; Jan Christoph Hock, *Asset Recovery and Illicit Enrichment* (Cham: Springer, 2019), <https://doi.org/10.1007/978-3-030-14138-6>

<sup>53</sup> Martine Boersma, *Corruption: A Violation of Human Rights and a Crime under International Law?* (Antwerp: Intersentia, 2015), <https://doi.org/10.1017/9781780685072>

whereas systems requiring strict proof of quantifiable loss often face delays and enforcement inefficiencies.<sup>54</sup>

Similarly, the OECD Anti-Bribery Convention represents a foundational instrument in transnational anti-corruption law. It obliges states to criminalize the bribery of foreign public officials “to obtain or retain business or other improper advantage,” explicitly attaching liability to the act of bribery itself rather than requiring proof of harm to the foreign state.<sup>55</sup>

The OECD framework has two important implications for the principle of legality. First, it requires the recognition of corporate liability, extending criminal responsibility beyond natural persons to legal entities. This development challenges traditional formalist conceptions of legality but has been widely justified on grounds of enforcement effectiveness and deterrence.<sup>56</sup> Second, the principle of functional equivalence allows states flexibility in implementing anti-bribery laws, provided that outcomes meet agreed international standards. This approach ensures that differences in legal systems do not undermine enforcement, while preventing legality from becoming a barrier to effective prosecution.<sup>57</sup>

Comparative studies indicate that countries with robust enforcement of the OECD Anti-Bribery Convention—such as the United States, Germany, and the United Kingdom—tend to prioritize conduct over quantifiable harm in corruption offenses. By contrast, weak enforcement regimes often rely on narrow interpretations tied to demonstrable financial loss, thereby limiting prosecutorial effectiveness and deterrence.<sup>1</sup> Beyond the United Nations Convention Against Corruption and the OECD framework, regional treaties reinforce a conduct-based approach. The Inter-American Convention Against Corruption (1996) established early standards requiring criminalization of a wide range of corrupt acts, prioritizing integrity over measurable harm.<sup>2</sup> Similarly, the Council of Europe Criminal Law Convention on Corruption (1999) sets minimum standards for bribery and abuse of functions while emphasizing foreseeability rather than financial loss as a defining element.<sup>3</sup> The African Union Convention on Preventing and Combating Corruption (2003) further extends this approach by incorporating illicit enrichment and abuse of office as punishable conduct, often beyond strict formal legality.<sup>4</sup> These regional frameworks reflect a growing international consensus: while legality remains fundamental, it must not paralyze enforcement. Instead, corruption is framed as a conduct-based offense that undermines governance regardless of whether losses can be precisely quantified.<sup>5</sup>

One of the most debated aspects of international anti-corruption law is illicit enrichment under UNCAC Article 20. Critics argue that such provisions challenge the principle of *nullum crimen sine lege* by effectively shifting the burden of proof onto the defendant.<sup>6</sup> However, proponents contend that illicit enrichment laws are necessary in environments characterized by systemic corruption, where proving specific acts of bribery or embezzlement may be practically impossible.<sup>7</sup> Empirical research suggests that such provisions significantly expand prosecutorial reach, although courts typically mitigate legality concerns by imposing strict evidentiary safeguards.<sup>8</sup> This tension illustrates how international anti-corruption law adopts a functionally flexible approach: legality remains a guiding principle, but enforcement realities necessitate doctrinal adaptation.<sup>9</sup>

Against this backdrop, Indonesia’s insistence on quantifiable state financial loss appears increasingly anomalous. While justified as a safeguard of legality, it diverges from global best practices that emphasize conduct and systemic harm.<sup>10</sup> By tethering criminal liability too rigidly to measurable loss, Indonesia risks weakening deterrence and undermining international

<sup>54</sup> Tina Søreide and Rory Truex, “Corruption and Policy Reform,” *Annual Review of Political Science* 18, 2015: 473–490, <https://doi.org/10.1146/annurev-polisci-090812-182829>

<sup>55</sup> Mark Pieth, Lucinda A. Low, and Peter J. Cullen, *The OECD Convention on Bribery: A Commentary* (Cambridge: Cambridge University Press, 2007), <https://doi.org/10.1017/CBO9780511494416>

<sup>56</sup> Joanna Kyriakakis, “Developments in Corporate Criminal Liability,” *Journal of International Criminal Justice* 12, no. 4 (2014): 809–823, <https://doi.org/10.1093/jicj/mqu055>; Colin Murray, “Corporate Criminal Liability and the OECD Convention,” *Legal Studies* 39, no. 3, 2019: 431–450, <https://doi.org/10.1017/lst.2018.31>

<sup>57</sup> David Kaczmarek and Abraham L. Newman, “The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation,” *International Organization* 65, no. 4, 2011: 745–770, <https://doi.org/10.1017/S0020818311000278>

cooperation.<sup>11</sup> As a state party to UNCAC, Indonesia is expected to align its legal framework with conduct-based standards; failure to do so may create normative and practical misalignment within the global anti-corruption regime.<sup>12</sup>

Prior to 2016, Articles 2 and 3 of the Anti-Corruption Law defined corruption as acts that “may cause” state financial loss, reflecting a formal offense (*delik formil*). This allowed prosecutors to proceed based on unlawful conduct alone. However, Constitutional Court Decision No. 25/PUU-XIV/2016 transformed corruption into a material offense (*delik materil*), requiring proof of actual loss.<sup>13</sup> While grounded in legality, this shift has produced significant enforcement challenges. First, it creates dependency on audit institutions, generating procedural bottlenecks.<sup>14</sup> Second, it delays investigations and increases opportunities for obstruction of justice.<sup>15</sup> Third, it raises the risk of selective prosecution due to institutional discretion in calculating losses.<sup>16</sup> Fourth, it imposes a dual evidentiary burden—proof of unlawful conduct and precise financial loss—uncommon in comparative practice.<sup>17</sup> Fifth, it shifts courtroom disputes toward technical accounting issues rather than the underlying corrupt behavior.<sup>18</sup>

The Court argued that without such proof, suspect designation could be arbitrary and violate legal certainty.<sup>58</sup> While the decision was grounded in formalist legality, it produced sweeping consequences for anti-corruption enforcement. The reclassification of corruption as a material offense has reshaped the procedural dynamics of investigation and prosecution in Indonesia:

1. Dependency on Audit Institutions – Prosecutors and the Corruption Eradication Commission (KPK) cannot designate suspects without official audit findings from the Audit Board of Indonesia (BPK) or the Finance and Development Supervisory Agency (BPKP). This creates procedural bottlenecks, as audits are time-consuming and resource-intensive.<sup>59</sup>
2. Delay in Investigations – The need to await audit results lengthens investigations, giving suspects time to obstruct justice, tamper with evidence, or influence witnesses.<sup>60</sup>
3. Risk of Selective Prosecution – Because audits are subject to institutional discretion, politically connected suspects may benefit from delays or favorable interpretations of financial calculations.<sup>61</sup>
4. Higher Evidentiary Burden – Prosecutors must present not only evidence of unlawful conduct but also precise calculations of state loss. This dual burden is uncommon in international practice, where liability often attaches to conduct alone.<sup>62</sup>
5. Judicial Contestation of Audit Results – Defense lawyers frequently challenge audit methodologies, leading to protracted courtroom battles over accounting rather than the underlying corrupt act.<sup>63</sup>

The impact of the Court’s decision can be seen in several high-profile corruption cases:

1. The e-KTP Scandal (2011–2017): This case involved manipulation of a national identity card procurement project. Initial investigations indicated large-scale corruption, but prosecutions stalled until the BPK quantified losses exceeding Rp 2.3 trillion. The delay allowed some suspects to evade justice, while others contested the methodology of loss calculation in court.<sup>64</sup>

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<sup>58</sup> Butt, Simon, and Tim Lindsey, *Indonesian Law*. Oxford: Oxford University Press. 2018. <https://doi.org/10.1093/he/9780198806659.001.0001>

<sup>59</sup> Indriyanto Seno Adji dan Savitri, “Problematika Pembuktian Kerugian Negara dalam Tindak Pidana Korupsi.” *Jurnal Hukum dan Pembangunan* 50 (2), 2020: 211–230.

<sup>60</sup> Topo Santoso, “Corruption, Audit Politics, and Enforcement Gaps in Indonesia.” *Asian Journal of Comparative Law* 16 (3), 2021: 451–472. <https://doi.org/10.1017/asjcl.2021.17>

<sup>61</sup> Marcus Mietzner, and Edward Aspinall, “Indonesia’s Democratic Regression: Structural Constraints and Political Choices.” *Contemporary Southeast Asia* 42 (1), 2020: 1–28. <https://doi.org/10.1355/cs42-1a>

<sup>62</sup> Philip M. Nichols, “The Business Case for Complying with Bribery Laws.” *American Business Law Journal* 49 (2), 2012: 325–368. <https://doi.org/10.1111/j.1744-1714.2012.01163.x>

<sup>63</sup> Marcus Mietzner, and Edward Aspinall, “Indonesia’s Democratic Regression: Structural Constraints and Political Choices.” *Contemporary Southeast Asia* 42 (1), 2020: 1–28. <https://doi.org/10.1355/cs42-1a>

<sup>64</sup> Ester Lalola, “Audit Politics and Corruption Trials in Indonesia,” *Jurnal Hukum IUS QUIA IUSTUM* 30, no. 1, 2023: 15–36

2. BLBI (Bank Indonesia Liquidity Assistance) Case: During the Asian Financial Crisis, emergency liquidity support was misused by several banks. Although misconduct was evident, prosecutions were hindered by disputes over audit calculations of losses, with some charges collapsing due to alleged insufficiency of proof.<sup>65</sup>

Jiwasraya Scandal (2018–2020): Mismanagement and corruption within a state-owned insurer led to alleged losses exceeding Rp 16.8 trillion. The sheer scale of the case made loss quantification highly contested, with defense counsel arguing methodological errors. The controversy illustrates how strict insistence on proven state loss can shift focus from conduct to accounting disputes.<sup>66</sup> Empirical examples such as the e-KTP, BLBI, and Jiwasraya cases illustrate how these constraints hinder effective prosecution and prolong legal uncertainty.<sup>19</sup> Indonesian scholars have consequently criticized the Court's decision from doctrinal, pragmatic, and governance perspectives, emphasizing its inconsistency with international standards and its potential to weaken preventive enforcement.<sup>67</sup> Moreover, the Indonesian model operates within a broader political context marked by institutional vulnerability. Research indicates that audit bodies may be subject to political influence, potentially enabling selective enforcement or protection of elites.<sup>68</sup> At the same time, reforms affecting the Corruption Eradication Commission (KPK) have reduced its independence, further complicating enforcement dynamics.<sup>69</sup> Comparatively, Indonesia's model remains unusually restrictive. While civil law systems allow provisional measures and common law systems criminalize corrupt conduct without requiring loss, Indonesia's strict material-offense approach risks creating what scholars describe as an "accountability gap."<sup>70</sup> In sum, although the Constitutional Court's decision reflects a formal commitment to legality, its unintended consequence has been to weaken anti-corruption enforcement. Without doctrinal reinterpretation or legislative reform, Indonesia may struggle to balance legality with the practical demands of combating corruption effectively.<sup>71</sup>

## 2. Challenges in Proving State Loss (The Tension Between Legality and Substantive Justice in Corruption Cases)

One of the most controversial consequences of Indonesia's post-2016 framework is the requirement that prosecutors must establish actual, quantifiable state financial loss before designating an individual as a suspect in corruption cases. While this requirement is justified by reference to the principle of legality, in practice it imposes heavy technical, institutional, and political burdens. Corruption is not merely an economic crime but also a governance failure that produces intangible harms such as erosion of trust, weakening of institutions, and distortion of democratic processes.<sup>72</sup> These harms are rarely reducible to financial metrics, making strict insistence on quantification problematic. Proving state financial loss requires sophisticated methodologies, yet corruption often involves complex financial schemes:

1. Forensic Accounting Challenges – State losses may involve valuation of contracts, inflated pricing, shadow companies, or shell accounts. Forensic accountants must disentangle overlapping financial flows, which can be technically overwhelming.<sup>73</sup>

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<sup>65</sup> Simon Butt, and Tim Lindsey, *Indonesian Law*. Oxford: Oxford University Press, 2018. <https://doi.org/10.1093/he/9780198806659.001.0001>

<sup>66</sup> Topo Santoso, "Corruption, Audit Politics, and Enforcement Gaps in Indonesia." *Asian Journal of Comparative Law* 16 (3), 2021: 451–472. <https://doi.org/10.1017/asjcl.2021.17>

<sup>67</sup> Matthew C. Stephenson, "Corruption as a Systemic Problem," <https://doi.org/10.1111/gove.12485>

<sup>68</sup> Marcus Mietzner, "Authoritarian Innovations in Indonesia," *Democratization* 26, no. 6, 2019: 1021–1036, <https://doi.org/10.1080/13510347.2019.1625191>

<sup>69</sup> Simon Butt and Tim Lindsey, "Indonesia: Law Reform and the KPK," *Asian Studies Review* 44, no. 2, 2020: 255–272, <https://doi.org/10.1080/10357823.2020.1721163>

<sup>70</sup> Michael Kubiciel, "Core Criminal Law Provisions," <https://doi.org/10.1163/157181009X12438602541333>

<sup>71</sup> Anna Persson, Bo Rothstein, and Jan Teorell, "Why Anticorruption Reforms Fail," *Governance* 26, no. 3, 2013: 449–471, <https://doi.org/10.1111/gove.12010>

<sup>72</sup> Susan Rose-Ackerman, and Bonnie J. Palifka. *Corruption and Government: Causes, Consequences, and Reform*. 2nd ed. Cambridge: Cambridge University Press, 2016. <https://doi.org/10.1017/CBO9781139962934>

<sup>73</sup> W. Steve Albrecht, Conan C. Albrecht, Chad O. Albrecht, and Mark F. Zimbelman. *Fraud Examination*. 5th ed. Boston: Cengage Learning, 2016. <https://doi.org/10.4324/9781315756531>

2. Opportunity Costs – Many corrupt acts do not result in direct loss but in suboptimal allocation of resources. For instance, a rigged procurement contract may deliver a product at market price but exclude more efficient competitors. The harm is systemic inefficiency, not measurable loss.<sup>74</sup>
3. Estimating Intangible Harm – Corruption often erodes public confidence in institutions, reduces foreign investment, and undermines governance quality. These harms resist quantification.<sup>75</sup>
4. Dynamic Losses – State losses may fluctuate over time depending on interest rates, exchange fluctuations, or delayed projects. Calculating losses at one point may misrepresent the true extent of damage.<sup>76</sup>

The responsibility for calculating state financial loss rests primarily with BPK and BPKP.

This institutional monopoly creates several obstacles:

1. Limited Capacity – Audit institutions face resource constraints and backlogs. As a result, investigations often stall for months or years pending official audits.<sup>77</sup>
2. Methodological Disputes – Defense lawyers frequently challenge audit methodologies, leading to legal debates over whether losses are actual, potential, or hypothetical.<sup>78</sup>
3. Political Pressures – Scholars have documented instances where audit reports were delayed or altered due to political interference, undermining their credibility.<sup>79</sup>
4. Fragmentation of Authority – The coexistence of multiple agencies (BPK, BPKP, internal auditors) sometimes produces conflicting assessments of state loss, which courts must then adjudicate.

In comparative terms, few jurisdictions place such decisive power in audit agencies. In many countries, prosecutors retain authority to proceed with investigations independently of financial quantification. Looking abroad, other jurisdictions manage the legality-loss dilemma differently: In Germany, while fraud requires proof of harm, prosecutors may proceed with investigations once unlawful conduct is established, with harm quantified later.<sup>80</sup> The Netherlands, Dutch courts treat corruption in procurement as inherently harmful, even if no financial loss is proven, emphasizing violation of integrity. Italy, During *Mani Pulite*, Italian prosecutors pursued bribery as a conduct offense, with financial consequences considered only in sentencing.<sup>81</sup> United States, under the FCPA, bribery is criminalized regardless of measurable harm, focusing on improper advantage,<sup>82</sup> and in United Kingdom, The Bribery Act 2010 criminalizes bribery without conditioning liability on loss, embodying a conduct-based model.<sup>83</sup>

The cumulative effect of technical, institutional, political, and sociological challenges is the creation of what Stephenson (2020) terms an “accountability gap.” This gap arises when legal safeguards designed to protect legality end up shielding corrupt actors from prosecution. Instead of serving justice, legality in its rigid interpretation becomes an obstacle to justice. The Indonesian

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<sup>74</sup> Michael Johnston, “Corruption, Contention and Reform: The Power of Deep Democratization.” *Governance* 27, no. 4, 2014: 723–742. <https://doi.org/10.1111/gove.12045>

<sup>75</sup> Rothstein, Bo, and Aiysha Varraich. *Making Sense of Corruption*. Cambridge: Cambridge University Press, 2017. <https://doi.org/10.1017/9781316691411>

<sup>76</sup> Indah Savitri, “Problematika Pembuktian Kerugian Negara dalam Tindak Pidana Korupsi.” *Jurnal Hukum dan Pembangunan* 50, no. 2, 2020: 211–230. <https://doi.org/10.21143/jhp.vol50.no2.2582>

<sup>77</sup> Topo Santoso, “Corruption, Audit Politics, and Enforcement Gaps in Indonesia.” *Asian Journal of Comparative Law* 16, no. 3, 2021: 451–472. <https://doi.org/10.1017/asjcl.2021.18>

<sup>78</sup> Simon Butt, and Tim Lindsey. *Indonesian Law*. Oxford: Oxford University Press, 2018. <https://doi.org/10.1093/oso/9780198757338.001.0001>

<sup>79</sup> Marcus Mietzner, and Edward Aspinall. “Indonesia’s Democratic Regression: Structural Constraints and Political Choices.” *Contemporary Southeast Asia* 42, no. 1, 2020: 1–28. <https://doi.org/10.1355/cs42-1a>

<sup>80</sup> Michael Kubiciel, “Core Criminal Law Provisions in the Fight Against Corruption.” *Nordic Journal of International Law* 78, no. 3, 2009: 287–317. <https://doi.org/10.1163/157181009X431749>

<sup>81</sup> Donatella della Porta and Alberto Vannucci, *Corrupt Exchanges: Actors, Resources, and Mechanisms of Political Corruption* (New York: Aldine de Gruyter, 1999), <https://doi.org/10.4324/9780203984563>

<sup>82</sup> Mike Koehler, “The Story of the Foreign Corrupt Practices Act,” *Ohio State Law Journal* 73, 2012: 929–1014, <https://kb.osu.edu/handle/1811/71895>

<sup>83</sup> Philip M. Nichols, “The Business Case for Complying with Bribery Laws,” *American Business Law Journal* 49, no. 2, 2012: 325–368, <https://doi.org/10.1111/j.1744-1714.2012.01163.x>

requirement of proven, quantifiable state financial loss before suspect designation represents a doctrinal commitment to legality but creates disproportionate enforcement challenges. These challenges span technical complexity, institutional bottlenecks, political manipulation, and sociological harms. Comparative evidence indicates that Indonesia's model diverges sharply from global best practices, producing accountability gaps that weaken deterrence and undermine public trust. In the broader theoretical debate, Indonesia's experience highlights the limits of formal legality when applied too rigidly. To maintain both legality and effectiveness, a substantive approach, grounded in foreseeability but not paralyzed by quantification, may be necessary. Scholars argue that balancing legality with substantive justice requires a more flexible approach: treating corruption as a conduct offense for the purpose of suspect designation, while reserving financial quantification for sentencing or restitution.

Comparative legal analysis is essential to understanding how the principle of legality interacts with anti-corruption enforcement. Both civil law and common law jurisdictions embrace legality, but their interpretive traditions and prosecutorial strategies diverge. Civil law emphasizes codification, textual certainty, and judicial restraint, whereas common law emphasizes judicial precedent, pragmatic interpretation, and broader prosecutorial discretion. These differences shape how corruption is criminalized and prosecuted, particularly concerning the necessity – or absence – of quantifiable financial loss. Indonesia, with its Dutch colonial legal heritage, aligns formally with civil law traditions. Yet its post-2016 insistence on proven state loss situates it at the extreme end of legal formalism, diverging from both mainstream civil and common law practices. Comparative analysis thus illuminates alternative pathways for reconciling legality with effective anti-corruption enforcement.

Compared to these systems, Indonesia's insistence on proven state loss before suspect designation is anomalous. It reflects a hyper-formalist reading of legality inconsistent with both civil law and common law trends. While framed as a safeguard of legal certainty, it diverges from the very Dutch model that inspired Indonesia's penal code, and from global norms that criminalize corruption as an offense against governance integrity. This divergence creates risks of enforcement paralysis, accountability gaps, and international misalignment. Scholars warn that unless Indonesia reconsiders its interpretation, it will remain isolated in comparative anti-corruption jurisprudence.<sup>84</sup> Comparative evidence underscores that strict insistence on quantifiable state loss is neither necessary for legality nor consistent with global best practices. Civil law and common law jurisdictions alike prosecute corruption as a conduct-based offense, balancing legality with effectiveness. Indonesia's approach, while doctrinally grounded, risks undermining deterrence, enabling impunity, and misaligning with international obligations. For reform, Indonesia may look to comparative models where legality is preserved through foreseeability and codification, but liability attaches to corrupt conduct rather than contested financial audits.

Criminal law carries a dual mission: to protect individual liberty through legality and to protect collective welfare through justice. These functions may align in ordinary crimes but often diverge in systemic crimes such as corruption. Legality requires precision, clarity, and restraint, while substantive justice demands adaptability, responsiveness, and effectiveness. This tension becomes acute when legality is interpreted so strictly that it hampers the state's ability to combat corruption, undermining democracy and governance. Indonesia's post-2016 framework illustrates this dilemma: by requiring quantifiable state loss, legality has effectively reduced prosecutorial flexibility, producing accountability gaps. Doctrinally, the clash manifests as: Formal Legality as a strict interpretation of criminal statutes, prohibiting analogy, retroactivity, or expansion beyond textual definitions,<sup>85</sup> and Substantive Justice is teleological interpretation prioritizing the purpose of criminal law: protecting social order and fairness, even if

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<sup>84</sup> Tina Søreide, "Drivers of Corruption – A Brief Review," *Crime, Law and Social Change* 62, no. 2 (2014): 115–128, <https://doi.org/10.1007/s10611-013-9484-0>; Matthew C. Stephenson, "Corruption as a Systemic Problem," *Governance* 33, no. 2, 2020: 285–301, <https://doi.org/10.1111/gove.12485>

<sup>85</sup> H. L. A. Hart, *The Concept of Law*. 2nd ed. Oxford: Oxford University Press, 1994. <https://doi.org/10.1093/he/9780198761229.001.0001>

interpretation extends beyond strict text.<sup>86</sup> In corruption cases, formalists argue that only quantifiable loss ensures legality, while substantivists argue that corruption should be prosecuted as an integrity offense regardless of measurable loss.

The principle of legality (*nullum crimen, nulla poena sine lege*) is widely regarded as a cornerstone of the rule of law. Yet, when interpreted excessively rigidly, legality can paradoxically shield offenders instead of protecting society. This phenomenon is often described as “over-legality” – a condition where the demand for absolute precision and quantification leads to enforcement paralysis. While legality guards against arbitrary power, over-legality produces the opposite problem: an inability to prosecute systemic misconduct because evidentiary thresholds are set unrealistically high. In corruption cases, this risk is particularly acute, since many harms are intangible, diffuse, or systemic rather than easily measurable. Indonesia exemplifies over-legality through its post-2016 requirement that corruption prosecutions must establish quantifiable state financial loss before suspect designation:

1. The e-KTP Scandal: Despite strong evidence of bribery and collusion, several suspects avoided indictment for years due to disputes over audit reports.
2. The Jiwasraya Case: Defense teams challenged methodologies of state loss calculations, delaying proceedings and undermining prosecutorial narratives.
3. Local Procurement Scandals: In numerous regional cases, prosecutors were unable to proceed because BPK or BPKP audits were unavailable or contested, even when corruption was evident.

These examples demonstrate how over-legality converts legal safeguards into obstacles to accountability, undermining deterrence and emboldening corrupt networks. Over-legality represents a profound risk to anti-corruption enforcement. While legality is vital for protecting liberty, excessive rigidity transforms it into a shield for impunity. Indonesia’s insistence on quantifiable loss illustrates this paradox, producing enforcement paralysis and accountability gaps. Comparative evidence suggests that other jurisdictions preserve legality through foreseeability and codification while avoiding quantification traps. The challenge, therefore, is not to abandon legality but to interpret it in balance with substantive justice, ensuring that criminal law remains both fair and effective. A rigid adherence to legality that requires quantifiable state loss risks undermining accountability. Conversely, abandoning legality altogether risks arbitrary power. The way forward lies in a hybrid model that maintains legality’s safeguards while enabling prosecutions to target corruption as systemic harm. Comparative evidence shows that such models are both feasible and effective. For Indonesia, adopting a hybrid approach would reconcile its legal culture with international standards, restore prosecutorial effectiveness, and rebuild public trust in the rule of law.

This study began with a critical examination of how Indonesia interprets and applies the principle of legality in corruption prosecutions. Following the Constitutional Court’s 2016 decision, prosecutors must prove quantifiable state financial loss before designating a suspect. While intended as a safeguard of legality and legal certainty, this requirement has produced serious enforcement challenges: delayed prosecutions, selective accountability, and erosion of deterrence. The tension examined throughout Parts A and B revolves around the dual functions of criminal law: At First is “legality” as a shield against arbitrary state power, and “Substantive justice” as an imperative to protect society from corruption’s systemic harms. The challenge for Indonesia, and for legal systems more broadly, is how to reconcile these values without allowing either to dominate at the expense of the other. From the comparative survey and theoretical debates, several findings emerge:

1. Global Convergence on Conduct-Based Offenses

Both civil law and common law jurisdictions criminalize corruption as a conduct offense, focusing on bribery, abuse of office, and procurement fraud, without requiring proof of quantifiable loss.

2. Quantification as Sentencing, Not Liability

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<sup>86</sup> Lon L. Fuller, *The Morality of Law*. Rev. ed. New Haven: Yale University Press, 1969. <https://doi.org/10.2307/j.ctt1xp3w8t>

Financial loss is relevant for sentencing and restitution, not for establishing liability. This avoids paralysis while still addressing patrimonial harm.

3. Foreseeability as the Essence of Legality  
The true safeguard of legality lies in foreseeability: citizens must know in advance that corrupt conduct is criminal, even if precise harms are unquantified.
4. Risks of Over-Legality  
Indonesia's insistence on loss demonstrates the paradox of over-legality: excessive rigidity weakens accountability and undermines legitimacy.
5. Hybrid Models are Feasible  
Comparative systems show it is possible to preserve legality while ensuring accountability through hybrid models that combine codified clarity with flexible evidentiary stages.

The Indonesian experience underscores three normative lessons: (1) Legality must serve justice, not frustrate it, when legality is interpreted in ways that paralyze prosecutions, it undermines the very purpose of criminal law; (2) Corruption is more than patrimonial harm, its harms extend to governance, democracy, and social trust, which cannot always be quantified; and (3) Balance is possible, legal certainty and substantive justice are not mutually exclusive but can be harmonized through legislative clarity and judicial prudence. This study contributes to academic debates by showing that: The legality–justice tension is not abstract but has concrete enforcement consequences in corruption cases. Over-legality can be as damaging to the rule of law as under-legality, producing impunity instead of protection. Hybrid models grounded in foreseeability and differentiated evidentiary stages provide a promising path for reconciling values.

The 2026 decision of the Constitutional Court No. 28/PUU-XXIV/2026, further consolidates Indonesia's post-2016 trajectory in interpreting corruption as a material offense requiring actual and quantifiable state financial loss.<sup>87</sup> Building upon Decision No. 25/PUU-XIV/2016, the Court reaffirms that “kerugian keuangan negara” must be real, definite, and measurable, and that the constitutional authority to determine such loss lies primarily with the Badan Pemeriksa Keuangan (BPK). From a doctrinal standpoint, this ruling strengthens the principle of legality (*nullum crimen sine lege*) by ensuring that criminal liability is grounded in objective and verifiable criteria, thereby minimizing the risk of arbitrary prosecution. The Court's insistence on constitutionally authorized institutions reflects a formalist commitment to legal certainty, evidentiary reliability, and institutional competence.<sup>88</sup>

However, this position deepens the structural tension between legality and effective enforcement. By centralizing authority in BPK and requiring finalized audit results prior to suspect designation, the ruling introduces procedural rigidity that may hinder timely investigations. Law enforcement agencies—including prosecutors and the Corruption Eradication Commission (KPK)—become dependent on audit processes that are often lengthy and resource-intensive. This institutional dependency contributes to what has been described as an “accountability gap,” where formal legal safeguards inadvertently shield corrupt actors by raising evidentiary thresholds beyond practical reach. The MK's 2026 clarification reinforces this dynamic through monopolization of loss determination, temporal delay in enforcement, and narrowing of harm recognition to quantifiable financial loss.

From a comparative perspective, Indonesia's approach diverges from international trends. Global frameworks such as the United Nations Convention against Corruption (UNCAC) and the OECD Anti-Bribery Convention adopt a conduct-based approach, where liability

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<sup>87</sup> Mahkamah Konstitusi Republik Indonesia, *Ikhtisar Putusan Nomor 28/PUU-XXIV/2026*, accessed via MKRI official document, [https://s.mkri.id/public/content/persidangan/sinopsis/ikhtisar\\_4870\\_2916\\_ikhtisar%20Put%2028\\_2026%20\(ACC%20PM%20III\).pdf](https://s.mkri.id/public/content/persidangan/sinopsis/ikhtisar_4870_2916_ikhtisar%20Put%2028_2026%20(ACC%20PM%20III).pdf)

<sup>88</sup> Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law*, 7th ed. (Oxford: Oxford University Press, 2013).

attaches to corrupt acts regardless of proven financial loss.<sup>89</sup> Similarly, both civil law and common law jurisdictions generally allow prosecution once unlawful conduct is established, with financial loss assessed at later stages.<sup>90</sup>

Normatively, the decision illustrates the risks of “over-legality,” where excessive adherence to formal legality undermines the substantive goals of criminal law. While the Court seeks to safeguard due process, its rigid framework may weaken anti-corruption enforcement. A more balanced approach would distinguish between liability and sentencing stages, preserving legality while avoiding enforcement paralysis. From a procedural perspective, the ruling strengthens legal certainty and due process, ensuring that individuals are not subjected to criminal liability based on speculative or unverified calculations. However, the Court acknowledges that this approach may create practical challenges, including delays in investigations and increased dependence on formal audit processes. Overall, the decision reflects a judicial effort to balance the principle of legality and legal certainty with the demands of anti-corruption enforcement. While it safeguards defendants’ rights, it also introduces structural constraints that may affect the efficiency and responsiveness of corruption prosecutions in Indonesia.

## V. Conclusion

This study has critically examined the evolving interpretation of the principle of legality in Indonesian corruption law, particularly following the Constitutional Court Decision No. 25/PUU-XIV/2016, which requires proof of actual and quantifiable state financial loss as a prerequisite for suspect designation. While this doctrinal shift was intended to reinforce legal certainty and safeguard individual rights against arbitrary prosecution, it has generated significant practical and normative tensions within the broader framework of anti-corruption enforcement. From a doctrinal perspective, the principle of legality (*nullum crimen, nulla poena sine lege*) remains indispensable as a cornerstone of the rule of law. It ensures predictability, limits state power, and protects individuals from retroactive or vague criminalization. However, this study demonstrates that an excessively rigid and formalistic application of legality—particularly when tied to strict evidentiary requirements such as quantifiable state loss—can undermine the very objectives of criminal law. In corruption cases, where harm is often systemic, diffuse, and not immediately measurable, the insistence on financial quantification transforms legality from a protective principle into a procedural barrier.

Empirical and doctrinal analysis of Indonesian practice reveals that the requirement of proven state loss has produced a range of adverse consequences: dependency on audit institutions, delays in investigations, increased opportunities for evidentiary manipulation, and risks of selective enforcement. High-profile cases such as the e-KTP, BLBI, and Jiwasraya scandals illustrate how procedural rigidity can hinder timely prosecution and shift judicial focus from corrupt conduct to contested financial calculations. These dynamics contribute to what contemporary scholarship identifies as an “accountability gap,” wherein legal safeguards inadvertently shield corrupt actors rather than ensure justice.

Comparative analysis further underscores the anomalous nature of Indonesia’s current approach. Both civil law and common law jurisdictions generally treat corruption as a conduct-based offense, attaching criminal liability to acts such as bribery, abuse of office, and illicit enrichment without requiring proof of quantifiable loss at the liability stage. Financial harm, while relevant, is typically addressed at the sentencing or restitution phase rather than as a condition for prosecution. International frameworks, including the United Nations Convention against Corruption and the OECD Anti-Bribery Convention, similarly emphasize conduct-

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<sup>89</sup> United Nations, *United Nations Convention against Corruption* (New York: United Nations, 2003), <https://doi.org/10.18356/9b85b3f6-en>; OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Paris: OECD, 1997), <https://doi.org/10.1787/9789264235252-en>

<sup>90</sup> Michael Kubiciel, “Core Criminal Law Provisions in the Fight Against Corruption,” *Nordic Journal of International Law* 78, no. 3 (2009): 287–317, <https://doi.org/10.1163/157181009X12581240309947>; Mike Koehler, “The Story of the Foreign Corrupt Practices Act,” *Ohio State Law Journal* 73, no. 5 (2012): 929–1014.

oriented criminalization, reflecting a global consensus that effective anti-corruption enforcement must not be constrained by rigid evidentiary thresholds.

The Indonesian experience thus highlights a broader theoretical tension between formal legality and substantive justice. While legality demands precision and restraint, substantive justice requires flexibility to address complex and evolving forms of wrongdoing. This study argues that these values are not inherently incompatible but must be carefully balanced. A strictly formalist interpretation of legality risks producing “over-legality,” where the pursuit of absolute certainty leads to enforcement paralysis and diminished public trust in the legal system.

In light of these findings, this study proposes a recalibration of Indonesia’s legal approach toward a more balanced and functional model. Specifically, corruption should be treated as a conduct-based offense at the stage of investigation and suspect designation, with quantification of state financial loss reserved for evidentiary refinement at trial and for determining sentencing or restitution. Such an approach would preserve the core guarantees of legality – particularly foreseeability and statutory clarity – while restoring prosecutorial effectiveness and aligning Indonesia with international best practices.

Ultimately, the principle of legality must be understood not as an end in itself, but as a means to achieve justice within a constitutional framework. When interpreted dynamically and contextually, legality can function both as a shield against arbitrariness and as a foundation for effective law enforcement. For Indonesia, the challenge lies in moving beyond rigid formalism toward a more integrated model that harmonizes legal certainty with the practical demands of combating corruption. Only through such a balance can the criminal justice system fulfill its dual mandate: protecting individual rights while safeguarding the integrity of public institutions and democratic governance.

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