THE LIMIT OF *PENAL APPROACH* REACH AND THE OTHER ALTERNATIVE ENDEAVOR TO ERADICATE CORRUPTION IN INDONESIA

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Abstraksi

Tulisan ini memaparkan problematika dan keterbatasan jangkauan hukum pidana dalam menanggulangi korupsi, serta mencarikan solusi alternatifnya. Secara umum korupsi disebabkan oleh dua faktor utama, yaitu faktor struktural dan kultural. Faktor strukturalnya adalah birokrasi yang kurang kontrol dan akses publik. Sedangkan faktor kultural adalah sikap masyarakat yang seringkali menganggap wajar, atau setidaknya toleran terhadap korupsi. Namun kultur tersebut dapat dirubah dengan 'pencelaan' masyarakat terhadap korupsi. 'Pencelaan' ini akan berdampak secara internal maupun eksternal, sehingga nantinya bisa menjadi 'special deterrence' *dan* 'general deterrence'. *Ternyata usaha pemberantasan korupsi melalui dua cara tersebut mendapatkan legitimasi dan dukungan dari Islam. Islam terbukti mengajarkan kontrol terhadap penguasa dan juga mengutuk keras korupsi.*

الخلاصة

حاول الكاتب كشف النموذج لعلاج جريمة الفساد. هناك أمران تسببان للانتشار هذه الجريمة: الأول العوامل التركيبية للنظم الحكومية كعدم المراقبة على البيروقراطية الجارية والثاني العوامل الثقافية للمجتمع الإندونيسى التى ترى أن هذه الجريمة من الأمور العادية في جميع المجال. وتأسيسا على هذا فإن العلاج لهذه الجريمة يحتاج إلى مشاركة المجتمع لمراقبة البيروقراطية.

Keywords: penal approach, corruption, positive law, and public control

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A. Introduction

Corruption is an evil and cancer that should be fought by all people. Nevertheless, talking about corruption and how to combat it, is not as simple as a matter of course assumed by armchair theoreticians or they who have no enough experience in this field notwithstanding. Those who are cognizant of, and have enough understanding in how convolution is the concrete problem, will certainly recognize the complexity of this problem. Corruption is not a merely juridical problem or social problem only, but it is a whole problem involves all facets-social, law, economy, politics, moral, religiosity etc. Beside that, according to Syed Hussein Alatas, corruption is an age-old problem and that all human societies, except the very primitive, are, in some extent, in varying degrees, affected by it.[1]

Particularly in Indonesia, corruption has entered into all sectors and, therefore, become an "extra-ordinary crime" that requires 'extra-ordinary law' to combat. Based on the report of Transparency International, Indonesia is still one of the most corrupt states in the world up until now.[2] Moreover, according to Romli Atmasasmita, corruption in Indonesia, de facto, has become "crime against humanity".[3] He regards corruption as "crimes against humanity" since this crime has become a 'systematic and widespread' crime attacking social and economical rights of people. These all may give a clear portrait of how chronic is corruption growth in Indonesia.

Responding to that complicated problem, this paper will discuss about the difficulty of combating corruption, especially in Indonesia, started by defining the term and its boundary, seeking its causes, understanding the crime-typology of corruption, the problem of its eradication, and finished by the solution that is immediately possible and trouble-free to be enforced by everyone. The study of this paper will take Islamic perspective on that problem comparatively. Islamic

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[1] Syed Hussein Alatas (1999), *Corruption and The Destiny of Asia*, Selangor: Prentice Hall (M) Sdn. Bhd., p. 8.

[2] Detailer information of the perception index of corruption in Indonesia can be found in: <http://www.ti.or.id>.

[3] See Mahkamah Konstitusi, *Risalah Mendengarkan Keterangan Ahli Perkara Nomor 069/PUU-II/ 2004 Tentang Pengujian Pasal 68 UU Nomor 30 Tahun 2002 Terhadap Pasal 28 Huruf I Ayat (1) Perubahan Kedua UUD 1945*, be found in: <www.mahkamahkonstitusi.go.id>. It is must be noted that, based on Article 7 of *Rome Statute* for International Criminal Court 1998 and Article 9 of Law 26/2000 on *Human Right Court*, there are, indeed, some requirements to consider certain crime as *"crime against humanity"* juridically. Nevertheless, opinion Romli Atmasasmita presented was not wrong, since he just considered corruption factually in Indonesia as "crime against humanity", then his opinion did not base on the requirements of these articles; he did not consider that juridically.

perspective is important for this purpose in view of the fact that Islamic is the religion has been along time embraced by majority of Indonesian and convinced about by them. This, at least, can give justification or legitimacy and, furthermore, make that view easily to be accepted, followed, and enforced by them.

B. Defining Corruption And Understanding Its Causes

Corruption is a simple term with large meaning. According to in what field this term used, it will have various senses of meaning. 'Political corruption' means money politic, intimidation in a voting, and manipulation of vote. 'Intellectual corruption' means plagiarism or laying claim to intellectual property right deceitfully. 'Sociological corruption' means, *inter alia*, corruption of time or corruption of state funds. 'Juridical corruption' means using power/ opportunity to enrich himself and/or other person or corporation unlawfully.

According the common usage of the term corruption, public servants are called corruptor when they accept gifts bestowed by a private person with the object of inducing him to give special consideration to the interests of the donor, demand such gifts in the execution of public duties, or use the public funds they administer for their own benefit. Appointment of relatives, friends or political associates regardless of their merits and the consequences on the public weal, also can be described as corruption. Based on this, three types of phenomena contained in the term corruption are: bribery, extortion, and nepotism.[4]

May be, the most comprehensive definition elucidating corruption is what was formulated by Syed Hussein Alatas, i.e. "the subordination of public interests to private aims involving a violation of the norms of duty and welfare, accompanied by secrecy, betrayal, deception and a callous disregard for any consequence suffered by the public".[5] This formulation is likely near to what thought by people and, of course, larger than the meaning of corruption stipulated in the written law.

There are so many theories and opinion observing the causes of corruption. Most of them believe that poverty is the main root of corruption. This assumption, factually, is not accurate enough, since there are so many destitute persons who still hold honesty and integrity. The other cause usually believed by some analysts, like 'Abd al-Rahman Ibn Khaldun, is the passion for luxurious living within the ruling group,[6] however, this opinion cannot be

[4] Quoted by Syed Hussein Alatas, *op. cit.*, pp. 6-7
[5] *Ibid.*, p. 7
[6] *Ibid.*, p. 5

proved empirically. According to what commonly believed, it might possible to say with all-embracing word that corruption, in general, caused by two primary factors. The first is cultural factor, which includes numerous acts caused by the family and friendship ties - like the tradition of bestowing gift each other, collusion, nepotism - and by the paradigm of hedonism taken as way of life by several factions of ruling group. The second is structural factor, which consists of various conditions caused by the powerful bureaucracy lacking public access that open chance to corrupt.[7] To understand this second factor, it is perhaps fine enough to keep in mind the illustrious word presented by Lord Acton, that "The power tends to corrupt, and absolute power corrupts absolutely".

C. Corruption in Indonesian Positive Law

Combating corruption has become national commitment as determined in *Majelis Permusyawaratan Rakyat* (MPR's) Decree of No. XI/MPR/1998, and then performed by Law No. 28/1999 on State Executors Which Is Clean from Collusion, Corruption, and Nepotism, and Act No. 31/1999 on Eradication of the Criminal Act of Corruption. Based on what stipulated in Act 31/1999 on Combating Criminal Act of Corruption, which later amended by Act 20/2001, there were five types of criminal conduct stipulated on that law, these are:

a. First Type, regulated in Article 2 (enrich himself and/or other persons or corporation in such a way as to be detrimental to the finances of the state or the economy of the state).
b. Second type, regulated in Article 3 (with the intention of enriching himself or other persons or a corporation, abusing the authority, the facilities or other means at their disposal due to rank or position in such a way that is detrimental to the finances of the state or the economy of the state).
c. Third Type, regulated in Article 5-13 (adoption of several Articles from Criminal Code, i.e., Article 209, 210, 387 or 388, 415, 416, 417, 418, 419, 420, 423, 425, 435 with changing of the sanctions, where in Act 20/2001 these several Articles are directly mentioned, and also rendering gifts or promises to civil servants in view of the powers and authority attached to their respective ranks or positions, or deemed by the person rendering such gifts or promises to be attached to the aforementioned rank or position)

[7] See Aliansi Jurnalis Indonesia, *Jurnalisme Anti Korupsi*, supported by Institute of Development and Economics Analysis and The Partnership for Governance Reform in Indonesia, Yogyakarta: AJI, p. 16.

d. Fourth Type, regulated in Article 15 and 16 (attempting, abetting or maliciously conspiring to commit criminal acts of corruption, and rendering assistance, opportunities, means or information to enable the commission of criminal acts of corruption).
e. Fifth Type, regulated in Article 21-24 (other criminal acts related to criminal acts of corruption).

Act 20/2001 was enacted to replace Act 31/1999, because the definition of corruption in this later one was too narrow, and the criminal law procedure stipulated was there too limited. Act 20/2001 had extended the definition of corruption and given new stipulations included 'extra ordinary law'.[8] Actually, Act 20/2001 has given many hard stipulations for corruptor and provided a large chance for law enforcer in combating corruption. Nevertheless, the efforts of combating corruption using this law still have many crucial problems, like what will be discussed below.

D. The Limit and Problem of Penal Approach

'Criminal policy' is a part of 'social policy' at large meaning, and criminal policy includes: (a) penal approach and (b) non-penal approach. 'Penal approach' consists of every effort to eradicate criminal act using 'written law' (including Act 20/2001). 'Non-penal approach' is all efforts of preventing crime without punishment and influencing views of society on crime and punishment.[9] Since the Law 20/2001 is not more than just a 'little' part of policy at large meaning, it seems absurd, therefore, if all of considerations and attentions - without ignoring the significance of this approach - are focused in this 'little' part only.

Actually, Act 20/2001 is good-enough mean for combating corrupt acts. However, it must be added here that every written law has weak points, mainly in relation with its words redaction. The meaning of words in one article, for example, has reaches and the limits of that reaches. No matter how good is Act 20/2001, this law undoubtedly still has some weakness and limitation of reaching. It means that this law cannot reach and cover all forms of the living-corruption exists in the everyday live of Indonesian, especially which be present in the government officials or ruling groups activities. It, therefore, accurately points to the truth of what discerned by Sudarto, that is, "The reach of criminal law is

[8] Emmy Hafild (2004), *Corruption Eradication in Indonesia*, Paper Commission for Kenya Meeting on New Governments, Co-Organize by Government of Kenya, TI-Kenya and Transparency International, Nairobi, Kenya, 11-13 October, p. 10.

[9] Abdul Kholik (2002), *Buku Pedoman Kuliah Hukum Pidana*, Yogyakarta: Fakultas Hukum Universitas Islam Indonesia, p. 264.

limitative".[10] This condition may become constrains in the endeavor to cope with corruption in Indonesia anyhow.

The problem that comes from law itself is more difficult than only that described above. In fact, corruption is a criminal act that generally involves public servants; hence, the law ruling corruption will have contact with the law ruling those public servants, namely 'administrative law'. In this puncture, it is very difficult to differentiate between juristic of criminal law or administrative law. Indriyanto Seno Adji, a Professor of Criminal Law that became Abdullah Puteh's advocate, said that the improvement of criminal law and administrative law has entered into a "grey area", especially in the case of corruption. Because of that, he then clarified the meaning of "abuse of authority" ("detournement de pouvoir") in one side, and "unlawful" ("wederechtelijk") in other side - the two-most important elements of article that, according to him, usually be understood falsely. After that, he demonstrated the bad understanding of the District Court judges who judged the case of Akbar Tandjung, Syahril Sabirin, Samadikun, and the three ex-Indonesian Bank Directors.[11]

The clearest attestation for that "grey area", may be, is what happened in the Akbar Tandjung case, where, at the last time, Supreme Court concluded that his case was not a criminal act, from the time when one of the element of article that Akbar Tandjung charged with, i.e. 'abusing authority', could not be proved.[12] The very interesting point in this case is the fact that each of the District Court, High Court, and Supreme Court had opinions that sharply different from each other.[13] That must be noted here isn't whether Indriyanto's opinion and Supreme Court sentence right or wrong—notwithstanding the opinion and also the sentence issued by Supreme Court must be lamented, but the problem that comes from law itself, that is, how difficult to understand and interpret the term of law, especially the elements of law article.[14]

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[10] Sudarto (1981), *Hukum dan Hukum Pidana*, Bandung: Alumni, p. 124

[11] For more information, see Indriyanto Seno Adji (2005), *"Overheidsbeleid" Dalam Perspektif Tindak Pidana Korupsi di Indonesia*, paper delivered on the General Course of Criminal Law, Faculty of Law, UNKRIS, Jakarta, Juny 28, pp. 10-23.

[12] See Sentence Reg. No. 572/Pid/2003 issued by The Supreme Court of Indonesia, can be found in SF. Marbun (ed.) (2004), *Akuntabilitas Putusan Akbar Tanjung, Akuntabilitas Putusan Akbar Tanjung Oleh Mahkamah Agung*, Yogyakarta: UII Press.

[13] For the deep elaboration of that difference, see, for example, Jazim Hamid, in *Ibid.*, pp. 593-594.

[14] To imagine how difficult this problem is, remember that Adami Chazami even wrote a difficult book titled *"Hukum Pidana Materiil dan Formil Korupsi di Indonesia"* (about 400's pages book) focusing on one problem: just to elaborate the written-law of corruption. See Adami Chazawi (2003), *Hukum Pidana Materiil dan Formil Korupsi di Indonesia*, Malang: Bayumedia.

The problem of penal approach will be more difficult when it takes into practice. As what concluded by many researchers, corruption has affected all regions and levels of Indonesian judicial sector.[15] It is not a strange fact, therefore, if nowadays Indonesian judicial sector well known as 'black market justice'. "Law becomes a commodity most demanded by wealth and powerful buyers, while its enforcers can be so directed that justice is exchanged for money and pleasure".[16] The most difficult question for those who falsely extol penal approach is that: how law will enforce, if the enforcer himself breaks that law. How corruption law will be forced while the enforcer himself corrupts? The answer for that is so clear, that is, impossible or, at least, very hard.

Besides that, the using of criminal law to eradicate criminal acts is only likely a "kurieren am symptom" (eradicating/curing symptom only), so law or criminal sanction cannot reach the root causes of those criminal acts.[17] This limitedness of criminal law, of course, also occurs in the eradication of corruption in Indonesia that uses that law. Perhaps, the latest weakness of this approach is that the effectiveness of criminal law still depends on many factors and often questioned by many scholars, like Wolf Middendorf, Donald R. Taft, and Karl. O. Christiansen.[18]

All above point to one clear reality, namely that the penal approach is facing many hard and difficult hurdles, besides its effectiveness is still questionable, so that the efforts of combating corruption can be relied on this. Because of that, and remembering that the penal approach is just a part of criminal policy - and a 'little' part of social policy at large meaning, the focus in combating corruption must be turned to the other alternative, that's non-penal approach - for once again, without disregarding 'penal approach'. But before go any further, the characteristic of this crime must be understood firstly in order to make the endeavor will be taken accurate.

E. Corruption As a White-Collar Crime

Primarily Edwin H. Sutherland introduced the term white-collar crime in 1939, even though before him, Edward A Ross had uttered such phenomenon

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[15] *Legal Review* Magazine, No. 38./TH IV/November 2005, pp. 12-15.

[16] As quoted by Laica Marzuki (2005), *Membangun Sistem Penegakan Hukum Yang Akuntabel*, paper presented in National Seminar titled *"Law Direction and Policy of New Government"*, organized Post Graduate Program of Gadjah Mada University, Yogyakarta on January 15, p. 1.

[17] Barda Nawawi Arief (1998) *Beberapa Aspek Kebijakan dan Pengembangan Hukum Pidana*, Bandung: PT. Citra Adiya Bakti, p. 139.

[18] Abdul Kholiq, *Op.Cit.*, pp. 270-271.

of social attitudes could be qualified as white-collar crime. Nevertheless, the terms Ross had had used were still in the boundary of his capacity as a pure sociologist, while Sutherland had elaborated that in his capacity of a criminologist rather than a sociologist.[19] White-collar crime is defined, according to the conventional definition of Sutherland, as "a crime committed by a person of respectability and high social status in the course of his [or her] occupation".[20]

Joann Miller categorized white-collar crime into fourth categories, these are: (a) organizational occupational crime, (b) governmental occupational crime, (c) professional occupational crime, and (d) individual occupational crime.[21] Governmental occupational crime is crime done by government official, such as arbitrariness, abuse of authority, corruption, collusion, nepotism, etc. It is true that corruption can be committed by both of person with high social status and who with low social status, it possible to be done by everyone. However, it is not so false, too, that corruption in general has been committed by those who with high-level position or social status. By committing this fact to the memory, so the policy for combating corruption has to be conformed to its type and characteristic.

As well as the other white-collar crimes, corruption also repetitively involves high-level public officials or intellectual criminal. Thus, this crime is prepared sophisticatedly, smartly, and complicatedly. These all make corruption very difficult to be uncovered. In addition, the special characteristics of white-collar crime (including corruption) are usually done with low visibility, complexity, diffusion of responsibility, diffusion of victimization, hurdle of detection and prosecution, ambiguity of law, and two hesitant attitudes towards the offender.[22] Moreover, quoting Alatas, those who practice corrupt methods usually attempt to camouflage their activities by resorting to some form of lawful justification.[23] For the reason that corruption is brightly different from the other crimes, this crime obviously requires special endeavors.

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[19] Artidjo Alkostar (1994), "White Collar Crime dan Corporate Crime", article in *Jurnal Hukum Ius Quia Iustum*, No. 2 Vo. 1, Yogyakarta: FH. UII, 1994, p. 3.

[20] Sutherland (1949), "White-Collar Crime 2" in John Braithwaite, 1982, *Challenging Just Deserts: Punishing White-Collar Criminals*, Journal of Criminal & Criminology, Northwestern School of Law, p. 2.

[21] Joann Miller, *op. cit.*, p. 1, as quoted in Hanafi, *Politik Kriminal Terhadap White-Collar Crime*, article in *Jurnal Hukum... op. cit.*, p. 25

[22] Muladi, *op. cit.*, p. 5-6, as quoted by Hanafi in *Ibid.*, p. 27

[23] Hussein Alatas, *op. cit.*, p. 7

F. The Effective Method to Combat Corruption in Indonesia

The theory has been bruited about, as an effective way to combat structural factor of corruption, is the theory formulated by Sutherland, namely the theory of 'differential association'.[24] Primarily, this theory was issued in 1934, in his well-known book Principles of Criminology. He divided his theory into two versions; the first issued in 1939, and the second, issued in 1974. In his second version of Differential Association, Sutherland emphasized that "criminal behavior is learned behavior and, hence, not heritage behavior". In this purpose, and for the shake of argument, he then explained that trough nine propositions, they are:

1. Criminal behavior is learned behavior.
2. Criminal behavior is learned in interaction with other persons in a process of communication.
3. The principle part of the learning of criminal behavior occurs within intimate personal groups.
4. When criminal behavior is learned, the learning includes (a) techniques of committing the crime, which are sometimes very complicated, sometimes very simple, (b) the specific direction of motives, drives, rationalization and attitudes.
5. The specific direction of motives and drives is learned from definitions of the legal codes as favorable on unfavorable.
6. A person becomes delinquent because of an excess of definition favorable to violation of law.
7. Differential association may vary in frequency, duration, priority and intensity.
8. The process of learning criminal behavior by association with criminal and anti-criminal patterns involves all of the mechanism that involved in any other learning.
9. While criminal is an expression of general need and values, it is not explained by those general needs and values since non-criminal behavior is an expression of the same needs and values.[25]

Based on that theory, and by remembering corruption as a white-collar crime, it can be concluded that, in fact, public officials learn to be corruptor by

[24] See Narayan Srinivasan, *Focus Group Discussion of Study of Factors That Could Help Improve the Investigation and Prevention of Corruption in Indonesia*, p. 2, can be reached at: < <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN011671.pdf. > >

[25] Lilik Mulyadi (2004), *Kapita Selekta Hukum Pidan, Kriminologi dan Viktimologi*, Jakarta: Djambatan, pp. 87-90.

seeing and observing their coworkers. After that, they will justify their acts as a normal behavior, especially in their particular environment.[26] The most favorable environment for that act is a closed-system of office, where the official activities are remote from public access. Theoretically, "without the existence of intention and chance, there will be no crime". Taking this theory into consideration, the closed-system, at very least level, will give large chance for those who have intention to corrupt, and those who primarily have no intention will be tempted by that. In the simple word, this type of bureaucracy supports and promotes one to corrupt. Penal approach can't ever change this condition, the same as Sudarto ever noticed: "a 'clean government' that corruption is not existing or, at least, hard to be found, can't be realized by the law stipulations only, even though that is criminal law with very hard sanction".

The only possible way to break these potentially corruption-fraught areas, perhaps, is by making all government office system accessible to all people.[27] It means that aside from the corruption law enforcement, the reformation of infrastructure of government officials must be ensured immediately, even this later one is more important than the first. One who is confusing the exigency of this effort must to think about an admonition come from Montesquieu, that is: "In the birth of societies, it is leaders of republics who create the institutions; afterwards it is the institutions that form the leaders of the republic".[28]

The hardest problem in fighting corruption is the problem of government official opinion about it, where sometimes they deem several corruption acts as normal or usual behavior. In most cases, indeed, they understand clearly that they break the law, but they argue that their actions will not hurt anyone, or have no influence in the big amount of state economic. Hence, they feel no anything with that act. Facing this fact, it is needed to ponder again what John Braithwaite ever said, when he formulated his theory of re-integrative shaming. However, before elaborating his theory any further, it is important to be noted here that John Braithwaite's theory of re-integrative shaming, actually, was formulated to face the 'delinquency of youth'. Nevertheless, some of this theory's propositions are likely approximate to be used in the effort of combating corruption, especially when the corruption, in particular time or place, becomes so usual or even a cultural behavior.

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[26] See Narayan Srinivasan, *Op.Cit.*, p. 2.

[27] Hussein Alatas, *Op.Cit.*, p. 148.

[28] As quoted in World Bank (2003), *Combating Corruption in Indonesia: Enhancing Accountability for Development*, World Bank East Asia Poverty Reduction and Economic Management Unit, p. xiv.

Braithwaite's re-integrative shaming theory claims that communitarian societies tend to put heavy emphasis on group obligations and mutual trust, and to rely on normative mechanisms to control people's behavior. Thus, these types of societies are more likely to use shame as both of special deterrence and general deterrence.[29] Braithwaite defined shaming as: 'all social processes of expressing disapproval which have the intention or effect of invoking remorse in the person being shamed and/or condemnation of others who become aware of the shaming'. What is important for Braithwaite then is 'disapproval' and 'remorse' rather than what is conventionally or popularly thought of as shame or shaming.[30] The difference Braithwaite made between "stigmatic shaming" and "re-integrative shaming" is very crucial. Re-integrative shaming means that the offence rather than the offender is condemned, and the offender is reintegrated with rather than rejected by society.[31] The most important thing of these propositions is that the 'expressing of disapproval' can be normative mechanism to control people's behavior.

John T. Noonan, Jr., as quoted by Robert Klitgaard, ever said, "In spite of fact that bribery has existed as old as the government itself, it doesn't mean that bribery is accepted in a certain culture. Bribery has been universally considered disgraceful.[32] A Latin word 'corruptus' (pas participle form of 'corrumpere')[33] - where the other languages adopted from this - gives series of illustration of 'evil', and that word consists of such a 'moral intonation'.[34] Based on this, considering corruption as a normal behavior is merely a distortion of norm values, whatever the argument is. All of this ought to be considered as a guide by all people in how to give attitude to 'the culture' of corruption; they must show their 'disapproval' for it. In the process of expressing 'disapproval' against corruption, press or mass media as the 'fourth power' in Indonesia, indeed, has very big role. But it's very grieved over that Indonesian press/mass media don't do that consistently. According to what Nadya Abrar, a researcher from *Fakultas Ilmu Sosial dan Politik Universitas Gajah Mada* has concluded, Indonesian press or

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[29] See *Revisiting Reintegrative Shaming* (2001), article originally appeared in the Criminology Aotearoa/NewZealand. A newsletter from the Institute of Criminology, Victoria University of Wellington. September, No. 16., p. 1.

[30] *Ibid.*

[31] Robert Klitgaard (2001), *Membasmi Korupsi*, Jakarta: Yayasan Obor Indonesia, p. 9.

[32] Extracted from *American Heritage Talking Dictionary*. Copyright © 1997 The Learning Company, Inc. All Rights Reserved.

[33] Robert Klitgaard, *op.cit.*, p. 31.

[34] See Aliansi Jurnalis Indonesia, *op.cit.*, pp. 16-17.

mass media has no enough attractiveness to report money politic or corruption case.[35]

Because of that, all Indonesian people have to make all of their toleration and permissiveness for corruption disappears, and then starts to express their 'disapproval' for this society-cancer. Since in Indonesian society, in the name of 'presumption of innocent' principle, there are so many corruptors being tolerated. The strongest evidence for that can be seen visibly in their attitude: a small-fry theft often killed by people lively and intolerantly, while high-level government official suspected of corruption are still respected by them. Hence, they must take their 'living-law', 'morality', and 'sense of religiosity', as a standard of their attitude in facing corruption.

May be, this effort is the only possible way to be done by everyone this time, no matter he or she is. Perhaps, there will be one put this effort in doubt, but anyhow, there are also so many sociologists who believe the helpfulness of this method. The leading sociologist studying shame effect in certain cultural live is Braithwaite himself who claims that shame (as an consequence of disapproval) will occur in two level: "internally, through our socialization and our sense of right and wrong (conscience) and externally through sanctions or condemnations from family, community or important others.[36] It means that the effort of expressing disapproval for corruption finally will be both of special deterrence and of general deterrence in the eradication of corruption in Indonesia.

G. Islamic View on Combating Corruption Using Public Control and 'Shaming'

Along the government of Mohammed, corruption was not a major feature of public crime since the limited finance of the state and the simplicity form of the government. The other cause why corruption not so luster in his period was the high morality of the persons managing the government and The Prophet Mohammed still among them. However, the infrequent of corruption case in the Mohammed period doesn't mean that Islam and the Prophet didn't give any guidance how to combat corruption.

Like what clearly known, Islam divides crimes, according to the perspective of penalty or sanction, into three categories. The first is "*hudûd* crimes", namely those that break the fixed and non-negotiable punishment stipulated. The second

[35] For a fuller information on that, see, for example, Andrew J. Hund (1999), *Participatory Reintergrative Shaming Conferences*, Humboldt State University.

[36] Musthafa al-Rafi'y (1996), *Ahkam al-Jara'im fi al-Islam: Al-Qishash wa al-Hudud wa al-Ta'zir*, Beirut: Al-Dar al-Afriqiyyah al-'Arabiyyah, pp. 25-28 and 82-85.

is "*qishâsh* and *diyat* crimes", i.e. those which are retributive in nature, but which can be substituted by some payment in kind as restitution, or forgiven by the injured party. The third is "*ta'zir* crimes", i.e. all other crimes has been forbidden, generally or particularly, in Qur'an, Sunnah, and or General Principles of Islamic Law, but for which a punishment is not prescribed since the authority of establishing that punishment is given to the *imam* or Judge. In relation with the topic explored in this paper, corruption belongs to the "*ta'zir* crimes".[37]

So many writers had fallen in false when they said that corruption Islam considers corruption as 'theft' (*sariqah*). As a part of "*hudûd* crimes", theft is evidently different from corruption, and both of them cannot be treated as the same. Abdul Qadir 'Awdah has very detailed discussion on the theft crime, for which there are so many requirements to consider one act as a theft, and also the fixed penalty for that.[38] Therefore, this false opinion will make corruption has a very limitative stipulations in both of the punishment and procedure, whereas, in fact corruption has so many kinds that different each other in the danger and involves high complexity in its 'modus operandi'. By the clear word, that false opinion will make the eradication of corruption in Islamic view more difficult.

Indeed, Islam has a very clear attitude against dishonesty at large - including corruption. In Islamic view, authority, chance, and public funds are "amanah" (means: things entrusted to somebody and all the duties that Allah has ordained for him) which those who hold it must fulfill. Allah said in Al-Anfal: 27:

> *"O you who believe! Betray not Allah and His Messenger, nor betray knowingly your "amanat" (things entrusted to you, and all the duties which Allah has ordained for you)".*

Allah also said in Al-Nisâ': 58:

> *Verily! Allah commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice. Verily, how excellent is the teaching which He (Allah) gives you! Truly, Allah is Ever All Hearer, All Seer.*

Islam prohibits its believers from the misuse of '*amanah*' - Islam usually calls this misuse "*khianat*", and corruption is certainly an important share of this misuse. By this, it is very clear now that Islam extremely prohibits corruption. Islam, in the scope of "*amar ma'ruf nahi munkar*" (i.e. enjoining *al-*

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[37] For detail information, see 'Abd al-Qadir 'Audah (1968), *al-Tasyri' al-Jinâiy al-Islâmi*, Beirut: Mu'assasah Abdul Hafiz, pp. 514-636.

[38] Ibn Hamzah al-Hasany (1982), *al-Bayân wa al-Ta'rif fi Asbâb Wurud al-Hadits*, Al-Maktabah al-Ilmiyyah, p. I/62.

ma'ruf and forbidding *al-munkar*), also commands every Moslem to fight all form of *al-munkarat* (i.e. all that Islam has forbidden), including corruption that has been clearly prohibited in the vein of what explained above. Then Allah said in Ali 'Imran: 110:

You (true believers in Islamic Monotheism, and real followers of Prophet Muhammad SAW and his Sunnah (legal ways, etc.)) are the best of peoples ever raised up for mankind; you enjoin *al-ma'rûf* (i.e. Islamic Monotheism and all that Islam has ordained) and forbid *al-munkar* (polytheism, disbelief and all that Islam has forbidden), and you believe in Allah. And had the people of the Scripture (Jews and Christians) believed, it would have been better for them; among them are some who have faith, but most of them are Al-Fasiqun (disobedient to Allah - and rebellious against Allah's Command).

Ibn Hamzah wrote, *"It was truly related by Ashâb al-Sunan, al-Thabarâny in his 'al-kabir', Ahmad in his 'al-Musnad', and al-Bayhaqiy in his 'al-Sya'b', that Rasulullah said:*

"The best 'jihad' is (saying) truth in front of the despotic Governor".[39]

This hadith obviously legimates and even supports public control to government activities. By other word, The Prophet Mohammed suggested his followers that they ought to control their governor's activities. It means that Islam has started to support every Moslem since several ages ago to control their governors in order to make their governor has no chance to do corrupt. Clearly, Islam has started to suggest every Moslem to combat all structural cause of corruption.

The other interesting point of Islamic view on combating corruption is what the Prophet said in bribery, as one of many forms of corruption. Rasulullah, as related by Ibn Hibban, said:

"Allah cursed the briber and bribery taker".[40]

In other place, it is also reported that:

"The Messenger of Allah cursed the briber and bribery taker"[41]

In the other report added: "*al-ra'isy*" (the person who connects briber and bribery taker"). That must be underlined here is the using of term "*la'nah*" (i.e.

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[39] Ibn Hibban, *Shahih Ibn Hibban*, Beirut: Dar al-Fikr, p. 4/392, also related by Ibn Majah with different redaction. See Ibn Majah, *Sunan Ibn Majah*, Beirut: Dar Ihya' al-Turats al-'Arabiy, p. 2/777.

[40] See, for example, Al-Imam al-Tirmidzi (1994) *Sunan Al-Tirmidzy*, Beirut: Dar al-Kutub al-'Ilmiyyah, p. 4/548.

[41] This translation follows Research & Studies Centre (2004) *The Dictionary Bilingual (Arabic-English, English-Arabic)*, Beirut: Dar al-Kotob al-'Ilmiyah, p. 582.

anathema).[42] In Arabic, "*la'nah*" means "*al-thardu*" (avoidance) and "*al-ib'ad*" (keeping somebody or someone away). As well as what generally accepted by Islamic jurists, the term "*la'nah*", at very least, means that the act condemned by this term is forbidden. Moreover, Ibn Hajar al-'Asqalany and Al-Syawkany, said that the term "*la'nah*" was the characteristic of the act considered 'big-sin' in Islamic law.

Islam will not use the term "*la'nat*" except in the very serious kind of crimes, and forbid its follower to use this term for usual crime. Imam al-Bukhari has an interesting book chapter in his *al-Jâmi' al-Shahîh*, namely *Bâbu Ma Yukrahu Min la'ni Syaribi al-Khamri wa Innahu laysa bi Kharijin Minal Millati* (chapter explaining disliked thing, that is condemning arrack drinker, and he is not apostate). It means that Islam dislikes every Moslem to damn the arrack drinker, whereas, in the other side, Islam extremely condemns corruptor. Islam condemns corruption, because Islam regards corruption as a very serious crime must be eliminated from social live.

The hadith mentioned above shows that bribery as one kind of corruption has been condemned by an 'anathema' in Islam. Both of Allah and His Messenger cursed and clearly expressed their 'disapproval' for that act. The other form of corruption must be treated the same as bribery, and therefore, must be condemned and cursed by every Moslem. Because of that, in this puncture, Islam has the same attitude with what mentioned above. In the simpler term, Islam legalizes and supports the effort of combating corruption by expressing 'disapproval' for all forms of corruption.

H. Concludin Remark

It is perhaps fair to say that corruption can only eradicated trough all-inclusive strategy covering various facets - law, social, economic, politics, administrative and, more fundamentally, culture. The hardest strategy, i.e. endeavor using penal approach, will face so many hurdles and not able to threat corruption until its root causes. Therefore, not all of expectations in the combating corruption can be relied on this strategy. Taking into consideration that corruption is caused by two important factors, namely structural and cultural cause, the effort must be focused on both of these two factors. The structural factor of corruption is the existence of powerful bureaucracies with the weakness

[42] See Ibn Hajar Al-'Asqalay, *Fath al-Bari bi Syarh Shahih al-Bukhari*, Al-Mathba'ah al-Salafiyyah, p. 10/377; Muhammad Ibn 'Ali al-Syawkany, *Nayl al-Awthar*, Cairo: Mathba'ah Musthafa Bab al-Halaby, p. 6/216.

of public control. It become the potentially corruption-fraught of government activity, so then must be broken by making the government accessible to the people. Factually, Islam as a biggest religion in Indonesia supports this method.

In the other hand, the cultural factor can be treated by expressing 'disapproval' repeatedly for all forms of corruption, including any form of corruption that is not stipulated in the written law yet, but prohibited in accordance with the 'living-law'. Remembering that campaign against corruption is still too weak and infrequent, it is very needed, therefore, to start expressing 'disapproval' for all kinds of corruption in order to change people mind on this cancer and to make them aware of the danger of corruption. This effort will make them know that any corruption is an 'evil' which more dangerous for them than just a small-fry theft. This attempt will change the culture of Indonesian, which sometimes, in the name of *'presumption of innocent'* principle, exceedingly tolerates several kinds of corruption. Therefore, corruption will have no any place comfortable for it structurally and culturally.

One may say that it is easier to be said than done. But unless one learns to start fighting against corruption, this evil will not only exist but will growth greater and greater in Indonesia. Islam as a religion commonly embraced by Indonesian citizens has started to do this effort since along time before. Both of Allah and His Messenger, Muhammad, extremely damned bribery—kind of corruption had existed in the Mohammed period. Along with thinking out comprehensive solutions, everyone may start with this easiest and most possible method in fighting corruption: just expressing his 'disapproval' for corruption. This 'little' attempt will be both of special and of general deterrence finally —the two important goals that actually *penal approach* wants—for all people of Indonesia.

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