

**AN ANALYSIS OF CRIME ACT AND PUNISHMENT OF
SEXUAL GRATIFICATION
(ON FIQIH JINAYAH AND POSITIVE LAW PERSPECTIVE)**

THESIS

Submitted to the Faculty of Syari'ah and Law in Partial
Of the Requirements for the Degree of Bachelor of Law in
Department of *Jinayah Siyasah*



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2017**

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(ON FIQIH JINAYAH AND POSITIVE LAW PERSPECTIVE)

Is definitely my work. I am completely responsible for the content of this thesis. Other writer's opinions and finding included in the thesis are quoted or cited in accordance with ethical standards.

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Assalamu'alaikum Wr. Wb

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It is ready to be submitted in joining the last examination

Wassalamu" alaikum Wr. Wb.

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RATIFICATION

This thesis has been examined by two experts and has passed on 9th Januari 2018
Therefore, this thesis has been accepted as one of requirements for fulfilling the Bachelor of Law
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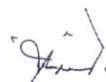
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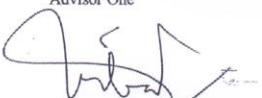
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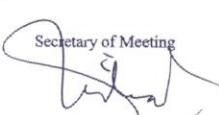

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MOTTO

خير الناس انفعهم للناس

“The greatest person who can gives beneficial for others”

*O ALLAH enrich me with science, wisedom and wealth to be
“your hand”
To help and share with the others.*

TRANSLITERATION

Vowel Letters

A	a long spelling
I	i long spelling
U	u long spelling

Arabic Letter	Written	Spelling
ا	A	Alif
ب	B	Ba'
ت	T	Ta'
ث	TS	Tsa'
ج	J	Jim
ح	<u>H</u>	Ha'
خ	Kh	Kha'
د	D	Dal
ذ	Dz	Dzal
ر	R	Ra'
ز	Z	Zal
س	S	Sin
ش	Sy	Syin
ص	Sh	Shad
ض	Dh	Dhad
ط	Th	Tha'
ظ	Zh	Zha'

ع	'A	'ain
غ	Gh	Ghain
ف	F	Fa'
ق	Q	Qaf
ك	K	Kaf
ل	L	Lam
م	M	Mim
ن	N	Nun
و	W	Waw
ه	H	Ha'
ي	Y	Ya'

a. Long vocal

نا = naa

b. Double Letter (Syiddah)

رب = Rabbu

c. The use of Article

الشفاء = Al- Syifa'

القلام = Al- Qalamu

DEDICATION

I dedicate my thesis to:

My Lovely Mother and father. The first ones on earth who give me

timeless love

My Inspiring Teacher, DR.KH Fadholan Musyafa', Lc, M.A.

Your spirit burns my zeal

My greatest Aka, Sonia sa'adah

Who always close in my heart and mind

My lovely sisters who always hold my hand, Mb Tresay, Ms. Cunny,

Faza, Alfa, Imam, Hadisti.

My little brother and Sister

Hassan Nashih Ulwan and Hasna Fairus syifa

Who really mature to face our storm in life

My Family in Ma'had Al Jami'ah Walisongo.

And for every love, smile, and zeal we share, we always are.

ACKNOWLEDGMENT

All Praises due to Allah *al- rahman al Rahim*, the all- Knowing.

Peace and Salutation always be with my prophet, Muhammad SAW. The last prophet who guides muslims to be international student, go where science goes!

The biggest obstacle in finishing my thesis is my self. Fortunately, Allah gives me easiness through His servants. Therefore, I would like to express my gratitude for their hospitality, generosity, and kindness.

1. Prof. Dr. H. Muhibbin, M. Ag, the rector of university of Walisongo state University who gives his best effort for this university.
2. DR. H. Ahmad Arif Junaidi, M. Ag, the dean of Syari'ah and Law faculty. Your wisdom made me admired at
3. H. Mohamad Solek, M. A as my adviser. Your trust on me, grows my self confidently.
4. Dr. H. Agus Nurhadi as my adviser and inspiring teacher.
5. DR. KH. Fadholan Musyafa, Lc, M.A, the great teacher who always made me admire at, who loves and gives opportunities to his poor student

6. All of my teachers and staff of Syari'ah and Law Faculty
7. My strong parents, family, and friends.

I ask to Allah to give you reward and easiness more than you give to me.

Semarang, 30 Desember 2017

Nadea Lathifah N.
140202026067

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CURRICULUM VITAE

ABSTRACT

One of the new practices of corruption which is lively discussed lately is sexual gratification or the offering of sexual services. There are many cases, which showed us about sexual gratification. Moreover, there is no express provision in criminal law on sex gratification. It has became a blind spot for legal punishment. Because of that, it should be regulated by law as soon as possible.

Seeing the phenomena of sexual gratification, many people asked the government's rule. Is it regulated clearly? or even what is the position of sexual gratification in the national criminal law. Beside that, what is the position of sexual gratification based on fiqh jinayah perspective as the principle of Islamic law. Consiously, according to Islamic law, sexual gratification is not a simple *jinayah*..

Therefore, the writer is encouraged to analyse the law of sexual gratification on positive law and fiqh jinayah perspective. Type of research applied in this study is qualitative and its method of collecting data is library research, not only that, but also a normative legal research as it appears from the haziness norms on sexual gratification in the legislation governing corruption in Indonesia. Thus, the approach applied in this research is statute approach, case approach, comparative approach, and conceptual approach.

The final research concludes and finds that law No. 31 of 1999 as amended by Law No. 20 of 2001 on Eradication of Corruption. Exactly in Article 12 B, still occurs pertaining about sexual gratification, this article only stipulates types of gratuities including a gift of money, goods, rebate (discount), commissions, interest-free loans, travel tickets, lodging, travel, free medical treatment, and other facilities. Based on fiqh jinayah, gratification has double crimes, there are: Risyawah and zina. That has explained in Alquran and hadist abouth the punishments. The law enforcers may use the methods of interpretation in dealing with the cases of sexual gratification occurred, namely, by extensive interpretation method, historical interpretation method, comparative and futuristic interpretation methods. Seeing the phenomena of sexual gratification, the people question the government's rule. According to the writer truly need to discuss again about sexual gratification and decide about special article to reach fairness of law.

Keywords: Classification Crimes, Sexual Gratification, Fiqih Jinayah and Positive law perspective

CHAPTER I

INTRODUCTION

A. Background

Nowadays, the most crucial problems in Indonesia is corruption. There are many definition of corruption. Corruption is taken from greek language, *corruptio* which has meaning all of damaging deeds. In *black's Law Dictionary*¹, corruption is intentional act to give illegal beneficial for himself or people around him through his position or authority. According to Syed husein Alatas, Corruption is the abusing trust.²

Corruption divided into many forms and ranges from trivial to monumental. Syed Husein Alatas divided corruption into 7 types.

1. Transactive Corruption
2. Exsortif Corruption
3. Investive Corruption
4. Nepotistic Corruption
5. Otogenic Corruption
6. Supportive Corruption
7. Defensive Corruption.

One of Corruption form is Gratification. Gratification on *Kamus Besar Bahasa Indonesia* is giving and accepting money to

¹ Henry Campbell Black, *Black's Law Dictionary*, edition IV, (Minesota,West Publishing,1990), page 27.

² Syed Husein Alatas, *Corruption :Its Nature, Causes, and Consequences*, (Massachussets: Driana, 1999), page 81.

the official which is not related to their own salary.³ Gratification has mentioned on article 12 B and 12 Number 20 year 2001 about criminal act of corruption. *Gratification is 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.* In the form above, gratification includes of *transactive corruption*.

As a new form of gratification crime, "sexual gratification" has became increasingly intense in recent years. The sexual gratification is a great harm to the society. There are many cases, which showed us about sexual gratification. Moreover, there is no express provision in criminal law on sex gratification. It has became a blind spot for legal punishment. Because of that, it should be regulated by law as soon as possible.

Sexual gratification has became crucial problem In Singapura, Start from police official, minister and even the lecturer who give the best score for his student that paid by sexual service. Moreover, we know that Singapura has been well known as the country with the littlest corruption of Asia.

³ National Education Departement, *Kamus Besar Bahasa Indonesia*, third edition, (Jakarta: Balai Pustaka,2003), page 371.

Malaysia has different cases, The judge set 4 people free who accused accept gratification from a businessman to ease his project. The four people who accused has known that ask woman to accompany them in Villa at Subang on February 2003. Because difficult to prove this case, the judge just set them free.⁴

In Indonesia, Sexual gratification is uncommonly term, but crowded in action. Permadi as one of the house of representative said that every civil servant or state caretaker who goes for official job has offered sexual service absolutely, it depends on their mentality for accepting or refusing sexual gratification offering.⁵

On Islamic law, sexual gratification is not only *Risyawah* but also includes into Jarimah Zina. Sexual gratification has not been common in Prophet era, Therefore, Hadith- hadith about *Risyawah* or gratification related to the things or money, but in globalization era, the developing of technology is also support the developing of crime. Therefore, in many centuries ago, or even in prophet era, we find Risyawah which related to the money or things, nowadays, we find a new case of risyawah that related into sexual relationship.

About the sexual gratification, the writer interest to write about this case, because there are many sexual gratification cases that happened in Indonesia, and there has not been specific rule about this cases,Therefore, we need deep analysis to find the rule

⁴<http://hukum.kompasiana.com/2013/01/14/gratifikasi-pelayanan-seksual-524246.html> (access on 18 April 2017).

⁵ www.tvonews.com (access on 16 April 2017).

and the punishment whether in positive or Islamic law about sexual gratification.

B. Research Question

1. How is the law and the punishment of sexual gratification on Fiqih jinayah perspective?
2. How is the law and the punishment of sexual gratification on positive law perspective?

C. Purpose of Research

The purposes of this research are:

1. To know how is the law and the punishment of sexual gratification based on fiqh jinayah perspective.
2. To understand about the law of sexual gratification based on positive law perspective.

D. Significant of Research

Some of helpfulness of this research are:

1. To answer indonesia's citizenship question on crime of sexual gratification from fiqh jinayah and positive law perspective.
2. To enrich our knowledge in fiqh jinayah and positive law

E. Literature Review

Through literature review, the writer knows the previous researches on corruption specially gratification. The purpose is not only to inform which research, but also to avoid plagiarism. There are a lot of researches on corruption through gratification, some of them are:

Evin Fardo, The student of UIN Syarif Hidayatullah Jakarta with his thesis *Pemberian Hadiah Sebagai Modus Tindak pidana korupsi pejabat (Tinjauan Hukum Islam dan UU No.20 Tahun 2001)*

⁶ The research has showed data and cases of civil servant who do corruption. They do through gratification. The gratification here, which is related into many and things. The researcher try to compare between Islamic and positive law. The result of this research is everything which is given to the servant. Which related to their job called gratification. This research focus on money which can be the object of gratification.

Abdurrahman Hakim with his thesis *Tinjauan Hukum Islam terhadap Tindak Pidana Gratifikasi*.⁷ The research describes about element crimes on gratification related to things and money. He concludes that gratification is one of corruption and he analyses deeply article of 12B UUPTPK which showed about gratification or bribe. The result of this thesis is based on Islamic law, gratification includes into risywah. Risyawah is one form of corruption. There is no specific regulation and punishment of gratification, whether in Alquran or hadeeth. Therefore, by this research, find that gratification should be punished by Ta'zir.

⁶ Evin Fardo, *Pemberian Hadiah Sebagai Modus Tindak pidana korupsi pejabat (Tinjauan Hukum Islam dan UU No.20 Tahun 2001)*. (Thesis: UIN Syarif Hidayatullah, 2010).

⁷ Abdurrahman Hakim, *Tinjauan Hukum Islam terhadap Tindak Pidana Gratifikasi*.

(Thesis:UIN sunan kalijaga Yogyakarta 2003).

Abdul Kholik with his thesis *Hadist- Hadist Laknat Bagi Para Pelaku Suap (Risywah)*⁸ The research says about necessity of society's role to fight bribe as a kind of extraordinary crime. By this research we find that Islamic law should threat assertively to the suspect of gratification, for losing this case is not only government role but society have to participate for reducing or even losing gratification. This research found that, In prophet's era, Prophet Muhammad and his followers often to be flattered by gratification. Because principal negotiation about religion and belief. Therefore, there was unbelievers who flattered moslem always. Moreover, by this condition, hadeeth about risywah is not relevant again. Because, the increasing complex of gratification cases now, is not same with prophet era.

Jamal Wiwoho with his research *Menyoal Gratifikasi Seks dalam Tindak Pidana Korupsi* on his opinion based on prof. Mahfud MD explaines that sexual gratification is more complicated than money gratification⁹. The result of this research is there is no specific regulation and punishment of sexual gratification. Therefore, by this research, Indonesia must be renew of article about corruption especially gratification. Moreover, Indonesia should look at

⁸ Abdul Kholik, *Hadist- Hadist Laknat Bagi Para Pelaku Suap (Risywah) dalam kutubus sittah*, (Thesis:UIN Sunan Kalijaga Yogyakarta, Tafsir Hadist 2010).

⁹ Jamal Wiwoho .*Menyoal Gratifikasi Seks dalam Tindak Pidana Korupsi* (Media Indonesia. Edisi 7 februari 2013), page 6.

Singapura which has applied the punishment of sexual gratification clearly.

Chusnul Chasanah with his thesis *Tindak pidana korupsi dalam perspektif fiqh Jinayah dan hukum positif Singapura* discusses about comparation corruption on fiqh jinayah and positive singapura law. She conludes that corruption term on fiqh jinayah has many different term but on positive singapura law only related to gratification or risywah.¹⁰ The finding of this result is about gratification rule both of Indonesia and Singapura.

Singapura has more developed more than Indonesia. This statement proved by the punishment of sexual gratification which has applied there. The researcher find that law as the social principle. The law comes from society's value. The law is society's product. Therefore, Singapura has respected with honesty value, because of that, corruption law includes sexual gratification regulated assertively. Therefore, Indonesia should learn and look at Singapura which has applied sexual gratification rule assertively.

Therefore, from literature review that the writer has mentioned, it can be conclude the researches have different object of this research. The writer focuse to analyse and to compare a Criminal Act of Sexual Gratification based on Fiqih Jinayah and Positive Law Perspective.

¹⁰ Chusnul Chasanah *Tindak pidana korupsi dalam perspektif fiqh Jinayah dan hukum positif Singapura* (Thesis UIN Syarif Hidayatullah Jakarta , Jinayah Siyasah).

F. Research Metodology

Cambridge dictionary defines methodology as “*a system of ways of doing, teaching, or studying something*”. In a word, methodology is the researcher guidance to discover the purpose of this research.

1. The type of the research

The type of the research is Qualitative. Qualitative is a kind of research which examines the object in natural setting because it focuses on process and quality of something¹¹. Through Qualitative, the writer will analyse and compare sexual gratification cases on fiqh jinayah and positive law perspective.

2. Method of data collecting

The method of data collecting in this research is library research. Because the writer will look for the data from document and any other references to find appropriate explanation to analyse and compare sexual gratification on fiqh Jinayah and positive law perspective.

3. Resource

a) Primary Resource

The main resources of this research are UUPTK, KUHP, nash Alquran and Hadist, scholar's argument on

¹¹<http://www.google.com/url?sa=t&rct=j&q=esrc=s&source=web&cd=1&cad=http%3A%2F%2Fstaff.uny.ac.id> access on 5 April 2017

Islamic book about sexual gratification in classic and contemporary fiqh.

b) Secondary Resource

The secondary resource of this research are: book, journal, news paper and online media which are related to sexual gratification cases.

G. System of writing

To achieve the purpose of this research, the writer organized this thesis by the systematic writing below:

The first chapter is introduction by describing the background. Describe about the research question, explaine about what the purpose of research, describing significant research, showing about literature review and explaine about research methodology for doing this research.

The second chapter is define about what Criminal act is, explaine about classification of criminal act, explaine about definition of gratification based on article 12b uuptk, explaine about punishment of gratification based on article 12b uuptk, define about gratification on fiqh Jinayah and finally expalaine about punishment of gratification based on Fiqih jinayah.

The third chapter is describing the object of this research. Its contents are: Definition of Sexual gratification, Background of sexual gratification, factors of sexual gratification, some cases and law enforcement of sexual gratification.

The Fourth chapter is analysis, by knowing the rule of gratification and sexual relationship illegally on fiqh jinayah and positive law, the writer will compare element crime of sexual gratification as solution of the cases to find the punishment which is suitable in fiqh jinayah and positive law for sexual gratification.

The fifth chapter is closing. In this chapter, the writer will present final result from the explanations of the previous chapters which have been elaborated in the research, and conclude about the rule and punishment of sexual gratification on fiqh jinayah and positive law.

CHAPTER II

CRIMINAL ACT OF GRATIFICATION BASED ON FIQIH JINAYAH AND POSITIVE LAW PERSPECTIVE

A. Definition of Criminal Act

Criminal Act is every deed which break the rule of law. The deed which include into criminal act, which has been threaten by penal sentence¹.The word of criminal act comes from Netherlands which called *strafbaar feit*, or *delict*. It comes from latin also which called *delictum*. Beside that, the penal law from Anglo saxon countries is using *offense* or criminal act term for getting resemblance of terms².

Criminal act which usually mention with “strafbarfeit” divided into two words. “strafbaar” means be punished and “feit” means fade or reality which can be punished. According to Pompe, “strafbaarfeit” is a norm offense or disturbing the law intentionally or unintentionally. The author of giving punishment is for guaranting legal order and public interest.³

Criminal Act according to prof. Moeljatno is prohibited deed which has been threaten by some punishment for everyone who broke

¹ Suharto, *Hukum Pidana Materiil: Unsur-Unsur Objektif Sebagai Dasar Dakwaan*,(Jakarta: Sinar Grafika, 2002), page 28.

² Andi Hamzah, *Asas-Asas Hukum Pidana*, (Jakarta: Rineka Cipta, 1994), page 86.

³ Evi Hartanti, *Tindak Pidana Korupsi*, second edition, (Jakarta: Sinar Grafika, 2007), Page 5.

it.⁴ Definition of criminal act contains of 2 elements, there are deed and threat. The relation between two elements are tightly, therefore the relation between deed and the person are tightly either. Deeds only be punished if the suspect is human. Also human beings can not be punished and prosecuted if the deeds have not been threaten. Therefore, many people and institution has agreed to used “criminal act” term⁵

A person cannot usually be found guilty of a criminal offence. Criminal offense unless two elements are present: an *actus reus*, Latin for guilty act; and *mens rea*, Latin for guilty mind. Both these terms actually refer to more than just moral guilt, and each has a very specific meaning.⁶ Therefore, the important thing to remember is not to be guilty of an offence, an accused must not only have behaved in a particular way, but must also usually have had a particular mental attitude to that behaviour.

The exception to this rule is a small group of offences. The small group has been known as crimes of strict liability, the definition of a particular crime, either in statute or under common law. The crime also will contain the required *actus reus* and *mens rea* for the offence. The prosecutor has been to proved both of these elements. So that, the magistrates or jury are satisfied beyond reasonable doubt

⁴ Moeljatno, *Asas-Asas Hukum Pidana*, (Jakarta: Rineka Cipta, 1993), page 54.

⁵ Moeljatno, *Asas-Asas Hukum Pidana*, (Jakarta: Rineka Cipta, 1993), page:56

⁶ Fuad Usfa and Tongat, *Pengantar Hukum Pidana* (Malang: Umpress, 2004), page 30.

of their existence. If has not yet, the person will be acquitted, as in English law all persons are presumed innocent until proven guilty.

According to Lamintang, criminal act elements are divided into two:

- a. Subjective element is element related to the self of suspect. They are: intentionally or intentionally (dolus and culpa), intention in trying doing an in justice and planning to do crime.
- b. Objective element is element related with condition outside the suspect. They are: character of contempt of court, the quality of the suspect and causalitas.⁷

Based on Fiqih Jinayah, criminal act or *jarimah* etimologically is a wrong deeds. Therefore *jarimah* as same as *jinayah*. Jarimah means a wrong deed that is prohibited by syara' related to the soul, property and others.⁸ Specifically, According to Abu Zahrah criminal act is :

الجريمة هو الأمور المحظورة الذي يكون فيه عقاب قرره القضاء

The meaning: "Criminal Act which broke law of syara' which the perpetrator is treaten by punishment through a court".⁹

According to Al Mawardi criminal Act is :

الجرائم محظورات شرعية زجر الله تعالى عنها بحد او تعزير

⁷ Fuad Usfa and Tongat, *Pengantar Hukum Pidana*,(Malang: Umpress, 2004), page 33

⁸ Audah, Abd. Qodir, *At- Tasyri al Jina'I al Islami mugorranan bi al qanun al wadi*, chapter 1, (Beirut- Libanon: Dar Al Kutub al immiyah, 2011), page 53-54.

⁹ Drs. Rochmadi, M.Ag. *Hukum Pidana Islam*, (Semarang: CV. Karya Abadi Jaya 2015) page xii.

The meaning is: "Criminal act is prohibited deed which is threaten by punishment from Allah (*had*) and *Ta'zir*"¹⁰

Therefore, it can conclude that the definition of criminal act is committing what is forbidden by the law. On positive law, it means criminal act is prohibited deed by national law. On Fiqih jinayah, criminal act means prohibited deed by Allah. According to the writer, actually, the concept of Islamic criminal law are almost similar to criminal act in the positive law. But what makes similar or different is due to the difference source of law between both of that.

B. Classification of Criminal Act

The classification of crimes based on fiqh Jinayah there are absolut regulation (Qath'i) and dynamic regulation (dzanni) which open in every changing. According to Audah, Criminal act or jarimah classified into 3:

a. Jarimah Hudud

Jarimah which decided absolutely and assertively about kind and number of punishment constantly.¹¹ It's can not be deleted and changed except Allah. Because jarimah hudud, the punishment is from Allah purely and related to society interest.

¹⁰ Drs. Rochmadi, M.Ag., *Hukum Pidana Islam*, (Semarang: CV. Karya Abadi Jaya, 2015) page xiii .

¹¹ Doi, Abdur Rahman I, 1992, *Tindak Pidana Dalam Syaria'at Islam*, (Jakarta: Rineka Cipta, 2012), page 6.

b. Jarimah Qisas- Diyat

Jarimah qisas jarimah which threaten by equalable punishment. Jarimah diyat which threaten by compensation punishment. Jarimah qisas can be replaced by jarimah diyat. The requirement is the suspect has been forgiven by victim's family. But according to ulama *Khalaf* government should give punishment (*Ta'zir*). Although the propetreter has been forgiven by the victim's family.

c. Jarimah Ta'zir

Jarimah which threaten by punishment from goverments such as teaching (*ta'dhib*), warning and others which the punishment from the judge or government.¹²

I. Jarimah Hudud

a. Jarimah Zina

Zina is morally the most heinous crime, In islamic law zina divided into two terms, *zina muhsan* (Adultery) for the suspect who has been married, *zina ghairu muhsan* (Fornication) for the suspect who has not been married before. Absolutely It will implied for different punishment.

1. Adultery (*Zina Muhsan*)

Adultery is an evil which opens the road to other evils.¹³ Adultery is not only shameful in itself and

¹² Drs. Rochmadi, M.Ag., *Hukum Pidana Islam*, (Semarang: CV. Karya Abadi Jaya, 2015) page xiii .

inconsistent with any self-respect or respect for others, but it induces to invite many other evils. It destroys the basic of the family, it works against the interests of children born or to be born, it may lead to murders and feuds and loss of reputation and property. Not only should be avoided as a sin but any approach or temptation too it should be avoided.

وَلَا تَقْرُبُوا الزِّنَا إِنَّهُ كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا

“Nor come close to adultery for it is wickedness (shamefull deed) an an evil path” (Al- isra:32)

2. Fornication (*Zina Ghairu muhsan*)

Fornication is morally the most heinous crime that a person can commit.¹⁴ The one who commits it, in fact, robs that his humanity has been overwhelmed by his animality and he is not fit to live as a virtuous member of the society. From the social point of view is one of those heinous crimes which cut the root of civilization. Therefore, islam has held fornication as a punishable offence for its own sake, whether it is accompanied by some other offence as the use of violence or encroachment upon somebody else is legal or not.

¹³ M. Iqbal Siddiqi, *The Penal Law Of Islam*, (Delhi : Shahid International Islamic Publishers,1994) page:53.

¹⁴ M. Iqbal Siddiqi, *The Penal Law Of Islam*, (Delhi : Shahid International Islamic Publishers,1994) page:81.

b. Jarimah Qazaf

Qazaf is accusing *muhsanat* (a great girl) do zina.

The suspect of qazaf who can't attended 4 witness is punished by 80 stripes as main punishment and can not accept his arguments as additional punishment for getting daunted.¹⁵

c. Jarimah Asyurbu

Jarimah *Asyurbu* is drinking which intoxicated whether Khamr or not, which made by squeezing grape or others. According to Abu Hanifah *Asyurbu* is drinking khamr whether much or little.

d. Jarimah As-sirqoh

Sariqah is stealing something which is not his rights.

There are many different opinion from scholars about the criteria or requirements of sariqah which can be punished by cutting hands. The general argument gives the requirements. They are:

- a. Mature
- b. Be able to use a his ratio properly
- c. Unforced (Free)
- d. Hiddenly
- e. Dignified things

¹⁵ Drs. Rochmadi, M.Ag., *Hukum Pidana Islam*, (Semarang: CV. Karya Abadi Jaya, 2015) , page 39 .

- f. The things must be kept properly
- g. Reach one nishab
- h. The condition reason in war
- i. A precious things
- e. Jarimah Al-Hirabah

Hirabah is big stealing or (robbery). According to Hanafiyah, hirabah is taking other property by violence for making frightened only or even taking property while killing. According to Asyafi'iyah hirabah is taking other property by killing, frightening, by violence in a lonely place where far away from help.¹⁶

- f. Jarimah Al- Bagyu

According to Hanafiyah, *Al bagyu* is out from obedience to the imam (author) by invalid ways. According to Syafi'iyyah, *Al bagyu* is apostating of some group which have leader whom became idol than the legal leader by invalid arguments (*ta'wil*)¹⁷

- g. Jarimah Ar-Riddah

(رِتَّادٌ *riddah* or ارتداد *irtidād*) is commonly defined as the conscious abandonment of Islam by a Muslim, through word or deed. It includes the act of converting

¹⁶ Drs. Rochmadi, M.Ag., *Hukum Pidana Islam*, (Semarang: CV. Karya Abadi Jaya, 2015), page 69.

¹⁷ Drs. Rochmadi, M.Ag. *Hukum Pidana Islam*, 2015, Semarang: CV. Karya Abadi Jaya . page:87.

another religion, by a person who was born in a Muslim family or who had previously accepted Islam.

يشرح في الكتاب اليقوت النفيس التعريف عن الردة لغة
الرجوع عن الشيء إلى غيره وشرعاً قطع من يصح طلاقه
الإسلام بکفر عزماً أو قوله أو فعله أو عناداً أو اعتقاداً^{١٨}

1. The classification of Riddah (Apostasy)

There are 3 classification of Riddah. They are:

a) Apostasy by saying

Apostasy by saying for example: When there is a muslim and said “Iam a Christian, Iam not muslim”. It means that man has apostated.

b) Apostasy by action

Apostasy by action for example : When there is a muslim, he understand well about regulation in Islamic Law, then he stole something which is not belong to him, or he do sexual relation unlegally, and he said “ it is lawful (halal) and allowed in islam”.It means that man has apostated.

c) Apostasy by faith

¹⁸Syaikh Ahmad Asyatiri,*Alyaqtun Nafis*, (Surabaya: Al-Hidayah.), page: 190.

Apostasy by faith for example : When there is a muslim intentionally believe that Allah has a couple or even has a children.

According to kitab nadhrotul Qur'an Punishment for Apostasy is giving a war (killed). As we know that Islam is respectful to the humanity, Therefore, If the apostasy was repent, The government has authority to give punishment (Ta'zir) or even set him free.¹⁹

The conclusion from explanation above, hudud offences are considered the limits of Allah. Hudud has decided kind and number of punishment by Allah. It means the government has not right to add, to less or even to change the punishment.

II. Jarimah Qisas- Diyat

a. Qatl al amd

According to Abdul kadir Al audah, *qatlu al amdi* is an action of losing human soul intentionally. While, According to Zainuddin ali and sayyid sabiq *qatlu*

¹⁹ M. Abdul Mun'im. *Nadhrotul Quran Ila Jarimah wal Iqob*. (Kairo: Darul Manae. 1988), Page: 251.

al amdi is killing someone else with suitable guns to kill . There are three elements, an action can be identified into intentional killing. They are:

- 1) The victim is still alive, human.
 - 2) Making dead effect
 - 3) Having a big intention to kill the victim²⁰
- b. Qatl Syibh amd

Qatl Syibh amd has 2 elements. They are Intentional and error elements. Intentional element has been showing by action such as hit, or making hurt. Error element has been showing by nothing intention to kill.

According to Imam Syafi'i semi intentional Killing is Kiiling when the killer has intention in action but error in killing process.

According to *Kitab Nadhrotul Quran ilal Jarimah Wal iqob*, kinds of killing are only two, intentional and error killing.²¹

Punishment for the suspect there are 2 kinds. First, the main Punishment diyat. Diyat is compensation that given by the suspect to victim's family. The suspect must pay as same as 100 camels or 200 cows or 1000

²⁰ Syaikh Ahmad Asyatiri, *Alyaqtun Nafis*, (Surabaya: Al-Hidayah), page: 178

²¹ M. Abdul mun'im. *Nadhrotul Quran ila jarimah wal iqob*. (Kairo: Darul Manae. 1988), page: 151.

goats. If the suspect didn't able to do that, So the suspect can do kaffarat by giving independence to the slavery , if didn't able to find slavery, The suspect can do fasting for 2 months without space.

The second one is alternative punishment The suspect fasting 2 months for changing difficulties to find slavery. Or changing punishment by takzir, where goverment has authority to choose what kind of punishment which is suitable for the suspect.²²

c. Qatl Khata'

The definition of unintentional killing (Qatl Khata') is Killing process when the suspect doesn't have an intention to kill and he doesn't have willingness for the effect.

1. Elements of Unintentional killing

There are 3 elements of Unintentional killing

- a) The deeds make the victim has died
- b) The deed because of foolishness or mistake (unintentional deed)
- c) There are relationship between a mistake deed and The death of victim

²² Rochmadi, *Hukum Pidana Islam* , (Semarang: CV. Karya Abadi Jaya, 2015), page: 37.

2. Punishments for Unintentional killer.

As same as qatl amd and qatl syibh amd before, qatl khata' or unintentional killing has a main, change and addition punishments.

For unintentional killing, The main punishment is Diyat mukkhaffafah and kiffarat.

In here, the kind of kiffarat is give an independence for a slave. And diyat mukhafafah can pay indirectly for 3 years, for the suspect who can't able to fulfil main punishment, can change by fasting for 2 months.²³

In summary, According to the writer, Jarimah Qishas are really respect into the law of equality and humanity. Equality in retaliation is prescribed with a strict sense of justice, but it makes a clear provision for mercy and forgiveness. Therefore, qishas has been balanced by diyat. Diyat can become an optional punishment, if the perpetrator has been forgiven by the victims family. This law has showed the comprehensive and the blessing of Islamic religion.

²³ Rochmadi, *Hukum Pidana Islam*, (Semarang: CV. Karya Abadi Jaya, 2015), page: 38.

III. Jarimah Ta'zir

According to Abu Zahrah *Jarimah ta'zir* is criminal act which punishment it depends on the government because doesn't explained on Alquran or hadeeth.²⁴

Based on kitab Nadhrotul Quran criminal act divided into 2:

- Crimes related to wealth
- Crimes related to people and esteem

1) Crimes related to wealth

Wealth is everythings belong to human beings

And crimes related to wealth are:

- a) *Sariqah* (Stealing/ Theft)
- b) *Al itlaf* (Destruct)
- c) *Riba*
- d) *Al ikhtilash* (Corruption)
- e) *Ar risyawah* (Bribe)
- f) *Al luqothoh* (Finding)
- g) *Al wadi'ah* (entrusting)
- h) *Al ariyah* (borrowing)
- i) *Al ghulul* (embezzling)
- j) *Annasb* (combining)
- k) *At tazwir* (faking signature)
- l) *Al gusyu* (reducing scales)

²⁴ Al- Imam Muhammad Abu Zahrah, *Al Jarimah*, (Mesir: Dar al Fikr al arabi), page: 75.

- m) *Khiyanatul amanah* (Betraying)
- 2) Crimes Related to people and esteem
 - a) Action Which treats nation's safety
Every people who has a motivation or idea to destruct this nation include on crimes.
 - b) Murder
 - c) Hit and making pain²⁵

According to Abdul qadr Audah, Ta'zir has divided into 3:

1. *Ta'zir alal- ma'ashi* (التعزير على المعاishi)

Ta'zir for the one who doing criminal. The criminal act is not related to “*haq adami*. But related to “*haq jama'ah*”. Al fuqoha' has divided *al- ma'shiyah* into 3: *Al- ma'shiyah* which is punished by had. *Al ma'shiyah* which is punished by kaffarat. *Al ma'shiyah* which is punished by ta'zir. For example: The couple who has not married, but doing steady (*khalwat*), mosleam who eats unlawful food.

2. *Ta'zir lil maslahatil amah* (التعزير للمصلحة العامة)

Ta'zir lil maslahatil amah is not related to the *ma'shiyah*. For example, Ta'zir for educating children who leave sholat. Prohibited the crazy people interact

²⁵ M. Abdul Mun'im, *Nadhrotul Quran Ila Jarimah wal iqob*, (Kairo: Darul Manae. 1988) page: 153.

with general human. The aims is for public benefit(*maslahatil amah.*)

3. *Ta'zir alal Mukhaalifaat* (التعزير على المخالفات)

Ta'zir ala al- Mukhalifat is not related to someone who leave his obligation. But related to someone who did everything which is *makruh* than *sunnah*. The goal of punishment is for public benefit.²⁶

Therefore, according to the writer, the conclusion is Ta'zir is used for punishment other *hadd*, *qisas* and *kaffarah*. From explanation above, the writer concludes that the most fundamental aim in imposing punishment in Islamic criminal law, for example Ta'zir. That's the way to protect public interest or public benefit.

C. Definition of Gratification on article 12 B UUPTK

Gratification is one of corruption which has done by civil servants and the executive of this nation, but that's problem has not touched yet by law. Even, in the reality that's matter influences them in doing their duty and obligation.

Gratification based on Indonesian dictionary whose the author WJS Poerwadaminta is a gift that given to the civil servant more than salary which has determined. Based on constitution, on article 12 B and 12 Number 20 year 2001, gratification means giving in wider

²⁶ Abd. Qodir Audah, *At- Tasyri” al Jina’I al Islami muqorranan bi al qanun al wadi*, chapter 2, (Beirut- Libanon: Dar Al Kutub al immiyah, 2011), page: 155.

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. In the form above, gratification includes of *transactive corruption*.

Firstly, gratification or giving a gift is permitted, even giving a gift was becoming a good tradition long ago. But, nowadays because of developed technology and varieties of social life pattern, gratification or giving a gift was abused by someone who has determined goal. so gratification lost it's pure meaning. And because of it, nowadays gratification is prohibited.

Gratification tends to happen in providing things and service factory which involve the government. The person who abuses the true meaning of gratification by having a big intention to reach agreement with the government easily, for succeeding his project.

Giving which can indicate into gratification are:

- a.) Giving a gift as repayment for help
- b.) Giving a free ticket for holiday to the civil servant
- c.) Giving a free parcel to the civil servant
- d.) Giving a free discount for the civil servant
- e.) Giving a souvenir to the civil servant in a work tour

The example above, showed that giving a gift which include into gratification is, giving which related into position of civil servant or worshipship relationship.

D. Definition gratification On Fiqih Jinayah

Based on islamic law, gratification has same meaning with bribery, or in Arabic called *Risywah*. *Risywah* is one of corruption, Based on Islamic law, jarimah which is close to corruption divided into 8.

1) *Ghulul (Embezling)*

Etimologically, *ghulul* means betray in keeping property of war.²⁷ From this definition, scholars relate to history of Uhud war that Rasulullah do the strategy by place archers on behind the hill to keep another troops from unbeliever aggression.

In the beginning, moslem has been success to defeat some unbelievers, they lost their control, they snatch and struggle to take property of war, and live their maintenance. Finally, this condition used by unbelievers to defeat moslem, and moslem undergone a big defeat.

Terminologically, *Ghulul* is embezzling money related belong to country and public property.²⁸ *Ghulul* is one of

²⁷ Ibrahim Anis, Abdul Halim Muntasir dkk. *Al Mu'jam al Wasit*, (Mesir:Dar al-Maarif,1972) page:659

²⁸ M. Nurul Irfan, *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah,2012), page:81

corruption that happened in Rasulullah era.²⁹ Rasullullah only gave some restoration or character building to the suspect, because the nominal which has taken is too little, no more than three dirham. If the nominal which has corrupt until millions dollar, absolutely the punishment is more than constructive moral like corruptor not to be prayed by moslem when they died, it will be more heavy.

2) *Risywah (Bribery)*

Etimologically, Risywah derived from *rasya-yarsyu*, from masdar *risywah*, *rasywah* or *rusywah* which has meaning *al ja'lu* (salary, reward or bribery)³⁰. Terminologically, based on the expert of Islamic law, the author of *Al Mu'jam Al wasith*, *Risywah* is the things given for justifying the wrong and blaming the truth.³¹

Accordding to Abdullah bin Abdul Muhsin Ath-Thariqi, Risywah is the things which given for being tools for attaining desire related to position, and wealth.³² From the definition, we can conclude that Risywah or gratification has 3 elements.

²⁹ M. Nurul Irfan, *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah,2012), page:88

³⁰ M. Nurul Irfan, *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah,2012), page:89

³¹ Arrange Team *Al Mu'jam Al Wasith*,(Mesir, Dar Al ma'arif ,1872), Vol 1 page: 348

³² Abdullah bin Abdul Muhsin Ath-Thariqi, *Jarimah Ar-Risywah fi Asy Syari'ah Al islamiyyah Ma'a Dirasah Nizham Mukafahah Ar- Risyhwah fi Al Mamlakah Al Arabiyyah As- Su'udiyah*. (Mesir: Al- Mukarrom, 1999), page:50

There are, the giver (*Ar-rasyi*), the one who accept (*Al-Murtasyi*) and the object of Risyawah (*Al- Mursyalah*). According to M. Nurul Irfan in the reality, risywah is'nt only involved by three elements, it can involved another elements such as broker who became an intermediary between the first party and second party, and person who write the agreement.³³

There are some verses in Quran and Hadith explained about prohibition of *risywah*

وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ وَتُذْلُوا بِهَا إِلَى الْحُكَمَ لِتَأْكُلُوا فَرِيقًا
مِنْ أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنْتُمْ تَعْلَمُونَ

“And eat not up your property among yourselves in vanity, nor seek by it to gain the hearing of the judges that ye may knowingly devour a portion of the property of others wrongfully”
(Al Baqoroh:188)

عَنْ عَبْدِ اللَّهِ بْنِ عُمَرَ قَالَ لِعَنِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ
الرَّاشِي وَالْمَرْتَشِي

“Allah curses those who gave and took bribes.

Risyawah whether in Quran or hadith is prohibited deeds, it's include to the *Al ma'shiyyah* (prohibited deed by Allah). Surah Al Baqoroh 188 explained and showed that *Risyawah* or gratification is haram. It showed by using *fīl Mudhari'* followed

³³ M. Nurul Irfan, *Gratifikasi dan Kriminalitas Seksual dalam Hukum Pidana Islam*, (Jakarta:Amzah,2014),page:12

by *la nahi* which connected by *Qaidah ushuliyah* “*Annahi indal itlaq yaqtad attahrim* (prohibition which absolut means haram)³⁴

There is no specific regulation about punishment of *Risyawah*, therefore, *Risyawah* include into Jarimah Ta’zir. It’s became consequent of againts Islamic regulation and consequent of disobey to the Allah. Therefore, *Risyawah* must be given asserted punishment for saving others from the suspect and deleting a bribery culture. From Abu Said Al-Khudri r.a said : I heard Rasulullah said:

من رأى منكراً فليغيره بيده، فإن لم يستطع فبلسانه، فإن لم يستطع
فبقلبه وذلك أضعف الإيمان

“Anyone who sees munk then let him prevent with his hand, if he can not, then with his tongue, and if he can not (also), then with his heart. That is the weakest-weak faith.” (HR. Muslim, Al-Tirmidzi,Al Nasai and Ahmad)

Who has the authority to prevent and to lose it, is the government while helped by every elements of nation. Therefore, jarimah ta’zir is suitable for becaming punishment of *Risyawah*.

3) *Ghasab* (using other property unexcusely)

Etimologically, according to Al khatib al- Syarbini, ghasab is taking other property wrongly and openly.³⁵ According to Sayyid Ahmad umar asyatiri, on kitab

³⁴ Asmawi, *Teori Maslahat dan Perundang-Undangan Khusus di Indonesia.*(Badan Litbang Kementrian Agama RI,2010) page:131

Alyaqtun nafis, ghasab means:

أخذ الشيء ظلماً و شرعاً استيلاء على حق الغير بغير حق³⁶

Etimologically, Sayyid Ahmad umar Asyatiri has agreed with Al khatib Asyarbini that *Ghasab* means taking other property wrongly, but terminologically, according to him, *Ghasab* means dominate or control other right invalidly.

Scholars agree that *ghasab* is forbidden, Imam Nawawi said that the majority of moslem agree that *Ghasb* is proscribed.³⁷ About the punishment, there is no dalil or argumentation in Alquran or Hadist that showed specific punishment of *Ghasb*. Therefore, the punishment of *Ghasb* include into ta'zir. In the positive law, *ghasab* related to the penal law.

Imam Al Nawawi classified punishment of *ghasab* based on the object of *ghasab* into 3:

a. Punishment for the object of *ghasab* which is totally

The punishment of those cases is returning the things which is taken and *ta'zir* or *ta'dib* by the government.

b. Punishment for the object of *ghasab* which is lost

Beside *ta'zir*, the suspect must be return and change which has been taken as price as thing which has taken.

c. Punishment for the object which is lackly.

³⁵ M. Nurul Irfan, *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah,2012), page:105

³⁶ Sayyid Ahmad bin Umar Asyatiri, *Alyaqtun Nafis fi madzab bin Idris*, (Surabaya: Al-Hidayah) page: 104

³⁷ Imam Nawawi,*Al Majmu' Syarh al Muhadzzab*, Chapter 14 page: 62

The suspect have to return and change the lack of things which have been taken.

4) *Khianat*

According to Wahab Al- Zuhaili Khianat is breaking trust which has trusted such as slaughtering to the moslem or showing hostility to the moslem³⁸.

5) *Sariqoh (Stealing)*

Sariqah is stealing something which is not his rights. There are many different opinion from scholars about the criteria or requirements of sariqah which can be punished by cutting hands. The general argument gives the requirements. They are:

- a. Mature
- b. Be able to use a his ratio properly
- c. Unforced (Free)
- d. Hiddenly
- e. Dignified things
- f. The things must be kept properly
- g. Reach one nishab
- h. The condition reason in war
- i. A precious things

6) *Hirabah (Robbery)*

Hirabah is big stealing or (robbery). According to Hanafiyah, hirabah is taking other property by violence for

³⁸ Al Zuhaili, *Al Fiqh Al Islami wa adillatuh*, chapter 8, page 5876

making frightened only or even taking property while killing. According to Asyafi'iyah hirabah is taking other property by killing, frightening, by violence in a lonely place where far away from help.³⁹

7) *Al maks* (Illegal pickings)

According to Muhammad bin Salim, *al maks* is a rule that decided by tyrannical leader. It has related to wealth which is not suitable with constitution, but intentionally made for individual profit.⁴⁰

8) *Al- Ikhtilas* (pilfering)

Al Ikhtilas is taking other property through violence without permission clearly and fastly.

Therefore, by knowing criminal act which is close to corruption above, the conclusion is gratification include into *Risywah* (bribery). The criminal act above, which is related to the corruption, especially gratification has not explained clearly about the punishments by Alquran or hadeeth. Therefore, it can conlude into jarimah ta'zir which the punishment depends on the government.

³⁹ Rochmadi, *Hukum Pidana Islam*, (Semarang: CV. Karya Abadi Jaya, 2015), page: 69

⁴⁰ M. Nurul Irfan, *Korupsi dalam Hukum Pidana Islam*, (Jakarta: AMZAH,2012) page: 129

E. Punishment of Gratification

1. Punishment of gratification based on positive law

Policy of gratification regulated on Law No. 31 of 1999 as amended Law No.20 of 2001 about eradication of corruption. Corruption explained clearly into every article on that Law. Based on that articles, explained every deeds which can indicate include into corruption. They are:

- a. Bribery
- b. Embezzling money of country
- c. Exploitation
- d. Gratification

One of Government effort to overcome and eradicate corruption is, amend and renewal the regulation which regulated before. Law No. 31 of 1999 is not really strong to be principle, therefore, government legitimates or declares law No. 20 of 2011 as amended from law no. 31 of 1999. There is interest item on new regulation is about gratification. Actually gratification has been mentioned on law no. 31 of 1999 but has not explained clearly and specificly.

Regulation of crime for civil servant about gratification and who does not report to the corruption eradication commission (KPK) regulated on article chapter 12 B and 12 C. The formulation of article 12 B is absolutely about criminal act, because the characteristic are fulfilled, there are prohibited deeds

and the object which has threaten by criminal threat. Gratification based on article 12 B is formulated below:

- (1) Any gratification to public servant or state official are considered to be a bribe if related to their position. For Rp. 10.0000.000 and more, the one who prove that gratification or not is the suspect. For less than Rp. 10.0000.000, the one who prove that gratification or not is the prosecutor.
- (2) Threaten Punishment for civil servant that accept gratification is living jail penalty or minimum jail for 4 years and maximum jail for 20 years, and fund punishment minimum Rp. 200.000.000 and maximum Rp. 1.000.000.000

The explanation of article 12 B verses 1 that gratification means giving in the large meaning, 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. In the form above, gratification includes of *transactive corruption*.

Article 12 C

- 1) Point on article 12 B verses is not prevail when the one who accept gratification report to the corruption eradication commission.

- 2) Conveying report which mentioned by verses (1), the last reporting 30 days after accepting gratification
- 3) Corruption Eradication commission (KPK) at least 30 days working after reporting must be determine which one gratification belong to country and not.
- 4) Regulation about the way to convey which has mentioned in verses (2) and determination of gratification which has mentioned in verses (3) regulated on Law about corruption eradication commission.

The way to conclude every deed include into gratification or not based on article chapter 12B and 12C law No.31 of 1999 as amended law No. 20 of 2001 about eradication corruption, must be fullfill elements below:

- a. Civil servant
- b. Accepting thing or facilities which indicates into gratification
- c. Related to the position or opposite with his obligation as the civil servant.
- d. Gratification which does not report to the corruption eradication commission on 30 days after accepting.

Explanation and determination of chapter 12 B looks that inside of that chapter is not about determination of accepting gratification only, but also determination of authentication for criminal act of gratification, which explained in verses (1) a and b. Beside that, in this chapter is also explaine about accepting

gratification on verse (1) and threaten punishment explaine on verses (2).

The aim to entering gratification element on Law No. 31 1999 as amended law No. 20 of 2001 about eradication corruption is eliminating unfairness for the suspect of corruption in relative amount, therefore by additional chapter about gratification, corruptor in every scale can be punished.

Gratification which defined by chapter 12 B law No. 31of 1999 as amended law No. 20 of 2001 about eradication corruption has a larger meaning. Passive corruption can include into gratification based on chapter 12 B, as Adam Chazawi concluded determination of chapter 12 B verse (1) below:

- 1) Gratification is same with passive corruption
- 2) Based on chapter 12 B, gratification is corruption or bribe passively, therefore, goverment can not punish the giver, because gratification is not include active corruption.
- 3) Therefore, because of largery meaning of gratification, there was a gap between the definition of gratification on chapter 12 letter b verses (1) and chapter 5 and 6 verses (2), chapter 12 letter a,b and c.⁴¹

Some of chapter that have a gap with others like explaine before are:

⁴¹ Adami Chazawi, *Hukum Pembuktian Tindak Pidana Korupsi*, (Bandung, Alumni, 2006), Page:284

Chapter 5 verses (2)

Every civil servant which accept something which has explained on chapter (1) letter a or b, has a same criminal prosecution.

Chapter 6 verses (2)

For the judge and lawyer who accept the gift such as explained in verse (1) letter a must be punished which determined on verses (1).

Chapter 12 threaten by live jailing or minimum 4 years jailing and maximum 20 years jailing and fine minimum Rp. 200.0000.000 and maximum Rp. 1.000.000.000.000. Who one threatened by this chapter are:

- a. Civil servant who accept a gift, moreover, has indicated for asking movement that related about his position and deny with his obligation.
 - b. Civil servant who accept a gift, moreover has indicated that a gift is repayment for doing his job.
 - c. The judge who accept a gift, moreover has indicated for influencing decision of some cases.
2. Punishment of gratification based on fiqh Jinayah

Gratification based on fiqh jinayah has same meaning with bribe (*Risywah*). Related to the punishment of gratification is almost same with *ghulul* or embezzling money. The suitable

punishment is Ta'zir, because of gratification is not include into jarimah hudud or qisas and diyat.

According to Abdullah bin Abdullah muhsin, there is no specific punishment for gratification in syariat. Because of gratification include into jarimah ta'zir which the fully decision based on the judge. For finding a kind of punishment must through Islamic law principle which equal with humanity principle for keeping society life. The punishment must be suitable with the criminal act, the environment where the violation done, and motivation which encourage criminal act. The main point is, gratification include into jarimah Ta'zir⁴²

Jarimah Ta'zir, the judge or the government should give the limitation, minimum or maximum for determining the punishment. Government should make the regulation depend on the situation. It means the government has a big authority to decrease or increase the punishment.

There are some verses in Quran and Hadith explained about prohibition of gratification.

وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ وَنَذِلُوا بِهَا إِلَى الْحُكَّامِ لِتَأْكُلُوا فِرِيقًا
مِنْ أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنْتُمْ تَعْلَمُونَ

“And eat not up your property among yourselves in vanity, nor seek by it to gain the hearing of the judges that ye may

⁴² Abdullah bin Abdullah Muhsin, *Jarimah Ar Risywah fi Asy- Syari'ah Al-Islamiyyah*, (Riyadh: 1396 H) page: 113

knowingly devour a portion of the property of others wrongfully”
 (Al Baqoroh:188)

عن عبد الله بن عمر قال لعن رسول الله صلى الله عليه وسلم
 الراشي و المرتاشي

“Allah curses those who gave and took bribes.

Gratification whether in Quran or hadith is prohibited deeds, it includes to the *Al ma'shiyyah* (prohibited deed by Allah). Surah Al Baqoroh 188 explaine and show that *Risyawah* or gratification is haram. It showed by using *fîl Mudhari'* followed by *la nahi* which connected by *Qaidah ushuliyah* “*Al nahi ind al itlaq yaqtad yaqtad al Tahrîm* (prohibition which absolut means haram)⁴³

Related into gratification, the kind of jarimah Ta'zir which usually done are:

1) Employee dismissal

The suspect of gratification act can be dismiss from his position in his factory.

2) Prevention

Prevent the suspect of gratification act to accept his rights such as ghanimah when he involve into war.

3) Seizure orders

⁴³ Asmawi, *Teori Maslahat dan Perundang-Undangan Khusus di Indonesia.*(Badan Litbang Kementrian Agama RI,2010) page:131

Deprivation all of the things which indicate into criminal act and the things are not belong to the suspect

4) Eliminating

Eliminate all of the result of criminal act such as destruct the illegal building, eliminate the wine and counterfeit goods.⁴⁴

Therefore, the conclusion of the theory of criminal act above, gratification includes into criminal act. Based on positive law has been threaten on Law No. 31 of 1999 as amended Law No.20 of 2001 about eradication of corruption. Especially on chapter 12 B about gratification. Based on fiqh jinayah gratification include into *Risywah*. The punishment is depend on the government, because *Risywah* includes into jarimah *Ta'zir*

⁴⁴ Rochmadi, *Hukum Pidana Islam*, (Semarang: CV. Karya Abadi Jaya, 2015), page: 288-289

CHAPTER III

SEXUAL GRATIFICATION

A. Definition of Sexual Gratification

Definition of sexual gratification is giving illegal sexual facilities. The sexual gratification give to the official or civil servant. The gift which is not related to their right and duty. Other definition, sexual gratification is kind of bribe that use woman as the object, given to the civil servant that related to their position, the aim of given is to be the winner of thunder or escape from the cases.¹

The law expert from University Indonesia, Ganjar Laksamana Bondan said that sexual gratification is only the addition of bribe. The main bribe is related to money and things.² The warm discussion on this society is about sexual gratification as a new form of gratification. Moh.Mahfud MD said that sexual gratification is kind of terrible corruption than corruption or gratification by money.³

The chief of PBNU, Said Agil Siraj said that sexual gratification is heinous crime, because not only element but double elements which contained in sexual gratification. Assertively, he said that

¹ Jamal Wiwoho, *Menyoal Gratifikasi Seks dalam Tindak Pidana Korupsi*, (Media Indonesia,) access 10 september 2017 from <http://jamalwiwoho.Jamalwiwoho.com/2017/10/09/>

² Tempo.com. *gratifikasi seks menjadi pelengkap suap*. Access 10 september 2017 from <http://www.tempo.com/2017/10/09/>

³ Jamal Wiwoho, *Menyoal Gratifikasi Seks dalam Tindak Pidana Korupsi*, (Media Indonesia), access 10 september 2017 from <http://jamalwiwoho.Jamalwiwoho.com/2017/10/09/>

sexual gratification is not only harmful for Indonesia, but will damage nation character.⁴

In Summary, Sexual gratification is one of new style of corruption, this case has not been clear writtten on UUPTK, but impliedly entered in article 12B UUPTK on its explanation. If the regulation do attention to what implied in every rules, sexual gratification must be punished. Unlucky, only corruption and gratification which related to the things and money which be punished.

B. History of Sexual Gratification

Corruption has begun in the beginning of life. When the society has been crowded, human has been bother with corruption as thousand years ago. Intensity and kind of corruption tend to different in everytime and everyplace. Corruption especially gratification has been crowded problems in Egypt, Babilonia, India, China, Ibrani and Roman long ago, the leader of Babilonia, Hammurabi, asked to the governor to investigate some gratification cases.⁵

On revolution era (1945-1950), Indonesia has been fulled by stories of the greatest author like, Pramodya Ananta Toer (*Di Tepi Kali Bekasi*), and Mochtar Lubis (*Maut dan Cinta*), We often read about the one who take profit, while other do struggle hard for

⁴ [⁵ Syed Husein Alatas, *Korupsi, Sifat, Sebab dan Fungsi*. \(Jakarta: Lp3Es . 1987\) page: 1](http://www.rmol.co/read/2013. KH Said Agil- gratifikasi seks kategori Zina. Access: 14 september 2017</p>
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making country independence.⁶ Time goes by, the rule about corruption created. The crucial problem is on the way to overcome and wipe out. Corruption eradication commission (Kpk) as the only trusted institution to overcome corruption now.

Seeing history, corruption is one of democracy product , because there is no democracy country which has been free from corruption. After 13 years ago, reformation of politic birocracy can not eliminate of corruption tradition. Birocracy of reformation hold on repairing government system through transparency mechanism. The reality, the members of birocracy inhibit the succesing of clean birocracy and government system.

Beside that, the fertilize of corruption, specially gratification caused of attenuation of trusted institution to eradicate corruption, such as corruption eradication commission (KPK), Tipikor court, and others. Therefore the suspect more glorius to do his action, and even corruption became of democracy fuel.

C. Factors of Sexual Gratification

Factors of sexual gratification as same as corruption's factors. Sayyed Husein Alatas said that cause of corruption is increasing amount of civil servant. By increasing amount of civil servant, it means increasing authority and chance of bureaucracy while a weak

⁶ Ajip Rosidi, *Korupsi dan Kebudayaan*, , (Jakarta: PT Dunia Pustaka Jaya.2006) page: 24

of supervision and influencing from political party.⁷ According to Krisna Harahap, there are 2 factors, internal and external factors.

a. Internal factors there are:

- i. impulsing neccesity. Someone accept gratification caused of amount of salary less than necessity.
- ii. Impulsing of greed. Someone accept gratification to make luxurious life.

b. External factors

- i. Enviroment which consider that gratification is common deeds
- ii. Big opportunity caused of weakness of supervision about gratification.⁸

According to the transparency international society, sexual gratification can happen because the lawness willing of government to overcome the problem.⁹ This statement has proven by the lawness institution of military which is dominant in politic sector. Therefore, will be less of maintaining for the people who broke the law specially sexual gratification.

According to Ilham Gunawan, factors of sexual gratification are:

- i. Decreasing morality and ethics

⁷ Syed Husein Alatas, *Korupsi, Sifat, Sebab dan Fungsi*, (Jakarta: LP3ES, 1987) page: 122

⁸ Krisna Harahap, *Pembarantasan Korupsi Jalan Tiada Ujung*, (Bandung: PT Grafiti, 2006) page: 7-8

⁹ Surachim and Suhandio Cahaya. *Strategi dan teknik Korupsi mengetahui untuk mencegah* (Jakarta: Sinar Grafika. 2011) page. 107

- ii. Colonialism
- iii. Weakness of education and science
- iv. Poverty
- v. Weakness of government policy
- vi. Unassertive of Government structural¹⁰

According to the author, one of Sexual gratification factors is lawness of understanding religion. As same As Nurul Irfan argument, if someone has been strong faith, little Possibility to do sexual gratification.¹¹ Beside that, decreasing qualification of requirements for recruitment civil servant is also became the factor of sexual gratification. Someone who has not a good mentality, who became civil servant or minister for example, face a big opportunity and big chance to do corruption, he will do, because there is a big chance while no balanced by a good mentality.

D. Cases and law enforcement of sexual gratification in several countries.

Sexual gratification happened along ago in many countries. Singapura, Malaysia, South Korea and even Indonesia. Sutan Bathoegana one of comite III DPR RI admited that sexual gratification happened long ago in many countries for example

¹⁰ Surachim and Suhandio Cahaya. *Strategi dan teknik Korupsi mengetahui untuk mencegah* (Jakarta: Sinar Grafika. 2011) page. 108

¹¹ Nurul Irfan, *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: AMZAH, 2012) page: 37

Singapura.¹² In Singapura, sexual gratification has became crucial problem. Start from police official, minister and even the lecturer who will give the best score for his student that paid by sex service. Moreover, we know that Singapura has been well known as the country with the littlest corruption of Asia.

In Singapura, some of sexual gratification has been punished by the government. On 2011, director at Singapore drug center (CNB), Ng Boon Gay asked to go to the court cause of accepting sexual gratification from Cecilia Sue Siew Nang. Ng Boon Gay admitted has accepted sexual gratification for four times from Cecilia for successsing IT project. He was punished on December 2011.

Other cases, member of Police Singapore, Sersan Pathivan Ramaya and Investigator on ministry of Labor, Norezwan Em. Sersan Pathivan was punished because giving remission for stealing cases as recompense of sexual gratification from Dwi sulistiani. Norezwan Em accepted sexual gratification from Liu Lihua Citizen of China for extension of resident permit in Singapura. Both of them, threaten by jailing maximum 5 years, and fine maximum 1000.000 dollar Singapore or about 800 millions.¹³

Singapore senior minister of state for foreign affairs and Home Affairs, Masagos Zulkifli said that In Singapore, everyone, who accept everythings whether money, things, or service, he must

¹² www.Tvone.news.tv (access on 17 october 2017)

¹³ <http://www.Ilr.or.id/> sexual gratification service. (access on 20 October 2017)

pay off and collecting a half of his salary, that's the consequence of doing gratification.¹⁴

Three arbiters from Lebanon accused has accepted sexual gratification, for succesing league score of one group. Three arbiters was leading AFC Cup 2013 competition between Singapore club Tampines Rovers and East Bengal from India. All of the arbiters directly changed with another arbiter after caught by Corrupt Practices Investigation Bureau (CPIB) with accusation has accepted sexual gratification.¹⁵

One of a main agency colonel of Singapore, Singapore civil defence force (SCDF) Peter Lim, has accepted sexual gratification from 3 women as his partners . Sexual gratification which has accepted as repayment of project technology and information contract on the women enterprise. Peter has been caught by Corrupt Practices Investigation Bureau (CPIB) on January 2012 and on February he asked to resign from his position. Three women were gave sexual gratification hold high

position in every business. They are Pang Chor Mui as general manager Nimrood Engineering, Lee Wei Hoon, as the director of radiation centre of Singapore and Esther Goh as director of developing business NCS Private Limited. Peter Lim has admitted that he did sexual gratification in different place with different

¹⁴ <http://news.detic.com/> hukum anti gratifikasi ala singapura (access on 6 juni 2017)

¹⁵ //www.googletagmanager.kompas.com (access on 1 Nov 2017)

women. Such as Big Splash East Coast Park, Singapore Indoor Stadium and a luxurious hotel on france.

Malaysia has different case, The judge set 4 people free who accused accept gratification from a businessman to ease his project. The four people who accused has known that ask woman to accompany them in Villa at Subang on February 2003. Because difficult to prove this case, the judge just set them free.¹⁶

E. Cases and law enforcement of sexual gratification in Indonesia.

In Indonesia, Sexual gratification is uncommonly term, but crowded in action. Permadi as one of the house of representative said that every civil servant or state caretaker who goes for official job has offered sexual service absolutely, it depends on their mentality for accepting or refusing sexual gratification offering.¹⁷

The example cases gratification which indicated by sexual services are:

1. Ahmad Fathonah Case

Ahmad Fathonah as the close friend of the chief of PKS, Lutfi Hasan, catched by KPK in Le Meridien hotel with Mariana Suciono one of student in one of famous university in Jakarta. Kpk also found a bundle of money Rp. 10.000.000 as

¹⁶<http://hukum.kompasiana.com/2013/01/14/gratifikasi-pelayanan-seksual-524246.html> (access on 18 April 2017)

¹⁷ www.tvonews.com (access on 16 April 2017)

recompense becoming *escort lady*¹⁸ from that cases, the identification is too difficult without balancing by the strong regulation of this country.

2. Al Amin Nasution Case

On 2008, DPR RI Al Amin Nur Nasution Caught by KPK In Pub Mistere Hotel Ritz Carlton cause of sexual gratification case. Al Amin accompanied by a beautiful woman which accused as “ a gift ”from regency secretary of Bintan. Al amin has accepted sexual gratification as repayment for helping nature preserve business of Bintan Island. Al Amin Nasution declared as the suspected of sexual gratification, has broke chapter 12 a and 12 e Law No. 31 of 1999 as amended by Law No. 20 of 2001 on Corruption Eradication. By Jailing 15 years and find 500 millions. On Next court, the judge decided based on chapter 11 and 12 e Law No. 31 of 1999 as amended by Law No. 20 of 2001 on Corruption Eradication by sentenced Al Amin to jail along 8 years and fine 250 millions.¹⁹

On higher decision on the next step which decided by high court, Punishment increase into jailing 10 years by considering transcript dialogue between the suspect and others about asking to look for a good woman. And there was

¹⁸ *Escort Lady* comes from Italy. Escort means guard. Escort lady assign by her boss to accompany the guest's boss for dinner and doing project in the night time. But day by day escort lady abuse their profession to the negative way as called woman.

¹⁹ www.haluankepri.com/insert/40302layanan-seks-bisa-masuk-gratifikasi-.html, Access on 15 Agustus 2017.

negotiation about woman criteria. Final decision on cassation the punishment decrease into 8 years.it showed that transcript dialoge about woman suitable to consider in giving punishment.

3. Hakim Seya Budi Case

On 2013, Setyabudi tejo cahyono, Judge of district court of Bandung has accepted gratification from Toto Hutagalung , its about 3 billions, for decreasing punishment of corruptor social fund and for eliminate the name of Edi Eswadi as ex mayor and regional secretary of Bandung .²⁰

Toto Hutagalung as the chief of Gasibu Padjajaran is soulmate of Dada Rosada, governor of Bandung. They admitted that asked to provide sexual services oftenly by Setyabudi. Johson Siregar, as the lawyer of Toto Hutagalung explained to the team of corruption eradication commission that, Setyabudi was not only ask money for gratification but also sexual service.²¹

Toto Hutagalung gave adition that every Friday night, Setyabudi asked karaoke service beside asking money and asking woman to entertain him. According to Toto, Karaoke service can spend more than 25 millions.²² Prosecutor has prosecuted

²⁰ Ikatan Hakim Indonesia (IKAHI), *Varia Peradilan Majalah Hukum* Tahun XXIX No.344 (Jakarta: IKAHI, 2014), page:72.

²¹ Dewi Novita Sari, *Tindak Pidana Korupsi dalam Bentuk Gratifikasi Seksual*, (Lex Crimen, Vol. II, No. 3, Juli, 2013), page: 176.

²² <http://www.tribunnews.com/regional/2013/11/01/para-terdakwa-sering-karaokean-bersama>. 2013. (Acess on 14 November 2017).

Setyabudi and snatched him with chapter 12 C, Chapter 6a and Chapter 12a, Law No. 31 of 1999 as amended by Law No. 20 of 2001 on corruption eradication. By jailing 16 years and fine 400 millions. Finally, final decision which decided by judge is, jailing 12 years and find 200 millions.

Therefore, for this cases, it showed that sexual gratification element is not really consider by the judge. Although there was admission from the whitness and suspect. Toto Hutagalung as the whitness has said that Setyabudi also asked sexual service beside money.

4. Izedrik Emir Moeis

Izedrik Emir Moeis, member of DPR RI snatched gratification cases on PLTU project Tarahan, Lampung. On investigation of whitness, Pirooz Sharafi said that Emir has accepted sexual gratification on 2002. Emir, Sharafi and Fred perruci met in one of club in Paris, and gone out with beautiful woman who asked by fred to accompany Emir in Paris. On 2014, Emir mois sentenced by the judge, jailing 3 years and fine 150 millions. The judge declared that the suspect was broke chapter 11 Law No. 31of 1999 was amended by Law No. 20 of 2001 of Corruption eradication.²³

5. Police woman case

²³[www.tempo.co/read/news/2013/12/05/063534803/Emir-Moeis-Disebut-Dapat-Gratifikasi-Seks-diParis, 2013. \(Access on 11 September 2017\).](http://www.tempo.co/read/news/2013/12/05/063534803/Emir-Moeis-Disebut-Dapat-Gratifikasi-Seks-diParis, 2013. (Access on 11 September 2017).)

On October 2014, one of candidate of police woman, initial GS, knew has pregnant when doing study process on police academy. Gs admitted that she has pregnant because giving sexual service for policeman. She has threaten, if she refuses, she will be eliminated from candidate of policewoman list. Sexual gratification has given by police woman as repayment for her success on selection police woman test. This case will be cleared b police of Bali.

This case showed that sexual gratification has spread out on police agency. Policeman asked sexual service clearly as his repayment for succesing GS on her test. Policeman deeds related to his position, therefore, policeman deed include into gratification if related to chapter 12 B.

Law enforcement for sexual gratification which has implied in Indonesia is, the judge tend to consider gratification element by money or things, because sexual gratification element looks different to enter in consideration, because there is no clear regulation, it should be there is explanation more on Law No. 31 of 1999 as amended Law No.20 of 2001 about eradication of corruption.

The most difficulties to overcome sexual gratification case is, how to prove it. Authentication is one of inhibiting factor in law enforcement. According to H. Ansori, the judge of Ad Hoc in criminal act of corruption in Maluku, he explained that sexual

gratification is really difficult to prove because of a bit of evidence and witness.²⁴

Indonesia has not applied the true of sexual gratification regulation on national penal law. Although, About gratification has explained in Law No. 31 of 1999 as amended Law No. 20 Of 2001 about eradication of corruption, but unfortunately, there is no effort for entering sexual gratification element clearly into regulation.

Moreover, sexual gratification cases has spread out in every institution and society. Assertiveness of the judge to overcome this cases also needed to be the best solution, Based on chapter 12 B actually sexual gratification element has included into gratification and must be punished. Because decreasing assertiveness of the judge and there is no one to start to overcome and brave to punish, therefore other judge to be followers only, who did not to punish sexual gratification.

²⁴ Ikatan Hakim Indonesia (IKAHI), *Varia Peradilan Majalah Hukum* Tahun XXIX No.344 (Jakarta: IKAHI, 2014), page:94

CHAPTER IV

COMPARING ANALYSIS CRIMINAL ACT OF SEXUAL GRATIFICATION BASED ON FIQIH JINAYAH AND POSITIVE LAW

A. Sexual Gratification on Fiqih Jinayah Perspective

Based on Fiqh Jinayah perspective, gratification is prohibited. Allah curses the one who gave and took gratification.

عن عبد الله بن عمر قال لعن رسول الله صلى الله عليه وسلم
الراشبي و المرتضي

Rasulullah Saw asked Abdullah bin Al Iudbiyah azdi for collecting alms (zakat) from bani Sulaim. Abdullah said “it’s too much for *zakat*, how about we divided it for *shadaaqoh*? ” Rasulullah answered “Stay on your parents house until the one who give shadaqoh comes, if you are truly honest.¹ In Khulafaurrasyidin era, Khalifah Umar bin Khatab asked all his governor to refuse whatever the kind of gift. Because gift is a part of bribe or gratification.

ایاکم والهدايا فانها من الراشبي

Statement of Khalifah Umar bin Khatab is really true if related to the assumption todays. *Risywah* covered by a gift that has common in society. Khalifah Umar bin Abddul aziz always refused all of the things that given to him, because Rasulullah Saw said :

¹ A. Rahman I, *Penjelasan Lengkap Hukum- Hukum Allah Syariah*, (Jakarta: PT Raja Grafindo Persada ,2002) , page: 505.

كانت له هدية و لنا رشوة لانه كان يتقرب اليه لنبوته لا وليته و نحن
يتقرب اليها للولاية

“For them that’s a gift, but for us that’s a bribe. Because close to rasul is because he is rasul , is not because of his authority. But they want to close us because our authority”

Prophet Muhammad SAW ever accepted a gift, then gave to the beggar. In Rasulullah era, giving a gift to the author specially Rasulullah is not related to own profit intent ,but nowadays, there are many kind of profit intention to close to the author. Prophet Muhammad has reminded that “There is era where risiyah is consider to permitted by a gift and killing by reprimand”.² About bribe or gratification in islam has prohibited clearly, moreover sexual gratification.

Sexual gratification contains of double crimes, not only *Risyawah* but also zina. Zina is morally the most heinous crime, In islamic law zina divided into two terms, Zina muhsan (Adultery) for the suspect who has been married, Zina ghairu muhsan (Fornication) for the suspect who has not been married before. Absolutely It will implied for different punishment.

Based on Fiqih Jinayah, Zina is divided into two, Adultery and fornication. Adultery is an evil which opens the road to other evils.³ Adultery is not only shameful in itself and inconsistent with

² A. Rahman I, *Penjelasan Lengkap Hukum- Hukum Allah Syariah*,(Jakarta: PT Raja Grafindo Persada ,2002) page: 505

³ M. Iqbal Siddiqi, *The Penal Law Of Islam*, (Delhi : Shahid International Islamic Publishers,1994) page:53

any self-respect or respect for others, but it induces to invite many other evils. It destroys the basic of the family, it works against the interests of children born or to be born, it may lead to murders and feuds and loss of reputation and property. Not only should be avoided as a sin but also any approach or temptation to the fornication is should be avoided.

وَلَا تُقْرِبُوا الِّزْنَى إِنَّهُ كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا

“Nor come nigh to adultery for it is wickedness (shamefull deed) an an evil path” (Al- isra:32)

Fornication is morally the most heinous crime that a person can commit.⁴ The one who commits it, in fact, robs that his humanity has been overwhelmed by his animality and he is not fit to live as a virtuous member of the society. From the social point of view is one of those heinous crimes which cut the root of civilization. Therefore, islam has held fornication as a punishable offence for its own sake, whether it is accompanied by some other offence as the use of violence or encroachment upon somebody else is legal or not.

According to Abddul Malik sexual gratification includes into jarimah zina.⁵ Therefore, based on fiqh jinayah perspective, law position of sexual gratification includes into jarimah Zina and *Risywah* and absolutely includes into a big sin.

⁴ M. Iqbal Siddiqi, *The Penal Law Of Islam*, (Delhi : Shahid International Islamic Publishers,1994) page:81

⁵ M. Abdul Malik, *Perilaku Zina pandangan Hukum Islam dan KUHP*, (Jakarta: Bulan Bintang,2003). Page: 25

Threaten punishment for the suspect or the one who accept sexual gratification is for 100 times for the one who is single and *rajam* for the one who has been married.

Fornication is strict signification implies illicit sexual relation between two unmarried persons. The punishment for fornication is one hundred stripes. The holy Qur'an says:

الَّزَانِيَةُ وَالَّزَانِي فَاجْلِدُوَا كُلَّ وَاحِدٍ مِنْهُمَا مِائَةً جَلْدَةً وَلَا تَأْخُذُكُمْ بِهِمَا رَأْفَةً
فِي دِينِ اللَّهِ إِنْ كُنْتُمْ ثُوَّابُنُوْنَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلْيَشَهَدْ عَذَابُهُمَا طَافِقَةً مِنْ
الْمُؤْمِنِينَ

“The fornicators shall each be given a hundred stripes, and let not compassion move you in their case, in matter prescribed by Allah, if you believe in Allah and Last day: And let a party of the believers witness their punishment.” (Qs. Annur: 2)

If the person convicted of fornication is a slave, male or female, the punishment of such is only fifty stripes. Because holy Quran says:

فَإِذَا أُحْسِنَ فَإِنْ أَتَيْنَ بِفَاحِشَةٍ فَعَلَيْهِنَ نِصْفُ مَا عَلَى الْمُحْسَنَاتِ مِنْ
الْعَذَابِ ذَلِكَ لِمَنْ حَشِيَ الْعَنْتَ مِنْكُمْ وَأَنْ تَصْبِرُوا وَخَيْرٌ لَكُمْ وَاللَّهُ غَفُورٌ
رَحِيمٌ

“And if when they (The slave girl) are honourably married, they are guilty of indecency, they shall incur the half of the punishment (prescribed) for free woman (in that case).”(Qs. Annisa:25)

Authentication of zina based on fiqh jinayah there are 4:

- I. Confession of the suspect
- II. Four whitness who strengthen by swear

III. Documents such as proof of pregnancy, and other forensic documents.⁶

Therefore, for response this cases, according to Fiqih Jinayah, the writer uses Double Crimes Theory. There are 2 *Nazhariyat at-tadakhul* (Completing theory) and *Nazhariyat al jab* (Absorbtion Theory).

a. Completing Theory (*Nazhariyat At-Tadakhul*)

According to this theory, when double crimes happened, the punishment are completing each others. Therefore, the deeds only give one punishment. The reason for giving one punishment only, for give (*ta'dhib*) or education or preventing for others society (*zajru*) And both of this aims, can reach by one punishment only.

b. Absorption Theory (*Nazhariyat Al-Jabbu*)

According to this theory, giving punishment which other punishment can not be given because has absorbed by one punishment. The punishment is Death penalty. The death penalty absorb all of kind a punishment.

According to Imam Syafi'i, there is no absorption theory (*Nazhariyat al jab*) . All of the punishment must be given. The criminal act which related with right adami

⁶ M. Abdul Malik, *Perilaku Zina pandangan Hukum Islam dan KUHP*. (Jakarta: Bulan Bintang,2003). Page: 273-274

became a priority. After that, the criminal action which related by Allah's right . .

c. Mixing Theory (*al Mukhtalath*)

Mixing theory uses for overcoming the weakness of previous theory, completing and absorption theory. Gathering both of the cases and look for the center way.⁷

Therefore, using this theory and analyse deeply to the sexual gratification cases, sexual gratification punished by mixing theory (*Al- Mukhtalath*) which give the punishment mixed. Jarimah Ta'zir as the punishment for Risywah, must be first priority cause related to the right adami. Zina is related to Allah's adamy, according to Imam Syaff'i, Allah's adami must be implemented after right adami. After Right adami has done, punishment for jarimah zina may be done to the suspect of sexual gratification.

B. Sexual Gratification on Positive law Perspective.

Based on constitution, on article 12 B the giving object is common by something which has meaning and others which has value and usability for human. The words "thing" (sesuatu) it can be material or immaterial things. If material things which can be object, it means, transferring ownership for the things to whom accepted . If

⁷ Hanafi. Ahmad 1968. *Asas-Asas Hukum Pidana Islam*. (Jakarta: Bulan Bintang.2001), page: 57

immaterial things which can be object, it means, transferring authority of things such as, facility and service. It means, which move is not the shape of things but the authority of the things.⁸

On constitution chapter 209 KUHP which adopted into chapter 5, chapter 418 which adopted into chapter 11 and chapter 419 KUHP which adopted into chapter 12 a and b. The word giving a things (sesuatu) in chapter 5 moreover, the word giving “a gift” (hadiah) comes from the same root, that’s the word “a gift” which has meaning “hadiah”. The word “gift” is include into noun, it means, a gift is a things.

The word “gift” on chapter 418 KUHP which adopted into chapter 11 gave the addition on the word “gift” to be giving a gift. Back to the definition of elements on chapter 5, the word gift or things it can be immaterial things such as, service, facility, and ease that include into gratification on chapter 12B.

According to Adami Chazawi, distinguish between gratification and giving a gift is can truly detected, for example: A man who has big intention to solve his project , he gave beautiful woman to the civil servant for accompanying him in the other country for a week. This cases is impossible to called giving a usual gift, its include into gratification .⁹

⁸ Mahrus Ali, *Asas Teori dan praktek Hukum Pidana Korupsi* (Jakarta: Umpress 2010), page. 126-127

⁹ Adami Chazami, *Hukum Pidana Materil dan Formil Korupsi di Indonesia*, (Surabaya: Hidayah, 2011), page: 170-171

Based on decision of Hoge Raad (Supreme Court of Dutch) on 25 April 1916 said that “Giving a gift in this chapter not only cause of generosity but also balanced by having a profit for the one who will accepted”¹⁰. This decision explained that bribe or gratification is impossible caused of generosity and valuable things is based on public perspective , is not subjective into the giver or the one who accept. This decision give answer for debatable object of gratification, that the object is not only material things, but immaterial things also, Therefore, sexual gratification is not include into chapter 12B UU Tipikor, but also chapter 5 and 12 a and b.

Based on positive law punishment of the suspect sexual gratification can be punished by chapter 5 verse 2, chapter 12 a and b chapter 12B UU No.31/1999 Jo. UU No. 20/2001. For the giver punished by chapter 5 verse 1. For the object of gratification (*escort lady*) can be punished by chapter 15 contains of trial, help and evil conspiracy. Elements of chapter 15 has same contain with chapter 1 verse 2 UU No.3 th. 1971 which explaine that “Because of Corruption is really destruct economy of nation, therefore trial to do corruption is also threaten by punishment which same by corruptor.” Not only trial but also evil conspiracy to do corruption is will be

¹⁰ P.A.F Lamintang. *Delik-Delik Khusus Jabatan Tertentu Sebagai Tindak Pidana Korupsi* (Jakarta: Sinar Grafika ,2011) page:309

punished. Chapter 15 includes into special regulation. Commonly, punishment of trial in crime less 1/3 than the origin punishment¹¹.

Therefore, the object of sexual gratification can be punished by chapter 5 verses 1 UU corruption. as the one who help the giver of gratification, she can be punished same as the corruptor.

In the society mind, authentication of sexual gratification looks difficult, but actually authentication of sexual gratification as same as authentication of other crimes. Based on chapter 184 KUHP the requirements are: confession of the witness, the expert and the suspect and also documents and instructions. The requirements minimal are showing 2 of proof.

The Example cases, a business man on 2 Mei 2010 gave a beautiful girl to the governor for fluencing his bussines to get SK (decision letter) from the governor. A business man asked to the beautiful girl to flatter the governor and check inn in the hotel. The business man gave some money (10 millions) to the beautiful girl as the honorarium .1 Juni 2010 the governor gave SK to the business man for his factory.

Based on that cases, The proof are decision letter, 10 millions of money, receipt of staying at hotel and the confession of beautiful girl. Society consider to gratification has not been regulation clearly, moreover there are many cases that done by civil servant. Actually,

¹¹ R. Wiyono, *Pembahasan Undang-Undang Pemberantasan Korupsi* , (Jakarta: Umpress 2011), page: 134-135.

KPK has regulated in the constitution of gratification even sexual gratification.

The truly solution of this thesis are the government must be analyse and include the sexual gratification into chapter 12 B Law No. 20 of 2001 as the corruption act. The regulation should be clearly. Because sexual gratification is really different whether in object or even punishment.

Based on Fiqih jinayah, sexual gratification must be punished by mixed theory which appropriate into right adamy and doesn't ignore Allah's right. This punishment is suitable enough to the Islamic state or even the region such as Aceh, which implemented Islamic law purely. Sexual gratification must be punished heavily, because it's deed related to the moral nation

CHAPTER V

CLOSING

A. Conclusions

1. Based on Positive law perspective, gratification has been regulated on Law No. 31 of 1999 as amended No. 20 of 2001 about eradication of corruption. Specifically on chapter 12 B. The problem is the regulation has not been clear. The regulation has not clear for mentioning sexual gratification includes intogratification as corruption act. The regulation only mention which include into gratification are money, goods, discount, commission, loan with no interest, traveler check, overnight facility, tourism journey, free medication, and other facilities.
2. Based on Fiqih Jinayah perspective, sexual gratification includes into double crimes, *Risywah* and *Zina*. Therefore, using this theory and analyse deeply to the sexual gratification cases, sexual gratification punished by mixed theory (*Al Mukhalath*) which give the one punishment mixed by the first criminal act and others. *Jarimah Ta'zir* as the punishment for *Risywah*, must be first priority cause related to the right adami. *Zina* is related to Allah's adamy, according to Imam Syafi'i, Allah's adami must be implemented after right adami.
3. Study comparative between fiqh Jinayah and positive law has explained that both of them are different in the definition and even punishment. Fiqih Jinayah perspective, sexual gratification

has destructed *right adami*, through emblezzing society's money. Not only that, but also broke Allah's right through *Zina* which prohibited by *nash*. Basically, both of them agree to prohibite sexual gratification for keeping Indonesian character and nation.

B. Suggestion

Sexual gratification is really destruct morality of nation, therefore, as the great citizenship, holding dogm of religion tightly is obligation, specially for the civil servant and law enforcement must be careful on doing their duty. Nowadays, Society's perspective on sexual gratification is very common. Therefore law enforcement is must be assertive to solve and lose this problem.

Government must be active to show that sexual gratification include into corruption. For the next and new young generation to behave a critical thinking, to continue to solve and analyse this problem clearly. All of the element of society should be realize that corruption is extraordinary crime and must help the government to decrease or even lose corruption especially sexual gratification.

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