

IMPROVEMENT VIETNAM'S LAW ON CORRUPTION IN PRIVATE SECTOR

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Abstract:

Corruption in the private sector has become a topical issue in Vietnam. In fact, corruption has spread to the private sector and has closely related to corruption in the state sector. Anti-corruption law 2018 has regulated about this issue. Thus, this issue needs to be studied. In this paper, the author focuses on clarification regulations about corruption in private sector, the relationship between corruption in the private sector and state sector; give solution to improvement regulation of law and practical application.

Keywords: Corruption in private sector, Anti-corruption law, Improvement, Vietnam

I. Introduction

Corruption is an objectively negative social phenomenon and it received much attention from the State, society and researchers. Cause a negative social phenomenon, corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish¹. In Vietnam, corruption is a topical issues. 43% people said corruption is a problem that the Government needs to solve after poverty reduction, food safety, security/crime². Previous studies have also shown that people have a particular interest in corruption in the private sector, people participating in the study believe that large private companies/corporations dominate government policy for their own benefit, this reflects widespread public concern and discussion about the negative impact of interest groups on Vietnam's socio-economic development³.

In the fight against corruption, Vietnam always considers building a strict legal framework as one of the most effective measures. At the same time, this is also the obligation of member states to participate in The United Nations Convention against Corruption (UNCAC). Vietnam has shown its interest in the issue of corruption in the private sector by codifying it in Chapter VI, Anti-corruption law 2018. However, this is the first time this issue has been mentioned at the Law level, so there are still many shortcomings that need to be research and evaluate. Therefore, the study was conducted to address the following issues:

(1) What is the current law on corruption in the private sector in Vietnam? And what are the inadequacies in the law?

(2) What is the current state of corruption in the private sector in Vietnam? Which are solutions to improve Vietnam's legal regulations on corruption in the private sector that the study could make?

II. Materials and Methods

The study uses secondary data from the research papers of the Vietnam Chamber of Commerce and Industry (VCCI), Towards Transparency, United States Agency for International Development (USAID), United Nations Development Program (UNDP), Center for Social Governance Research (CENSOGOR), Vietnam Business Forum (VBF) from 2017 to present. The author has conducted a survey on issues including the current state of corruption in the private sector in Vietnam; data on the legal basis for anti-corruption in the private sector. On the basis of survey data, the author uses analytical methods to clarify the research issues of the study.

In addition, the author also uses the desk review method to analyze and review relevant legal documents such as Anti-Corruption Law 2018, Penal Code 2015 (Amended and supplemented in 2017), the Law on Enterprises, documents of the Party and State of Vietnam related to the research issue. On the basis of analysis, author has review and clarify legal regulations on the research issue, the consistency between legal documents, current limitations of Vietnamese law and propose solutions.

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¹ UN (2004), *United Nation Convention Against Corruption*, pp.iii

² Towards Transparency (2019), *Vietnam Corruption Barometer Report 2019 (VCB-2019)*, Hong Duc Publisher, pp, 12

³ Towards Transparency (2019), *Ibid*, pp, 19

III. Research results

Vietnam has had regulations on corruption in the private sector. This regulation comes from the social practice and anti-corruption views of the Vietnamese Party and State. However, the current regulations still have certain shortcomings such as lack of consistency, nonconformity of the Anti-corruption Law 2018 with provisions of UNCAC.

Corruption in the private sector in Vietnam has a serious tendency. Enterprises tend to pay more than informal fees, accepting the payment of commission to win bids. Corruption in the private sector includes both of petty corruption and grand corruption, which is shown through the secondary data presented by the author.

The author assesses that the 2018 anti-corruption law needs specific guidelines for the private sector. At the same time, it needs to expand the subject matter of corrupt acts to be commercial legal entities, with appropriate legal sanctions. In addition, it also needs to add private corrupt acts under UNCAC. Its solutions to improve the law to improve the effectiveness of the fight against corruption in the private sector.

IV. Discussion

4.1. Corruption and Corruption in private sector

Corruption is approached from many different angles, but in a widely understood way in society, it is associated with the powerful (usually the public sector); it can be understood as an exchange in which the role of the official is emphasized as *"a form of secret social exchange through which those in power (political or administrative) take personal advantage, of one type or another, of the influence they exercise in virtue of their mandate or their function"*⁴. But the most common approaches are in the form of "behavior". According to the Anti-corruption law 2018, corruption means *"an office holder's abuse of his/her official capacity for personal gain"*⁵. This definition is the unified view of the Vietnamese state and is quite similar to international regulations on corruption. In the above definition, it can be seen that corruption includes three characteristics: (1) acts performed by persons in positions and powers; (2) taking advantage of positions and powers to perform; (3) the act is done for personal gain purposes. Acts are considered corrupt when all three factors mentioned above are present. If one of those three elements is missing, it may be a violation of other laws. Corruption in private sector may include, but is not limited to: bribery, embezzlement, cover-up tolerated or manipulation, fraud, embezzlement of public funds⁶. Bribery is the most common form of the private sector's corruption⁷. Bribery is usually the response or payment of individuals/businesses to state agencies to create beneficial influence on their side. Bribery is also known as "Sweetener" - payments to state officials to speed up the handling of business-related issues. Other corrupt behaviors such as cover-up, tolerance can be understood as a bias in resource allocation⁸.

In the past, corruption was often associated with an element of state power and occurred in the public sector. However, the development of society led to a close relationship between the public and private sectors. This relationship as "communicating vessels" because of its reciprocal effects. The private sector is sometimes a hidden place for corrupt behavior in the public sector⁹. In this aspect, businesses are seen as "victims" as well as "causes". Corruption is a problem and challenge for businesses in Vietnam. The Vietnam Business Forum in 2017 pointed out that "corruption is considered a major risk for foreign-invested companies. Bribery has become a business problem. A lot of companies see this as an inevitable problem without solution"¹⁰.

Currently, Vietnam has provisions on private corruption in the 2018 anti-corruption law. The basis of this provision can be explained as follows:

⁴ Mény, Yves (1996), *Fin de siècle' corruption: change, crisis and shifting values*, International Social Science Journal, vol.48, no.3, pp.309-320.

⁵ Vietnam's Anti-Corruption Law 2018, Article 3 (1)

⁶ Klitgaard, Robert (1988), "Kiểm soát tham nhũng", University of California Press.

⁷ Luo, Yadong (2005), *Quan điểm từ góc nhìn của tổ chức về tham nhũng*, Management and Organization Review 1, no. 1, pp. 119-154

⁸ CENSOGOR (2017), *Báo cáo: Phòng ngừa tham nhũng trong kinh doanh đánh giá dưới góc nhìn thực tiễn doanh nghiệp*, pp. 14.

⁹ UNDP (2020), *Report on Anti-Corruption Legislation in The Private Sector and Propose Guidance for Enterprise*, pp. 7

¹⁰ CENSOGOR, VBF (2017), *Report: Analysis of Corruption Risks for Investors in Vietnam*, pp. 16

Firstly, the reality of Vietnam, shows that the state tends to share more and less public services for businesses in the private sector because of the efficiency and benefits it brings¹¹. In addition, many private economic groups have become partners in providing services to the state in areas such as public administration services, transportation, construction, education, health care, up to material supply investment, goods, technical means for security and defense...¹². In fact, by sharing work with the private sector, the state has made it "powerful". This lead makes the private sector act of abuse of power for personal gain, which is corruption.

Secondly, according to the traditional perception, business owners cannot betray their interests. But reality has shown that, at present, the public and private sectors have a relationship like an "communicating vessels", so corruption has spread to the private sector. Besides, from an economic perspective, corruption in the private sector will negatively affect the economy, increase costs and significantly reduce profits of enterprises, and form unhealthy business habits, distorting the nature of economic relations¹³.

Thirdly, the regulation on corruption in the private sector aims to legalize the policy "*step-by-step expanding the anti-corruption activities to the non-state sectors*", at the conclusion No.10-KL/TW on December 26, 2016, of Political Bureau about continuing the implementation of 3rd Central Resolution (X) on strengthening the Party's leadership in anti-corruption and waste prevention. In addition, the legalization of private corruption also serves to fulfill the obligations of a member of the United Nations Convention against Corruption (UNCAC). Of which, Article 12 stipulates that "*each Member State shall take measures to prevent corruption related to the private sector, strengthen accounting and auditing standards in the private sector, promulgate appropriate and deterrent civil, administrative or criminal sanctions for acts that do not comply with these measures*".

4.2. Vietnamese legal framework on/about corruption in the private sector

Currently, Vietnam's legal framework for corruption in the private sector is concentrated in the 2018 Law on Anti-Corruption and several guiding documents and related legal documents such as on Penal Code 2015 (Edit amended and supplemented in 2017), the Law on Enterprises. In the 2018 Anti-Corruption Law, there are a total of 10 related articles and clauses, specifically:

Article 2(2) stipulates corrupt acts committed by people with positions and powers in enterprises and non-state sector organizations, including: Embezzlement; Taking bribes; Bribing or brokering bribery for taking advantage of one's influence over the operation of the enterprise or organization, or for personal gain. This is a new point in the provisions of the Anti-Corruption Law 2018.

Article 3(2)(d) explains the term an "office holder" in the private sector that is holders of managerial positions in organizations. It means a person that is designated, elected or employed under a contract or another form of employment, receiving or not receiving salaries, assigned certain duties and authority to perform such duties.

Article 4(2) stipulates the responsibilities of enterprises and non-state sector organizations in anti-corruption including: Implement measures for prevention of corruption; discover and report any act of corruption that occurs within their organization to competent authorities, and cooperate with competent authorities in taking actions in accordance with its rules and regulations; Promptly provide information about acts of corruption committed by office holders and cooperate with competent authorities in prevention and taking actions against such acts of corruption.

Article 76 stipulates the responsibilities of enterprises, associations of enterprises and industry associations in anti-corruption: Enterprises, associations of enterprises and industry associations have the responsibility to disseminate and encourage their employees and members to implement anti-corruption laws; organize implementation of measures for prevention and discovery of corrupt activities; report corrupt activities to competent authorities; Enterprises, associations of enterprises and industry associations have the responsibility to propose amendments to anti-corruption laws and policies; Competent authorities shall cooperate with enterprises, associations of enterprises and industry associations in holding forums for discussion and provision of information serving anti-corruption activities.

¹¹ Economic and Financial Times Online, *More "open" for the private sector to participate in public service delivery*, <http://thoibaotaichinhvietnam.vn/pages/kinh-doanh/2020-10-19/mo-hon-nua-cho-tu-nhan-tham-gia-cung-ung-dich-vu-cong-93703.aspx> [Access: July 2, 2021]

¹² Nguyen Van Huong, *The issue of criminalizing provisions of the United Nations Convention against Corruption in Vietnam*, <http://tks.edu.vn/thong-tin-khoa-hoc/chi-tiet/79/113> [Access: July 2, 2021]

¹³ UNDP (2020), *Ibid*, pp. 7-8

Chapter VI of the Law on Anti-corruption with 5 articles stipulates anti-corruption, business integrity practice in enterprises and organizations in the non-state sector, including: Professional ethics and business ethics (Article 78); Development of code of conduct and internal control mechanism for inhibition of corruption (Article 79); Implementation of anti-corruption measures in enterprises and non-state organizations (Article 80); Inspection of implementation of anti-corruption law by enterprises and non-state organizations (Article 81); Discovery of corruption in enterprises and non-state organizations (Article 82).

Article 95 stipulates actions against other violations against anti-corruption laws in enterprises and non-state organizations.

Guidelines for the Anti-Corruption Law 2018, on July 1/2019, the Government issued Decree No. 59/2019/ND-CP to guide the application of anti-corruption measures in enterprises and non-state organizations. In addition, Vietnam also stipulates criminal liability for commercial legal entities in case of corruption-related crimes in the 2015 Penal Code, according to regulations, commercial legal entities can be prosecuted for criminal liability for money laundering.

From the provisions of the Law on Anti-Corruption 2018, it can be seen that currently, most of Vietnam's regulations are in the form of "guidelines" and "recommendations", there are no clear sanctions for the corruption in private sector (except for cases of the public and private sectors are collaborated to act corruption. In addition, commercial legal entities are not subject to crimes related to corruption (except for money laundering); There is a lack of consistency between the Anti-Corruption Law, the 2015 Criminal Law and the Enterprise Law when defining what is the non-state sector.

4.3. Practical issues about corruption in private sector

To give an overview of the reality of private corruption in Vietnam, the author used secondary data from the PCI provincial competitiveness index report from 2016 to 2020.

In 2016, PCI 2016 Report is based on the survey results of 12,079 enterprises (excluding FDI enterprises)¹⁴. The report shows that on average about 66% of enterprises in the median province reported making regular payments of informal payments, higher than in the 2008-2013 period. 9%-11% of enterprises participating in the survey from 2014-2016 said that expenditures for this category alone accounted for more than 10% of their total revenue, much higher than 6-8% in the previous 5 years. Besides, enterprises believe that the situation of corruption when handling procedures for businesses is still common, this indicator has improved in the past 2 years (decreased from 65% in 2013-2014 to 58% in 2016) but is still high compared to the survey results of previous years (2006-2012)¹⁵.

In 2017, the PCI 2017 Report conducted an annual survey of over 8,000 private enterprises in 63 provinces and cities across the country. The number of private enterprises participating in the survey response in 2017 was 8,292 enterprises¹⁶. The report has shown 59% of enterprises have to pay informal expenses (Compared to 66% of 2016), 9.8% of enterprises have to pay more than 10% of revenue for informal expenses (Compared to 11.1% of 2015). The report also shows that enterprises rate 72% of civil servants to handle their work effectively. 13% of inspection contents are duplicated (Compared to 26% in 2015)¹⁷, 32% of enterprises reported paying unofficial fees to speed up land procedures¹⁸.

Compared to 2017, the PCI 2018 report has conducted a survey of 8,681 enterprises¹⁹. The phenomenon of "petty corruption" – small-scale lubricating costs that businesses have to pay to apply for licenses – decreased in 2018 compared to the previous period. Only 54.8% of enterprises have to pay informal fees, the lowest in the past 5 years. The scale of informal payment tends to decrease when only 7.1% of enterprises report that they have to pay more than 10% of revenue for informal expenses. 58.2% of enterprises reported that there was a phenomenon of harassment when officials of local state agencies handled procedures for enterprises, a decrease compared to the previous year. The 2018 PCI also noted that "grand corruption" showed signs of abatement. Only 30.8% of enterprises reported paying informal fees to speed up land procedures (down from 32% last year). Most impressively, 39.3% of enterprises reported that they paid unofficial fees for inspection and inspection staff (in

¹⁴ VCCI, USAID (2016), *The Provincial Competitiveness Index 2016* (PCI 2016), pp. 16

¹⁵ VCCI, USAID (2016), *Ibid*, pp. 33 - 34

¹⁶ VCCI, USAID (2017), *The Provincial Competitiveness Index 2017* (PCI 2017), pp. 3

¹⁷ VCCI, USAID (2017), *Ibid*, pp. 41- 47

¹⁸ VCCI, USAID (2017), *Ibid*, pp. 51

¹⁹ VCCI, USAID (2018), *The Provincial Competitiveness Index 2018* (PCI 2018), pp. 3

2017 it was 51.9% and in 2014 it was 65.6%). In 2018, 48.4% of businesses agreed with the statement that "Paying a commission is necessary to have a chance to win a bid" (in 2017 it was 54.9%)²⁰.

The PCI 2019 report conducted an annual survey of over 8,500 enterprises in 63 provinces and cities across the country. The number of private enterprises participating in the survey response in 2019 was 8,773 enterprises²¹. The PCI 2019 continued to receive positive feedback from the business community about the government's efforts in anti-corruption and reduce unofficial feeds in localities. In 2019, the percentage of enterprises agreeing with the statement that "Paying a commission is necessary to have a chance to win a bid" was only 41.2%, continuing to decrease compared to 48.4% in 2018 and 54.9% of 2017. In 2019, 54.1% of enterprises reported the existence of harassment when local government officials handled administrative procedures for businesses, down from 58.2% in 2018. The percentage of enterprises that said they had to pay unofficial fees in the PCI 2019 survey was only 53.6%, the lowest level in the past 6 years. About grant corruption, the percentage of businesses that reported paying unofficial fees to speed up land procedures, after decreasing from 32% in 2017 to 30.8% in 2018, increased to 36% in 2019²².

Although in the ranking of competitiveness, Vietnam increases year by year (ranked 70 in business environment 2019) but according to PCI 2020 conducted on 8,633 enterprises in 63 provinces and cities, nearly 44.9% said that they have to pay unofficial feeds. In which, 84.4% of enterprises said that unofficial feeds at an acceptable level, a significant increase compared to 79.2% in 2016. Percentage of enterprises that said that "harassment when handling business procedures is common" is 54.1% in 2020²³. 20% of enterprises assessed that state officials in handling work were still ineffective and unfriendly, and also 3% of enterprises reported that they were audited and inspected more than 5 times a year and 40% of businesses agree with the statement "paying a commission is necessary to have a chance to win the bid". About grant corruption, the percentage of enterprises paying unofficial feeds to speed up land procedures in 2020 returned to 32% in 2017, after increasing to 36% in 2019²⁴.

Through an overview of the private corruption situation in Vietnam, it can be seen that private corruption has existed and tends to develop over the years. This is reflected in the fact that enterprises have to pay unofficial costs in many forms, which can be administrative procedures, avoidance of inspection, spending to win bids...; The state of government officials being harassed to receive "sweetener" is still in existence, and businesses are also willing to pay. Especially, grant corruption in land licensing activities persists over the years and does not tend to decrease.

4.3. Inadequacies and suggestions for improvement of legal regulations

Firstly, the 2018 anti-corruption law extends beyond the state sector is a big step forward in awareness and legislation. However, the provisions of the 2018 anti-corruption law lack specific guidelines. Previously, Decree No. 47/2007/ND-CP dated March 27, 2007 of the Government guiding the 2005 anti-corruption law stipulating the role and responsibilities of society in anti-corruption and regulations to guide enterprises, business associations and professional associations in the anti-corruption work. The Decree clearly states that enterprises apply anti-corruption measures through the implementation of fair competition in production and business; fulfill obligations towards the State and employees; implement the statistical regime; perform of democracy, openness and transparency. However, Decree No. 47/2007/ND-CP has expired, while Decree No. 59/2019/ND-CP dated July 1, 2019 of the Government guiding the Anti-Corruption Law 2018, there were no guiding provisions for Articles 4 and 76. For example, the Law and Decree No. 59 only state the principle that enterprises, business associations, and industry associations are responsible for organizing the implementation of measures to prevent and detect corruption, but have not yet provided guidance on how to implement them. This shows that Decree 59 completely omits some provisions on the private sector, some of which may even be misleading. In the opinion of experts, the Law and by-law documents are not enough to help enterprises have sufficient awareness and action in the field of anti-corruption. International experience shows that all countries have researched and issued specific guidelines for businesses to ensure consistency and compliance with the law. Consequently, Vietnam needs to study and issue detailed guidelines for anti-corruption work in the private sector to fill the current legal gaps.

²⁰ VCCI, USAID (2018), *Ibid*, pp. 6-7

²¹ VCCI, USAID (2019), *The Provincial Competitiveness Index 2017* (PCI 2019), pp. 19

²² VCCI, USAID (2019), *Ibid*, pp. 24 - 25

²³ VCCI, USAID (2020), *The Provincial Competitiveness Index 2020* (PCI 2020), pp. 27

²⁴ VCCI, USAID (2020), *Ibid*, pp. 62-63

Secondly, according to the provisions of the current anti-corruption law, the scope of subjects in the private sector is quite narrow, section 2 application of the anti-corruption law to enterprise and non-state organizations to "regulations are applicable to public companies, credit institutions, social organizations whose establishment is decided by the Prime Minister, the Minister of Internal Affairs or Presidents of the People's Committees of provinces, and social organizations whose charter allow raising of charity funds from the people"²⁵. With the current development of Vietnam's economy, the private sector has a mutual interaction and close relationship. Too narrow scope of actors will lead to the impossibility of anti-corruption regulation in practice, in addition to the omission of corrupt practices, leaves seeds for corruption to flourish in the private sector. Consequently, Vietnam needs to expand the scope of the subject of private corruption to all private economic organizations, even household businesses.

Thirdly, Article 2 (2) of the 2018 Anti-Corruption Law stipulates that corrupt acts in the private sector include: property embezzlement, bribery, give bribes, and broker bribes to solve the problems of businesses and organizations for personal gain, showing that the subjects include both commercial legal entity and individual. This provision leads to conflicts with the Penal Code 2015 (amended and supplemented 2017) when commercial legal entity is not criminal liability for crimes related to corruption and positions. In addition, UNCAC have regulation about criminal liability for commercial legal entity for act of corruption in private sector. Therefore, the provisions of the Penal Code need to be revised in the direction of stipulating the criminal liability of commercial legal entity for crimes related to corruption to contribute to improving the effectiveness of anti-corruption work. Besides, Vietnam's current regulations still lack a number of acts that UNCAC considers corrupt such as: embezzlement of property in private sector, concealment, obstruction of justice, trading in influence, illicit enrichment..., this needs to be considered for additional research.

Fourthly, in the provisions of the Enterprise law 2020 related to corrupt acts, there are still some points that are not consistent with the provisions of the anti-corruption law. Specifically, in Article 8 of the Enterprise Law 2020 in the prohibited acts, there is no bribery, this leads to inconsistencies between The Anti-corruption law and The Enterprise law. Therefore, it is necessary to have a timely supplement to ensure consistency in the legal system. In addition, the current Vietnamese legal regulations still lack provisions such as: bribing foreign officials, regulations on the prohibition of bribery affecting unfair competition in business (for example, management enterprises pay commission to become purchasing partners of other businesses), regulations on preventing illegal enrichment in the private sector...

V. Conclusion

Private corruption is a currently alarming problem in Vietnam. Meanwhile, relevant legislation still has certain shortcomings. The private sector itself is closely linked to the public sector, acting as both "victim" and "causes", at the same time, there have also been corrupt acts within the private sector. Thus, improvement the law on private corruption is an urgent requirement. The study presented the results related to the status and improvement of the law on private corruption in the context that this type of corruption is spreading and developing in the business environment in Vietnam.

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²⁵ Vietnam Anti-corruption 2018, Article 80 (1)

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