



Criminal Sanctions As an Eradication Strategy Of Corruption: A Critical Study from the Perspective of Islamic Criminal Law

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Abstract

The spirit of anti-corruption movement has been a motion since reformation era in 1998 and the government has issued various policies. Firstly, the policy relating to the substance of the law, the government has passed various laws and ratified international conventions. Secondly, the regulations concerning law enforcement agencies, the government has established the Corruption Eradication Commission, Corruption Crime Court, the Center for Reporting and Analyzing Financial Transactions (PPATK), the Witness and Victim Protection Agency (LPSK), and the establishment of internal supervisory bodies. However, these efforts seemingly face failure. The facts show that corruption increases in the executive, legislative and judicial institutions, from the center to the region level. The failure of corruption eradication can be one of the reasons that indicates the formulation of criminal sanctions in Law No. 20/2001 for corruption is weak, not appropriate for the negative impacts of the crime. Consequently, the punishment imposed has no deterrent effect for either the perpetrators or others. It is contrast to the concept of sanctions in Islamic criminal law, sanctions imposed on the perpetrators must be comparable with their evil deeds (Qur'an Surah 42, verse 40), with the aim to benefit for human both individual and collective. According to the concept, this article will examine criminal sanctions based on Islamic criminal law as an eradication strategy of corruption. The results of this article can be a consideration for the revision of the framework in formulating criminal sanctions contained in Law No. 20 / 20011 concerning corruption.

Keywords: *sanction, Eradication, Corruption, Islamic Criminal Law*

Introduction

In the Indonesian Age of Reforms which initiated in 1998, various efforts to prevent and eradicate corruption have been committed by the Government . Through the legal instrument the Government has passed Statute No. 31 of 1999 juncto Statute No. 20 of 2001 on Corruption Eradication. Thorough law enforcement agency, the Government has formed the Corruption Eradication Commission and Corruption Court, even establishing each supporting agencies that are expected to prevent the occurrence of corruption, such as the establishment Financial Transaction Analysis and Reporting Center (*id: PPATK*) and Institute of Witnesses and Victims Protection (*id: LPSK*).

These efforts are fruitless . What is happening is corruption thrives well in the executive branch, legislative branch, judiciary branch, starting from central government to local government. Even the People were exposed to the virus of corruption in the form of vote-buying in the local elections event, the Electoral Legislative and Presidential Election events.

One of its causes is the harmless criminal sanctions defined by the law of corruption, thus it is not a deterrent, due to very light sanctions (UU No. 20 Tahun 2001), whereas corruption have damaged the very life of the Nation and State (UU No. 31 Tahun 1999). Viewed from the perspective of the Islamic Criminal Law, the formulation of criminal sanctions in Corruption Eradication Statute is not comparable to the crime (QS 42:40), so that it does not have a deterrent effect, because the purpose of the criminal sanctions imposition according to Islamic law is – in addition to fixing the perpetrators of crimes in order not to commit crimes any longer – more importantly to protect the people from becoming crime victims themselves. The problem is which formulation of criminal sanction for the perpetrators of corruption that has a deterrent effect for both the perpetrator and others? Through normative juridical research, the problem will be studied in-depth from the perspective of Islamic criminal law which is derived from Al-Quran and Hadith.

Methodology

In this study the authors use the normative juridical method by examining norms contained in the Quran that relates to the crime of corruption and its criminal sanctions as corruption prevention and eradication strategy.

Discussion

A. Understanding Corruption

The term corruption comes from the word *corruptio* (Latin), *corruption* (English), *corruptie* (Dutch) which means rottenness, ugliness, depravity, dishonesty, immorality, perversion. According to Hamzah (2005) corruption is a bad deed, rotten, depraved, bribed, deviate from purity and immoral. The corrupt and the corrupted are the morals of those who perform acts of corruption (Lopa, 1997). From a sociological approach corruption can be interpreted as nepotism, bribery. Judging from the norm, bribery is an offense (Pasal 209 dan 2010 418 KUHPidana)

From such a broad understanding of corruption all leads to ugliness, ignorance, fraud and even tyranny which can damage and destroy the order of life of society, nation and state. If mentally and administratively corruption is not revoked to the roots, then corruption it would become a national cancer (Alatas, 1986). The practice of corruption could spread throughout the hierarchy. Therefore corruption can only be eradicated if the holders of power are high moral, efficient and rational laws.

From the descriptions above, the characteristics of an act can be classified as corruption act consisting of: a) corruption always involves more than one person, b) involves secrecy, c) engaging mutual obligations and benefits, d) the perpetrator attempting to envelop his or her actions by taking cover behind the legal truth, e) those involved in corruption permit decisions firmly and they are able to influence those decisions, f) any act of corruption contains fraud; g) the corrupt form of corruption is a betrayal of trust; h) every form of corruption involves the contradictory dual function of those conducting the activity. When an official is bribed to issue a business license by the offeror, the act of issuing the license is a function of his or her own position, i) an act of corruption violates the norms of duty and accountability in the social order, placing public interest under special interests.

From such characteristics it is natural that corruption in Indonesia is difficult to eradicate because the legislation and its sanctions are inadequate and unable to provide a deterrent effect, the weak law enforcement as a result between bureaucrat apparatus are ensconced in the case of corruption, lack of commitment from the top-brass, non-transparent state administration, management of the business world and society that does not raise the principles of good governance.

B. Causes of Corruption

According to the result of a research, there are several factors that caused corrupt behavior of public officials in this country thrives. Amirudin in his dissertation concluded that based on reports from BPKP there has been a 30% leakage of goods and services

(Amirudin, 2010). According to Indonesia Procurement Watch, root causes of corruption in the procurement of goods and services consist of a) weak legal and institutional frameworks, b) weak capacity of public procurement and government service providers, c) weak regulatory compliance, supervision and enforcement (<http://www.a-smarthing.com/>). As Robert Kligart states, the factors that trigger corruption are due to the monopoly of power supported by the authority to make decisions, but not with accountability (C = M + DA) (Kligart *et al.*, 2005).

Artidjo Alkostar in his dissertation states that there is a correlation of political corruption to the dimensions of political, socio-economic, socio-cultural, socio-juridical and human rights (Alkostar, 2007). Furthermore, according to Indriyanto Seno Adji in his book titled Corruption Policy of Administrative and Law states that the teachings of unlawful materiel nature is not only negative but also a function of the positive function (Adji, 2007).

Komarudin in his book Corruption In The Procurement Of Goods And Services states that the parameters of the act against the law in the crime of corruption procurement of goods and services is against the law. While the parameter of abuse of authority in the criminal act of corruption in the procurement of goods and services is the objective attached to its authority (Amiruddin, 2010).

The results of research (Nurdjana, 2010) in his dissertation stated that law enforcement against corruption actors both in quantity and quality is still very low and it is not comparable with the increasing corruption trend with big state losses. The cause is the problematic in the criminal law system related to corruption that is *first*, from the substance of the law, corruption is not an extraordinary criminal act. Because of this, the law enforcement treated corruption like a petty crime even corruptors are treated with privileges. *Second*, from the legal structure, there is a considerable gaps between KPK, Police, Prosecutor and Judge relating to all necessary means, facilities and technology including welfare. Unable to establish a control system with accountable and transparent auditors. They do not have integrated, harmony, and synergic vision and mision. *Third*, from its legal culture, the law enforcement culture still ignores the functional differential principle, the weakness of the integrity and synergy of its law enforcers (Nurdjana, 2010)

Bibit Samad Rianto in his book Corruptor Go To Hell said that what is meant by corruption is an act against the law or misusing public authority that harms the state or society, the perpetrator is the state or civil servant (Jasin, 2011). In the era of regional autonomy, opportunities of corruption in the local region are increasing. According to the Statute of Regional Autonomy (UU No. 32 Tahun 2004 dan UU No. 33 Tahun 2004), regions are given the political and legal rights to manage and manage their own households which include managing the DAU and DAK, managing their own assets, the regions gaining the flexibility to upgrade and manage their PAD. As a consequence of the widespread authority of the region, the chances of corruption in the regions are increases (Jasin, 2011).

C. Formulation of Criminal Sanctions in Statute No.31 of 1999 jo Statute No.20 of 2001

Weak criminal penalties for perpetrators of corruption as set forth in Statute No. 31 of 1999 juncto Statute No. 20 of 2001 on combating corruption can be seen in article 6-12 of the law. Article 5 (1) Sentenced to imprisonment of at least 1 (one) year and maximum 5 (five) years and or a fine of at least Rp 50,000,000.00 (fifty million rupiah) and a maximum of Rp 250,000,000, 00 (two hundred and fifty million rupiah) each person who:

- a. give or promise something to a civil servant or state organizer with the intention that the civil servant or the organizer of the state undertakes or does not do anything in his or her position, which is contrary to his obligations; or
- b. giving something to a civil servant or state organizer because of or in connection with something that is contrary to the obligations, done or not done in his / her position. (2) For civil servants or state officials receiving the gifts or appointments referred to in paragraph (1) a or b, shall be subject to the same criminal punishment referred to in paragraph (1)

Article 6 (1) It shall be imprisoned for a minimum of 3 (three) years and a maximum of 15 (fifteen) years and a fine of at least Rp 150,000,000.00 (one hundred and fifty million rupiah) and a maximum of Rp 750,000,000, 00 (seven hundred and fifty million rupiah) any person who: mem give or promise anything to the judge with intent to influence the decision of the case submitted to him for trial; or b. give or promise something to a person who, under the terms of legislation, is determined to be an advocate to attend a court hearing with the intention to influence the advice or opinion to be given in respect of the case submitted to the court for trial.

Article 7 (1) Punishable by imprisonment of at least 2 (two) years and a maximum of seven (7) years or fined at least Rp 100.000.000, 00 (one hundred million rupiah) and at most Rp 350,000,000.00 (three hundred and fifty million rupiah):

- a. contractors, building builders, or sellers of construction materials who, at the time of handing over construction materials, commit fraudulent conduct that could compromise the security of persons or goods, or the safety of the state in a state of war;
- b. any person who is in charge of supervising the construction or delivery of building materials, intentionally letting the cheating as referred to in letter a;
- c. any person who, at the time of handing over the goods of the Indonesian National Army and / or the Indonesian National Police, commits a fraudulent act which may endanger the safety of the state in a state of war; or
- d. any person in charge of supervising the delivery of goods for the purposes of the

Indonesian National Army and / or the Indonesian National Police shall deliberately allow the fraudulent act referred to in letter c.

(2) For a person receiving the delivery of building materials or persons receiving the delivery of goods for the purposes of the Indonesian National Army and/or the Indonesian National Police and allowing the fraudulent act referred to in paragraph (1) a or c, shall be liable to the same crime referred to in paragraph (1).

Article 8 shall be imprisoned for a minimum of 3 (three) years and a maximum of 15 (fifteen) years and a fine of at least Rp 150,000,000.00 (one hundred and fifty million rupiah) and a maximum of Rp 750,000,000.00 (seven hundred and fifty million rupiah), a civil servant or a person other than a civil servant assigned to a public office continuously or temporarily, intentionally embezzling money or securities held for office, or allowing the money or securities to be taken or embezzled by others, or assist in doing the deed.

5 Article 9 Punishable by imprisonment for a minimum of 1 (one) year and a maximum of 5 (five) years and fined at least Rp 50,000,000, 00 (fifty million rupiah) and at most Rp.250,000,000.00 (two hundred fifty million rupiah) a civil servant or a person other than a civil servant who is given the duty of running a public office on a continuous or temporary basis, deliberately falsifying books or special register for administrative examination.

Article 10 Punishable by imprisonment of at least 2 (two) years and a maximum of seven (7) years and fined at least US \$ 100 million, 00 (one hundred million rupiah) and at most Rp 350,000,000.00 (three hundred and fifty tens of millions of Rupiah) public servants or persons other than civil servants assigned to carry out a public office on a continuous or temporary basis intentionally:

- a. embedding, destroying, destroying or making unusable goods, deeds, letters, or lists used to convince or prove in advance the competent authority, which is controlled for office; or
- b. letting others remove, destroy, destroy, or make unusable such goods, deeds, letters, or lists; or
- c. help others remove, destroy, destroy, or make unusable such goods, deeds, letters or lists.

Article 11 Sentenced to imprisonment of at least 1 (one) year and maximum 5 (five) years and or a fine of at least Rp 50,000,000.00 (fifty million rupiah) and a maximum of Rp 250,000,000.00 (two hundred or fifty million Rupiah) a civil servant or an organizer of a country receiving a gift or a pledge when it is known or reasonably suspected that the prize or promise is given because of the authority or authority relating to his position, or who in the mind of the person giving the gift or promise there is a relationship with his position.

Article 12 Sentenced to life imprisonment or imprisonment for a minimum of 4 (four) years and maximum 20 (twenty) years and a fine of at least Rp 200,000,000.00 (two

hundred million rupiah) and a maximum of Rp 1,000. 000,000.00 (one billion rupiah):

- a. a civil servant or an organizer of a country accepting a gift or a pledge, when it is known or reasonably suspected that such gift or promise is given to mobilize in order to do or not to do anything in his or her position, which is contrary to his obligations;
- b. a civil servant or an organizer of a country receiving a prize, whereas it is known or reasonably suspected that the prize is awarded as a result or is due to having committed or abstained from doing anything in his / her position against his / her obligations;
- c. a judge accepting a gift or a pledge, when it is known or reasonably suspected that such gift or promise is given to influence the decision of a case submitted to him for trial;
- d. a person who, by law, is determined to be an advocate to attend a court hearing, to accept gifts or promises, where it is known or reasonably suspected that such gift or promise is to influence the advice or opinion to be given, in respect of the case submitted to the court for trial;
- e. a civil servant or an organizer of a state with the intention of profiting himself or others unlawfully, or by misusing his power forcing a person to give something, to pay, or to receive payment by piece, or to do something for himself;
- f. a civil servant or an organizer of a State who, at the time of carrying out his duties, solicits, receives, or withholds payments to public servants or other state administrators or to the public treasury, as if the civil servant or other state or municipal public entity has a debt to it, it is known that it is not a debt;
- g. a civil servant or an organizer of a state who, at the time of carrying out his duties, solicits or accepts employment, or the delivery of goods, as if it were a debt to him, when it is known that it is not a debt;
- h. a civil servant or an organizer of a state who, at the time of carrying out his duties, has used state land on which a right to use, as if in accordance with legislation, has harmed the rightful person, knowing that the act is contrary to the legislation; or
- i. civil servants or state officials, whether directly or indirectly intentionally participates in chartering, procurement or leasing, which, at the time of the deed, is wholly or partially assigned to take care of or supervise it.

From the current formulation of criminal threats it can be concluded that ineffectivity of the criminal law instrument and criminal law enforcement agencies in fighting corruption due to the legal substance of the Statute No. 31 of 1999 juncto Statute No.20 of 2001 on the Corruption not explicitly stated whether a criminal act of corruption as a crime or as an offense. On the contradictory to Statue No.3 of 1971 which expressly states that corruption

is a crime (art. 33). Affirmation as a crime or as a violation has implications to the severity of the sentence imposed by the judge (the punishment to a felony is more severe than an offense) .

The next downside is problem about application of capital punishment as stipulated in article 2, paragraph 2 of Statute No. 31 of 1999 and an explanation of the provision which states that the death penalty can only be imposed if corruption is done at the time of a state of danger in accordance with applicable law, in the event of a national natural disaster, as a repetition of a criminal act of corruption or at a time when the State is in a state of economic and monetary crisis.

By such formulation, it means that not all corrupt offenders can be sentenced to death. This is contrary to the general explanation which states that the purpose of making Law No.31 of 1999 is to eradicate any forms of corruption . Therefore, by formal juridical, actors of other criminal acts of corruption committed by abuse of authority / opportunity / facilities because the position as regulated in article 3 can not be sentenced to death, but only sentenced to life imprisonment or 20 years imprisonment. Viewed from the people's sense of justice it is form of unfairness, because the corruption by abusing authority / position notch is felt heavier, meaner, (Article 2), which at least have seen the same weight so worthy punishable by death.

Under certain circumstances the reasons for the imposition of capital punishment mentioned in the above explanation of article 2 is rare occurrence, for such occurrence of such circumstances may take a long time. The inclusion of death penalty is only granted to the perpetrators of corruption which committed in the event of a national natural disaster, or the state in such a situation of economic and monetary crises that results in the perpetrators of corruption perpetrated by the abuse of power and authority worth tens of billions of rupiah resulting in destructive the joints of their country's economy are only convicted by a judge with a very light prison sentence (under 3 years of average) is not worth of the negative impact to the crime.

Another weakness of the criminal penalty formulation in Statute No.31 of 1999 juncto Statute No.20 of 2001 is that the law does not have an extraordinary spirit in eradicating corruption. It can be seen from the formulation of the first criminal threat the criminal threat is very light compared with its crime – which classified as extraordinary crime – criminal threats either prison or the fine. Both formulation of penal threat using the word “maximum” and “minimum” . This allows the judge to impose minimal penalties.

Thus corruption eradication could not handed over to criminal law enforcer as usual, because the criminal law formulation still got a lot of weaknesses. The operation of criminal law requires a more varied and more demanding means of support. That in order to increase the success of eradicating corruption in Indonesia, the citizens of society must display the

behavior in such a way that it does not open up opportunities for corrupt bureaucrats, there must be a willingness of bureaucrats to prioritize the fulfillment of their obligations rather than claim their respective rights. As a public servant the services provided by bureaucrats must be fair, friendly, quick, lighter without discrimination (Siagian, 1994).

The government's failure to eradicate corruption is also due to corruption issues related to the complexity of issues such as morals, lifestyle, culture, social environment, economic needs, socio-economic disparities, economic system, cultural/ political system, weak financial supervision and public service (Arief, 2007), also because Indonesia failed to reform bureaucracy, failed to break the colonial legacy in the life of government bureaucracy, failed to transform itself as a service agent and agent of change (Dwiyanto, 2011). The values, symbols and behaviors that develop in the bureaucracy tend to show its position as agent of power and status quo. The continued strength of paternalistic culture, fragmented political environment and weak civil society has exacerbated the poor bureaucracy in Indonesia.

Poor bureaucracy has thus fostered corrupt practices. Poor bureaucracy is a corruption printing machine. Therefore, to stop the corruption engine whose source is from bad bureaucracy, bureaucratic reform is a necessity. There is no single corruption case that does not involve bureaucracy, most cases of corruption occur through bureaucracy.

The misappropriation of the development theory runs by the government from the New Order to the Reform Order is a development program oriented only towards economic development with the exclusion of human resources development and exacerbates corrupt practices. This policy spawned leaders who were dishonest and insecure so that as the economy grew into a struggle of the political elites by corrupting it. If the corruption case is uncovered by law enforcement officers then with their economic power they pay the police, the prosecutor for the case to be terminated its investigation (SP3) by the District Attorney's Office. If these efforts are unsuccessful and their case is brought before court then with their economic power they also try to bribe the judge to free themselves from the criminal act of corruption. And if the judge handed down the imprisonment, they attempted to bribe the Bureau of Public Service authorities to obtain the privilege of the facility, such as Artalita Suryani case. The so-called case brokers, mafia judiciary and Law mafia.

Another issue that is not less interesting to be disclosed in relation to the eradication of corruption in Indonesia is that if the perpetrators of such corruption act politically and financially benefit the ruling elites, then the authorities will not hesitate to protect it, such as Century case. On the other hand, if there is a political elite who politically threatens the existence of his leadership, then he will not hesitate to instruct the law enforcers to take action against him, such as Antasari Azhar case.

The negative impact caused by such massive corruption practices has made Indonesia lagging behind in all aspects of life, damaging the nation's mentality, destroying the joints

of the state's economy, making the government's program ineffective, causing victims of violations of individual rights and groups of people, jeopardize the stability of the state, threaten public security, undermine democratic values and values of justice, impede social, economic and political development and threaten political stability (BPS, 2011).

D. Criminal sanctions Islam as a Strategy in the Prevention and Eradication of Corruption.

Before discussing about criminal sanctions as a strategy in the prevention and corruption eradication. a critical study of Islamic criminal law. The writer would like to describes in advance, the types of crime and punishment set in the Qur'an, especially types of crimes that are similar to corruption which are robbery and crime theft stipulated in Islamic criminal law which is derived from Al-Quran and Hadith.

Al-Quran as a source of law, commonly formulates only the basic norm to determine the type of punishment for a crime (QS 40:40), but against a particular crime that is thought to be damaging the joints of people's lives such as murder (QS 2:178-179), robbery (QS 5:33), theft (QS 5:38-39) the type of sanction / punishment is expressly mentioned in the Qur'an .

Regarding robbery, The Holy Qur'an lets the emotions of aggression extend to all members of society, because the crime of robbery is seen to have actually invaded the safety and security of society extensively (Abdoerrauf, 1970). Hence the type of punishment affirmed in the Quranic letter of Al-Maidah verse 33 that the punishment of the person who created the riot on earth is merely killed, crucified or cut off from their hands and feet in a cross. This type of punishment becomes the right of Allah and such right can not be aborted by the ruler, just as in the Law, the crime against law becomes the right of the Sovereign which can not be aborted by anyone.

Another type of crime whose kind of punishment is affirmed in the Koran is theft. Al-Quran Suraa Maidah Verse 38 said, "men and women who steal cut both hands in return for the deeds they do." This type of punishment by legal experts is seen as a kind of sadistic, cruel, inhuman punishment, contrary to the sense of community justice. That cruel word, sadistic, inhuman is a relative word, depending on who speaks it. For example, if there is one who defends his property from night robbery then he chopped the perpetrator's hand to drop, we could not say it is a cruel gesture. Likewise, if a woman defends herself from the act of rape, against her rapist then the woman with all of her strength and a knife around, injures the rapist, we could not say it is sadistic. Of course "No" is the answer and that action can be justified by law as stipulated in the Criminal Code. With such a mind pattern then the hand-cut penalty for thieves as an attempt to save the public from the crime of theft, can not be said to be sadistic and cruel.

Why is Islamic criminal law formulates the cutting hands penalty? The answer is because the hand for thieves is a tool to steal so that when imposed penalty cut hands then he will have difficulty to do theft again. This act is in accordance with the purpose of law according to the Qur'an that is so that people do not do evil to others. Thereby imposing sanction / hand cut penalty for thieves was meant to alert them not to do evil. So there is a logical link between crime, punishment and the purpose of law.

From the description above, it can be concluded that judging from the characteristics of the crime committed, the corruption can be classified the same as the crime of robbery and theft as regulated in Al-Quran and Hadith. Therefore, the appropriate criminal sanction for corruptors must be comparable with the negative impact of their crime which has damaged the very life of the nation and the state, thus the perpetrator might be subject to severe sanctions such as the death penalty, or cutting their hand as stipulated in Qur'an Suraa Maidah Verse 38 to 39, revoking their political rights, undisclosing their assets to the State, and the life-long social work penalty.

Conclusion

1. Viewed from criminal aspect, the punishment formulation for the perpetrators of corruption as in Statute No. 31 of 1999 juncto Statute No. 20 of 2001 is very light and does not have extraordinary spirit in eradicating corruption. It impacts to criminal sanctions imposed by the judge, which also does not have a deterrent effect for both the perpetrators and others
2. Theoretically from the study of Islamic criminal law, because of corruption crimes included as extraordinary crime that has damaged the very life of the nation and state, the criminal sanction that should be threatened to the perpetrator of corruption must be as severe punishment as possible.
3. According to Islamic criminal law, corruption crimes can be classified similarly to the crime of *Fasad* (making destruction on earth), robbery and theft, the punishment for the perpetrators of corruption could be death, life imprisonment, hand-cutting punishment, lifetime revocation of political rights, lifetime social work, confiscation of their treasures which are not reported to the State.

