

ISLAMIC AND POSITIVE LAW PERSPECTIVES OF GRATIFICATION IN INDONESIA

Fazzan

University of Malaya, Kuala Lumpur
E-mail: fazzan.ma@yahoo.com

Abdul Karim Ali

University of Malaya, Kuala Lumpur
E-mail: abdkarim@um.edu.my

Abstrak

Peraturan perundang-undangan tentang gratifikasi merupakan sesuatu hal yang baru dan dianggap berbenturan dengan budaya pemberian di kalangan masyarakat Islam di Indonesia. Penelitian ini bertujuan untuk mengeksplorasi makna gratifikasi dari perspektif hukum positif di Indonesia, dan batas-batas gratifikasi, yang diatur oleh hukum. Penelitian ini menggunakan metode normatif yang menganalisis hukum positif di Indonesia yang mengatur gratifikasi. Hasil penelitian menunjukkan bahwa kepuasan dalam hukum positif dan perspektif hukum Islam memiliki arti luas termasuk setiap pemberian untuk Pegawai Negeri Sipil atau Aparatur Negara. Menurut hukum Indonesia, gratifikasi bisa menjadi positif atau negatif. Gratifikasi yang diperbolehkan oleh hukum adalah hadiah untuk Pegawai Negeri Sipil atau Aparatur Negara tanpa mengharapkan imbalan apa pun. Sebaliknya, gratifikasi yang tidak diizinkan oleh hukum adalah hadiah untuk Pegawai Negeri Sipil atau Aparatur Negara karena posisi mereka dalam pekerjaan itu dan tujuan itu tidak berhubungan dengan tugas atau perintah mereka. Berdasarkan perspektif hukum Islam, gratifikasi dilarang oleh nas al-Qur'an dan hadits. Secara substansial, aturan hukum positif di Indonesia yang melarang praktek gratifikasi telah sesuai dengan tujuan hukum Islam. Meski demikian dalam hukum positif di Indonesia masih ada gratifikasi yang diperbolehkan yaitu yang mengarah kepada penipuan. Sebaliknya dalam hukum Islam semua jenis gratifikasi untuk Aparatur Negara dan Pegawai Negeri Sipil dilarang sehingga semua jalan yang menggiring ke arah terjadinya gratifikasi tersebut harus ditutup.

Kata kunci: *Gratifikasi; Hukum Pidana; Hukum Islam*

Abstract

A set of rules about gratification is a novelty within society and perceived to collide with the cultural of giving in the Islamic society in Indonesia. This study is aimed to explore the meaning of gratification from the perspective of positive law in Indonesia, and the boundaries of gratification, which is interdicted by the laws. This study used the normative method which analyzes the positive law in Indonesia regulating the gratification. The result of this study shows that gratification in the positive law and Islamic law perspective has a wide meaning including each tribute for Civil Servant or State Apparatus. According to Indonesia law, gratification could be either positive or negative. Gratification which is allowed by the laws is a gift with a pure tension of the recipient to the Civil Servant or State Apparatus without expecting to achieve anything in return. In contrary, gratification which is not

allowed by the laws is a gift for the Civil Servant or State Apparatus because of their position in that employment and the purpose of it is not related to their duty or order. Based on Islamic law perspective, gratification is forbidden by *naṣ al-Qur'ān* and hadith. Substantially, the rule of positive law in Indonesia which forbids the gratification practices has fit with the aim of Islamic law. In positive law in Indonesia, however, there is still gratification allowed that leads to the fraudulence. Instead, in Islamic law all kinds of gratifications for the State Apparatus and the Civil Servant are forbidden in order to ensure all the ways of fraudulences are closed off.

Keywords: *Gratification; Criminal Law; Islamic Law*

مستخلص

إن نظام الإكرامية اظام جديدة في المجتمع الإندونيسي ويعتبر أنها تصادم مع ثقافة العطاء لدى المجتمع الاسلامي الإندونيسي. تهدف هذه الدراسة إلى استكشاف معنى الإكرامية من منظور القانون الوضعي الإندونيسي وحدودها المحددة التي قررها القانون. استخدمت هذه الدراسة المنهج المعياري في تحليل نظام الأكرامية في القانون الوضعي الإندونيسي. وأظهرت النتائج أن الإكرامية لها معان واسعة، سواء كانت من منظور القانون الوضعي أو الشريعة الاسلامية، وتدخل تحتها جميع عطاءات وهبات لموظف حكومي أو جهاز الدولة. وقد يترتب الإكراميات عند القانون الوضعي الإندونيسي على أثر سلبي أو إيجابي. ثم إن الإكرامية المسموحة هي هدية خالصة من المانح تجاه موظف حكومي أو جهاز الدولة دون توقع أي شيء في المقابل. وخلافاً لذلك أن الإكرامية الممنوعة هي إكرامية اعطاء الهدية أو الهبة لوظيفة المهاب ولا تتعلق الهبة بتكليفات وواجبات المهاب. فالإكرامية عند الشريعة الإسلامية في هذه القضية حرام عند القرآن والأحاديث النبوية. وكان القانون الوضعي في إندونيسيا الذي يحظر ممارسة الإكرامية قد اتفقت مع أهداف الشريعة الإسلامية أساسياً، ولكنها في بعض الأحيان قد ينحو هذه الممارسة نحو الاحتيال و الغش، ولم يكن في الاسلام كذلك، لأنه قد تم منع كل أنواع الإكرامية تجاه أي موظف حكومي وجهاز الدولة، حتى تكون أبواب الغش والاحتيال مغلقة تماماً.

الكلمات الرئيسية: الإكرامية; منظور الشريعة الإسلامية

A. Introduction

Gratification started to become a popular term among the general public after the legislation of Law No. 20 of 2001 on the amendment of Law No. 31 of 1999 on Corruption Eradication. Although it has been legislated since about 14 years ago, the concept of gratification is still considered something new, and frequently considered as something that is against the culture of exchanging gifts among the general public. There is an assumption that the laws regarding gratification are damaging to the culture of exchanging gifts among the Muslim society, especially those in Indonesia.

In addition to contrasting the cultural norms of exchanging gifts among the Muslim society in Indonesia, the gratification laws are also deemed unsuitable with

ISLAMIC AND POSITIVE LAW PERSPECTIVES

the teachings of Islam, which encourages the act of exchanging gifts. Based on this issue, there is a need for a deeper research regarding the laws of gratification in Indonesia to determine whether it prohibits every form of gratification that has become a custom among the Muslim society in Indonesia. The author therefore will elaborate on gratification from the perspective of Islamic law. It consists of explanation regarding the definition, court cases, legal basis, elements, and illustration of gratification in Indonesia.

B. Discussion

1. Gratification in the Positive Law

Corruption is one of the most popular words in the society and has become an everyday conversation theme. Even so, many of its members are not aware of its meaning. Generally, society only sees corruption as something that is financially harming to the state.¹ In actuality, as mentioned in Law No. 20 of 2001 on the Corruption Eradication which is an amendment of Law No. 31 of 1999 on the same subject, there are 30 types of corruptions, elaborated in 13 articles as such:

“Bribing a civil servant is corruption; giving gifts to a civil servant because of his position is corruption; a civil servant who received a bribe; a civil servant who received a gift because of his position; bribing a judge; bribing a lawyer; a judge and a lawyer who received bribes; a judge who received a bribe; a lawyer who received a bribe; a civil servant who embezzled money or intentionally let others embezzle; a civil servant who falsified books specifically for administrative audit; a civil servant who destroyed an evidence; a civil servant who assisted others to destroy an evidence; a civil servant who intentionally let others destroy an evidence; a civil servant who extorted another person; a civil servant who extorted another civil servant; a contractor who swindled; a project supervisor who intentionally let others swindle; a partner of TNI/Polri who swindled; a supervisor of the partner of TNI/Polri who intentionally neglected the swindling; the recipient of TNI/Polri goods who intentionally neglected the swindling; a civil servant who used state land for which the right to use the land has been issued, thus inflicting loss to others; the involvement of a civil servant in a procurement in which he was assigned to arrange it; a civil servant whoc received a gratification and failed to report to the Corruption Eradication Commission (KPK) is corruption; the hindering of a corruption case investigation; the failure of a suspect to report his wealth; a bank which withheld a suspect’s account information; a witness or expert who withheld information or gave false

¹ According to Law No. 31 of 1999 jo. Law No. 20 of 2001 on Corruption Eradication, corruption is an illegal act of enriching oneself or another person or corporation, thereby creating loss to the state finance or state economy.

information; a person who holds professional confidentiality who withheld information or gave false information; and a witness who uncovered the identity of the whistleblower.”²

The thirty forms of corruption could be simplified and grouped into seven categories, namely state financial loss, bribery, embezzlement, extortion, swindling, conflict of interests in procurement (tender), and gratification. Regarding gratification, Law No. 20 of 2001 on Corruption Eradication, the amendment to Law No. 31 of 1999, was the first to use the term gratification in the Indonesian laws and regulations, stipulated in Article 12 B.

In Article 12 B, the act of receiving gratification by a Civil Servant or State Apparatus is considered corruption if the gift was given because of his position in violation of his obligations.³ This law was legislated to anticipate the misuse and abuse of gratification as a loophole to legalize corruption, especially in public services, hence this element was stipulated in the corruption law. There was an expectation that if the cultural norm of giving and receiving gratification by/to Civil Servants and State Apparatuses were stopped, corruption would subside or even stop altogether.

The definitions of a Civil Servant and State Apparatus in the law are. Based on Article 1 verse 2 of Law No. 31 of 1999 as amended by Law No. 20 of 2001, Civil Servants include:

- 1.) A personnel of Supreme Court (MK), Constitutional Court (MK)
- 2.) A personnel of a Ministry/Department and a Non-Department State Agency
- 3.) A personnel of the Attorney General Office
- 4.) A personnel of Bank Indonesia
- 5.) Head and personnel of Provincial/Level Two Region of MPR/DPR/DPD/ Provincial DPRD offices
- 6.) A personnel of a state university
- 7.) A personnel of a commission or agency formed by a legislation, Presidential Decree, or Presidential Regulation

² Articles 2, 3, 13, and 14 of Law No. 31 of 1999 on Corruption Eradication. Articles 5, 6, 7, 8, 9, 10, 11, and 12 of Law No. 20 of 2001 on Corruption Eradication. Anti-Corruption Clearing House (ACCH), <http://acch.kpk.go.id/tentang-acch>, 6 April 2015

³ Article 2 of Law No. 28 of 1999 on State Administration and Free of Corruption, Collusion, and Nepotism. See: Doni Muhandiansyah et. al., *Buku Saku Memahami Gratifikasi* (Jakarta: Komisi Pemberantasan Korupsi Republik Indonesia, 2010), 11.

ISLAMIC AND POSITIVE LAW PERSPECTIVES

- 8.) Head or personnel of Presidential Secretariat, Vice Presidential Secretariat, Cabinet Secretariat, and Military Secretariat
- 9.) A personnel of State Owned and
- 10.) A personnel of a State-Owned Corporations (BUMN) and Regional-Owned Corporations (BUMD)
- 11.) A personnel of a Judicial Body
- 12.) A personnel of the National Army (TNI) and Police (POLRI), as well as a civil servant in TNI and POLRI
- 13.) Head and personnel in Levels One and Two Region of the Regional Government.

Based on Article 2 of Law No. 28 of 1999 on State Administration and Free of Corruption, Collusion, and Nepotism, State Apparatuses include:

- 1.) A State Official of the Highest Governmental Institution
- 2.) A State Official of a High Governmental Institution
- 3.) A minister
- 4.) A governor
- 5.) A judge
- 6.) Other state officials in accordance to the prevailing laws and regulations; An ambassador; A vice governor; and A mayor
- 7.) Other officials with a strategic function in relation to the State Administration in accordance to the prevailing laws and regulations; A Commissioner, Director, Structural Officer of a BUMN and BUMD; A Head of BI and National Bank Restructuring Agency; A Head of a State University; First Echelon Officer and other equivalent officers in civilian, military, and national police circles; An attorney; An investigator; A clerk of the court; and A project head and treasury.⁴

In reality, the enforcing of the gratification regulation faces many obstacles as most of the Indonesian society generally sees gratification as something normal. Sociologically, a gift is not merely a normal and common object; it also has quite a big role in strengthening the relationships among the members of a society, societies, and even among nations.

⁴ Article 1 verse 2 of Law No. 20 of 2001 on amendment of Law No. 31 of 1999 on Corruption Eradication. Article 2 of Law No. 28 of 1999 on State Administration and Free of Corruption, Collusion, and Nepotism. Doni Muhandiansyah et. al., *Buku Saku...*, 11.

2. Gratification in the Perspective of the Law in Indonesia

a. The Definition of Gratification

In the Indonesian Dictionary, *gratifikasi* (gratification) is defined as the giving of a money gift to an employee outside of the determined salary.⁵ The Law dictionary explains that the word gratification comes from Dutch word *gratificatie*, while the English word is *gratification*, meaning a money gift. Based on the given definitions, it could be concluded that both Indonesia and Law dictionaries define gratification as the act of giving money as a gift. The definitions in both dictionaries are neutral. It could be understood that the act of gratification itself is not necessarily a misconduct or negative action. In the Indonesian dictionary, the object of gratification is clearly addressed to employees, while the Law dictionary does not address it to any object.⁶

The definition of gratification according to the law could be found in Article 12 B verse 1 of Law No. 31 of 1999 jo. Law No. 20 of 2001, where it states “referred to as “gratification” is reward in the broad sense, including money, goods, discounts, fees, interest-free loans, travel tickets, lodging, tours, free medicine, and other facilities, whether it was received at home or abroad, done through the use of electronic device or not.”⁷

After observing the explanation given by Article 12 B verse 1 above, it could be understood that the definition given for gratification is only limited to the sentence “reward in the broad sense”, whereas the sentence after describes the types of gratification. From this explanation, it could be concluded that gratification has a neutral meaning, without any negative connotations. When this explanation is then combined with the stipulations of Article 12 B, one could deduce that not all gratifications are against the law, so long as it does not fulfill the criteria mentioned in Article 12 B.

It is necessary to look at the conditions defined in Article 12 B Verse 1 of Law No. 20 of 2001 to determine whether a gratification is considered as a criminal act or not. As stated therein, every gratification given to a Civil Servant or State

⁵ Tanti Yuniar, *Kamus Lengkap Bahasa Indonesia* (Jakarta: Agung Media Mulia, t.th.), 224.

⁶ Eddy OS Hiareij, “Memahami Gratifikasi”, *Harian Kompas*, 13 Juni 2011.

⁷ Article 12 B verse 1 of Law No. 20 of 2001 on Corruption Eradication.

ISLAMIC AND POSITIVE LAW PERSPECTIVES

Apparatus is considered corruption, if it was given because of his position in violation of his obligations.⁸

It can be concluded from the citation above, that gratification or gift giving will be considered an act of criminal if a Civil Servant or State Apparatus received said gift in regard and because of his position or job. However, if the gift has nothing to do with his position or job and not violating against his obligations, it is considered lawful.

One of the customs commonly occurs in society is the giving of a gift, whether goods or money, as a token of gratitude to the services provided by a “staff”. This could become a negative custom and could potentially lead to corruption in the future. This potential is what the laws and regulations are trying to prevent. Therefore, the law does not prohibit the act of gratification among the general public; only that which is given to and or received by Civil Servants and State Apparatuses, because of the underlying potential of it becoming a loophole for corruption.

The author observes that there are at least three differences between the act of gratification and other acts of corruption. Firstly, the strictness or certainty of the law. The acts of corruption, such as inflicting loss to the state finance, bribery, embezzlement and position abuse, swindling, conflict of interests in procurement, are definitely illegal if they were proven to have happened. However in gratification, even after it was proven to have happened, it still needs to be put under consideration to determine whether or not it is illegal. This consideration, as mentioned above, is to determine whether the gift was given because of a Civil Servant’s or State Apparatus’ position in violation of their obligations. Basically, gratification is an act which could become a medium or means to other acts of corruption. Secondly, the scope of the act. All acts of corruption apart from gratification are limited to a certain amount of acts determined by the law, while the act of gratification is unlimited, because it is a reward in the broad sense. Therefore, other acts not included in the law could be included in the regulation concerning gratification. Thirdly, valuation emphasis. Other acts of corruption aside from gratification are judged based on the agency or authorized official. It means that the valuation is limited to the opportunity of a position or authorization to do such acts. However, in the act of gratification, besides judging the agency or authorized official sides, it is also judged from the

⁸ Article 12 B verse 1 of Law No. 20 of 2001 on Corruption Eradication.

society side, because of their support towards gratification that leads to the commitment of a criminal act.

Based on the analysis above, it could be concluded that the gratification permissible by the positive law in Indonesia is a gift to another with pure intentions without any attached self-interest, i.e. a token of gratitude without expecting anything in return. Whereas the gratification prohibited by the law is the act of receiving gratification by a Civil Servant or State Apparatus because of his position in violation of his obligations. This is considered an act of corruption.

b. Court Cases Regarding Gratification

Before the author presents several gratification act cases with its final and binding court decisions (*inkracht*), the author would first give a general illustration of the latest data on the progress of gratification eradication, including those that are proven to be corruption. As of 27 February 2015, there are four *inkracht* cases in 2015. From 2005-2015, there are 126 *inkracht* cases in the District Court, 28 in the High Court, and 133 in the Supreme Court, totaling to 287 *inkracht* cases.⁹

The latest 2015 data on gratification and gratification type corruption will be elaborated by the author as follows:

1.) Gratification based on ownership status.

As of the 27 February 2015, there are a total of 278 reported gratuities to the Corruption Eradication Commission (KPK) in 2015 alone, 17 reports of which are state-owned, 6 recipient-owned, 5 partly state-owned, 191 in process, and 59 non-decree reports.

2.) Gratification based on agency

As of 27 February 2015, there are 278 reports in 2015, 120 of which are from the executive branch, 148 from BUMN/BUMD, 6 from the judicative branch, 0 from the legislative branch, and 4 from independent institutions.

There are a total of 278 reports on gratification in 2015 alone based on the data above. It needs to be underlined that not all report would become illegal gratification acts (corruption). To determine whether the gratification is illegal or not there needs to be evidence that the reported gratification is because of the Civil Servant's or State Apparatus' position and in violation of their obligations.

⁹ Anti-Corruption Clearing House (ACCH), <http://acch.kpk.go.id/gratifikasi-berdasarkan-status-kepemilikan>, 6 April 2015.

ISLAMIC AND POSITIVE LAW PERSPECTIVES

The author will bring forward an example of a court case concerning a non-gratification corruption act, as a comparative data for a court case concerning illegal gratification (corruption). The case is a corruption case on the procurement of goods and services which caused a great loss to the state finance, and the embezzlement as well as positional abuse done by Abdullah Puteh, who at the time was the Governor of the Province of Nanggroe Aceh Darussalam (now Aceh Province) from 2000-2004. The corruption that he did was the purchase of a 2000-2001 type MI-2, VIP Cabin civilian version helicopter from the Mil Moscow Helicopter Plant Russia factory.¹⁰

Based on the Supreme Court decision No. 1344 K/Pid/2005, dated September 14, 2005, Abdullah Puteh was sentenced to 10 years imprisonment and a fine of Rp 500,000,000.¹¹ The sentence was given to the corruption convict in the procurement of goods and services because the accusations were backed with strong evidence that suggested the convict did actually commit the criminal act of corruption. The evidence suggested that the convict intentionally transferred Rp 4 billion of state funds to his private account with the purpose of purchasing a Rp 9,1 billion helicopter, even if there was no helicopter purchase contract yet. In addition to the embezzlement of state funds, the convict also abused his position.

In this case, the criminal act done by Abdullah Puteh is clear in the eyes of the Indonesian law, because he intentionally took the state funds for his own personal use by abusing his position and responsibilities, as well as causing loss to the state finances. There are clearly no elements of gratification in this case, because the criminal act done by the convict was not based on the desire of others to give him money. Hence this case is categorized as a corruption case rather than a gratification case.

Next, the author will bring forward several examples of gratification cases that already have the final court decision, meaning that the gratifications mentioned below are proven to be corruptions. The author will give several case examples of both recipient and provider of gratification:

1.) The Case of Angelina Sondakh (Gratification Recipient)

¹⁰Anti-Corruption Clearing House (ACCH), <http://acch.kpk.go.id/abdullah-puteh>, 7 April 2015.

¹¹ Anti-Corruption Clearing House (ACCH), <http://acch.kpk.go.id/abdullah-puteh>, 7 April 2015.

Angelina Sondakh was a member of the 2009-2014 Period of the Republic of Indonesia House of Representatives (DPR-RI) who was incriminated as a recipient of gratification in 2009-2010. Based on the court decision No. 1616 K/Pid.Sus/2013, dated November 20, 2013, the Supreme Court sentenced her to 12 years imprisonment, a fine of Rp 500,000,000, and substitute money as additional punishment of Rp 12,580,000,000 and US\$ 2.350.000.¹²

The amount of money that Angie received was Rp 12,58 billion and US\$ 2,35 Million, as a gratification or kickback for securing the budgets for higher education activity/program projects in the Ministry of National Education and the procurement of facilities and infrastructures procurement program in the Ministry of Youth and Sports Affairs to be adjusted according to the demand of Permai Group.¹³

2.) The Case of Miranda Swaray Goeltom (Gratification Provider)

Miranda Swaray Goeltom worked as a Senior Deputy Governor of Bank Indonesia (DGSBI) in 2004-2009. She provided gratification in order to be elected as a DGSBI before her election. There were three DGSBI candidates participating in the fit and proper test conducted by DPR-RI at that time, they were Miranda Goeltom, Hartadi A Sarwono and Budi Rochadi.¹⁴

Before the election, Miranda, who failed to get elected as a Governor of Bank Indonesia in 2003, conducted a meeting with Nunun Nurbaetie. In the meeting, she asked Nunun's assistance to help her pass the fit and proper test for the position as the 2004 Senior Deputy Governor of Bank Indonesia. Miranda asked Nunun to introduce her to Nunun's friends in the Commission IX DPR-RI to seek support for her candidacy. Nunun accepted Miranda's request, and a meeting was conducted to introduce her.¹⁵

As reward for the support, Miranda, through her assistant, distributed the International Bank of Indonesia's (BII) traveler's checks during the fit and proper test to members of the Commission IX conducting the test. They are Duhie

¹² Anti-Corruption Clearing House (ACCH), <http://acch.kpk.go.id/angelina-patricia-pingkan-sondakh>, 7 April 2015.

¹³ Anti-Corruption Clearing House (ACCH), <http://acch.kpk.go.id/angelina-patricia-pingkan-sondakh>, 7 April 2015.

¹⁴ Anti-Corruption Clearing House (ACCH), <http://acch.kpk.go.id/miranda-swaray-goeltom>, 7 April 2015.

¹⁵ Anti-Corruption Clearing House (ACCH), <http://acch.kpk.go.id/miranda-swaray-goeltom>, 7 April 2015.

ISLAMIC AND POSITIVE LAW PERSPECTIVES

Makmun Murod, who received BII traveler's checks worth Rp 9,8 billion, Endin AJ Soefihara received Rp 1,25 billion worth, and Hamka Yandhu received Rp 7,8 billion worth. The checks are accepted by the three recipients, who then proceeded to distributed to their colleagues of the same party in the same commission.¹⁶

Miranda Goeltom, with the help of Nunun Nurbaetie, has given gratuities in the form of BII traveler's checks worth Rp 20,85 billion, which is a part of the total amount of 480 traveler's checks worth Rp 24 billion given to the members of DPR-RI. Because of this, she was sentenced to 3 years imprisonment and a fine of Rp 100,000,000, based on the Supreme Court decision No. 545 K/Pid.Sus/2013, dated April 25, 2013.

It is clear from both court cases above that the criminal act is based on the desire from the society to give money to State Apparatuses. After an investigation, it was clear that Angleina Sondakh did an act that was in violation of her obligations as a member of the RI House of Representatives (DPR-RI), and she received gratuities which are in fact given because of her position as a member of the parliament. The gratification given by Miranda Swaray was also because of the positions of the recipients as members of the parliament. As a result of her gift, they did an act that was in violation of their obligations and responsibilities of conducting an impartial DGSBI candidacy test. They should have conducted a fair and neutral test with the purpose of selecting candidates based on their integrity, instead of gratification.

The single example of corruption by positional abuse, swindling, conflict of interests in the procurement of the purchase of a helicopter is clearly different that the three gratification examples mentioned after. The difference is the taking of state funds for personal use is an evidence of corruption.

Whereas in the gratification cases, even if one is proven to have received a gratification, an evidence supporting the accusation is required to prove that the gratification was given because of one's position and in violation of one's obligations, as could be seen in the first example. In the second example, an investigation must first be conducted to determine if the gratification was given

¹⁶ Anti-Corruption Clearing House (ACCH), <http://acch.kpk.go.id/miranda-swaray-goeltom>, 7 April 2015.

because of the recipients' position and responsibility as a judge in the DGSBI fit and proper test.

c. The Legal Basis of Gratification and Its Elements

The regulations concerning gratification are required to prevent the emergence of corruption committed by a Civil Servant or State Apparatus. It is hoped that this regulation will encourage Civil Servants, State Apparatuses, and the general public to choose the correct steps and refuse or immediately report any gratification that they received. Gratification is specifically regulated in Law No. 20 of 2001 on Corruption Eradication:

Article 12 B

- a. Any gratification given to a civil servant or state apparatus shall be considered as a bribe when it has something to do with his/her position and is against his/her obligation or task, with the provision that:
 - i. When the gratification amounts to Rp 10,000,000 (ten million rupiahs) or more, it is the recipient of the gratification who shall prove that the gratification is not a bribe;
 - ii. When the gratification amounts to less than Rp 10,000,000 (ten million rupiahs), it is the public prosecutor who shall prove that the gratification is a bribe.
- b. A civil servant or state apparatus who is found guilty of the criminal offense as referred to in paragraph (1) shall be sentenced to life imprisonment or a minimum of 4 (four) years imprisonment and a maximum of 20 (twenty) years imprisonment and be fined a minimum of Rp 200,000,000 (two hundred million rupiahs) and a maximum of Rp 1,000,000,000 (one billion rupiahs).

Article 12 C

- d. The provisions as referred to in Article 12B paragraph (1) shall not be valid if the recipient reports the gratification to the Commission for Corruption Eradication.
- e. The recipient of gratification shall convey the report as referred to in paragraph (1) no later than 30 (thirty) working days after the gratification has been received.
- c. The Commission for Corruption Eradication within a period of 30 (thirty) working days at the latest after the receipt date of the report shall decide whether the gratification belongs to the recipient or the state.
- d. The procedures for conveying the report as referred to in paragraph (2) and for determining the status of the gratification as referred to in paragraph (3) shall be laid down in Law on the Commission for Corruption Eradication.¹⁷

¹⁷ Articles 12 B and C of Law No. 20 of 2001 on Corruption Eradication.

ISLAMIC AND POSITIVE LAW PERSPECTIVES

It could be understood from the legal basis above that if a gratification fulfills every aforementioned element it will be considered as a criminal offense. The punishment for gratification offenders could be found in Article 12 B, where the guilty party will be sentenced to life imprisonment, or a minimum of 4 years imprisonment and a maximum of twenty years imprisonment, and be fined a minimum of Rp 200,000,000 and a maximum of Rp 1,000,000,000. Any gratification received by a Civil Servant or State Apparatus is considered as a bribe, except if it was reported to the Corruption Eradication Commission (KPK) no later than thirty days after it has been received.

The receiving parties referred to in this legal basis are: firstly, Civil Servant or State Apparatus who received a gift or promise believed to have been given to encourage him/her to do something or not to do anything because of his/her position in violation of his/her obligation. Secondly, a Civil Servant or State Apparatus who intentionally benefits him/herself or other people in violation of the law, or by abusing his/her power, forces a person to give something, pay, or receive discounted payment, or to do something for him/herself.¹⁸

Based on Article 12 B verse 1 of Law No. 20 of 2001, there are four elements to be fulfilled to consider a gratification illegal, namely:

- 1.) A Civil Servant or State Apparatus;
- 2.) Giving and receiving of gratification;
- 3.) Because of or in regard to one's position;
- 4.) In violation of one's obligation or task.

To conclude, these are the elements used to determine whether a gratification is illegal or not. These four elements must be fulfilled if the gratification were to be considered unlawful. If one or more elements are absent, a gratification would not be considered illegal.

f. Illustrations of Gratification Acts

To understand gratification better, the author has listed the following examples to illustrate which are considered lawful and which are not according to Article 12 B of Law No. 20 of 2001. Of course, these are only a small part of

¹⁸ A Civil Servant is a Civil Servant (PNS), both regional and central. State Apparatus is a person who is in charge of state administrations, directly or indirectly, and whose duties are financed by state budgets or BUMN. It could be concluded that the subjects that could receive gratuities are very broad.

commonly practiced gratuities. The following are the most common forms of gratifications:

- 1.) Giving gifts or parcels to state officers during religious holidays by colleagues or subordinates.
- 2.) Bringing gifts during an officer's son/daughter marriage ceremony by colleagues.
- 3.) Giving free tickets to an officer or his family.
- 4.) Giving a special discounted price to an officer when buying from a colleague.
- 5.) Giving pilgrimage fare to an officer by colleagues.
- 6.) Birthday gifts or other personal events
- 7.) Giving gifts or souvenirs to officers during work visits.
- 8.) Giving gifts or money as a token of gratitude.¹⁹

The illustrations above still have two possibilities, legal and illegal. If it contains the elements mentioned in the previous section, then it is considered illegal. If it does not, then it is considered legal. A more detailed investigation is needed to determine the permissibility of a gratification.

3. Gratification in the Perspective of the Islamic Law

As mentioned earlier, gratification is a gift for Civil Servant and State Apparatus. Therefore, according to the guideline from *naş*, either visually or contextually, particularly or generally, the *dalil-dalil* of *al-Qur'ān* which could be referred to as the primary laws of gratification are QS. Al-Baqarah 2: 188, QS. Ali 'Imr n 3: 161, QS. Al-Mai'dah 5: 42, and QS. Al-Mai'dah 5: 62 and 63. Furthermore, there are also several *hadith*, those are *hadith* riwayat al-Bukh r from Abi Humayd al-Sai'dy,²⁰ *hadith* riwayat Muslim from 'Ad Ibn 'Amiyrah al-Kindy,²¹ *hadith* riwayat Ahmad from Abi Humayd al-Sai'd,²² *hadith* riwayat al-Bukh r from Abu Hurayrah,²³ *hadith* riwayat al-Bukhari from Abi Hamid al-Sa'idi,²⁴ and *hadith* riwayat al-Turmidhi from 'Abdullah bin 'Amar.²⁵ According to

¹⁹ Doni Muhandiansyah et. al. *Buku Saku...*, 19.

²⁰ Al-Bukhari, *Sahih al-Bukhari*, al-Maktabah al-Syamilah, Bab Hadaya al-'Amal, j. 9, Hadith No. 7174 (t.tp.: Dar Tuq al-Najah, 1422 H), 70.

²¹ Muslim, *Sahih Muslim*, al-Maktabah al-Syamilah, Bab Tahrim Hadaya al-'Amal, j. 3, Hadith No. 30 (t.tp.: Dar Tuq al-Najah, 1422 H), 1465.

²² Ahmad, *Musnad Imam Ahmad*, al-Maktabah al-Syamilah, Bab Hadith Abi Humayd al-Sai'dy, j. 39, Hadith No. 23601, (t.tp.: Mu'assasah al-Risalah, 2001), 14.

²³ Al-Bukhari, *Sahih al-Bukhari*, Bab al-Ghulul, j. 4, Hadith No. 3073.

²⁴ Al-Bukhari, *Sahih al-Bukhari*, Bab Sadaqah, j. 2, Hadith No. 1410, 1396.

ISLAMIC AND POSITIVE LAW PERSPECTIVES

those *dalil*, it is very obvious either visually or contextually, the gratification is forbidden. Hence, giving the gift for Civil Servant and State Apparatus is prohibited. Even though it is given without certain purpose, it would lead the receiver to neglect and against his duty and order.

Instead of the *dalil* above, the prohibition of gratification in Islam is also because it could cause the government lose their wisdom and the injustice happen of Civil Servant or State Apparatus. This is a despotism of ourselves and other's. Therefore, in Islamic law perspective, it is appropriate if Indonesia government prohibits the gratification through the legislation. Because of its benefit and loss, Islam forbids the gratification. If the gratification is still allowed, it is not impossible that the country and society become uncontrolled and ruined. Briefly, this is a kind of the despotism of ourselves and other's.

Ulil Amrī is divided to two sides. *First*, who is charged the responsibility of law or the authority of its implementation that is the executive council. *Second*, the society. They who chose those become the executive council and asked them their responsibility. They are the legislative council (*Ahlu al-Hilli wa al-'Aqd*). Hence, the despotism done by a ruler in *syarīah Islam* must be beard by enforcing the keepers of those fraudulent officials to act harder in order to keep the justice. Not only punishing, but also preventing that thing happens again. Because the purpose of *syara'* is to maintain the justice (the certainty and the verdict of Allah).²⁶

One characteristic the officials either working for government or other institutions should have is trusteeship. This is which when they had a position so that they would not abuse it for profit-making for themselves or their relative which could start from the gratification or bribery (*risywah*). Furthermore, in the hadith, Rasulullah SAW clearly explained that any gift for the officials is forbidden.

From the explanation above, the real concern of the issue is about gratification. Looking from Islamic view, that is included in one of *dalil* in Islamic laws that is *sadd al-dharīah*. Thus, the gratification is forbidden in order to close any possibility of the bribery or corruption. Therefore, it is clear that most of gratifications does not give any benefit for others unless the disadvantage.

²⁵ Al-Turmodzi, *Sunan al-Turmodzi*, al-Maktabah al-Syamilah, Bab Ma Ja'a fi al-Rasyi wa al-Murtasyi fi al-Hukm , j. 4, Hadith No. 1336 (Mesir: Syirkah Maktabah wa Matba'ah Mustafa al-Bab al-Halab, 1975), 614.

²⁶ Farid Abdul Khaliq, *Fikih Politik Islam* (Jakarta: Amzah, 2005), 204.

In line with the forbidden gratification is as *sadd al-dharī'ah*, it shows that the Islamic law settled not only the people's act which is done, but also before it is done. However, it does not mean the Islamic law tent to bridle the people's freedom, but it is because one of the purposes of Islamic law is to create the advantage for people and to prevent the ravage (*mafsadah*). If an act which is not done yet is totally estimated will rise the ravage, then all behaviors which leads to that act will be prohibited. Same as the gratification that happens among Islamic society which is believed as the thanksgiving by some people.

From another perspective, the gratification has been part of tradition or '*urf*' in people's daily life. The author say so because gratification has become an ordinary act in society and it is supported by the meaning of term '*urf*' itself which has been urged by the *ulama*. The word '*urf*' is derived from '*arafa*' in the word form *taṣrīf* which is in other form becomes *al-ma'ruf* that means something known.²⁷ While in other meaning *al-'Urf* is every single thing known by the people because it has been a habit or tradition either in verbal, action, or something related to not doing some particular actions which is also called as *adat*.²⁸ By having a look at the description of gratification in Indonesia, it is included in one of definitions of the '*urf*' above that is an action known by the people and becomes a habit.

In *Usul Fiqh*, there is a very popular concept about '*urf*' that is *al-'adah muhakkamah*. Thus, according to this '*urf/adat*' concept it explains that a habit has its law and allowed in Islamic system. However, how is the '*urf*' of gratification in Indonesia. Is it a part of the concept of '*urf*' above. The author assume that gratification among people in Indonesia is a part of '*urf*', but the gratification is included in the '*urf fasid*' category. Therefore, in line with the law in its explanation, the '*urf fasid*' cannot be justified toward the action in the consideration of *syara'*. Gratification is called as '*urf fasid*' because the action is considered improper and cannot be accepted, because it is opposite with the *syara'* as stated by the author in

²⁷ Amir Syarifuddin, *Ushul Fiqh*, j. 2 (Jakarta: Logos Wacana Ilmu 2001), 363.

²⁸ Based on most of *ulama*, *adat* and *al-'urf* in terminological aspect have no different concept. Means the differentiation between them is not significant with the law is also different. For instance, in *kitab fiqh* there is the expression *hadza thabit bi al-'urf wa al-'Adah* (this rule is based on *al-'urf* and *al-'adat*), so the meaning of both is alike. The mentioning of *al-'Adah* after the word *al-'urf* has function as the reinforcement (*ta'kid*) only, not as the dependent sentence that consists of different meaning (*ta'asis*). Even though there is the differentiation, the term that the author use between *al-'urf* and *al-'adah* is same. See, 'Abd al-Wahab Khalaf, '*Ilm Usul al-Fiqh*, (Qahirah: Dar al-Qalam, tt.), 88. 'Abd al-Karim Zaydan, *al-Wajiz fi Usul al-Fiqh*, Muassasah al-Risalah, vol. 9, 2001, 155.

ISLAMIC AND POSITIVE LAW PERSPECTIVES

the explanation above about dalil-dalil that forbids the gratification. Hence, based on the consideration of '*urf*', gratification is included in the forbidden deed by the '*syara*' because it cannot be categorized in '*urf saḥīḥ*'.

Considering from the authority of wealth in Islam, gratification that leads to the fraudulence is an act contrasts with the way to get and use the wealth in Islam. Islam forbids the property had by the illegal way. Islam through the al-Qur'an has given the guidance for the human to get the property by good and halal working and strong effort, not by the wrong way (cheating). Moreover, Islam also guides its *ummah* to utilize the property in the way of Allah's willing, not for the immoral thing and cheating. Islam also prohibits the utilizing of the wealth for place that leads to the fraudulence. Furthermore, Islam also forbids the suppression upon the other's right.

Considering this issue, the gift and the achievement of wealth through the gratification for Civil Servant and State Apparatus could rise the betrayal, deceitfulness, abusing others', and *risywah*. Those are clearly far away from the right ways in Islam in getting and utilizing the wealth. Because of the gratification, the suppression of other's right happens either directly or not. The receiver of gratification is willing to have the wealth through not authorized way in Islam. So does the recipient of gratification not utilize his wealth in the right way of *syari'ah* law.

C. Conclusion

From the explanation of gratification in the perspective of the positive law in Indonesia it could be concluded that gratification has been regulated in Law No. 31 of 1999 jo. Law No. 20 of 2001 on Corruption Eradication. Gratification has a broad meaning according to the positive law, which is every type of gift or reward given to a Civil Servant or State Apparatus.

Gratification has a positive as well as negative meaning, depending on the intention and motive of the gift. The gratification considered lawful by the law is a gift given by someone to a Civil Servant or State Apparatus with a pure intention and without expecting anything in return. It is considered illegal if it was given because of his/her position in violation of his obligations and tasks. As conclusion, the positive law in Indonesia does not prohibit every form of gift (gratification) in the society.

Fazzan dan Abdul Karim Ali

In Islamic law, gratification is included to the forbidden deed. Because Islam forbids the Civil Servant and State Apparatus to receive the gift from the society, in which it is excluding from the salary they should receive. In Islamic view, generally the rule of government in the law which forbids the gratification has been appropriate and fit with the Islamic law. However, there is the differentiation between them. In positive law in Indonesia there is still gratification which is allowed so that the fraudulence might exist. While in Islamic law, all kinds of gratifications for the Civil Servant and State Apparatus are forbidden in order to ensure that there is no way for crime and fraudulence.

BIBLIOGRAPHY

Al-Qur'ān al-Karīm.

Aḥmad. *Musnad Imām Aḥmad.* Al-Maktabah al-Syāmilah. t.tp.: Mu'assasah al-Risālah, 2001.

Anti-Corruption Clearing House (ACCH). <http://acch.kpk.go.id/abdullah-puteh>. 7 April 2015.

Anti-Corruption Clearing House (ACCH). <http://acch.kpk.go.id/angelina-patricia-pingkan-sondakh>. 7 April 2015.

Anti-Corruption Clearing House (ACCH). <http://acch.kpk.go.id/gratifikasi-berdasarkan-status-kepemilikan>. 6 April 2015.

Anti-Corruption Clearing House (ACCH). <http://acch.kpk.go.id/miranda-swaray-goeltom>. 7 April 2015.

Anti-Corruption Clearing House (ACCH). <http://acch.kpk.go.id/tentang-acch>, 6 April 2015.

Al-Bukhārī. *Ṣaḥīḥ al-Bukhārī.* Al-Maktabah al-Syāmilah, t.tp.: Dār Ṭūq al-Najāh, 1422 H.

Hiareij, Eddy OS. Memahami Gratifikasi. 13 Juny 2011.

Khalaf, Abdul Wahab. *Ilm Uṣūl Fiqh.* Kaherah: Dār al-Qalam, t.th.

Khaliq, Farid Abdul. *Fikih Politik Islam.* Jakarta: Amzah, 2005.

Muhardiansyah, Doni et. al.. *Buku Saku Memahami Gratifikasi.* Jakarta: Komisi Pemberantasan Korupsi Republik Indonesia, 2010.

Muslim. *Ṣaḥīḥ Muslim.* Al-Maktabah al-Syāmilah. t.tp.: Dār Ṭūq al-Najāh, 1422 H.

ISLAMIC AND POSITIVE LAW PERSPECTIVES

Syarifuddin, Amir. *Ushul Fiqh*. Jakarta: Logos Wacana Ilmu 2001.

Al-Turmidhī. *Sunan al-Turmidhī*. Al-Maktabah al-Syāmilah. Mesir: Syirkah Maktabah wa Maṭba'ah Mustafā al-Bāb al-Ḥalab, 1975.

Undang-undang Nomor 31 Tahun 1999 jouncto Undang-undang Nomor 20 Tahun 2001 tentang Pemberantasan Tindak Pidana Korupsi.

Yuniar, Tanti. *Kamus Lengkap Bahasa Indonesia*. Jakarta: Agung Media Mulia, t.th.

Zaidan, 'Abdul Karim. *al-Wajiz fī Uṣūl al-Fiqh*. Muassasah al-Risalah, 2001.