

# TRIAL IN ABSENTIA AND EXPLICIT CHARGES AGAINST CORRUPTORS IN THE PERSPECTIVE OF ISLAMIC LAW

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## Abstracts:

If you look at it from the aspect of the benefit of the Indonesian people as direct victims of corruption. Then the trial process must continue even though the defendant is absent or without the presence of the defendant / in absentia, so that the state money from corruption as evidence can return to the state through appropriate legal process. In the country's financial return the explicit cost consisting of the cost of anticipating corruption, the cost of consequences and reactions to corruption must be considered, so that the country's financial recovery can be carried out.

## 1. INTRODUCTION

The Prophet Muhammad practiced three forms of such institutions. There must be a fair nature is a political problem, meaning there is no necessity in political cases to adhere to the constitutional principle that the suspect is clean of all charges until there is evidence to prove that he is guilty, it is the basis for the realization of justice in the judiciary. Islam since the beginning of the history of its emergence, with the Prophet Muhammad SAW as the central figure, as a religion then quickly gave birth to a civil society community (civil society) stateless in Medina where in the chain of history of Islamic civilization is the most important phase of the construction of the main principles and solid foundations.

Islamic law is embraced and obeyed by Muslims who are the largest population in Indonesia. In practice, Islamic law is one part of the law in force in Indonesia, which has a very important and decisive role in regulating the life of the Indonesian nation. Islamic law is fundamentally divided into two areas of law, including: 1) laws that are *ubudiyah* include the law on *thaharah*, worship that concerns prayer, fasting, zakat and Hajj. 2) laws on social life, namely: the law of marriage, inheritance law, *Mu'amalah*, grants, Wills, *Al-sulthaniyah*, Criminal Law (Law *qishas* (*jinayat*), *hudud* law), jihad Law, Law on food and slaughter, *aqdiyah* law (court laws) and the law of *al khilafah* (a structure of government regulated according to the teachings of islam. Corruption is an extra-ordinary crime, because the impact is not only detrimental to the country's finances or economy but also hinders national development. The phenomenon of the rise of disclosure and punishment of perpetrators of corruption that occurs today shows a trend of deviation that continues to increase, even though the seriousness of the eradication of criminal acts has been done since 1960. Corruption is an extraordinary crime, systemic and broad impact and has been placed as a violation of the economic and social rights of the People corruption in Indonesia occurs systematically and widely, so it not only harms the state's finances, but also has violated the social and economic rights of the community at large, then

the eradication of corruption must be done. Unfortunately, the politics of the financial law of the country today is contemporary shifting. The lack of transparency in state financial management, the overlap of authority between supervisory institutions, and the reluctance of law enforcement in cracking down on acts that harm state finances are proof that the concept of state financial law constructed between mas is still far from the certainty and usefulness of the law. It is no longer necessary to emphasize, corruption is the main problem of our nation. Of course, there are many problems of other nations, but corruption is the root of the problem. The country has become independent, but the effects of development have not been felt by the majority of citizens, due to rampant corruption.

One way that is done in an extraordinary way that can be seen from the examination of corruption cases without being attended by the defendant (in absentia). This hearing in absentia has been mandated in Article 38 paragraph (1) of Law No. 20 of 2001 on the amendment of Law No. 31 of 1999 states: "in the event that the defendant has been called lawfully, and does not appear at the court hearing without a valid reason, then the case can be examined and decided without his presence". The basic idea of judicial enforcement in absentia in corruption cases is to obtain legal certainty on evidence (state money) in corruption cases that are not feared damaged or missing evidence and are no longer known. In addition, the decision in absentia is a legitimate means of saving State losses, so that the return of state financial losses can be realized without worrying about getting a lawsuit from other parties.

If you look at it from the aspect of the benefit of the Indonesian people as direct victims of corruption. Then the trial process must continue even though the defendant is absent or without the presence of the defendant / in absentia, so that the state money from corruption as evidence can return to the state through appropriate legal process. Romli Atmasasmita stated that corruption is an extraordinary crime, has a systemic and broad impact and has been placed as a violation of the economic and social rights of the people.

## 2. METHOD

This study uses a type of normative legal research (doctrinal research). Doctrinal legal studies analyzes authoritative texts (with binding legal force) and readers whose strength persuasive (reinforcement). Texts that have binding legal force are the main legal material that includes laws and regulations relevant to research issues. related to this, considering that this normative legal research analyzes the rule of law, the object under study is in the form of regulatory documents and library materials. in this case the object of this study is in the form of rules or literature related to persidangan absentia and corruption In the implementation of this study, the authors use several approaches to research a field science so that research focuses on solving problems following a predetermined scope. This approach in this study consists of legal and conceptual statute approach approach. The statutory legal approach is done by examining laws and regulations. The legal approach of this statute is used to examine the legislation or legislation related for absentia trial with the application of the explicit cost of the return of State losses. About conceptual approach, it is done based on legal principles obtained in view of the law scholars or other legal doctrine by not deviating from the existing regulations this approach

is necessary because there are no rules governing it. application of conceptual approach is to seek the definition of absentia trial, explicit charges and corruption in the perspective of Islamic law, which is available in the law books, and other legal journals.

### **3. RESULTS AND DISCUSSION**

#### **3.1 Trial In Absentia In Handling Corruption In Saving State Losses**

One way that is done in an extraordinary yitu can be seen from the examination of corruption cases without being attended by the defendant (in absentia). This hearing in absentia has been mandated in Article 38 paragraph (1) of Law No. 20 of 2001 on the amendment of Law No. 31 of 1999 states: "in the event that the defendant has been called lawfully, and does not appear at the court hearing without a valid reason, then the case can be examined and decided without his presence". The basic idea of judicial enforcement in absentia in corruption cases is to obtain legal certainty on evidence (state money) in corruption cases that are not feared damaged or missing evidence and are no longer known. In addition, the decision in absentia is a legitimate means of saving State losses, so that the return of state financial losses can be realized without worrying about getting a lawsuit from other parties.

Judiciary in absentia is effectively considered in an effort to return the assets of corruption that has been looted by the perpetrators of corruption due to the following matters:

- a. The settlement of the case is faster and prosecutors as government representatives can pursue state property.
- b. A judicial decision in absentia is a valid means of saving State losses, if the procedure for its implementation is in accordance with the legislation, so that the return of state financial losses can be realized without worrying about getting a lawsuit from other parties.
- c. Speeding up the judicial process because the procedure is not protracted so that in the case of the criminal act will minimize the arrears of cases and the existence of legal certainty.
- d. As long as the assets of the defendant clearly status of ownership so as to facilitate foreclosure. If it is not clear the ownership will cause problems at the time of the foreclosure process.
- e. Theoretically, it can streamline efforts to save state property, but in its application there are still obstacles, especially in the implementation of replacement money execution as an effort to save state losses.

#### **3.2 Explicit Charges Against Perpetrators Of Corruption In Restoring State Finances**

In the holy book The Qur'an mentions about the subject of seeking lawful sustenance (QS.2: 188) which means "and do not part of you devour the wealth of one another in falsehood, nor bring it to the judge, that you may eat of the wealth of another in Sin, knowing it."

Because the verse is described by Ibn Kathir in his interpretation through the khabar from the path of Ibn Abbas says that this verse refers to a man who bears a debt, while the person who gives the debt does not have strong evidence (when he wants to collect the debt). So the man who has a debt denies his debt and complains about his case to the judge, while he knows that he is dealing with a matter of truth and that he is on the wrong side. This historical Setting is then responded by the Qur'an with the descent of the verse which expressly forbids a person to eat other people's property and fight for something false. Therefore, Islam strictly forbids bringing hartabenda Affairs to the judge if the background is falsehood.

In the Encyclopedia of the Qur'an, asbabunnuzul told this verse that one day, there were two people who fought each other and both claimed that they were the rightful owners of a land. However, neither of them had any witnesses and evidence that could corroborate his confession. Because this process is quite tough, then the judge orders both parties to equally swear. They both swear. But one of them, namely a person named Imri'i Qays gave a perjury. That is why this verse came down. This is also closely related to the habits of society at that time (perhaps also today) that make the court as a rescue medium to defend those who are actually on the wrong side. This irony is due to the proliferation of judicial mafia. In court, people who are good at Tongue Twisters and have sufficient funds, it is possible to win the case even though they are on the wrong side. This is the outcome of the practice of bribing judges, lawyers, and people involved in the judiciary.

No longer denied, corruption is an extraordinary crime that threatens the joints of the life of the state and nation, hindering development, high-cost economy and other adverse effects. Corruption that has been considered only occurs in the public service sector and involves the state apparatus, in fact also occurs in the business world and involves actors from their elements (individuals and corporations). The Global Competitiveness Report 2017-2018 shows the fact that corruption is still a major factor in problems in doing business in Indonesia and hinders Indonesia's economic growth rate (World Economic Forum, 2017).

The problem of corruption and the reaction to it has indeed been much discussed and researched. In criminology itself, the problem of corruption has been discussed for a long time. Sutherland himself had begun by bringing up crimes committed by honourable men. Until now the problem of corruption remains one of the interesting discussions to be investigated. Corruption as a crime also developed in line with the development of human civilization so that efforts to find a solution jugaakan increasingly difficult. Research on corruption needs to continue to be developed in order to find an appropriate solution in overcoming this problem.

When discussing and discussing about corruption, it will indeed find such a reality, because corruption involves moral aspects, rotten nature and circumstances, positions in government agencies or apparatus, misappropriation of power in office due to granting, economic and political factors, as well as the placement of families or groups into service under the power of their positions. Thus, it can literally be concluded that the term corruption actually has a very broad meaning.

- a. Corruption is misappropriation or embezzlement (state or corporate money and so on) for personal and other people's interests.
- b. Corruption is rotten, broken, likes to wear things or money entrusted to him, can be bribed (through his power for personal gain).

The explicit cost of corruption is the real cost that comes out as the cost of anticipation, the cost of reaction and the cost of consequence of a crime of corruption, which can be calculated directly. Explicit costs in this count are limited to costs that come out of the state budget although it is possible that there are costs that come out from outside the state budget.

Implicit costs are costs that are not directly visible, such as the economic cost (opportunity cost), the cost of damage (effect) that the impact through the market, and the cost of damage (effect) that the impact does not through the market. Implicit costs are calculated today by taking the lowest estimate of a corrupt event or activity.

The cost of anticipating corruption basically consists of:

- a. The cost of socialization of corruption as a latent danger;
- b. Bureaucratic reform to reduce the desire for corruption; and
- c. Various activities in order to prevent corruption issued by the KPK.

In the calculation of the social cost of corruption carried out, only the calculation of Point c was successfully carried out. Activities and Budget points for point A have not been recorded specifically in ministries/government agencies, so the calculation cannot be done. While Point b, the bureaucratic reform process spread across ministries/institutions and local governments causes the calculation of this cost is so complex that it cannot be included in the calculation. Thus, the definition of the cost of anticipating corruption in this paper is the amount of the budget spent on prevention activities of corruption, reflected in the budget of prevention activities in the KPK.

Corruption reaction costs are all the resources required by law enforcement officers to process a person who commits corruption, from the stage of Investigation, investigation, prosecution, trial and correctional or until complete physical or financial punishment. The cost of corruption reaction consists of:

- a. The cost of the case handling process starts from complaints, investigations, and investigations. (Police, Attorney, KPK, PPATK, BPKP etc.);
- b. Judicial fees (clerks, prosecutors, judges, etc.);
- c. Costs of expropriation of assets outside and within the country; and
- d. The cost of detention houses and correctional institutions, the cost of collecting fines, etc. In calculating this social cost, the budget for action activities in question is the action budget in the KPK.

The cost due to corruption (explicit) is the value of money that is corrupted, whether it is enjoyed alone or together with others which translates as the financial loss of the state. The Data used is the result of the count of state financial losses that have been calculated by the BPK or BPKP which is authorized to calculate state losses. Basically, the economic analysis of the law in general postulates that every normal person, up to a certain point, will certainly make a profit-and-loss calculation of the actions he committed, including in committing crimes.

Decision of Ijtima Ulama Fatwa Commission in Indonesia IV on contemporary Fiqh issues (Masail Fiqhiyyah Mu'ashirah) [(I) divorce outside the Court; (II) confiscation of assets of perpetrators of corruption; (III) Money Laundering; (IV) punishment for producers, dealers, and drug abusers; (V) nicotine as an active ingredient of consumptive products for the benefit of treatment; (VI) obligation to transact in Shari'ah] Bismillahirrahmanirrahim Ijtima Ulama Fatwa Commission in Indonesia IV-12 Sha'ban 1433 H/ 29 June-2 July 2012 M.

Asset confiscation of corruption is one of the crimes that fall into the category of extra ordinary crime. Although there are legal instruments that provide harsh and strict penalties against perpetrators of corruption, but the fact is that corruption still continues to occur. The punishment given to the perpetrator of a criminal act is not enough to provide a deterrent effect. In fact, in the conception of Islam, punishment ('uqubah) serves as *zawajir* and *mawani* ' (making the perpetrator a deterrent and the one who has not committed becomes afraid of doing so). Often there are problems in the enforcement process that are not balanced between allegations, demands, and also legal decisions for someone charged with corruption. A person who is suspected of committing a crime of corruption, but in the evidence is only proven a small number of those accused of causing the perpetrators of corruption are still alive and enjoying the results of corruption. This fact then gave birth to permissiveness on the one hand, and apathy on the other to the pattern of law enforcement and the fight against corruption. Thus, the principle of *zawajir* and *mawani* ' in the provision of punishment does not materialize. Recommendations:

- a. Law enforcement is required to act decisively and measurably in the seizure of assets of perpetrators of corruption.
- b. Law enforcers who abuse their authority in law enforcement in cases of confiscation of assets resulting from corruption should be strictly sanctioned.

Ulama to actively participate in the Prevention of corruption, among others by socializing the threat of worldly and ukhrawi punishment for perpetrators of corruption.

Ash-Syaitibi formulated 5 (five) *al-maqashid as-shariaht* / objectives of Islamic law, namely:

- a. Maintaining religion;
- b. Nurturing the soul;
- c. Nurturing reason;
- d. The property; and
- e. Nurturing offspring.



The five objectives of Islamic law were then agreed upon by other Islamic legal scientists. The five objectives of Islamic law in the literature is called al maqasid al-khamsah or al Maqasid al-Shari'ah (read: Al-maqasidis Shari'ah (the objectives of Islamic law), the purpose of the Islamic law can be seen from the box in terms of, namely: in terms of Islamic legal acts, namely Allah and his messenger; and in terms of human beings who.

From the explanation of corruption is an extraordinary crime (extraordinary crime), has a systemic and broad impact and has been placed as a violation of the economic and social rights of the people. Thus, the imposition of criminal sanctions related to the reimbursement of State losses is not only the financial state that was harmed at the time of corruption but must pay attention to explicit costs as part of the social costs of corruption caused by corruption. The explicit cost consists of the cost of anticipation of corruption, the cost of consequences and reactions to corruption. Not only punishment as a deterrent effect or financial return of the state alone that sees it from the law on combating corruption with horse glasses, but must look at it from the aspect of the benefit of the Indonesian people as direct victims of corruption. So that must be achieved is "state financial recovery".

#### 4. CONCLUSION

Corruption is an extra-ordinary crime, because the impact is not only detrimental to the country's finances or economy but also hinders national development. So the trial process without the presence of the defendant (in absentia) who has been called lawfully is an extraordinary means used for extraordinary crimes. The execution of justice in Absentia in the case of corruption does not violate the rights of the defendant, this is because the defendant is given the opportunity to follow each stage of the investigation process, the investigation process until the trial process, but the defendant does not take advantage of his rights granted by the Criminal Procedure Code. If you look at the perspective of Islamic law from the aspect of the benefit of the Indonesian people as direct victims of corruption. Then the trial process must continue even though the defendant is absent or without the presence of the defendant / in absentia, so that the state money from corruption as evidence can return to the state through appropriate legal process. That explicit costs are part of the social costs of corruption that must be charged to perpetrators of corruption. Explicit costs are divided into 3 forms, namely: anticipation costs, consequences costs and reactions to corruption. In the legal setting in Indonesia, only the cost of the consequences of corruption crimes are given to the perpetrators of corruption regulated in Law No. 20 of 2001 on amendments to Law No. 31 of 1999 on the eradication of corruption, but for the cost of anticipation and reaction to corruption crimes there is no detailed regulation. Therefore departing from the aspect of benefit that comes from The Theory of Al-Syaitibi Al-maqashid as-syariaht, then the concept of substitute money in the sanctions eradication of corruption should be oriented to "state financial recovery". So that the perpetrators of corruption are not only charged to the cost of the consequences of the crime but also charged to the cost of anticipation and reaction to the crime of corruption.

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