

**PREVENTION OF BRIBERY IN THE PRIVATE SECTOR IN
INDONESIA ACCORDING TO THE UNITED NATIONS
CONVENTION AGAINST CORRUPTION****Indra Kurniawan**

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ABSTRACT

Acts of corruption in the private sector regulated within UNCAC include illicit enrichment, embezzlement of wealth in the private sector, bribery in the private sector, and trade in influence. The focus of the problem in this study is how to prevent and eradicate bribery in the private sector as a crime of corruption in Indonesia according to the United Nations Convention Against Corruption (UNCAC). The Method used in this paper is legal research. Based on the results of the study it is understood bribery as part of the fraud is a crime that often occurs in organizations both government and private parties in certain activities. Fraud in the form of bribes is caused by several elements, among others; Pressure pressure is an encouragement to commit fraud (Fraud) on employees (employee Fraud) and by managers (management Fraud) and encouragement, Opportunity. There needs to be an understanding from law enforcement officials that the use of private sector bribery in Indonesia is an act of bribery as stipulated in the Law on Bribery Where the Law can be used to ensnare bribery perpetrators in the private sector.

Keywords: Prevention, Bribery, Private Sector.

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INTRODUCTION

Istilah corruption refers to various activities or actions in secret and illegal to gain profit for the benefit of the person or class. In its development, there is an emphasis that corruption is an act of abuse of *power* or public position for personal gain.¹

Corruption is categorized as an *extraordinary crime* because it has caused human rights violations. Human rights violations here are defined; that corruption results in the act of mastering in a form and manner that overrides human rights to enrich oneself. This leads to suffering due to poverty and unemployment. The chance to live a decent life has been inhumanely deprived. People are losing the right to a decent life, health care and a decent life.²

The State Ministry in Eka NAM Sihombing (2018) stated that justice is a basic human right that should be respected and guaranteed to be fulfilled. Access to justice in essence focuses on two objectives of the existence of a legal system, namely the legal system should be able to produce provisions and

decisions that are fair to all people, both individually and in groups.³

The United Nations Convention Against Corruption (UNCAC) is an international treaty established by the United Nations (UN) through the *United Nations Officer On Drugs And Crime* (UNODC) signed on December 18, 2003 in Merida, Mexico. UNCAC includes a series of guidelines for participating countries to implement corruption eradication, disarming prevention efforts, formulating types of crimes including corruption, law enforcement processes, provisions for international cooperation and asset recovery mechanisms, especially cross-border ones. The effective implementation of the provisions in UNCAC can be considered as a reflection of a country's strong efforts to eradicate corruption, implement good governance and enforce *the rule of law*.⁴ the rule of government cannot replace the constitutional law of nature and issues relating to state institutions, judicial power, the exercise of the sovereignty of the

¹ Raden Imam Al Hafis, *Abuse Of Power: Tinjauan Terhadap Penyalahgunaan Kekuasaan Oleh Pejabat Publik Di Indonesia*, PUBLIKA, Vol 3, No. 1 p. 80-88 (2017), p. 7.

² Muhammad Hatta, *Kejahatan Luar Biasa (Extra Ordinary Crime)*, Unimal Press, Lhoksmawe, p. 23.

³ Eka N.A.M Sihombing, Mendorong Pembentukan Peraturan Daerah tentang Bantuan Hukum di Provinsi Sumatera Utara (Encourage of Establishing Regional Regulation Concerning Legal Aid at Province of North Sumatera), *Jurnal Rechtvinding*, Vol. 7, No. 3, December (2018).

⁴ Anti-Corruption Education Center, 'United Nations Convention against Corruption (UNCAC)', *Aclc.Kpk.Go.Id*, 2020 <<https://aclc.kpk.go.id/materi/pengetahuan-keterampilan-antikorupsi/united-nations-convention-against-corruption-uncac>>.

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people, etc. beyond the scope of state administrative maintenance.⁵

Jimly Asshiddiqie in Eka NAM Sihombing and Irwansyah argue that the Convention is not synonymous with custom. Thus the convention of state regulation is also not identical to the customs of state regulation. Habit demands regular repetition, whereas conventions don't always have to be based on repetition. Conventions of state regulation can be in the form of customs, can also take the form of practices or *constitutional usage*. To this end, it is important that the customs, prevalence, and practices that must be carried out in the process of organizing the state, although not written, are considered good and useful in the administration of the state according to the constitution. Therefore, although it is not based on the provisions of the written constitution, it is still considered constitutionally.⁶

UNCAC is a joint effort of countries to eliminate the catastrophe called corruption from the face of the earth. If fully enforced, UNCAC could make a real difference to the quality of life of millions of people around the world. In 2006 Indonesia ratified the *United Nation's Convention Against Corruption*

(UNCAC), 2003 through Law No. 7 of 2006 on the Ratification of the United Nation Convention Against *Corruption*, it has implications for the adjustment of legal devices as an effort to prevent and eradicate corruption in Indonesia. In the first round of assessment of UNCAC implementation in Indonesia, 32 (thirty-two) recommendations have been implemented in Indonesia.⁷⁸

Therefore, the Indonesian government should enhance international cooperation, both bilaterally and multilaterally with the signatory countries of The United Nations Convention against Corruption (UNCAC) to track, freeze, confiscate, and return assets (asset recovery) resulting from corruption abroad. Otherwise, the government will have difficulty in tracing and returning assets (asset recovery) carried away by the corruptor.⁹ So, there is an urgency the stem the corruption by the prevention way to avoid corruption in the private sector especially the bribery.

⁵ Ibnu Sina Chandranegara, Eka NAM Sihombing, Emergency Law-Making In Indonesia: Between Political And Constitutional Process, *Journal of Legal, Ethical and Regulatory*, Issues Volume 24, Issue 4, 2021.

⁶ Eka N.A.M Sihombing, Irwansyah, *Hukum Tata Negara*, Medan: Enam Media, 2019. p. 10.

⁷ enti Garnasih, 'Paradigma Baru Dalam Pengaturan Anti Korupsi Di Indonesia Dikaitkan Dengan UNCAC 2003', *Jurnal Hukum Prioritas*, 2009.

⁸ Vidya Prahassacitta, 'Injauan Atas Kebijakan Hukum Pidana Terhadap Penyuaapan Di Sektor Privat Dalam Hukum Nasional Indonesia: Suatu Perbandingan Dengan Singapura, Malaysia Dan Korea Selatan', *Jurnal Hukum & Pembaruan*, 4 (2017), p. 397.

⁹ Fariz Cahyana, Urgensi Pengaturan Suap Di Sektor Swasta Sebagai Tindak Pidana Korupsi Di Indonesia, *Jurist-Diction* Vol. 3 (1) 2020.

METHOD

The research conducted is descriptive research with normative legal approach method (normative juridical) conducted by means of literature study. The data collection tools used in this study are data in the form of document studies and literature searches, which become the analysis knife in this study is law enforcement theory, criminal liability theory and crime prevention theory.

DISCUSSION

In 2006, Indonesia ratified the *United Nations Convention Against Corruption* (UNCAC), 2003 through Law No. 7 of 2006 on ratification of the *United Nations Convention Against Corruption*, 2003. This has implications for the adjustment of legal devices as an effort to prevent and eradicate corruption in Indonesia.¹⁰ In the first round of assessment of UNCAC implementation in Indonesia, there were thirty-two recommendations to be implemented. To date only eight recommendations have been implemented in Indonesia.¹¹ One of

the recommendations that have not been implemented is the criminalization of bribery in *the private sector*.

In addition to regulating active and passive bribery relating to *national public officials*, UNCAC also regulates bribery¹² in the private sectors stipulated in Article 21. Arrangements relating to corruption in the private sector are also found in several regional conventions such as the *Council of Europe Criminal Law Convention on Corruption* as well as in the African Union Convention on preventing *and combating corruption*. Globally, however, the regulation of bribery in the private sector is new when compared to other arrangements in the UN's international instruments. Article 21 shows the importance of integrity and honesty needs in carrying out economic, financial, or commercial activities.^{13,14}

Regulation on bribery in the private sector, it supports the development of the current trend of privatization. The development of the private sector resulted in services to the public in the form of products

Selatan', (2017) 4 *Jurnal Hukum & Pembaruan*, p. 397

¹² *United Nation Convention Against Corruption*, Ps. 15.

¹³ Cecily Rose, Michael Kubiciel, dan Oliver Landwehr, *The United Nations Convention Against Corruption: A Commentary* (Oxford University Press 2019). p 238

¹⁴ *Legislative Guide For The Implementation of The United Nation Convention Against Cor- ruption*. p. 104.

¹⁰ Yenti Garnasih, 'Paradigma Baru Dalam Pengaturan Anti Korupsi Di Indonesia Dikaitkan dengan UNCAC 2003' (2009), *Jurnal Hukum Prioris*. p. 161

¹¹ Vidya Prahassacitta, 'Tinjauan Atas Kebijakan Hukum Pidana terhadap Penyuapan Di Sek- tor Privat Dalam Hukum Nasional Indonesia: Suatu Perbandingan Dengan Singapura, Malaysia dan Korea

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and services no longer only carried out by the government or state business entities. The private sector then began to compete and provide services to the public. With such circumstances, it is important not to distinguish between the public and private sectors as part of anti-corruption policies.¹⁵

Before discussing bribery in the private sector, it is necessary to understand that corruption is basically not only possible in the public sector. The private sector is also inseparable from corruption. This is in line with Robert Klitgard's opinion that *Corruption can be defined as the misuse of office for personal gain. The office can be a public office, or it can be any position of power, including the private sector, nonprofit organizations, even university professors.* " (Robert Klitgard, 2008) Regarding the understanding of corruption in the private sector in general, Antonio Argandoña explains "*Private-sector corruption means that a manager or employee chooses to act for his benefit, and contrary to his duties and responsibilities*"(Antonio Argandoña, 2003). In various forms, Transparency International explains that "*Corruption in the private sector takes many forms, among them bribery, undue influence, fraud,*

money laundering and collusion." From Transparency International's explanation, it can be seen that bribery in the private sector is one form of corruption that can occur in the private sector.¹⁶

In this case, corruption itself must be eradicated because it not only affects relations between the private sector, but also has an impact on society, although there are no direct financial losses. First, bribery interferes with the course of market activity by unfairly competing/undermining fair competition. This condition lowers the confidence of other market participants in an economic ecosystem which can then hinder the economic development of the community. In addition, corruption incurs additional costs for bribes or for building corrupt networks, charging bribes as well as to other competitors for the opportunity to obtain contracts. These costs are consequently transmitted to consumers through higher prices or lower quality of products and services.¹⁷¹⁸

In line with this, *UNCAC's Legislative Guide* affirms that the

¹⁶ Andreas Nathaniel Marbun, '*Suap di Sektor Privat: Dapatkah Dijerat?*' (2017) 1 *Integritas*, p. 57.

¹⁷ Cecily Rose, Michael Kubiciel, and Oliver Landwehr, *Op. Cit.* p. 239.

¹⁸ Prianter Jaya Hairi, '*Urgensi Penanganan Tindak Pidana Korupsi di Sektor Swasta*', (2018) 24 *Info Singkat* (Pusat Penelitian Badan Keahlian DPR RI). p 5.

¹⁵ *State Of Implementation Of The Implementation of The United Nation Convention Against Corruption.* p. 52.

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existence of Article 21 of UNCAC helps to protect integrity and honesty in economic, financial, or commercial activities. Furthermore, corruption cannot be limited to only occurring in certain sectors of society but tends to develop and can occur in various sectors. This is due to the dependence of various activities that exist in people's lives. If corruption in the private sector develops, it will indirectly also have an impact on society and the public sector. At the state level, corruption hinders investment, erodes competition, negatively affects the quality of public services, undermines citizens' trust in state institutions, exacerbates inequality, and ultimately jeopardizes political stability.^{19,20}

It is of particular concern to the State where the public sector and the private sector of the State play an equally dominating role as well as for the State with the private sector that is undergoing developments in economic, financial, or commercial activities. When a person who is believed to be a *decision-maker* in a private entity has not been equated with a state official, then corruptive actions committed by the private party is considered as a legal thing so that forever will not be punishable and eradicated as public officials are threatened with criminal punishment. Under Article 21 of UNCAC itself,

in summary, *state parties* are recommended or obliged to consider establishing as a criminal offense concerning (a) the promise, offer, or award of an improper benefit to a person who leads or works in a private sector entity, in order for that person to act in a manner that violates his or her obligations, and (b) the request or receipt of improper benefits obtained by a person who leads or works in a private sector entity, for that person to act or refrain from acting in a manner that violates his or her obligations. From the provisions of the article then qualified as active bribery (letter a) and passive bribery (letter b).²¹

In addition to regulating criminalization, UNCAC also regulates the prevention of bribery in the private sector as stated in Article 12 of the *Private Sector*. Article 12 is intended to prevent parties in the private sector from engaging in acts of corruption. The provisions of this Article are divided into four paragraphs. The first paragraph contains three conditions. First, *state parties* are required to make rules to prevent corruption committed by the private sector. Second, *state parties* are required to have regulations to improve *accounting* and *auditing* standards in the private sector. Third, state parties must provide sanctions either in the form of administrative sanctions or criminal sanctions for

¹⁹ Cecily Rose, Michael Kubiciel, and Oliver Landwehr, *Loc. Cit.*

²⁰ Prianter Jaya Hairi, *Loc. Cit.*

²¹ Cecily Rose, Michael Kubiciel, and Oliver Landwehr, *Op. Cit.* thing 98

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violations of *accounting* and *auditing* standards that have been established. Paragraph 1 is a mandatory *provision* but *state parties* still have the freedom to adjust the rules to be made with the basic principles of national law of each State.²²

Paragraph 2 of Article 12 contains examples of actions that can be taken by the State to support the achievement of the matters set forth in the provisions of paragraph 1. Actions that can be taken include encouraging cooperation between law enforcement officials and private entities, encouraging the development of standards and procedures by regulating the code of conduct and so on, encouraging the realization of transparency in private sector entities, preventing abuse of power in private entities by making rules, preventing conflicts of interest, and ensuring private companies have adequate internal audit control. Paragraph 2 is a *non-mandatory measure* which means the State may choose not to adopt it. Paragraph 3 is *mandatory provision*. The provisions in this paragraph are essentially derived from Article 8 (which governs accounting) of the OECD Anti-Bribery Convention. Paragraph 3 *of the state parties* is obliged to prohibit some acts taken for the purpose of violating UNCAC provisions. These actions include recording outside the bookkeeping,

making the recording in the book keeping of transactions made, undocumented expenses, the use of false documents, and the intentional destruction of bookkeeping documents. Paragraph 4 requires *state parties* to prohibit tax deductions from the proceeds of bribery.

To prevent massive bribery, officials who occupy corruption-prone positions must be registered with their wealth before taking office. So it is easier to check the increase in wealth compared to the official income and the imposition of strict sanctions for those who do not carry out. In carrying out a strategy to eradicate corruption, it must be sought first the cause, then the cause is prevented and eliminated by means of prevention followed by public legal awareness education. Awareness education will be effective if all of people in the private sector have a legal awareness to stay away from bribery behaviour.

Handling of criminal acts through the approach of legislation known as *penal (repressive)* efforts, namely by sanctioning anyone who commits a crime to sanction bribery crimes is a reaction to bribery that has been done.

Repressive efforts are carried out through a channeled approach based on the work of criminal law provisions. The crackdown and handling of corruption crimes are

²² *Ibid.* p. 127.

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done professionally and proportionately. Such efforts can be felt effectively if the implementation is carried out effectively to achieve the objectives of the theory of funding

CONCLUSION

Bribery in the private sector based on the laws and regulations in Indonesia is an act of bribery that has been regulated in the Eradication of Corruption. Related to the prevention and eradication of corruption crimes need to the strengthening of the regulation sector, then there needs to be an understanding from law enforcement officials that the use of private sector bribery in Indonesia is an act of bribery as stipulated in the Law on Bribery Crimes where the Law can be used to ensnare bribery perpetrators in the private sector. In addition, there is also a need for regulation of bribery in the private sector by the recommendations of UNCAC through the renewal of the law in the revision of the Bribery Crime Act by adding the regulation in the Article on the subject of corporate law and in the Article stating that bribery in the Bribery Act is a criminal act of corruption as part of efforts to eradicate corruption comprehensively and is also expected to encourage transparency and accountability in the private sector.

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