

Legal Implications and Regulatory Formulation of Private Sector Bribery as A Corruption Offense in Indonesia

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Abstract. This article explores the qualification of bribery in the private sector as a criminal offence in Indonesia. No specific positive legal regulation can prosecute individuals involved in private-sector corruption, resulting in a legal vacuum. Criminal law must consider realising a just and prosperous society, and the costs of criminalising such acts (bribery in the private sector) should be balanced with the outcomes to be achieved. Although Indonesia's Law on the Eradication of Corruption (Law No 31 of 1999, as amended by Law No 20 of 2001) lags and is not in line with the United Nations Convention against Corruption, Indonesia should align its national criminal law with UNCAC, particularly Article 21 of UNCAC. By introducing new concepts and formulating provisions regarding bribery in the private sector in the law on the Eradication of Corruption, as well as implementing the Deferred Prosecution Agreement (DPA), it is hoped that future cases of bribery in the private sector in Indonesia can be effectively addressed.

Keywords: Bribery in the Private Sector; Corruption Offenses; UNCAC.

INTRODUCTION

The national legal framework for addressing corruption has long been perceived as insufficient to combat corrupt activities across various countries effectively. The limitations of domestic legal instruments, such as the Anti-Corruption Law in Indonesia, are a prevalent issue worldwide. The United Nations has advocated for a convention rejecting corruption through international collaboration. As a manifestation of this commitment to tackling corruption, the signing of the United Nations Convention Against Corruption (UNCAC) took place on December 9, 2003, in Merida, Mexico, involving 133 nations. UNCAC provides a comprehensive guide for all countries to undertake anti-corruption measures, encompassing prevention strategies, defining corrupt practices, fostering international cooperation, and establishing cross-border asset recovery mechanisms. The provisions of UNCAC reflect the commitment to upholding the rule of law and promoting effective governance.

Indonesia ratified UNCAC in 2006 through Law No 7 of 2006, which signifies implications for tailored legal frameworks to prevent and eradicate corruption within the country [1]. This ratifica-

tion necessitates the adoption of essential norms by Indonesian positive law, emphasising the nation's seriousness in the fight against corruption [2]. However, owing to UNCAC's two-fold nature, encompassing both mandatory and non-mandatory offences, Indonesia retains the right to selectively follow UNCAC's provisions, particularly Article 21, which addresses bribery in the private sector.

One prominent instance of alleged private sector bribery in Indonesia is the PT Interbat case, which surfaced through an investigation conducted by Tempo. PT Interbat is suspected of offering bribes to several hospitals and doctors. Metropolitan Medical Centre (MMC), a private hospital, and its doctors were among the recipients of these alleged bribes. Furthermore, data from a Databoks study conducted by Indonesia Corruption Watch (ICW) reveals that the recorded instances of corruption offenders within the Corruption Eradication Commission (KPK) between 2004 and 2022 amounted to 1,442 individuals. Notably, the highest corruption occurrences were in the private sector, with 372 perpetrators.

Regarding Indonesia's domestic legal framework about corruption, none of the existing regulations, including UNCAC's Article 21, explicitly focus on criminalising private bribery. This gap is evident in laws such as the Amendment to Law No 31 of 1999 on the Eradication of Corruption and Law No 11 of 1980 on bribery. The absence of clear and specific provisions within these regulations has led to this legal vacuum.

This study aims to analyse the challenges posed by enforcing laws against corruption in the private sector in Indonesia. Through an in-depth exploration of existing legal constraints, this research seeks to formulate constructive and sustainable recommendations to address regulatory gaps and enhance preventive and enforcement measures against private-sector bribery. By embracing the principles embodied in UNCAC and drawing insights from the experiences of other nations, it is anticipated that the outcomes of this study will contribute significantly to fostering a clean, fair, and transparent business environment in Indonesia.

METHODS

The research method applied in this article is the normative juridical research method. This method refers to a literature study approach that involves analysing relevant legal literature sources and utilising primary and secondary data as the basis for argument development.

Normative juridical research involves collecting and analysing various legal sources, such as laws, regulations, court decisions, legal documents, academic literature, and articles related to the researched topic. Primary data consists of original legal sources, such as texts of laws and court rulings. In contrast, secondary data encompasses interpretations, analyses, or comments on these primary sources provided by legal experts or researchers.

In this study, the author collects and examines various legal sources related to corruption in the private sector in Indonesia. Primary data, such as corruption and criminal law regulations, as well as relevant court decisions, serve as the legal basis for analysing issues about enforcing laws against bribery in the private sector. Secondary data, such as the views of legal experts or researchers regarding the effectiveness of existing legal instruments, can provide additional insights in formulating more holistic recommendations.

By adopting the normative juridical research method, the author can systematically analyse legal issues related to tackling corruption in the private sector. This approach allows the author to explore relevant legal perspectives, formulate strong arguments, and generate substantial recommendations to enhance the existing legal framework.

RESULTS AND DISCUSSION

Bribery or corruption is a criminal act that often occurs and involves government officials being conducted by business people/private individuals. One of the common forms of bribery is giving gifts, items, or bribes in the form of money. The purpose of bribery is something that can influence decision-making by the person or official being bribed [3]. As a country governed by the rule of law, Indonesia has established regulations related to the crime of bribery. The relevant legislation encompasses:

1. *Law No 31 of 1999 concerning the Eradication of Corruption.* Bribery under the Corruption Law is regulated in Article 5, § 1 letters a and b, and § 2. Upon dissecting the formulation of this article, one of the elements of the bribery offence consists of the subject of the briber. In Article 5, the phrase "giving or promising something to a public official or state administrator" has not been clearly defined, indicating that this article could potentially be used to prosecute private individuals as active bribe givers or bribe offerors. In contrast, public officials or state administrators would be passive recipients. However, this provision can only be applied if bribery from private individuals is connected to a public official or state administrator. At the same time, if both the active and passive briber are private individuals, the existing national law in Indonesia does not address this situation.

2. *Law No 11 of 1980 concerning Bribery.* In Indonesia, the criminal offence of bribery is primarily governed by Law No 11 of 1980 concerning corruption. This law explicitly prohibits both giving and receiving bribes. The relevant prohibitions are stated in two articles, Article 2 and Article 3. Although the wording of these provisions does not explicitly refer to public officials as subjects who can be subjected to these provisions, the mention of the term "authority or duty" suggests that individuals involved must possess authority or duties related to public interests. The termi-

nology of "authority" in administrative law generally refers to appointed and sworn public officials who can make decisions or carry out actions on behalf of the state.

Nevertheless, the explanation of Article 2 of the Republic of Indonesia Law No. 11 of 1980 concerning bribery clarifies that the term "authority and duty" includes the authority and duty regulated by professional ethics or determined by respective organisations. The explanation in Chapter I of the same law states that enacting this law is necessary to instil a clean and robust national character based on Pancasila. Therefore, bribery in various forms and nature need to be prohibited, with restrictions applied to acts of corruption concerning public interests. Consequently, the subjects governed by the Republic of Indonesia Law No. 11 of 1980 are not limited solely to public officials but also encompass individuals bound by professional ethical codes and those possessing authority within organisations.

The provisions outlined in the Republic of Indonesia Law No 11 of 1980 concerning Bribery and Corruption Law have not been previously applied to legal subjects beyond public officials. If the provisions regarding bribery apply to private individuals, then the private individual would be associated with the public official who receives the bribe. Using criminal sanctions for bribery between private parties (private sector) tends to be enforced against the bribe giver.

The criminal offence of bribery has two distinct dimensions: active bribery, often referred to as the bribe giver, and passive corruption, often referred to as the bribe recipient [4]. Therefore, both the bribe giver and bribe recipient are involved in addressing bribery cases. The suboptimal application of the Republic of Indonesia Law No. 11 of 1980 concerning bribery in handling bribery cases within the private sector is attributed to the broad interpretation of "...concerning public interests," one of the elements in Articles 2 and 3 of the same law. The law's explanation does not limit what constitutes "public interest." The term "public interest" is overly expansive generally and tends to lack boundaries. Public interest can be interpreted as the interests of the nation and state, as well as the interests of the people, considering various aspects of life.

To explain the meaning of public interest, we can refer to language experts' opinions. In this context, Huybers states that public interest relates to

the interests of society with specific characteristics, including concerns about all public resources necessary for civilised living. Soetandyo Wignjo Soebroto presents two meanings for the criteria of general interest:

1. Public interest, in the sense of being the interest of many people, is determined and defined based on the choices and preferences of many individuals, possibly through a somewhat organised or managed process. It may also arise spontaneously, originating from the bottom up.
2. Public interest, in the sense of being a national interest, is decided and defined through a normative and structural process centrally controlled to meet the demands of development planning and engineering.

Based on the explanations from the experts above, a general outline can be drawn to interpret public interest, which is an interest intended and beneficial for many individuals. The public interest mentioned in the phrase "contrary to the authority or duty that concerns public interest" in Law No. 11 of 1980 concerning bribery means that the authority or duty must pertain to the general population [5]. Thus, Articles 2, 3 of Law No 11 of 1980 concerning Bribery cannot be used to prosecute all perpetrators of bribery in the private sector, as economic actors engaging in bribery within economic activities do not establish corporations based on public interest, thereby lacking authority or obligations related to the public interest [6].

1. Implementation of UNCAC Regulations on Private Sector Bribery into Indonesian National Law. UNCAC is an international codification of corrupt practices. This treaty doesn't declare specific acts as international crimes. Still, it obligates participating countries to prosecute or extradite perpetrators of such actions based on national law, as stipulated in Article 30 of UNCAC. The internationalisation of corruption is due to its elements that breach international interests, making it necessary to prevent and suppress it through international criminalisation as one of the appropriate measures.

In the UNCAC background paper, at least six impacts of corruption underlie the internationalisation of corrupt practices. First, corruption is seen as damaging to democracy. Second, corruption is perceived as undermining the rule of law. Third, corruption can disrupt sustainable development. Fourth, corruption is considered detrimental to

markets. Fifth, corruption can deteriorate the quality of life. Lastly, corruption is seen as violating human rights, particularly the right to a decent life for society, which is neglected due to insufficient state budget allocation caused by corruption. A study even explicitly states that corruption is a violation of human rights.

Based on the six impacts of corruption mentioned above, the objectives of UNCAC are as follows:

a) First, to prevent and efficiently combat corruption. Hence, coordination among anti-corruption institutions, including safeguarding and protecting individuals reporting suspected crimes, is essential.

b) Second, international cooperation and technical assistance, including asset recovery. Collaboration extends not only among convention-participating countries but also involves non-state party nations. The establishment of UNCAC has regulated legal technicalities, especially concerning asset recovery, as the basis for international cooperation between countries.

c) Third, promoting integrity, accountability, transparency, and proper management within the public sector.

As a result, the Indonesian government must enhance international cooperation, both bilaterally and multilaterally, with signatory states of The United Nations Convention against Corruption (UNCAC) to trace, freeze, seize, and recover assets from corruption committed abroad. Otherwise, the government would face challenges in tracking and recovering assets that corrupt individuals have taken overseas.

2. Future Criminal Law Policies Regarding Private Sector Corruption in Indonesia. Addressing private sector corruption necessitates renewal through reformulating provisions related to personal sector corruption via criminal law policies. This policy aims to effect change by altering substantive rules, including expanding norms regarding bribery and the elements of private sector corruption, broadening the subjects of the law, and ensuring equal penalties for active and passive bribery, all regulated under a single legislative enactment, the law on the Eradication of Corruption.

This approach aligns with the theory of criminalisation, which transforms an initially non-criminal act into a criminal offence due to its per-

ceived reprehensibility and the need for punishment, considering fundamental societal values and aimed at the community's welfare. Thus, reformulation and new regulations will provide legal certainty, a primary objective of law that embodies justice. Legal certainty is demonstrated through law enforcement actions against actions regardless of the perpetrator. It ensures that individuals can behave according to prevailing laws and vice versa. Without legal confidence, individuals lack a standardised framework for conducting their actions.

Considering the absence of specific regulations on private-sector corruption in the law on the Eradication of Corruption in Indonesia, an effort is required to address this gap through legal reformulation concerning private-sector corruption in Indonesia via the Anti-Corruption Law, which would also involve a comparative study with the United Kingdom [7]. Indeed, it is imperative to regulate private-sector bribery promptly due to the resulting impact, which justifies the criminalisation of private-sector corruption in Indonesia. This is consistent with The Harm Principle, which dictates that an action can be criminalised if it endangers the perpetrator or others or has broad-ranging consequences. Moreover, regulating private sector corruption in relevant legislation aligns with other theories, such as legal moralism, benefit-conferring legal paternalism, and perfectionism. According to these theories, private-sector corruption can be criminalised if the action concerns the state, as it constitutes an immoral act that benefits the perpetrator or others [8].

Suppose we intend to criminalise private-sector bribery according to national law. In that case, it should ideally begin with Article 21 of UNCAC, which has been ratified by Indonesia and reads as follows: "Each state party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally in the course of economic, financial, or commercial activities:

The promise, offering, or giving, directly or indirectly, 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, acts or refrains from acting;

The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private

sector entity, for the person himself or herself or for another person so that he or she, in breach of his or her duties, acts or refrains from acting."

Article 21 of the United Nations Convention against Corruption doesn't render private-sector bribery a mandatory offence, in layperson's terms. The international agreement doesn't obligate ratifying states to incorporate private-sector corruption as a criminal act through national law. Instead, it only requires consideration. Therefore, based on international law (United Nations Convention against Corruption), as a ratified state, Indonesia doesn't violate any agreement provisions by not incorporating private sector bribery into its national law. From this perspective, the absence of violated provisions in the United Nations Convention against Corruption doesn't imply that Indonesia refrains from criminalising private sector bribery in the law on the Eradication of Corruption. The motivation to criminalise private-sector bribery should be rooted in the harm experienced by Indonesian society due to private-sector corruption [9].

Referring to the comparison outlined in the preceding paragraph and considering all national and international provisions, the proposed model for its formulation in Indonesia in this study is as follows:

1. *Prohibited Acts*. Expanding the clause of bribery norms in the law on the Eradication of Corruption and broadening the formulation elements in the article's wording, one of which is prohibited acts, is closely related to criminal offences. According to criminal law expert Pompe, a strawbale fait, in positive law, is an act considered punishable based on legal formulations that must first be regulated by law.

In detail, the formulation of private sector corruption in the UK includes bribery provisions that, while not distinguishing between public officer and private sector bribery, essentially cover bribery generally (both in the public and private sectors). In this regard, Indonesia should utilise more superficial elements in line with its language conventions but with the same objective: to regulate the act of offering or providing gifts or promises to induce someone, contrary to their authority or duty, to act or refrain from working in a way that breaches good faith. Therefore, "offering or providing directly or indirectly" should create a stereotypical provision. Consequently, all acts falling within this element can be subject to criminal sanctions in the future.

2. *Expansion of Subjects of Law*. The formulation of subjects of law aims to determine perpetrators of criminal acts or individuals to be held accountable for their crimes. Those subject to accountability can be individuals or legal entities per legislative regulations. Indonesia can formulate an expansion of subjects of law similar to the UK, encompassing both individuals and legal entities. Moreover, the UNCAC's regulation is specifically aimed at the economic sector.

Based on the outlined losses resulting from private sector actions, which are more inclined towards the economic sector, Indonesia should criminalise private sector bribery specifically for financial sector recovery. Therefore, Indonesia should create a new formulation that aligns with UNCAC's goal, such as 'any person within an economic activity' covering all individuals or corporations involved in producing or consuming goods and services, with the same objective as regulated by the UNCAC.

3. *Criminal Sanctions*. Criminal law consists of prohibition norms and criminal sanctions. A distinct feature of criminal law is that any prohibited act, when violated, incurs sanctions or criminal penalties. The predominant sanctions or criminal threats used in the law on the Eradication of Corruption are imprisonment and fines. Additional penalties can be applied to Articles 2, 3, 5 to 14. Based on comparisons, the criminal sanctions imposed by the UK under the UK Bribery Act can be used on individuals and legal entities. The regulation regarding individual perpetrators of bribery in the UK is specified in Article 11 of the UK Bribery Act, which stipulates a maximum prison sentence of 10 years and fines. In addition to penalties, corporations can be barred from participating in auctions. Indonesia can reference the criminal sanctions provided in the Bribery Law, which entails a minimum prison sentence of 1 year and a maximum of 5 years or a fine ranging from a minimum of IDR 50,000,000 to a maximum of IDR 250,000,000.

Based on the formulation outline derived from the application of private sector bribery elements in the UNCAC and the UK, a suitable norm formulation for private sector bribery to be applied in future Indonesia is as follows:

1. Any person within an economic activity who directly or indirectly offers or provides something to an individual occupying any position in the private sector, intending to influence them to

act or refrain from acting contrary to their authority or duty.

2. Any person within an economic activity who directly or indirectly requests or receives something, knowing or reasonably suspecting that the giving of such thing or promise is intended to influence them to act or refrain from acting contrary to their authority or duty.

3. Acts, as mentioned in §§ 1, 2, are subject to a minimum prison sentence of 1 year, a maximum of 5 years, and/or a fine ranging from a minimum of IDR 50,000,000 to a maximum of IDR 250,000,000.

4. Acts as stated in §§ 1, 2 may incur additional penalties.

Furthermore, the Indonesian criminal justice system should consider adopting Deferred Prosecution Agreements (DPA). This aligns with the law enforcement model against corruption, aiming to recover state losses due to crime and considering the reduction of penalties for suspects or defendants. The principle of opportunity in the Indonesian law enforcement model still does not accommodate provisions present in the UNCAC [10].

In implementing DPA in Indonesia, the following aspects should be considered:

1. The DPA applied in Indonesia should consider the judicial system within its constitutional structure and legal tradition. Regulatory and compliance burdens for corporations, involving additional costs, must be addressed.

2. Crimes eligible for the DPA mechanism include serious crimes (but are not limited to them), necessitating the establishment of specific laws governing this matter.

3. DPAs should apply solely to corporations, presenting an opportunity for preventive effects and potential prosecution of employees (company personnel). However, if limited to corporations, individuals who have committed offences might be discouraged from reporting due to fear of prosecution.

4. The judiciary's role is crucial in DPA implementation, enhancing trust.

5. DPAs should balance building public trust while pursuing fraudulent corporations.

6. The Indonesian DPA scheme may require agreements for public interest that are fair, reasonable, and proportional.

7. Clear guidelines on DPA negotiation and effective oversight mechanisms are necessary.

These considerations are essential for implementing DPA in Indonesia to ensure justice, legal certainty, and legal benefits while minimising potential conflicts of interest.

The success of combating corruption depends on the effectiveness of law enforcement, both abstract and concrete. Abstract Law enforcement involves substantive rule reform and integrating penal and non-penal efforts. Using non-penal measures aims to eliminate factors conducive to crime, creating an environment responsive to crime eradication.

CONCLUSIONS

In conclusion, implementing UNCAC within member states' legal frameworks, including Indonesia, is justified and imperative. Its designation as an international crime, combined with Indonesia's deliberate ratification and adherence to overarching principles of international law, underscores the necessity of integrating its provisions into the national legal system. The convention's self-executing nature and complementary role alongside domestic criminal law further fortify its applicability. Additionally, the pressing need to combat private sector bribery, as evidenced by high-profile cases and the undeniable societal harm it inflicts, underscores the importance of criminalising such acts. By balancing the costs and benefits of criminalisation and considering international standards set by UNCAC, Indonesia can pave the way for a more just and prosperous society. To this end, aligning its legal framework, particularly within private-sector bribery, with UNCAC's provisions will bolster the country's anti-corruption efforts and enhance its criminal justice system.

In a broader sense, the convergence of international and national efforts in combating corruption, specifically within the private sector, holds the potential to reshape Indonesia's socio-economic landscape. A culture of integrity and ethical conduct can take root by redefining societal norms and expectations by criminalising private-sector bribery. The pivotal role of UNCAC, backed by global consensus and the commitment of member states, offers a roadmap towards curbing corruption's pervasive influence. The journey towards a corruption-free society requires legal amendments and proactive preventive measures,

acknowledging the need for a comprehensive strategy. With a strengthened legal framework, stringent enforcement, and a proactive approach to prevention, Indonesia can pave the way for sustainable development, transparency, and accountability. As Indonesia positions itself as a staunch advocate against corruption, the synergy between UNCAC and national efforts will undoubtedly shape a brighter future for the country and its citizens.

As a recommendation to the House of Representatives and the President, we propose that an adjustment be promptly made to the Anti-Corruption Law to accommodate the principles of the United Nations Convention against Corrup-

tion (UNCAC), mainly focusing on addressing private sector bribery. This step is crucial to ensure legal clarity, enhance law enforcement effectiveness, and bring Indonesia closer to international standards in combating corruption. Additionally, we strongly encourage serious consideration of implementing Deferred Prosecution Agreements (DPA) as an alternative solution for handling cases of private-sector bribery. Adopting DPA could provide flexibility and efficiency in legal resolution while maintaining public interest and principles of justice. By taking these measures, Indonesia can strengthen its legal system, build public trust, and become a model for sustained anti-corruption efforts.

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