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POLICY FORMULATION AGAINST BRIBERY IN THE PRIVATE SECTOR IN INDONESIAN CRIMINAL LAW REFORM

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Abstract

The purpose of this research is to analyze the regulation of bribery in the private sector in Indonesian positive law and future Indonesian criminal law formulation policies in terms of regulating bribery in the private sector. This research used normative legal research which departs from vacuum of norms with the type of approach used are statutory approach, analytical approach and legal concepts, comparative approach, and case approach. The results of the study show that basically Indonesia already has Act Number 11 of 1980, but it seems to be neglected or never been used. Although bribery in the private sector is non-mandatory, it is important for Indonesia to consider criminalizing bribery in the private sector, therefore it is necessary for legislators to form a criminal law policy by criminalizing bribery in the private sector as well as conducting comparative studies in several countries to address the gap, so the law enforcement can carry out law enforcement in accordance with the regulations governing bribery in the private sector as a form of corruption.

Keywords: *Penal Policy, Bribery in the Private Sector, Crime of Corruption*

INTRODUCTION

Indonesia as a developing country is inseparable from the problem of corruption. Corruption is related to the problem of bribery that is related to manipulation in the economic field, and concerns the field of public interest. According to Subekti, corruption is a self-enrichting crime that directly harms state's finance and economy. Robert Klitgaard formulates corruption as an equation between discretion added with the existence of monopoly and lack of accountability, whereas Sudarto defines the word corruption as an act that is destructive, evil and rotten related to finance (Syamsuddin, 2017:137). Corruption is a crime that is classified as an extraordinary crime because corruption can threaten security and balance in the national and international community. As an extraordinary crime, corruption requires serious and firm handling by the law enforcement and the government in order to create a clean and transparent governance which is free from bribery and corruption (Waluyo, 2014:171).

Indonesia has ratified the United Nations Convention Against Corruption (UNCAC) 2003 which was realized by Law Number 7 of 2006 concerning Ratification of the United Nations Convention Against Corruption. This ratification proof that politically Indonesian government is committed to eradicating corruption through international cooperation, concidering that corruption is a crime that can damage the foundations of a country's economic life. There are 11 (eleven) types of acts that are criminalized as an act of corruption in UNCAC 2003, 6 (six) types of actions that are mandatory offenses such as:

1. Bribery of national public officials
2. Bribery of foreign public officials and officials of public international organizations
3. Embezzlement, misappropriation or other diversion of property by a public official
4. Abuse of function

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5. Laundering of proceeds of crime
6. Obstruction of justice

Whereas the types of actions that is non-mandatory offenses such as:

1. Trading in influence
2. Illicit enrichment
3. Concealment
4. Embezzlement of property in the private sector
5. Bribery in the private sector

According to Eddie OS Hiariej, if an act that is criminalized as a mandatory offenses, it means that there is an agreement from all state participants to regulate these actions in their national laws, whereas if an action is non-mandatory offenses, it means there is no agreement among the state participants to criminalize the act. These two characteristics are inseparable from the agreement of the participating countries in the convention (Hiariej, 2019:55). According to IGK Ariawan, the difference between this two characteristics can be seen in the clause that distinguishing between mandatory offenses and non-mandatory offenses (Ariawan, 2019:4). The mandatory offenses must contain the clause "The state party shall adopt such legislative and other necessary actions to determine as a crime..." (Each state party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses,...). Whereas for non-mandatory offenses there is a clause "The state party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offenses". Bribery in the private sector is regulated in Article 21 of the UNCAC 2003, which describes the act as:

a. The promise, offering, or giving, directly or inderectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or another person, so that he or she, in breach of his or her duties, act or refrain from acting;
b. The solicitation or acceptance, directly and indirectly, of undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or another person, so that he or she, in breach of his or her duties, act or refrain from acting.

Bribery is currently regulated in Law Number 20 of 2001, amending Law Number 31 of 1999 on the Eradication of Corruption Crimes, but this regulation does not address bribery in the private sector where both subjects are private parties. According to Transparency International Indonesia, bribery in the private sector is similar to bribery in the public sector, but the difference is the party that receiving the bribery is not a public official and the party receiving the bribery acts as a commission or does not act as an omission, contrary to their obligations (Tohary, 2015:7). In many cases, bribery in private sector are handled internally by companies through sanctions in the form of dismissal or refunds. Within the UNCAC 2003, the alleged corruption case involving PT Interbat, the Rolls-Royce bribery case, and

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the Center Point bribery case should be viewed within the UNCAC 2003 framework. Unfortunately, Indonesia has not adopted provisions regarding bribery in private sector. Moreover, many corruption cases such as bribery in private sector still occur in Indonesia and are not revealed because of the vacuum of norms.

Corruption in private sector not only causes state losses, but also can weakened the economic growth and worsen national investment (Mulyadi, 2013:3). Corruption in private sector also has an impact on companies, because corruption can increases cost for bribes or building corrupt network. The government are often confused about finding ways to make the Indonesian legal system can ensnare perpetrators of bribery in the private sector. Even though Indonesia already has Law Number 11 of 1980 concerning the Crime of Bribery, this rule seems to be forgotten never even been used. The occurrence of systemic problems makes it difficult for law enforcement officials to apply these rules. The purpose of this paper is to analyze the regulation of bribery in the private sector in Indonesian positive law and the formulation of Indonesian criminal law policies in the future in terms of regulation of bribery in the private sector.

LITERATURE REVIEW

Principle of Legality

The principle of legality in criminal law means that only the law can define a crime and prescribe a penalty. It also embodies, that the criminal law must not be extensively interpreted to an accused's detriment, for instance by analogy. According to that principle, an offence must be clearly defined in the law. The concept of law comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability. The requirements are satisfied where the individual can now from the wording of the relevant provision and, if need be, with the assistance of courts interpretation of it, what acts and omissions will make him criminally liable.

The principle of legality also includes the rule which prohibit the retrospective application of the criminal law to an accused's disadvantage. That principle is enshrined in the constitutions of many countries as well as in the most important international convention that protects human rights. According to Moeljatno, the principle of legality, the decisive principle, that "no action is prohibited and threatened with crime if not determined in advance in legislation" (Selma, 2017:308). Usually this is known as nullum delictum nulla poena sine praevia lege (no offense, no criminal without rules first) (Timoera, 2011:4). In connection with this research, if there are vacuum of norm, the law enforcement officials cannot enforce the law because the law does not regulated as it should. This study applies the principle of legality is to examine the vacuum of norm concerning bribery in private sector in Indonesian positive law.

Crimal Law Policy

According to Soedarto, criminal policy has several meanings, which are divided into two parts, namely criminal policy in the narrow sense and criminal policy in the broadest sense (Arief, 2011:3).

1. In a narrow sense, it has the overall meaning of principles and methods that form the basis of the reaction to violations of laws in the form of criminal, in the broadest sense, to have an overall understanding of the functions of law enforcement officials including how to work from the court and the police;
2. In the broadest sense, it means the whole policy, which is carried out through legislation and official bodies, which aims to enforce the norms of society.

Barda Nawawi Arief believes that "Criminal law policy is a direct translation of the term "penal policy", but sometimes the term "penal policy" is translated into the politics of criminal law. The term penal policy has the same meaning as criminal law policy and "strafrechtspolitiek" so that both terms are also translated with politics of criminal law or criminal law policy, but from the previous explanation that the term policy is taken from the term policy in English or "Politiek" in Dutch. Based on the definitions above, it can be seen that criminal policy is a rational effort by the community to prevent crime and to react to crime. This rational effort is a logical consequence, because according to Soedarto, in carrying out politics, people make judgments and make selections from the many alternatives faced.

The implementation of criminal law policy is essentially an effort to realize the rules of criminal law in accordance with the situation and circumstances at a time and in the future. Thus, if seen as part of the politics of law, the politics of criminal law means how to seek or make and formulate a proper criminal legislation. In essence, the purpose of overcoming crime is a consideration for the formulation of criminal law policy in accordance with the criminal law enforcement process to regulate community behavior. Criminal law policy has a relationship with criminalization issues. The relationship can be seen through which actions are categorized as criminal acts and what kind of sanctions should be imposed on the perpetrator. The scope of criminalization is the existence of unlawful acts, the existence of criminal responsibility (mens rea), and the type of criminal sanctions imposed.

METHOD

This research used normative legal research, because the focus of the study departs from vacuum of norms, using approaches: statutory approach, analytical approach and legal concepts, comparative approach, and case approach. The data used to examine the issue under study include United Nations Convention Against Corruption (UNCAC) 2003, Law Number 20 of 2001, amending Law Number 31 of 1999 on the Eradication of Corruption Crimes, Law Number 7 of 2006 concerning Ratification of the United Nations Convention Against Corruption, and legal materials primary in the form of scientific works and the results by legal experts, especially related to bribery in private sector. The data was collected by means of literature study, then analyzed using qualitative normative methods.

RESULTS AND DISCUSSION

Bribery Regulations in the Private Sector in Indonesian Positive Law

Bribery in the private sector in Indonesia initially sees as an act that was still in the private area with the private sector so that if there were a violation of this matter, it would

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resolve through private law channels. A private party bribing another private party is considered an unlawful act in civil law. However, there has been bribery in the private sector, such as the bribery case committed by PT. Interbat to doctors in various hospitals, both private and government, Rolls Royce bribery cases, and Center Point bribery cases (Silalahi, 2015:2).

Based on this, law enforcement on eradicating bribery in the private sector in Indonesia is still far from feasible. Reflecting on other countries such as Singapore, Malaysia, and South Korea, the concept of bribery should not only be seen as occurring in the public sector and harming public interests but also in the private sector. If it does not have proper law enforcement, bribery in the private sector can kill people's interest in competing fairly in the public and private sectors. Similarly, with law enforcement in the public sector, if it is inappropriate, it will kill people's trust in the government.

Unlike the provisions in Law Number 20 of 2001, which categorizes bribery into several articles, namely Article 5 paragraph (1) letter a, Article 5 paragraph (1) letter b, Article 13, Article 6 paragraph (1) letter a, Article 6 paragraph (1) letter b, Article 5 paragraph (2), Article 12 letter a, Article 12 letter b, Article 11, Article 6 paragraph (2), Article 12 letter c, and Article 12 letter d. The explanation of these articles shows that Law Number 20 of 2001 is limited to regulating bribery relating to civil servants, state administrators, judges, and advocates. It has the consequence that bribery of someone who is not a civil servant or state official cannot be qualified as a criminal act of corruption in Law Number 20 of 2001 because, Law Number 20 of 2001 only regulates official public *bribery* where the perpetrators are civil servants (bureaucrats), both as bribe takers and bribe givers (Napitupulu, 2021:329).

According to Oemar Seno Adji, civil servants are the subjects of criminal acts of corruption. In contrast, non-civil servants can only become subjects of criminal acts of giving bribes, which is also regulated in Law Number 20 of 2001 (Adji, 2012:93). Act No. 20 of 2001 has provisions regarding bribery committed by the private sector to the private sector. However, it is limited to the subject of the recipient of the bribe, namely only limited to advocates regulated in Article 6 paragraph (1) letter b. This law stipulates that an advocate may not be a civil servant or state official. In this case, an advocate is not a civil servant or state official either sitting in the legislature, executive, judiciary or commission, or other state institutions. The contents of the provisions of the article are the same as provisions of Article 210 paragraph (1) number 2e of the Criminal Code, where the article has been declared null and void through Law Number 20 of 2001. Even so, the existence of this article is often not seen as a regulation regarding bribery in the private sector. The private sector is seen not as a business activity. Based on this, currently, Indonesia does not have a transparent model approach to regulating bribery in the private sector.

Act No. 11 of 1980 has formulated a prohibition for everyone to bribe other parties with the intention that the bribed party is willing to do or not perform their obligations which harm the public interest as regulated in Article 2. Whereas Article 3 regulates criminal provisions which are aimed at parties who receive bribes, but until now, the existence of this law is like suspended animation, even though it is still valid, it seems neglected.

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There is a difference in the formulation of the bribery provisions in Law Number 11 of 1980 with the bribery provisions in the UNCAC 2003 namely the bribery provisions in the UNCAC 2003 are more specifically intended to eradicate bribery in the private sector. Bribery and bureaucratic problems in the private sector that harm public interests are considered harmful to society and have the potential to create shocks in the national economic system. It should also be remembered that the UNCAC 2003 recommends that each country make bribery in the private sector a criminal offense, not advising each country to classify bribery in the private sector as corruption so that if Indonesia does not regulate bribery in the private sector it does not mean that Indonesia is not complying. To the UNCAC 2003 provisions, this seems strange, because corruption in the private sector is conceptually-theoretically included in the category of corruption, so it is regulated in the UNCAC 2003. However, in Indonesia, bribery in the private sector cannot be said to be a criminal act of corruption because it is not included in the category of criminal acts. Corruption crime based on Law Number 20 of 2001.

The impact arising from the non-regulation of bribery in the private sector as a form of criminal corruption apart from inefficiency in the private sector, of course, will have an impact on actors who can carry out the eradication and enforcement of these provisions. Then, there is legal politics that wants efforts to uphold and eradicate corruption in the public and private sectors to be regulated in a comprehensive anti-corruption law, the enforcement of which is often associated with the Corruption Eradication Commission making Law Number 11 of 1980 excluded. The part of the legislation assessed in the UNCAC 2003 assessment. Another problem that arises is the difficulty of reaching bribery in the private sector in Indonesia because there are no regulations regarding standardization of accounting and auditing, internal company regulations, maintenance of books and records, including disclosure of financial reports as required by UNCAC 2003 as part of efforts to prevent bribery in the private sector (Suryanto, 2021:594).

There are no provisions contained in Law Number 20 of 2001 that regulate and criminalize bribery in the private sector, so considering the provisions of the principle of legality, bribe actors in the private sector cannot be charged under Law Number 20 of 2001. Bribery in the private sector is a crime that causes a weakening of values, such as trust and loyalty which are very necessary for an effort to maintain and improve the social and economic relations of a country.

Corruption Eradication Commission (KPK) is a state institution that is independent in dealing with corruption issues. The KPK is not authorized to take action to eradicate, prevent and monitor bribery in the private sector because this is not included in the scope of criminal acts of corruption referred to in Law Number 20 of 2001. This also indicates that the criminal law policy regarding bribery in the private sector in Indonesia is currently still not placed as part of the eradication of corruption. This offense arrangement is still separated from Law Number 20 of 2001, so the KPK cannot reach this crime and legal action is the authority of other law enforcement institutions outside the KPK, therefore in order to be sentenced to a crime, bribery in the private sector must be clearly defined in law.

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Policy Formulation of Indonesian Criminal Law in the Future in Terms of Regulating the Crime of Bribery in the Private Sector

Criminal law reform is part of criminal law policy or politics. Concretely reforming criminal law must include reforming material criminal law, formal criminal law and criminal law enforcement. These three areas of law are jointly or integrally improved so that there are no obstacles in their implementation. Regarding the urgency of regulating bribery in the private sector, there has been a lot of discussion since 2006 when Indonesia passed Law Number 7 of 2006. Some of the articles in the UNCAC 2003 recommend that each state party take steps to deal with corruption in the private sector.

Article 21 UNCAC 2003 recommends that state parties establish legislative policies that regulate bribery in the private sector. However, until now, this has yet to be realized to become a product of legislation in positive Indonesian law. According to data recorded at the Corruption Eradication Commission (KPK), from 2004 to 2017, it was recorded that perpetrators from the private sector were the highest. There were 183 actors from the private sector whom the KPK arrested for being involved in bribery and corruption with the executive and legislative bodies. The high data on corruption involving the private sector is one of the factors causing the difficulty in eradicating corruption. Report *Transparency International* about*Corruption Perception Index* (CPI) in 2018 shows that Indonesia is ranked 89th out of 180 countries with a score of 38. Although it shows an increase from the previous year, more is needed to show that there has been an increase in the eradication of corruption in Indonesia (Hidayat, 2017:47).

Bribery in the private sector has already been discussed at the discussion meeting on the Criminal Code Bill, which is contained in the 2018 Criminal Code Bill. However, this provision was eventually withdrawn by the government, and it is planned to be included in Law Number 20 of 2001. The formulation of the substance of the article is sufficiently suitable for ensnaring perpetrators of corruption in the private sector, especially in this case bribery in the private sector. The formulation of the bribery article in the private sector in the 2018 RKUHP is as follows:

Article 696 RKHUP:

(1) Any person who promises, offers or gives something or an unfair advantage, directly or indirectly to someone who leads or manages an agency in the private sector, with the intention that that person does or does not commit an act that violates the duties shall be punished with maximum imprisonment... and/or... Alternative.

Sentenced to the same sentence as paragraph (1), Everyone who manages or works in the private sector (Corporate) in the economic, financial or commercial sector which:

a) Directly or indirectly promising, offering, or giving illegal benefits to someone who leads or works for a body in the private sector, to do or not do something contrary to their obligations; or
b) Directly or indirectly accepting promises, offers or giving illegal benefits as referred to in letter a

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(2) Leaders or administrators of bodies in the private sector who accept promises, offers or give something or an unfair advantage as referred to in paragraph (1) shall be subject to the same punishment as paragraph (1).

In substance, the formulation of the article regarding bribery in the private sector contained in the Criminal Code Bill is almost the same as what is regulated in the German Criminal Code. The element of action contained in the formulation of the article is "taking and giving bribes in the commercial field", with legal subjects such as employees or anyone in company management so that the regulation regarding bribery in the private sector needs to be considered for inclusion in the draft reform of the Eradication Law. Corruption Crime. Many private sector corruption cases have been handled internally by companies concerned with sanctions such as refunds or dismissal. However, when viewed from the side of the impact on companies, corruption creates additional costs for bribes or for building corrupt networks, paying bribes to other competitors for the opportunity to get contracts. The impact on the state is that corruption hinders investment, undermines citizen trust in state institutions, exacerbates inequality, and ultimately endangers political stability.

Although the provisions of Article 21 UNCAC 2003 are *non mandatory*, however, Indonesia must consider incorporating this offense into national law, and Indonesia must criminalize bribery in the private sector. This criminalization is part of the criminal law policy using a policy-oriented approach *(policy-oriented approach)* which is more pragmatic, rational, and value-oriented (Vidya, 2017:70). This is intended so that the new criminal law policy can reach bribery offenses in the private sector in the future. The criminalization of bribery in the private sector aims to solve corruption problems and protect the interests of society and the country's economy by renewing the scope of corruption which also covers the private sector, so that the eradication of corruption can be more comprehensive.

Regulating bribery in the private sector as a form of the criminal act of corruption is a form of Indonesia's responsibility as a country that ratified the UNCAC 2003 which requires Indonesia to adapt its national law to the provisions of the convention. If bribery in the private sector has specific regulations in Indonesia, Indonesia has participated in cooperating with other countries in eradicating corruption globally by harmonizing regulations on corruption. Based on this, it is indispensable to formulate bribery in the private sector explicitly so that in the future there will be no legal vacuum in the regulation of bribery in the private sector and it has been regulated in Law Number 11 of 2001.

Several countries have criminalized bribery in the private sector such as Singapore, Malaysia and South Korea. Bribery in the private sector in Singapore is categorized as bribery conducted between private sectors. Bribery in the private sector is considered to damage the investment climate for the state and undermine public trust in the private sector, especially those engaged in public services. Furthermore, in Singapore and Malaysia, the offense is regulated by law, namely in Singapore *Prevention of Corruption Act*, 1993 and in Malaysia through the Malaysian *Anti-Corruption Commission Act*, 2009. Whereas in South Korea, the offense of bribery in the private sector is regulated in *South Korean Penal Code*, 1995, which is a codification. Besides, their isles *specialist* specifically regulates the

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offense of bribery in financial institutions, namely T*he Aggravation of Punishment of Specific Economic Crimes Act* and The *Anti-Corruption and Bribery Prohibition Act, better* known as the Kim *Young-ran Act*, 2016, which regulates the provision of gratuities.

Concerning law enforcement, Singapore, Malaysia and South Korea have anti-corruption agencies with different functions and authorities. Singapore and Malaysia have anti-corruption institutions, *Corrupt Practices Investigation Bureau* (CPIB) *Singapore* and Malaysian *Anti-Corruption Commission* (MACC) which also acts as a law enforcement agency. In comparison, South Korea has *The Anti-Corruption and Civil Rights Commission* (ACRC), an integrated anti-corruption agency that does not act as a law enforcement institution. The three countries have shown their seriousness in law enforcement against bribery in the private sector.

After making a comparison, if it is related to Indonesia, this can be used as a consideration regarding the model of regulation of bribery in the private sector that is suitable to be applied in positive Indonesian law in the future. Since corruption is a crime that develops systematically, eradicating corruption in Indonesia must be carried out comprehensively in both the public and private sectors, therefore law enforcement will be more effective if it is carried out under an anti-corruption agency, in this case, the KPK as an anti-corruption agency in Indonesia. In addition, by making comparisons with Singapore, Malaysia and South Korea, legislators can formulate policies regarding bribery in the private sector in a comprehensive manner that is more pragmatic, rational, and value-oriented (Umari, 2019:152).

In connection with the non-categorization of bribery in the private sector as a form of the criminal act of corruption, legislators must formulate a policy formulation regarding bribery in the private sector that is more comprehensive and can accommodate all the provisions contained in the UNCAC 2003. In addition to conducting an assessment of the regulation of bribery in the private sector in Indonesia's positive law, it is also crucial for legislators to carry out legal comparisons with other countries relating to the regulation of bribery in the private sector because bribery in the private sector is not only an act of crimes that are national but are already international.

CLOSING

Conclusion

Indonesia already has Law Number 11 of 1980 concerning Crime of Bribery, but this regulation seems to be neglected or never been used. Although UNCAC recommends each country to make bribery in the private sector as a criminal offense, and does not recommend each country to make bribery in the private sector as a category of corruption because it is a non-mandatory offence, but it is important for Indonesia to consider criminalizing bribery in the private sector according to the cases that occur and the impact that caused by corruption.

As an effort to reform criminal law as much as possible, the formulation of the bribery in the private sector should be regulated in the revision of Law Number 20 of 2001 in a firm and clear manner, therefore it is necessary to criminalize it as part of criminal law policy, and the perpetrators of bribery in the private sector can be sentenced. The future formulation

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of bribery in the private sector in Indonesian positive law that needs to be considered is an explanation of the qualifications of those who are considered to have committed bribery in the private sector in both active and passive forms.

Suggestions

Based on the result and conclusion above, some suggestion may be taken into this study is that the bribery in private sector must be reclassified as a criminal act of corruption in Indonesia. The eradication of corruption in Indonesia will not be completed entirely if the government does not participate in eradicating bribery that occurs systematically in the private sector and extends to various fields of life such as social sector and economic sector.

Legislation regarding bribery in private sector must be formulated comprehensively, as well as accommodate all provisions in UNCAC 2003, therefore the governments need to evaluate itself and consistent in punishing bribery in private sector and must immediately make regulations regarding this matter. If bribery in private sector is regulating in Indonesian positive law, it also can help law enforcement officials which is KPK that tried to revise the Corruption Act by including the bribery in private sector in the Anti-Corruption Act.

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