THE CAUSE OF INHIBITION POLICY FORMULATION OF TRADING IN INFLUENCE AS CORRUPTION IN INDONESIA

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ABSTRACT

Trading in Influence acts are non-mandatory offenses regulated in UNCAC and ratified by Law Number 7 of 2006 concerning UNCAC Ratification. Based on the cases that have occurred in Indonesia, the act of Trading in Influence has actually developed in Indonesia, but is considered as "bribery". Indonesia has not been able to ensnare the perpetrators of trading in influence under the Corruption Law because there are no rules that regulate it, so there is legal uncertainty and a legal vacuum. This is due to the many factors that hinder the formulation of trading in influence policies in Indonesia. The research method used is normative using library materials or document studies for library research. This study looks back at what are the causes so that it is immediately regulated in Indonesia to be able to distinguish between bribery and the act of trading in influence in the context of overcoming corruption in Indonesia.

Keywords: *Trading in Influence, Corruption, UNCAC, Factors/Causes*

1. PREFACE

The crime of Corruption is one of the most extraordinary crimes which is not only a national legal priority but is of concern to the international community. The word of corruption is a term derived from the word corruption, namely damage, leading to circumstances of foul deeds and dishonesty of a person in the field of finance. According to Nyoman, the crime of corruption cannot be committed by state organizers and between countries only, but also to cronies, businessmen and families, namely private parties. The perpetrator of corruption is someone who is highly intellectual and works as a government apparatus (state organizer) who misuses state finances for personal gain or known as white collar crime. In the fights against corruption, the International Community makes a deal with the realization of United Nations Convention Against Corruption (UNCAC) IN Mexico, 2003 as an embodiment of the eradication of corruption that is increasingly complex in the international world.

Indonesia in one of the participating countries (state party) which has ratified it through Law Number 7 of 2006 on UNCAC Ratification, 2003. Chapter III UNCAC on Criminalization and Law Enforcement, mentions that the existence of 11 criminalized acts is a criminal act of corruption with 2 different traits. First, mandatory offences are the agreement of the participating states to regulate the act into their national regulations. There are 5 actions: bribery of national public officials, bribery of foreign public officials and officials of public international organizations, embezzlement, misappropriation or other diversion of property by a public official, laundering of proceeds of crime and obstruction of justice.

Second, non-mandatory offences are the absence of agreement between the participants in declaring that the act is criminal and not mandatory to be regulated into its national laws. There are 6 actions: Trading in Influence, abuse of function, illicit enrichment, bribery in the private sector, embezzlement of property in the private sector and concealment.

Indonesia has conducted a country visit and review on March 14-16, 2011 and it was found that all UNCAC Norms have not been implemented in Indonesia. One of them is Trading in

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Influence (non-mandatory offences) arranged in Chapter 18 letters (a) and (b) UNCAC, stating that:

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;

(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.

One of the elements of offense of Trading in Influence is that many people in the environment of power but not state organizers, take advantage of their close relationship with the rulers who have influence or power to control a government project and earn a certain amount of fees. If the state organizer does so, it can be ensnared with the Anti-Corruption Law, but if it is not the state organizer as referred to in the Anti-Corruption Law, then the Anti-Corruption Law cannot ensnare it. With the system of "lobbying" in the government sector, it can cause deviations and ignore the public interest. It is clearly a root of the growth and development of corruption itself. This weakness is caused by the non-adoption of the act of "Trading in Influence" in Indonesia.

Such actions should be formulated in positive law in Indonesia so that there is no legal vacuum, considering the actions that are substantially included in the act of Trading in Influence has clearly grown and developed in the life of the government and politics in Indonesia, Unfortunately, it is considered "bribery". Cases in Indonesia that are considered "bribery" but substantially included in the act of Trading in Influence for example are carried out by Muchammad Romahurmuziy, Luthfi Hasan Ishaaq, Idrus Marham, and Irman Gusman.

Based on the case that occurred, Indonesia has not been able to ensnare influence traffickers based on the Anti-Corruption Law because there are no rules governing, so there is a legal vacuum and legal uncertainty. Many reasons are questioned in Indonesia why until now has not been regulated acts of trading in influence in Indonesia as one of the criminal acts of corruption. This is what encourages research on the policy inhibiting factors of the formulation of trading in influence as corruption in Indonesia.

2. RESEARCH METHOD
Problems

The issue raised based on the introduction above is what are the cause of inhibition policy of trading in influence formulation as corruption in Indonesia?

Our Contribution

This paper presents some inhibitory factors based on interview results and normative research as well as several related books. On the one hand, this paper will discuss in detail its inhibitory factors and conduct an analysis of some of the major cases that should constitute trading in influence. Thus, we include several reasons and arguments related to the causes and reasons that arise, so that we can suggest that this act can be regulated in the Criminal Act of Corruption in Indonesia or not.

Paper Structure

This paper will be compiled from several sections. We will introduce the definition of trading in influence based on UNCAC, then conduct exposure to factors inhibiting trading in influence settings and analyze based on the data we get normatively and interview results. Finally, the last section will conclude the paper and presents direction for future research.

Method and Materials

This paper using normative juristic (doctrinal) research that uses literature, document studies as s source of research (library research) and collecting the data. This method use to find out what is hindering Indonesia in regulating the act of trading in influence in Indonesia. The nature of the research used is explanatory, which is to find an explanation of the symptoms of an event or why a phenomenon occurs by looking at the factors that cause the event to occur (causal relationship), in this case with regard to explaining the factors inhibiting the regulation of Trading in Influence in Indonesia.

This type of data collection in this study consists of primary legal materials, namely laws and regulations, treatises or judge's rulings, secondary legal materials consisting of books, articles and related journals and tertiary legal materials as supporting other legal materials, namely the Indonesian Grand Dictionary (KBBI).

The technique of collection the data in this paper using an in-depth interview to get information on practical situations that occur about the Cause of Inhibition Policy Formulation of Trading in Influence. This article has a research approach that a way or method of conducting a research, this article using a statue approach by conducting a review of related laws and regulations regarding the trading in influence.

The data analysis technique used is deductive, the withdrawal of conclusions using the logic of thinking from general truths is then used to see phenomena of a special nature.

3. RESULT AND DISCUSSION
Trading in Influence in UNCAC

The issue of prevention and handling of corruption is the center of attention of the international community, so that in order to overcome the practice of corruption was born one of them is the United Nations Convention Against Corruption or UNCAC which discusses strategies to deal with the eradication of corruption globally, this convention is an agreement with states committed to ratifying and implementing its norms. UNCAC is a guide line in handling corruption that has been rampant in the international world. Based on the convention, it means that the crime of corruption is an international crime that is cross-border, so to conduct international cooperation there must be double criminality (between countries have comparable anti-corruption provisions). Crimes regulated by UNCAC are complementary in the system of combating corruption as a whole, especially matters concerning the substance of corruption.

The UNCAC Convention does not specify what the term criminal act of corruption means, but Chapter III UNCAC on criminalization and law enforcement, the crime of corruption is divided into 11 acts. The acts criminalized in UNCAC are divided into 2 (two) traits that are not separated from the agreement of the state parties at the convention. First, mandatory offences are the agreement of convention participants to regulate such acts into the national

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arrangements of the participants so that it becomes an obligation. Second, non-mandatory offences are the absence of agreement by the participants of the convention to regulate such acts and declare them a criminal act.

Trading in influence arranged in Chapter 18 letters (a) and (b) UNCAC *non-mandatory offences.* This offense is much wider in reach than bribery, because it is concerned with "real or supposed influence" instead of "do or not do" (in accordance with the wishes of the briber). This act is divided into two, *active Trading in Influence* (Chapter 18a), is the provision of an offer to trade an influence, dan *passive Trading in Influence* (Chapter 18b) is the acceptance of an offer to trade an influence. Legal subjects that can be punished or *addresat,* not only public officials, but also anyone who has a relationship with public officials and not.

The offense formulation set out in UNCAC illustrates that there is an expansion of criminal liability against perpetrators. That the broker in the act of trading in influence can also be held criminally liable. So that anyone who provides public services can be considered a public official regardless of "status", because in this case UNCAC does not emphasize status but makes stakeholders vulnerable to corruption. The form of error in the formulation of this article is mentioned "with intent" which means intentionality with intent (*opzet als oogmerk*) The form of error in the formulation of this article is mentioned "with the intention" which means intentionality as the intention is to want the will and knowledge (*weten en wilen*) from the perpetrator to achieve the goal.

The act of trading in influence is a form of trilateral relationship that means including three parties, namely the giver of something that wants to get a benefit or profit from the policy maker that comes from a state organizer, decision maker or policy, someone who sells influence (not mandatory state organizer or public official). This act has a difference with bribery which has a form of bilateral relationship that means consists of the recipient of bribes who are state organizers and bribers are state organizers or private parties. This form of trading in influence does not have a direct conflict with the authority or obligations attached to the office of its public office. The form of trading in influence is divided into 3 (three) patterns according to Indonesia Corruption Watch, namely vertical patterns, vertical patterns with brokers and horizontal patterns.

The form/pattern of trading in influence that often occurs in Indonesia is the third pattern, namely horizontal patterns that often occur in the political party environment. Horizontal pattern, consisting of interested parties or clients with scalpers who are both active parties and the authority of public officials are passive parties that are affected parties. This pattern is found in the environment of political parties that have networks and an important role in executive power, namely being in the structure of government to take policy and influenced by external factors, especially those from political parties. This is different when the client directly hands over money / profits to the authority of public officials, because it can be subject to bribery. Based on this pattern, the profit must pass through the scalper first.

Horizontal patterns with trilateral relationship is when a businessman approaches the chairman of a political party (not a state organizer) with a commitment fee agreement to obtain a benefit by influencing public officials who are members of the political party. Based on that influence, a policy and decision will be born of a public official who will abuse the power he has to help the businessman realize his wishes. Based on the illustration above, so trilateral relationship in Trading in Influence is fulfilled, the existence of influential parties (general chairmen of political parties), parties who influence (businessmen) and affected parties (public officials). The chairman of a political party in this case cannot be charged with bribery under the Anti-Corruption Law in Indonesia, because he is not a public official with the power contained in him (direct authorities). So the criminal article of bribery cannot be used in the illustration, even

though the chairman of the political party is an beneficiary actor because he has received a number of fees from the businessman.

Trading in influence actors in this case receive an undue advantage, it means has a wider scope compared to the crime of bribery. The form of acceptance received is clearly different from bribery, because bribes receive gifts or promises that have a relationship with the office or that are clearly contrary to their obligations.

Acts that fall under the category of trading in influence in the Article 18 UNCAC are abuses of functions contained in Article 19 UNCAC included as a category abuse of functions that sound as follows:

"Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity."

Abuse of function is defined as an act carried out intentionally aimed at abusing a function or a position to carry out or not carry out an unlawful act with the intent to obtain undue benefits for himself or for another person or entity. The act of trading in influence has a relationship or relationship between the intention of the perpetrators to receive an advantage and the attempt to use the authority they have unlawfully.

Cause of Inhibition Regulation of Trading in Influence

The law is for humans, *het recht hinkt achter de feiten aan* Which means that the law lags behind the events that occur, then Indonesia's laws and regulations must be able to adjust to the times that can provide legal certainty. Based on the explanation of the theory of legal certainty above, Indonesia must provide certainty in combating corruption crimes including in the formulation policy against trading in influence. Considering the actions that are substantially included in the act of Trading in Influence has clearly grown and developed in the life of the government and politics in Indonesia, but is considered as "bribery" and the absence of legal certainty in the enforcement of the law against corruption. This action is depicted in the corruption case committed by Muchammad Romahurmuziy, Luthfi Hasan Ishaaq, Idrus Marham and Irman Gusman.

The article imposed on the convicts in the above cases is the bribery article, this is because the convicts have received some money and are state organizers even though the deed is actually not related to the authority in their position. The act of trading in influence that has not been regulated in criminal law in Indonesia makes law enforcement officials force to ensnare the perpetrators with bribery, although the elements are indeed fulfilled based on the article ensnared but this does not rule out the possibility that the act of trading in influence can be regulated in criminal law in Indonesia in order to make a clearer difference between bribery and trading in influence. Not yet regulated an action in the national law of a country, of course, has many inhibiting factors including also with trading in influence that has various inhibitory factors. Acts that systematically harm the general public and are common crimes that result in harm to the common good can be regulated in law.

Factors that hinder the policy of formulation of trading in influence actions in Indonesia are taken based on the results of interviews conducted to various legal practitioners in Indonesia, namely the Corruption Eradication Commission of the Republic of Indonesia and the Attorney General's Office of the Republic of Indonesia. The inhibiting factor is that this act is non-mandatory offences so it does not become an obligation to be applied in national law, then

assumes that giving something to others is cultural and not seen as a criminal act of corruption, the existence of a wrong view of law enforcement officials by equalizing bribery
and trading in influence and the lack of good will from the government to initiate that the trading in influence is regulated and considered as a crime of corruption. These inhibitory factors clearly have an explanation and the consequences of the unregulated act of trading in influence in criminal law in Indonesia.

Analysis Cause of Inhibition Regulation of Trading in Influence as a Corruption

Indonesia as an adherent of the civil law legal system realizes the law based on regulations formed in a law and arranged systematically in a codification. Characteristics of the civil law legal system based on the purpose of law namely legal certainty that can regulate human legal action based on the written rule of law. Based on Fence's opinion, a law that is not based on certainty will eliminate its meaning because it does not become a guideline for the behavior of the lives of all the people of the country.

The main factor that inhibits an act cannot be included in the law is the trading in influence is non mandatory offences which means it is not an obligation for states parties to criminalize the act into their respective national laws. So that even though UNCAC has been ratified in the UNCAC Ratification Act, it cannot necessarily directly become a law, can be used and implemented by stakeholders. UNCAC cannot immediately become a positive law in Indonesia because of the need for a new formulation in Indonesian law that is the same norm and must be incorporated into our national law. The norms set out in UNCAC only mention acts that are included in the crime of corruption but there are no criminal sanctions or prosecutions to perpetrators so that they cannot be immediately applied in Indonesia.

Indonesia adheres to the dualism of international law that cannot necessarily apply directly at the national level, so it cannot directly bind Indonesian citizens and cannot yet be incorporated into existing laws. The International Treaty Law has also made it clear that ratification of an international treaty is a form of government that has bound itself to the treaty. The form of ratification carried out by the government on an international treaty is also called a form of ratification. Ratification of an international convention makes the competent institutions need to pay attention to the elements of offense that are in accordance with our country and have been in accordance with the philosophical, juridical and sociological people of Indonesia and what sanctions can apply to the perpetrators.

So by its nature, it becomes a consideration for the lawmakers to apply this act into our positive law by looking at the number of cases that occur and so that there is no longer a wrong application of the article. These cases illustrate the misapplication of the article that should be applicable to the article of trading in influence, but as a result of the nature of its actions, Indonesia has not made this act a priority to be regulated in national law. Based on the ratification made by Indonesia through the UNCAC Ratification Law, it does not expressly exclude the offense trading in influence in its ratification. Indonesia ratifies all contents of the convention and also includes the trading in influence as a criminal offence. On this basis, the crime of corruption in UNCAC is a universally-accepted international crime, so the trading in influence is also a malicious act.

Another factor is that giving something to others is considered part of a culture that is reasonable and commonplace to do and is not seen as a criminal act of corruption. The culture that has been attached, namely the culture of 'reluctant' and afraid of superiors and making him do all the deeds he ordered. The trading in influence is illustrated by the fact that the ugliness of the leader must be concealed but the good of the leader must be upheld and justified. This fact is at the root of the growth of Trading in Influence is growing and becoming a habit that is considered

reasonable and commonplace by state organizers and officials both in the government sector and the private sector. This act gave birth to an act that harmed the country's finances, namely the crime of corruption.

Special arrangements on trading in influence actions are needed with the implementation of criminal sanctions and implemented in Indonesia, so that the act does not develop and allows the perpetrators to rethink their actions not to do so and work on the entire project objectively and proportionately. The culture of trading in influence that has been attached to the lives of Indonesian people not only occurs in the government environment, but is also considered a reasonable action that is 'lobbying' for business practice projects carried out between the private sector and the government's power environment. These acts also occur in everyday life, but in reality many of them have deviated and ignored the public interest. It is only natural that lobbying is only conducted by private parties and does not harm the interests of the general public. But the problem is that when the act causes harm to the general public, then this should be avoided by the government's intention in discussing this act to be regulated in our national law.

Another inhibiting factor is that there is a wrong view from law enforcement officials by equating bribery with trading in influence, namely with Article 11 Anti-Corruption Law that has regulated the crime of bribery.

The description of elements of offense in Article 11 Anti-Corruption Law and Article 18 UNCAC is 2 (two) very different things, both in the arrangement, the element of offense, the parties involved, the legal subject, the form of his actions and the acceptance received from the parties. One thing that distinguishes the two articles is that Article 11 Anti-Corruption Law focuses on 'having a relationship in his office' and 'based on the thought of someone who has given a gift because there is a relationship with the office'. UNCAC's Article 18 does not focus on those with ties to their positions but 'existing or perceived influences and abuses'. Based on these two phrases, it is clear that Article 11 Anti-Corruption Law is imposed on the perpetrator who has abused his authority related to his position, while trading in influence does not focus on actions that must be related to his position or authority, but has influence because of his power environment to get an undue gain or benefit.

Legal political factors also clearly determine whether an act can be a criminal act or not, namely by whether there is good will from the government to make this act a priority to be immediately regulated in the laws and regulations in Indonesia. The parties who can initiate this act can be regulated in our national law are of course the government that has the same will or intention in realizing the ideals in combating corruption. The priority prioritized by the governments in regulating an act in national law is not entirely for the benefit of the government but also for the people in order to create a life of nation and state in accordance with the ideal law. The legal products created by the state will have a great impact on people's lives and for the country itself which is free from corruption.

The arrangement of this act certainly has many pros and cons on the part of the government itself because it is certainly considered a natural thing and does not need to be regulated because it will hamper all the process of running the project. But with the emergence of these thoughts can certainly cause polemics because this act is the root of the growth of corruption. Institutions authorized in drafting laws also need to readjust the philosophical, juridical and sociological elements of the Indonesian people as well as what sanctions can apply to the perpetrators of these acts. This is the basis for the need for various kinds of implementation before an act can be passed in the laws and regulations.

The act of trading in influence that is at the root of the growth of widespread acts of corruption can be immediately regulated in the laws and regulations in Indonesia and discussed further related to its elements by the authorities that are adapted to existing norms and associated with

social policies for the welfare of the community. Criminal law policy in the framework of criminal law reform in Indonesia by formulating trading in influence as a criminal act in Indonesia is a hope and becomes a form of embodiment in achieving the goal of criminal law in eradicating and tackling crime for the welfare of the people. Based on
Indonesia's ideals in realizing to eradicate criminal acts of corruption, it is closely related to the theory of criminal law policy to create a good rule based on the lives of Indonesian people.
Criminal law policy or criminal law politics is a regulation that regulates violations and crimes included in criminal acts and sanctions imposed on perpetrators that become a rational effort used to tackle crimes using criminal law. Criminal law policy theory makes an effort in creating laws in accordance with the situation and circumstances that will occur. Factors inhibiting the policy of formulation of trade deeds that are the root of the growth of corruption make it the main basis for trading in influence is regulated in criminal law in Indonesia based on criminal law policy theory. The purpose of criminal law policy is to harmonize or harmonize laws and regulations with the time that continues to run and develop based on the times.
Penal policy is part of the social defence policy so in other words criminal law policy clearly cannot be separated from social policy. The attachment between the two policies becomes an effort to create the protection and welfare of the community that is certainly not separated from the policies of legislation and law-making plans accepted by the community. Legislative policy is a stage of formulation carried out by authorized institutions in making laws.
Indonesia's embodiment of UNCAC ratification is certainly by regulating the norms contained in it including trading in influence into national law for one purpose, namely combating corruption. So based on all the inhibiting factors that have been explained in the discussion in this study aims to reaffirm what are the reasons and how this action should be regulated in Indonesia. The hope is to provide legal certainty so that there is no longer a legal vacuum and errors in ensnaring perpetrators with articles that are not appropriate.

4. CONCLUSION

Major factors inhibiting formulation policy of *Trading in Influence* in Indonesia is this act is non mandatory offences Which means it is not the obligation of the state parties to regulate the act into national law, another factor is because this act is considered a culture and there is a wrong view of law enforcement officials by equating bribery with the trading in influence, namely and the absence of good will from the government to make this act as an offense in Indonesia. The Institutions that are authorized in drafting laws and regulations need to renegotiate related to trading in influence and perform the formulation stage, namely by reviewing, formulating and compiling them in the Anti-Corruption Law.

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