

# Differences between Bribery and Gratification: A Review of Anti-Corruption Act of Indonesia

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## Abstract

This study analyzes the concepts of bribery and gratification and the distinguishing parameters between them as regulated in several Articles of the Anti-Corruption Law. This involved the application of the normative legal research supported by court decisions to clarify these differences. The results of this study showed that bribery requires a meeting of mind between the bribe givers and bribe recipients which is not found in gratification. The reporting mechanism and the reversal burden of proof do not apply to bribery while Operation Catching Hand does not apply to gratification due to its inability to satisfy the provisions of Article 1 point 19 of the Criminal Procedure Code. Criminal sanctions are also imposed on both the giver and the recipient of a bribe while the act of a giver in gratification is not considered as a criminal offense. The study also found the wrong application of these essential differences in court decisions.

**Keywords:** Meeting of mind, reversal burden of proof, caught hand, report mechanism.

## Introduction

Law Number 31 of 1999 and 20 of 2001 concerning Corruption (hereinafter called Anti-corruption Law) regulates 7 types of criminal acts of corruption including those associated with state financial losses, embezzlement in office, bribery, extortion, conflicts of interest in procurement, fraud, and gratification. In comparison with the others, the formulation of bribery offenses in the Anti-Corruption Law is at most regulated in Articles 5, 6, 11, 12 a, b, c, and d as well as Article 13. Moreover, the data released by the Corruption Eradication Commission (KPK) between 2014-2019 shows that 65% of corruption cases in Indonesia are bribery.<sup>1</sup> The Catching Hand (OTT) conducted by the KPK from 2016-2019 totaling 87 times was also all related to bribery.<sup>2</sup>

The Anti-Corruption Law does not provide a specific meaning or clear parameters related to the act of bribery despite its frequent occurrence and regulation in several offenses. This, therefore, affects the handling of bribery cases both by the KPK, the police, the prosecutor's office, and the court.<sup>3</sup> It also shifts the establishment of a legal norm from the legislators to law enforcement by providing them the power to declare an action as a bribe.<sup>4</sup>

This study was, therefore, conducted to explore the general concepts and parameters determining an act as a bribery and to analyze the difference between the concept and gratification. This is necessary due to the fact that the Anti-Corruption Law also prohibits the acceptance of gratuities. Some court decisions related to bribery and gratification cases were also reviewed and the result of this study is considered crucial and important for law enforcement official in applying bribery legal norms while handling corruption cases.

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## Method

A normative legal research method was used to particularly examine the legal norms on bribery and gratification in the Anti-Corruption Law as promulgated

in Law Number 31 1999 and 20 of 2001 concerning Suppression of Corruption, Indonesia. These provisions were used as the primary source of this study using a statute and conceptual approach. Literature study as well as court decisions were also used to collect data based on the assumption that the essential natures and parameters between bribery and gratification as defined by scholars need to be clearly distinguished. The data were analyzed qualitatively through data reduction by focusing on the Articles of bribery and gratification in the Anti-Corruption Law after which findings were presented and conclusions were drawn.

## Results and Discussion

**The Nature of Bribery:** Bribery is generally defined as ‘the abuse of public office for private gain’.<sup>5</sup> It specifically means giving or promising a state administrator or public servant some certain privileges<sup>6</sup> due to the favor obtainable from the position<sup>7</sup> and has also been equated with the positional offense.<sup>8</sup> This study was, however, limited to public positions without the inclusion of the private sector<sup>9</sup> due to the fact that the Anti-Corruption Law does not include bribery in the private sector as a corruption criminal act<sup>10</sup> in line with the 2003 United Nations Convention against Corruption ratified by Indonesia with Law Number 7 of 2006.

The bribery offense in the Anti-Corruption Law is characterized by several natures such as the meeting of mind between the bribe giver and recipient. This means that bribe is not established except the two parties have the will and are aware of the action. This, in economics, requires the activities of supply and demand between them.<sup>11</sup> This means bribery case necessitates the use of Article 55 paragraph (1) of Criminal Code specifically concerning participation to crime (*medeplegen*) that requires two pieces of evidence of intention; intentional cooperation to commit an offense and performance of an offense together committed internationally.<sup>12</sup> It is, therefore, not appropriate to convict only the giver or recipient of a bribe. For example, in the Century Bank scandalous corruption case, the panel of judges convicted Budi Mulia, a former Governor of Central Bank of Indonesia, for participating in the act in a quo case based on Article 55 paragraph (1) of Criminal Code while Boediono, a former Vice President of Indonesia and the senior Governor at the time, was not suspected or even convicted even though the verdict proves that the century bailout decision can only be taken collectively and collegially.

The evil intention to conduct a prohibited act usually happens before a bribe offense is committed through the use of an object such as a gift or promise. The author, however, feels it is inappropriate to describe a gift as a bribery object due to the fact that it is allowed but proposed the use of the term ‘something’ instead which is further defined as anything of economic value. It is not necessary that the recipient has the bribery object in possession before a case is established as long as such an individual has sufficient control over the item. Promises are not in the form of goods but are generally related to actions of the giver in response to an activity conducted by the recipient. The bribe giver can be anyone including individuals, corporations, public servants, advocates, judges, or even state administrators while the recipients are limited to civil servants, state administrators, advocates, and judges.<sup>13</sup> This is necessary considering the fact that bribe is related to the position of the recipient which is usually public as observed with public servants or state administrators not doing anything in their position or found using their authority or position to conduct some activities.

The prohibited acts conducted by the bribe giver include ‘giving or promising something to the public servants or state administrators’ (Article 5 paragraph 1 letter a), ‘giving something to civil servants or state administrators’ (Article 5 paragraph 1 letter b), ‘giving or promising something to an advocate’ (Article 6 paragraph 1 letter a), ‘giving or promising something to a judge’ (Article 6 paragraph 1 letter b), and ‘giving gifts or promises to civil servants keeping in mind the power or authority attached to the position or his position’ (Article 13). Meanwhile, the prohibited conduct for the recipients is ‘accepting gifts or promises’ (Article 5 paragraph 2), ‘judges or advocates accepting gifts or promises’ (Article 6 paragraph 2), ‘public servants or state administrators receiving gifts or promises despite knowing they are provided in order to influence their decisions or actions is contrary to their obligations’ (Article 12 letter a), ‘public servants or state administrators receiving gifts even though they reasonably suspect the gifts are meant to influence their professional conduct is contrary to their obligations’ (Article 12 letter b), ‘the judge receiving a gift or promise’ (Article 12 letter c), and ‘the advocate receiving a gift or promise’ (Article 12 letter d). Article 12 letter a focuses on the bribe provided to the civil servants or state administrators to conduct a certain act while letter b emphasizes those provided after the action has been conducted.

The reversal burden of proof does not apply in bribery cases and this means neither the bribe giver nor the recipient is obliged to prove that the gift or promise has nothing to do with the public position of the recipient since it is the responsibility of the public prosecutor.<sup>14</sup> It is, however, possible to have catch hands/ caught operations (OTT) in bribes offenses as observed in KPK<sup>15</sup> where they are implemented in several corruption cases which are almost impossible to solve using conventional method. Even though it is possible to have OTT in bribery offenses, those conducted by KPK do not actually violate the four criteria of being caught red-handed as shown in Article 1 number 19 of Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP). The criteria includes arresting a person, while committing a crime, immediately after the crime is committed, third, based on the confirmation of the general public, and the moment an object allegedly used in committing a crime indicates the perpetrator participated or assisted in the process.<sup>16</sup>

In a case of bribery offense, OTT is in the form of a promise to a civil servant or organizer to receive favor based on the position of such an individual contrary to obligations. For example, a defendant promises a judge a sum of Rp. 2 billion to acquit such person in a corruption case, bribery is established when there is an agreement between them. It is important to note that the offense is completed on the day where the agreement was made, assuming March 30, 2020, even though the promise was fulfilled on July 23, 2020, after the defendant has been acquitted by the judge, and KPK implemented OTT against both the defendant and the judge. The four criteria of being caught red-handed in Article 1 number 19 of the Criminal Procedure Code have not been met, therefore, the process is declared as illegal OTT due to the existence of 4 months between the period the offense was committed and OTT was implemented by KPK.

### **Gratification vs Bribery**

Gratification is determined to be an offense in Article 12B of the Anti-Corruption Law formulated to include the following:

1. Every gratification to a civil servant or a state administrator is considered a bribe as long as it relates to the position and contrary to the obligations or duties of such individual with the following conditions:
  - a. In the amount of IDR 10,000,000.00 (ten million

rupiahs) or more with proofs the gratuity is not a bribe made according to the recipient;

- b. The value less than IDR 10,000,000.00 (ten million rupiahs) with proofs the bribery is conducted by the public prosecutor.
2. Criminal punishment for civil servants or state administrators as referred to in paragraph (1) is life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years, and a minimum fine of IDR 200,000,000.00 (two hundred million rupiahs) and a maximum of IDR 1,000,000,000.00 (one billion rupiahs).

This article defines 'gratification' as a gift in the broadest sense including the provision of money, goods, rebates (discounts), commissions, loans without interest, travel tickets, lodging facilities, tourist trips, free medical treatment, and other facilities which are received both domestically and abroad or conducted using electronic or non-electronic means. The acceptance of gratuities by civil servants or state administrators by virtue of their position and against their obligations or duties is known as gratification. There is usually no meeting of mind between the gratuity giver and the public servants or state administrators as the recipients. The existence of a meeting of mind makes the gift a bribe with the gratification objects broadly as previously explained in Article 12B paragraph (1).

The gratuity recipient is obliged to prove the gift received is not a bribe and has nothing to do with the position not contrary to the obligation if the value is IDR. 10,000,000 or more. Such cases also involve provisions or mechanisms of reporting as confirmed by Article 12C paragraph (1), (2), and (3) that the offense in Article 12B paragraph (1) does not apply if the recipient reports the gratification received to the Corruption Eradication Commission (KPK) no later than 30 (thirty) working days from the date where the gratuity is received to determine the gratuity belong to the recipient or the state.

The provision of Article 12C eliminates criminal prosecution against civil servants or State administrators receiving gratuities. It means that acceptance of gratuity itself is an offense but the prosecution process depends on whether or not a report has been filed by the recipient to the KPK no later than 30 working days from the date it was received after which the commission determines either the gratuity belongs to the recipient or the state. Even though the Anti-Corruption Law interprets

gratification broadly, it does not include sexual relations services provided by a person to a public servant or state administrator known as sexual gratification due to its ability to cause problems as well as the impracticality of determining either the action belongs to the recipient or state. Does the inclusion of sexual service in the meaning or form of gratification makes KPK confiscate ‘women’s goods’ as the property of the State and then auction it off? This is, of course, impossible and causes women dignity. Therefore, gratification needs to be limited to the material forms and types.

Another sign of gratuity is the emergence of evil intention precisely after civil servants or state administrators receive a gift because of their position.<sup>17</sup> They are, however, allowed to report such gift within

a 30-day work period to avoid being prosecuted based on Catching Hands Operation (OTT). KPK is not authorized to conduct OTT on corruption cases related to the acceptance of gratuities due to the fact that the four criteria of being caught red-handed previously described are not satisfied. For example, a civil servant receives gratuity between April 3 and 4, 2020 and, 30 working days later, the Corruption Eradication Commission is not authorized to conduct OTT due to the provision of Article 12C paragraph (1) and 12B paragraph (1) Anti-Corruption Law which prohibit the KPK to conduct OTT after 30 working days of receiving gratuities because it contradicts the criteria previously explained. To understand more clearly, the following table shows the difference between bribery and gratification:

**Table 1: Gratuity vs. Bribery**

Element	Gratuity	Bribery
Perpetrators/Actor	Civil servants/State administrators	Public servants/State administrators/individuals/advocates/corporation/private employees
Meeting of mind	No	Yes
Bad intention	After receiving gratuity	Before a bribe occurs
Reporting mechanism	The provisions/mechanisms of reporting to the KPK apply	The provisions/mechanisms of reporting are not applicable
Reversal burden of the proof	Apply	Not apply
OTT	Impossible	Possible

**The data are processed by the authors:** In the gratification case of Nur Alam, a former Governor of Southeast Sulawesi, the verdict of the first instance court, appeal, and casation stated that Nur Alam was proven to have received a gratuity considered a bribe from Richcorp International Ltd in the amount of IDR. 40,268,792,850 from illegal grounds and not reported to the KPK within the prescribed time limit. The decision was based on several legal considerations. The money borrowed by the defendant personally from Chen Linze certainly opened the opportunity for a conflict of interest to the defendant as the Southeast Sulawesi Governor. Besides, sending money to the defendant to buy an insurance policy at AXA Mandiri on behalf of the defendant using his biological children as beneficiaries also proves that the money is not a Chen Linze’s investment to advance Southeast Sulawesi but from Richcorp International Ltd for the defendant. In addition, all cancellation/disbursement of the three AXA Mandiri insurance policies on behalf of the defendant has

been accommodated in the Non-Customer Giro (GNC) account of IDR 30,481,436,261.00. At the defendant’s request, the money was transferred to the account of Timbel Mas Abadi Ltd. gradually with each transaction below the nominal value of IDR 500,000,000 to avoid suspicion from PPATK. Finally, the money in the Sultra Timbel Mas Abadi Ltd. account, at the defendant’s request to Bank Mandiri, was also transferred in batches with the value less than IDR 500,000,000 to avoid suspicion from PPATK with the destination account being Untung Anaugi Ltd, Gino Valentino Ltd, and Bososi Pratama Ltd.<sup>18</sup>

According to the researchers, the money received by the defendant was not a gratuity or a bribe and the defendant’s actions are purely considered a civil law in the form of investment placements and personal loans. It is strengthened by several facts that investment Agreement No. CI/NA/IA/2010/001 of 19 August 2010 conducted by Richcorp International Ltd and the

defendant in a personal capacity. Provisional Fund Provision Agreement No. PPDS/RC/NA/2010/002 dated August 19, 2010. Moreover, based on the investment agreement and personal loan in the amount of IDR 40,268,792,850, the defendant apparently returned the money to Richcorp International Ltd as observed from these two pieces of evidence. First, evidence of money transfers from Giofedi Rauf to Richcorp International Ltd totaling IDR 15,000,000,000 dated May 30, 2013, IDR 15,000,000,000 dated June 3, 2013, and IDR 10,750,000,000 dated June 4, 2013. A letter dated June 10, 2013, from Richcorp International Ltd to Geofedi Rauf regarding evidence of receipt of money transferred by the defendant in the amount of IDR. 40,750,229,110. This shows that the defendant returned the money to Richcorp International Ltd before the investigation was conducted by KPK. The money was also returned in accordance with the contents of Investment Agreement No. CI/NA/IA/2010/001 dated August 19, 2010, between Richcorp International Ltd and the defendant is in a personal capacity and Agreement of Temporary Funds Provision No. PPDS/RC/NA/2010/002 dated 19 August 2010.<sup>19</sup> This, therefore, means there is no connection between the defendant's position as the Southeast Sulawesi Governor and transactions. It is important to note that it is only possible to establish gratification as long as it is related to the defendant's position.

### Conclusion

Bribery and gratuity are *malversations*. Meanwhile, in bribery, the bribe giver and receiver need to agree to commit a crime before it happens and the existence of the word 'agreed' becomes the basis for the crime imposed on both of them. The Anti-Corruption Law shows the givers can be anybody from any background while the recipients are limited only to certain performers. Moreover, the OTT usually conducted by KPK are all related to bribery cases. It was also discovered that reversal burden of proof and reporting mechanism apply only to gratuities and this means that the recipients have 30 working days after gratification has been received to report to the KPK to avoid criminal prosecution. Failure to report means that the recipient is corrupt.

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