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PREVENTION OF CORRUPTION IN THE PERSPECTIVE OF ISLAMIC CRIMINAL LAW

by Siti Farhani

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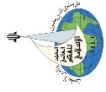
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ON THE PERSPECTIVE OF LAW
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PREFACE

First of all, we would like to thank to Allah SWT. as we all know, this 3rd International Conference on Islamic Epistemology (ICIE 2019) has been held on 8 October 2019 in the Auditorium Arifin Panigoro University Al-Azhar of Indonesia, located at Jakarta, Indonesia.

This Third International Conference on Islamic Epistemology is conducted through the cooperation between Center for Islamic Integration on Scientific Paradigm, University of Al-Azhar Indonesia (PII-MKU) and the International Institute of Islamic Thought (IIIT) with the basis of similar mission in developing Islamic epistemology into scientific paradigm. The first symposium which has also been conducting through the cooperation of PII-MKU and IIIT as the first program and it has used the theme Islamic epistemology from the perspective of modern scientific paradigm.

We have received more than 32 abstracts. The paper selection process was based on full paper submissions. We thank to all authors who have contributed and participated in presenting their works at this conference. We also gratefully acknowledge the important review supports provided by the scientific members of the program committee. Their efforts were crucial to the success of the conference.

More than 300 persons from Indonesia, Australia, and Malaysia and some ambassadors from various countries have been participated in this conference. About 25 presentations including 6 invited talks were presented during the conference. From 32 abstracts submitted during the conference, 20 papers were accepted for publication after peer reviews.

We would like to express our deepest gratitude and honor to Dr. Habib Chirzin as the co Chairman of IIIT Indonesia Chapter. Also we would like to express our respectful appreciation to all speakers, particularly to Keynote Speakers, HE. Mr. Ibrahim Ali Shoukry from Islamic Development Bank (IDB) and Jimboh Santoso, S.E., M.Sc., Ph.D from Commissioner Board of OJK Indonesia, also Prof. Dr. Sonny Zuhuda from International Islamic University Malaysia at Kuala Lumpur Malaysia who has presented "Financial Technology Regulated System and Its Benefit for the Maslahat of Ummah", and also to the speaker, Mr. Sajid Bokhari from National Australia Bank Limited, Australia, who has presented "Fintech Opportunities for the Halal Industry" and also Dr. Sapta Nirwandar from the Indonesia Halal Lifestyle Center, Indonesia who has presented under the topic "Halal Lifestyle in the Era of Financial Technology", and also to Mr. Mohd. Yazrie bin Mohd. Shukri as entrepreneur and Founder YAZ Venture who has presented under the topic "Industrial Revolution 4.0: A Wake Up (and alarming) Call For The Ummah".

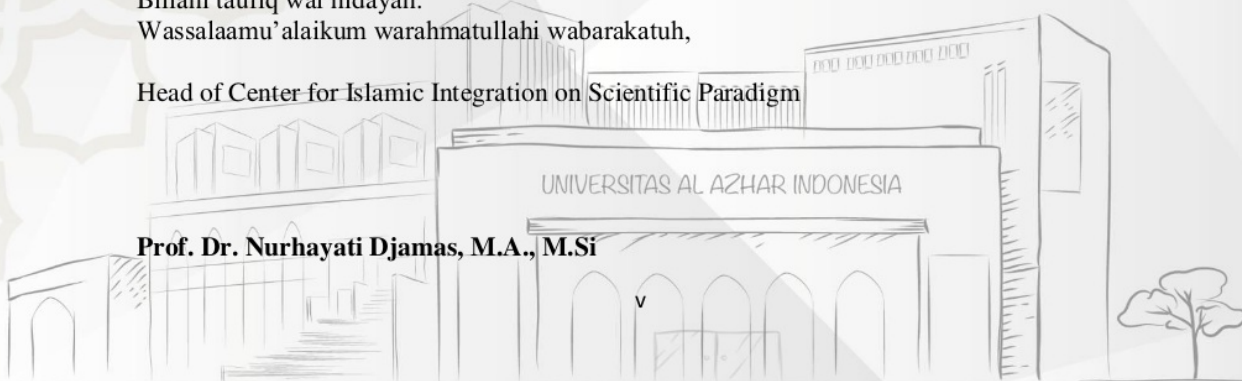
Finally, we also deliver our gratitude to all who have supported this conference. Thank to all sponsors, all participants, our Rector, all of civitas academica UAI and to all of committees who have assisted the success of this conference.

Billahi taufiq wal hidayah.

Wassalaamu'alaikum warahmatullahi wabarakatuh,

Head of Center for Islamic Integration on Scientific Paradigm

Prof. Dr. Nurhayati Djamal, M.A., M.Si





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PREVENTION OF CORRUPTION IN THE PERSPECTIVE OF ISLAMIC CRIMINAL LAW

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Abstract

Corruption is an extraordinary crime that is very influential on the stability of the country's economy, because corruption acts against the joints of the country's economy that can destroy the Indonesian nation slowly and surely. Because corruption is a criminal act that is systemic and detrimental to sustainable development, it requires preventive measures at the national and international levels. In order to carry out the prevention and eradication of corruption that is efficient and effective it is necessary to support good governance management and international cooperation including the return of assets originating from criminal acts of corruption. Because it is said that corruption is an extra ordinary crime, therefore extraordinary legal efforts are needed to eradicate corruption. One of them is by conducting studies on efforts to tackle corruption from various disciplines, one of which is in the perspective of Islamic criminal law. This research will assess the needs and quality of efforts to eradicate corruption in Indonesia from the perspective of Islamic criminal law. The results of this research are expected to provide input to resolve problems regarding efforts to tackle corruption in another perspective, namely from the perspective of Islamic criminal law.

Keywords: Corruption, Criminal Law, Islamic Law Perspective, Corruption Eradication.

1. INTRODUCTION

Corruption is an extraordinary crime, because corruption is a very serious problem, corruption can endanger the stability, security of the country and its people, endanger the social and economic development of society, politics, and can even damage the values of the value of democracy and the morality of the nation because it can have an impact on the culture of corruption.¹

Corruption, as an international legal term, may include various crimes that have special links with each other, which are all called (corruption crimes). In this

¹ Ermansjah Djaja, *Memberantas Korupsi Bersama KPK: Kajian Yuridis Normatif UU Nomor 31 Tahun 1999 juncto UU Nomor 20 Tahun 2001 versi UU Nomor 30 Tahun 2002*, Cet. 1, Jakarta: Sinar Grafika, 2008. Page. 2.

⁴ context, there is not specific crime that can be called corruption crime, but this term includes various ones. Accordingly, the UN convention in counter-corruption has put rules and investigative, judicial procedures for corruption fighting and to inflict punishment thereof.²

Islam views corruption as a crime against human property (*akl amwal al-nas bi al-bathil*) and is essentially similar to *ghulul*, namely betrayal of the mandate in the management of spoils of war (*ghanimah*). *Ghulul* is clearly forbidden in the Qur'an with the threat that the culprit will bring the corrupted goods as accountability in the afterlife.³

The word of Allah in the Quran surah Al-Baqarah verse 188:⁴

"And let not one of you eat the treasure of another part of you by way of the way and (do not) you bring (the affairs) of that treasure to the judge, so that you can eat a portion of the property of others by (way of committing) sin, even though you know. "

According to M. Cholil Nafis, there are at least three crimes in corruption, namely: First, crimes that have an impact on the loss of state money so that acute acts of corruption will cause loss of people's lives, widen social-economic inequality, and eliminate justice. Second, corruption can eliminate the citizens' right to life and regulation of state finances. A corrupt country will lead to poverty and ignorance. Third, corruption crimes undermine the honor and safety of future generations. The finding that Indonesia is the most corrupt country causes our self-esteem as a nation to be tarnished. Based on this, corruption is contrary to the objectives of Sharia (*maqashid alsyari'ah*), namely protecting the soul (*hifd al-nafs*), protecting property (*hifd al-mal*), and protecting offspring (*al-aql*) and blasphemy against religion (*hifd al-din*).⁵

Because it is said that corruption is an ordinary crime, therefore extraordinary legal efforts are needed to eradicate corruption. Various efforts have been made by the Government to tackle corruption, but the plague of corruption is still mushrooming and increasingly widespread, as if the efforts made by the Government have no effect to minimize corruption.

Based on the background above, the author is interested in studying the Corruption Crime Countermeasure in the Perspective of Islamic Criminal Law. For this reason, research is expected to generate new thinking, the need for overcoming the crime of corruption through another perspective, namely through the perspective of Islamic criminal law. The results of this study are expected to

² Ghaleb Hawamdeh, Countering The Crimes of Administrative Corruption in The International Law, International Journal of Asian Social Science, Vol. 8, No. 9, 751-769, 2018. Page 1.

³ Agus Kasiyanto, Teori dan Praktik Sistem Peradilan Tipikor Terpadu di Indonesia, Jakarta: Kencana, 2018. Page. 31.

⁴ Departement Agama Republik Indonesia, Al Quran Terjemahan, Bandung: CV Darus Sunah, 2017. Surah Al-Baqarah verse 188

⁵ Op.Cit. Agus Kasiyanto. Page. 32.

help provide solutions to the handling of corruption, as well as provide recommendations in the form of formulas in dealing with corruption.

2. LITERATURE REVIEW

2.1 Research Question

Considering the description and background above and taking into account the factual conditions regarding the handling of corruption in Indonesia, the next discussion will come to the issue regarding the process of overcoming corruption in Indonesia which is related to the rules in carrying out the process of handling the criminal act of corruption, what efforts and obstacles alone experienced during the process of tackling corruption. Therefore this research is focused on the concept of overcoming corruption in another perspective, namely the perspective of Islamic criminal law. With the formulation of the problem include:

- 1) What are the government's efforts to tackle corruption in Indonesia?
- 2) What are the obstacles in tackling corruption in Indonesia?
- 3) What is the concept of tackling corruption in the perspective of Islamic criminal law?

2.2 Research Purposes

The purpose of this research is to answer the questions which are formulated as follows:

- 1) To find out what are the government's efforts to tackle corruption in Indonesia.
- 2) To find out what are the obstacles in tackling corruption in Indonesia.
- 3) To find out and learn how the concept of combating corruption in the perspective of Islamic criminal law.

3. METHOD

The method used to carry out research and analyze research results, is designed as follows:

3.1 Research Method

This research uses a normative juridical method with a descriptive analytical approach. That is, writing is done by first examining library materials that are closely related to this thesis by looking for information from legislation books relating to research issues, besides that the author also explores and draws from various sources including seminar papers, socialization, then coupled with observations and direct interviews to the field with the main attention on the rules of handling criminal acts of corruption in the perspective of Islamic criminal law, so that thus there is a temporary synchronization that can be set forth in this study.

3.2 Research Method

3.2.1 To answer the first question, use primary legal material through books, articles, journals and legislation.

3.2.2 To answer the second research question, use secondary data which includes:

- 1) Primary legal materials, namely legal materials that have binding legal force. Then the primary legal material in the form of legislation includes the Corruption Eradication Act, the Criminal Code, the Criminal Procedure Code and other laws and regulations.
- 2) Secondary legal materials, namely materials related to primary legal materials and provide an adequate description of primary legal materials. This material consists of books relating to research material, research exposures, articles, and other scientific writing.
- 3) Tertiary legal material that helps examine writings such as jurisprudence and court decisions relating to this research material, as well as dictionaries containing technical terms.

3.3 Data Analysis

Based on the results of the analysis in the two steps above and to answer the third research question, an in-depth analysis of the provisions of the Criminal Law and other laws and regulations related to the source of Islamic law in tackling corruption.

4. RESULTS

4.1 *Government's Efforts to Tackle Corruption in Indonesia.*

The government through its legal instruments has made various efforts and policies to make legal regulations in eradicating criminal acts of corruption, which in essence cannot be separated from the purpose of overcoming crime which is part of criminal law politics.⁶ In this connection, the politics of criminal law of corruption can be interpreted as "all rational efforts from the community to tackle corruption crime".⁷ These efforts include the activities of lawmakers, police, prosecutors, courts and officials related to the execution of corruption crimes.

Efforts made by the government to tackle corruption have often been intensified in various forms such as socializing anti-corruption movements, forming Corruption Eradication Commissions, and establishing corruption criminal trials in regions in the hope of reaching out to regional corrupt practices. However, these efforts have not been able to eradicate corruption, and even corrupt practices are mushrooming in various regions.

⁶ Adi Toegarisman, *Pemberantasan Korupsi dalam Paradigma Efisiensi*, Jakarta: Penerbit Buku Kompas, 2016. Page 13.

⁷ Muladi dan Barda Nawawi Arief, *Bunga Rampai Hukum Pidana*, Bandung: Penerbit Alumni, 1992. Page 1.

The principle of efforts to eradicate corruption must also be supported by the principles of good governance to form an impartial legal system, criminal justice and public order that upholds fundamental political and civil rights, protects personal security and provides rules that are consistent, transparent to achieve the goals of overcoming corruption.⁸

4.2 *Obstacles in overcoming corruption in Indonesia.*

Efforts in tackling corruption are not easy. Although various efforts have been made to tackle corruption, corrupt practices are still growing and even mushrooming. The various obstacles in eradicating corruption can be classified as follows:⁹

- 1) Structural Barriers, namely obstacles that originate from the practices of state and government administration that make handling of criminal acts of corruption not run as they should. Included in this group include: sectoral and institutional egoism that leads to the submission of as much funding for the sector and its institutions without regard to overall national needs and seeks to cover up irregularities in the relevant sectors and agencies; the functioning of the supervision function effectively; weak coordination between the supervisory apparatus and law enforcement officers; and the weak internal control system which has a positive correlation with various irregularities and inefficiencies in the management of state assets and the low quality of public services.
- 2) Cultural Barriers, namely obstacles that stem from negative habits that develop in society. Included in this group include: the existence of "reluctance" and tolerance among government officials that can hamper the handling of corruption; lack of openness of the leadership of the agency so that it often seems tolerant and protect the perpetrators of corruption, interference of the executive, legislative and judiciary in handling corruption, the low commitment to deal with corruption firmly and thoroughly, as well as the permissiveness (ignorance) of the majority of the public towards efforts to eradicate corruption .
- 3) Instrumental Obstacles, namely obstacles originating from the lack of supporting instruments in the form of laws and regulations that make handling of criminal acts of corruption not run properly. Included in this group include: there are still overlapping laws and regulations that cause corrupt actions in the form of fund bubbles within government agencies; the absence of a "single identification number" or an identification that applies to all community needs (SIMs, taxes, banks, etc.) that can reduce opportunities for abuse by every member of the community; weak law enforcement handling corruption; and the difficulty of proving corruption.

⁸ Andi Hamzah, Pemberantasan Korupsi melalui Hukum Pidana Nasional dan Internasional, Jakarta: Rajawali Pers, 2014. Page 233.

⁹ Wicipto Setiadi, Korupsi di Indonesia (Penyebab, Bahaya, Hambatan dan Upaya Pemberantasan, Serta Regulasi), Jurnal Vol 1, Jakarta: Universitas Pembangunan Nasional (UPN) "Veteran" Jakarta. Page 252-253

- 4) Management Obstacles, which are obstacles that stem from ignoring or not applying good management principles (high commitment carried out fairly, transparently and accountably) which makes handling of criminal acts of corruption not run as it should. Included in this group include: lack of commitment by the management (Government) in following up on the results of supervision; weak coordination between the supervisory apparatus and between the surveillance apparatus and law enforcement officers; lack of information technology support in the administration of government; not independent monitoring organization; lack of professionalism by most supervisory officers; lack of system support and supervision procedures in dealing with corruption, and inadequate staffing systems including recruitment systems, low "formal salary" civil servants, performance appraisals and reward and punishment.

4.3 Prevention of Corruption in the Perspective of Islamic Criminal Law

The word Islam comes from Arabic which refers to submission and complete obedience to Allah, this is why it is called Islam. Another literal meaning of the word Islam is "peace" and this indicates that one can achieve true peace of mind and body only through submission and obedience to Allah.¹⁰

Judging from the source of the crime, punishment in Islam has a very solid foundation, namely the Qur'an and the Sunnah of the Prophet Muhammad, and not based on human conjectures alone regarding matters that are considered fair. In terms of legal certainty, it is also clear because humans are prohibited from changing the sentences that are threatened, so for crimes that are threatened with punishment there must be no change, prohibited acts will continue to be prohibited.¹¹

Corruption in Islamic criminal law is called *ghulul*, where *ghulul* fulfills all elements of corruption because:¹²

- 1) *Ghulul* occurs because there is an intention to enrich themselves.
- 2) *Ghulul* harms others and at the same time harms the country's wealth because *ghanimah* and gifts that are embezzled (received) by the perpetrators result in the scattering of the rights of others and the rights of the State.
- 3) *Ghulul* occurs because of abuse of authority.
- 4) *Ghulul* is an act that is contrary to and at the same time against the law because it is prohibited by religion and damages the legal and moral system of society.

For corruption, there are several elements that can be considered by judges in determining the right type of punishment for corruptors, including: seizure of other people's assets, betrayal or abuse of authority, cooperation in crime. The

¹⁰ Topo Santoso, *Asas-Asas Hukum Pidana Islam*, Jakarta, PT. Raja Grafindo Persada, 2016. Page 37.

¹¹ *Ibid.* Page. 146.

¹² Amelia, *Korupsi dalam Tinjauan Hukum Islam*, *Jurnal Juris* Vol 9 No. Juni 2010. Page 80.

element of this punishment depends on the shape and size of the consequences arising from corruption committed.

Corruption is a crime that is clearly prohibited in Islamic law. Henceforth it is left to the judge's discretion to decide what type of punishment is appropriate. This sentence must of course be based on common sense, the conviction and sense of justice of the judge based on the justice of the community to determine the type of punishment that is appropriate for the perpetrators of corruption. This type of punishment is called *'uqubah mukhayyarah* (optional punishment).

For criminal acts of corruption clearly constitutes immorality which carries strict punishment in the Koran or the Sunnah of the Prophet, therefore for the perpetrators of corruption the appropriate punishment for the perpetrators is *ta'zir* law (Refusing and Preventing). The objectives of *ta'zir* sanctions are as follows:¹³

- 1) Preventive (prevention). Aimed at others who have not yet done Jarimah.
- 2) Repressive (making a deterrent). Intended so that the perpetrators do not repeat the deeds of the finger in the future.
- 3) Curative (reconciliation). *Ta'zir* must be able to bring improvements in the behavior of convicts in the future.
- 4) Educative (education). Expected to be able to change his lifestyle towards a better.

Ta'zir applies to all people who commit crimes. The condition is common sense. There is no difference between men and women, adults and children, or infidels and Muslims. Every person who commits munkar or harasses another party with an excuse that is not justified either by actions, words, or cues needs to be sanctioned *ta'zir* so as not to repeat his actions.

5. DISCUSSION

The National Criminal Law that is currently used in tackling corruption has essentially embraced Islamic values, and the purpose of national law is also in line with where the Islamic law is to provide misery for perpetrators of criminal acts of corruption. But the difference here is regarding the application of the law. Islamic Criminal Law is an absolute law where its contents cannot be changed by anyone based on the Al-Quran and Al-Hadith and its law enforcement is carried out according to the provisions contained in the Al-Quran and Al-Hadith. It is different from national law, the contents of which can be changed by humans even by the stakeholders who can betray and harm the interests of the community. Therefore, the perspective of Islamic law in dealing with corruption should be focused on fixing material laws that contain Islamic values, so that the regulation on combating corruption can protect the interests of the wider community, not the interests of the authorities, as well as healthy law enforcement in carrying out its functions based on what has been taught in Islamic law.

Regarding the *al-takeef al-kanuni* (legal characterization) of this criminal offense, Muslim *'ulmma* (scholars) differ in defining it. Etymologically, *fasadlifsad* (corruption) covers mischief, misuse, degradation, spoiledness, decay,

¹³ Nurul irfan, Masyrofah, Fiqih Jinayah, Jakarta: Amzah, 2013. Page. 136.

corrosion, putrefaction, depravity, wickedness, viciousness, inequity, fraudulence, misconfidence, and pervertedness. Epistemologically, there are many descriptions among Muslim jurists in the criminal context, as some argued that *rashwa* (bribery) is the key form of corruption and defined it as what is given to invalidate (nullify) a *haq* (right) or to validate (legalize) a *batil* (deception or falsehood). Others claimed that bribery is a gift, whether in real or monetary terms, presented to judges, heads of states, public officials, and other decision/policy makers to enable a favorable ruling or verdict. Other intellectuals said bribery is an abuse of judicial or administrative power or of political authority, trust, or financial competency. Accordingly, most Muslim criminal jurists see bribery as embodying corruption as “something given by the *briber* and received by the *bribee* irrespective of it is a material or a moral thing, money or a benefit.” They having canvassed Muslim academics, white-collar crimes can be described as “cover[ing] governance matters, decision making, rules through rebuking the misuse of trust placed in public servants through acts such as accepting gifts, utter misappropriation or embezzlement of public funds, and undermining rules in exchange for bribes, on recommendation or due to family and tribal considerations (peddling/trafficking in influence).”¹⁴

It is significant to highlight the distinction between bribery and other numerous concepts that are in close connection with it, comprising illegal earnings, gifts, charities, and salaries. *alsoht* means *al-haram alzy la yahal kesbhe wa akleh* (prohibited earnings and the maximization of profits in an illegitimate manner) and is defined by the *Maliki* School as “bribery given to the witness to testify, the judge to rule, and the price of power.” On the other hand, *alhadiya* (gift) means to give something without any compensation in a real or monetary form and supported by the *Qur’an*. Therefore, the purpose of both a gift and a bribe is to transfer the benefit to the other, although with a gift, there is no compensation expected, and in contrast, the briber anticipates his private benefit from the bribe. *alSadaqah* (charity) means giving it to the poor people in order to be blessed and receive the mercy of God, which is the only true purpose of giving it, and so, it involves giving without any monetary or non-monetary compensation. Sometimes, the bribee is a poor person or the briber gives whatever he wants to give in order to be closer to him, but in reality, he has a private interest, and in such a case, charity becomes *rashwa mukna’h* (disguised bribery). *alGa’al* (wage) is a known monetary obligation upon a certain work, whether known or unknown. Although it is originally legitimate, some doctrines (as *Shafi’i* School) prohibit it at certain times where it might disguise fraudulent transactions, for instance, if it represents an obstacle to the realization of other legitimate public interests. The Prophet Mohammad’s companions (Omar ibn elkhatib) used to record the possessions of the public officials at the times of their appointments and confiscated wholly or partly whatsoever they added while in office on doubt of benefiting from their jobs.

¹⁴ Mohamed A. Arafa, White-collar crimes, corruption and bribery in Islamic criminal law: Lacuna and conceivable Path, *Rule of Law and Anti Corruption Jurnal*, 2018, Page. 3.

6. CONCLUSION

The responsibility of all Muslims is to play a proactive role in the campaign against corruption as it represents a veritable ‘amal ṣ ālih (good task-motive) which is the right moral action that the Qur’an recurrently commands upon all Muslims. Moreover, it is an act with great societal benefit that raises the standing of the ummah (community) along with the international community. Combating *rashwa* (bribery) and *fasād* (corruption) is an integral part of the Qur’anic teachings and the *hadith* (Mohammad’s teachings). The Qur’an forbids *akl al-māl bi’l-bātil* (devouring/ misappropriation of the property of others), which is a broad concept that subsumes such other offences as fraud, hoarding, theft, and gambling. Furthermore, the Islamic law condemns those in authority who spread corruption and mischief among people, bestowing favors on some and oppressing others. The Prophet Mohammad added his voice to say that all the parties to bribery, “the bribe-taker, the bribe-giver, and their go-between,” provoke God’s wrath and condemnation.

It should be noted that the scope of *rashwah* is prolonged to financial transactions among the members of the public and governmental officials, which are obviously favorable to the latter, and hence, any sale, lease, hire, and partnership that are so concluded fall under bribery. The second *Caliph* ‘Umar *ibn al Khattab* expropriated and confiscated the properties of some of his officials had accumulated due to favors they had received and he divided the assets in question and surrendered a portion thereof to the public treasury. Thus, *Fasād* is more general than *rashwah* as it includes dishonesty, betrayal, trust, abuse of power, and deceit in both private and public dealings. It refers to private gain from public office or seeking recompense for rendering duties customarily considered as non-compensatory. Because of the many forms it can take, corruption escapes inclusive definition, as it knows no boundaries, applies to rich and poor, as well as to individuals and communities, and tends to have a cultural dimension. Although conducts such as officials demanding bribes are considered corrupt in virtually all cultures, attitudes vary as to gift giving and cronyism among countries and cultures. Furthermore, it is forbidden for government officials to accept any kind of bribe from anyone, whether gift, donation, or contribution, in the course of duty, irrespective of whether the gift is specified or unspecified and benefits the official directly or indirectly. Other models of enrichment that materialize through misuse of public assets may amount to *khiyānah* (a breach of trust) and *ikhtilās* (embezzlement), which are also prohibited and a gift that has not yet been received by the official should be returned to the donor, but if this cannot be done, it should be paid to the public treasury.

Prevention of corruption in the Islamic Criminal Law Perspective has been regulated in the Al-Quran and Al-Hadith and is categorized as immoral acts or *Ta’zir*, regarding the application of law that can be imposed on corruption perpetrators is left to the judge’s discretion to decide what type of punishment is appropriate. This punishment must of course be based on common sense, beliefs and a sense of justice for judges based on community justice to determine the type of punishment that is appropriate for the perpetrators of corruption.

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