

Legal Policy of Gratification Crime: Conceptual Issues in the Indonesian Criminal Law System

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Abstract

Corruption is increasingly widespread in society, its development continues to increase both in cases and State's financial losses and in terms of the quality of criminal acts committed more systematically and its scope that enters all aspects of peoples' lives. The research is a juridical-normative research by using statute, case, historical, comparative and conceptual approaches. The processing and analysis of legal materials was aimed to find pragmatic truth and/or coherence. The results show that the essence of the gratification arrangement in the Corruption Acts is to eliminate the sense of injustice for the corruptor, in terms of the value of corruption with a relatively small amount. Even though the value of corruption is large or small, the act is still corruption. If reviewed normatively, gratification has the meaning of giving in the broadest sense, both received at home and abroad and that conducted by using electronic or without electronic. Whereas, bribery has a narrower meaning because the intention of the bribe giver and receiver is clear and contains unlawful act. The improvement of criminal law policy plan on gratification offenses needs to be done so that the criminalization of gratification can be more comprehensive so that the Corruption Acts becomes a practical and effective legislation to eradicate corruption.

Keywords: *Corruption; Criminal Law; Gratification; Legal Policy*

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1. Introduction

Constitutively, the Indonesian State aims to protect to protect the entire nation and all of Indonesian peoples, to promote public welfare, to educate the life of nation, and to participate in maintaining world-order. Recently, we are facing a rapid momentum of change, especially in the fields of economy, science and information technology.¹ Change requires opportunities and threats, which in turn can lead to success or failure.

Currently, Indonesia as a State and nation entity is participating in a momentum of change globally, regionally and nationally. These changes raise hopes for more real and progressive changes in national and State life. One of the factors causing the high cost economy and being potential threats of the

¹ Harris, C., & Laibson, D. (2012). Instantaneous gratification. *The Quarterly Journal of Economics*, 128(1), 205-248.

nation is to lead Indonesia to become a “failed State” in the phase of change.

Corruption as one of crimes related to human rights, State ideology, economy, State finance, national morals, and so on.² According to Rober Klitgaard³ that corruption is a behavior that deviates from the official duties in a position because personal benefits, status or money (individuals, family, and groups) or violates the implementing rules of personal behavior.

Corruption is classified as an extraordinary crime. In the Decree of Constitutional Court No.003/PUU-IV/2006, the Court has taken the prosecutor’s opinion of the Corruption Eradication Commission and the Attorney General that views corruption as an extraordinary crime. Furthermore, in the explanation of Act No. 30 of 2002 concerning the Corruption Eradication Commission (hereinafter referred to as the Corruption Eradication Commission Acts), Part I General mentioned that corruption cannot be categorized again as ordinary crimes but as an extraordinary crime.

In fact, corruption is increasingly widespread in society, its development continues to increase both in cases and State’s financial losses and in terms of the quality of criminal acts committed more systematically and its scope that enters all aspects of peoples’ lives. Based on the effect or impact, the increase in uncontrolled corruption will bring disaster not only to the national economy but also to the life of the nation and State in general. Also, widespread and systematic corruption is a violation of social and economic rights of the community.⁴

Table 1. Indonesian Corruption Perception Index by Transparency International Indonesia

Year	CPIs Score	CPI Level	Number of Surveyed Countries
2008	2,6	133	180
2009	2,8	110	180
2010	2,8	110	180
2011	3,0	100	183
2012	32	118	176
2013	32	114	177
2014	34	107	175
2015	36	88	168
2016	37	90	176
2017	37	96	180
2018	38	89	180

Source: *Transparency International Indonesia, 2019 (edited).*

Based on both considerations, the criteria used to classify a criminal act as an extraordinary crime is based on the fact of the existence of the criminal and the risks or dangers it can cause. According to

² Ermansjah Djaja. 2010. *Memberantas Korupsi Bersama KPK*. Jakarta: Sinar Grafika. p. 1

³ Robert Klitgaard. 1998. *Memberantas Korupsi*. Jakarta: Yayasan Obor Indonesia. p. 31.

⁴ Sugeng Purnomo, Muhadar, Farida Patittingi, and M. Said Karim. (2018). Corruption Crime in Lending to the Government Banks: A Challenge in Criminal Law, *Journal of Law, Policy and Globalization*, Vol. 80.

the research of Anti-Corruption Institution, *Transparency International Indonesia*⁵ report that in the last ten years (2008 to 2018) the level of corruption in Indonesia is still categorized as country with lowest Corruption Perception Index as shown in Table 1.

Table 1 shows that in 2008-2018 there is progress in terms of corruption eradication in Indonesia, although it is considered slow and still classified as a category of countries with low CPI. At ASEAN level, for 2018 with CPI score 38, Indonesia in 4th position after Singapore in the first position with a score of 82, and the second position is Brunei Darussalam with CPI score 62 and the third position is Malaysia with CPI score 47.

One dimension of corruption is gratification that received by public servants or State administrators. The cases as occurred become the public discussion and it occurs in almost every sector of national and State life. In the survey of *Global Corruption Barometer (GCB)* that released by *Transparency International Indonesia* on March 7, 2017 revealed that from 1000 respondents in Indonesia there were 32% who claimed to have committed bribes. It different when asked a similar question to Japanese citizens, the figure is very small at 0.4%.⁶

The problem of gratification is identical to the reality of the relatively small salary of civil servants or disproportionality between income and expenditures of civil servant on basic needs that must be met by them so that it is considered proper for civil servants to receive money or goods from the citizens in doing their duties as additional income.

In essence, the gratification in relation with positions that are contrary to their obligations or duties is a corrupt act that is considered despicable because a civil servant or State official as a public official should not receive gifts because they can cause conflict of interest with their position. However, it is not easy to develop legal awareness of corruption. Reflectively, the depiction of criminal law enforcement is not in a vacuum and has limitations, in this case in order to achieve the goal of law enforcement itself, namely legal order.⁷

Legal practices that occur in a corruption in the form of receipt of gifts such as money or goods by civil servants or State administrators are alleged with multiple indictment and subsidiarity. The implication of the difference in the criminal offense has led to disparities in the application of law and injustice and legal holes to exploit the weaknesses of the offense formula in the law.

⁵ Transparency International Indonesia conducts a research and rating of countries that considered capable of eradicating corruption from countries in the world and *Corruption Perception Index (CPI)* is an indicator that measures public perceptions of the public service sector in a country by providing value with a scale between 0 (most corrupt) to 10 (cleanest) then since 2012 it experiences changes of methodology and index scale becomes 0 - 100. See <http://www.tii.org.id/corruption-perception-index>, accessed on 2 February 2019.

⁶ Data Global Corruption Barometer. Source: www.ti.or.id, accessed on 3 February 2019.

⁷ Francis A. Allen. 1974. *The Political of Criminal Justice*. University Chicago Pers. p. viii

2. Method of Research

The type of research is juridical-empirical research or a socio-legal research, which examines the legal provisions and what happens in communities.⁸ It was conducted at the Attorney General of the Republic of Indonesia, the Directorate of Corruption Crimes of the Indonesian National Police, the Corruption Eradication Commission, and the Supreme Court of the Republic of Indonesia.

3. The Essence of the Arrangement of Gratification in the Legal System in Indonesia

Law enforcement provides benefits or uses for the community, in the sense that the implementation of the law may not cause unrest in the community. In law enforcement, justice or fairness must really be considered. In addition, it should also be considered that the law enforced must be a law that contains the values of justice. In essence, the law enforcement lies in the activities of creating, and maintaining peace of life.

The function of law enforcement itself is to actualize the rules of law so that it is suitable with the ideals of the law to realizing human attitudes or behavior in accordance with the rules established by law. The law enforcement system with good values is related to the harmonization between values and the rules and real human behavior.⁹

Law enforcement is intended to improve order and legal certainty in society. It conducted by disciplining the functions, duties and authorities of institutions to enforcing the law according to the proportions of their respective scope, and based on a good system of cooperation and supporting the goals to be achieved. The level of community development where the law is enforced affects the pattern of law enforcement because in modern societies that are rational and have a high level of specialization and differentiation, the organization of law enforcement is also increasingly complex and bureaucratic.

Theoretically, a systematic study of law enforcement and justice is declared effective if 5 (five) pillars of the law go well, namely legal instruments, law enforcement officials, factors of citizens affected by the rule of law, legal culture, as well as facilities that can support the implementation of the law. Hikmahanto Juwono¹⁰ stated that in Indonesia, traditionally the legal institutions that conduct law enforcement are the Police, the Attorney General, the Judiciary Body, and the Advocates.

Corruption has become an extraordinary crime as well as in effort to eradicate it cannot be done again normally, but it is demanded in extraordinary ways and in special ways and exact and specific steps involving all the potential that exists in communities, especially the government and law enforcement officers. Corruption of one country with another country from the intensity and mode of operation is

⁸ Bambang Waluyo, 2002, *Penelitian Hukum Dalam Praktek*, Sinar Grafika, Jakarta, pp 15-16

⁹ Siswanto Sunaryo. 2004. *Penegakkan Hukum Psikitropika (Dalam Kajian Sosiologi Hukum)*. Jakarta: PT. Grafindo Persada. pp. 70-71

¹⁰ Hikmahanto Juwono, 2006, *Penegakan Hukum Dalam Kajian Law and Development: Problem dan Fundamen Bagi Solusi di indonesia*, Jakarta: Majalah Varia Peradilan, No.244. p. 13.

very dependent on the quality of peoples, customs, and its law enforcement system.¹¹

Bribery corruption originates from bribery offense (*omkoping*) in the Criminal Code. The Criminal Code itself distinguishes between 2 (two) groups of bribery offense, namely accepting and giving bribes. The first is called active bribe (*actieve omkoping*), the legal subject is giver of bribes.

Certainly, giving a gift as an act of someone who gives something (money or goods/services) to other is allowed. However, if the gift is expected to be able to influence the decision or policy of the gifted official, then the gift is not just a greeting or gratitude, but as an attempt to get benefit the official or examiner that will affect the integrity, independence and objectivity, and it is not justified and it can be categorized as gratification.

There is an argument why the recipient of gratification is considered as reprehensible act, it is based on moral reasons that public officials should not receive gifts because they may cause a conflict of interest with their positions. The question that often arises is why gratification giver is not classified as unlawful? The reason is very simple, namely the difficulty of proving the evil intentions of gratification giver (Table 2).

Table 2. Provisions on gratification in the Corruption Criminal Laws

Understanding	Action	Mistake	Punishment
In the broadest sense, the giving includes money, goods, discounts, commissions, loan without interest, travel tickets, lodging facilities, travel, free medical treatment, and other facilities. The gratifications were received both at home and abroad and which were conducted using electronic or without electronic media. (Elucidation of Article 12B)	Receiving material/having economic value which when receiving is attached to a public position (Article 12B) Reasons for Eliminating Action Reporting for something receipt in 30 days (Article 12C)	Cannot be proven the malicious intentions of gratification receiver, but <u>possible</u> there is malicious intentions of gratification giver in the form of certain interests in the future. The value of honesty and good intention of public officials	Life sentence, or a minimum of 4 years and a maximum of 20 years, and a minimum fine of 200 million rupiah and a maximum of 1 billion rupiah (Article 12B)

Source: Primary data, 2019 (edited).

Legal practices that occur, a criminal offense of corruption in the form of receiving gifts, whether in the form of money or goods by civil servants or State administrators are alleged with multiple indictment and subsidiarity. The implication of the difference in the application of offense in a crime has led to disparities in the application of law and injustice and legal hole to exploit the weaknesses of

¹¹ Djoko Sumaryanto. 2009. *Pembalikan Beban Pembuktian*. Jakarta: Prestasi Pustaka. p. 2.

the offense the law. Implications of the application of positive criminal law instruments provide a space for criminalization as a general crime (Criminal Code and Act No. 11 of 1980 on Bribery) and as a special crime (Act No. 31 of 1999 on Eradication of Corruption) leads to the law criminal procedure and competence of the court authorized to examine, hear and decide on a criminal case.

Jeremy Pope¹² argues that corruption is more easily found in various fields of life. *First*, the weakening of social values, personal interests become more important than the public interest, and the ownership of objects individually becomes the personal ethic that underlies the social behavior of most people. *Second*, there is no transparency and accountability of the public integrity system. Various groups consider that corruption seems to have penetrated all life and seems to have been integrated with the State governance system. According to Patrick Glynn, Stephen J. Korbin and Moises Naim,¹³ both actual and perceived exist in several countries, due to systematic political changes, so that it weakens or destroy not only social and political institutions but also the law.

The author believes that the arrangement of the gratification offense actually shows progress in the criminal law system in Indonesia because the arrangement will actually form the mindset of the State apparatus to act professionally in doing its main duties and functions. In principle, giving something to others is not a legal problem, but if it has an impact on the performance of the State official, then it is appropriate to regulate it in the legal system so that it does not become a bad habit for the State administrators.

4. An Ideal Concept of the Gratification Offense in the Renewal of National Criminal Law

Corruption eradication must be a priority on the government agenda to be resolved seriously and urgently and as part of a program to restore the public trust and the international community in order to enhance the economic growth of a country, including Indonesia. Criminal law enforcement, like the law enforcement process in general involves a minimum of three related factors, namely legal, law officers or, and legal awareness.¹⁴

The discussion of these three factors can be related to the division of three components of the legal system, i.e *legal substance*, *legal structure*, and *legal culture*. In the criminal justice system, the establishment of the Corruption Eradication Commission in this reform era raises problems because it will disrupt the existing system, namely the criminal justice system against corruption or the law enforcement system against corruption.

In daily life, giving or gifts is an ordinary act and there is no relation with unlawful acts. But it is different if the giving or gift is given to someone in relation with their position as an official or State

¹² Jeremy Pope. 2003. *Strategi Memberantas Korupsi*. Edisi Ringkas. Jakarta:Transparency International Indonesia. p. 2

¹³ Kimberly Ann Elliot. 1999. *Corruption and The Global Economy*. Edisi Pertama. Terjemahan Yayasan Obor Indonesia, Jakarta. p. 11.

¹⁴ Bambang Waluyo. 2014. *Optimalisasi Pemberantasan Korupsi Di Indonesia*. The Journal of Juridical. Faculty of Law, Universitas Pembangunan Nasional Veteran Jakarta. Vo. 1 No. 2. Jakarta. pp. 175-179

administrator with the intention that through such gift may influence the decision or policy of the government official who is given the gift, so the gift is an attempt to obtain the benefit. The act of giving something to government officials/administrators with an intention to obtain benefit is called gratification.

As described earlier it appears that there are weaknesses in the criminalization of the gratification crime in the Corruption Acts. Therefore, there needs to be an update (renewal) so that these laws and regulations are in accordance with the socio-political, socio-philosophical and socio-cultural values of the Indonesian people and also technological progress and social change.¹⁵ The most important improvement is done through the legal policy of the gratification itself.

As explained in Chapter II that legal policy is a basic policy in the administration of the State in the field of law that will, while and has been implemented and it originate from the values prevailing in society to achieve the goals of the country. It is inseparable from the social reality that exists in the country, and on the other hand, as a member of the world community, Indonesian legal policy is inseparable from the reality and international legal policy.

Legal policy is a basic policy that determines the direction, form and content of the law to be established or being enacted. It is actually more about the policy in the creation of law to determine the content and direction of the law and what matters are used as criteria for formulating good law.¹⁶ If it is specified in criminal law, then the legal policy of criminal law is a policy in the creation of criminal law to determine the contents and direction of the criminal law itself and what matters are used as criteria for formulating a better criminal law in accordance with social conditions and development of era, both philosophically and sociologically.

Actually, the formulation of norms of bribery and gratification in the Corruption Acts at the implementation level makes it difficult for prosecutors to apply. The difficulty is in terms of proving the crime itself. The formulation of Article 12B paragraph (1) begins with the element “*Every gratification to public servants or State administrators.*” The issue is whether any giving to State administrators is a prohibited gratification? According to the author, it is not certain that all gifts given to State administrators are prohibited gratification; it could be given in their capacity as social beings. For this reason, the proving of the “*malicious intent*” from a gift to the State administrator is very difficult to do, unless it is followed by concrete actions taken by the State administrator who violates the law.

Based on this explanation, according to the author, bribery and gratification need to be clearly distinguished. The author’s intention is that the provisions of Article 12B of the Anti-Corruption Acts should be amended by emphasizing that gratification is a separate form of criminal act which is independent of the provisions regarding bribery. Not to mention if looking at the elements of

¹⁵ Amir Ilyas, 2012. *Asas-asas Hukum Pidana, memahami tindak pidana dan pertanggungjawaban pidana sebagai syarat pemidanaan*. Yogyakarta: Rangkang Education, p. 31

¹⁶ Hendrik Dengah, M. Syukri Akub, Slamet Sampurno, Syamsuddin Muchtar. (2019). ‘Hand Catch Operation’ on Corruption Crimes: The Case of the KPK in Indonesia, *Journal of Law, Policy and Globalization*, Vol. 81, pp: 32

gratification contained in Article 12B of Act No. 20 of 2001, it can be said that these elements overlap with the elements referred to in the provisions of Article 5, 6, and 12 of Act No. 20 of 2001. If observes, then the formulation of Article 12B regarding gratification with the formulation of Article 5 and 6 has similar elements (Table 2), as seen on Table 3.

Table 3. Elements of gratification in Corruption Acts

Article 12B	Article 5	Article 6
1. The maker is civil servant or State administrator	1. The maker is civil servant or State administrator	1. The makers are judges and advocates
2. The act is receiving (giving in the broadest sense)	2. The act is receiving gifts or promises	2. The act is receiving gifts or promises
3. The giving is related to his/her position	3. The giving is intended that the civil servant or State administrator do or not do something in his/her position	3. The giving or promise is intended so that the judge or advocate doing something
4. Contrary to his/her obligations and duties	4. Contrary to his/her obligations	4. Contrary to their obligations

Source: Primary data, 2019 (edited).

Certainly, such provisions or norms will cause various problems in the aspect of law enforcement. For this reason, it is necessary to have a clear distinction on the regulation regarding the gratification which is certainly different from bribery. In criminal law, there are 3 (three) important principles that need to be examined in the context of the criminalization of an act, namely the principle of *Lex Scripta*, *Lex Certa*, and *Lex Stricta*. *Lex Scripta* emphasizes that statutory or law must regulate behavior that is considered a criminal offense. Without statutory governing prohibited acts, these actions cannot be said to be criminal offense. Furthermore, *Lex Certa* emphasizes that lawmakers must define clearly without vague (*nullum crimen sine lege stricta*), so that there is no ambiguous formulation of prohibited acts and sanctions.

Unclear or complicated formulations will only lead to legal uncertainty and hinder the success of (criminal) prosecution efforts because citizens will always be able to defend themselves that such provisions are not useful as guidelines for behavior. Whereas, *Lex Stricta* emphasizes that a material in a statutory regulation cannot be expanded or interpreted other than what is written in the legislation or in other words the principle of a provision or legislation cannot be extended unless it is determined clearly by the laws and regulations.

These conditions indicate inconsistencies in bribery and gratification in the Corruption Acts. Even if the lawmaker wants to distinguish between bribery and gratuity (gratification), then articles must be made that contain different elements of the two acts or crime and no longer categorize gratification as a bribe if it fulfills its elements.

Based on the construction of the law, then the formulation of gratification should be formulated comprehensively regarding the giver and recipient of gratification as a comprehensive rule so that in the case of the application of sanctions can refer to one article governing it. This has an impact on the principle of balance and fairness where the actors, both the giver and the recipient of gratification receive appropriate sanctions so that law enforcement regarding the gratification is suitable with the goal to be achieved namely justice and legal certainty.¹⁷

5. Conclusion

The essence of the gratification arrangement in the Corruption Acts is to eliminate the sense of injustice for the corruptor, in terms of the value of corruption with a relatively small amount. Even though the value of corruption is large or small, the act is still corruption. If reviewed normatively, gratification has the meaning of giving in the broadest sense, both received at home and abroad and that conducted by using electronic or without electronic. Whereas, bribery has a narrower meaning because the intention of the bribe giver and receiver is clear and contains unlawful act.

The ideal legal policy of gratification in the renewal of national criminal law is to formulate elements of gratification offense, including restrictions on what is acceptable or not acceptable to State administrators. The formulation of gratification offense in the Corruption Act is intended to form an anti-corruption culture within the scope of government so that good and clean governance can be realized. The criminalization of gratification is expected to be the beginning of the formation of a legal culture namely *zero tolerance to corruption*. Thus, there is a need for commitment and seriousness of the government in combating corruption through *non-penal* means. The improvement of criminal law policy plan on gratification offenses needs to be done so that the criminalization of gratification can be more comprehensive so that the Corruption Acts becomes a practical and effective legislation to eradicate corruption.

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¹⁷ Nur Mauliddar, Mohd. Din, dan Yanis Rinaldi. *Op.Cit.* pp. 170-171

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