



The Urgency of Regulation of Bribery in the Private Sector as a Criminal Act of Corruption in Indonesia

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Abstract

In Indonesia, a form of corruption that has escaped attention is corruption that occurs in the private sector. Corruption in the private sector has not been comprehensively accommodated in Indonesian positive law, even though many cases are related to corruption in the form of bribery in the private sector. If we dissect the formulation of the article on the crime of bribery, one of them consists of the subject of the bribe perpetrator himself. Indeed, in Article 5, the element of "giving or promising something to civil servants or state administrators", what is meant by who gives or promises something has not been clearly defined, meaning that this article could be used to ensnare private parties as bribe givers or called active bribers. While civil servants or state administrators are recipients of bribes or passive bribers. However, this article can only be used if the bribe from the private party is related to civil servants or state administrators, whereas if the perpetrators of active bribery and passive bribery are both private parties, then the existing national law in Indonesia has not regulated this matter.

Keywords: *Corruption; Bribery in the Tourism Sector*

Introduction

The State of Indonesia is a rule of law (recessed) not a state of power (machtstaat) in which coercive legal regulations apply to regulate human behavior in society, are made by official bodies that are obligated, and certain penalties will be imposed if the regulations are enforced. Above is violated. The goal is to uphold the law and create a just and prosperous country.

One of the crimes handled by law enforcers is corruption. The origin of the word corruption is the Latin corruption or corruptus which means savagery, depravity, dishonesty, can be bribed, immoral, or deviation.¹ The rampant corruption that is getting out of control is increasingly hurting the state because it can harm the state directly and indirectly. Apart from Indonesia, history shows that many other countries are also facing corruption problems. Corruption has become a crime that is ranked second in Asia and sixth in the world to date.² According to the theory of modernization, the rate of corruption is closely

¹ Evi Hartanti, **Tindak Pidana Korupsi**, Sinar Grafika, Jakarta, 2009, hlm 1.

² IGM Nurdjana, **Sistem Hukum Pidana dan Bahaya Laten Korupsi**, Pustaka Pelajar, Yogyakarta, 2010, hlm.5.

related to a country that is poor or development that is being carried out is hampered, this is in line with the causes of the existence of obstacles to the economic development of a country so that this economic backwardness causes criminal acts of corruption.³

The laws governing the eradication of criminal acts of corruption are specifically regulated and differentiated from another special criminal handling in their arrangements. This is done because corruption is an extraordinary crime that must be prioritized compared to other crimes.⁴ Corruption besides being detrimental to state finances also has other negative impacts on democracy, the economy, and the general welfare of a country. In general, this corruption crime has a connection with the state apparatus, both civil servants and state officials, often called white-collar crime or white-collar crime.⁵

So far, the use of national legal instruments in dealing with corruption is not effective enough to overcome the occurrence of criminal acts of corruption in various countries. The limitations of national legal instruments such as the Corruption Crime Act in Indonesia occur almost all over the world. From this, the United Nations (UN) launched the idea of the need to form a convention that rejects corruption in the form of international cooperation. So as a form of seriousness in dealing with criminal acts of corruption on December 9, 2003 in Merida Mexico, 133 countries signed the United Nations Convention Against Corruption (UNCAC). This UNCAC contains a series of guidelines for all countries to carry out the eradication of corruption, starting from the prevention stage, formulating types of activities that include corruption, prevention, international cooperation provisions, to asset recovery mechanisms that are cross-country in nature. The provisions of UNCAC are a reflection of upholding the rule of law and implementing good governance.

This UNCAC was later ratified by Indonesia in 2006 through Law Number 7 of 2006 concerning The Ratification of the United Nations Convention Against Corruption, which has implications for legal instruments adapted to prevent and eradicate corruption in Indonesia.⁶ The consequence that must be fulfilled when Indonesia ratifies the UNCAC is that there is a necessity to adopt norms that are considered important by positive law in Indonesia. In addition, ratification also provides clear evidence of the seriousness of the state in eradicating corruption.⁷

Corruption crimes are not only carried out in the public sector, but are also often carried out in the private or private sector. It is from this matter that one of the articles in the UNCAC regulates the prevention of corruption in the private sector according to the policy in article 5 of the UNCAC, where the article reads:

“States shall, by the basic principles of their legal system, develop and implement or maintain an effective and coordinated anti-corruption policy that enhances public participation and reflects the principles of rule of law, good management of public affairs and public assets, integrity, transparency and accountability.” Based on this, the state is obliged to make efforts to prevent corrupt practices effectively.

³ Emmanuel, M. ; L. Q., **The Impact of Corruption on Government Public Services Quality, Justice and Cost of Business Regulations in Developing World**. International Journal of Innovation and Research in Educational Sciences, 2019, 6(1), 27–28.

⁴ IGM Nurdjana, **Sistem Hukum Pidana dan Bahaya Laten Korupsi (Problematic Sistem Hukum Pidana dan Implikasinya pada Penegakan Hukum Tindak Pidana Korupsi)**, Total Media, Yogyakarta, 2009, hlm 156.

⁵ Teguh Suista dan Aria Zurneti, **Hukum Pidana: Horizon Baru Pasca Reformasi**, PT. Raja Grafindo Persada, Jakarta, 2011, hlm 63.

⁶ Yenti Garnasih, **Paradigma Baru Dalam Pengaturan Anti Korupsi Di Indonesia Dikaitkan Dengan UNCAC**, Jurnal Hukum Prioritas, 2003, hlm 75.

⁷ Romli Atmasasmita, **Hukum Kejahatan Bisnis: Teori & Praktik di Era Globalisasi**, PT. Premedia Group, Jakarta, 2014, hlm 90.

In addition, article 21 of the UNCAC also explains that organizations that work and promote policies will still have a positive impact on the economic and social sectors. Even corruption that is committed in both the private sector and the public sector only has a difference in the losses that occur, namely corruption in the private sector has an impact on inefficiency in the private sector itself. This means that the existence of corruption in the private sector causes not optimal utilization of all resources in the production process of goods and services so that there is no increase or decrease in value.

Article 21 UNCAC also explains bribery in the private sector, namely; the state party is obliged to consider taking legislative and other measures necessary to determine as a crime, if it is committed intentionally in the context of economic, financial or trade activities: Promise, offer or give, directly or indirectly, improper benefits to people who lead or works, in office or for private sector bodies, for himself or other people so that regulations related to corruption in the private sector are also contained in several regional conventions such as the *Council of Europe Criminal Law Convention on Corruption is the African Union Convention on preventing and fighting corruption*.⁸ Therefore Indonesia as a UN country must participate in preventing corruption both in the public sector and the private sector through the UNCAC.

Some examples of criminal acts of corruption in the private sector whose rules are contained in the UNCAC are acts of illegal self-enrichment (*illicit enrichment*- wealth obtained by unfair means), embezzlement of wealth in the private sector, bribery in the private sector, and trading in influence. Because bribery contained in the UNCAC is non-mandatory until now Indonesia does not have clear rules regarding the eradication of corruption in the private sector, especially regarding the types of criminal acts of corruption, bribery and embezzlement.

The law used by Indonesia to apply sanctions for criminal acts of corruption is the enactment of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning The Eradication of Corruption Crimes which contains regulations related to corruption. In particular, this is regulated in Article 2 and Article 3 of Law Number 20 of 2001 namely:

Article 2:

Every one who unlawfully commits an act of enriching himself, another person, or a corporation that can harm the state's finances shall be punished with a minimum sentence of four years and a maximum of 20 years.

Article 3:

Everyone to benefit himself, other people, or the corporation, abusing the authority, opportunity or means available to him because of a position that can harm the state's finances is subject to life imprisonment or imprisonment for a minimum of one year and a maximum of 20 years.

In Indonesia, a form of corruption that has escaped attention is corruption that occurs in the private sector. Corruption in the private sector has not been comprehensively accommodated in Indonesian positive law, even though many cases are related to corruption in the form of bribery in the private sector. Bribery itself is regulated in Article 5 of the Corruption Law. Article 5 paragraph (1) letters a and b regulate active bribery which reads:

(1) Shall be punished with imprisonment for a minimum of 1 (one) year and a maximum of 5 (five) years and or a fine of at least Rp 50.000.000,00 (fifty million rupiahs) and most widely Rp 250.000.000,00 (two hundred and fifty million rupiahs) everyone who:

⁸ Oliver Landwehr Cecily Rose, Michael Kubiciel, **The United Nations Convention Against Corruption: A Commentary**, Oxford Universitas Press ,Ingggris, 2019, hlm 42.

- a. Give or promise something to a civil servant or state administrator with the intention that said civil servant or state administrator will do or not do something in his position, which is contrary to his obligations; or
- b. Give something to a civil servant or state administrator because of or in connection with something contrary to obligations, done or not done in his position.

Meanwhile, Article 5 paragraph (2) regulates passive bribery, which reads:

- (2) Civil servants or state administrators who receive gifts or promises as referred to in paragraph (1) letter a or letter b shall be punished with the same punishment as referred to in paragraph (1).

If we dissect the formulation of the article on the crime of bribery, one of them consists of the subject of the bribe perpetrator himself. Indeed, in Article 5, the element of "giving or promising something to civil servants or state administrators", what is meant by **who gives or promises something** has not been clearly defined, meaning that this article could be used to ensnare private parties as bribe givers or called active bribers. While civil servants or state administrators are recipients of bribes or passive bribers. However, this article can only be used if the bribe from the private party is related to civil servants or state administrators, whereas if the perpetrators of active bribery and passive bribery are both private parties, then the existing national law in Indonesia has not regulated this matter.

One of the cases of private sector bribery that has occurred in Indonesia is the bribery committed by PT. Interbat with doctors in various hospitals. One of them is the Metropolitan Medical Center (MMC) Hospital. Based on the results of an investigation into the November 2, 2012 edition of Tempo magazine, 2,125 doctors allegedly received bribes of up to IDR 131 billion from pharmaceutical companies to doctors. The results of the investigation found dozens of receipts and dozens of files containing the names of doctors who were allegedly involved in the bribery case with PT Interbat. They are generally specialist doctors who practice in DKI Jakarta, West Java, Banten, East Java and South Sulawesi. Added to this is the case of Rolls-Royce giving money worth 2.25 million US dollars and a silver spirit Roll-Royce car to someone for services "supporting work contracts for Rolls-Royce" procuring Prent aircraft engines to Garuda Indonesia.

Discussion

1. Theory of Legal Certainty

Certainty is a sure thing. The law essentially must be fair and certain. Certainty is a question that can be answered normatively, not sociologically. Normative legal certainty is when regulations are made and promulgated with certainty because they regulate them in a definite and logical manner.

Legal certainty is one of the goals of law as the embodiment of justice. The real form of legal certainty is the implementation of law enforcement against an action regardless of who is doing it. With legal certainty, everyone can predict what will happen if they take legal action. Certainty has characteristics that cannot be separated from law, especially written legal norms. Law without certainty value will lose meaning because it cannot be used as a guideline for behavior for everyone.

Sudikno Mertokusumo believes that legal certainty is a guarantee that the law must be implemented in a good way. Legal certainty requires efforts to regulate law in legislation made by authorized and authoritative parties, so that these rules have a juridical aspect that can guarantee certainty that the law functions as a rule that must be obeyed.⁹

⁹ Asikin zainal, **Pengantar Tata Hukum Indonesia**, Rajawali Press, Jakarta, 2012, hlm 31.

In addition, there is an opinion from Gustav Radbruch who put forward 4 (four) fundamental things related to the meaning of legal certainty, namely:

1. That law is positive, meaning that positive law is legislation.
2. That the law is based on facts, meaning that it is based on reality
3. The facts must be formulated clear to avoid misunderstandings in meaning, in addition to being easy to implement.
4. Positive law should not be easily changed.

From the explanation above. This principle of legal certainty is a principle that is interpreted as a situation where the law is certain because there is concrete power for the law in question. The existence of principle of legal certainty is a form of protection for justice (justice seekers) against arbitrary actions, which means that someone will and can obtain something that is expected in certain circumstances. This statement is in line with what Van Apeldoorn said that legal certainty has two aspects, namely the ability to determine the law in concrete matters and legal security. This means that the party seeking justice wants to know what is the law in a certain matter before starting a case and protection for justice seekers.

So that with legal certainty, it will guarantee that someone can carry out a behavior that is by the provisions of the applicable law and vice versa. Without legal certainty, an individual cannot have a standard provision to carry out a behavior.

A. Theory of Criminal Law Policy

Criminal law policy is the whole of the regulations that determine what actions are prohibited and included in criminal acts, as well as how the sanctions are imposed on the perpetrators to overcome crime. In theory, many of the doctrines raised by experts are related to the notion of criminal law policy.

Barda Nawawi, argues that the term "policy" is taken from the terms "*policy*" (English) and "*politiek*" (Dutch), so that "*Criminal Law Policy*" can also be referred to as "*Criminal Law Politics*" and is often known by the term "*penal policy*", "*criminal law policy*" or "*strafrechtspolitik*".¹⁰ In his book Barda Nawawi Arief quotes the opinion of Marc Ancel who states that Penal Policy is a component of Modern Criminal Science in addition to other components such as "*Criminology*" and "*Criminal Law*".¹¹ Marc Ancel argues that "*Penal Policy*" is: "a science that has a practical objective to enable positive legal regulations to be better formulated and to provide guidance not only to legislators, but also to courts that applicable laws and also to organizers or executors of court decisions."¹²

Senada dengan Marc Ancel, Prof. Sudarto memberikan pengertian "Penal Policy" sebagaimana dikutip oleh barda Nawawi Arief ialah:¹³

- a. Efforts to realize good regulations in accordance with the circumstances and situation at one time;
- b. Policies from the state through authorized bodies establish the desired regulations which are expected to be used to express what is contained in society and to achieve what is aspired to.

Another opinion comes from A. Mulder, "*Strafrechtspolitik* or *Penal Policy*" is a policy line for determining:¹⁴

¹⁰ Barda Nawawi Arief, **Bunga Rampai Kebijakan Hukum Pidana Perkembangan Konsep KUHP Baru**, Cetakan Ke-1, Jakarta, Kencana Prenadamedia Grub, 2008, hlm 26.

¹¹ Ibid., hlm 23.

¹² Ibid., Hlm 26.

¹³ Sudarto, **Hukum dan Hukum Pidana**, Bandung, Alumni, 1981, hlm. 159;

- a. To what extent do the applicable penal provisions need to be amended or renewed;
- b. What can be done to prevent the occurrence of criminal acts; And
- c. How investigations, prosecutions, trials, and execution of crimes must be carried out.

From some of these opinions, it can be concluded that "Criminal Law Policy" or "Penal Policy" is a legal regulation that is formulated and established by authorized bodies as a guideline (positive law) for the public and law enforcers that aims to prevent crime. and tackle a crime or in other words a criminal act. Efforts to deal with crime with criminal law are in essence also part of law enforcement efforts (especially criminal law enforcement), therefore it is often said that criminal law policies are also part of law enforcement policies (law enforcement policy).¹⁵ Apart from being part of law enforcement efforts, it is also an integral part of efforts to protect society (social welfare) as well as an integral part of a policy or social politics (social policy). Social policy can be interpreted as a rational effort to achieve community welfare and at the same time includes community protection, so that in the sense of "social policy" it also includes "social welfare policy" and "social defense policy".⁸ Broadly speaking, criminal law policies may cover the scope of policies in the field of material criminal law, in the field of formal criminal law and in the field of criminal law in the implementation of criminal acts.

The criminal law policy is implemented through the stages of concretization/operationalization/functionalization of criminal law consisting of:

- a. Formulation/legislative policy, namely the stage of formulation/composition of criminal law. At this stage it is the most strategic stage of efforts to prevent and overcome crime through criminal law policy, because at this stage the formulation/legislative power is authorized in terms of determining or formulating what acts can be punished which are oriented to the main issues in criminal law including criminal actions. against the law, guilt/criminal liability and what sanctions legislators can impose. So that if there are errors/weaknesses in legislative policies, they will become obstacles to efforts to prevent and overcome crime at the application and execution stages;
- b. Applicative/judicial policies, namely the stage of application of criminal law. The application stage is the power in terms of applying criminal law by law enforcement officials or courts; And
- c. Administrative/executive policies, namely the stage of implementation of criminal law. this stage is the stage in carrying out criminal law by the executing/criminal execution apparatus.

This research will focus more on policy formulation because this research will provide a new concept for the regulation of private-sector bribery in Indonesia in the future as a criminal act of corruption.

B. Overview of Bribery

Criminal acts of corruption in Indonesia are regulated in Law Number 31 of 1990 in conjunction with Law Number 20 of 2001 concerning the eradication of Corruption Crimes classifying corruption into seven types, namely: (1) harming state finances (enriching oneself or abusing authority to harm state finances), (2) bribes, (3) gratuities, (4) embezzlement in office, (5) extortion, (6) fraudulent acts, and (7) conflicts of interest.

The seven types of corruption are described in great detail in the law as formulations of delict (criminal acts), namely acts that are punishable by law, contrary to law, committed by someone guilty and that person is held responsible for his actions. The formulation of a crime shows what must be proven in

¹⁴ Barda Nawawi Arief, Op. cit., hlm 27;

¹⁵ Ibid., hlm 29.

an investigation according to the law. The following are the articles that define corruption in the Corruption Law:

No	Classification of Corruption Crimes	Article Used
1	Lose state finances	Article 2 and Article 3
2	Bribe	Article 5 paragraph (1) letters a and b, Article 5 paragraph (2), Article 12 letters a, b, c and d, Article 6 paragraph 1 letters a and b, Article 6 paragraph 2, Article 11, Article 13
3	Gratification	Article 12B jo. Article 12 C
4	Embezzlement in office	Article 8. Article 9, Article 10 letters a, b and c
5	Extortion	Article 12 letters e, g, and f
6	Cheating	Article 7 paragraph 1 letters a, b, c and d, Article 7 paragraph 2, Article 12 letter h
7	Conflict of interest in procurement	Article 12 letter i

The Corruption Law does not only regulate the formulation of criminal acts of corruption, but also regulates the types of "derivative" crimes, namely certain acts or actions that are not types of criminal acts of corruption, but can be charged under the Corruption Law. These actions can be subject to articles in the Corruption Law because they relate to the handling of criminal acts of corruption. Here's the classification:

No	Other Crimes Related to Corruption Crimes	Article Used
1	Obstructing the process of examining corruption cases	Article 21
2	Failure to provide information and providing incorrect information	Article 22 jo. Article 28
3	Banks that do not provide information about the suspect's account	Article 22 jo. Article 29
4	Witnesses or experts who do not provide information or provide false information	Article 22 jo. Article 35
5	The person who holds the secret of office does not provide information or give false statements	Article 22 jo. Article 36
6	A witness who reveals the identity of the complainant	Article 22 jo. Article jo 31

However, of the many provisions governing corruption in the Corruption Law, the provisions governing "harm to state finances" are only found in articles, namely Articles 2 and 3 of the Corruption Law. Moreover, criminal acts categorized as corruption do not require calculating state financial losses. Several articles do not link corruption with state finances, for example bribery. An official who accepts bribes from someone cannot be said to be detrimental to state finances. Even though there are only two articles, these articles are often used or are the favorite of law enforcement officials to prosecute corruptors who as a whole are suspected of causing losses to the state.

So it can be concluded that there are two types of corruption, the first is corruption which requires the element of "harmful to the country's finances or economy" contained in Articles 2 and 3 of the Corruption Law and corruption which does not require financial or economic losses to the country. , one of which is bribery.

Bribery or Risywah comes from the Arabic rasya, yarsyu, rasyu, rasywan, which means "bribe" or "persuasion". Other terms that live in the community are "bribe" and "stick money", "polish money", and "facilitating". Risywah or bribery is a social disease or deviant behavior in social life and is not justified by Islamic teachings.¹⁶ In terminology, risywah is something that is given to realize a benefit or something that is given to give wrong/wrong or blame the right.¹⁷

So it can be concluded that a bribe is giving something, both money and goods to someone to do something according to the bribe giver but contrary to obligations, whether the order is carried out or not to be carried out. From this it can also be understood that bribery is an act that results in illness or loss of another person, or other words is an attempt to obtain something by manipulating it and paying a sum of money, so that there is a deviation from both the procedure and the social structure.

In addition, Law Number 11 of 1980 concerning the crime of bribery defines bribery:

Article 2

"Giving or promising something to someone to persuade that person to do something or not do something in their duties, which is contrary to their authority or obligation which concerns the public interest".

Article 3

"Accepts something or a promise, while he knows or should reasonably suspect that the giving of something or the promise is intended so that he will do something or not do something in his duties, which is contrary to his authority or obligations which concern the public interest shall be punished for accepting bribes with eternal imprisonment 3 years or a maximum fine of IDR 15,000,000.- (fifteen million rupiah)".

Conclusion

There is no single regulation on Corruption Crime Act in Indonesia that regulates and criminalizes bribery in the private sector. Given the provisions of Article 1 of the Criminal Code and the principle of legality (*nullum delictum nulla poena sine praevia lege poenali*), bribery in the private sector cannot be prosecuted using the Corruption Law. If we dissect the formulation of the article on the crime of bribery, one of them consists of the subject of the bribe perpetrator himself.

Indeed, in Article 5, the element of "giving or promising something to civil servants or state administrators", what is meant by who gives or promises something has not been clearly defined, meaning that this article could be used to ensnare private parties as bribe givers or called active bribers. while civil servants or state administrators are recipients of bribes or passive bribers. However, this article can only be used if the bribe from the private party is related to civil servants or state administrators, whereas if the perpetrators of active bribery and passive bribery are both private parties, then the existing national law in Indonesia has not regulated this.

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