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Legal Reconstruction in Indonesia Based on Human Rights

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Faculty of Law, Sultan Agung Islamic University

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“Legal Reconstruction in Indonesia Based on Human Right”

IMAM AS SYAFEI BUILDING

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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnau, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

PROCEEDINGS

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Criminological Aspects of Corruption Crime

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Abstract

This article will discuss about Corruption and Organized Crime, Corruption and the White Collar Crime and the Etiology of Corruption. Organized crime has become the most important domain in criminology for research on corruption. criminologists place corruption within the scope of the types of crimes that occur in an organizational context. Therefore, it makes sense to explore whether the theories that have been developed to understand forms of crime also apply to the etiology of corruption

Keywords: Criminology, Crime, corruption, etiology.

A. INTRODUCTION

Corruption is a form of crime. Most people, including scholars, would agree on that. Criminology is a discipline that makes crime the object of its study. However, corruption is rarely the focus of criminological research. When corruption is examined, it is mostly in the context of a broader concept of crime, such as organized crime. The study of corruption from the criminological aspect is important, considering that criminology makes a very large contribution to criminal law, by revealing the factors that cause corrupt criminal behavior, which forms the basis of criminal policies in the process of tackling corruption crimes.

This article will discuss about Corruption and Organized Crime, Corruption and the White Collar Crime and the Etiology of Corruption

B. DISCUSSION

1. Corruption according to an Islamic perspective

Currently in Indonesia, it can be said that corruption cases have become commonplace. We can see it in the data from the Corruption Eradication Commission (KPK) 2019 corruption cases in the scope of bribery reached 661 cases, this indicates that there are so many corruptors in Indonesia. With all

kinds of demands and encouragement from those who force corruptors to take what is not their right.

Islam itself divides the term corruption into several points, namely Risywah or bribery, Saraqah or theft, Al-gasysy or fraud and also betrayal or betrayal. Corruption in the dimension of bribery or Risywah in the view of Islamic law is a disgraceful act and is also a major sin due to mass destruction, and Allah curses the perpetrator.

Saraqah or theft, seen from its etymology, means committing an action to another person by hiding it. However, according to Abdul Qadir 'Awdah, theft is defined as the act of taking other people's property in a hidden state.

Allah strictly forbids us to do corruption, this is contained in:

- An-nisa': 29
O you who believe, do not eat each other's wealth in an evil way, except by way of commerce which is consensual among you. And don't kill yourselves; verily Allah is Most Merciful to you.
- Al-Ma'idah: 2
O you who believe, do not violate the syi'ar-syi'ar of Allah, and do not violate the honor of the haram months, do not (disturb) the animals had-ya, and animals qalaa-id, and do not (also) disturbing people who visit Baitullah while they are looking for gifts and pleasure from their

Lord and when you have completed the pilgrimage, then it is permissible to hunt. And do not ever hate (mu) for a people because they prevent you from the Masjidilharam, encouraging you to do persecution (to them). And help you in (doing) goodness and piety, and don't help in committing sins and transgressions. And fear Allah, indeed Allah is very heavy in punishment.

• Al-Ma'idah: 42

They are people who like to hear fake news, eat a lot of what is haram. If they (the Jews) come to you (to ask for a verdict), then decide (the matter) among them, or turn away from them; if you turn away from them they will not harm you in the slightest. And if you decide their case, then decide (that matter) among them fairly, verily Allah loves those who are just.

Allah does not forbid something which contains a lot of mudhorot for the perpetrator and many people. Likewise with corruption or ghulul. The doer of ghulul will be shackled or will bring the results of corruption on the Day of Judgment as the Prophet said: "By Allah, my soul is in His hands. Not someone will take something from it (zakat property), but he will come on the Day of Judgment with something around his neck. If what a camel takes, the camel eats a voice. If what a cow takes, then the cow makes a sound ..."

And also not accepting Sadaqah from the results of corruption, how can we donate part of the property that is not our right, of course, basically this is something that is haram. So that the impact on the perpetrator is that it can hinder the fulfillment of the prayer he is praying.

The law that gives to ghulul actors is cutting off their hands. Of course there is a wisdom behind this law, as in Saudi Arabia the application of this law, for example, there is a thief who steals on Friday and then advertises in the mass media. Then the next day there will be a police car carrying the thief, and there will also be an ambulance and

a medical team who will take care of him after his hand has been cut off, and there is a court car that reports to the king when the execution has been carried out. Then the perpetrator's hand will be placed on the table and then tied with his left hand and then cut off his palm.

With this law some people say that this is a cruel punishment, a harsh punishment and so on. Let us imagine with the application of this law in Indonesia, how big the impact will be. We advertise the corruptors and they will be executed via social media as is applied in Saudi Arabia, the chances of corruption will disappear. Because the punishment applied is very harsh, but in reality the punishment for corruptors only has to live in iron bars that have facilities like "their own house". Punishment like this will not deter the corruptors, there will be many perpetrators who will be corrupt.¹

2. Corruption and organized crime

Organized crime has become the most important domain in criminology for research on corruption. This was motivated by the existence of an international criminal policy initiative in the late nineties in fighting organized crime. Organized crime is considered a criminal phenomenon that increasingly threatens the country's economy, but it seems difficult for law enforcement to catch the illegal networks behind organized crime. Money laundering and corruption are considered mechanisms used by criminal organizations to facilitate or to continue illegal activities that benefit them without being detected. In the case of money laundering, there is a unique symbiosis between organized crime and the legal market which is linked to, among others, the financial sector, real estate sector and art trading. In cases of corruption, a distinction is made between corruption at the political level, at the enforcement level or at the administrative level.

¹ <https://tafsirq.com>

On a world scale, Van Dijk found a strong correlation between the level of organized crime in a country and the level of corruption, as reported by Transparency International.² However, it should be recognized that relations with illegal organizations are only one particular dimension of corruption. There is another dimension of corruption which is why it is important to discuss corruption as a criminal phenomenon.

2. Corruption and White Collar Crime

Corruption and White Collar Crime (WCC) are the second concept of criminological research on corruption. Sutherland, who introduced this concept, and defined the WCC as a crime committed by someone of honor or of high social status during his tenure.³ This definition refers to empirical research which explains that criminal behavior is carried out by members of a high socio-economic class during their tenure, and in fact, the person or company is the beneficiary of this criminal behavior. With regard to the function of criminal law in defining the WCC, according to Sutherland, the reality is that criminal law in general does not cover all forms of WCC because most of the dangerous activities by WCC criminals remain outside the court. Given that "upper class" criminals often operate undetected, that if detected they may not be prosecuted, and that if prosecuted they may not be convicted "the amount of criminally convicted persons are far from the total population of white collar criminals."⁴

According to the 2008 Global Integrity report,⁵ Most countries have anti-corruption regulations and even those countries are

considered prone to corruption. But when we examine the application of anti-corruption laws, the results are less optimistic. In many countries, practice-restricted, or, cases end in disciplinary action or are dismissed for lack of evidence.

3. Etiology of Corruption

As stated earlier, criminologists place corruption within the scope of the types of crimes that occur in an organizational context. Therefore, it makes sense to explore whether the theories that have been developed to understand forms of crime also apply to the etiology of corruption. In the context of corporate crime, companies can act as agents who offer bribes in order to achieve company goals, for example to obtain projects, or to obtain government permits. On the passive side, it will result in members of a private or public service organization accepting bribes to benefit themselves, in exchange for services that may not be for the benefit of the organization.

Theories about the causes of organized and white collar crime are often elaborated on in general theories about crime. This theory focuses on three categories of explanatory variables, namely motivation, opportunity and operational social control. According to Coleman,⁶ motif is a set of symbolic constructions of several types of goals and activities that are appropriate and desired. Opportunities require a course of potential action, made possible by the particular setting of social conditions, which the actor has symbolically adopted.⁷ Operational control is the opposite of opportunity: the imposition of informal and formal controls, which function as a deterrent to crime. When motivation is a subjective construct of psychological desire, and opportunity and control are rooted in

² J. van Dijk, I. Sagel Grande and L. Toornvliet, 2006, *Actuele Criminologie*, The Hague.

³ Sutherland, E. H., 1961. *White collar crime*. New York: Holt, Rinehart and Winston, p. 9

⁴ Slapper G and Tombs S, 1999, *Corporate crime*. Essex: Pearson, p. 3

⁵ Global Integrity Report, 2008, results: <http://report.globalintegrity.org/globalindex/results.cfm>

⁶ Coleman, JW *Toward an Integrated Theory of White-Collar Crime*, 1987. *American Journal of Sociology* 93 (2), p. 409

⁷ Shover, N., & Bryant, KM, 1993. *Theoretical Explanations of Corporate Crime*, in: Blankenship, MB *Understanding Corporate Criminality*. New York: Garland Publishing, p. 144

objective social conditions, the inseparable variables are interwoven in certain settings. Motivation evolves in response to certain structural opportunities. Opportunities require symbolic constructs that make psychological behavioral choices available to the perpetrator, whereas lack of control contributes to opportunities to commit crimes.

This suggests that the explanatory variables can be found at several levels of the aggregate: the level of individual actors and their social interactions, the level of structural organization and organizational culture, and the institutional level of political economy and business regulation.⁸ Vaughan,⁹ emphasizes the importance of understanding the interconnections and relationships between the environment, organizational settings and individual behavior in order to explain actions performed in an organizational context.

4. Globalization and Anomie

Most writers in the field of criminology admit that globalization has an effect on corruption. According to Passas,¹⁰ globalization multiplies, intensifies and activates the asymmetric criminogens that lie at the root of corporate crime. Passas defines it as mismatches and gaps in the political, cultural, economic and legal fields. It is a criminogenic factor that offers illegal opportunities, creates a motive for using the opportunities, and allows offenders to do so.

Passas sees corruption as a conservative force that maintains or increases the asymmetry that hinders social, economic and political progress and facilitates illegal markets that are the result of asymmetry.

Corruption, on the other hand, is also a consequence of asymmetry. Companies operating slowly and administering inefficiently will be tempted to pay 'facilitation payments' for business opportunities. This condition will allow the growth of an attitude to justify corruption.

On the other hand, criminogenous asymmetry can also be found in the regulation of corruption. The nature and rigor of regulations on corruption clearly differ from country to country, ranging from the absence of binding standards, as well as the emphasis on regulation and criminalization. Even though most countries have regulations on corruption that were developed after ratifying the Anti-Bribery Convention (OECD), many countries are still ambiguous because the law enforcement process is not going well.¹¹

Asymmetry in corruption regulations not only provides de jure opportunities, but can also contribute to moral ambiguity in the giving and taking of bribes. Lack of clarity of regulatory requirements, and therefore prevailing norms and limits of acceptable behavior, is often seen as a distinctive feature of white collar crime.¹² Situations where there is high uncertainty or confusion as to what and what is unacceptable, due to radical changes in society, is labeled by Durkheim as 'anomic' (normless). Reputable countries.

High corruption, maybe while in the process of rapid and radical changes such as changes in politics, democratic systems, free markets can lead to instability. Corruption is unlikely to be blamed for this mess, but in fact it may reflect it.¹³ In this regard, Klitgaard argues that the rapid development in international trade and international communication causes nations to be tempted

⁸Kramer, RC & Michalowski, RJ, 2006. State-corporate crime. Worngdoing at the intersection of business and government. New Brunswick: Rutgers University Press

⁹Vaughan, D. 2002. Criminology and the sociology of organizations. Analogy, comparative social organization, and general theory. *Crime, Law and Social Change*, 37, p. 117

¹⁰ Passas, N. 1998. Structural Analysis of Corruption: The Role of Criminogenic Asymmetries. *Transnational Organized Crime*, p. 4

¹¹ International Transparency, the Corruption Perception Index, 2008, Retrieval from: http://www.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table 20 January 2012)

¹²Zimring, FE, & Johnson, DT On the comparative study of corruption. *British Journal of Criminology*, 52, 2005, p. 794

¹³Beare, ME Corruption and Organized Crime: A Means to an End. In B. Rider (ed.) *Corruption: The Enemy Within* The Hague: Kluwer Law International, 1997, p. 65

by high economic gains, while their capabilities are limited. New economic growth gives birth to new needs, and income is being eroded by inflation, so that it is necessary to engage in corruption to fulfill it.¹⁴

Another alternative to looking at the effects of globalization on corruption is that it has increased the sensitivity to corruption. Based on a review of the publications and policy statements of the OECD (Organization for Economic Co-operation and Development, IMF and World Bank, Williams and Beare,¹⁵ states that the key change that has taken place over the last few years is not the growth in the level of global corruption or the severity of the effect on the country's economic growth but rather, reframing corruption as a source of economic risk and uncertainty that problematically must be in line with global economic goals and interests.

At the macro level, many criminologists emphasize the effects of criminogens on 'competitive' culture, a very powerful complex of values and beliefs in social systems based on industrial capitalism.¹⁶ In this case, the greatest interest is to achieve wealth and success, and people are seen as autonomous individuals with powers of reason and free choice, and therefore responsible for their own conditions. Thus, the culture of competition views competitive struggles for personal gain as positive, rather than negative or selfish. Competition produces maximum economic value for society as a whole. The desire for success and the pursuit of wealth are viewed by some criminologists as criminogenic factors.

Another point, points to the opposite fact that carries risks: when success is threatened and legal means are considered the

only method of still achieving wealth. According to Coleman, "fear of falling" is an inevitable correlation of a desire to succeed, which together constitute a powerful set of motivations for economic behavior. The critical question that then arises is whether business globalization has increased the prevalence of corruption or has globalization increased the visibility and sensitivity of corruption.

Strain

Strain theory was originally formulated by Merton as a general theory of crime. In his analysis of American society in the 1930s, Merton argued that the goals of economic success apply to all members of American society (The American Dream), whereas the means that culture suggests to achieve these goals are not uniform among all members and groups. social groups in society. This could lead to groups with less access to legal means of acquiring wealth to seek alternatives, possibly illegally, which Merton dubs 'innovation'. the basic assumption is that society creates tension and can lead to deviant behavior. Cloward and Ohlin also added that the availability of legal means may not be evenly distributed among the community. Children who grow up in environments with a large informal economy may have easier access to illegal opportunities, than children who grow up in environments without these criminogenic opportunities. Strain theory has proven very popular in explaining WCC, especially combined with the idea of anomie. Some research has focused on the relevance of the strains that can be created in organizations for understanding crime, especially when opportunities for profit are threatened, allowing supra behavior to get the opportunities it wants. Children who grow up in environments with a large informal economy may have easier access to illegal opportunities, than children who grow up in environments without these criminogenic opportunities. Strain theory has proven very popular in explaining WCC, especially combined with the idea of anomie. Some research has focused on the relevance of the

¹⁴ Klitgaard Robert, *Memberantas Korupsi*, 1998, Yayasan Obor, Jakarta, p. 31

¹⁵ Williams, JW, & Beare, ME *The business of bribery: Globalization, economic liberalization and the 'problem' of corruption*. *Crime, Law & Social Change*, 32, 1999, p. 115-146.

¹⁶ Coleman, JW 1995. *Motivation and Opportunity: Understanding the Causes of White Collar Crime*. In G. Geis, R Meier & L. Salinger (eds.), *White Collar Crime* (3rd edition) New York: Free Press, p. 363

strains that can be created in organizations for understanding crime, especially when opportunities for profit are threatened, allowing supra behavior to get the opportunities it wants. Children who grow up in environments with a large informal economy may have easier access to illegal opportunities, than children who grow up in environments without these criminogenic opportunities. Strain theory has proven very popular in explaining WCC, especially combined with the idea of anomie. Some research has focused on the relevance of the strains that can be created in organizations for understanding crime, especially when opportunities for profit are threatened, allowing supra behavior to get the opportunities it wants.

However, the application of the strain theory is not limited to firms. This is because, first, because all types of organizations have the goal of looking for entities, innovative ways to achieve goals - apart from profit - can be used when conventional means do not provide access. Corruption as an innovative way of achieving organizational goals - which can be closely linked to personal goals - can also be found in non-profit institutions, such as political parties and NGOs; second, a high level of ambition with which the goals are set and the perception that the achievement of the goals is threatened, which creates a situation of despair. Even in a healthy and profitable corporate economy tension can be a motive for breaking the rules when ambition is set so high. can only be fulfilled by using innovative means. In his study of large retired managerial firms, Clinard found that top management set goals and responsibilities for achieving big goals, which were passed on by the lower management. Ambition from above can create so much internal stress that reactions are only possible for people in midfield or bottom, resulting in them breaking the rules of ethics and the law. Although lower-ranking officers may be forced to do dirty work, such as actually bribing, they cannot possibly do it without personal gain. then passed on by the

management under him. Ambition from above can create so much internal stress that reactions are only possible for people in midfield or bottom, resulting in them breaking the rules of ethics and the law. Although lower-ranking officers may be forced to do dirty work, such as actually bribing, they cannot possibly do it without personal gain. then passed on by the management under him. Ambition from above can create so much internal stress that reactions are only possible for people in midfield or bottom, resulting in them breaking the rules of ethics and the law. Although lower-ranking officers may be forced to do dirty work, such as actually bribing, they cannot possibly do it without personal gain.

Indeed, personal success goals may be linked to and depending on the well-being of the organization, including career advancement, owning shares and receiving personal bonuses. The alignment of personal interests and organizational goals is not limited to companies but can be seen in political and government organizations. Violation of legal norms can simultaneously constitute behavior that conforms to standards and expectations. prevalent in organizations. "These standards can arise from attempts to deal with problematic situations." This means that emerging procedures and standards are clearly not in accordance with the law, but which are seen and rationalized as acceptable and non-criminal, for example because there are no real victims. The same rationalizations could apply standard procedures for being corrupt.

Another rationalization is a situation where corruption is endemic, and many people do it. In a systemically corrupt society, "clientelism" and patronage are the norm, and who does not take part can be viewed as deviant behavior. This rationalization causes deviant behavior that has become deeply embedded in the organizational culture and which is passed on to new organizational members.

Sutherland not only introduced WCC, but also to develop a theory for

understanding deviance as social learning. According to the theory of differential association (Differential Association) criminal behavior is studied like any behavior and the criminal must learn both criminal techniques and motivations beneficial to criminal behavior. Through differential association, techniques, rationalization and attitudes are passed on. The hypothesis of differential association is that criminal behavior is studied in relation to the people who determine the behavior.

C. CLOSING

1. Conclusion

Corruption behavior is a worldwide phenomenon, and countries in various parts of the world, including Indonesia - which is listed as one of the most corrupt countries - have made various efforts to overcome it.

Even so, many countries are not successful in this effort, because they do not carry out a holistic study of the factors that cause corrupt behavior, so that the handling of them does not achieve what is desired. Criminology can be an entry point in determining the right criminal policy in tackling corruption.

2. Suggestions

Criminological analysis of corruption has provided new knowledge that there are limitations to juridical and social control as a means of preventing corruption. The other side of the government always issues surprising policies, especially in the economic sector and the government does not provide facilities that are balanced with the wishes of the people. This becomes a disaster and then crime grows, especially corruption crimes.

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