Slack on Evidence System: Entrance of “Coerced Corruption” to Public Procurement Mistakes in Indonesia

Tri Andari Dahlan
{ triandaridahlan@mail.unnes.ac.id }
Universitas Negeri Semarang, Sekaran Campus, Gunung Pati, Semarang, Indonesia

Abstract. Administrative and civil (contractual) mistakes in several cases of public procurement have been "forced" to submit to the formulation of acts of corruption that are detrimental to the State. For this reason, an understanding of the legal consequences arising from each stage of the implementation of the public procurement needs to be classified. Administrative mistakes in the procurement process, not optimal implementation and control of contracts are not things that automatically lead to the classification of corruption. Failure in contract execution, is there always a manipulative element in the selection process? Is the forgery/lack of provider data a mistake in the selection/auction process? Bribery or gratification, mark up, fictitious, collusion, fraud and forgery are some of the acts that can be classified as corruption, and that must be proven firmly and not loosely. "Not every mistake is a crime".

Keywords: Proof, Error, Corruption, Public Procurement

1 Introduction

Government procurement services, referred to as public procurement, is a complex process because it must go through several stages, each of which has its legal domain. The appointment of the committee, the dissolution of the committee or the completion of public procurement accountability are carried out under the State Administrative Law. If an unlawful act or administrative mistakes occurs, it will be resolved through administrative law mechanisms and will be subject to administrative sanctions. Contracts between the public procurement committee and partners are subject to contract law (Civil). If an act against civil law occurs, it will be resolved through a civil law mechanism and subject to civil sanctions. Actions against administrative law are not identical to acts against criminal law. Acts against administrative law as a preparatory act to commit a criminal act. However, what happens is that acts against administrative law or contractual errors, as administrative or civil law errors, are measured by criminal law, especially corruption.

In Indonesia, corruption eradication law enforcement tends to use a criminal law approach. This is not a problem as long as the standard of proof in processing corruption cases is not relaxed (strict/high standards). Corruption law enforcement tends to use a criminal law approach. This is not a problem as long as the standard of proof in processing corruption cases is not relaxed (strict/high standards). Corruption eradication law enforcement tends to use a criminal law approach. This is not a problem as long as the standard of evidence in processing corruption cases is not relaxed (strict/high standards).

Talking about Corruption Crimes, it cannot be separated from the provisions of Articles 2 and 3 of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes. The provisions of Article 2 and Article 3 are similar, but Article 3 is more directed at the State Civil Apparatus if they abuse their authority in carrying out their duties. The elements of Article 2 are everyone; unlawfully; enrich oneself, others or corporations; can harm state finances (the word 'can' be removed through a decision of the Constitutional Court). The evidence of Article 2 is more “simple” than Article 3, but the provisions of Article 3 are more widely applied in Indonesia. This is of course interesting to study, why is it that the more difficult it is to prove, but the more cases there are?

This is because the standard of proof in articles 2 and 3 is not a high standard (beyond reasonable doubt) but a loose standard of evidence (more likely than not true). Why? Because the element of "unlawfully" has been considered fulfilled if someone violates any law, including administrative and civil law. The element of "enriching oneself, other people, or corporations" has been considered fulfilled if

ICILS 2021, June 08-09, Semarang, Indonesia

DOI 10.4108/eai.8-6-2021.2314361

there is a flow of money from the state to other people or corporations, even though the flow of money does not benefit oneself. Several cases are administrative errors and even default (contractual) is considered a criminal error (corruption). Of course, this is not in accordance with the concept, and something that is not following the concept will lead to much greater chaos and problems. The existence of Slack on Evidence System (More Likely Than Not True) results in the emergence of fear of the State Civil Apparatus to be involved in procurement; Law Enforcement Officials have the potential to abuse their authority (they are perpetrators of corruption themselves or as pawns of political war chess) and the worst result is the loss of public trust in the legal system so that they will use their laws to solve corruption problems, which of course alone it can cause conditions that are not very conducive for Indonesia (chaos).

2 Application of Legal Law in Public Procurement

Legal dimensions in the public procurement process based on its substance can be seen from two sides: [1]

a. Private law is the law that regulates the legal relationship between one legal subject and another legal subject, with an emphasis on individual interests.
b. Public Law, is the law that regulates the relationship between the State and its equipment or the relationship between the State and its citizens.

In many countries, public procurement is regulated by official regulations[2]. In the context of trade in general, between companies and the government can conduct business transactions. Business transactions carried out between companies and the government are generally contained in business contracts. The variant of a business contract between a company and the government follows the provisions of statutory regulation. This can be seen from the characteristics of the government itself which is a subject of public law, which emphasizes the rules of the game or the legal basis and its operational standards for conducting transactions. The procurement contract between the government and the company is a form of the state as a public legal entity that carries out civil actions.

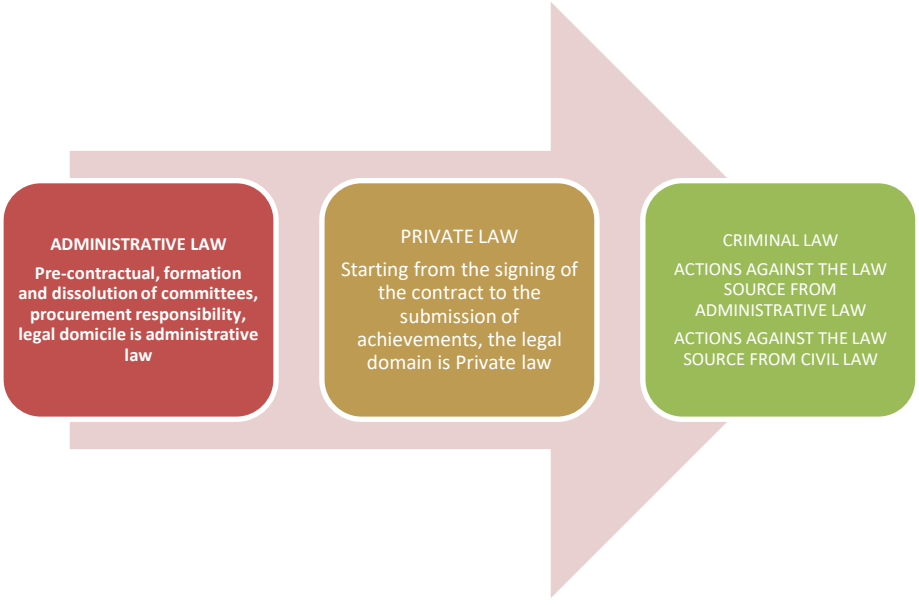

***Fig.1**: Public Procurement Aspect Law*

Criminal law enforcement in the above scheme does not have to exist. Actions against Administrative Law are not identical with acts against criminal law. Acts against administrative law as an act of preparation for committing a crime.

3 “Dualism” Application of Law in Public Procurement

3.1 Development of Court Decisions Relating to Public Procurement

Court decisions have also coloured the development and understanding of public procurement law. Aspects of Constitutional Law are no longer included in the scope of Public Procurement. The following charts illustrate the legal aspects of public procurement before and after the decisions of judges at the Supreme Court level.

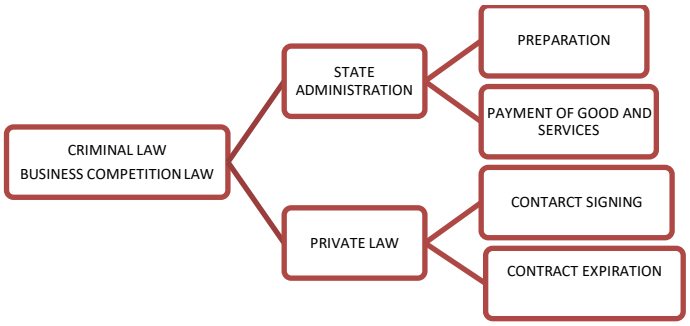

***Fig.2**: Legal Aspects of Public Procurement Pre-Decision of Judges at the Supreme Court Level*

***Fig.3**: Legal Aspects of Public Procurement After the Judge's Decision at the Supreme Court Level*

Of course, it is not only the judge's decision that is seen (normative) but also considers policy, justice and theoretical developments in resolving legal cases. What attracts attention is the use of the opplossing theory to determine when a state administrative decision is considered to be merged into a private law act. To ensure that a State administrative decision is deemed to have merged into a civil action if the State administrative decision:

1. The final scope of the issued State administrative decisions is intended to give birth to a civil law act.
2. If the defendant in issuing the State Administrative Decree the object of the dispute will be the subject or party to the civil engagement as a continuation of the State administrative decision of the object of the dispute.
3. State administrative decisions related to divorce permits are not classified as State administrative decisions that are incorporated into civil actions.

According to Figure Fig.3, the legal aspects in public procurement are criminal law, business competition law and civil law. According to Mudji Santoso, Indonesia is the "only" country that applies criminal law in public procurement. This is not found in other countries, where business processes that are heavily nuanced in private law are applied in public procurement matters. The inclusion of aspects of criminal law indicates a tug-of-war between the government and business people. The government secures the condition of "loss of value" does not occur. This is because the loss of a public value is considered to eliminate the wealth of the State which in the end is the loss of the State. On the other hand, business people try to be in a “value without loss” position, the value of profits they seek without experiencing losses.

The authority of the state as a legal entity in carrying out civil acts is represented by the government. If the actions taken by the government are civil acts, then the private law aspects are

the basis, including in the public procurement process. "How to Buy" carried out by the State is not only a "procedure to buy", but must also be the same as the usual rules used by business people. Public procurement has a special character that distinguishes it from private sector procurement. The shift in the rule of law in public procurement may change seeing the legal rules of procurement carried out by other countries that have been applied internationally because the interaction of business actors feels comfortable without being forced into criminal cases.

The judge's decision "Judge Made Law" is very influential in the shift in state administrative law in the public procurement process. Criminal law may have the same fate as state administrative law so that in public procurement, only civil law and business competition law are left behind as demands for business development that is always evolving.

3.2 Common-Law Versus Civil Law in Public Procurement

History records that Indonesia was a former Dutch colony so that the tradition and influence of the civil law adopted by the Dutch state persist in Indonesia until now. Civil law comes from Roman law drawing a clear line of separation between civil law and public law [3]. The main principle of the Civil Law system is to make positive law in written form or outlined in the form of law (the principle of legalism) [2]. Because of its written nature, the civil law system tends to be less flexible, rigid and static. Regulation is a measuring tool that has a position above all else.

Unlike civil law, common law, originally developed in England and known as unwritten law, is a more flexible legal system. In essence, common law is a legal system established by the royal court and maintained by the powers granted to the judicial precedent.

DIFFERENCE	COMMON LAW	CIVIL LAW
REGULATION SYSTEM	1. Dominated by the unwritten law, or customary law through judge's decision 2. There is no clear separation between public law and private law	1. Written law (codification) 2. A strict separation between public law and private law
JUDICIAL SYSTEM	1. The jury system in determining fault. 2. Judges simply apply the law and pass sentences. 3. Judges are bound by previous decisions in similar cases (The Binding of Precedent) 4. Adversary System: in all cases, judicial examinations always have two conflicting parties	1. Not using a jury. 2. Examination, determination of guilt, application of the law, sentencing lies in the hands of the judge 3. Free judge (not bound by jurisprudence) 4. Only in civil cases see two conflicting parties and in criminal cases, the presence of the defendant is not the challenger.

***Fig.4**: Table of Differences in Common Law and Civil Law*

In its development, the legal system in force in Indonesia does not fully adhere to civil law, but a combination of two systems, namely civil law and common law. The existence of these two legal systems also provides a separate understanding of the public procurement process in Indonesia. There is no firm consistency when it comes to applying one of the two legal systems. If we determine the enforceability of a strict civil system in the public procurement process, then, what we find is an unequivocal separation (legal dualism) as occurs in the common law system in public procurement (public law sector or private law sector or even legal amalgamation) in public law and private law).

3.3 Criteria for Corruption in Public Procurement

Corruption is one of the criminal acts that harm the state or society directly or indirectly. The regulation of corruption in Indonesia has undergone several changes, to be sharper and more optimal in ensnaring the perpetrators of corruption. But in reality, the quantity of perpetrators of corruption is increasing. Based on the release of Transparency International (TI) in 2017 (PERC Editor Team, 2010) In 2017, Indonesia's corruption perception index was the same as the previous year (2016), which was at level 37 (ranked 96 out of 180 countries) on a scale of 0-100 (score 0) indicates the most corrupt while 100 indicates the cleanest). In 2018, Indonesia's Corruption Perception Index Rank rose 1 point from 37 to 38 (ranked 89). [4]

Fig.5 *Indonesia's Corruption Perception in 2018* (Transparency International Indonesia)

According to the World Justice Project (WJP) 2019 Rule of Law, Indonesia is ranked 62 out of 126 countries in the 2019 Law Enforcement Index. This is of course not an achievement to be proud of. There are 8 (eight) factors in the WJP Law Enforcement Index conceptual framework, which include:

1. Government Restrictions
2. No Corruption
3. Government Openness
4. Basic Rights
5. Order and Security
6. Rule Enforcement
7. Civil Court
8. Criminal Justice

There are 3 (three) forms of corruption that are the benchmark for the World Justice Project (WJP). The factors consider three forms of corruption: bribery, improper influence by public or private interests and misappropriation of public funds or other resources. These three forms of corruption are examined for government officers in the executive branch, the judiciary, the military, police and legislature. [5].

Concerning the management of state finances by government officials, the misuse of public funds (state finances) in the process of procuring goods/services is a very sensitive matter and leads to negative sentiments. However, it is undeniable that the public service sector is very vulnerable to corruption, including in the public procurement process [6]. Talking about state losses cannot be separated from corruption. It is deemed necessary to regulate the crime of corruption, given its nature which is an extraordinary crime. The specificity of the crime of corruption is seen from the subject as well as from the crime committed so that the defendant in the case of a criminal act of corruption must be charged with the right charges.

The process of examination in courts of corruption cases must prioritize the provisions of the Corruption Crime Act per the principle of Lex specialis derogate legi generalis, special provisions override general rules. In the ideal level of implementation of government procurement of goods/services, if there is no criminal act of corruption, the officials or procurement actors will feel safe without intimidation or the shadow of cases or legal problems. When news appears about the

collapse of a building, it is automatically accompanied by talk or rumours of a "case". The interested parties began to accuse and blame each other, even worse, those who were not interested were "provoked" to come to develop the case. I don't want to lose either,

For example, various perspectives/points of view in the case of a building collapse which is the result of the public procurement process. For the Auditor, the element of harming public funds or the presence or absence of state losses is the main point of view. Therefore, the focus of the auditor's work is to calculate how big the "total loss" is due to the case. Other auditors, other law enforcement officers, will be "busy" with matters surrounding "negligence" or other matters that as much as possible enter or can be included in the realm of law enforcement officers, namely criminal or criminal. A construction expert may argue that the construction work is not following construction standards. Legal experts may argue from a legal point of view. Procurement contract experts may look at how contracts are drawn up and how they are controlled. Basically,

In various forums related to the procurement of government goods/services that are attended by various professions, there is a condition that reflects the lack of openness and acceptance of diverse and more precise understandings. For example, regarding administrative errors in the procurement of government goods/services by one or several procurement actors. Many cases of administrative errors lead to criminal cases. State losses that occur without being accompanied by a criminal element are still considered a criminal act, where there is an opinion that states it does not need to be punished. It is enough to just return the loss to the state. It should be understood that the nature of the crime is an ultimum remedium (last resort), which does not need to be used except in conditions that require it.

It is very interesting if we look at the situation review above, a condition that leads each individual/party to be the “most correct” party or feel right with the support of their knowledge, knowledge and experience. So that directly or indirectly, it is possible to blame parties who do not share the same point of view/perspective with him.

Dian Puji Simatupang said that a policymaker as a product of state administration cannot be punished even though the policy is wrong because a policymaker is attached to attributive authority. Hikmawanto Juwana also explained the same thing. According to him, policies that are considered wrong cannot immediately be given criminal sanctions. Mistakes in making policies cannot be equated with evil acts as regulated in criminal law. [7].

In addition, the 1966 Jurisprudence of the Supreme Court of the Republic of Indonesia abolished criminal acts that arise from policy actions provided that the policy actions meet 3 conditions, namely the State is not harmed, a person or legal entity is not benefited against the law, and for public services or protecting the public interest.

Various problems regarding procurement cases only because of administrative errors, procedural errors, or other problems bring their colour in the process of procuring government goods/services. In practice, some solutions to problems in the procurement of government goods/services are not appropriate according to the problems that arise. Agreements/contracts become a general reference when problems occur while agreements/contracts are the realm of civil law, specifically engagement law.

So far, the dominant legal perspective has coloured the dynamics of the public procurement process. This is very reasonable considering the provision of public procurement is one of the legal products. On the other hand, the law is also very diverse in providing colour in the dynamics of government procurement of goods/services. Each stage of the procurement of goods/services has its own legal space, both State Administrative Law, Civil Law and Criminal Law. Law is not only seen as a normative rule or provision or science/theory about the law.

3.5. The Way to Deal with Corruption is Not By Creating Loose Criminal Law Norms

Qualitatively, the degree of proof in criminal law recognizes the term "beyond reasonable doubt", meaning that the defendant's guilt is "indeed convincing", and therefore deserves a criminal sentence. [8]. Meanwhile, the degree of proof in civil law and administrative law is referred to as "more likely than not true" or "preponderance of evidence" which means "whichever seems more true".

The standard of proof of a criminal case has a concept that tends to be "higher" than other cases because in a criminal case it is better to acquit a guilty person than to punish an innocent person. A legal system is justified in imprisoning a person only if this system provides the best protection for that person from the risk of a possible wrong verdict and if there is no other mechanism that can

provide better protection to the community" (other than imprisoning the person). [9].

In Indonesia, the standard of criminal evidence, especially corruption in public procurement, is still in its infancy low standard of evidence. Errors in the auction process or poor execution of contracts are often linked to state losses and are weighed on the balance sheet for criminal acts of corruption. Some time ago the Constitutional Court examined the petition for the cancellation of some of the substance of the Anti-Corruption Law, namely:

a. Article 2 paragraph (1);

b. Article 3;

c. Article 15;

d. Explanation of the three.

The application for cancellation of Article 2 paragraph (1) and Article 3 is based on the reason that the word "can" is considered to give the meaning that a person can be sentenced to be detrimental to state finances, either because the state loss has occurred, or because the state loss has not occurred. This does not provide legal certainty and therefore contradicts Article 28D paragraph 1 of the 1945 Constitution.

However, at the end of the decision, the Constitutional Court decided to keep the word "can" to ease the burden of proof. The Constitutional Court considers that the phrase "may harm state finances or the state economy" does not contradict the right to a fair legal certainty, as long as it is understood per the Court's interpretation. The interpretation referred to is if precise and strong evidence cannot be submitted for the actual loss or the act committed is in such a way that the loss to the state can occur, it is deemed sufficient to prosecute and convict the perpetrator, as long as the other elements of the indictment are elements of enriching oneself or others or a corporation unlawfully has been proven.

The Constitutional Court also decided to cancel the explanation of Article 2 paragraph (1), thus automatically cancelling the explanation of Article 3 because the explanation of Article 3 refers to the explanation of Article 2 paragraph (1). The explanation is considered not to guarantee legal certainty as mandated by Article 28D paragraph (1) of the 1945 Constitution because acts that are not regulated in written rules can also be used as reasons to convict someone. The Constitutional Court does not mention the importance of law enforcement to prove that the unlawful act committed by the suspect/defendant is an act that aims to harm state finances. However, the Court is concerned that the explanation will form the criteria and indicators of unlawful acts regulated in civil law as if they have merged into one against the law criteria in criminal law. The Constitutional Court is concerned that civil wrongdoing will be a measure for committing a crime (criminal error). Ironically, although this is an important matter to be observed, in reality, law enforcers still think that civil matters can be dragged into corruption matters.

In this case, the formulation of articles on corruption that harm the state's finances should be corrected by re-submitting these articles to the Constitutional Court. The revision of these articles on corruption as much as possible avoids legislative interference because it is feared that the process of improving these articles will be "politicised" so that in the end it will hinder the eradication of corruption in Indonesia. The question is: Can these articles be resubmitted to the Court considering that according to Article 10 paragraph (1) of the Constitutional Court Law, the Court's decisions are final and binding?

There are several reasons for these articles to be re-examined:

1. For Human Rights reasons, the Constitutional Court as the guardian of the constitution is obliged to ensure the right to life and fundamental human freedoms, only to be confiscated if the person concerned has committed a criminal offence and the matter is proven by a high standard of evidence.
2. Situational differences. At that time (2006), the judges of the Constitutional Court believed that the lowered standard of evidence could help facilitate proof of corruption that was detrimental to the state's finances without considering:
    a. that this may injure the justice of (some) parties who have been found guilty, because of errors in civil law and administrative law being held criminally responsible;
    b. that this can provide unnecessary fear and violate the principle of legal certainty. Given that there are new things that should be considered, the Court needs to

reconsider examining these articles

c. the reason/purpose of the test is different. If previously the objective was the cancellation of these articles, the current application is asking for an interpretation from the Constitutional Court so that the standard of proof in the application of corruption offences harming the state's finances is increased.

The author believes, the improvement of the proof system from loose to a more assertive direction will bring a more realistic atmosphere of justice because people will be punished according to the degree of guilt. Wouldn't it be unfair to convict someone of having committed corruption, even though the court was only able to show that the defendant's fault was "default" or "poor execution, supervision and control of contracts" or other public procurement errors with administrative and civil elements?

Other than that, Law enforcers will be more professional in proving the formulation of "harming the State". Law enforcement will act fairly to prove wrong The (unlawful) act committed by the defendant was indeed based on the intention to "rob" state property. With an increase in higher standards of evidence, law enforcers can be prevented from acting arbitrarily by pressing potential suspects to violate the law for the personal interest of the law enforcer.

Indirectly, public procurement actors are also not "phobic" in carrying out their duties so that the dynamics of public procurement can run well. And the most important and most important of all is the creation of public trust in the applicable legal system. Can we imagine if people don't believe in the rule of law? Just one word "Chaotic".

Acknowledgements

The author wishes to thank the Head of Semarang State University and Head of Faculty of Law for providing a facility to join International Conference in ICILS 4 UNNES.

References

[1] Rasyidin, Debt and Supriyadi, Dedi: Introduction to Indonesian Law From Tradition to the Constitution, pp. 134, 25. CV. Pustaka Setia. Bandung (2014)

[2] Thai, KV, : Public Procurement Re-Examined. J. Public Procure vol 1. No. 1, pp. 9-50 (2001)

[3] Rahardjo, Sacipto: Legal Studies. pp. 73. PT. Image of Aditya Bakti. Bandung (2000)

[4] Irawan, G.: Indonesia's Corruption Perception Index Ranked 89th in the World in 2018. https://www.tribunnews.com/nasional/2019/01/29/index-perception-of-corruption-Indonesia-rank-89-in-the-world-2018(2018)

[5] World Justice Project (WJP) Rule of Law, https://worljusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2019 (2019)

[6] Yani, Ahmad: Appeal and Cassation Legal Efforts in Corruption Crime Cases (Palu District Court Case Study). pp. 1. Journal of Legal Opinion Edition 3, Volume 1 (2013)

[7] Academics:Public Policy Makers Can't Be Convicted.https://www. Hukumonline.com/berita/baca/lt531b60851cc21/akademisi--pengambil-policy-publik-tak-can-dipidana. (2019)

[8] Dennis. IH : The Law of Evidence. Sweet and Maxwell, London. PP 481 (2013)

[9] Stein, Alex: Foundations of Evidence Law, Oxford University Press. Oxford. Pp.175 (2005)