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CONTRIBUTION OF ISLAMIC LAW IN THE DEVELOPMENT OF CORRUPTION CRIMINAL LAW

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Abstract

Indonesia as one of the largest Muslim population in the world requires the contribution of Islamic law in fighting against corruption. As corruption has damaged all aspects of life in Indonesia, it needs special handling. The problem discussed in this paper is how the criminal act of corruption is regulated in national criminal law and Islamic criminal law and how Islamic law contributes to the development of criminal law on corruption. This is a normative research using traditional customs as the secondary data. The National Law on Corruption defines a restriction on the imposition of the death penalty, where the death penalty will only be imposed if the criminal act of corruption is committed under certain circumstances. In Islamic law, corruption belongs to the act of *fasad* (the act destroying the order of life). There are at least four conceptions in the Islamic law on corruption, especially in Indonesia, including *ghulul* (abuse of authority), *sariqah* (theft or embezzlement), *khianah* (treasonous), and *risywah* (bribery or graft) Corruption is equated with *Jarimah Hirabah* whose punishment is death, crucifixion, corporal punishment or isolation. Death penalty has been mentioned in the National Law on Corruption of Article 2, paragraph 2 and has been reinforced by the Al-Qur'an in Surah Al-Maidah, verse 33. Death penalty needs to be applied to corruptors because criminal act of corruption can harm the welfare and prosperity of a country.

INTRODUCTION

Indonesia is a country with an ideology of *Pancasila* (Harefa, 2011). Belief in the Almighty God as the first principle is the prime clause in the points of *Pancasila* in implementing the sharia of religion (Kaelan, 2015). The majority of Indonesia's population is Muslim. The religion of the majority people in a country will certainly affect the prevailing law in that country. (Budiyono, 2014) A good law must be a reflection of the social ethical values of the society because a law is created by human beings to fulfill their interests (Ujan, 2009). In the history of Islamic thought, various

scholars have appeared with their own philosophical framework for understanding the Islamic faith as mentioned in the Qur'an and Hadith of the Prophet (S.A.W) (Mamat, Ahmad, Al-Shafi'i & Yabi, 2017). Therefore, Islamic law should be taken into account in establishing a law or imposing a punishment. The society has a great influence in establishing a law (Salam, 2015). Legal experts should sharpen their judicial sensitivity to the social reality. (Komisi Yudisial Republik Indonesia, 2017) The indication that a law answers the social needs is visible when there is a conformity between the standards recognized by the society and the objective values of a positive law. A good law should conform to the living law in a society (Ujan, 2009) or appropriately reflects the prevailing values in a society. Similarly, the prevailing social culture in Indonesia should also affect the prevailing norms (Ruman, 2009).

Corruptors are the nation's most terrible enemies (Pramono, 2012). They are taking the state's properties in various ways, destroying the social life, disregarding the religious values and betraying the noble heritage of the nation's founders (Khusnan, 2012). In the midst of the various development efforts, the people's aspirations to combat corruption and other forms of irregularities are increasing, because corruption has obviously caused huge losses to the state which in turn can have a significant impact on the many fields crisis. (Rodliyah & Salim, 2017)

Not surprisingly when there is a discourse of a death penalty for corruptors. Death penalty allegedly can give a deterrent effect and a sense of justice for the community. Considering its huge effect, corruption should be eradicated totally. (Rodliyah & Salim, 2017) Corruption is a national problem in which an eradication process is still going. One of the efforts is through the renewal of a legal material, in this case the legislation. (Atmasasmita, 2003) This is very important considering the impact of a corruption really destroys the many aspects of a nation's life, (Supandji, 2009) and the eradication process has been done in accordance with several laws and regulations concerning the Criminal Act of Corruption. In combating corruption crimes, which is categorized as an extraordinary crime, lawmakers have formulated several important matters, that can be applied as a means to defeat the corruptors as well as to provide a deterrent effect to them. (Rodliyah & Salim, 2017)

In the religious law perspective, God has actually delegated through His words by ordering the death penalty to be imposed and executed in certain cases to maintain the balance and order of life (Poernomo, 1982). This God's Delegation, for example, is reflected in the Holy Qur'an of Surat Al-Baqarah: 178, Al-Isra': 31 and others. The existence of this delegation doctrine obviously implies that imposing and executing a death penalty is not a violation to God, the Owner of the ultimate right of life. Pertaining to the majority of Indonesian people are Muslims, Islamic Law can actually be applied in Indonesia. In addition, the corruption crimes in Indonesia do require a special regulation, and a religious approach needs to be addressed to overcome such cases. Islam has regulated several crimes for which a death penalty can be imposed.

Formulation of the Problem

The problems of this research are formulated as follows:

1. How is corruption crime regulated in the Indonesian criminal law and Islamic criminal law system?
2. How is contribution of islamic law in the development of corruption criminal law?

RESEARCH METHODS

This study applies a normative research method using a statute approach. The sources of data were obtained from the secondary data, consisting of primary legal materials, secondary legal materials and tertiary legal materials. The data were collected using a literature review and documentation analysis. Then the data were analyzed using a qualitative method and were described using a prescriptive technique

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This study applies a normative research method using a statute approach. The sources of data were obtained from the secondary data, consisting of primary legal materials containing legislation related to the criminal act of corruption, secondary legal materials containing literature related to criminal act of corruption and tertiary legal materials containing dictionaries of law. The data were collected using a literature review and documentation analysis. Then the data were analyzed using a qualitative method and were described using a prescriptive technique.

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RESULTS AND DISCUSSION

Regulating Criminal Acts of Corruption in Indonesian Criminal Law and Islamic Criminal Law

Corruption is an act of doing something with an intent to give some advantages inconsistent with the official duty and the rights of others orto get some benefits either personally or for someone else, contrary to the rights of others.(Bryan, 1999) Corruption is a criminal act that could not only harm the state finances, but could also cause losses to the people's economy.(Arief, 2005) Sheikh Hussein Alatas states that the essence of a corruption is a theft through a fraud in the situations that betray the faith.(Anwar, 2008) Meanwhile, Baharudin Lopa argues that a corruption is a criminal form contrary to the act of a bribery and manipulation, as well as other acts that can harm the state's economic finance and harm the welfare and interests of the people.(Bahri, 2015) The perpetrators of a corruption are not indiscriminate people because they have an access to do so, by misusing their

authorities, opportunities or facilities (Harkrisnowo, 2002). Corruption to include not only all forms of improper or selfish exercise of power and influence attached to a public office or the special position on occupies in the public life but also the activity of the bribers (Myrdal as in Djaja, 2013)

Corruption exist individual illicit puts personal interest above those of the people and ideals her or she is pledged to server. It comes in many forms and can range from trivial to monumental. Corruption can involve the misuse if policy instruments, tariffs and credit, irrigation system and housing policies, the enforcement of laws and rules regarding public safety, the observance of contracts, and the repayment of loans or of simple procedures. It can occur in the private sector or in public one and often occurs in both simultaneously. It can be rare or widespread; in some developing countries, corruption has become systemic. Corruption can involve promises, threats, or both, can be initiated by a public servant or an interested client; can entail acts of omission or commission; can involve illicit or licit services; can be inside or outside the public organization. The boundaries of corruption are hard to define and depend on local laws coustoms. The first task of policy analysis is to disaggregat the type of corrupt and illicit behaviours in the situation at hand and look at concrete examples (Klitgaard in Chaerudin, Dinar & Fadillah, 2008).

In the juridical sense, the Corruption Law provides a boundary comprehensible through the text of its articles which are then grouped into some offense formulas: the group that could harm the state's finances or economy (Articles 2 and 3 of Law Number 31 of 1999), the group of bribery, both active (bribers) and passive (bribery recipients) bribery (Articles 5, 11, 12 and 12B of Law Number 20 of 2001), the group of embezzlement (Articles 8 and 10 of Law Number 20 of 2001), the group of extortion (Article 12e and f of Law Number 20 of 2001), and the group of offenses related to chartering, supplying and partnership (Article 7 of Law Number 20 of 2001); (Chaerudin et al., 2008). Basically, there are at least 4 (four) categories of deeds that can be classified into the concept of juridical corruption, namely: Bribery, extortion, fraud and nepotism (Danil, 2011).

The criminal sanctions imposing to individuals as the subject of a corruption crime include: death penalty, life imprisonment, imprisonment within a certain time and a fine (Milono, 2014). Meanwhile, the principal punishment imposing to corporations as the subject of a corruption crime is only a fine in addition to the criminal sanctions as imposed to individuals (Rahmayanti, 2017).

Risywah linguistically means something that can deliver someone to achieve his/her goal by all means (Ismawan, 1999). *Risywah* is part of a corruption crime related to bribing a person who has a power or an authority to facilitate someone in achieving his/her purpose (Rafi', 2004).

Al-ghulul is the act of embezzling the state treasury (*baitul mal*) or in the literature of Islamic history is stated as stealing the spoils of war or hiding some part of it to be owned before delivering to the distribution place (Sumarwoto, 2014). The word "*ghulul*" in the hadith above means fraud, but in other literary works the word "*ghulul*" means embezzlement relating to the state treasury or *baitul mal* (Ali, 2006). Actions in the category of *al-ghulul* include rewards to officials, *risywah*, embezzlement, unlawful use of the public properties and protecting a corruption case. Protecting a corruption

case is a corruption crime which can demolish the operation of the legal system (Anwar, 2008).

Al-maksu is the act of collecting taxes by taking what is not his/her right and giving to the person who does not deserve it (Irfan, 2013). This act is identical with the illegal fees usually imposed to someone during an administration process. They illegally charge people with a certain amount of money without prior agreement on the amount (Rafi', 2004).

The fiqh scholars have divided Islamic crimes into three groups: *hudud* crimes, murder offenses and *ta'zir* (*jarimah*) crimes (Muslich, 2004). Corruption crime is categorized in the group of *ta'zir* crimes. (Az-Zuhaili, 2007) Therefore, the determination of punishment, including its type, form and number is delegated by sharia to the judges. In determining the punishment for a corruptor, a judge shall refer to the sharia's purpose of defining the punishment, (Jumali, 2014) the interests of the society, the circumstances and conditions of the environment, and the circumstances and conditions of the corruptor; therefore, the punishment will provide a deterrent effect to corruptors and may serve as a warning for others. The Indonesian Ulama Council (MUI) recommends that perpetrators of corruption should be sentenced to death. In addition, the fiqh scholars have agreed to say that the act of corruption is *haram* and forbidden as it is opposed to the demand of sharia (*maqasid ash-shariah*) (Sumarwoto, 2017).

The Indonesian national law is derived from: (1) the living law in Indonesian society, i.e. the existing law before the arrival of Islam in Indonesia; (2) Islamic law, the law taught by the Islamic religion followed by the Indonesian nation after its arrival in Indonesia; and (3) Dutch colonial legacy law created by the Dutch Colonial Government during the colonization of Indonesia. (Kusumah, 1986)

As most Indonesian people are Muslims, its legal tradition is inseparable from the teachings of Islamic Sharia. Even in the practice of the legislation, we find some facts that: (i) most of the national laws are derived from the Islamic law which are applicable to all citizens; and (ii) another part of the national laws is the transformation of an Islamic law into an Islamic legal system which are applicable only to Muslims or who submit themselves to the Islamic law (Syarifuddin, 1997).

The main and supreme source of Islamic law is the Qur'an, the Muslim holy book, which comes from God and contains revelations from God (Allah) to the Prophet Muhammad who lived in 570-632 AD (Menski, 2016). Next, in the hierarchy of the source of the Islamic law, there is a *sunnah*, which is an explanation of the words, deeds, and behavior of the Prophet. *Sunnah* can be found in tradition or hadith, which describes what has been said or done by the Prophet on certain occasions. (Bogdan, 2015) The next source of Islamic law is *ijma'*, comprising opinions generally accepted among believers, especially legal scholars, in interpreting the main source of law (the Qur'an). In addition, there are several additional sources, such as court precedents, customs and common good. (Edi, 2014).

Due to the fact that the two legal resources of primary and fundamental Islamic law are Qur'an (coming from God) and *Sunnah* (coming from His Messenger Muhammad SAW). (Bogdan, 2015) Both are regarded by Muslims as valid and permanent laws of all times. This means that the two laws are the final perfect laws which will someday be recognized and

followed by all people. In accordance with these views, the national legislature in many countries cannot change these laws, but can only regulate the details and modalities that have not been regulated by the sharia.(Menski, 2016).

Contribution of Islamic Law in Developing Criminal Law on Corruption

The Corruption Eradication Commission (KPK) classifies corruption as an extraordinary crime that has a tremendous impact on the society.(Toule, 2013) Constitutionally, Law Number 31 of 1999 which was amended by Law Number 20 of 2001 on Corruption Eradication has included death penalty as one of the punishment options for corruptors. However, it can only be applied under certain circumstances: when a country is in danger; when a natural disaster hits the nation; when there is a repetition of committing the corruption crime; and when the state is facing an economic crisis (Muhammadiyah, 2010). In the Islamic law, corruption is a *fasad* act or an act that destroys the order of life (Semma, 2008). Furthermore, in the Islamic law, the corruption perpetrator is categorized to have committed a great sin (*jinayah kubro*) and must be subjected to death penalty sanction, be crucified, be cut off by the feet and hands crosswise or be expelled (Zainuddin, 2012).

In Islam, criminal sanctions can be categorized into two: (i) definitive (*mahdudah*) sanctions, whose explanations have already been mentioned in the Qur'an and Al-Sunnah, such as caning sentence (*jild*), cutting off of hands (*qath'*); and (ii) non-definitive (*ghair mahdudah*) sanctions (Zaheah, 1998) whose explanations are not found in the Qur'an and Al-Sunnah, so the formulation of sanctions refers to human considerations, such as criminal sanctions for bribery (*risywah*) and betrayal (*khiyanah*). Such criminal sanctions are commonly referred to as *ta'zir*. (Dahlan, 2003)

In the context of broader Islamic teachings, corruption is an act contrary to the principles of justice (*al-'adalah*), accountability (*al-amanah*) and responsibility. Corruption together with its negative impacts that cause distortions to the life of the state and society can be categorized as the deeds of *fasad*, damaging the earth, which is very condemned by Allah SWT (Kaffah and Amrullah, 2003). There are at least four conceptions of Islamic law on corruption, especially in Indonesia, namely *ghulul* (abuse of authority) (Khasan, 2011), *sariqah* (theft or embezzlement) (Khasan, 2011), *khianah* (treasonous), and *risywah* (bribery or graft) (Khasan, 2011).

Corruption is a form of *khiyanah* (Gad, 1991) (betrayal) crime because of its identical character in terms of betrayal of trust pertaining to the state finances. Besides, it has also been described that the legal sanctions of the corruption are adjusted depending on the factors motivating the perpetrators to do it, such as by means of their power. Corruption is equated with *hirabah*, i.e. a corruption by means of power and authority whose effects are so devastating to the order of the state and national life. Therefore, it can be subject to capital punishment, as mentioned in the Al-Qur'an in Surah Al-Maidah verse 33 (Sabiq, 2007).

In Islamic law, *khiyanah* belongs to the category of non-definitive criminal acts (*jarimah ghair mahdudah*) which, therefore, falls into the *ta'zir* category. So, if the Islamic law entirely handed over *ta'zir* criminal sanctions to a leader or a judge, then the punishment provisions in such law could be

referred to as the minimum and maximum limit applied in the context of criminal sanctions for corruptors. (Arifin, 2015)

In fact, however, the Islamic law considers the formulation of *ta'zir* punishment which should consider several factors, one of which is the benefit of the people (Zainuddin, 2012). Imposing *ta'zir* punishment should be able to provide a deterrent effect and should not cause more damage in the society. There should be a conformity between the amount of crime with its punishment, neither deficient nor too excessive. Besides, there should be an equality and justice for the whole people, in the sense that it does not differentiate between individuals and groups (Zainuddin, 2012).

In its relation to the criminalization of *ta'zir*, the imposition of criminal sanctions for a crime is part of the judge's or government's discretion; he/she could have established a criminal offense based on certain reasons corresponding to the *maslahat* (Asmawi, 2010). The purpose of discretion is the possibility of self-determining decisions taken from several possibilities as alternatives (Saleh, 1988).

Corruption is a crime in the form of betrayal (*khiyanah*) causing the state's financial loss at various levels and frequencies. The *ta'zir* criminal sanctions imposed by the authorities or judges should consider such matters as: warning (*wa'dh*), beating (*dharb*), dismissal (*'azl*), imprisonment (*sizn*), crucifixion (*shulb*) which may be imposed on corruptors with certain levels. Similarly, the sanction of a capital punishment or a death penalty (*al-qatl*) may be sentenced to corruptors with a very harmful amount that affects the benefit of the masses (*ihdar mashâlih al-ammâh*). Corruptors might be compared to subversive actors because they threaten the welfare of the state and the people (Praja, 2014).

The judges of corruption court must dare to impose severe punishment on corruptors. Noor (2013) stated that as corruption is equated with *Jarimah Hirabah* whose punishment is death, crucifixion, corporal punishment or isolation. The death penalty has been contained in the National Law on Corruption in Article 2, paragraph 2 and has been reinforced by the Al-Qur'an in Surah Al-Maidah verse 33.

The majority of Indonesia's population is Muslim. In several regions in Indonesia, Islam is not only an official religion, even the prevailing law in those regions is the Islamic law. This fact shows that there is a desire from the majority of Muslims to live according to their religion. Therefore, the contribution of Islamic law is needed to provide a formulation in fighting against corruption in Indonesia for future criminal law reform, especially in the effort to overcome corruption.

CONCLUSIONS

In Islamic law, corruption is the act of *fasad* or the the act destroying the order of life. It is an act contrary to the principles of justice (*al-'adalah*), accountability (*al-amanah*), and responsibility. There are at least four conceptions of Islamic law on corruption in Indonesia, including *ghulul* (abuse of authority), *sariqah* (theft or embezzlement), *khianah* (treasonous), and *risywah* (bribery or graft). There needs to be more severe criminal sanctions and to provide a deterrent effect (*al-zajr*) for corruptors. As corruption is a form of criminal acts of *Khiyanah* whose perpetrators are categorized as committing a great sin, the sanctions that can be imposed on corruptors are dismissal, deportation, imprisonment, crucifixion and death

penalty. The death penalty has been contained in the National Law on Corruption in Article 2 Paragraph 2 and has been reinforced by the Al-Qur'an in Surah Al-Maidah verse 33 in which the punishment is completely handed over to the judges according to their *ijtihad* (effort) within the area of ta'zir. The National Law on Corruption defines a restriction on the imposition of the death penalty, where the death penalty will only be imposed if the criminal act of corruption is committed under certain circumstances. Such regulation may be exempted when referring to criminal sanctions set out in the Islamic criminal law. According to the Islamic law, a death penalty can be imposed by considering the benefit of the people and sense of justice for all people. It is, therefore, appropriate that the laws and regulations, particularly those governing the criminal act of corruption consider this view by considering the increasingly widespread cases of corruption in Indonesia. In solving criminal corruption cases, law enforcement officers should pay attention to the principles of the Islamic law.

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