

Criminal Act Of Corruption From The Perspective Of *Syafi'iyah* Thinking And Positive Law Of Indonesia

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Abstract

Corruption is an unlawful act of misappropriation of funds, powers, mandates for personal, familial, party and group gains that could prove detrimental for the nation or others. This researcher aims to research corruption from the perspective of Syafi'iyah thinking and positive law of Indonesia. This research employs the method of analysis descriptive. The data was collected through library research. The result of this research shown that, based on the concepts of corruption set by the positive law of Indonesia, corruption from the perspective of Syafi'iyah thinking could be categorized as a criminal act (ma'shiyah), as risywah (bribes), as al-gasysy (fraud), and as khiyanah (betrayal). Threat of legal punishment for corruptors from the perspective of Syafi'iyah thinking could be categorized inside ta'zir law, in which the amount and nature is set by an imam and must not surpassed the law of hadd.

Keywords: *Corruption; Thinking; Syafi'iyah; positive law*

INTRODUCTION

There is a general consensus in the current public of a semi-believe that all national problems could be easily solved through law enforcement, properly run economics and polite politics based on customs. The 1945 Constitutions (UUD 1945) stated that Indonesia as a nation is build on law (*rechtstaat*), and not on power (*machstaat*). Therefore, the Indonesian Republic is a lawful democratic nation which greatly honour human rights and guarantee that every people hold the same standing in the eye of law without exception.

The general public define the term "corruption" as a series of unlawful action done in order to gain an advantage by harming others. Despite not having a proper definition regarding the specific act of corruption, the most prominently accepted definition emphasizes the abuse of power or public positions for personal, group or other parties' gain.

Legal instruments of the positive law regarding the criminal act of corruption that have been utilized before is the 1971 Constitutions No. 3 regarding the Eradication of the Criminal Act of Corruption. Deemed unfit with the need of the people, that constitution was changed to the 1999 Constitution No. 31. Furthermore, there is also the Tap. MPR No. XI/MPR 1998 regarding the Effectuation of a Nation Clean and Free from Corruption, Colusion, and Nepotism. The 2002 Constitution No. 30 regarding the Commision to Eradicat the Criminal Act of Corruption, and many more other constitutions. However, the reality is corruption did not decline, rather they are on the incline. This shown that the law enforced so far did not have a deterrent effect to the perpetrator. Therefore, what is the right model of enforcement that is appropriate for the perpetrator of corruption.

The purpose of Islamic Law is to benefit humanity (*ummah*), which are happiness in this world and in the afterlife. (Syatibi, 1341 H) The benefits are realized through the reaping of the benefits and the rejection of ruin. Those benefits are rotted on the maintenance of five main aspects which are religion, spirit, mind, ancestry and possession (Mau'ud, 2003) In fiqh this is called *maqāshid syarīah*. Amongst those benefits is the maintenance of possession (*hifdzul māl*) from any kind of foul play and misappropriation. Modern ulamas agreed that corruption is *haram* because of its contrary nature to the principles of *maqāshid syarīah*. Therefore, its only logical to consider those principles when considering the penalty for the criminal act of corruption.

Penalty in Islamic law is categorized to penalty with *nas* and those without *nas*. *Nas* penalties includes *hudud*, *qashash/diyat* and *kafarah*. *Nas*-lees penalties is the *ta'zir*. *Ta'zir* is set based on the *ijtihad* because it is not explicitly stated on al-Qur'an and *al-sunnah* on what is the penalty for the act. (Mau'udi, 2003).

Based on those descriptions, a basic problem emerges, why did the positive law have not set a practical law that could instill a detterent effect on the perpretator of corruption and what is the view of Islamic law on this concept? Further research needs to be conducte in order to answer that question. Therefore, this researcher is interested in furthering the research on Corruption from the Perspective of Syafi'iyah Thinking and Positive Law of Indonesia.

RESEARCH METHODS

This research utilizes a descriptive analysis method as well as comparative, which define the problems based on the criteria and criminal sanctions of corruption of the Constitutions Regarding Corruption (*UU TIPIKOR*), as wel as the *fiqh* Syafi'iyah law which were then further analyzed based on both constitutions and compared based on their criteria and sanctions.

This research utilizes a normative-juridical approach which is an approach used to find the problem with corruption, especially the criteria and constitutional sanctions by from the *UU TIPIKOR* or from the perspective of Shafi'iyah thinking of *fiqh*. The data collected in this research are archival data of

classic works of Shafi'iyah sect ulamas and the Constitutions Regarding Corruption as the primary source. The 1999 Constitutions No. 31 regarding the eradication of corruption is used as the primary source.

Next, the researcher describes the theories and concepts in general terms. The theories and concepts of corruption meant here are the thinking scope of researchers of Islamic *fiqh*, as well as specifically study the concept of corruption from the perspective of Syafi'iyah ulamas.

Lastly, research was done on the 1999 Constitutions No. 31 regarding Corruption and other constitutions related to the topic of corruption, based on the steps mentioned above, which is related to the analysis method used in this research which is an *ushul fiqh* analysis method through the inferring of ta'liliyah, bayaniyah or lughawiyah and istishlahiyah on the criteria and lawful sanction of corruption.

RESULTS AND DISCUSSION

1. Corruption According to Positive Law of Indonesia

Corruption is an act done with the intention of gaining advantages that is not in accordance with legal obligations or rights of others; abuse of power or characters for personal or other benefits, with all of the obligations and other rights. (Black, 1990) Another definition of corruption is an act that did not adhere to principles, by an individual in a private sector or public that makes decisions based on personal or familial relationship, then corruption would occur, as well as conflict of interest and nepotism (Tanzi, 1994)

Corruption based on the 1999 Constitutions No. 31 is covered as such: First, general corruption. Second, an act of abuse of power. Third, act of bribes, gifting and blackmail. Fourth, act of chattering. Fifth, act of embezzlement. Sixth, act with the intent of, helping or in agreement to corruption. Seventh, the act of handling corruption. (Naim, Rofiah, & Rahmat, 2006)

The 1999 Constitution No. 31 regarding the eradication of corruption, Chapter 2 subsection (1) stated that "the act of enrichment of selves or others or corporations that might cost national finance and economics." and in Chapter 3 it is stated that "corruption is the act of enrichment of selves, others or corporations, abuse of power, opportunities or means due to a position that might cost national finance and economics."

2. Corruption According to *Fiqh* Syafi'iyah

Islamic literature did not have a concrete meaning of corruption, however, based on the action that could be categorized as corruption according to Indonesian law as well as the concepts of *Maliyah* in *fiqh*, there are three main aspects; which are

1. *Tasharruf*, an act of acceptance, utilization, gifting and taking.



2. A betrayal and abuse of power.
3. Detrimental to the general public. (Naim, Rofiah, & Rahmat , 2006)

Based on those aspects, corruption can be categorized as a criminal act (*ma'siyah*) in the contexts of *risywah* (bribes), *sariqah* (theft), *al-gasysy* (fraud), and *khiyanah* (betrayal) based on the study of *fiqh*.

This research focused and classified corruption in the categories of *risywah* (bribes), *sariqah* (theft) and *khiyanah* (betrayal).

1. *Risywah* (bribes)

Risywah came from the Arabic phrase “رَشَا- يَرشُو” which verbally could be read as “رَشْوَةٌ” or “رَشْوَةٌ” (recited with *kasrah*, *fathah*, or *dhammah*) meaning “الجَعْلُ” which is reward, gift, compensations or bribes. (Manzhur, 1990)

Zainuddin al-Malibari clearly stated in Fathul Muin: (Al-Malibari, tth)

(وحرَمَ قبوله) أي القاضي (هدية من لا عادة له بما قبل ولاية) أو كان له عادة بما لكنه زاد في القدر أو الوصف (إن كان في محله) أي محل ولايته (و) هدية (من له خصومة) عنده أو من أحس منه بأنه سيخاصم وإن اعتادها قبل ولايته لانها في الاخيرة تدعو إلى الميل .

Meaning: It is *haram* for *qadhi* (*imam*) to accept gift from those who has not given him gift before he is a *qadh*, or if he has, they've added the amount or kinds in the domain of his authority. It is also *haram* to accept gifts from those who is in an entanglement of case or if they possessed an opposing political view because it could cause them to favor their wants and need.

Sayed Abu Bakr also said that for a *qadhi* to receive gift outside of his authority is allowed. It is *haram* for *qadhi* to receive gift for the good of himself, so that he would not be weak in making a just and right decision. (As-Sayyid, bs)

2. *saraqah* (theft)

Etomologically, theft is the act of taking an object that does not belong to the takers. Theft, in terminological term, is the act of taking possession that does not belong to the takers surreptitiously from its place with certain requisite. (Manzhur, 1990) The sanction for theft is the cutting of the hands (*had saraqah*). The legal basis of *had sariqah* is a non-negotiable rule, because it is stated in the al-Qur'an on al-Maidah verse 38 that said:

والسارق والسارقة فاقطعوا ايديهما جزاء بما كسبا نكالا من الله والله عزيز حكيم (المائدة: 38)

Meaning: Men or women who conduct theft must have both of their hand cut off, as the reprisal of their action and as the punishment from Allah, the all mighty and wise.

Ulamas have said that it is the responsibility of a ruler to cut off the hands of thief after there is proven accusation from the owner regarding the case. The right hand is cut off for both men or female for object as much as a quarter dinar. This amount is set as a standard for every object that they've stolen, meaning every act of thievery which amounted to a quarter of dinar must be punished with the cut off of the hand. Another criterion is that the object must be returned to its rightful place. (Al-Malibari, tth) Said place must be in accordance to the custom of the area in accordance to the *fiqhiyah* law. (As-Sayuthi, 2009)

Meaning: custom could be the basis of law.

Paying attention to the view of the ulama, they agreed upon the punishment of cutting off the hand, but they have different opinion in setting the standard of the amount of *nisab* to justify the measure of said punishment. (Katsir, 1991)

The punishment of cutting off the hand is set only for the criminal act of thievery. Therefore, it should not only rely on the logics of law to set said punishment for any other criminal offense that is considered equal or worse than the act of corruption. Another view of this topic considers the possession of a corruptor is possession with unclear owner. They are tasked of distributes said possession, despite the uncertainty of those who should receive them, therefore the figure whose harmed in this situation is unclear.

3. *Khiyanah* (betrayal)

Etymologically, *khiyanah* is the change in someone towards evil (*syarr*). Rasulullah decree in a hadith that “the testimony of a traitor, men or women, is denied”. (Manzhur, 1990) Someone who has given a trust which they were then betrayed, meant that they have headed towards evil. Terminologically, betrayal is the act of taking something trusted (deposited) to them. (Sabiq, b.s) Based on its uses, that phrased could be assumed as the betrayal of someone regarding national secrets or certain elements that have been trusted to them.

On this problem the researcher divide betrayal into two parts: (1) betrayal of national secrets; (2) betrayal of possession (*al-qulul*).

a. Betrayal of national secrets.

Regarding betrayal on a nation, it must be noted that Islam is very protective of its people. Imam Syafi'i once asked regarding a muslim that spread the secret of muslims to the *mushrik* through a letter. The imam answered “there are no tainting of the blood of a muslim, unless they commit murder or adultery after marriages, or if they submit the *kufir* and stayed in that belief. (Asy-Syafii, n.d)

Imam Syafi'i based his view on the hadts narrated by Sufyan ibn Uyaynah. He stated that Ali spoke: Rasulullah saw appointed me, Miqad and az-Zubayar, he said for us: go to the garden of Khakh, there is a woman there, with her is a letter; therefore, we went there, when we found the woman we asked for the letter, yet she answered “there are no letter with me” then we responded “you shall reveal the letter or we shall take off your veil!”. She then proceed to take out the letter from bun of her hair. We bring the letter to Rasulullah, the letter contains such writing, “from Hathi bib Abi Malta'ah to the *mushrik* in Mecca, this letter contains the behest of Rasullulah saw.” Rasulullah then said: Alas! Hathib, what is this letter? In which Hathib answered; do not rush to judgement O Rasulullah, for I am familiar with the Quraish, but I'm not one of them. The *Muhajirin* people with you have relatives who protects their own relatives; meanwhile I did not have any relatives in Mecca. I am glad, because of the condition I'm in I have to find

protection for my relatives in Mecca. In Allah's name, I did not conduct this behaviour because I doubt my religion nor have I submitted to the *kufur*. After hearing the plea of Hathib, Rasulullah stated that he is telling the rightful truth. Umar then said, O Rasulullah, gave me the command to behead this hypocrite! In which the prophet responded, this man took arms in the battle of Badr, may Allah watch over Ahl al-Badr. Allah decree "do what you think is right, truthfully I've forgiven it from you". The following scripture was then decreed.

ياايهاالذين آمنوا لاتتخذوااعدوى وعدوكم اولياء...

Meaning: To those who believe, don't you make those who opposed me and yourself as your closest friends... (QS. al-Mumtahanah: 1)

Imam Syafi'i summarized that Rasulullah in this case chose *zhahiriah* as a punishment. Imam Syafi'i compared this case with the case of hypocrisy, the prophet basically knew about the lies of hypocrisy however in reality he set the punishment based on the fact of the matter. Hypothetically, in the case of Hathib he set the basic penalty based on his knowledge of the truth told by Hathib, surely, he would set the death penalty for hypocrisy, but the prophet set the penalty based on the fact of the matter. (Asy-Syafii, n.d)

From the discussion above it is shown how the maintenance of the people take precedence in Islam. There are a lot of *hadith* regarding this issue. Generally, there are three conditions which are *mukhsan* adultery, murder and apostation. A traitor did not receive *hadd*, unless they have been declared as *kufur*.

b. Betrayal of possession (*al-qulul*)

Amongst the concept of offense on possession (*Maliyah*) in *ghulul fiqh* contain the closest characteristic of corruption, because both corruption and *ghulul* involves the existence of power and public properties as well as done by members of or outside of the governance. (Naim, Rofiah, & Rahmat, 2006)

According to Ibn Hajar al-Asqalani, *al-qhulul* meant *al-khiyanah fi al-maqhnan* which is the *khiyanah* of stolen possession. (As-Qalani, 1998) Ibn Qutaibiyah have an opinion that *al-ghulul* was named as such because it concerns the spoils of war and hiding them (Mau'udi, 2003) According to Muhammad Syams al-Haq al-Azhim every person who conducts betrayal in secret (sneakily) they have conducted *al-qhulul*. (Al-Haq, 1990)

3. Penalty of Corruption According to the Positive Law of Indonesia.

According to the 1999 Constitutions No. 31 regarding the amended penalty of corruption of the 2001 Constitutions No. 20 regarding the change of the 1999 Constitutions No. 31 regarding the Eradication of Corruption, there are some chapters of the constitutions set for the perpetrator of corruption which are Chapter 5 subsection (1) and (20), Chapter 11 and Chapter 12.

Meanwhile for other officials that have set an incompatible rules or administration with the administrative provision regarding forestry that allows wild logging, should be righteously penalized with heavy penalty of Chapter 2 subsection (1) or Chapter 3 of the amended 1999 Constitutions No. 31 regarding

the Eradication of Corruption through the 2001 Constitutions No. 20 regarding the Change of the 1999 Constitutions No. 31 regarding the Eradication of Corruption.

This is caused by an unlawful action done to gain advantages for themselves, their groups or their corporations that cause harm to the nation. Those who are embroiled in this act would be implicated with the Constitutions of Criminal Law Chapter 55 subsection (1) regarding an act done together (along with) or at least consisting of any support element as stated in the Constitutions of Criminal Law Chapter 56. When an act was done repeatedly (on purpose), therefore the punishment might be added for a third by adjusting the Constitutions of Criminal Law Chapter 64 regarding their next act.

Other than that, the composition of the 1999 Constitution Chapter 2 subsection (1) and Chapter 3 regarding the Eradication of Corruption that have been amended through the 2001 Constitution No. 20 regarding the change of the 1999 Constitution No. 31 regarding the Eradication of Corruption written in Chapter 2 subsection (1) and (2) and Chapter 3.

Based on those clarifications of those constitutions it could be summarized that in order to achieve the most effective effects as the means of prevention and eradication of corruption, the 1999 Constitution No. 31 was abridged with a different criminal provision of the 1971 Constitution No. 3. The ever-expanding problem of corruption did not only harm national finance but also count as an offence on social rights and the wider public economies, therefore the criminal act of corruption was categorized as an act that must be eradicated swiftly and correctly.

4. The Penalty of Corruption According to *Syafi'iyah Fiqh*

The punishment in Islamic law is generally categorized as penalties with *nash* and those without. Penalties with *nash* comprise of *hudud*, *qishash/diyat* and *kafarah*. Penalties without a *nash* is the punishment of *ta'zir* (Mau'di, 2003) *Hadd* is the law set by Allah SWT which its kind and amount is set and applied based on the al-Qur'an. Therefore, the punishment was set to prevent an act of evil and to maintain the six affairs which are the soul, religion, ancestry, claims, possession and the mind.

At its core, sharia functions to eliminate harm on humanity as said on the rule of *fiqhiyah*: (As-Sayuthi, 2009)

الضرر يزال

Meaning: harm must be eradicated.

Previous discussion shown the consequences of *ta'zir* as a dominant force, when the condition and principle of *sirqa* were unidentifiable as an act of corruption.

Ulama set the punishment of *ta'zir* for every act not under the certitude of *hadd* and *kifarah*. From those that concern Allah's right or right of children of Adam, such as sexual infraction according to *ajnabiyah* onto another other than

genitals. (Qulyubi, bs.) *Ta'zir* also concern betrayal of divulging national secret to the enemy. According to Imam Syafi'I, the act of betrayal is not categorized as a betrayal of promises therefore their blood and possession stayed halal. If the perpetrator is a *rahib*, then they will suffer punishment and removed from their *shaum'a*. Included in their punishment is their removal from Islam, they are then must choose between giving a *jiz'uah* and allowed to stay in an Islamic country or letting them comeback and putting them in prison. (Asy-Syafi'I, nd). The rule of *ta'zir* is set by the judge and the amount is set by his *ijtihad*, in accordance to the measure of human and violation they've done.

Punishment for perpetrator of *al-ghulul*, according to Imam Syafi'I when once asked if they should come down from their pedestal and walk barefoot as his saddle or possession is burned away. The imam said he is not punished (*'iqab*) on his possession, but on his body. Truly Allah has set the *al-hudud* on your body, as well as *al-uqubat*, therefore there is no *uqubat* on possession. (Asy-Syafii, n.d)

Corruption according to the 1999 Constitution No. 31 regarding Corruption, according to the above criteria, can be penalized with *ta'zir*. According to Islamic law, *ta'zir* could be in the form of fine, prison, caning, and others. The penalty for thievery with *ta'zir* is in accordance to the amount with the intention of giving a lesson to the perpetrator when the act of crime has not reached the level of the *hadd* punishment. (As-Sayyid, bs)

The types of *ta'zir* punishment set for perpetrator of corruption are prison, striking without scarring, slapping, humiliating (by words or cutting of the hair), exiles, and caning under fourty count. For the punishment of imprisonment, Qulyubi opinionated that for the criminal act the punishment must be life-time imprisonment (until death). (Qulyubi, b.s.)

CONCLUSION

Based on the discussion above, corruption according to the positive law have been formulated in the 1999 Constitution No. 31, 2001 Constitution No. 20 regarding Corruption and previous other constitution, which is the 19710 Constitution No. 2, both in meaning and kinds. Juridiscally, corruption not only limited on the formulated act that cause harm on national finance and economics, but also include the act that could cause harm on the people or individuals.

Based on the aspects of corruption of the positive law, therefore corruption in the perspective of syafi'iah thinking could be categorized as criminal act (*ma'shiyah*) in the context of *risywah* (bribes), *al-gasysy* (fraud), aand *khiyanah* (betrayal).

The penalty for corruptor according the positive law is explained in the 1999 Constitution No. 3 Chapter 2 of imprisonment for life or at the least 4 (four) years and 20 (twenty) years at the latest and fine of at least Rp 200.000.000,00 (two hundred million rupiah) and at most Rp 1.000.000.000,00 (one billion rupiah). It is also explained in Chapter 3 of imprisonment for life or at the least 1

(one) year and 20 (twenty) years at the latest or fine of at least Rp 50.000.000,00 (fifty million rupiah) and at most Rp. 1.000.000.000,00 (one billion rupiah).

According to the perspective of syafi'iyah thinking, the penalty for corruptor could be categorized in the law of *ta'zir*, in which the amount and kind is set by Imam as imprisonment, striking without scaring, slaping, humiliating (by words or cutting of the hair), exiles, or caning under fourty count.

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