

JOURNAL

**Disparity Regulation of Criminal Sanction
Between Bribery Article 5 Section (2) and Gratification Article 12B
Act Number 20 Year 2001 About Corruption Criminal Action**

SCIENTIFIC PAPER

To Fulfill Partly of the Terms
Acquire a Title Bachelorship
in Science of Law

By :

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**MINISTRY EDUCATION AND CULTURE
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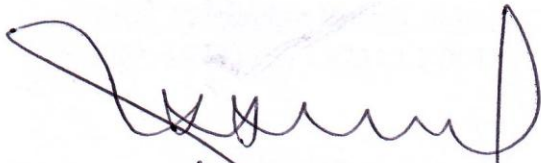
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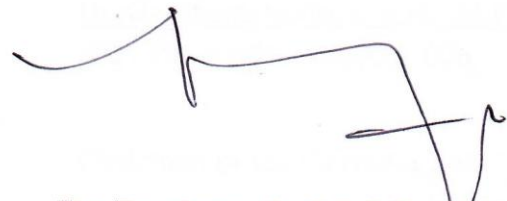
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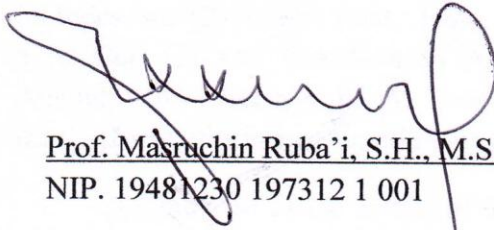
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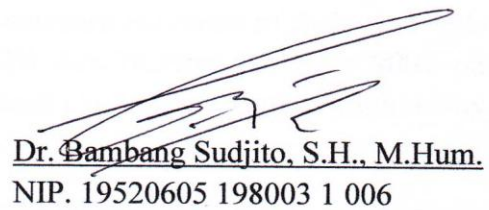
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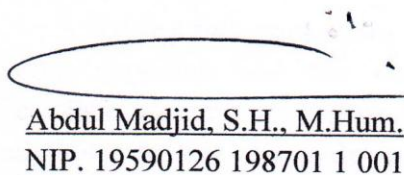
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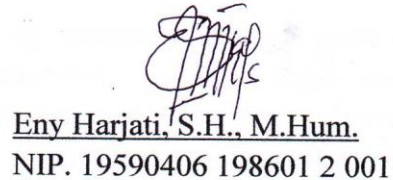
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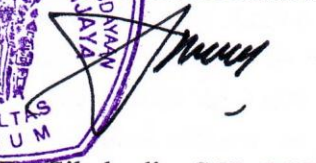
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KEYWORDS

1. The Disparity or Comparison of Law means to describe the similarity and the difference between law systems or to look for the essence of similarity of whole law systems.
2. Criminal Sanction, or usually known as criminal law, or sometimes just called as criminal, is an unpleasant feeling (misery) charged by the judge by giving verdict against the people who violate criminal law act.
3. Bribery is giving or promising something to civil servant or state caretaker in order to make this civil servant or state caretaker to do something or not to do something with their rank but it may stand in violating against their duty.
4. Gratification is the giving in wider sense of definition which involves money, goods, discount, commission, loan with no interest, traveler check, overnight facility, tourism journey, free medication, and other facilities. Gratification may be received within the host country or the foreign country, and can be given by electronic or by manual.
5. Civil servant is the employee who has met the qualification, been appointed by the incumbent officer, given assignment of an official rank, or given other kinds of state duty, and paid with salary based in the regulation.
6. State Caretaker is the state officer who implements the function of executive, legislative or judicative, or who works based on the function and principal task related to the organizing of state in pursuance of the regulation.

INTRODUCTION

Corruption is a community disease that is similar to other crime such as theft. It is indeed that corruption has been existed since the human knows the importance of community. Main problem is that corruption increases with the advance of prosperity and technology. It seems that the more civilized nation is experiencing the greater demand and courage of people to engage with corruption. Somehow, corruption means abusing state wealth in expense of state wellbeing.¹ The worse fact is that the abuse of state wealth is not committed by people in poverty. The state finance is not easily used by everyone, but only by people with authority or right given to manage for good reason. However, corruption is more recognized as the deed of state caretaker who supposes to be state officer.

State Caretaker is State Officer who positions at High Agency of State. They can be Minister, Governor, Judge, officers appointed with regulation (Temporary and Full-Authorized Ambassadors, Vice Governor, Regent/ Mayor), officers with strategic function related to the organizing of state based on specific regulation (Director, Commissioner, structural officers at state-owned and local-owned enterprises, the Leader of Bank Indonesia and National Banking Recovery Agency, etc).² These state caretakers are usually educated and coming from the afforded economic category. It is therefore appropriate to say that a factor causing people to do corruption is the defiance against Act Number 28 Year 1999 about The Organizing of State to Clean and Free from Corruption, Collusion, and Nepotism.

Corruption crime in Indonesia is a serious problem. Such criminal action begins to be a culture. Many daily newspapers have written about corruption criminal action. The hot lately issue is corruption case involving The Minister of Youth and Sport Mr. Andi Alfian Mallarangeng, The General Treasurer of Democrat Party Mr. Muhammad Nazaruddin,

¹ Andi Hamzah, **Perbandingan Pemberantasan Korupsi**, Sinar Grafika, 2004, hal 1.

² Undang – Undang Nomor 28 Tahun 1999 *tentang Penyelenggara Negara yang Bersih dan Bebas dari Korupsi, Kolusi, dan Nepotisme*. Citra Umbara, Bandung, 2009. Pasal 2.

and the defiant tax employee Mr. Gayus Tambunan. The bribery case is also popular, such as that involves the Chair of Constitutional Court Mr Akil Mochtar, the member of Commission X of Central House of Representative Mrs. Angelina Sondakh, Judge Muhtadi Asnun, Prosecutor Urip Tri Gunawan, Governor Banten Mrs. Ratu Atut Chosiyah, Regent Buol of Southeast Sulawesi Mr. Amran Batalipu, Chief of Sleman Village of Yogyakarta Mr. Sinduadi, and many others. These cases indicate that the organizing of state is not serving the people, but it is tormenting people with the excessive corruption.

The progressive eradication against corruption must be supported by reliable regulation products. For instance, Act Number 31 Year 1999 is amended with Act Number 20 Year 2001.³ Substantially, Act Number 31 Year 1999 which is revised by Act Number 20 Year 2001 has regulated several aspects entangling various modus operandi of more complex corruption criminal action. These Act formulate corruption criminal action as formal criminal action. Civil servant is defined in wider sense. The actor of corruption is not only defined as an individual but also as a corporate. Minimum sanction is determined for 20 years or lifetime imprisonment and it is already consistent to Article 5 and 12 of Act 31 year 1999 which is amended with Act Number 20 Year 2001 about The Eradication of Corruption Criminal Action.

Both Acts are causing a conflict to each other. Some new criminal actions that are not previously stated in Act Number 31 Year 1999 are found in Act Number 20 Year 2001. It is debated whether the criminal sanction of the corruption criminal action of accepting Gratification Article 12B is not relevant with that of Bribery Article 5 Section (2). Indeed, Article 5 Section (2) explains that the actors of active bribe (fixer) and passive bribe (briber) are agreeing that what is to do is wrong based on the state duty of the passive briber (civil servant and state caretaker) either committed or not committed within their rank / position. Meanwhile, gratification Article 12B is the action of accepting bribe if it

³ Kaligis, **Praktik Tebang Pilih Perkara Korupsi**, Bandung, 2008.

is related with the state duty or task, or defiant against the state duty or task of passive briber (civil servant and state caretaker). The sanction against bribe Article 5 Section (2) and gratification Article 12B is also different because the sanction of Article 12B is heavier because it still presumes that gratification accepted by passive briber (civil servant and state caretaker) is the result of the relationship with their state duty or task, or of being defiant against the state duty or task of civil servant and state caretaker. However, in essence, gratification Article 12B is not surely certain whether the gratification is the result of the relationship with the state duty or task, or of being defiant against the state duty or task.

PROBLEM FORMULATION

Based on the backgrounds above underline the problems formulated as following:

1. How is the comparison of criminal action of bribery Article 5 Section (2) and gratification Article 12B in the Act Number 20 Year 2001 about the Amendment of Act Number 31 Year 1999 about The Eradication of Corruption Criminal Action?
2. Why is there disparity of criminal sanction between bribery Article 5 Section (2) and gratification Article 12B in the Act Number 20 Year 2001 about the Amendment of Act Number 31 Year 1999 about The Eradication of Corruption Criminal Action?

METHOD OF RESEARCH

A. Type of Research

Type of this research is normative law research. Precisely, it is a law research conducted by examining literatures or secondary data. Normative law research also involves studying about law principles.⁴

B. Method of Approach

Some approaches are used in this research such as Statute Approach and Comparative Approach.⁵ Respectively, Statute Approach is the review of all statutes and regulations related to the law issues. Result of this review is an argument to solve the issues challenged. Comparative Approach is the comparison of content between law regulations observed and other specific laws.⁶ The comparison may be also useful to fill into the vacuum of positive law. Moris L. Cohen says that the comparative approach considers some materials such as: the Decision, Decree and Report of Government; the Note and Report of Appeal; the Opinion of General Prosecutor; the Report and Note of Advocate/Attorney Association; the Bibliography and Research Manual; the Biography; the Quote/Summary of Case and Statute; the Comment; the History and Survey of Law; the National Constitution; the Convention and its History; the Law Dictionary; the Abstracts of Case Law; the Manual of Advocate and Legal Support Agency; the Encyclopedia; the Document of Government; the Fiction and Anecdote of Law; the Source of Foreign Law and Comparative Law; the Source of Books; the Source of International Law; the Report of Court; the History and Source of Legislative; the Freelance Publishing Service; the Magazine and its Index, the Book of Manual of Practice and Procedure; the Book of Reference, Law and General; the Book of New Review about Law; the Book of Sources of

⁴ Soerjono Soekanto dan Sri Mamudji, **Penelitian Hukum Normatif Suatu Tinjauan Singkat**, Rajawali Pers, Jakarta, 2001, hal 14.

⁵ Peter Mahmud Marzuki, **Penelitian Hukum**, Kencana, Jakarta, 2005, hal 93.

⁶ Johnny Ibrahim, **Teori dan Metodologi Penelitian Hukum Normatif**, Bayumedia, Malang, 2005, hal 248.

History Document, Statute, and Regulation; the Book of Regulation, Script, Essay and Monograph; the Essays; and the Report of Court Examiner.⁷ All these materials are also useful to explain the disparity of the criminal sanction between bribery Article 5 Section (2) and gratification Article 12B in the Act Number 20 Year 2001 about the Amendment of Act Number 31 Year 1999 about The Eradication of Corruption Criminal Action. Normative research must indeed use statute approach because the research object is many law regulations which are the focus and the central theme of a research.⁸

C. Type and Source of Law Agencies

Law research source is distinguished into primary law material and secondary law material.⁹

1. Primary Law material

Primary law material may include statutes, official documents or essays of statute formulation, and judge verdicts. The author uses the following law primary materials:

1. Fourth paragraph of National Constitution;
2. Article 18, Article 52, Article 62, Article 209, Article 209 Section (1) number 1 and 2, Article 210, Article 387 Section (1) and (2), Article 415, Article 416, Article 417, Article 418, Article 419, Article 420, Article 423, Article 425, and Article 435 of Penal Code (KUHP);
3. Article 1 and 2 of Act Number 20 Year 1946 about the Closing Law of Republic of Indonesia;
4. Article 1 Section (1) Sub a and b of Act Number 24 (Prp) Year 1960 about The Investigation, Prosecution, and Interrogation of Corruption Criminal Action;
5. Article 1 Section (1) Letter b, c, d, of Act No. 3 of 1971 about The Eradication of Corruption Criminal Action.

⁷ *Ibid*, hal 96.

⁸ Johnny Ibrahim, *Op. Cit.*, hal 248.

⁹ Peter Mahmud Marzuki, *Op. Cit.*, hal 141.

6. Article 1 Number 1, Article 2, Article 3, Article 5, Article 5 Section (1), Article 5 Section (1) Paragraph a and b, Article 5 Section (2), Article 7 Section (1), Article 7 Section (1) Paragraph a and b, Article 11, Article 12, Article 12 Paragraph a, b, c, d, e, f, g, h, and i, Article 12A, 12B, and 12C, Act Number 31 Year 1999 jo Act Number 20 Year 2001 about The Eradication of Corruption Criminal Action;
7. Article 5 Section (1) of Act Number 48 Year 2009 about The Authority of Judge;
8. Article 2 Paragraph c of The Decree of Central Warlord of Army Staff Number Prt/Peperpu/013/1958 (dated on April 16 Year 1958);
9. The Decree of President Number 11 Year 1963 about The Eradication of Subversive Action;
10. The Decree of Assembly of Representatives of Republic Indonesia Number XI/MPR/1998 about The Organizing of State to Clean and Free from Corruption, Collusion, and Nepotism.

2. Secondary Law Material

Main secondary material involves textbooks about the base principles of law science and the classical viewpoints of scholars. These textbooks can be books about jurisprudence and rhetoric. In addition, other law materials may include writings about law in the certain books or journals.¹⁰

3. Tertiary Law Material

Tertiary law material is law material which provides the guide or explanation for the understanding of primary and secondary law materials such as law dictionary, encyclopedia, and others.¹¹ Tertiary law materials may include Law Dictionary, Indonesia Dictionary, English-Indonesia Dictionary, Magazine and Newspapers.

¹⁰ *Ibid*, Hal 142.

¹¹ Johnny Ibrahim, *Op.Cit.*, hal 296.

D. Law Material Collection Technique

Based on the source of law, it is therefore that primary, secondary and tertiary law materials are collected. The collection may be through literature study by collecting and analyzing the literature materials and exploring Internet-based materials. Any law materials either collected from literatures or internet access, or in the forms of journals, newspapers or other sources related to the research, are obtained by the author at The Center of Law Science Documentation (PDIH) of Brawijaya University, Central Library of Brawijaya University, Public Library of Brawijaya University, and other sources from printed media, electronic media, internet and law literature of the author's personal collection.

E. Law Material Analysis Technique

Law materials are presented in integrated manner and also analyzed to obtain the comprehensive description. The analysis device over law materials is descriptive method which is conducted by referring to law principles and basing on law theories related to the research problems. Teleological and sociological interpretations are used.¹² Both interpretations explain the significance of regulations based on the social goal. The vacuum of law, therefore, is analyzed and then searched for the solution toward its social goal.

¹² Sudikno Mertokusumo, **Mengenal Hukum Suatu Pengantar**, Liberty, Yogyakarta, 2005, hal 171.

DISCUSSION

What has been worked by the government to eradicate corruption criminal action is by rejuvenating the regulations underscoring this work. Act Number 31 Year 1999 is not considered as complete for the eradication of corruption criminal action. The concrete measure is realized through the release Act Number 20 Year 2001 about the Amendment of Act Number 31 Year 1999. A principal item regulated in Act Number 20 Year 2001 is that Article 12A, Article 12B and Article 12C are new articles inserted between Article 12 and Article 13.

A new corruption criminal action is then introduced within Act Number 20 Year 2001. This new action has been explained previously in articles of bribery corruption criminal action in the Act Number 31 Year 1999 about The Eradication of Corruption Criminal Action, but it is not mentioned in precise and clear manners.¹³ If the stipulation about corruption criminal action in Article 5 Section (1) Paragraph a, which takes source from Article 209 Section (1) of Penal Code is closely examined, the following substances are found:¹⁴

- A. everyone;
- B. giving or promising something;
- C.
 - 1. civil servant
 - 2. state caretaker;
- D. in order to make this civil servant or state caretaker to do something or not to do something with their rank but it may stand in violating against their duty.

¹³ Andi Hamzah, Badan pembinaan Hukum nasional Departemen Hukum Dan HAM, **Pengkajian Masalah Hukum penanggulangan Tindak pidana Korupsi**, Jakarta, 2002, hal 15.

¹⁴ Adami Chazawi, **Hukum Pidana Materil dan Formil KORUPSI di Indonesia**, Bayumedia Publishing, Jatim, 2011, hal 79.

If the stipulation of corruption criminal action in Article 5 Section (1) Paragraph b based on Article 209 Section (1) Paragraph 2 of Penal Code is closely scrutinized, the following substances are observed:¹⁵

- A. everyone;
- B. giving something;
- C. 1. civil servant;
2. state caretaker;
- D. because the presence or the relationship with something deviating against the duty, either with or without doing something in the rank.

if the corruption criminal action in the Article 5 Section (2) is strictly inspected, the following substances are found:¹⁶

- A. the maker;
 - 1. civil servant;
 - 2. state caretaker;
- B. the deed;
 - 1. accepting the gift;
 - 2. accepting the promise;
- C. the object is something given or promised as stated in Section (1) Paragraph a and b.

The third corruption criminal action above is not adopted from Article 209 of Penal Code but it is a new formulation that is previously not existed. The formulation which is identical with this third form of bribery formulation is Article 418 of Penal Code which is used as the corruption criminal action in the Act Number 3 Year 1971, and it is then also adopted into Act Number 20 Year 2001 Article 11.

Pursuant to the stipulation of Act Number 20 Year 2001 about the Amendment of Act Number 31 Year 1999, the criminal sanctions that can be decided by the judge against the defendant of corruption criminal action may be Dead Penalty, Imprisonment, Additional Penalty, and even

¹⁵ *Ibid*, hal 93-94.

¹⁶ *Ibid*, hal 96.

Civil Accusation by The Heir. If Criminal Accusation on the Behalf of Corporate is submitted, the principal sanction is fine penalty at maximum rate plus 1/3.

The sanction given to the actor of corruption criminal action as stated in Article 5 Section (1) Paragraph a, b and Section (2) is counted to less than Rp. 5,000,000.00 (five millions rupiahs).¹⁷ In the Article 12A Section (2), what so called as “new criminal action about gratification” is corruption criminal action about gratification which amounts to Rp. 10,000,000.00 (ten millions rupiahs) or as explained in Article 12B Section (1) Paragraph a.¹⁸

In relative with Article 12C Section 1 (1 jo 2), the stipulation in Section 1 is not in effect if the acceptor reports the gratification received to Corruption Eradication Commission (KPK), which means the acceptor of gratification is not committing gratification criminal action. Article 12C Section (1) determines that the stipulation in Article 12B Section (1) is not prevailed although Article 12B Section (1) is the stipulation of criminal action.

The question is whether the stipulation reporting the accepting of gratification is a reason behind the elimination (exception) of the criminal action article. It is not strong reason because the cause of criminal exception in the law doctrine shall involve reason of apology and reason of justification which may be in effect after or during the occurrence of the deed. These reasons must be the integral part of the deed of the doer. In other words, these reasons must be existed in the mentality of the doer during the occurrence of the deed, not after the deed. The action of civil servant/state caretaker as the acceptor of gratification “to report the accepting of gratification” to Corruption Eradication Commission (KPK) may mean that gratification is already happened or far away before it is reported, for example in the day 30 of workdays. Therefore, the action of

¹⁷ Wiyono, R. **Pembahasan Undang-Undang Tindak Pidana Korupsi**. Ed. 2. Cet. 3. Sinar Grafika, Jakarta, 2012, hal 120.

¹⁸ *Ibid*, hal 122.

reporting the accepting of gratification cannot be considered as the reason of criminal exception.

The question is then whether the criminal exception as stated in Article 12C Section (1) is valid. The answer “yes” seems less appropriate. Because the corruption criminal action has been manifested perfectly, the action to report it cannot be possible to deserve for criminal exception. The doctrine of criminal law is not familiar with the exception of criminal action. Those contained within criminal law doctrine are the exception of mistake, the reason of justification and the reason of exception/elimination of nature against deed law. If the criminal action is occurred already, the conversion of the substance “the criminal action” to “the not criminal action” is still impossible although it is by the reason that “the maker is reporting the deed” which is gratification in this case.

CLOSING

CONCLUSION

The author attempts to question against the unclearness and irresolution of the reason behind the difference between bribery and gratification (aggravated form of bribery), especially in term of substantial difference in giving the sanction.

Considering the stipulation of Act Number 20 Year 2001 about the Amendment of Act Number 31 Year 1999, the criminal sanction that may be sentenced by the judge against the defendant of corruption criminal action may include Dead Penalty, Imprisonment, Additional Penalty, and even Civil Accusation by The Heir. If Criminal Accusation on the Behalf of Corporate is found, the principal sanction is fine penalty at maximum rate plus 1/3.

The sanction against the actor of corruption criminal action as explained in Article 5 Section (1) Paragraph a, b and Section (2) is amounted to less than Rp. 5,000,000.00 (five millions rupiahs). “New criminal action about gratification” in the Article 12A Section (2) is a corruption criminal action about gratification which amounts to Rp. 10,000,000.00 (ten millions rupiahs) or as stated in Article 12B Section (1) Paragraph a.

SUGGESTION

Corruption criminal action in Indonesia has been becoming a culture and shall be coped immediately. Some cases of corruption criminal action of bribery and gratification have involved state officers. A preventive measure against corruption criminal action is through the mechanism of giving sanction that must be clear and not overlap between stipulations of sanction. The author may suggest that the overlapped articles shall be reformulated by modification Article 5, Article 6, Article 7, Article 8, Article 9 of Prevention of Corruption Act of Singapore and Article 15 of UNCAC.

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