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# THE URGENCY OF CRIMINALIZATION OF BRIBERY IN THE PRIVATE SECTOR AS A CRIMINAL ACTION OF CORRUPTION IN THE CORRUPTION LAW

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**Abstract.** The purpose of this study is to examine the philosophical basis, the urgency of regulating bribery as a criminal act of corruption and reformulating the regulation of bribery as a criminal act of corruption in the future. This study applies normative legal research, using a normative juridical approach, using analysis techniques of legal materials obtained from research, examined, to be compiled systematically and presented in descriptive sentences. The results of the study indicate that the cause of the weakness of the corruption law is due to the absence of norms (vague of norms) from the perpetrators of corruption crimes committed other than the government. That every private actor in committing a criminal act of corruption is required to have joint participation with state officials (state apparatus), other than that it is not a criminal act of corruption, even though the consequences of that act have caused state financial losses or very large state economic losses. This study focuses on legal subjects, legal acts and criminal sanctions (penal) which are more open in order to achieve fair legal certainty against bribery by private to private actors, thus there is a need for new regulatory arrangements regarding private to private bribery. as a criminal act of corruption in Indonesia.

**Keywords:** *corruption, bribery, private sector, UNCAC, state finance.*

**Rezumat**. Scopul prezentului studiu este de a examina baza filozofică, urgența reglementării mitei ca act penal de corupție și reformularea reglementării mitei ca act penal de corupție în viitor. Studiul aplică cercetarea juridică folosind o abordare juridică normativă și utilizând tehnici de analiză a materialelor juridice obținute în urma cercetărilor, examinate pentru a fi compilate sistematic și prezentate în propoziții descriptive. Rezultatele studiului indică faptul că motivul slăbiciunii legii corupției se datorează absenței unor norme (norme vagi) vis-a-vis de autorii infracțiunilor de corupție săvârșite în afara guvernului. Fiecare actor privat în comiterea unui act penal de corupție este obligat să participe în comun cu funcționarii statului (aparatul de stat), cu excepția faptului că nu este un act penal de corupție, chiar dacă consecințele acelui fapt au cauzat pierderi financiare de stat sau pierderi economice foarte

mari ale statului. Acest studiu se concentrează pe subiectele juridice, actele juridice și sancțiunile penale (penale) care sunt mai deschise pentru a obține o securitate juridică echitabilă împotriva luării de mită de către actori privați către privați, astfel că este nevoie de noi aranjamente de reglementare privind mita de la privat la privat, ca act criminal de corupție în Indonezia.

**Cuvinte cheie:** *corupție, mită, sector privat, UNCAC, finanțe de stat.*

## 1. Introduction

Corruption in human history is nothing new. It was born at the same time as the human age itself. The United Nations (UN) noted that corruption is a serious crime that can weaken social and economic development at all levels of society [1]. The massive corruption of the world has become a special international concern, this can be seen by the problem of corruption always being a special topic. UNODC (United Nations Office on Drug and Crime) in 2003 then produced a recommendation in the form of a convention called the United Nations Convention Against Corruption (UNCAC) [2]. The constitutional practice in Indonesia in ratifying an international convention is formulated in Law Number 24 of 2000 concerning international treaties, however, it is emphasized that the ratification of the agreement based on the law is only a form of "approval" from the House of Representatives (DPR), as has become a requirement of the constitution. Article 11 of the 1945 Constitution of the Republic of Indonesia.

Some of the cases that the author can bring up in this writing include acts that are categorized as bribery between the private sector and private business entities as contained in the online news investment report Indonesiana quoted from Tempo magazine's investigation that 40% of drug prices are used to bribe doctors. Other cases can also be seen from the differences in interpretation regarding State Enterprises (BUMN) and SOE subsidiaries, some experts argue that the finances of SOEs and SOE subsidiaries have entered the private sphere [3]. Another example, related to inter-club soccer match-fixing bribery that is rife nowadays affecting PSSI, which investigators only suspected with the Law of the Republic of Indonesia Number 11 of 1980 concerning the Crime of Bribery, the Act on the crime of bribery does not include in corruption, because the perpetrators are not civil servants, state administrators, state financial managers [4].

The author finds the philosophical problems of the Anti-Corruption Law ontologically on what is the meaning of the private sector and the limits of state losses. The juridical problem in the author's view is that there is a Vague of norm against bribery committed between private actors and private actors. Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 concerning Corruption has created legal uncertainty, especially in the case of perpetrators who are subjects of corruption crimes who bribe the private sector. This legal uncertainty is suspected to have a wide impact on aspects of the economic life of the country and society as parties who feel the justice, and it will result in not achieving the conditions envisaged by Law no. 31 of 1999 concerning the Eradication of Corruption Crimes. Furthermore, the theoretical problems on the concept of state financial limits and private sector corruption, the authors find that there are acts of corruption committed by the private sector which do not exist in the current corruption law but in other laws regulate the acts of corruption in the private sector. These other laws do not take into account the aspects of state economic losses as an element of the fault of the private actors, even though there have been losses to the state economy, so in this case the legal concept must really be carried out

in order to realize the framework for the orderly passage of people's lives. Based on this description, this research was conducted to determine the urgency of the Criminalization of Bribery in the Private Sector as a Corruption Crime in the Corruption Act.

## 2. Resarch Methods

This type of research is normative legal research, namely research that examines legal issues from the point of view of legal science in depth against established legal norms [5]. Some of the approaches used include the statutory approach, the concept approach, the historical approach and the comparative approach. The purpose of using a statutory approach is to find out whether the regulations that regulate have been arranged comprehensively, hierarchically, systematically and logically and have been able to accommodate the legal needs that exist in society [6]. The conceptual approach used is to remember the approach that will be used to analyze problems for which there are no or no legal regulations [7]. The historical approach is used considering that the regulation of criminal acts of corruption has been regulated for a long time, while the comparative approach, intended by the author is to compare events that are included in the acts of corruption in UNCAC 2003 that occurred in Indonesia, but are not in the realm of corruption. in Indonesia by taking the basis of comparison in several countries, in this case Singapore and the Netherlands.

The legal materials used in this study are primary legal materials (legal materials consisting of legal norms relating to the issues discussed), secondary (legal materials that provide explanations of primary legal materials and those relating to evidence, including explanations of statutory regulations, literature, journals, court documents and so on), and tertiary (legal materials that provide explanations for primary and secondary materials such as the English-Indonesian Dictionary; Black's Law Dictionary; and the Dutch-Indonesia Dictionary).

Legal materials collection techniques are carried out by means of documentation studies or literature studies, both through electronic media and all other library media. The analytical method used in this study is a qualitative juridical analysis. Qualitative juridical analysis method is a research procedure that produces descriptive data. Normative legal research that uses secondary data, research is generally descriptive or descriptive-explorative and the analysis is qualitative based on a theoretical framework that has been prepared using deductive logic of thinking [8].

## 3. Results and Discussion

### 3.1 The urgency of the philosophy of criminalizing private sector bribery in the corruption crime act

Currently, the Anti-Corruption Law only accommodates the eradication of corruption in the public sector, the eradication of corruption only prioritizes public actors and only on elements of state losses as a result of losses arising from such acts of corruption, so that it can be calculated by the BPK or anti-corruption agency in determining the value of the state finances loss. However, for acts of corruption committed by private to private actors that result in losses to the state economy, until now it is not a category of acts of corruption according to this Corruption Act, even though the state's economic losses are greater than the financial losses of the state itself. The current Corruption Law is completely unable to enforce the law in the event that the perpetrator is private to private, because private to private actions in this case are still seen as civil acts, administrative acts or are general

criminal acts, so they do not look at private sector corruption. This is an extraordinary crime, as is the case with the corruption law.

The current Corruption Act, Law no. 31 of 1999 concerning criminal acts of corruption as amended and supplemented by Law Number 20 of 2001 concerning amendments to Law Number 31 of 1999 does not at all mention the existence of private to private corruption. The main requirement for a criminal act of corruption is that the perpetrator of the criminal act of corruption is someone who is authorized by law to be responsible for mere public affairs. Therefore, the consequences of acts of corruption in the form of harming state finances or harming the country's economy are the main requirements for the perpetrator to be declared a criminal act of corruption. As in the current Anti-Corruption Law, even though there are state financial losses or state economic losses caused, there will be no accountability in the event that corruption is committed by private to private.

Therefore, the author is of the opinion that the Anti-Corruption Law currently has a narrow concept of defining corruption itself, because it limits the act of corruption only to those who are given the task by law to carry out the task authority and the public interest can only be reached as a member of the public perpetrators of corruption, but not for private actors. The impossibility of corruption in the private sector to be ensnared by the Anti-Corruption Law is due to the absence of a definition of corruption in the Anti-Corruption Law, even the Anti-Corruption Law limits corruption to any act that is categorized as a criminal act of corruption in the articles of corruption, so that only Explaining corruption based on the types of corruption crimes only, it results in the narrow meaning of the criminal act of corruption itself based on laws determined by the state, so that the understanding of corruption becomes much narrower than the actual crime of corruption that applies internationally [9].

Private actors, where private-to-private bribery acts in committing acts of bribery corruption are completely untouched by Law No. 31 of 1999 as amended and added to Law no. 20 of 2001 concerning amendments to Law No. 31 of 1999 concerning the Crime of Corruption. This happens because the Anti-Corruption Law currently only provides criminal sanctions against public actors who commit criminal acts together with private actors, or it can also be that both perpetrators are public actors, in the sense that the actions of private actors can only be punished as a party who participates in doing together with public actors or what is known as *delneeming*, in the general provisions of the Criminal Code, the position of private actors in this case is positioned as a party or actors participating together with public actors, thus cannot be positioned as the main actor in committing corruption crime.

This is a legal norm stated in Article 55 paragraph 1 1 of the Criminal Code, which reads "Criminalized as perpetrators of criminal acts are those who commit, who order to do, and who participate in committing the act". Thus, based on the norms contained in Article 55 paragraph 1 to -1 of the Criminal Code, in terms of the relationship between each actor in resolving the criminal act of corruption, according to the author, participation can only be done in 3 (three) ways, namely:

Jointly commit acts of corruption;

a. A person has the will and plans a crime while he uses other people to carry out the crime of corruption;
b. Only one person carries out the crime of corruption, while other people help carry out the crime of corruption.

Guided by the concept of *Stufenbaw* theory presented by Hans Nawianski as the author mentioned above, *stuffend*-theory is a concrete process or a process of concretizing a norm. The hierarchy in the *stuffend*-theory is arranged starting from the ground norm, the basis for the application of the norm to the judge's decision, which is a very concrete norm. Sollen applies on the basis of another higher sollen, the law applies on the basis of a higher sollen. The ground norm is not held, but assumed (*vuraus gessetz*), meaning that by following the legal certainty theory presented by Hans Kelsen, the ground norm is assumed to be the basis of the conditioned *stufen* (level), in this case the bribery corruption committed private actors together with other private actors if observed, at this time it is still a ground norm, applies is a prohibition against everyone without any distinction, may not commit acts of corruption, but the corruption norms do not provide uniform sanctions against the perpetrators, still there are acts of corruption that are not subject to sanctions for criminal acts of corruption even though they are seen as acts of corruption, namely acts of corruption in the private sector.

Although there is an act of corruption in the private sector but it is not seen as a criminal act of corruption, so that there is no criminal sanction against the act of corruption, only bribery is not categorized as corruption, as stated in the explanation of LAW No. 11 of 1980 concerning Acts of The crime of bribery, thus the act of corruption in the private sector in Indonesia is currently still in the form of Corruption, has not become a law because acts of corruption are in an abstract position with the absence of sanctions for corruption in the private sector.

The rule of law on corruption as a legislative product that reflects the rule of law (supremacy of law) as a norm which is sanctioned by the legislative product only emphasizes the prohibition of committing criminal acts of corruption to state administrators, state apparatus and state financial management bodies. In the event of corruption committed by private to private actors, even though the act is seen as an act of corruption, it is only an abstract norm because there is no affirmation in the law that the act is corruption, thus the act cannot be sanctioned for committing a criminal corruption act by Judge.

Although there are judges' interpretations of certain cases carried out by private actors, both interpretations of constitutional judges, or adjudicating judges for acts of corruption, these interpretations still reflect legal uncertainty, because these decisions are made in cases that are gray in the law as in the case of The law on BUMN and BUMN Subsidiaries which is debated by experts is in the realm of private or public law, so that judges based on their authority in the form of giving independent judges' decisions and judges are not obliged to follow the decisions of previous judges giving various decisions on the position of BUMN and its subsidiaries The BUMN, as well as the function of an independent judge in order to enforce law and justice based on Pancasila, for the sake of the implementation of the legal state of the Republic of Indonesia as regulated in Article 1 of Law no. 48 of 2009 concerning Judicial Power. The freedom of judges in deciding cases against uncertain rules also creates legal uncertainty.

Regarding legal certainty compared to legal norms, Hans Kelsen argues that law is a system of norms. Norms are statements that emphasize aspects of "should" or das sollen, by including some rules about what must be done. Norms are the product of deliberative human action. Laws containing general rules serve as guidelines for individuals to behave in society, both in relation to fellow individuals and in relation to society. These rules become limitations for society in burdening or taking action against individuals. The existence of these rules and the implementation of these rules give rise to legal certainty [7].

In relation to corruption as a value that is seen as wrong or despicable by the community, the authors view that corruption is a moral norm, where the moral norm of corruption is something that is forbidden to do and is seen as detrimental to the general public even though there is no law prohibiting it thus bribery is the moral norm of corruption. The author's opinion is in line, quoting the opinion of Ackerman, that the level of corruption is also determined by the risks calculated by the perpetrators. Furthermore, it is said that the level of corruption is a function of honesty and integrity, both for public officials and private circles. If these two factors are constant, then the measure of the level of corruption including bribes and kickbacks is determined by the overall level of profit to be obtained, the risk and the relative bargaining power of the parties involved, for example, those who take bribes and accept bribes. If bribery is highly likely to be uncovered, or corrupt behaviour can be uncovered, including severe penalties, then fraud may not be committed [10].

That corruption is currently only a moral norm, because bribery is seen as an act that is against the law and harms the interests of many people but cannot be sanctioned with corruption because legal norms provide different meanings of bribery. Corruption in laws and regulations never defines the meaning of corruption in its entirety, the legal norm of bribery as corruption is only part of the types of corruption crimes, thus outside of the provisions of the law, corruption does not become a corruption crime. Thus the legal norm of bribery as corruption in terms of corruption has narrowed the meaning of corruption itself by only making bribery in the public sector a criminal act of corruption.

In this case, there are conflicts between norms of the same normative order, especially a legal order regarding bribery as corruption and bribery as a non-corruption norm, which has been discussed previously. This shows that there is a conflict between the norm of corruption as a legal order and a norm of corruption as a moral order, so with the existence of two legal norms that view the norm of corruption as moral, it loses its validity, although the rule of law cannot determine that corruption is a moral norm in conflict with the legal norms will lose their validity. Thus, derogation is needed because there are two legal norms that are equally applicable but do not reflect the moral norms against corruption.

Therefore, the existence of these two conflicting bribery legal norms creates legal uncertainty. Referring to the opinion of Gustaf Radbruck, the author views that the law that has succeeded in guaranteeing a lot of legal certainty in society is a useful law, that is what Gustaf Radbruck calls "legal certainty". Thus, with legal certainty because of the law, it will be able to guarantee legal justice and the law must remain useful. But at this time what is happening is "legal certainty in law" where the law is formed as many laws as possible, but in these laws there are provisions that contradict the logic of the system. Laws are made based on *rechtswerkelijkheid* (true legal conditions) and in these laws there should not be acceptable terms.

Based on the concept of legal certainty, the author argues that a legal certainty is needed regarding the norm of bribery as a non-corruption crime. The author agrees with John Austin's opinion that requires legal positivism in order to achieve legal goals, namely certainty where to achieve legal certainty it is necessary to separate law from morals so as to produce a logical, permanent, and closed logical system. Therefore, to avoid conflicts in legal norms related to bribery, it is necessary to positive bribery as a criminal act of corruption, so that there is no difference in the norms of bribery as it is today, where the bribery norms contained in the corruption law cannot be enforced. When the corruption is carried out by

the private sector, because there are restrictions made by the Bribery Act, in the case of bribes committed outside the corruption law, the bribe can only be sanctioned by the bribery law.

In creating legal certainty because of the law, as stated by Gustaf Radbruck, a legal positivism is needed by implementing a criminal law policy, to form a legal regulation related to bribery, where bribes do not provide a separate interpretation with the benchmarks of actions committed by the person or the person, as is the case with the bribery law and the current corruption law, so that it does not provide a legal certainty regarding what bribery itself says.

Ratification of the United Nations Convention Against Corruption (UNCAC) in 2003 which was further ratified by Law No. 7 of 2006 concerning Ratification of the United Nations Convention Against Corruption, 2003, which in his explanation stated that so far the prevention and eradication of corruption in Indonesia has been carried out based on special laws and regulations that have been in effect since 1957 and have been amended 5 (five) times, however, these laws and regulations are not adequate, partly because there is no international cooperation in the matter of returning the proceeds of corruption. In this case, the ratification is also guided by the Bali convention which requires the establishment of technical cooperation and exchange of information in the prevention and eradication of corruption under the umbrella of economic development cooperation and technical assistance at bilateral, regional and multilateral levels; and harmonization of national legislation in the prevention and eradication of corruption in accordance with this Convention.

In UNCAC provisions also regulate private sector bribery as a criminal act of corruption as regulated in article 21 UNCAC 2003, the principle of international law does not separate corruption committed by private to private, or public to private or private to public, thus the norm of bribery is seen as a criminal act corruption by the UN convention. Because there has been a ratification of the corruption norms in UNCAC 2003 into the ratification law, normatively there is a lack of norms in Law No. 11 of 1980 concerning bribery and Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 concerning the eradication of Corruption, and with the lack of legal norms, of course, to create legal certainty for different norms, changes are needed from the current bribery legal norm to adapt to the existing legal norms in Law No. 7 of 2006 concerning Ratification of the United Nations Convention Against Corruption, 2003 as a mandate for harmonization of national laws and regulations in the prevention and eradication of corruption in accordance with this Convention (UNCAC 2003).

### 3.2 Juridical urgency criminalization of bribery in the private sector in the corruption act

Besides regulating active and passive bribery related to public officials (national public officials), UNCAC also regulates active and passive bribery in the private sector as regulated in Article 21. Regulations relating to corruption in the private sector also contained in several regional conventions such as the Council of Europe Criminal Law Convention on Corruption and the African Union Convention on preventing and combating corruption [11]. However, globally, the regulation of bribery in the private sector is a new thing when compared to the arrangements in other UN international instruments.

Article 21 shows the importance of the need for integrity and honesty in carrying out economic, financial or commercial activities. With the regulation on bribery in the private sector, it supports the development of the current trend of privatization. The development of

the private sector has resulted in services to the public in the form of products and services that are no longer solely carried out by the government or state business entities. The private sector then began to compete and provide services to the public. In such circumstances, it is important not to distinguish between the public and private sectors as part of an anti-corruption policy. Whereas corruption basically can not only occur in the public sector, the private sector is also inseparable from acts of corruption, even the consequences of private sector corruption are far more touching and have a bad influence on the community's economy.

In line with this, the UNCAC Legislative Guide emphasizes that the existence of Article 21 of UNCAC helps to protect integrity and honesty in economic, financial or commercial activities. Furthermore, corruption cannot be limited only to certain sectors in society but tends to develop and can occur in various sectors. This is due to the dependence of various kinds of activities that exist in social life. If corruption in the private sector develops, it will also indirectly have an impact on society and the public sector. At the state level, corruption deters investment, erodes competition, negatively affects the quality of public services, undermines citizens' trust in state institutions, exacerbates inequality, and ultimately jeopardizes political [12].

This is a special concern for countries where the public sector and the private sector of the country play an equally dominant role as well as for countries with the private sector which is experiencing development in economic, financial, or commercial activities. When someone who is trusted to be a decision-maker in a private entity has not been equated with a state official, then the corrupt act committed by the private party is considered a legal thing so that forever it will not be punished and eradicated as public officials who are threatened with criminal penalties. Based on Article 21 of UNCAC itself, in summary, state parties are recommended or required to consider determining as a criminal offense regarding:

a. the promise, offer, or giving of an undue advantage to a person who leads or works in a private sector entity, for that person to act or refrain from acting in a way that violates his obligations, and
b. the solicitation or receipt of an undue advantage by a person who leads or works in a private sector entity, in order for that person to act or refrain from acting in a way that violates his or her obligations.

From the provisions of the article, it is qualified as an active bribery act (a) and a passive bribe (b). In addition to regulating criminalization, UNCAC also regulates bribery prevention in the private sector as stated in Article 12 concerning the Private Sector. Article 12 is intended to prevent parties in the private sector from being involved in acts of corruption. The provisions in this Article are divided into four paragraphs. The first paragraph contains three provisions. First, state parties are required to make rules to prevent acts of 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 in the form of administrative sanctions or criminal sanctions for violations of established accounting and auditing standards.

Paragraph 1 is a mandatory provision, however, state parties still have the freedom to adjust the rules that will be made with the basic principles of the national law of each country. Paragraph 2 of Article 12 contains examples of actions that can be taken by the State to support the achievement of the things that have been regulated in the provisions in 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 codes of ethics and so on, encouraging 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 controls.

Paragraph 2 is a non-mandatory measure which means the State can choose not to adopt it. Paragraph 3 is a mandatory provision. The provisions in this paragraph are basically taken from Article 8 (which regulates the accounting) of the OECD Anti-Bribery Convention. In paragraph 3 state parties are required to prohibit certain actions that are carried out with the aim of violating UNCAC provisions. These actions include off-bookkeeping records, off-bookkeeping records of transactions made, unrecorded expenses, use of forged documents, and intentional destruction of bookkeeping documents.

Paragraph 4 requires state parties to prohibit tax deductions from the proceeds of bribery. Meanwhile, in the Indonesian laws and regulations, bribery is basically regulated in Law Number 11 of 1980 concerning the Crime of Bribery. The law is formulated regarding the prohibition of giving or receiving bribes. The regulation on the prohibition of bribery in the Law on the Crime of Bribery is regulated in two articles, namely Article 2 and Article 3. Based on the article, the legal subject that is regulated is anyone. This has the consequence that anyone can be snared by this Article.

This is different from the Corruption Law which limits certain legal subjects, namely those relating to civil servants or state administrators, judges, and advocates as recipients of bribes. If it does not meet these provisions, then the Anti-Corruption Law cannot be used to ensnare an act of bribery. Another difference is that the Anti-Corruption Law has regulated the legal subject of corporations or *rechtpersoon* while the Bribery Law has not included corporations as legal subjects that can be charged with the Act. This has the consequence that corporations cannot be subject to criminal penalties in the context of the Criminal Act of Bribery. This then became one of the weaknesses of the Law on the Crime of Bribery to be able to ensnare bribers in the private sector. In addition, Articles 2 and 3 of the Law on the Crime of Bribery, which regulates active and passive bribery, state that the giving and receiving of bribes, with elements of *dolus and culpa* when giving or receiving bribes, is always accompanied by the phrase "regarding the public interest". In the explanation of the Law, it is emphasized by stating "... then bribery in various forms and in nature needs to be prohibited, however it is necessary to have restrictions, which are limited to acts of bribery involving the public interest" [13].

The phrase of public interest is also found in Article 310 (3) of the Criminal Code, which states that if the defendant commits it in the public interest, the provisions regarding (oral) or written pollution do not apply to him. The public interest phrase in the Article is thus a basis for abolishing the crime of "*strafuitsluitingsgrods*". In contrast to Law Number 11 of 1980 where the public interest based on the Act is used as a test-criterum, whether there is bribery according to the Act. If there is no public interest factor in activities that give rise to bribery, then this is precisely what creates a "*strafuitsluitingsgrods*" for bribery.

### 3.3 The practical urgency of criminalizing private sector bribery in the corruption crime act

In Indonesia, the magnitude of corruption that occurs in the private sector is actually well understood and occurs a lot in the business world and the country's economy, and law enforcement officials also know this condition. The amount of corruption in the private sector

is in line with the amount of money or business turnover in the sector. If the State Revenue and Expenditure Budget (APBN) is 2,000 trillion, then the money in this sector reaches more than 10,000 trillion, taking into account Indonesia's annual gross domestic product.

In handling it, corruption in the private sector is mostly handled internally by companies with sanctions such as refunds or dismissals [14]. The Indonesian government has made efforts to prevent corruption in the private sector. Prevention of corruption in the private sector that has been included in Presidential Instruction Number 10 of 2016 is the implementation of an anti-bribery management standard in the form of ISO 3700 [15]. This International Standard establishes requirements and guidelines for developing and implementing an anti-bribery management system applicable to public, private, and not-for-profit sector organizations. However, the government's efforts did not run optimally. This is due to the lack of private companies that apply the SNI ISO 37001:2016 standard regarding the Anti-Bribery Management System [16].

Based on investigations from tempo, the alleged bribery case of the private sector is the case of PT Interbat where PT Interbat is suspected of bribery to several hospitals and doctors. One of the parties who received the bribe was the Metropolitan Medical Center (MMC) Hospital which is a private hospital and the doctors who worked at the hospital. MMC Hospital has received money from PT Interbat four times totaling 253 million. The funds went through the account of Robby Tandiari, President Director of PT Kosala Agung Metropolitan, the company that owns MMC.

As written in PT Interbat's financial records obtained by Tempo, the money was used to finance the construction of hospital facilities. In return, MMC promised to sell as many drugs as possible from the pharmaceutical company for a year, from August 2013 to September 2014 [17]. That MMC Hospital was not the only hospital that received facilitation payments. Interbat cooperates with 150 other public and private hospitals in DKI Jakarta, Banten, West Java, East Java and South Sulawesi. Some of them used the funds to build a new hospital building, the cost of eating and drinking for doctors, buying operational vehicles, and for hospital anniversary activities. In the document obtained by Tempo, four hospitals belonging to the Hermina Group in Jakarta and Bekasi were the largest recipients, around 1.3 billion, in 2015. However, the Hermina Group was not willing to be interviewed by Tempo.

Furthermore, there is also the case of AJB Bumi Putra which took actions that were contrary to the investment program, which invested customer funds incorrectly, which ultimately until 2020 was unable to pay customer claims, where in 2007 & 2008 entered into investment fund management contracts through PT. Optima Kharya Capital Management (Optima) was conducted 7 (seven) times, however the selection of Optima was indicated based on the results of Bribes, where the total money managed by Optima reached 307 billion, in 2009 Optima could not return the investment funds of PT.[18] AJB Bumi Putra, and only returns 10 billion at maturity. Besides Optima, there are also 5 (five) Investment managers who also manage the funds of PT. AJB Bumi Putra also has problems. As a result of the improper investment, PT. AJB Bumi Putra experienced an increase in money reaching 22.7 trillion, even though the assets owned by PT. AJB Bumi Putra is only 12.1 Trillion. The policy holder as the customer becomes the aggrieved party because he cannot receive his rights in accordance with the insurance policy.

In contrast to PT. Asuransi Jiwasraya and PT. ASABRI, who was made a suspect, defendant and convict of a corruption case, even his corporation was also made a suspect in corruption, the suspects/defendants were sentenced by the Supreme Court to life

imprisonment, fined, and an obligation to pay compensation as much as the state financial loss of 16 trillion for PT. AJS and 22 trillion for ASABRI. Meanwhile PT. AJB Bumi Putra is only subject to articles of the Capital Market Law, so it cannot provide fair legal certainty to the subject of the criminal law. The case above shows that law enforcement related to private sector bribery in Indonesia has not been running effectively. The bribery case is just one example of the many alleged private bribery cases in Indonesia. If this is allowed to happen, bribery cases in the private sector will continue to occur which not only harms the community but also has an impact on the country's economic losses.

### 3.4 Comparison of regulatory laws regarding bribery in the private sector

UNCAC 2003 has changed the world's paradigm in viewing corruption, where corruption was initially dominated by the concept of public actors, and was carried out to harm state finances, after the signing of the UN anti-corruption convention, the private sector and pure private actors were finally seen as corruption as soutlined in the concept of international law, namely the convention, thus the convention becomes the norm of international law, which departs from the moral norms currently in force.

As a comparison, the authors use comparisons to other countries that have changed their paradigm on corruption, and do not distinguish the concept of corruption in terms of the perpetrators, but as long as it interferes with or harms the public interest or society, then the legislative product is seen as corruption. The author in this paper chose the Netherlands, because the legal system in Indonesia is guided by the legal system and legal principles in force in the Netherlands, thus it can be assessed regarding the shortcomings and backwardness of Indonesian legal products in viewing corruption compared to the Dutch which are both based on civil law system in its criminal law policy. Furthermore, the author chooses England which uses the common law legal system, where the criminalization of an act does not need to wait for ratification, because the judge's decision can directly make international law the basis for the implementation of its national law.

#### *3.4.1 Private sector bribery in the Netherlands*

The Netherlands is one of the countries that has criminalized bribery in the private sector, and has included a policy of criminalizing bribery in the bribery sector in the Dutch Criminal Code. Regarding bribery in the private sector, the Netherlands criminalizes this action, because there are parties who have received a gift from another party so that the recipient acts outside the existing provisions without good intentions. In the Netherlands, private sector bribery is criminalized if the bribed person conceals his gift or promise from his employer in breach of the requirement to act in good faith [19].

Furthermore, there are basically differences in terminology used by the Dutch Criminal Code and UNCAC in formulating bribery offenses in the private sector. If UNCAC uses the terminology "Bribery in the private sector", the Netherlands uses the definition "Private commercial bribery". However, in the formulation of the regulation, it does not have a different arrangement with bribes in the private sector. No wonder, if GRECO (*Group d'Etats Contre la Corruption*/ Group of States Against Corruption), an organization that assesses the suitability of legal products and anti-corruption programs in European countries with anti-corruption conventions that have been made and agreed upon by the European Union, instead categorizes the offense as Bribery in the private sector.

Since 1967, the Dutch Criminal Code has not only criminalized Active Bribery against Public Officials as regulated in section 177 of the Dutch Criminal Code (hereinafter referred

to as DCC or the Dutch Criminal Code) – 178 DCC, and Passive Bribery against Public Officials as regulated in section 363 DCC – 364 DCC, but also criminalize Bribery in the Private Sector, both active and passive, as regulated in section 328 DCC paragraphs 1 and 2. In contrast to UNCAC which uses the definition of under advatage as one of the elements in the article, the Dutch Criminal Code actually outlines the forms of Advantage in detail. The Dutch Criminal Code uses the phrases of gift, promise, and certain actions (service), to replace the definition of advantage. Regarding the element of the gift itself, the gift does not have to be goods or money but also other things. This is as once decided by Hoge Raad (Dutch Supreme Court) in 1994 who considered in its decision which finally the decision became jurisprudence, that providing/giving sexual favors could be included as a gift category, the Hoge Raad Decision 31 May 1994, NJ 1994, 673).

The phrases that have been used as elements in the offense have been used and explained further in the jurisprudence made by Hoge Raad which states that certain gifts, promises, and actions can be material or immaterial. Furthermore, the Dutch Supreme Court also explained that although the Gift, Promise and service must have a certain value for the recipient, it can also be in the form of non-commercial goods that are only of value by the recipient as stated in the Hoge Raad 25 consideration. April 1916, NJ 1916, 551. In the regulation of bribery in the private sector in the Dutch Criminal Code, the absence of accountability or concealment of certain gifts, promises and actions is the core of the offense.

### *3.4.2 Private sector bribery in the UK*

In contrast to previous countries that included bribery offenses in the Criminal Code of their respective countries, the UK as a common law country and does not codify each offense into a criminal code, has regulations regarding bribery in the United Kingdom Bribery Act 2010 (UK Bribery Act). In this provision, there is no specific distinction between public officers and private sector bribery. This provision separates general bribery offenses from criminal acts of bribery committed against foreign public officials (bribery of foreign public officials). Furthermore, the provisions and fulfillment of offenses in the UK Bribery Act are slightly different from other countries.

If other countries generally regulate bribery offenses in the formulation of general norms based on elements of Offences, England actually fulfills bribery offenses by example. This can be seen in the arrangements in each article that regulates bribery offenses. Although the UK does not make a distinction between public officers and private sector bribery, the formulation of bribery offenses in the UK Bribery Act can basically cover bribery offenses in general (both public and private sectors). These provisions divide into two categories, namely, active bribery (offences of bribering another person) as regulated in Article 1 of the UK Bribery Act, while passive bribes (offences relating to being bribed) as regulated in Article 2 of the UK Bribery Act.

For example, if the police find facts and evidence that A as the owner of Manchester United football club gave money in the amount of 900 million to B as a football player from Manchester City club who wanted A to act unsportsmanlike and was given a red card by the referee or to play ' not professionally' in order to be replaced by the Manchester City coach with another player, in a final match between Manchester United and Manchester City, then A agrees to B's request, A does what B is asked, then English law enforcement can ensnare A based on the case first on the basis of article 1 paragraph (2) of the UK Bribery Act, and B was charged under the third case through article 2 paragraph (2) of the UK Bribery Act. As for the

criminal arrangements related to legal subjects that can be sentenced under the UK Bribery Act, it can be imposed on individuals or legal entities. Arrangements related to the legal subject of individual bribery in the UK are regulated in article 11 of the UK Bribery Act, while for corporate actors it is regulated in article 14 of the UK Bribery Act [20].

The regulation in article 11 of the UK Bribery Act distinguishes 2 (two) mechanisms for resolving bribery cases with different penalties. In article 11 paragraph (1) letter a, it allows the perpetrators of bribery to serve their sentences without a trial process with the jury. In short, the provisions provide definitions through summary convictions. Summary Conviction is the decision of two to three magistrate judges and one district judge through Summary Proceeding in which the Summary Proceeding itself is a judicial process that handles minor criminal cases (Summary Offences). There is no Jury in the Summary Proceedings. The institution authorized to take care of the Summary Proceeding is called the Magistrated Courts.

Every criminal process in the UK must go through Magistrated Courts (courts of first instance) where the case will be judged as light or heavy. There are certain serious criminal cases that cannot be handled by Magistrated Courts, such as cases of murder, rape can only punish rape, or robbery (these cases are commonly known as Indictable Offences). Magistrated Courts can only punish a maximum of 12 months and a maximum fine of £5,000. If the Magistrated Courts consider the defendant to be sentenced to more than this limit, then the Magistrated Courts in their decision must state that this case should be handled by the Crown's Courts (higher courts).

In general, cases handled through this mechanism are mild cases. Not surprisingly, the UK Bribery Act limits that bribery cases decided based on summary convictions can only be sentenced to a maximum of 12 months in prison and fines cannot exceed the limit determined based on the summary proceedings. It should also be noted that in criminalizing corporations, the UK Bribery Act adheres to a strict liability system where the intention or positive action of the corporation is proven. Meanwhile, for cases that are decided based on a decision through an ordinary trial process, through indictment until the jury is guilty or not and the sentence is determined by the judge, it can be subject to 10 years imprisonment and an unlimited fine. However, it should be noted that the UK as a common law country in general also has sentencing guidelines that can be used as a guide for judges in the UK so as not to arbitrarily impose the severity of punishment on convicts, and also to avoid the occurrence of a high rate of disparity in punishment from each judge's decision.

## 4. Conclusions

Normatively, it can be seen that there is a lack of norms in Law No. 11 of 1980 regarding bribery and Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 regarding the eradication of Corruption, and with these lacking legal norms, Of course, to create legal certainty for different norms, changes are needed from the current bribery legal norms to adapt to existing legal norms in Law No. 7 of 2006 concerning Ratification of the United Nations Convention Against Corruption, 2003 as a mandate for harmonization of regulations. National legislation in the prevention and eradication of criminal acts of corruption in accordance with this Convention (UNCAC 2003) that the laws and regulations in Indonesia have not regulated the criminal act of private bribery as regulated in Article 21 of UNCAC. The bribery arrangement in the Bribery Criminal Act can ensnare the private sector for bribery.

However, in the law there are obstacles, namely that corporations have not been regulated as legal subjects for *rechtsprson*.

In addition, another problem relates to the phrase "public interest" as a condition for an act to be considered an act of bribery under the Act. The next problem related to private bribery is the absence of rules regarding accounting and audit standardization, internal company regulations, maintenance of books and records, as well as disclosure of financial statements as regulated in Article 12 of UNCAC on the Private Sector. On the other hand, the lack of law enforcement through the instruments of Law no. 11 of 2018 is also something that needs to be considered. The Corruption Eradication Commission (KPK) as an independent state institution in dealing with corruption is not authorized to take action to eradicate, prevent and monitor bribery in the private sector because it is not included in the scope of corruption. According to the author, it is time for bribery in the private sector in accordance with UNCAC recommendations to be included in the law as an effort to eradicate corruption in a comprehensive manner.

**Conflicts of Interest.** The authors declare no conflict of interest.

**References**


1. Catatan Buruk Korupsi di Dunia. Available online: https://tirto.id/catatan-buruk-korupsi-di-dunia-cBmq (accessed on 26 February 2020).
2. Hiariej, E.O.S. United Nations Convention Against Corruption dalam Sistem Hukum Indonesia. *Mimbar Hukum*. 2019; 31(1), pp. 112-125. https://doi.org/10.22146/jmh.43968
3. Idonesiana, Suap Dokter = 40 Persen Harga Obat Tiga Hal yang Mengejutkan. Available online: https://www.indonesiana.id/read/53241/suap-dokter-40-harga-obat-tiga-hal-yang-mengejutkan (accessed on 15 october 2020).
4. Detik, 4 Kasus Pengaturan Skor di Tangan Satgas Anti Mafia Bola. Available online: https://sport.detik.com/sepakbola/liga-indonesia/d-4387385/4-kasus-pengaturan-skor-di-tangan-satgas-anti-mafia-bola (accessed on 12 September 2020)
5. Muhjadi, H.; Nuswardani, N. *Penelitian Hukum Indonesia Kontemporer*. Genta Publishing: Jogjakarta, Indonesia, 2012, p. 9.
6. Wibowo, M. *Kebijakan hukum terbuka dalam putusan mahkamah konstitusi konsep dan kajian dalam pembatasan kebebasan pembentuk undang-undang,* First Ed, First Printing. Rajawali pers: Depok, Indonesia, 2019, pp. 26-27.
7. Marzuki, P.M. *Penelitian Hukum*. Prenadamedia Group: Jakarta, Indonesia, 2011, p. 93.
8. Sumardjono, M.S.W. *Pedoman Pembuatan Usulan Penelitian Sebuah Panduan Dasar*, 3rd Ed.; Gramedia Pustakan Utama: Jakarta, Indonesia, 2001, p.10.
9. Priyono, B.H. *Korupsi, melacak arti, menyimak implikasi*. PT. Gramedia Pustaka Utama, Jakarta, Indonesia, 2018, pp.17-18.
10. Ruslan, M. *Politik Antikorupsi di Indonesia, Gradualitas Dan Ambiguitas*. Pustaka LP3ES, Jakarta, Indonesia, 2017, p.48.
11. Rose, C.; Kubiciel, M.; Landwehr, O. *The United Nations Convention Against Corruption: A Commentary*. Oxford University Press, Oxford, UK, 2019, p. 238.
12. Hairi, P.J. *Urgensi Penanganan Tindak Pidana Korupsi di Sektor Swasta*. Pusat Penelitian Badan Keahlian DPR RI: Jakarta, Indonesia, 2018, p. 24.
13. Adji, O.S. *Herziening-Ganti Rugi, Suap, Perkembangan Delik*. Erlangga: Jakarta, Indonesia, 1981, p. 226.
14. Korupsi di Sektor Swasta Lebih “Gila”. Available online: https://nasional.kompas.com/read/2018/02/01/07304001/korupsi-di-sektor-swasta-lebih-gila?page=all (accessed on 1 July 2021).
15. Standar Manajemen Anti Suap ISO 37001, Langkah Maju Indonesia Berantas Korupsi. Available online: https://padmaglobal.co.id/2018/04/27/standar-manajemen-anti-suap-iso-37001-langkah-maju-indonesia-berantas-korupsi/ (accessed on 1 April 2021).

16. Perusahaan Swasta yang Terapkan Sistem Manajemen Antisuap Masih Minim. Available online: https://katadata.co.id/hariwidowati/berita/5e9a558da6677/perusahaan-swasta-yang-terapkan-sistem-manajemen-antisuap-masih-minim (accessed on 11 Augst 2021).
17. Hadad, T. Di Balik Investigasi Tempo 01. Tempo Inti Media: Jakarta, Indonesia, 2017, pp. 48-49.
18. Select Commite on the bribery act. Available online: https://www.parliament.uk/globalassets/documents/lords-committees/Bribery-Act-2010/Bribery-written-evidence-volume.pdf (accessed on 30 December 2021).
19. Complying with bribery laws in key Europian Jurisdiction. Available online: https://www.iadclaw.org/assets/1/7/_4-_Rosenhek.pdf (accessed on 30 December 2021).
20. United Kingdom magistraat court act 1980. Available online: https://www.legislation.gov.uk/ukpga/1980/43/contents (accessed on 29 December 2021).

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