LEX SILENCIO POSITIVO TO ACCELERATE E-GOVERNMENT IMPLEMENTATION AND TO REDUCE CORRUPTION

Dr. Go Lisanawati*

Abstract: *Corruption has been transformed into a difficult, systemic, and sophisticated problem over time. The law enforcement in corruption is not only dealing with the substance of the laws on anti-corruption but also with the system, especially how the development of the core of corruption exists in a "grey area" between a criminal and administrative system of law. The decision of public officials both in the meaning of "beleid" and "discretion" can be contradictive under the regime of criminal law in the context of "excuses". Regarding the issue of the tackling of corruption and the uses of high technology, the Indonesian Government has released a package of regulations that encourages the utilization of technology to implement good governance then accelerate the effort of speeds up the fight against corruption. The Indonesian Government emphasizes the acceleration of bureaucracy reform as well to build a strong and good government system that is clean and free of corruption in every field, such as permitting, procurement, etc. The Indonesian Law on Administration can be synchronized with other regulations to accelerate the implementation of e-government as well as an effort to reduce corruption. Lex Silencio Positivo through a fictitious acceptance has put a burden on the Government to give a decision based on the request of the applicant that needs the decision of the Government Agencies after a certain time limit. Consistently implementing Lex Silencio Positivo will accelerate the implementation of e-Government. When the Authority did not issue the decision or action, the applicant did not need to sue to court. In this matter, this process will limit the interaction between applicants and administrative authority that may cause corruption practice. This paper will discuss the effectiveness of Lex Silencio Positivo as ordered in the law on the administration to reduce corruption.*

Keywords: *Lex Silencio Positivo; Practices of Corruption; e-Government; Good Governance.*

CORRUPTION AND ITS ANATOMY

In the literature, corruption has a meaning as something bad, dishonest, immoral, etc. Corruption itself is not a new problem in all countries, including Indonesia. Corruption has been part of life, has become a system, and adheres to the state governance itself.

* Faculty of Law, University of Surabaya; Email: lisanawatigo@gmail.com.

The word corruption has been rooted in the Latin word "corruptio", an English word "corruption", or a Dutch word "corruptie/korruptie". The definition of corruption is various, but it can be understood as:

Dishonest or illegal behavior especially by powerful people (such as government officials or police officers; inducement to wrong by improper or unlawful means (such as bribery).[1]

The United Nations Convention against Corruption (so-called UNCAC) does not provide a definition of corruption but rather sets out the characteristics and nature of the crime itself. In the preamble of UNCAC, corruption can be understood by nature and characteristics below:

- Serious problems and threats to the stability and security of society.

- Undermining institutions and values of democracy, ethical values, and justice.

- Jeopardizing sustainable development and the rule of law.

- Corruption is an organized crime and economic crime.

- Corruption has threatened the political stability and sustainable development of States

- Corruption is a transnational phenomenon rather than a local matter and affects all societies and economies.

The explanation above gives a complex understanding that corruption is widespread, jeopardizing, complex, and threatening but it exists and merges into the state governance life of nations. Corruption in such a way has inflicted losses not only on the State but also on the social and economic rights of people through its operation. Thus, it is categorized as a crime that shall be eradicated through extraordinary measures. We can see this through a consideration of The Republic of Indonesia Law Number 31 of 1999 as amended by the Republic of Indonesia Law Number 20 of 2001 concerning the Law of Corruption (Indonesian Law of Corruption). Corruption has some features and typologies. The Indonesian Law of Corruption has defined corruption into 13 features of corruption, and further categorized these into 7 forms, these being:

1. State financial loss, as mentioned in Article 2 and Article 3.

2. Bribery, as mentioned in the Article 5 subparagraph (1) a; 5 subparagraph (1) b; Article 13; Article 5 subparagraph (2); Article 12 a; Article 12 b; Article 11; Article 6 subparagraph (1) a; Article 6 subparagraph (1) b; Article 6 subparagraph (2); Article 12 c; Article 12 d

3. Embezzlement in office as mentioned in Article 8; Article 9; Article 10 a; Article 10 b; and Article 10 c

1 "Corruption" Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/corruption/ accessed 4 Oct 2020

4. Extortion as mentioned in Article 12 e to g

5. Fraudulence that is mentioned in Article 7 subparagraph (1) a – d; Article 7 subparagraph (2); Article12 h

6. Conflict of Interest in Procurement as mentioned in Article 12 i

7. Gratification/gratitude as mentioned in Article 12 B in conjunction with Article 12 C.[1]

Aside from the categorization mentioned above, there is also another category called "other types of crime related to corruption". This comprises of:

1. Obstruction of the process of corruption examination / Obstruction of justice as mentioned in Article 21

2. Failing to provide information or provide false information as mentioned in Article 22 in conjunction with Article 28

3. Failure by a Bank to provide the suspect's account information as mentioned in Article 22 in conjunction with Article 29

4. Witnesses or experts who do not provide information or provide false information as mentioned in Article 22 in conjunction with Article 35

5. Person who is holding the secret of the office that does not provide information or provide false information as mentioned in Article 22 in conjunction with Article 36

6. Witness who discloses a reporter's identity as mentioned in Article 24 in conjunction with Article 31.[2]

According to the categorization given by the Indonesian Commission of Corruption Eradication above, it is well understood that Indonesia recognizes various forms and types of corruption in its law.

Article 2 and Article 3 of Indonesian Law on Corruption, categorized as state financial loss, have become key provisions in developing an understanding of Corruption in Indonesia. The elements of the crime can be shown from the explanation below:

Table 1: Elements of Corruption Crime in Indonesia

Article 2	Article 3
- Anyone	- Anyone
- Unlawfully	- Intentionally

1 Komisi Pemberantasan Korupsi, *Memahami untuk membasmi: Buku Saku Untuk Memahami Tindak Pidana Korupsi*. (2nd edition, Komisi Pemberantasan Korupsi Jakarta, 2006).

2 *Ibid* .

- Enriching himself or other persons or corporation	- Enriching himself or other persons or corporations
- May caused state financial or the state economic loss	- Abusing the authority, the facilities, or other means at their disposal due to rank or positions
	- May caused the state financial or the state economic loss

In identifying the elements of corruption in Indonesia, the offence is more focused on the state financial loss or the state economic loss as the major characteristic. The delineation of Articles 2 and 3 above shows the different characteristics of a person who conducts corruption. Article 3 is notably focused on the person who has authority or facilities or other means in their position and who intentionally enriches himself or other persons or corporations by conduct which involves abusing his position and it may cause the state financial or the state economic loss. In comparison, Article 11 and Article 12 B of the Indonesian Law of Corruption explain:

Table 2: The Comparison to the forms of Bribery

Article 11	Article 12 B and 12 C
- A civil servant or State apparatus	- A civil servant or State apparatus
- Receives payment or a promise	- Received gratification that considered bribery
- Know or reasonably suspected	- Related to his position
- To have been given because of the power or authority related to his/her position or prize or promise which according to the contributor still has	- It is against his obligation or tasks - It is not reported to the Indonesian Commission of Corruption Eradication in 30 days

The subject of law as defined in these articles is a civil servant or state apparatus. Notably, it is directed to the specific subject of law of corruption. In the practice, the major corruption that takes place in Indonesia is the existence of 'facilitation payments' or 'cigarette money' that results in decisions being weighted on the basis of money and not by need.[1] This condition has meant that it is normal for people to give money to facilitate a decision being made more easily and smoothly, rather than choosing to follow the rules, not pay money and find they are faced with difficulties.

However corruption has been developed into a crime that can be difficult to prove. It thrives in line with the hegemony of politics, social, and laws power and authority. Corruption as a part of authority needs the reparation of the system itself. Indriyanto Seno Adji has mention that structural crime put corruption format as a part of organized crime. Corruption as a structural crime is including a system, organization, and a good structure.[2] In the context of the system, it needs a systemic approach for anti-corruption's counter measure.

1 Rohim, 'Modus Operandi Tindak Pidana Korupsi*',* (2008). Pena Multi Media. 17

2 Indriyanto Seno Adji, 'Korupsi Kebijakan Aparatur Negara dan Hukum Pidana', (2007). Diadit Media. 384

The development between criminal law and state administrative law has entered the grey area with all its technical difficulties of criminal sanction process. It continues to cause debate among criminal law experts. In this regard, Indriyanto Seno Adji explains how the decisions of state officials (both in the context of discretion or *beleid* often become a reason to reject or justify punishment in the context of criminal law.[1] The principle of *materiele wederrechtelijkheid* has sometimes been shifted into any act that is against the law, not only criminal law, but also administrative law and civil law. Indriyanto Seno Adji notes that:

Dalam kerangka Hukum Administrasi Negara, parameter yang membatasi gerak bebas kewenangan Aparatur Negata *("discretionary power")* adalah *detournement de povouir* (penyelahgunaan wewenang) dan *abuse de droit* (sewenang-wenang), sedangkan dalam area Hukum Pidana-pun memiliki pula kriteria yang membatasi gerak bebas kewenangan Aparatur Negara berupa unsur *"wederrechtelijkheid"* dan "menyalahgunakan wewenang". Permasalahannya adalah manakala Aparatur Negara melakukan perbuatan yang dianggap menyalahgunakan kewenangan dan melawan hukum, artinya mana yang akan dijadikan ujian bagi penyimpangan Aparatur Negara ini, Hukum Administrasi Negara ataukah Hukum Pidana, khususnya dalam perkara-perkara tindak pidana korupsi.[2]

(Translation: In the framework of Administrative Law, the parameters that limit the free movement of the authority of the State Apparatus *("discretionary power")* are *detournement de povouir* (abuse of authority) and *abuse de droit* (arbitrary), while in the area of Criminal Law it also has criteria that limiting free movement of the authority of the State Apparatus in the form of elements of *"wederrechtelijkheid"* and "abuse of authority". The problem is when the State Apparatus commits an act which is considered to be abusing their authority and against the law, which means which will be used as a test for this State Apparatus' irregularities, Administrative Law or Criminal Law, especially in cases of criminal acts of corruption).

In short, the way to differentiate when it is the criminal law or the administrative law that shall be implemented in corruption cases is based on studying the elements of crime itself. Criminal law must be seeking the material truth of the corruption elements of crime. Based on the explanation above, it is important to weigh the parameters that appear in the fault of the state apparatus, this is whether it is related to *detournement de povouir* and/or *abuse of droit*, or *wederrechtelijkheid* and/or *detournement de povouir*.

In regards to the corruption causing State financial loss (Article 2 and 3 of the Indonesian law of Corruption), Indonesia also regulates this area through other laws. Those laws are the Republic of Indonesia Number 17 of 2003 concerning State Finance

1 *Ibid* 398.
2 *Ibid* 399.

(so called as Law of State Finance), Republic of Indonesia Law Number 1 of 2004 concerning State Treasury (so called as Law of State Treasury), Law Number 15 of 2004 concerning State Financial Management and Accountability Audit (so called as Law of State Financial Management and Accountability Audit), and Law Number 15 of 2006 concerning Audit Board of the Republic of Indonesia (so called as Law of State Audit Board). These laws provide for criminal sanction such as *Primum Remedium* (the first resort) rather than using administrative sanction or civil sanctions.

The Indonesian Law on State Treasury explained that the state government administration needs to be managed in a state financial management system to realize the goal to determine rights and obligations of the state (inter alia Consideration number (a) of the law). Further Article 1 number 22 of Law on State Treasury gives a definition regarding State/Regional Loss. The article defines that State/Regional Loss involves a real loss of money, securities and goods, of which amount is caused by unlawful actions, either intentionally or negligently. Further Article 59 - 67 of The Indonesian laws of state treasury has created a mechanism called Settlement of State/Regional Losses through a. Administrative measurement (Article 59); b. Compensation imposing (Article 62); c. Criminal investigation. This criminal component will be followed once criminal elements are found in the examination of state or regional losses.

Some arguments arise concerning the terms and elements of state loss and state financial loss in the literature and criminal investigation. Makawimbang explains that the essence of both terms is different. It will impact to scope of the law that regulates it.[1] The scope of law that regulates the terminology of state loss is included in the Indonesian Law of State Treasury and is administrative law.[2] Further, State loss is irrelevant or disconnects from the criminal act of corruption that enriches the perpetrator himself or benefits himself or other people or corporation, and abuse of authority, opportunity or facilities given to him related his position. State loss can also arise due to Force Majeure (natural disaster, fire, or economy crisis).[3]

Nevertheless, it needs to be understood that the approach to corruption is extremely complicated as it will impact to the State. It is important to treat the problem of corruption with more care.

In 2014, Indonesia enacted the Republic of Indonesia Number 30 of 2014 concerning Government Administration (so-called as Law on Administration). The general principles of good governance and the provisions of laws and regulations are need to be preferred

1 Hernold Ferry Makawimbang, 'Memahami dan Menghindari Perbuatan Merugikan Keuangan Negara Dalam Tindak Pidana Korupsi dan Pencucian Uang', (2015) Thafamedia and PSA PPKN. 50.

2 *Ibid.*

3 *Ibid* 52.

in order to improve the quality of government administration, government agencies and/or officials in exercising authority (vide point a) and inter alia with point c, in order to realize good governance, it needs the legal basis to underlie decisions and/or actions of government officials to meet the legal needs of the community in government administration (vide point c). This aspect will be discussed in the section below.

From the explanation above, corruption is difficult to solve and understanding only from one perspective, but the important elements of crime could not be ignored.

GOOD GOVERNMENT IMPLEMENTATION

In the context of legal development, it needs to highlight that there is a significant and fundamental evaluation on the implementation of the development theory. It needs re-orientation of national legal development. One of the points in the re-orientation of national legal development relates to the explanation below:

Masalah penataan kelembagaan aparatur hukum yang masih mengedepankan egoisme sektoral, miskomunikasi dan miskoordinasi antar lembaga penegak hukum. Semua itu disebabkan miskinnya pemahaman aparatur hukum mengenai prinsip *"Good Governance"*, *"due process of law"*, "praduga tak bersalah", *"transparency"*, *"accountability"* dan *"the right to counsel"*.[1]

(Translation: Problems with the institutional arrangement of the legal apparatus that still prioritizes sectoral egoism, miscommunication and mis-coordination between law enforcement agencies. All of this is caused by the law apparatus 'poor understanding of the principles of "Good Governance", "due process of law", "presumption of innocence", "transparency', 'accountability' and" the right to counsel").

The Government of Indonesia is continually improving and conducting reform in the area of good governance, one of them is through the principle of "zero tolerance to corruption".[2] Thus, Good Governance is important and needs to be implemented by the State Apparatus in order to reduce and eliminate corruption in Indonesia.

The general principles of Good Governance hereinafter referred to as AUPB, are principles used as a reference for the use of Authority for Government Officials in issuing Decisions and / or Actions in government administration. (Vide Article 1 number 17). This AUPB has become important to guarantee the implementation of the duties of the Government. Philipus M. Hadjon, quoting G.H. Addink, states that good governance needs to:

---

1 Romli Atmasasmita, 'Teori Hukum Integratif: Rekonstruksi Terhadap Teori Hukum Pembangunan dan Teori Hukum Progresif' (2012) Genta Publishing. 81.

2 Romli Atmasasmita, 'Rekonstruksi Asas Tiada Pidana Tanpa Kesalahan Geen Straf Zonder Schuld' (2018) Gramedia Pustaka Utama. 49.

a. To guarantee the security of all persons and society itself;

b. To manage an effective framework for the public sector, the private sector and civil society;

c. To promote economic, social and other aims in accordance with the wishes of the population.[1]

The principle of Good Governance therefore has the same meaning as the principle of good administration. A good government must reflect good administration and fulfil its functions well. Thus, Article 2 of Indonesian Law of Administration regulates the purpose of the Law, that is:

The Law on Government Administration is intended as one of the legal bases for Government agencies and/or officials, citizens of the community, and other parties related to Government Administration in an effort to improve the quality of government administration.

In this context, the administration law follows the principle of administrative law itself. There are three main approaches in administrative law, as follow:

a. Pendekatan terhadap kekuasaan pemerintah.

b. Pendekatan hak asasi (rights based approach)

c. Pendekatan fungsionaris[2]

(Translation:

a. Government authority approach

b. Right based approach

c. Functionary approach)

The functionary approach starts from a position that it is officials (men) who exercise government power. Therefore, administrative law must concern to the behavior of officials. Administrative law itself does not include the government norms only but also the behavior norms of the officials. Behavioral norms are measured by the conception of maladministration. The implementation of government administration is based on three principles, namely:

a. The principle of legality;

b. The principle of Human rights protection; and

1 Philipus M. Hadjon, "*Hak Asasi Manusia Dalam Perspektif Hukum Administrasi"* in Muladi (Ed), 'Hak Asasi Manusia' Hakekat, Konsep dan Implikasinya dalam Perspektif Hukum dan Masyarakat' (2005) Refika Aditama. 67.

2 *Ibid* 66.

c. AUPB (The general principles of Good Governance) (vide Article 5 of the Indonesian Law of Administration)

Regarding the AUPB, Article 10 has regulates that the AUPB consists of some principles, as follow:

a. Legal certainty;

b. Utility;

c. Impartiality;

d. Accuracy;

e. Not conducting abuse of authority;

f. Openness;

g. Public interest; and

h. Good services

And there in the sub paragraph (2), the law mentions that there are general principles beyond AUPB as mentioned above that can be implemented as long as it is used as the basis for the judge's judgment as stated in the permanent legal force's court decision. (Vide Article 10 of the Indonesian Law of Administration).

In regard to the concern of the behavior of the state apparatus and officials to against corruption, it can be related to the discussion here on the AUPB principles points c, e, f, and h. The elucidation of Article 10 subparagraph 1 point c concerning Impartiality, the Indonesian Law of Administration explains that the principle of impartiality is the principle which obliges Government agencies and/or officials to determine and/or make decisions and/or actions by considering the interest of the parties as a whole and is not discriminatory. This principle is important in implementing good governance and can help to stop the behavior of corrupt that may appears as bad habit of the state apparatus due to the authority given to them by the law. The principle of openness (Vide Article 10 subparagraph (1) point f) has been defined in Indonesian law as:

The principle of openness is the principle that serves the public to gain access and obtain information that is correct, honest, and non-discriminatory in the administration of government while still paying attention to the protection of personal, class, and state secret human rights. This principle of openness is related to the behavior of the servants to fulfill the needed of the public of right, honest, and non-discriminatory information. This principle then will be needed to improve in order to achieve electronic government (so-called as e-government) that has been required to be implemented in the era of high technology. Further, this will be discussed later in this paper.

Another principle as AUPB Principles that can be related to the discussion of anti-corruption is the principle of good service as stated in Article 10 subparagraph (1) point h, as in its elucidation, explains that:

The principle of good service is the principle that provides services that are on time, clear procedures and costs, in accordance with services standards and the provisions of laws and regulations. This principle is actually strengthened in the model of standards of services and a provision of laws and regulations on the provision of services. It will also relate further in the context of *Lex Silencio Positivo*. The other important principle to stop or reduce the behavior of anti-corruption is the Principle of not abusing authority (vide Article 10 subparagraph (1) point e and its elucidation as follows:

The principle of not conducting abuse of authority is the principle that obliges every Agencies and/or Government Officials not to use their authority for personal interest or other interests and is not in accordance with the purpose of granting such authority, does not exceed, not abuse, and/or confound the authority.

Referring back to Indriyanto Seno Adji's opinion as discussed above, corruption today appears because of the authority of the Government Officials and/or State Apparatus, and it is in a dilemma whether the authority is in the criminal law scope or just in the administrative law scope. Further, the Indonesian Law of Administration states that the sources of authority are Attribution, Delegation and/or Mandate (vide Article 11). This authority itself has its limitations (inter alia Article 15), namely:

- The period or grace period of the authority;

- Area of where the Authority is applied; and

- The scope of the field or material authority.

Thus after the period of authority is ended, the State officials and/or state apparatus are not allowed to make any decisions.

Other authority given by the law to the state officials according to the law of administration is called Discretion. In the Article 1 number 9, Discretion is defined as:

Discretion is a decision and/or action determined and/or taken by government officials to solve concrete problems faced in the administration of a government in terms of laws and regulations that provide choices, do not regulate, are incomplete or unclear, and/or there is stagnation of government.

Discretion has been very crucial in its correlation with the Article 2 and 3 of Indonesian Law of Corruption. These articles are sometimes confused with discretionary powers carried out by State officials and/or State apparatus. Discretion can be used as a reason to avoid and/or justification to an action, but remain in debate. Article 22 of Indonesian Law of Administration in general regulates discretion as follow:

(1). Discretion can only be exercised by authorized government officials.

(2) Every use of a Government Official's Discretion is:

a. To aimed at carry out government administration;

b. Filling in the legal void;

c. Provide legal certainty; and

d. Overcoming government stagnation in certain circumstances for the benefit and public interest.

From the article above, discretion is needed in the terms of four conditions mentioned, and can only be exercised by authorized governments. As a result, the limitation in using discretion by authorized government officials inter alia with Article 24 of Indonesian Law of Administrative, those are:

Government Officials who use discretion must meet the following requirements:

a. In accordance with the objectives of Discretion as referred to in Article 22 paragraph (2);

b. Not contradicting the provisions of laws and regulations;

c. According to AUPB;

d. Based on objective reasons;

e. Does not cause a Conflict of Interest; and

f. Done in good faith.

The scope of Discretion is regulated in Article 23 of Indonesian Law of Administration as follow:

Discretion Government officials include:

a. decisions making and/or actions based on the provisions of laws and regulations that provide a choice of decisions and/or actions;

b. decisions making and/or actions because statutory regulations do not regulate;

c. decisions making and/or actions due to incomplete or unclear statutory regulations; and

d. Decisions and/or Actions due to the stagnation of government for broader interests

Discretion that is used by State Officials can potentially change budget allocations. Article 25 subparagraph (1) requires that the state officials must seek approval from the Supervisory officers. Further, Article 25 subparagraph (2), (3), (4), and (5) regulates that:

- The approval as referred to in paragraph (1) shall be carried out if the use of Discretion is based on the provisions of Article 23 letter a, letter b, and letter c and creates legal consequences that have the potential to burden state finances.

- In the event that the use of Discretion causes public restlessness, emergency, urgent and/or natural disasters occur; Government Officials are obliged to notify the Supervisors of Officials before the use of Discretion and report to the Officials Supervisor after the use of Discretion.

- Notification before the use of Discretion as referred to in paragraph (3) shall be made if the use of Discretion is based on the provisions in Article 23 letter d which has the potential to cause restlessness in public.

- Reporting after the use of Discretion as referred to in paragraph (3) shall be conducted if the use of Discretion is based on the provisions in Article 23 letter d which occurs in an emergency, urgent, and/or natural disaster.

Thus, discretion in its nature is needed to be controlled by the law and regulations and must be carried out in a way that reflects on the potential impact through its use.

Article 30 - 32 of Indonesian Law of Administration is also relevant and provides for three kinds of Discretion and its legal consequences, such that it:

- Exceeds the limit of authority will bring a legal consequence that the decision and the legal consequences are considered non-existence or Invalid.

- Mix up the authority will bring a legal consequence that the decision and the legal consequence must be exercise by the Supervisor or Court. In other word, the decision can be cancelled.

- An arbitrary action brings a legal consequence that the decisions are invalid.

From the previous section of this paper, there are several differentials between administrative aspects and criminal aspects. Criminal law will be based on the existence of criminal act with *Mens rea* - or fault while administrative law aspect will be based on the existence of acts that are against the law resulting in mal-administration. The state loss or economic loss of the state is not the main element in mal-administration while in criminal aspect, the state loss or state economic loss is being main elements of corruption. In Criminal law, there is a criminal element found, while in administrative aspect, there is no criminal element found.

***Lex Silencio Positivo* in e-Government and Anti Corruption Prevention**

In the era of Information Technology, the Government of Indonesia has implemented a policy of e-government. The legal basis of this implementation is the Presidential Instruction Number 3 of 2003 concerning National policy and strategy of e-government development. The background of this regulation was based on the conditions Indonesia faces in relation to a fundamental change in the life of the nation and state towards a governance system that is democratic and transparent and places a key emphasis on the

rule of law. The technological changes that are being experienced provide opportunities for the arrangement of various aspects of the life of the nation and state, where the interests of the people can be put back in a central position.

However, every change in the life of the nation and state is always accompanied by various forms of uncertainty. Thus, the government must strive for smooth communication with high-level state institutions and regional governments and encourage wider community participation, so that the uncertainty does not lead to widespread disputes and tensions, with the result that change has the potential to create new problems. The government must also be more open to the swift flow of expressions of the people's aspirations and be able to respond quickly and effectively. The government must be able to provide comprehensive information to the international community so that there are no misunderstandings that can put the Indonesian nation in a completely wrong position. The changes that are being undertaken are occurring at a time when the world is undergoing a transformation towards an era of information society.

The rapid advancement of information technology and the potential for its widespread use opens up opportunities for accessing, managing, and utilizing large volumes of information quickly and accurately. The fact has shown that the use of electronic media is a very important factor in various international transactions, especially in trade transactions. The inability to adapt to this global trend will lead the Indonesian nation to a digital divide, namely isolation from global developments because it is unable to utilize information. Therefore, the arrangement that we are carrying out must also be directed to encourage the Indonesian nation towards an information society.

Thus, the very rapid information and communication technology and all its potentials must be widely utilized, so that it can be accessed, managed and utilized quickly and accurately. Apart from that, its use must also address the use of information technology in government processes (e-government) for the sake of increasing efficiency, effectiveness, transparency and accountability in government administration (vide Consideration point a and b of the Presidential Instruction Number 3 of 2003). In this regard, the development of e-government must be focused on improving the quality of public services so that they can become more effective and efficient. This e-government reform must implement good e-governance fundamental principles as mentioned in the previous sub chapter above. Then it can be said in the perspective of bureaucratic reform, the existence of Indonesian Law of Administration is important. It becomes an instrument to realize the principles of good governance in the legal norms that bind bureaucrats and the public.

The Government of Indonesia has transformed its government system into one that maximizes the encouragement of Information Technology uses in every field, and it must be directed to be implemented in order to prevent the corruption and its related behavior. In the end, e-government must be set to realize the national goal of Indonesia as mentioned in

the Preamble of the 1945 Constitutional of Republic of Indonesia. E-Government must be directed to support the realization of business activity and its environments become accelerate.

Presidential Regulation Number 91 of 2017 was issued to support the implementation business and its acceleration. The aim of the policy is to increase service standard business permit become more efficient, easy, and integrated without neglecting good governance principles. As it is understood well, in arranges permits for business, there is a possibility for the practice of corruption to develop in this area. E-Government with good governance must guarantee openness, preventing the conducting of abuse of authority, and focusing on fairness. To provide for connected e-government - good governance - and *Lex Silencio Positivo*, it can be said that the adoption of positive "fictitious" decisions will bring good results in the policy of ensuring that business is done with ease, especially in the permit process. The positive "fictitious" decision provides legal certainty and provides legal protection for the applicant especially for permit regarding whether or not an application they submitted was accepted.

Enrico Simanjuntak explains that *Lex Silentio/silencio positivo* is expected to be able to solve various complaints regarding permit procedures.[1] The Indonesian Law of Administration has adopted the concept of *Lex Silencio Positivo* as a legal mechanism that requires an administrative authority to response or issue a decision or actions in within a certain time limit. If the requirement is not fulfilled, the administration authority is assumed to have granted the request to the applicant. This *Lex Silencio Positivo* as mentioned in Article 53 of Indonesian Law of Administration has been known also as a positive fictitious approval. Article 53 subparagraph (1) set an obligation for administration authority to establish and/or make decision and/or actions in accordance with the provisions of legislations. In the subparagraph (2) it mentioned that if the provisions do not mention specific time limit, the Government officials shall prescribe and/or make a decision and/or action within ten working days after applications are fully accepted by the Government offices. Inter alia with subparagraph (3), if within the time limit as referred, the Government officials does not issue and/or make decisions and/or actions, the application is deemed to be granted legally. After that, the applicant must submit application to the Court to obtain a decision to accept the application. In less than 21 working days, Court shall decide, and the Government Officials shall establish a decision to implement the Court decision no later than five working days since the Court is established. (Vide Article 53 subparagraph (4) (5) and (6)). For this, Bambang Heriyanto mentions that Article 53 has the potential to improve the public service quality as a part of bureaucratic reformation for Government officials to implement their duty and function.[2]

---

1 Enrico Simanjuntak, *'Perkara Fiktif Positif dan Permasalahan Hukumnya Fictious Proceedings and Its Legal Problems'* (2017) JHP 381

2 Bambang Heriyanto, *'Problematika Penyelesaian Perkara 'Fiktif Positif' di Pengadilan Tata Usaha Negara'*, (2019) PLR 41.

Lex silencio positivo will help to achieved good e-government implementation. Through e-government, applicants will not be in direct communication with the Government Officers, thus it will reduce and/or avoid practices of corruption, particularly the practice of bribery and/or gratification. *Lex Silencio Positivo* leads to an understanding of anti corruption, because if Government Officials must guarantee that the applicant will get a response to their application, in a certain time limit. Applicants therefore do not need to apply to the court and the State does not need to bear the cost of defending a Court case as it happened according to the previous perspective. It can therefore save state finances. The consistency of implementing e-government with good governance principles and respect *lex silencio positivo* will, it is expected, bring consequences of corruption and its practices become less and/or stop.

CONCLUSION

Corruption and its practices must be prevented and eradicated from many ways and many perspectives. The boundaries between criminal law and administrative law in viewing corruption must be strengthened. To know the boundaries between an illegal act from criminal law and administrative law must be clearly and properly applied. The terms of discretion must be implemented according to the law and directed to the goal or purpose as mentioned in the law. The law on administration provides methods of regulating how government (and e-government) should implement good governance principles, especially the principles of openness, good services, not conducting abuse of authority. In addition, the new aspect under the Law of Administration concerning *Lex Silencio Positivo* ensures that government decisions are made effectively and rapidly for the public. The consistent implementation of *Lex Silencio Positivo* will produce a positive impact ensuring consistency in e-government to prevent the practices of corruption itself.

REFERENCES

Indonesian Legislation

Corruption Law 1999.

Corruption Law 2001.

State Finance Law 2003.

State Treasury Law 2004.

State Financial Management and Accountability Audit 2004.

State Audit Board Law 2006.

Acceleration of Business Implementation Presidential Regulation 2017.

National Policy and Strategy of E-Government Presidential Instruction 2003

Secondary Sources.

Adji, Indriyanto Seno, *Korupsi Kebijakan Aparatur Negara dan Hukum Pidana*, (2nd edition Diadit Media, 2007).

Atmasasmita, Romli, *Teori Hukum Integratif: Rekonstruksi Terhadap Teori Hukum Pembangunan dan Teori Hukum Progresif,* (1st edition, 2012, Genta Publishing.

Atmasasmita, Romli, *Rekonstruksi Asas Tiada Pidana Tanpa Kesalahan Geen Straf Zonder Schuld,* (2nd edition, 2018, Gramedia Pustaka Utama).

Komisi Pemberantasan Korupsi, *Memahami untuk membasmi: Buku Saku Untuk Memahami Tindak Pidana Korupsi*, (2nd edition, Komisi Pemberantasan Korupsi, 2006).

Makawimbang, Hernold Ferry, *Memahami dan Menghindari Perbuatan Merugikan Keuangan Negara Dalam Tindak Pidana Korupsi dan Pencucian Uang*, (1st edition, Thafamedia and PSA PPKN, 2015).

Muladi (Ed), *Hak Asasi Manusia*, *Hakekat, Konsep dan Implikasinya dalam Perspektif Hukum dan Masyarakat,* (1st edition, 2005, Refika Aditama).

Rohim, *Modus Operandi Tindak Pidana Korupsi,* (1st Edition, Pena Multi Media, 2008)

Journal Articles

Heriyanto, Bambang, *Problematika Penyelesaian Perkara 'Fiktif Positif' di Pengadilan Tata Usaha Negara*, (2019, Pakuan Law Review Volume 5, Number 1, January -June 2019, eISSN 2614-1485).

Simanjuntak, Enrico, *Perkara Fiktif Positif dan Permasalahan Hukumnya Fictious Proceedings and Its Legal Problems* (2017, Jurnal Hukum dan Pembangunan, Volume 6 Number 3, November 2017).

Websites and Blogs

"Corruption" Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/corruption/accessed 4 Oct 2020.

UCC
UNIVERSITY COLLEGE CORK
SCHOOL OF LAW
CENTRE FOR CRIMINAL JUSTICE
AND HUMAN RIGHTS

VIETNAM NATIONAL UNIVERSITY, HANOI
SCHOOL OF LAW
MASTER PROGRAM IN STATE GOVERNANCE
AND ANTI-CORRUPTION

US
UNIVERSITY
OF SUSSEX
SCHOOL OF LAW,
POLITICS AND SOCIOLOGY
CENTRE FOR THE STUDY OF CORRUPTION

GOOD GOVERNANCE AND ANTI-CORRUPTION

OPPORTUNITIES AND CHALLENGES IN THE ERA OF DIGITAL TECHNOLOGY

(INTERNATIONAL CONFERENCE PROCEEDINGS)

QUẢN TRỊ TỐT VÀ PHÒNG, CHỐNG THAM NHŨNG

CƠ HỘI VÀ THÁCH THỨC TRONG KỶ NGUYÊN CÔNG NGHỆ SỐ

(KỶ YẾU HỘI THẢO QUỐC TẾ)

NHÀ XUẤT BẢN KHOA HỌC XÃ HỘI

GOOD GOVERNANCE AND ANTI-CORRUPTION: OPPORTUNITIES AND CHALLENGES IN THE ERA OF DIGITAL TECHNOLOGY

(International Conference Proceedings)

QUẢN TRỊ TỐT VÀ PHÒNG, CHỐNG THAM NHŨNG: CƠ HỘI VÀ THÁCH THỨC TRONG KỶ NGUYÊN CÔNG NGHỆ SỐ

(KỶ YẾU HỘI THẢO QUỐC TẾ)

UNIVERSITY COLLEGE CORK
SCHOOL OF LAW
Centre for Criminal Justice
and Human Rights

VIETNAM NATIONAL UNIVERSITY, HANOI
SCHOOL OF LAW
Master Program in State Governance
and Anti-corruption

UNIVERSITY OF SUSSEX
SCHOOL OF LAW,
POLITICS AND SOCIOLOGY
Centre for the Study
of Corruption

GOOD GOVERNANCE AND ANTI-CORRUPTION: OPPORTUNITIES AND CHALLENGES IN THE ERA OF DIGITAL TECHNOLOGY

(International Conference Proceedings)

QUẢN TRỊ TỐT VÀ PHÒNG, CHỐNG THAM NHŨNG: CƠ HỘI VÀ THÁCH THỨC TRONG KỶ NGUYÊN CÔNG NGHỆ SỐ

(KỶ YẾU HỘI THẢO QUỐC TẾ)

NHÀ XUẤT BẢN KHOA HỌC XÃ HỘI

TABLE OF CONTENTS
(MỤC LỤC)

PART 2

OPEN GOVERNMENT, E-GOVERNMENT AND ANTI-CORRUPTION

PART 3

HUMAN RIGHTS IN THE ERA OF DIGITAL TECHNOLOGY

PART 4
ADMINISTRATION AND ANTI-CORRUPTION IN THE DIGITAL ERA

PREFACE

Digital technology is one of the main features of the 4th Industrial Revolution. It has been happening globally and creates both advantages and challenges for governance and anti-corruption in all countries. Ways of taking advantage of digital technology to promote good governance and fighting against corruption are now a common concern of academia and policy makers worldwide. Therefore, it is necessary to have an extensive exchange of knowledge and opinions through academic workshops and conferences.

In this context, it was a great honour of the School of Law, Vietnam National University Hanoi to cooperate with the School of Law, University College Cork, Ireland, and School of Law, Politics and Sociology, University of Sussex, the UK to organise the International Conference on *"Good Governance and Anti-Corruption: Opportunities and Challenges in the Era of Digital Technology"* on 27th and 28th October 2020.

The conference aims to provide a forum for scholars around the world to discuss theoretical and practical issues of good governance and anti-corruption in the context of digital technology and foster international collaborations. Particular reference was made to advancements in digital technology and artificial intelligence. Main themes of the conference address the following questions:

+ What opportunities and challenges has digital technology posed for good governance and anti-corruption? This question invites reflection on both public and private sectors, national, regional and international levels as well as sector or country-based insights.

+ How can opportunities to improve good governance and anti-corruption be harnessed in this context?

+ How can challenges be addressed?

+ What national/regional/international standards and mechanisms have been adopted to assist in this process? And what examples of best practice can be shared?

The conference welcomed distinguished guests and scholars from Vietnam, Ireland, the UK and some other countries. It is also our great pleasure to receive nearly 40 papers from scholars in numerous countries. Full papers submitted for the Proceedings were subject to scholarly peer-review in several rounds by experts, the Selection Committee, and the Editorial Board. After rigorous peer-review, revision and editing processes, the Editorial Board and the Selection Committee accepted 34 papers for publication in the

Proceedings book. The Proceedings book comprises five parts: Part 1 - Digital Technology, Governance, Democracy and the Rule of Law; Part 2 - Open Government, E-Government and Anti-Corruption; Part 3 - Human Rights in The Era of Digital Technology; Part 4 - Administration and Anti-Corruption in the Digital Era; and Part 5 - Artificial Intelligence, Blockchain, Big Data and Anti-Corruption.

We would like to thank the authors for their excellent contributions to the workshop and this publication, and acknowledge the interests and efforts of participants, authors, reviewers, interpreters, translators, the Organising Committee, the Selection Committee, and the Editorial Board in making this workshop and the publication such a great success.

Hanoi, October 2020

The Organising Committee and Editorial Board

LỜI GIỚI THIỆU

Công nghệ số là một trong những thuộc tính cỗi lõi của cuộc Cách mạng công nghiệp lần thứ tư. Nó diễn ra trên phạm vi toàn cầu, tạo ra cả thuận lợi và thách thức cho quản trị và phòng, chống tham nhũng ở tất cả các quốc gia. Cách thức tận dụng công nghệ số để thúc đẩy quản trị tốt và phòng, chống tham nhũng hiện đang là mối quan tâm chung của giới học giả và các nhà hoạch định chính sách trên thế giới. Do đó, cần có sự trao đổi kiến thức và ý kiến sâu rộng thông qua các diễn đàn học thuật.

Trong bối cảnh đó, Khoa Luật, Đại học Quốc gia Hà Nội rất vinh dự khi hợp tác với Trường Luật, Đại học Cork, Ireland và Trường Luật, Chính trị và Xã hội học, Đại học Sussex, Vương quốc Anh tổ chức Hội thảo quốc tế *"Quản trị tốt và phòng, chống tham nhũng: Cơ hội và thách thức trong kỷ nguyên công nghệ số"* vào ngày 27 và 28 tháng 10 năm 2020.

Hội thảo là diễn đàn cho các học giả trên thế giới thảo luận các vấn đề lý luận và thực tiễn về quản trị tốt và phòng, chống tham nhũng trong bối cảnh công nghệ số, cũng như thúc đẩy hợp tác quốc tế. Hội thảo đặc biệt chú trọng các chủ đề về sự tiến bộ trong công nghệ số và trí tuệ nhân tạo. Các chủ đề chính của hội thảo bàn về các vấn đề sau:

+ Công nghệ số đã đặt ra những cơ hội và thách thức nào đối với quản trị tốt và chống tham nhũng? Câu hỏi này đặt ra những phân tích về cả khu vực công và tư nhân, cấp quốc gia, khu vực và quốc tế cũng như những hiểu biết sâu sắc về một lĩnh vực cụ thể hoặc quốc gia.

+ Làm thế nào để khai thác các cơ hội cải thiện quản trị tốt và phòng, chống tham nhũng trong bối cảnh này?

+ Các thách thức có thể được giải quyết như thế nào?

+ Những tiêu chuẩn và cơ chế quốc gia/khu vực/quốc tế nào đã được thông qua để hỗ trợ quá trình này? Và có thể chia sẻ những kinh nghiệm tốt nhất từ thực tiễn các quốc gia/khu vực?

Hội thảo đã chào đón các vị khách quý và các học giả đến từ Việt Nam, Ireland, Vương quốc Anh và một số quốc gia khác. Chúng tôi cũng rất vui mừng khi nhận được gần 40 bài viết từ các học giả ở nhiều quốc gia. Các bài viết toàn văn (được gửi cho Ban Tổ chức để xuất bản Kỷ yếu) đã được các chuyên gia, Hội đồng tuyển chọn và Ban Tổ chức Hội thảo phản biện trong nhiều vòng. Sau quá trình phản biện, hiệu đính và biên

tập nghiêm ngặt, Hội đồng tuyển chọn đã chấp nhận 34 bài để xuất bản trong tập Kỷ yếu. Cuốn sách Kỷ yếu gồm năm phần: Phần 1 - Công nghệ số, quản trị, dân chủ và pháp quyền; Phần 2 - Chính phủ mở, chính phủ điện tử và phòng, chống tham nhũng; Phần 3 - Nhân quyền trong Kỷ nguyên công nghệ số; Phần 4 - Quản trị và phòng, chống tham nhũng trong kỷ nguyên công nghệ số; và Phần 5 - Trí tuệ nhân tạo, blockchain, dữ liệu lớn và phòng, chống tham nhũng.

Chúng tôi xin cảm ơn các tác giả đã tham gia và đóng góp các tham luận, bài viết cho hội thảo và cho Kỷ yếu này, đồng thời ghi nhận sự quan tâm, nỗ lực của các đại biểu tham dự, các tác giả, nhà phản biện, phiên dịch, dịch giả, Ban tổ chức, Hội đồng tuyển chọn, Ban tổ chức bản thảo trong việc tổ chức hội thảo và xuất bản cuốn Kỷ yếu này.

Hà Nội, tháng 10 năm 2020

Ban Tổ chức Hội thảo

NHÀ XUẤT BẢN KHOA HỌC XÃ HỘI
26 Lý Thường Kiệt - Hoàn Kiếm - Hà Nội
ĐT: 024.39719073 - Fax: 024.39719071
Website: http://nxbkhxh.vass.gov.vn
Email:nxbkhxh@gmail.com

Chi nhánh Nhà xuất bản Khoa học xã hội
57 Sương Nguyệt Ánh - Phường Bến Thành - Quận I - TP. Hồ Chí Minh
ĐT: 028.38394948 - Fax: 028.38394948

GOOD GOVERNANCE AND ANTI-CORRUPTION: OPPORTUNITIES AND CHALLENGES IN THE ERA OF DIGITAL TECHNOLOGY

(International Conference Proceedings)

QUẢN TRỊ TỐT VÀ PHÒNG, CHỐNG THAM NHŨNG: CƠ HỘI VÀ THÁCH THỨC TRONG KỶ NGUYÊN CÔNG NGHỆ SỐ

(KỶ YẾU HỘI THẢO QUỐC TẾ)

Chịu trách nhiệm xuất bản:
PGS.TS. PHẠM MINH PHÚC

Biên tập nội dung: Trần Lệ Thu
Kỹ thuật vi tính: *PhusyBooks*
Sửa bản in: Lệ Thu
Trình bày bìa: *Phusybooks*

In 550 cuốn, khổ 19 x 27cm, Công ty Cổ phần sách và Phát triển Giáo dục Việt Nam
Địa chỉ: Số nhà 73, tổ 34 Hoàng Văn Thụ, Hoàng Mai, Hà Nội
Số xác nhận đăng ký xuất bản: 1273-2021/CXBIPH/07-80/KHXH
Số QĐXB: 53/QĐ-NXB KHXH, ngày 19/04/2021
ISBN: 978-604-308-485-6
In xong và nộp lưu chiểu năm 2021

GOOD GOVERNANCE AND ANTI-CORRUPTION

OPPORTUNITIES AND CHALLENGES IN THE ERA OF DIGITAL TECHNOLOGY

(INTERNATIONAL CONFERENCE PROCEEDINGS)

QUẢN TRỊ TỐT VÀ PHÒNG, CHỐNG THAM NHŨNG

CƠ HỘI VÀ THÁCH THỨC TRONG KỶ NGUYÊN CÔNG NGHỆ SỐ

(KỶ YẾU HỘI THẢO QUỐC TẾ)

ISBN: 978-604-308-485-6

SÁCH KHÔNG BÁN