IJCLS 4(2) (2019) 147-154

IJC LS

INDONESIAN JOURNAL OF CRIMINAL LAW STUDIES
http://journal.unnes.ac.id/sju/index/php/ijcls

URGENCY OF REGULATION REFORM OF BRIBERY OFFENCE AT PRIVATE SECTOR IN INDONESIA

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Received July 2 2018, Accepted September 2 2019, Published November 30 2019

DOI: 10.15294/ijcls.v4i2.21745

How to cite:
Umari, N.A., Lukitasari, D., & Ismurnano, I. (2019). 'Urgency of Regulation Reform of Bribery Offence At Private Sector In Indonesia', *IJCLS (Indonesian Journal of Criminal Law Studies)*, 4(2): 147-154. DOI: 10.15294/ijcls.v4i2.21745

Abstract

This research aims to assess the urgency of regulation reform of bribery offence at private sector in Indonesia. This study used doctrinal research methods with prescriptive characteristic. The approach used is legal approach. The legal substances used in this study are primary and secondary legal materials. The techniques of collecting legal materials are by library research and analysis techniques of legal materials using deduction methods. The results showed that the arrangement of bribery in private sector offences in Indonesia still has various problems with the unenactment of Law Number 11 of 1980 on Bribery Offences effectively and impressed forgotten. KPK has attempted to revise the Corruption Act through the Corruption Criminal Act Draft which included articles relating to bribery in private sector offences by adopting the provisions of Article 21 UNCAC. However, the Corruption Criminal Act Draft still lacked a shortage of passive bribery offences.

Keywords: *Criminal Act; Bribery in Private Sector; UNCAC*

INTRODUCTION

Bribery is one of the most common forms of corruption committed by corruptors. The Corruption Eradication Commission (hereinafter referred to as KPK) in the Corruption Crime Statistics by Case Type states that there were 78 cases of bribery out of a total of 93 corruption cases in 2018 (quoted from http://www.kpk.go.id/id/statistik/penindakan/ tpk-berdasarkan-jenis-perkara accessed Wednesday, June 3, 2019 at 12:21 WIB). Bribery has a strategic role in the development of other corrupt acts, because other corruption can be developed after an illegal act or abuse of authority from public officials preceded by bribery (Yohanes Pande, 2011: 101). Act Number 31 of 1999 as amended by Act Number 20 of 2001 concerning Eradication

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of Corruption (hereinafter referred to as the Anti-Corruption Act) until now has only categorized bribes in the public sector as corruption, whereby the bribed party must be a public official. Whereas bribery can not only occur in the public sector but can also occur in the private sector.

Bribery in the private sector is actually similar to bribery in the public sector, the difference is that bribery in the private sector occurs entirely in the private or private sphere that was born as a reaction to economic growth. Bribery in the private sector can have a negative impact on the state, not only causing losses on the amount of money, but also creating inefficiency, increasing crime, slowing growth and worsening the image and national investment climate at a macro level (Andreas Nathaniel Marbun, 2017: 53). Furthermore according to the 2009 Global Report issued by Transparency International (2009: 7) outlines the risk of corruption in the corporate sphere and the risk of bribery in the private sector in relation to consumers and suppliers. In a broader market environment bribes can be used to bribe competing companies and cartels to the detriment of traders and consumers. Bribery in the private sector can open the door to other corrupt actions in order to increase company profits.

Indonesia actually has legislation related to bribery in the private sector, namely Act Number 11 of 1980 regarding Bribery (hereinafter referred to as the Bribery Act). The Bribery Act was created when there was a bribery event among the football sport which was widely discussed by the public at that time (K. Wantjik Saleh, 1983: 79). However, according to Andreas Nathaniel Marbun (2017: 81) the Bribery Law seems forgotten and may never be used, because of the many writings and discourse written from academics to anti-corruption observers in Indonesia as if agreeing that Indonesia does not have any legal instruments which can ensnare bribes in the private sector. The forgotten Bribery Act and not effectively enforced resulted in bribery criminal cases in the private sector not being dealt with thoroughly.

There is nothing new on bribery in the private sector. The 2003 United Nations Convention Against Corruption, hereinafter referred to as UNCAC, has distinguished bribes in the private sector from the public sector. Article 21 UNCAC regulates that bribery in the private sector includes active and passive bribes where the perpetrators come from the private sector, those who lead or work in a private or private sector that carries out economic, financial or commercial activities.

Indonesia signed UNCAC on December 18, 2003, then ratified it on April 18, 2006 through Act Number 7 of 2006 concerning Ratification of UNCAC, 2003. However, to date there has been no serious attempt by the government to fully adjust corruption arrangements with UNCAC, wrong only about bribery in the private sector. It is not entirely wrong to remember that Article 21 of UNCAC is non-mandatory, which means that there is no agreement among the convention participants to declare such acts a crime (Andreas Nathaniel Marbun, 2017: 54-55). So Indonesia must consider whether bribery in the private sector is necessary or not to be determined as a crime.

The fact is that although it is non-mandatory it has become an international spotlight and assessment. The concept and definition related to bribery risk, including bribery in the private sector, is one of the components stated to respondents in a survey and assessment of corruption perceptions conducted by Transparency International and in recommending legislation products to be made to strengthen a system of preventing and enforcing corruption (Vidya Prahassacitta, 2017: 397-398). As a result, in 2015 Indonesia's value was 36 and ranked 88th. This shows that corruption in Indonesia still occurs systematically and focused on the public sector.

Indonesia has had a bribery law since 1980, but the law is not part of the legislation assessed in the assessment of the implementation of UNCAC. So that the

Bribery Act is not considered as a form of implementation of Article 21 of UNCAC. The Corruption Eradication Commission itself has tried to revise the Corruption Act through the Draft Corruption Act 2007-2010 (hereinafter referred to as the Anti-Corruption Act) where there are articles which have adopted the provisions of Article 21 of UNCAC. However, to date the Corruption Act has not been included as a priority to be discussed in the House of Representatives. Based on the description of the facts above, this article will discuss the the urgency of regulation reform of bribery offence at private sector in Indonesia.

RESEARCH METHODS

The type of research in this scientific article is a doctrinal legal research (Peter Mahmud Marzuki, 2005: 32). The research approach used by the writer is a qualitative approach by statute approach. The data obtained by literature study. The data is in the form of primary and secondary legal materials. The primary legal material in this article includes the Criminal Law Act, Act Number 11 of 1980 concerning Bribery, Act Number 31 of 1999 as updated with Act Number 20 of 2001 concerning Eradication of Corruption and United Nations Convention Against Corruption. Secondary legal materials used include legal science books, legal science journals, and other sources namely the internet and trusted sites.

FINDINGS AND DISCUSSIONS

Bribery in the private sector was first regulated through the Bribery Act. The Bribery Act was formed on the background of bribery events among soccer sports in 1980. Based on existing legal regulations, these acts cannot be classified in terms of criminal acts either regulated in the Criminal Code (hereinafter referred to as the Criminal Code) or Act Number 3 Year 1971 concerning Corruption Crime concerning Eradication of Corruption Crime which has been revoked and replaced with the Corruption Law. Initially a draft law had been prepared as a change and addition to the articles of the Criminal Code that were associated with bribery in the sport. However, this method was not implemented but by creating a separate law, namely the Bribery Act. The formation of the Bribery Act is indeed motivated by bribery in sports circles, but in its formulation not only regulates bribery related to sports, but also covers other fields (K. Wantjik Saleh, 198: 79). The complete provisions of the regulation read:

Section 2

> Whoever gives or promises something to someone with a view to persuading that person to do something or not to do something in his duty, which is contrary to his authority or obligations concerning the public interest, is convicted of giving bribes with imprisonment for a maximum of 5 (five) years and a maximum fine of IDR 15,000,000 (fifteen million rupiah).

Article 3

> Anyone who accepts something or promises, while he knows or ought to suspect that giving something or promise is intended so that he does something or does not do something in his duties, which is contrary to his authority or obligations concerning the public interest, convicted of accepting bribes with

imprisonment during - a maximum of 3 (three) years or a maximum fine of Rp. 15,000,000 (fifteen million rupiah).

The Bribery Act regulates bribery in the private sector both active and passive. The term bribe in the active private sector or "active bribe" refers to actors who promise, offer or give bribes, while "passive bribe" refers to actors who accept or agree to accept bribes (Jeffery R. Boles, 2014: 679). According to the provisions in Article 2 of the Bribery Act, what is meant by active bribery is the behavior of giving or promising something to someone or not doing something related to their duties that are contrary to their authority or obligations concerning the public interest. Article 3 of the Bribery Act stipulates that a person who receives something or promises that he knows or deserves to suspect that the gift is intended to make him do something or not do something in his duties that is contrary to his authority or obligation concerning public interests is called passive bribery.

Indonesia has ratified UNCAC since 2006. UNCAC is one of the anti-corruption conventions held by the United Nations in 2003. UNCAC was held because corruption has the potential to disturb the stability and security of society, harming the economy of a country so that it can have an impact on the international community (Atep Abdurofiq, 2016: 197). Since ratifying UNCAC Indonesia, it has been reviewed in two rounds and received several recommendations. The first round of 2010-2015 review conducted by the United Kingdom and Uzbekistan produced 32 recommendations in which five recommendations related to criminalization, 12 recommendations related to law enforcement, three recommendations related to extradition and 10 recommendations related to mutual legal assistance. In the second round, Indonesia was reviewed by Yemen and Ghana which produced 14 recommendations related to corruption prevention and seven recommendations related to asset recovery. To date, of the 32 first round recommendations, only eight have been completed by Indonesia. One recommendation that has not yet been implemented is the criminalization of bribery in the private sector.

Bribery in the private sector has indeed been regulated through the Bribery Act. However, legal politics in Indonesia wants bribery in the private sector to be regulated in the Anti-Corruption Act. This makes the Bribery Act considered not an implementation of Article 21 of the UNCAC. The Corruption Eradication Commission has tried to revise the Corruption Act through the Corruption Act that has included articles relating to bribery in the private sector by adopting the provisions of Article 21 of UNCAC.

The provisions governing bribery in the private sector in the Corruption Act are as follows:

Article 7

(1) Any person who in an economic, financial or commercial activity promises, offers or gives directly or indirectly to someone who occupies any position in the private sector for an improper advantage for his or her interests, so that the person does or not do anything contrary to their obligations, shall be sentenced to a maximum imprisonment of 1 (one) year and a maximum of 5 (five) years.

Article 13

(1) Any person who directly or indirectly:
   a. Give, approve or offer to give a gift or promise to someone who takes care of the public interest, either for oneself, that person or for someone else, so that the person does something that is contrary to his obligations, is sentenced to a maximum imprisonment of 3 (three) year

and a maximum fine of Rp 150,000,000.00 (one hundred and fifty million rupiah).

b. Give, approve or offer to give a gift or promise in taking care of the public interest, both for oneself and the interests of others, because they will or have done something contrary to their obligations, be sentenced to a maximum imprisonment of 3 (three) years or a fine a maximum of Rp 150,000,000.00 (one hundred and fifty million rupiah).

(2) Every person who receives a gift or promise as referred to in paragraph (1), is convicted with the same crime as referred to in paragraph (1).

Article 14

Everyone who directly or indirectly:

a. Give, approve or offer to give a gift or promise, whether for the benefit of another person, in return for that person arranging the final results of a sport or competition, being sentenced to a maximum imprisonment of 2 (two) years and / or a maximum fine of Rp 100,000,000 , 00 (one hundred million rupiah).
b. Give, approve or offer to accept a gift or promise, both for oneself and for the benefit of others, in return for he will or has arranged the final outcome of a sport or competition, shall be sentenced to a maximum of 1 (one) year imprisonment and / or a maximum fine of Rp 100,000,000.00 (one hundred million rupiah).

Provisions on the regulation of bribery in the private sector between the Anti-Corruption Act and the Bribery Act have differences, whereas the Anti-Corruption Act regulates gratification offenses that do not exist in the Bribery Act. The crime of bribery is regulated in Article 7 paragraph (1) of the Anti-Corruption Act concerning anyone related to economic, financial or commercial activities bribing someone who occupies any position in the private sector with the aim that the person does or does not do something in violation of his duties. Whereas the crime of gratuity covers the fields of public interest and sports. Article 13 regulates everyone who gives and receives gifts or promises within the scope of public interests relating to public services such as health workers, education personnel in the private sector, notary public and officials who make land certificates. Based on the explanation of Article 13 of the Anti-Corruption Act, the term "gift or promise" is the same as gratuity which can be in the form of facilities, rebates, deductions of debt, meals, entertainment and tourist trips. Then, for gratification in the field of sports regulated in Article 14 where every person who gives and receives gifts or promises with the aim of regulating the end result of sports.

Related to the regulation of bribery in the private sector in the Draft Anti-Corruption Act on active and passive gratification both in the field of public and sports interests has been regulated, but for bribery offense only regulates active bribery offense. Unlike the Bribery Act which regulates bribery offenses, both active and passive, the Anti-Corruption Act does not regulate passive bribery offenses. Provisions on bribery offenses in the Corruption Act will only provide sanctions to anyone who promises, offers or gives bribes, while those who receive bribes cannot be subject to sanctions. The regulation of bribery in the private sector in the Anti-Corruption Act is indeed clearer and broader than the Bribery Act, but with such a regulation would make eradicating criminal acts of corruption ineffective.

The UNCAC assessment team has provided recommendations to abolish Article 12 B and Article 12 C of the Corruption Act related to gratification offenses (Vidya Prahassacitta, 2017: 413). Based on the explanation of the provisions of Article 12 B of the Anti-Corruption Act, what is meant by gratification is giving in a broad sense,

which includes giving money, goods, rebates (discounts), commissions, interest-free loans, travel tickets, lodging facilities, tourist trips, free medical treatment and other facilities. The legal problem of the gratification crime is because the definition of gratification actually includes the scope of the definition of bribery in Article 5 paragraph (2) letters a and b, and Article 6 paragraph (2) of the Anti-Corruption Act. The regulation between gratuity and bribery is not yet clear, so it seems to overlap. The recommendation is intended to regulate bribery in the public sector in the Anti-Corruption Act, but it would also be good if applied to bribery offenses in the private sector.

The Indonesian government can make corporations the subject of legal bribery in the private sector, considering that corporations can be involved in bribery cases in the private sector in order to increase corporate profits. The Criminal Code currently only recognizes individuals as subjects of criminal law, whereas the corporation has not been regulated. However, in its development several laws and regulations have categorized corporations as legal subjects, for example the provisions of Article 2 paragraph (1) of the Anti-Corruption Act in which corporations have been regarded as subject to corruption. Then, the position of the corporation as a subject of criminal law is currently being drafted by the House of Representatives in the Draft of the Criminal Code (hereinafter referred to as the Criminal Code Draft). The provisions of corporations as legal subjects are regulated in Article 46 paragraph (1) of the Criminal Code Draft which states that corporations are subject to criminal acts. So it is not impossible to make corporations the subject of legal bribery in the private sector.

The Indonesian government in addition to making corporations a legal subject needs to regulate sanctions that can be imposed on corporations. Corporations cannot be subject to imprisonment sanctions, so sanctions that can be given are criminal sanctions for fines. In addition there needs to be clear criteria for determining the involvement of a corporation in bribery cases in the private sector so that it can be subject to appropriate sanctions. For example, bribery committed by one employee has provided benefits for the company or for the benefit of the company. These criteria can later simplify the process of handling bribery cases in the private sector involving the corporation.

The formulation of criminal law policies in Indonesia related to bribery in the private sector there are still many gaps that need to be fixed. Especially the bribery policy in the private sector in the Anti-Corruption Act that needs some changes so that it is not impressed as merely making a recommendation from the UNCAC assessment team and only doing the obligation as a ratification of UNCAC.

Law enforcement for bribery in the private sector is also still a problem related to what institution has the authority to take action. The KPK which tried to revise the Corruption Act by including bribery in the private sector indicated that the KPK wanted to have the authority to handle bribery cases in the private sector. However, it should be remembered that based on Act Number 30 of 2002 concerning the Corruption Eradication Commission, the KPK can only deal with corruption in the Anti-Corruption Act. So that this desire can still not be resolved because there is no criminal law governing it. Considering that bribery in the private sector is currently regulated in the Bribery Act only the police and the prosecutor's officer can handle it.

The Indonesian government is currently trying to prevent and tackle corruption in the private sector where President Joko Widodo issued President Instruction Number 10 of 2016 concerning Actions to Prevent and Eradicate Corruption in 2016 and 2017 (hereinafter referred to as Inpres Number 10 of 2016). The instruction regulates the initiation of anti-corruption certification efforts in the private

sector where both the private and public sectors. Especially State-Owned Enterprises (SOEs) are directed to meet international standards in the form of the International Organization for Standarization (ISO) 37001 which is an anti-bribery management system. ISO 37001 implements a series of steps to assist the private sector and SOEs in preventing detecting and overcoming bribery by providing guidance to establish, implement, maintain, review and improve the anti-bribery management system (Reza Lukiawan, 2018: 160-161). Presidential Instruction Number 10 of 2016 is issued with the aim of preventing and overcoming corruption in both the public and private sectors and is expected to be able to eradicate bribery effectively, especially in the private sector and can improve the ranking of Indonesia's corruption perceptions.

CONCLUSION

Indonesia already has a bribery arrangement in the private sector before ratifying UNCAC, the Bribery Act. However, the Bribery Act is not considered as a form of implementation of Article 21 of UNCAC because legal politics in Indonesia wants bribery in the private sector to be regulated in the Anti-Corruption Law. The Anti-Corruption Act has been formed, but there are still many gaps that need to be fixed, such as by removing gratification offenses and regulating passive bribery offenses. Being a corporation as a legal subject for bribery in the private sector is very important because the corporation can be involved in the crime. However, there needs to be clear criteria for determining the involvement of a corporation so that it can be subject to appropriate sanctions. Enforcement of bribery in the private sector is also still a problem related to the institution authorized to take action. The KPK wants to have the authority to handle bribery cases in the private sector, but because bribery in the private sector is regulated in the Bribery Act, only the police and prosecutors are authorized.

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