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Legal Pluralism Perspective in Prosecuting Perpetrators of Bribery and Gratuities Corruption Crimes

Perspektif Pluralisme Hukum dalam Penindakan Pelaku Tindak Pidana Korupsi Suap dan Gratifikasi

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Abstract

The act of giving and receiving has been a practice since feudal times. Gifts or tributes to kings or officials, among other forms of giving, are part of traditional customs and are considered social etiquette. To address these issues, the authors analyze the theory of criminal liability, lawlessness, legal pluralism, and the legal system. This research uses a normative juridical research methodology. The findings reveal that there are no clear boundaries concerning regulations related to bribery and gratuities, specifically regarding gifts or promises in which civil servants or public officials can or cannot accept. The application of the bribery and gratuity clause was misdirected, resulting in innocent individuals being punished while the guilty were acquitted.

Abstrak

Tindakan memberi dan menerima sudah menjadi praktik sejak zaman feodal. Hadiah atau upeti kepada raja atau pejabat, di antara bentuk pemberian lainnya, merupakan bagian dari adat istiadat dan dianggap sebagai etika sosial. Untuk mengatasi permasalahan tersebut, penulis menggunakan teori pertanggungjawaban pidana, pelanggaran hukum, pluralisme hukum, dan sistem hukum. Penelitian ini menggunakan metodologi penelitian yuridis normatif. Temuan penelitian menunjukkan bahwa tidak ada batasan yang jelas mengenai peraturan terkait suap dan gratifikasi, khususnya mengenai hadiah atau janji yang boleh atau tidak bisa diterima oleh pegawai negeri atau pejabat publik. Penerapan klausul suap dan gratifikasi salah sasaran, sehingga mengakibatkan orang yang tidak bersalah dihukum sedangkan yang bersalah dibebaskan.

A. INTRODUCTION

1. Background

In Dutch, a criminal act or event is referred to as a *"straafbaar feit"* or *"delict"*. The Indonesian translation defines a criminal event as a punishable act.[1] From the perspective of criminal law, criminal events consist of crimes and violations. The distinction is made by the fact that some actions are declared as criminal acts by law, while others are considered offenses under the law.

Acts that are declared criminal by law are often viewed as offenses within the legal framework. In this context, a crime is an act that is deemed inconsistent with the rule of law. It's important to note that the interpretation and application of these terms can vary based on the specific legal system and cultural context.

On the other hand, a violation is an act that is considered a breach of formal law because it does not disrupt legal objects. In this case, the legal purpose determines whether it pertains to the associated crime, the extent of the breach of the law, and other factors.

Criminal acts do not fall within the definition of criminal responsibility. A criminal act only refers to the prohibition and threat of a criminal act. Whether an individual is subsequently sentenced to a criminal sentence, as threatened under the Criminal Code, depends on his/her capacity to assume responsibility. The ability to be responsible is demonstrated by the presence of an element of error in the act and the negligence of the act of the perpetrator of the crime. This refers to the principle of accountability in criminal law, which means no punishment if there is no mistake (*geendsttraf zonder schuld*).[2]

The principle of "*geen straf zonder schuld*" (no punishment without guilt) may not exist in written law, but it is nevertheless applicable. Generally, Dutch law does not distinguish between the prohibition of an act and the punishment of a person who commits a criminal act. The relationship between a criminal act and a crime is expressed in the unlawful nature of an act. [3]

According to Roeslan Saleh, law-breaching behavior must render the perpetrator accountable and guilty. Thus, a criminal event can be considered if two elements are met:[4] unlawful conduct and a person who can be held accountable for his or her behavior. It can be concluded that a person cannot be held accountable (found guilty of a crime) without committing a criminal act. However, even if a person commits a criminal act, he or she may not always be convicted. [5]

At the international level, bribery in many cases can threaten the stability and security of society. Bribery has the potential to undermine democratic institutions and values, ethical

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1 Erns Utrecht, *Rangkaian Sari Kuliah: Hukum Pidana I* (Bandung: Pustaka Tinta Mas, 1965), 251.
2 Moeljatno, *Asas-Asas Hukum Pidana* (Jakarta: Rineka Cipta, 2008), 165.
3 Moeljatno.
4 Roeslan Saleh, *Perbuatan Pidana dan Pertanggung Jawaban Pidana* (Jakarta: Aksara Baru, 1983), 75.
5 Moeljatno, *Asas-Asas Hukum Pidana*, 165.

values, and justice. It is discriminating and undermines the ethical and honest nature of business competition. Besides, it also threatens sustainable development and the rule of law.[6]

Bribery of public officials is a practice that has evolved from the tradition of giving and receiving in the community. Traditionally, giving gifts or tributes to kings or officials, as well as other forms of giving, were common practices and even considered as a part of social etiquette. However, the perception of giving gifts to public officials who have authority has changed when it is put within the framework of positive legal rules with a normative legalistic pattern. Such practice is in contrary with legal rules that prohibit and may even criminalize the giver and the recipient. The articles of gratification regulated in Act Number 31 of 1999 in conjunction with the Act Number 20 of 2001 concerning the Eradication of Corruption Crimes (Anti-Corruption Act)[7] have a slight difference from the bribery article.

Indonesians need alternative standards and legal communication to be able to demonstrate good law to the society to help create a healthy system. This is known as legal pluralism. Even though legal pluralism is a new approach in the legal world, it involves other norms. Thus, this perspective aims to balance the legal aspects and social reality of people who adhere to reciprocal ways of giving gifts.

2. Research Questions

In this study, the authors formulate some questions as follows:

1. What is the difference between bribery and gratification in the context of Indonesian law from the perspective of legal pluralism?
2. How does legal pluralism influence prosecution and eradication of corruption in Indonesia?

3. Research Methods

The author uses a normative legal research methodology, based on a literature review of societal events.[8] The author utilizes secondary data types, which include primary legal sources, such as the Anti-Corruption Act. The secondary legal sources are several books related to the topic under investigation. The author uses qualitative data analysis. Qualitative analysis is an activity that involves formal and argumentative analysis. This approach allows a comprehensive understanding on the subject matter, considering various perspectives. It is important to note that the choice of methodology should align with the research questions and objectives, and linear with the type of data being analyzed.[9]

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6 Tim Penyusunan Kompendium Pidana Suap, *Bidang Pidana Suap* (Jakarta: Badan Pembinaan Hukum Nasional, 2006), 3, https://bphn.go.id/data/documents/bidang_pidana_suap.pdf

7 Republik Indonesia, Undang-Undang Nomor 31 tahun 1999.

8 Sri Mamudji*, Penelitian Hukum dan Metode Penelitian* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005), 93.

9 M. Syamsudin, *Operasionalisasi Peneltian Hukum* (Jakarta: Raja Grafindo Persada, 2007), 133.

B. DISCUSSION/ANALYSIS

Legal pluralism, as defined by John Griffiths, is a situation where multiple legal systems coexist in the same social sphere.[10] This concept is a critique of centralism and positivism in law enforcement. Legal pluralism is not only the diversity, but also the potential for conflict and uncertainty that it may create.[11] The Anti-Corruption Act aims to establish a fair and upright administrative system for the government. This legal norm is also enforced in society. To enforce the law effectively, extensive and intensive legal communication is necessary to raise public awareness about the rules that must be adhered to. In this way, the public can interact with the government officials without falling into legal pitfalls.

Lawrence M. Friedman proposed a legal system composed of several components: the legal structure, legal substance, and legal culture. The legal structure includes the court system, appeal procedures, powers, duties of the president, and others. The substance of the law encompasses the actual rules, norms, and patterns of human behavior within the legal system, including judicial decisions.[12] Legal culture is a humane approach to laws and humans, underlying the enforcement of law, and determining whether the law is used, avoided, or misused.[13]

The effectiveness of law enforcement depends on three elements of the legal system: the legal structure, legal substance, and legal culture.[14] A good legal structure and substance will not function well without the support of a good legal culture in society. Therefore, the success of law enforcement relies on the harmonious interplay of these three elements.

1. Bribery and Gratification Arrangements in Indonesia

According to Indonesian law, as regulated in the Anti-Corruption Act, there are 30 forms of corruption. These can be grouped into seven categories:

1. State financial losses (Article 2 and Article 3),
2. Bribery (Article 5, paragraph (1) letters a and b, paragraph 2; Article 13; Article 12, letters a, b, c, and d; Article 11; Article 6, paragraph (1) letters a and b),
3. Embezzlement in position (Article 8; Article 9; Article 10, letters a, b, and c),
4. Extortion (Article 12, letters e, g, h),
5. Cheating (Article 7, paragraph (1) letters a, b, c, and d, and paragraph (2)),
6. Conflict of interest in procurement (Article 12, letter i), and
7. Gratification (Article 12B in conjunction with Article 12C).[15]

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[10] John Griffiths, "What is Legal Pluralism," *Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 1. https://doi.org/10.1080/07329113.1986.10756387

[11] John Griffiths.

[12] Lawrence M. Friedman, *American Law: An Introduction, second edition*, trans. Whisnu Basuki (Jakarta: Tatanusa, 2001), 7.

[13] Lawrence M. Friedman.

[14] Soleman B. Taneko, *Struktur Dan Proses Sosial: Suatu Pengantar Sosiologi Pembangunan*, (Jakarta: Rajawali Press, 1933), 47.

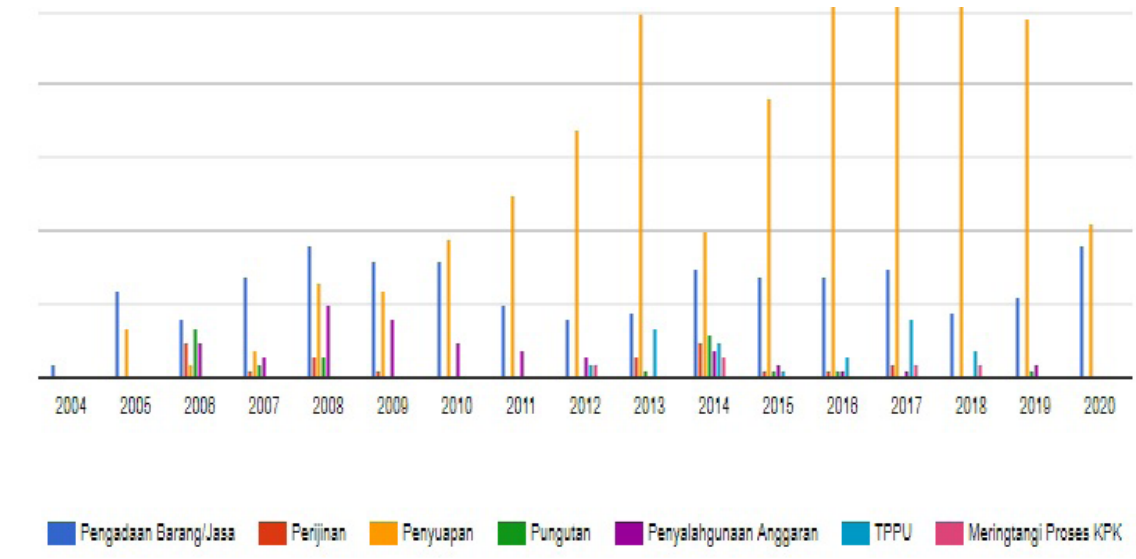
[15] Komisi Pemberantasan Korupsi, *Memahami Untuk Membasmi: Panduan Untuk Memahami Tindak Pidana Korupsi* (Jakarta: Komisi Pemberantasan Korupsi, 2006), 16-17.

Meanwhile, passive corruption is divided into 10 forms or types, as listed in Article 5 paragraph 2, Article 6 paragraph 2, Article 11, Article 12 letter a and letter d, and Article 12B. Therefore, there are 15 articles or types regulated in the Anti-Corruption Act regarding the bribery, including five crimes of active bribery and 10 crimes of passive bribery.[16]

Subsequently, the act of gratification in the Anti-Corruption Act is broadly defined to include gifts such as money, goods, discounts, commissions, interest-free loans, travel tickets, accommodation, tourist trips, free medical treatment, and other facilities. It is considered gratification when there is a work or official relationship between the giver and the receiver, or if it is solely due to the position or authority of the official.

Article 12B of the Anti-Corruption Act does not only have provisions for the crime of bribery to be gratified (material criminal law) but also criminal procedural law (formal criminal law), specifically regarding proof of gratification.[17] The articles on active and passive bribery have relatively the same formulation. Coupled with the regulation regarding gratification in the Anti-Corruption Act, this results in almost all types of passive bribery contained in the Anti-Corruption Act being applicable in the gratification arrangement as stipulated in Article 12B. Considering these differences, this overlap between bribery and gratification underscores the complexity of the legal framework of corruption and the need for clear distinctions and definitions.

Chart 1: Statistics of Corruption Cases by KPK in 2004-2020[18]



Source: KPK

[16] Adami Chazawi, *Hukum Pembuktian Tindak Pidana Korupsi* (Malang: MNC Publishing, 2018), 170.
[17] Adami Chazawi.
[18] Komisi Pemberantasan Korupsi, "Statistik Tindak Pidana Korupsi Menurut Jenis Perkara", KPK,2020 https://www.kpk.go.id/id/statistik/penindakan/tpk-based-type-perkara, tanggal akses

Table 1: Corruption Cases by KPK in 2004-2020[19]

Perkara	2004	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	Jumlah
Penggadaan Barang/Jasa	2	18	16	16	10	8	9	15	14	14	15	17	18	18	**224**
Perijinan	0	3	1	0	0	0	3	5	1	1	2	1	0	0	**23**
Penyuapan	0	13	12	19	25	34	50	20	38	79	93	168	119	25	**708**
Pengutan/ Pemerasan	0	3	0	0	0	0	1	6	1	1	0	4	1	0	**26**
Penyalahgunaan Anggaran	0	10	8	5	4	3	0	4	2	1	1	0	2	0	**48**

Source: KPK

The data shows that from 2010 to 2020, bribery was the most common type of corruption in Indonesia, handled by the Corruption Eradication Commission (KPK). The KPK recorded 670 corruption cases of bribery during this period, with continual increase. In 2018, the KPK recorded 168 corruption cases of bribery, and in 2019, there were 119 cases. The increased number of corruptions, particularly bribery cases, could lead to a catastrophe in Indonesia, giving a negative impact for the nation.

On a global scale, a substantial number of bribery cases can jeopardize societal stability and security.[20] In this nature, corruption may harm democratic institutions and values, ethical standards, and justice. Besides, it promotes discrimination, undermine ethics and fair business competition, and are detrimental to sustainable development and the rule of law.[21]

Public administration is closely linked with bureaucracy, referring to the procedures that must be followed to manage various aspects, including public services, within government agencies or departments.[22] Bribery in the administrative domain may occur due to a relationship of interest between the bribe giver and the recipient.[23] The recipient, having the authority to fulfill or refuse the interests of the bribe giver, creates an enticing relationship for the bribe giver. Hence, bribery is often referred to as a transactional crime.[24]

Bribery arises from a transactional relationship between those who have an interest in civil servants or public administrators. This transactional relationship also exists within the justice system, particularly in the case settlement process. The litigants are the party seeking justice, while the apparatus in the criminal justice system has the authority to provide justice. All parties involved in the case, including lawyers, police officers, prosecutors, clerks, judges, or the justice seekers themselves, may involve in the case settlement transaction.[25]

[19] KPK.
[20] Tim Penyusunan Kompendium Pidana Suap.
[21] Tim Penyusunan Kompendium Pidana Suap.
[22] Rachmat Trijono, *Kamus Hukum* (Jakarta: Pustaka Kemang, 2016), 39.
[23] Muhammad Mustofa, "Suap Menyuap dan Mafia Peradilan di Indonesia: Telaah Kriminologis" *Jurnal Masalah-Masalah Hukum* 42 no.1 (2013): 2, https://doi.org/10.14710/mmh.42.1.2013.1-5
[24] George P. Fletcher, "A Transactional Theory of Crime", *Columbia Law Review* 85 no. 5 (1985): 921-930.
[25] Muhammad Mustofa, "Suap Menyuap dan Mafia Peradilan di Indonesia: Telaah Kriminologis".

The fraud triangle theory, introduced by Cressey, states that fraud occurs due to a combination of three factors: opportunity, pressure, and rationalization. Pressure serves as the motivation for a person to commit bribery. Opportunity provides the means to execute the act. While rationalization helps the perpetrator reconcile feelings of guilt associated with the act of corruption.[26] In the context of public administration, council members are expected to represent and protect the interests of the people. However, they are often the ones most involved in bribery cases, resulting in hindered efficiency and effectiveness of projects.[27]

The overlapping of bribery and gratification arrangements in the Anti-Corruption Act does not equate the two. The distinction between bribery and gratification in the Anti-Corruption Act is very limited and almost indistinguishable. The author differentiates between bribery and gratification in the Anti-Corruption Act in the following table:

Table 2: ***Differences in the Crime of Bribery and Gratification***

No	Bribery	Gratification
1	Bribery is regulated in 15 (fifteen) different articles in the Anti-Corruption Act	Gratification is only regulated in 1 (one) article, namely Article 12B of the Anti-Corruption Act.
2	The element of the bribery is an element of giving something or a promise	The element of the criminal act of gratification is only the element of giving gifts (in a broad sense), not including promises.
3	Bribery happens because the giver intends to influence a civil servant or public administrator. In addition, bribes are accepted by civil servants or state officials because the bribe has something to do with their position.	The gratification received or given is not always related to the position. However, if the gratification is related to the position and contrary to the obligations or duties of the civil servant or public administrator, it is considered a bribe.
4	Bribes received or given to civil servants or public administrators are criminal acts that have been completed and will be subject to sanctions under applicable laws and regulations.	The gratification received must be reported to the KPK within 30 (thirty) working days. In this case, reporting gratuities to the KPK is an opportunity for civil servants or public officials not to be convicted.

Source: *Author*

Based on the table above, the authors conclude that the distinction between bribery and gratification lies solely in the element of promise and the abolition of criminal liability through the reporting of gratuities to the KPK. Distinguishing grants related to the positions of civil servants or public administrators is challenging, to the point of being nearly indistinguishable.

[26] Supeni Anggraeni Mapuasari and Hadi Maheasy, "Korupsi Berjamaah: Konsensus Sosial tentang Gratifikasi dan Suap", Integrity 4 no. 2 (2018): 166. https://doi.org/10.32697/integritas.v4i2.279

[27] Supeni Anggraeni Mapuasari and Hadi Maheasy.

The overlap of gratification with passive bribery is a result of the give-and-take culture, as previously explained. The author applies a legal pluralism perspective to the gratification arrangement in the Anti-Corruption Act, considering that the arrangement is also related to the societal habit of giving and receiving gifts.

Legal pluralism, a critique of centralism and positivism perspectives in law implementation, is defined by John Griffiths as a situation where two or more legal systems coexist in the same social domain.[28]

The act of giving and receiving is a part of Indonesian society.[29] For instance, giving gifts as an expression of gratitude is a common practice in daily life. However, this is prohibited for civil servants or public administrators. Thus, the authors conclude that giving and receiving have become a societal habit to reciprocate others' good deeds.[30]

The author links this habit to the nature of illegality as regulated in criminal law. The nature of illegality in criminal law is divided into two types.[31] The first is the violation of formal law, which is an act that is expressly prohibited and threatened by law. The second is the violation of material law, which is an act that may be illegal even though it is not expressly prohibited and threatened with punishment by law (e.g., general principles within the legal domain).[32]

However, the nature of violating material criminal law brings a negative function. This negative function is applied as a basis to justify the abolition of crime.[33] Moeljatno stated:

"Law is a law we have never experienced. Even better, almost all original Indonesian laws are unwritten. It is important to emphasize that while most of our criminal law is in the Criminal Code and other laws and regulations, the views on the law and the nature of the material against the aforementioned law have any meaning except to exclude acts which, even though they are included in the formulation of the Act, are not criminal acts. This is usually referred to as the negative function of the unlawful nature of the material."

The author agrees with this view through the perspective of legal pluralism, asserting that the nature of being against material law, which brings a negative function, which is the act of giving and receiving in Indonesian society. Thus, according to the author, the activities of giving and receiving can be used as a justification that eliminates the unlawfulness of the bribery arrangement in the Anti-Corruption Act.[34]

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[28] John Griffiths, "What is Legal Pluralism".

[29] Pitan Daslani, ed. *Menyibak Kebenaran: Eksaminasi terhadap Putusan Perkara Irman Gusman* (Jakarta: Bumi Aksara, 2018). Sebutkan halaman yang dikutip.

[30] Pitan Daslani, ed. *Mengungkap Kebenaran,* Sebutkan halaman yang dikutip.

[31] Albert Aries, "Perbuatan Melawan Hukum Dalam Hukum Perdata dan Hukum Pidana," Hukum Online, Sebutkan tanggal akses, https://www.hukumonline.com/klinik/detail/ulasan/lt5142a15699512/perbuatan-melawan-Hukum-dalam- Hukum-perdata-dan- Hukum-Pidana/.

[32] Albert Aries.

[33] Septri Yustisiani, "Pemberlakuan Sifat Melawan Hukum Materil Berfungsi Negatif Dalam Tindak Pidana Korupsi". *Dialogia Iuridica* 7 no. 1 (2015): 73. https://doi.org/10.28932/di.v7i1.710.

[34] Indriyanto Seno Adji, *Tindak Pidana Ekonomi, Bisnis, dan korupsi Perbankan, Modul Kuliah "Kejahatan Bisnis",* (Bandung: Universitas Padjajaran, 2004), sebutkan halaman yang dikutip.

It does not mean that the author condones with the bribery of civil servants or public officials. The authors argue that the act of giving and receiving is a culture that exists in people's lives. Further, the bribery of government officials or public administrators cannot be conducted freely. However, the authors believe that the regulation of the criminal act of bribery as regulated in the Anti-Corruption Act does not distinguish between giving and receiving which is a crime, and giving and receiving which is not a crime. In this context, a culture of giving and receiving that is prevalent in Indonesia.

The overlapping regulation of bribery and gratification articles impacts the implementation of these articles in prosecuting perpetrators of bribery and corruption. Applying these articles becomes challenging as it's impossible to distinguish whether gifts are related to the positions of civil servants or public administrators. These articles do not clearly define what constitutes an acceptable gift. This ambiguity often leads to misapplication of these articles, resulting in a lack of confidence in decision-making and weak evidence in court.

Lawrence Friedmann argues that the law is a shock wave in the form of demands coming from the society, which ultimately drives the legal process. Friedmann asserts that a legal system must operate from a complex organism comprising structure, substance, and legal culture. These elements interact to explain the background and effects of each part, necessitating the role of many elements. In other words, a legal system should ensure the correct and appropriate distribution of the law's objectives among individuals and groups.

2. The Constitution and Legal Pluralism in Gratification and Bribery: A Walk-Through Living Law

There are several methods to understand legal pluralism. First, legal pluralism explains the connection between various legal systems in society. Second, it reflects the various laws existing within the social scope. Third, it explains the relations, equality, and competition between legal systems. Lastly, legal pluralism demonstrates the citizens' choice to apply a certain law in conflict. From these perspectives, it can be concluded that legal pluralism is a reality in societal life.

Living Law refers to the law that is obeyed in a law-abiding society. It is defined in Article 1 of the Act Number 1 of 2023 concerning the Criminal Code, ratified at the beginning of 2023. Further, Article 2 stipulates that the living law in question applies throughout the areas not arranged in the Criminal Code, following Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and generally recognized legal principles.

This chapter on Living Law refers to the law that continues to evolve in Indonesian society. In some regions of Indonesia, there are unwritten laws which are considered as local laws that determine that someone must be punished. To establish a legal basis for the application of ordinary criminal law, the government must strengthen and organize it

from a regional regulation where the ordinary criminal law is applied. This set contains living laws in society classified as ordinary crimes.

Living Law is the law obeyed or applied in society. Studies on legal pluralism suggest that state law is not the only law that governs citizens' behavior. There are also customary laws, religious laws, traditional customs, or a mix of these, which are equally effective in governing relations between citizens. State law, with its supremacy, has the strongest binding force. If someone is proven to violate the law, the police (state agencies) can directly apprehend them. However, state laws are rarely encountered in everyday life, except in civil administration, civil trade, or crime. The laws most closely related to daily life are those outside the state.

Living law is not identical to normative legal formulas, constitutional law, customs, religion, and unwritten legal norms. Legal texts always contain immaterial norms and ideals to protect the public from harm, greed, and injustice. However, there is always a gap between the ideal formulation and the practice of law. Not everyone complies with the law, and some violate it. Living Law, or laws that live and develop in society, can be examined in legal disputes. This happens when a violation of law is explained in the court or in the community's custom or religion. Their part or normal ideals are put to the test through discussions between the judge and the parties. Then comes the examination and the judge's decision. Living law is a decision or jurisdiction of society, resulting from the inspection of legal texts, and it is the law that is obeyed and taken seriously in society.

Legal pluralism is not only the coexistence of different legal systems in a region or social area but also the encounter and mutual recognition of legal systems. In the era of globalization, the complexity of inter-judicial meetings increases due to the influence of international law on national legislation, especially in the field of basic human rights. At the United Nations (UN), delegates from various countries discuss the problems of their countries and seek joint legal protection. After it becomes an international legal instrument, countries will ratify (whole or part of) its contents, then incorporate it into a national law. Because of the intersection between legal systems, the law is always changing. So, not every legal system can be considered as a clear unity with distinct boundaries between other laws.

The act of gratification or bribery is strictly prohibited by law because it is considered that giving something to someone is subject to the law to gain profit for a certain purpose. Giving something (in the form of goods or money) does not always refer to gratuity or bribery. In Indonesia, giving gifts to kings or important people who lead a certain area is an expression of gratitude for what they have done for the society. The deep-rooted habit in Indonesian society of giving gifts is considered common and often happens from kingdom era to modern era like now.

The values in Pancasila, the 1945 Constitution, and human rights are critical for the enforceability of The Living Law (the law that applies in society). If it does not contradict

with the values or norms in Pancasila, the 1945 Constitution, and basic human rights, it has the power to apply in social life. Furthermore, if the actions based on The Living Law do not contradict with the normative values that apply to society, it can be used as a basis for determining whether a certain deed is deemed appropriate or not.

3. Analysis of the Constitutional Court Decision No. 75/PUU-XI/2013 Regarding Article 12B of Law Number 20 of 2001 on the Eradication of Criminal Corruption

A. Case Position

The applicant is Drs. H. Zulkarnain Djabar, who has filed a judicial review with the Constitutional Court (MK) under case number 75/PUU-XI/2013. This application was accepted by the Supreme Court on August 15, 2013. The applicant believes that his constitutional rights, protected by the 1945 Constitution, have been violated by the application of Article 12a and Article 12b of Law Number 20 of 2001 concerning Eradication of Criminal Corruption.

The applicant argues that the norms stipulated in Article 12a and Article 12b of Law 20/2001 are vague. The content of Article 12a and Article 12b of the Law differs only in terms of the severity of the criminal penalties and higher fines, compared to the sanctions stipulated in Article 5 of Law 20/2001. This is due to the introduction of the phrase "properly presumed" in Article 12a and Article 12b of the Law, the 'a phrase' implies uncertainty.

The content of Article 5 and Article 12 of Law 20/2001 is a repetition of Article 419 of the Criminal Code. It should follow the logic of criminal law when imposing heavier penalties in the arrangement of criminal norms, such as in the case of aggravated prison penalties in Article 340 of the Criminal Code, due to the presence of "planning" elements in the offense. It is different from normal murder offenses as stipulated in Article 338 of the Criminal Code.

The application of these norms, with high punishment threats in Article 12a and Article 12b applies to the applicant himself in the corruption cases at the Central Jakarta District Court. Therefore, the applicant feels harmed by the application of Article 12a and Article 12b of Law 20/2001. The application of Article 12a and Article 12b of Law 20/2001 makes the applicant experience legal uncertainty as a citizen and feels that his rights for equality before the law, as guaranteed in the 1945 Constitution, have been violated. Accordingly, such application violates the 1945 Constitution, for the following reasons:

a) Article 1 paragraph (3) states, "Indonesia is a country based on law." The idea of a "rule of law" provides legal protection for citizens against unfair and uncertain legal processes, as experienced by the applicant due to the application of Article 12a and Article 12b of Law 20/2001 in the criminal case proceedings alleging corruption against the applicant.
b) Article 27 paragraph (1) states, "All nationals are equal in the eyes of the law and government and are obliged to uphold the law and government without exception."

The application of Article 12a and Article 12b of Law 20/2001, which have nuances of "uncertainty, doubt in the offense formula" in the criminal case proceedings alleging corruption against the applicant, makes the applicant feel that they have been treated "unequally in the eyes of the law and government."

c) Article 28D paragraph (1) of the 1945 Constitution states, "Everyone has the right to recognition, guarantees, protection, and fair legal certainty as well as equal treatment before the law." The application of Article 12a and Article 12b of Law 20/2001, which have nuances of "uncertainty, doubt in the offense formula" in the criminal case proceedings alleging corruption against the petitioner, makes the applicant feel that they have been treated "unequally in the eyes of the law and government."

B. Petitum

Based on the arguments, the applicant, Drs. H. Zulkarnain Djabar, feels harmed by violation of his constitutional rights due to the enforcement of Article 12a and Article 12b of Law 20/2001. According to the applicant, this situation has led to legal uncertainty. Therefore, the petitioner requests the Constitutional Court to grant:

a) Declare that Article 12a and Article 12b of Law Number 20 of 2001, concerning amendments to Law Number 31 of 1999 on Eradication of Criminal Corruption, are contrary to Article 27 paragraph (1), and Article 28D, paragraph (1).
b) Declare that Article 12a and Article 12b of Law Number 20 of 2001, concerning amendments to Law Number 31 of 1999 on Eradication of Criminal Corruption does not have a legal binding force.

C. Court Rulings

The Constitutional Court has decided to reject the entire application filed for the following reasons:

a) The application filed by the petitioner is not legally justified.
b) Article 12a and Article 12b does not create dissimilarity, legal uncertainty, or injustice. Accordingly, these norms apply to everyone (subject to law), so they are not in contrary to Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution.
c) Article 12a and Article 12b are in accordance with the intent and purpose of the amendment to Constitution Number 31 of 1999 concerning the Eradication of Criminal Corruption.

D. Analysis

According to the applicant, Article 12a and Article 12b violate his constitutional rights because they are perceived to create legal uncertainty, injustice, and inequality. Hence, contradict with the Article 27 paragraph (1), Article 28D paragraph (1), and Article 28I paragraph (2) of the 1945 Constitution. However, according to the Constitutional Court,

Article 12a and Article 12b are in accordance to Article 27 paragraph (1), Article 28D paragraph (1), and Article 28I paragraph (2) of the 1945 Constitution.

The Article 12a and Article 12b reads as follows: "A civil servant or state official who accepts or promises, though it is known or reasonably suspected that the gift or promise is given to motivate them to do something or not to do something in their position, contrary to their obligations; and civil servants or state officials who accept gifts or promises, though it is known or reasonably suspected that the gift or promise is given as a consequence or because they have done or not done something in their position, contrary to their obligations." The breakdown of such norms are as follows:

1. Civil Servants or State Officials who accept gifts or promises: This is addressed to government officials who must accept gifts or promises from other parties.
2. Is known: This phrase indicates that civil servants or authorized officials already know that a gift or promise is for the purpose of motivating them to do something contrary to their official position.
3. Reasonably Suspected: This phrase is where civil servants or officials are uncertain or do not yet know that a gift or promise given by other parties so that civil servants or officials do something that may be contrary to their authorities.
4. Consequence or because they have done or not done something in a position conflicting with their obligations: This explanation is where civil servants or officials who have accepted or do not know that a gift or promise given from another party is a risk from later actions carried out by civil servants or officials that violate the authority possessed by the incumbent government officials.

The provisions in Article 12a and Article 12b concerning gratuities and bribery committed by civil servants or state officials, are not in contrary to Article 1, paragraph (3), which states that Indonesia is a constitutional state. This can be seen in the legal certainty for all Indonesian citizens who feel that they have been harmed or have acted in conflict with the applicable laws. This is evidenced by the soundness of Article 12a and Article 12b, with the consequences or sanctions given for actions taken by civil servants or authorized officials.

Article 27 paragraph (1) states "Each national is equal in position within the law and government and is obliged to uphold the law and government without exception." This means that with the validity of the applicable laws, all Indonesian citizens, without exception, must uphold the law.

Article 28D paragraph (1) states "Everyone has the right to recognition, guarantee, protection, and fair legal certainty as well as equal treatment before the law." In this matter, there is legal certainty and justice under the provisions of Article 12a and Article 12b. Hence, it is equally before the law.

However, the point is that every gift or promise to civil servants or government officials can fall within the scope of bribery or gratuities. These actions clearly violate the provisions of Article 12a and Article 12b. However, not every gift or promise for an action already done or successful is categorized as gratuity or bribery. Specifically in Indonesia, where giving gifts or tributes has been a long-standing tradition since the kingdom era. Gifts or tributes given by the society to the king or officials are signs of gratitude for the success of something which has a positive impact on Indonesian society.

Giving a gift or tribute to the king is an action that can be categorized as Living Law or applicable law in society. It is a part of daily life in society and does not contradict with the norms in society. If such actions fall under the act of bribery or gratuities, it should be explained and confirmed as follows:

Civil Servants should be able to explain and detail how much nominal value (if a gift is in the form of money) falls into the category of gratification or bribery. For example, if the Anti-Corruption Law determined that a gift (money) with a value of IDR 10,000,000 falls into the category of bribery, and proven validly and convincingly that a gift with such value has been presented, then the party doing so can be punished under the Anti-Corruption Law. Also, it should be explained in detail, what kind of promised or presented gifts can be classified as gratification.

Therefore, with such determination, it can provide clarity on whether a gift, present, or tribute falls into the category of gratification-bribery or not, without having to eliminate the tradition that the Indonesian society have been practicing since long time ago.

C. CONCLUSIONS

The concept of legal pluralism provides a critique of centralism and positivism in the implementation of law in society. To enforce the law, extensive and intensive legal communication is necessary to raise public awareness about the regulations that must be adhered to. This ensures that, when interacting with government officials, individuals are not caught in the traps that could lead to negative consequences. The legal structure pertains to law enforcement officials, legal substance encompasses statutory instruments and legal culture refers to the law that exists within society. In Indonesia, as stipulated in the Anti-Corruption Act, there are 30 forms of corruption. It can be grouped into seven categories, one of which is state financial losses (Article 2 and Article 3). Consequently, there are 15 articles or types regulated in the Anti-Corruption Act regarding the crime of bribery.

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