

**BURDEN OF PROOF REVERSE AS A SOLUTION TO ERADICATE
BRIBERY IN CRIMINAL ACTS OF CORRUPTION****Dian Adriawan Daeng Tawang*, Rini Purwaningsih**

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Abstract

The assumption that corruption is seen as an extraordinary crime (extraordinary crime) and transnational and cross-border crimes causes that in terms of eradicating it needs to be carried out in an extraordinary manner (extraordinary counter measure). There is a stereotype in the community regarding gratification and bribery, it is difficult to prove it, so it is necessary to apply an exception (enforcement exceptionality) through the application of reversing the burden of proof which will make it difficult for the public prosecutor to escape from the snares of the law. The research's purpose of implementing the method of reversing the burden of proof in addition to making it easier for public prosecutors to ensnare perpetrators of gratification and bribery is to minimize the occurrence of criminal acts of corruption. It is hoped that the results of this research will be able to contribute ideas and suggestions for the development of legal science, especially those related to criminal procedural law. It is also hoped that this research will become part of the library information media that provides benefits to sharpen the quality in making further research on formal criminal law. This normative research is supported by primary data, in addition to using secondary data which is a literature study in the form of laws and regulations. There is a stipulation of the method of reversing the burden of proof, shifting the burden of proof from the public prosecutor to the defendant.

Keywords: Burden of Proof Reverse; Bribery; Corruption

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INTRODUCTION

The difficulties experienced by the Public Prosecutor in the evidentiary stage in cases of gratification and bribery for criminal acts of corruption have hampered optimal law enforcement efforts, related to the desire to realize a fast, cheap and simple trial, as required by Law no. 4 of 2004 in conjunction with Law no. 48 of 2009 concerning Judicial Power (Ali, 2016). The Public Prosecutor as a single prosecution by the Criminal Procedure Code is assigned to prove that the defendant is guilty or not, has committed a crime in accordance with the actions he is accused of based on the evidence presented before the trial. This is in view of Article 66 of the Criminal Procedure Code which confirms that

the suspect or defendant is not burdened with the obligation of proof, referring to the principle of presumption of innocence (principle of presumption of innocence). Exceptional waiver by the law related to the principle of presumption of innocence regarding the burden of proof in the Criminal Procedure Code has been enacted since Law no. 3 of 1971 concerning the Eradication of Corruption Crimes and Law no. 31 of 1999 as amended by Law no. 20 of 2001 concerning the Eradication of Corruption Crimes. Regarding corruption cases, the burden of proof has undergone a paradigm shift, because it is specifically borne by the defendant.

The method of reversing the burden of proof as regulated in Article 37 of Law no. 20 of 2001 concerning Amendments to Law no. 31 of 1999 concerning the Eradication of Corruption Crimes, in principle, provides an opportunity for the defendant to prove that he is not corrupt (Rahim & Mokobombang, 2020). This means that the Defendant must be presumed guilty before he can prove otherwise. The method of reversing the burden of proof as stated in the provisions of Law No. 20 of 2001 can be described as known for the mistakes of people who are strongly suspected of committing a criminal act of corruption as stipulated in Article 12 B and Article 37 of Law no. 20 of 2001 (Samosir, 2017). Then the results of criminal acts of corruption are regulated in the provisions of Article 37 A and Article 38 B paragraph (2) of Law no. 20 of 2001.

There is a crucial dilemma in the Indonesian legislation regarding the Method of Reversing the Cost of Proofing. In the provisions of Article 12 B and Article 37, Article 38 B of Law no. 31 of 1999 in conjunction with Law no. 20 of 2001 regulates the Method of Reversing the Burden of Proof. Although in this provision there are rules regarding the method of reversing the burden of proof in criminal acts of corruption, there is an ambiguity in the formulation of norms in Article 12 B of Law 31/1999 in conjunction with Law 20/2002. The method of reversing the burden of proof at the level of legislation policy already exists in legislation, but in its application policy it is still difficult to implement optimally (Rahmad, 2019).

The aims of this study are (1) What are the legal rules related to reverse evidence in handling the disclosure of corruption? and (2) What are the obstacles faced in applying reverse evidence in bribery cases for corruption?

METHOD

Normative research in the form of literature studies of laws and regulations, research journals, literature related to corruption, the procedural law of corruption, and the results of research on bribery in corruption, which have been carried out previously (Nurhayati et al., 2021).

RESULTS AND DISCUSSION

A. Rules of Law Related to Reversed Evidence in Handling Disclosure of Criminal Acts of Corruption

The definition of corruption can be viewed from various aspects, depending on the discipline used, there are 4 (four) types, namely 1) *discretionary corruption*, 2) *illegal corruption*, 3) *mercenary corruption*, and 4) *ideological corruption* (Suyatno, 2005).

According to Prodjohamidjojo, (2000), the definition or formulation of corruption has developed, which can be classified into 5 (five) formulations, namely 1) the formulation of corruption from the perspective of market theory; 2) the formulation of corruption that focuses on government positions; 3) the formulation of corruption with an emphasis on the public interest; 4) the formulation of corruption from a political point of view; and 5) the formulation of corruption from a sociological point of view.

In addition to the various definitions of corruption put forward by the experts above, laws and regulations also define corruption. In Article 1 Point 3 of Law no. 28 of 1999 concerning the Implementation of a State that is Clean and Free from Collusion, Corruption, and Nepotism, it is stated that what is meant by: "Corruption is a criminal act as referred to in the provisions of the laws and regulations governing corruption" (Soekanto, 2014). Currently, the regulations governing corruption are Law no. 20 of 2001 concerning Amendments to Law no. 31 of

1999 concerning the Eradication of Corruption Crimes (UU PTPK). The definition of corruption is not explicitly stated in the legislation. However, Law no. 20 of 2001 only partially amended the provisions in Law no. 31 of 1999. The definition of corruption can be interpreted through the provisions contained in Article 2 of the old regulation, which stated that "Anyone who unlawfully commits an act of enriching himself or another person or a corporation that can harm state finances or the state economy, shall be punished ." It can be considered as corruption if it fulfills all of the following elements: a) Acts committed to enrich oneself, other people, or corporations that are against the law; b) Such actions may cause losses to the state finances of the state economy; c) Therefore, the act is subject to a penalty.

The existence of evidence, in criminal cases, is always important and crucial. This is because the evidence provides a strong basis and argument for the public prosecutor to file a claim. Evidence is seen as impartial, objective, and provides information to judges to draw conclusions on a case that is being tried. In criminal cases, this evidence becomes very essential and important because what is sought in criminal cases is material truth (Hiariej, 2013).

Evidence in criminal cases is different from evidence in other cases. Proof of criminal cases has started from the preliminary stage, namely investigation and investigation. At the preliminary stage, the procedure is much more complicated when compared to other procedural laws. The settlement of criminal cases includes several stages, namely the stage of investigation and investigation at the police level, the stage of prosecution at the prosecutor's office, the stage of examining cases at the first level in the district court, the stage of legal action in the high court and the Supreme

Court (MA), then the execution stage by the prosecutor's executor. Thus, evidence in criminal cases involves several law enforcement institutions, namely the police, prosecutors, and courts.

In the criminal case stage, it is very possible for forced efforts to be carried out by law enforcement officers and these forced efforts are related to evidence. Based on Article 1 point 14 of the Criminal Procedure Code, a suspect is a person who because of his actions or circumstances, based on preliminary evidence, should be suspected as a criminal act. The basis for the initial evidence is Article 17 of the Criminal Procedure Code. Article 17 of the Criminal Procedure Code only states that what is meant by sufficient initial evidence is preliminary evidence to suspect a criminal act in accordance with the provisions of Article 1 Point 14 (Hiariej, 2013).

Theoretically, the principle of Criminal Procedure Law recognizes 3 (three) theories about the evidence system, as follows. *First*, the Proof System according to the law Positively (*Positief Wettelijke Bewijs Theorie*) with the benchmark of proof the proof system depends on the existence of evidence which is limitedly stated in the law. In short, the law has determined which pieces of evidence can be used by the judge, how and how the judge must decide whether or not the case being tried is proven.

In another sense, this evidentiary system is referred to as a free evidentiary system followed by the defendant (Alfitra, 2014). The theory of free evidence as reflected and implied in the general explanation, and manifests in matters as stated in Article 37 of Law no. 31 of 1999 concerning the Eradication of Corruption Crimes, as follows.

- 1) The defendant has the right to prove that he has not committed a criminal act of corruption
- 2) In the event that the defendant can prove that he has not committed a criminal act of corruption, then the information is used as an advantage for him.
- 3) The defendant is obliged to provide information regarding all his assets and the assets of his wife or husband, children, and the property of any person or cooperative suspected of having a relationship with the case in question
- 4) In this case the defendant cannot prove that the wealth is not balanced with his income. or a source of additional wealth, then the information can be used to strengthen the existing evidence that the defendant has committed a criminal act of corruption.
- 5) In the circumstances as referred to in paragraph (1), paragraph (2), paragraph (3), paragraph (4), the public prosecutor is still obliged to prove his indictment only by not being bound by a rule.

Third, the evidence system according to the law is negative (Negatief Bewijs Theorie). The theory of proof according to the law in a negative way means that the proof is carried out by the prosecution. In this case, the judge may only impose a sentence on the defendant if the evidence is limited by law and supported by the judge's belief in the existence of the relevant evidence. The theory of negative evidence according to the law is reflected in Article 183 of the Criminal Procedure Code, which reads as follows.

A judge may not impose a sentence on a person unless, with at least two valid pieces of evidence, he is convinced that a crime has actually occurred and that it is

the defendant who is guilty of committing it.

Therefore, the requirements for imposing a criminal offense in the Criminal Procedure Code system are very heavy, which must meet the following criteria (Alfitra, 2014).

- a) Minimum 2 (two) pieces of valid evidence, according to law
- b) Judge's conviction.
- c) There is a crime that actually happened.
- d) The defendant is the person who committed the act.
- e) There is an error on the part of the defendant.
- f) What kind of punishment will be imposed by the judge against the defendant.

Based on the description above, it becomes clear the provisions regarding theories and principles of evidence in general, which apply in Indonesia, including those applied in the corruption case. Therefore, in the next section it is important to describe in detail and explore the Method of Reversing the Burden of Evidence in the eradication of Corruption.

Indonesia's positive legal provisions regarding corruption are regulated in Law no. 31 of 1999 in conjunction with Law no. 20 of 2001. In this Law, the provisions regarding the Method of Reversing the Burden of Evidence in corruption cases are contained in Article 12B paragraph (1) letters a and b, Article 37, Article 37A and Article 38B. If you look closely, the Law on corruption crimes classifies evidence into 3 (three) systems.

First, the reversal of the burden of proof is borne by the defendant to prove that he has not committed a criminal act of corruption. This reversal of the burden of proof applies to the crime of bribery of receiving gratuities in the amount of Rp. 10,000,000.00 (ten million rupiah) or more (Article 12B paragraph (1) letter a) and to

property that has not been charged with a corruption crime. (Article 38B).

Following the polarization of the thinking of legislators as a legislative policy, there are some strict restrictions on the application of the Burden of Proof Reversal Method associated with reasonable gifts for officials. The aspect-oriented limitation is only applied to gifts (*gratifications*) in bribery offenses, the gift is in the amount of Rp. 10,000,000.00 or more, related to their position (*in zijn bediening*) and those who do work that is contrary to their obligations (*in strijd met zijn plicht*) and must report to the Corruption Eradication Commission.

Second, the method of reversing the burden of proof which is semi-inverted or limited and balanced in which the burden of proof is placed on both the defendant and the public prosecutor in a balanced way against different objects of proof (Article 37A). In the explanation of Law no. 20 of 2001 it is stated:

In addition, this Law also applies limited or balanced reverse evidence, namely that the defendant has the right to prove that he has not committed a criminal act of corruption and is obliged to provide information about all of his property and the property of his wife or husband, children, and the property of any person or corporation suspected of having a relationship with the case in question, and the public prosecutor is still obliged to prove his indictment.

Third, the conventional system in which the proving of a criminal act of corruption and the guilt of the accused committing a criminal act of corruption is fully charged to the public prosecutor. This aspect is carried out for the crime of bribery to receive gratuities with a value of less than Rp. 10,000,000.00 (ten million rupiah) (Article 12B paragraph (1) letter b) and the main crime of corruption.

The Indonesian criminal law system, especially the Method of Reversing the

Burden of Proof in corruption, normatively recognizes the method or principle of reversing the burden of proof aimed at people's faults (Article 12B paragraph (1), Article 37 of Law No. 31 of 1999 in conjunction with Law No. 20 of 1999). 2001) and ownership of the defendant's property (Article 37A, Article 38B of Law No. 31 of 1999 in conjunction with Law No. 20 of 2001). Chronologically, the reverse evidence begins with the evidentiary system known from Anglo-Saxon countries, which is limited to "certain cases", especially for criminal acts of "gratification" or giving that correlates with "bribery" (bribery), for example in the United Kingdom of Great Britain, the Republic of Singapore and Malaysia. In the United Kingdom of Great Britain on the basis of the "Prevention of Corruption Act 1916" there is a regulation called "Presumption of corruption in certain cases"

Based on the issuance of Law No. 20 of 2001, the Burden of Proof Reversal Method is also known in the Continental European legal family such as Indonesia. Explicitly the provisions of Article 12B of Law no. 2 of 2001 in full reads as follows:

- (1) Every gratuity to a civil servant or state administrator is considered a bribe if it is related to his position and is contrary to his obligations or duties, with the following provisions:
 - a. The value of which is Rp. 10,000,000.00 (ten million rupiah) or more, proof that the gratification is not a bribe is carried out by the recipient of the gratification;
 - b. The value of which is less than Rp. 10,000,000.00 (ten million rupiah), proof that the gratification is a bribe is carried out by the public prosecutor.
- (2) The punishment for being a civil servant or state administrator as referred to in paragraph (1) is life imprisonment or a minimum imprisonment of 4 (four) years

and a maximum of 20 (twenty) years, and a minimum fine of Rp. 200,000,000.00 (two hundred million rupiah) and a maximum of Rp.1,000,000,000.00 (one billion rupiah).

B. Obstacles encountered in applying reversed evidence in bribery cases of corruption

The existence of the Burden of Proof Reversal Method from the perspective of legislation policy is known in corruption as a provision that is "*premium remidium*" and at the same time contains special prevention. Corruption is an *extraordinary* that requires *extraordinary enforcement* and *extraordinary measures*, so a crucial aspect in corruption cases is the effort to fulfill the burden of proof in the process carried out by law enforcement officials. This dimension is recognized by Oliver Stolpe that: "*One of the most difficult issues facing prosecutors in large-scale corruption cases is meeting the basic burden of proof when prosecuting offenders and seeking to recover proceeds.*"

There is a stipulation of the method of reversing the burden of proof, *shifting the burden of proof* from the public prosecutor to the defendant. Even so, the Method of Reversing the Burden of Proof is prohibited for mistakes/deeds of people and overall corruption offenses but is normatively allowed for the gratification of bribery offenses and the confiscation of property prices of people who commit corruption crimes. This is a distinct weakness of the PTPK Law. In practice this has been applied by the Hong Kong High Court (*Court of Appeal of Hong Kong*) based on the provisions of Article 11 paragraph (1) *Hong Kong Bill of Rights Ordinance* 1991.

The burden of proof for such a major decision is enormous, and it falls on those who advocate for such programs. If

certain paths are prohibited a priori, they must be fully justified and the alternatives shown (Heard, et al., 2017). According to Andi Hamzah, seeking material truth is not easy, and in assessing the strength of evidence There are several evidence systems or theories of proof, there are at least 4 (four) systems or theories of proof:

- a. The Positive Wettelijk Bewijstheorie (Positive Wettelijk Bewijstheorie) system or theory of evidence is evidence that is based solely on the evidence which is called the law positively, is said to be positive because it is only based on the law alone.
- b. System or Theory of Evidence Based solely on the judge's conviction, this theory is also called conviction intime. This theory is based on evidence based on the conviction of the judge's conscience, this system gives judges too much freedom.
- c. System or Theory of Evidence Based on the judge's belief on logical grounds (Laconviction Raisonnee) according to this theory, the judge can decide someone is guilty based on his belief, a belief based on the evidence bases accompanied by conclusions based on certain evidentiary rules. so the judge's decision was handed down with a motivation.
- d. System or Theory of Evidence Based on the negative law (Negatief Wettelijk) in this system or theory of evidence, sentencing is based on multiple evidence, namely on the legislation and on the judge's conviction.

In proving criminal cases in general and specifically for corruption offenses, the Criminal Procedure Code is applied, while in the examination of Corruption Offenses, apart from the Criminal Procedure Code, part of the Criminal Procedure Code is applied, namely Chapter IV consisting of articles 25 to 40 of Law No. 31 of 1999.

In the explanation of the law Law Number 31 of 1999 states that the meaning of "reverse evidence that is limited and balanced" means that the defendant has the right to prove that he has not committed a criminal act of corruption and is obliged to provide information about all his assets and the assets of his wife or husband, children, and property every year. a person or corporation suspected of having a relationship with the case in question and the public prosecutor is still obliged to prove his indictment.

The Reverse Evidence System in Proving Gratification Cases is suspected to have something to do with corruption (Article 38 B). In this case, the author places more emphasis on passive gratification, namely accepting bribes. Based on Article 12 B paragraph (1), the definition of bribery corruption receiving gratification is: "Civil servants or state administrators who accept bribes related to their positions and which are contrary to their obligations and duties." Meanwhile, the definition of gratification in the explanation of that article, is a gift in a broad sense which includes the provision of money, goods, rebates (discounts), commissions, interest-free loans, travel tickets, and other facilities.

With the issuance of Law no. 20 of 2001, the Burden of Proof Reversal Method is also known in the Continental European legal family such as Indonesia. Explicitly the provisions of Article 12B of Law no. 2 of 2001 in full reads as follows:

- (1) Every gratuity to a civil servant or state administrator is considered a bribe if it is related to his position and is contrary to his obligations or duties, with the following provisions:
 - a. The value of which is Rp. 10,000,000.00 (ten million rupiah) or more, proof that the gratification is not a bribe is carried out by the recipient of the gratification;

- b. The value of which is less than Rp. 10,000,000.00 (ten million rupiah), proof that the gratification is a bribe is carried out by the public prosecutor.

- (2) The punishment for being a civil servant or state administrator as referred to in paragraph (1) is life imprisonment or a minimum imprisonment of 4 (four) years and a maximum of 20 (twenty) years, and a minimum fine of Rp. 200,000,000.00 (two hundred million rupiah) and a maximum of Rp.1,000,000,000.00 (one billion rupiah).

The balanced limited inverted proof system is still a pro and contra in society and legal experts, the limited reverse proof system is felt by many parties to violate human rights and the principle of the presumption of innocence, because in this proof system indirectly In reverse proof, the judge departs from the presumption that the defendant has guilty of committing a violation of the law so that the defendant then has to prove that he is not guilty, and if he cannot prove it, then he is declared guilty without the need for further proof from the public prosecutor.

In the evidence system as above, it appears that the rights of a defendant are not guaranteed, even violated. Whereas in Article 183 of the Criminal Procedure Code, a judge may not pass a criminal verdict on a person unless with at least two valid pieces of evidence he obtains the belief that a criminal act has actually occurred and that the defendant is guilty of committing it.

In reverse evidence, this provision is openly deviated because the judge may pass a criminal verdict without any evidence, that is, if the defendant cannot prove that he is innocent. So here only the judge's conviction is sufficient to declare the defendant's guilt, without the need for evidence. Even though the application of

the reverse proof system is contrary to the principle of presumption of innocence as regulated in the Criminal Procedure Code, some parties still argue that the *lex specialis* derogate *lex generalis* principle applies so that this is one of the means that can be taken to eradicate corruption that has taken root in Indonesia and is expected to bring happiness or benefit to many people because it can reduce corruption that has harmed the country so much.

CONCLUSION

The reverse system, on the one hand, makes it easier to prove if someone is accused of bribery or receiving gratuities. Facilitating means being more in favor of and in favor of the Prosecutor. On the other hand, the reverse system can be very beneficial for the defendant and detrimental to the prosecutor. This can happen because in the reverse system the prosecutor is passive in proving. The reverse system must be used in major cases with the following conditions: (1) civil servants or state officials are suspected of having received bribes, especially from many parties, for a long time and many times, (2) acceptance of such bribes is difficult to prove, for example when receiving a bribe, from whom the bribe is and how much of each, (3) which causes or makes his wealth abundant, (4) which is not balanced with salary or other legal sources of income.

Law Number 20 of 2001 concerning Corruption distinguishes the reversal of the burden of proof into 2 (two) matters. First, on assets that are directly related to the case being charged. Article 37A emphasizes that the defendant is obliged to provide information about all of his property which is suspected to have a connection with the case being charged. If you cannot prove that your wealth is not balanced with your income, it strengthens the existing evidence that the defendant has committed corruption. Second, for assets that have not been indicted, but

are suspected of being the result of corruption. Article 38B states, for other assets that have not been charged with, but are also suspected of originating from corruption, the defendant must also prove that the assets are not the result of corruption. If they cannot prove it, the property is considered the result of corruption and the judge has the authority to decide that all or part of the property is confiscated for the state. It is clear that the two laws above have allowed law enforcement to use reversal of the burden of proof. This evidence system can be used in court. Thus, prosecutors and judges have a central role in the application of reversing the burden of proof.

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