

# Social Sanction Versus Legal Sanction in Corruption Case

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**Abstract**—Corruption in Indonesia is still gripping and increasingly apprehensive, both in central and local government, either alone or in groups. The predicate of the religious community does not guarantee those who live there to be free from corruption. There have been many examples of members of the community are caught as corruptors. The temptation to be rich quickly, easily and abundantly encouraged them to go against the law. Legal sanctions, although exacerbated, have not been able to erode corrupt practices in the country. That is why this article offers concept of reducing corrupt behavior through "dynamic" social sanctions in addition to legal sanctions. Social sanctions conducted by the Council of Ulama Indonesia, Nahdlatul Ulama and Muhammadiyah, as religion-based organizations, to combat corruption practices through the moral movement is considered effective and efficient. This article uses consilience method, comprehensive environmental policy, ethics and social sciences, Islamic balance (wasathiyah Islamiyah) and the purpose of enforcing Islamic law (maqashid al-syariah) as the basis of building arguments that there is strong influence of one's impulse to corruption and dominion of lust. With the foundation of thought (al-qaidah fikriyah, intellectual base), this study finds: first, the settlement of corruption cases through "dynamic" social sanctions is seen as effective. Second, the working of the law against corruption as a form of implementing living law. Third, the moral and cultural movement by labelling corruptors as unscrupulous is considered important. The fourth is building a network of "dynamic" social sanctions, social attitudes and social judgments.

**Keywords**— *Social Sanction; Legal Sanction; Corruption.*

## I. INTRODUCTION

Corruption in Indonesia is still gripping and increasingly apprehensive, both in central and local government, whether conducted alone or in groups. The predicate as the religious community does not guarantee a person to behave properly, truthfully and honestly, as many of them were caught as corruptor. The temptation to get rich easily and abundantly encouraged someone to go against the law (Triesman, 2000: Jain, 2010). Social sanction conducted by the Indonesian Ulema Council, Nahdlatul Ulama' and Muhammadiyah as religion-based and mass organization to fight corrupt practices through the moral movement are considered effective and efficient.

## II. SOCIAL SANCTION VERSUS LEGAL SANCTION IN CORRUPTION

Indonesia is a legal state where sanctioning to anyone who commit criminal offense is a necessity. However, corruption often occurs in slowness, the decisions are not as expected and even the case ends without clarity. Based on this condition, the community provide social sanction and push the law enforcement to conduct fair and punish the corruptor by impoverishing, confiscating assets and even death penalty. The framework for such thinking above is that criminal of corruption is categorized as very harmful (extraordinary crime) (Rontos, 2015). Therefore, all parties must contribute in participating to eradicate it in accordance with the portion and each position.

### A. Social Sanction in Case of Corruption

Normal legal and procedural operations as expected by the society are sometimes seem sluggish and non-transparent. It makes people impatient to participate actively so that any corruption case can end with a clear and balanced decision.

Various positive legal theories and approaches have been conducted to empower law enforcement officials. Legal positivism states that law is a set of autonomous logical and coherent norms of political, economic and cultural influences[1]. On the other hand, according to sociological ideology of jurisprudence, law is subject to the unrelenting influence of non-legal factors. As a result, good law is in accordance with the laws that live in society.

The current problem of corruption law has made religious organizations and communities in Indonesia, such as: Majelis Ulama Indonesia, Nahdlatul Ulama, and Muhammadiyah surrendered and are reluctant to bear the new burden[2]. Therefore, the study of law and society suddenly becomes an interesting and important topic. That is why John Austin raised the theory that law is a community of the wills of all components of society without exception. In addition, the law is also seen as an expression of a willingness to do something(Tamanaha, 1997).

Both social studies of the law as well as critical thinking about the law equally assume that the law does not exist in a vacuum space [3]. Instead, the law always exists in a social context influenced by external forces [4]. Although

instrumentalists believe that law is positioned as a tool or instrument to align itself with the interests of the ruling group, social forces outside the law always see the law as one of the factors in a decisive and determined social system.

Consilience approach implies that law can only survive when open and cooperate with other sciences (Wilson, 1998). This theory actually tries to integrate knowledge often divided into two groups: the science of normative law, also called as legal dogmatic, and the science of empirical law. Groups of disciplines classified into socio-legal studies are also categorized into groups of empirical law. Consilience actually obscures the concept of anti-metanarrative, anti-totality and anti-universality into legal studies. Socio-legal studies question the monolithic interpretation of policy makers, the universality of the enactment of laws and truths of classical (metanarrative) doctrines such as rule of law and equality before the law [5].

Roscoe Pound states that the function and usefulness of the law or as a tool of social reform or social engineering. This ideology wants to maximize power within society to push the law closer to substantive justice.

### *B. Legal Sanctions in Corruption Cases*

The reform era has brought hope for law enforcement and its development in Indonesia. A concrete proof of reform is the four times Amendment of the 1945 Constitution which in earlier era was difficult to be done. This new era is also marked by the birth of new laws to complement and fill the legal vacuum in various fields including the law on corruption.

Positivists like Bentham, Austin and L.A Hart agreed that there are five views legal positivism. Four of them are: (1) law is the command of the owner of sovereignty; (2) there is no relation between law and morals; (3) an analysis or study of the meaning of legal concepts to distinguish them from historical and sociological studies, also from morals and social ideas; and (4) that the legal system is a closed system of logic [6].

Thus, the Law on Corruption as a legal science is oriented to the philosophy of positivism which is also considered as providing a very valuable contribution. What should be anticipated is that the history of the non-dynastic era of positive law to solve social problems at that time is caused by two factors: first, the building of the legal system and the doctrines do not allow the law to make social change or bring substantive justice. This condition is caused by the second factor: polluted legal institutions. It works as a device of power that brings difficulties to existed good legal facts as promised by advocates of legal positivism. These situations are considered to be inseparable from the legal dogmatic characteristics that often alienates the influence of social aspects.

The rules on legal change influenced by time, place and customs of the related people are strongly correct. Changes or evaluation of a law must always be done in some significant chapters of law, so that the law can respond to the development of social dynamics such as the legal rule of law of corruption case.

According to Dragan Milovanovic, there are three approaches to the law: first is using jurisprudence; second is

using sociology of law, and third is using legal semiotics (Milovanovic, 1994). These three approaches are certainly best to be integrated to produce a comprehensive study. As law is a system, it is appropriate to use systemic approach to discuss, understand and apply the law. Friedman has offered three concepts in combining the three legal components for a law to be said ideal: the component of structure, substance and culture (Friedman, 1986).

### III. COMPONENT OF LEGAL STRUCTURE OF CORRUPTION ERADICATION

Structural components are institutions created by the legal system with various functions to support the working of the system. This component seeks to see how the legal system can provide services to the cultivation of legal materials on a regular basis (Warassih, 2005).

The legal structure is manifested as the application of law through authorized institutions such as Police, Attorney, Courts and other State Institutions engaged in law enforcement. All state apparatuses, particularly law enforcement increases commitment and passion to uphold law and justice. The legal structure components, therefore, give the freedom to organize the state to produce the necessary policies and regulations in accordance with such wisdom [7].

The anxiety of legal experts, especially lawyers, on the facts of law progress in Indonesia has actually been felt years ago since the emergence of the nation's agreement that Indonesian national law is a law consisting of Islamic law, Dutch colonial heritage law or so-called civil law / western law, and custom law. Bustanul Arifin, for example, felt uneasy about the existence of law in Indonesia with the statement as follow:

*"In Indonesia, conflicts occur not only around civil law and Syara law but also between three legal systems; Islamic Law, Civil (West) Law and Custom Law. The conflict between those three legal systems began as Dutch colonization entered Indonesia, and still continues today. Therefore, after Indonesia gained its independence on August 17th 1945, we did our best to resolve such conflict which until now has not yet been completed. (Arifin, 1996)"*

The philosophical-scientific perspective of al-Jabiri's methodology which introduces the bias method of *al-Nash* and *al-Ra'y*, textual and contextual, as well as to serve, *ta'lili* and *ishtilahi* in extracting knowledge is adopted to restructure Fiqh's proposal as a *Jama'i* epistemology. The Islamic study is no longer seen as a normative religious activity, but rather as an empirical-historical academic research activity, but as far as possible is guided in the spirit of morality and normativity of the Koran [8]. In this context, Islamic law as a dependent variable is read in terms of other variables-social, economic, political, cultural, gender, human rights and so on (Anwar, 2004).

Legal norms are the focus of the study of experts who seek to find rules of behavior that is considered the best and can be applied to provide legal provisions against cases of corruption. They are divided into three levels of norms: (1) basic norms or philosophical values. This philosophical value

is abstract and universal because it encompasses the benefit, justice, freedom, equality and peace; (2) the middle norms that bridge the basic norms with concrete legal rules, namely the principles and rules of law on corruption; and (3) concrete legal rules relating to actual legal cases in society, such as corruption. Such level of handling is considered able to be used optimally for various cases.

The tension between the supportive and the rejecting, the local and universal against the corruption case itself is a central part of ordinary life happening in the social world with various interests and social actions [9]. Community efforts in paving the way to overcome the gap between the government and certain parties that sometimes “off the context” give satisfactory results.

The paradigm that emphasizes the dimension of sociology provides valuable insight for the development of field-oriented and discipline-oriented legal research. Undoubtedly, the depth of theories on Sociology helps the observers of corruption cases recognize the various legal phenomena as an interesting “social fact”. The intersection of social facts and religious doctrines gave birth to a common understanding about participating of minimizing corrupt practices in Indonesia. The point of intersection gives rise to “living law” and evidence in which it gives room for the life of the social system.

#### IV. COMPONENT OF LAW SUBSTANCE OF CORRUPTION ERADICATION

The substantive component is the output of the legal system, in the form of rules, decisions used by both regulating and regulated parties (Warassih, 2005). The prevailing legal system must be based on the principle of *maslahah mursalah* (public interest) based on justice and benefit and *sad adz-dzari'ah* (preventing damage). In this way, the law will be able to bring order and prosperity for the community. The concept of *siyasah syar'iyah* in Fiqh is very important because it aims to guide the legal apparatus to think about the policy of bringing society closer to public goodness and at the same time away from evil and destruction. The essence of this concept is the same and concurrent with *maslahah mursalah*, which is the essence of values and goals to be achieved in the process of withdrawal of law (*istinbath*) excavated through *Qiyas*, general rules of law and *Istihsan* [10]. Important ideas in revitalizing the concept of legal objectives (*maqasid al-shari'a*) is as breaths in the dynamics of Islamic legal studies that provide opportunities for the use of empirical-historical approaches [11].

*Maslahah Mursalah* is a principle that must be put forward in establishing a law. That means that the new *nash* can be practiced as long as not contradictory and contrary to public goodness or not damaged. In other words, achieving a more essential benefit must be prioritized in the sense of *maslahah* concerning the interests of many people, not for a person or one group.

The consilience law approach also prevent damage to become an essential part of the welfare to be achieved in the practice of Islamic law in order to bring peace and prosperity of the people. In the method of legal excavation advocated, the method of deductive analogies gives freedom of expression while the method of comparison encourages the development

of ideas of an eclectic character. Indeed, the eclectic character is in line with this consilience discourse. Comparisons are even recommended not only between interdisciplinary jurisprudence faculties, but also with custom law and positive law [12]. The importance of developing collective *ijtihad* in an institutional domain is officially facilitated by the government (Shiddiqi, 1997).

Lon L. Fuller reminds us that to know the law as a system, it must be observed whether it meets the eight principles of legality such as; (1) The legal system must contain rules which mean not just ad hoc decisions, (2) The rules that have been made shall be announced, (3) Regulations may not apply retroactively, (4) Rules are arranged in understandable formulas, (5) A system must not contain contradictory rules, (6) The rules should not contain demands that exceed what is done, (7) Rules should not be changed frequently, (8) There should be a match between the rules enacted and the day-to-day implementation (Fuller, 1971).

#### V. COMPONENT OF LAW CULTURE OF CORRUPTION

The culture component of law which consists of values and attitudes that affect the workings of the law (Warassih, 2005) functions as the bridge that connects the rule of law with the legal behavior of all citizens. That's why globalization [13] here is no longer considered as an enemy, but must be addressed as challenge that can be managed into opportunities. If the achievement of the basic goal of family law development is like a journey to a place, then the journey requires a vehicle to bring all passengers to their destination. The vehicle must be reliable, can carry enough fuel, and be able to transport passengers who have never been to that destination. Culture or legal culture functions as that vehicle. It gives community mature understanding and mature attitude towards the law of corruption acts.

#### VI. CONCLUSION

This article provides important benefits both academically and non-academically that the strength of social sanctions from religious organizations such as the Majelis Ulama Indonesia (MUI), Nahdlatul Ulama (NU) and Muhammadiyah are very important as counterweight to legal sanctions. The limitations of social sanctions given such as pressure on any related parties so that the law can be conducted properly and equitably. Those who corrupt must be given strict sanctions, ostracized from their communities and impoverished by their corrupt property. Legal sanctions provided by state institutions are like applying justice fairly, reducing clemency and amnesty, and forcing the corruptors to bring back the state assets to the state.

Finally this paper is good enough for being considered as one input discipline of law and for acts of corruption eradication. It can be recommended to any institutions including to the corruption eradication agency.

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**REFERENCES**

- [1] *A thought that tries to separate between law and non-law* has been raised by Hans Kelsen (1881-1973). According to him, law must be sterile from what is not law. He said that it is called Theory of Pure Law (*reine rechtlehre*). Before Kelsen, figure for positivism was John Austin (1790-1859).
- [2] Amir Syarifuddin in "Fakultas Syari'ah Sebagai Lembaga Pendidikan Yang Berperan Strategis Dalam Membina Dan Mengembangkan Ilmu Syariah"
- [3] Anwar, Syamsul(2004) "*Pengembangan Metode Penelitian Hukum Islam*", in Riyanta et al. (eds.), *Neo Ushul Fiqh: Menuju Ijtihad Kontekstual*, Yogyakarta: Fakultas Syariah Press
- [4] This sentence was quoted by Alan Hunt in explaining the thought of sociological jurisprudence. That statement was conveyed via his book "*Explorations in Law and Society Toward Constitutive Theory of Law*", Routhledge, New York, 1993, p. 37.
- [5] Read Chambliss' theory on how law works.
- [6] Sidharta, "Postmodernisme dalam Ilmu Hukum", paper was conveyed at seminar on "Postmodernism and Its Impact into Knowledge" and book launching commemorating 70 years of Prof. Dr. Ir. Dali Santun Naga, MMSI at University of Tarumanegara on February 17th 2005.
- [7] Further explanation can be read on Jane Banfield (edit.), "*Readings in Law and Society*, fifth edition, Capture Press, 1993, p. 2&9, and Darji Darmodihardjo and Sidharta, "Pokok-pokok Filsafat Hukum", Gramedia Pustaka Utama, Jakarta, 2004, p. 114-115.
- [8] The results of assembly Commission C at *Ijtima' Ulama Komisi Fatwa all-Indonesia 4th year 2012* in Pondok Pesantren Cipasung Tasikmalaya. The chairman was Prof. Dr. H. Ahmad Rofiq, MA and the secretary was Dr. H.M. Khoiril Anwar, MEI.
- [9] About epistemological basis for integrating non-religious sciences into Islamic studies, see Amin Abdullah, "Studi Islam Ditinjau dari Sudut Pandang Filsafat (Pendekatan Filsafat Keilmuan)".
- [10] Amongst couple works in this category are Michael M.J. Pischer and Mehdi Abedi, *Debating Muslims: Cultural Dialogues in Postmodernity and Tradition* (Madison: University of Wisconsin Press, 1990), Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: John Hopkins University Press, 1993), Henry Munson, *Religion and Power in Morocco* (New Haven: Yale University Press, 1993) and John Bowen, *Muslims through Discourse: Religion and Ritual in Gayo Society* (Princeton: Princeton University Press, 1993).
- [11] Noorhaidi Hasan (Fakultas Syariah dan Hukum UIN Sunan Kalijaga Yogyakarta).
- [12] "Meretas Inovasi Kajian Hukum Islam di Indonesia: Pengalaman Fakultas Syariah dan Hukum UIN Sunan Kalijaga Yogyakarta", paper presented at *Semiloka Nasional "Eksistensi Ilmu-Ilmu Syariah di UIN, IAIN, STAIN dan PTAI Swasta: Upaya Mempertegas Peran dan Fungsi serta Integrasi Keilmuan*, at UIN Syarif Hidayatullah, Jakarta, 29th-30th of November 2011.
- [13] About the figure of Hasbi Ash-Shiddieqy and digest of his ideas on Islamic law, see also Malik Ibrahim, "Prof. Dr. Tengku Muhammad Hasby Ash-Shiddieqy dan Pemikirannya tentang Hukum Islam," in Khairuddin Nasution, Ahmad Pattiroy and Slamet Khilmi (eds.), *Pemikiran Hukum Islam Dekan Fakultas Syari'ah UIN Sunan Kalijaga Yogyakarta (1963-2007)* (Yogyakarta: Fakultas Syariah Press, 2008), p. 1-40.
- [14] The experts has begun to pay attention on this globalization era by showing many kinds of attitude, like Fiedman who described that this globalization has made the world flat and playing ground in all aspects competitively which sometimes be deadful. Read: Fiedman, TL, *The World is Flat: The Globalized World in The Twenty-First Century*, (Penguin Books, 2006).
- [15] Arifin, Bustanul ,(1996), *Pelebagaan Hukum Islam di Indonesia : Akar Sejarah, Hambatan dan Prospeknya*, Jakarta: Gema Insani Press
- [16] Banfield, Jane, (1993), *Readings in Law and Society*, fifth edition, Capture Press
- [17] Edward O. Wilson, (1998), *Consilience : The Unity of Kenowledge*, New York
- [18] Hunt , Alan ,(1993), *Explorations in Law and Society Toward Constitutive Theory of Law*", Routhledge, New York
- [19] L. Fuller, Lon, (1971), *The Morality of Law*, Revised Edition, New Haven & London : Yale University Press
- [20] K. Jain, Arvind, (2001) *Corruotion : A review*, International Journal of Economic Surveys, Vol 15, International Journal No.1
- [21] M. Friedman, Lawrence, (1986), *The Legal System : A Social Science Perspective*, New York : Russel Sage Foundation
- [22] Rontos, Kostas, (2015) *The Pillars Of Corruption Control Worldwide: Differences Between Rich And Poor Countries*, Journal of Economics and Business, Vol. XVIII, No 2.
- [23] Milovanovic, Dragan, (1994) "*A Premier in the Sociology of Law*", second edition, Harrow and Heston, New York
- [24] Shiddiqi, Nourouzzaman, (1997), *Fiqh Indonesia: Penggagas dan Gagasannya*, Yogyakarta: Pustaka Pelajar
- [25] Sidharta, "Postmodernisme dalam Ilmu Hukum", paper was conveyed at seminar on "Postmodernism and Its Impact into Knowledge" and book launching commemorating 70 years of Prof. Dr. Ir. Dali Santun Naga, MMSI at University of Tarumanegara on February 17th 2005.
- [26] Syarifuddin, Amir in "Fakultas Syari'ah Sebagai Lembaga Pendidikan Yang Berperan Strategis Dalam Membina Dan Mengembangkan Ilmu Syariah"
- [27] Tamanaha, Brian Z. (1997) "Realistic Socio-Legal Theory Pragmatism and a Social Theory of Law", Oxford University Press, New York
- [28] Triesman, Daniel, (2000), *The Cause Of Corruption: A Cross National Study*, International Journal of Public Economics 76
- [29] TL, Fiedman, (2006), *The World is Flat: The Globalized World in The Twenty-First Century*, Penguin Books
- [30] Warassih, Esmi, (2005), *Pranata Hukum : Sebuah Telaah Sosiologis*, Semarang : Suryandaru Utama