

Theory of Maslahah (Public Interest) and Its Relevance to Indonesian Corruption Eradication Law

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Abstract: This study focuses on the relevance of *maslahah* (public interest) theory to the Indonesian Corruption Eradication Law (Indonesian Anti-Corruption Law). This study aims to describe and analyze the relevance of *maslahah* theory to criminalization rules, formulation of criminal punishment, and formulation of corporation's criminal liability regulated within Indonesian Anti-Corruption Law. This study applies a qualitative approach and a normative-doctrinal legal study, and uses the documentary study in data collection. The theory of *maslahah* has the points of relevance to the Indonesian Anti-Corruption Law. Such relevance goes to criminalization rules, criminal punishment, and corporation's criminal liability of the Indonesian Corruption Eradication Law.

1 INTRODUCTION

Rifyal Ka'bah argued that Islamic law constitutes an element of Indonesian law system, and it becomes a kind of implementation of the first principle of Pancasila and Article 29 paragraphs (1) and (2) of the 1945 Constitution so that the implementation of Islamic law which requires state authority could obtain constitutional warranty (Ka'bah 1999). Imam Syaukani concluded that the Indonesian epistemology of Islamic law is built on a rationale or a paradigm including (i) understanding Islamic law with the approach and parameter of *maqâsid al-syarî'ah* (the objectives of Islamic law) which cored *maslahah* (public interest) in the framework of Islamic law transformation; and (ii) developing the *maslahah* theory to support the transformative way of Islamic law (Syaukani 2006). Samsul Bahri concluded that the positivisation of Islamic law by using jurisprudence is an effort to transform some values in abstract norms of Qur'an and Sunnah directly into concrete ones; and such matters are closely related to *ijtihad* (independent reasoning) which in fact may not avoid an application of the *maslahah* theory (Bahri 2007). Jimly Asshiddiqie examined that in the light of the modern theoretical approach of sentencing, kinds of Islamic criminal

punishment have relevance to be used as material for legislating a Indonesian criminal law (Asshiddiqie 1996).

Meanwhile, within the Islamic criminal law system, *maslahah* (public interest) also constitutes a primary objective and a main consideration in the formation and development of Islamic criminal law. 'Abd al-Qâdir 'Audah said that in general, Islamic criminal law has a way of criminalization consisting of *qisâs* or *diyât* offences, *hudûd* ones and *ta'zîr* ones; in fact all three are the names for the categories of criminal offences as well as punishments; and all three manifest *maslahah* that constitutes the core of *maqâsid al-syarî'ah* (Islamic law objectives) of the Islamic criminal law ('Audah 1998). It is said that *maslahah* relation to Islamic criminal law may certainly be examined further, to be contextualized in the spectrum of Indonesian criminal law system, especially Indonesian Anti-Corruption Law. In relation to the contextualization of Islamic criminal law, the notion of *maslahah* needs to be examined in terms of its relevance to the Indonesian Anti-Corruption Law. This paper aims to describe and analyze the points of relevance of *maslahah* theory to the Anti-Corruption Law that applies in Indonesia.

2 THEORY

It may be said that *maslahah* (public interest) constitutes a prime objective desired by God-as the lawgiver-in all rules set forth by Him through the *shari'a* holy texts (*nusûs al-syarî'ah*) in the form of *Qur'an* and *Sunnah*. According to al-Gazâli, such *maslahah* includes protection of religion, protection of life, protection of reason, protection of offspring, and protection of property, which are then identified as *darûriyyât* (necessary). Below the *darûriyyât* rank, there is *hâjiyyât* (needed) which aims to provide convenience and support so that *darûriyyât* still exists. Under the rank of *hâjiyyât*, there is *tahsîniyyât* (commendable) which aims to present politeness, civility, beauty and perfection (Al-Ghazali 1997).

Furthermore, al-Gazâli declared that *maslahah* includes 2 (two) solid and holistic elements, namely *jalb al-masâlih wa dar' al-mafâsid* (realizing public interests and preventing as well as eliminating harms). In this case, it is necessary to consider some aspects relating to particular interest (*maslahah khassah*) and public interest (*maslahah 'âmmah*), and the priority is given to public interest. It is said that *maslahah* contained in the *shari'a* holy texts (*Qur'an* and *Sunnah*) may be understood by examining the meanings of the holy texts (*Qur'an* and *Sunnah*) (Al-Ghazali 1997). According to al-Raisûni, here it is necessary to apply the ways of "maslahah-oriented interpretation of the *shari'a* holy texts" (*al-tafsîr al-maslahiy li al-nusûs*) and "maslahah-oriented application of the *shari'a* holy texts" (*al-tatbîq al-maslahiy li al-nusûs*) (A. al-Raisûni 2002).

In dealing with a case that unexplicitly determined by the specific *shari'a* holy texts, it is necessary to refer to the general *shari'a* holy texts, accompanied by steps of *maslahah*-oriented interpretation of the *shari'a* holy texts and *maslahah*-oriented application of the ones. In addition, *maslahah* may be found and applied: (a) by using the application of the analysis of *jalb al-masâlih wa dar' al-mafâsid* (realizing public interest and preventing as well as eliminating harms); (b) by using the application of secondary Islamic law methods or arguments such as *qiyâs* (analogical reasoning), *maslahah mursalah* (independent public interest), *sadd al-dzarî'ah* (rational prevention)), and *'urf* (custom); and (c) by using the application of *qawâ'id fiqhiyyah* (Islamic legal maxims). In this context, the effort to qualify something as *maslahah* should refer to general principles of the *shari'a* holy texts so that any legal conclusion contradictory to such texts may be avoided.

Ahmad Munif Suratmaputra concluded that in relation to new problems arising in public daily life,

the application of *maslahah* is the most appropriate method of *ijtihâd* (independent reasoning); and this has been honored in a number of *ijtihâd* conducted by Companions of the Prophet, the cleric successors (*tâbi'în*) and the scholars of the schools (Suratmaputra 2002). The agenda for reforming Islamic law must determine the application of *maslahah* as the prime formula. Yudian Wahyudi considered that the application of *maslahah* is actually an extraordinary method to develop the values and spirit of Islamic law into various problems (Wahyudi 2006). Hasbi Asshiddiqiey declared that *shari'a* rules of economy and commercial business may be understood and grasped by the reason so that it may be analyzed and interpreted by its objectives of Islamic law, with guidance of the principle of *jalb al-masâlih* and *dar' al-mafâsid* (realizing public interests and preventing as well as eliminating harms), in which everything that contains, or carries to, *maslahah* is *mubâh* (permitted); and vice versa, everything that contains, or brings, to *mafsadah* is *harâm* (forbidden) (Asshiddiqiey 1981). Munawir Sjadzali concluded that *maslahah* (public interest) and justice were the objectives of Islamic law and justice was the basis of *maslahah* (Sjadzali 1988). In line with Munawir Sjadzali, Masdar F. Mas'udi underlined that Islamic law may not be based on a notion that is not law, but a notion that goes beyond the law (meta-law), namely the system of values in form of *maslahah* and justice so that it is relevant for adagium "idzâ sahat al-maslahah fahiya madzhabi" (whenever *maslahah* comes true and valid, there is my own school) (Mas'udi 2004).

Thus, the integration of Islamic law into state law has a choice of strategic way that is far from socio-political resistance, and such way is the application of *maslahah* in the framework of transformation of Islamic law into the state legal system

3 MATERIALS AND METHODS

This study is a model of Islamic law study with a qualitative approach so that it applies a qualitative method. In the light of the Islamic legal studies, this study combines two approaches: theoretical approach and doctrinal one. Theoretical approach is applied because the *maslahah* (public interest) is an important issue discussed within Islamic legal theory (*usûl al-fiqh*) studies. The doctrinal approach is used because the core problem directly related, namely Islamic criminal law, constitutes one aspect of the overall Islamic legal doctrines. In the light of legal research methodology in general, this study is a legal study

(Islamic law) with a doctrinal approach or normative-doctrinal legal study. Within this study, data collection exercises technique of the documentary study. The data collection instrument is the researcher himself, something that certainly constitutes a logical consequence of the applicable qualitative method. Used data sources are secondary ones, namely general legal literatures and Islamic law ones. Within analyzing data, a technique of qualitative content analysis is applied. To analyze some sources and materials of Islamic criminal law, a theoretical-philosophical approach is applied by *usûl al-fiqh* (Islamic legal theory), *al-qawâ'id al-al-fiqhiyyah* (Islamic legal maxims), and *maqâsid al-syarî'ah* (the Islamic law objectives). Whereas within analyzing materials of special criminal legislation and criminal law doctrines, a normative-doctrinal approach is applied by making use of legal interpretation models.

4 RESULTS

4.1 The Relevance of Maslahah to the Criminalization

The Anti-Corruption Law referred to as the Law Number 20 of 2001 on Amendments to Law Number 31 of 1999 on Corruption Eradication and the Law Number 31 of 1999 on Corruption Eradication. The focused issues include 3 (three) main points, namely (a) the criminalization rules, (b) formulation of criminal punishment rules, and (c) corporate criminal liability rules, in which these rules are accommodated by a number of articles of the Law. In this case, the *maslahah* (public interest) theory is used for analysis. The term of "relevance" in this analysis is indicated by the level of *maslahah* (public interest) application to each rule analyzed.

The *maslahah* (public interest) application within the criminalization rules consists of: (a) "the *maslahah* application within the criminalization of corruption itself", and (b) "the *maslahah* application within the criminalization of other corruption acts". The notion of "the *maslahah* application within the criminalization of corruption itself" includes 7 (seven) kinds of corruption in which the *maslahah* is applied. They are (a) corruption of the country's finance or economy; (b) bribery corruption; (c) corruption of power abuse; (d) extortion corruption; (e) fraud corruption; (f) corruption of interest conflict in procurement, and (g) gratification corruption.

Regarding "corruption of the state finance or state economy", it is stipulated by Article 2 and Article 3

of Law Number 31 of 1999. The criminalization of Article 2 paragraph (1) and Article 3-which is really a kind of *gulûl* (manipulation) and *akl al-suht* (consuming the forbidden things) as well as *ma'siyyah* (immoral)-certainly has a rationale described as follows. Firstly, all acts criminalized within Article 2 paragraph (1) and Article 3 really caused negative effects on the state economy due to erosion of the state incomes from the public sector and escalation of the government expenditure for it. Secondly, such criminalized acts surely increase a high cost economy. Thirdly, such criminalized acts firmly engender the state losses, and accordingly hamper the quality of national development in order to achieve the public welfare. These are three notions which constitute a rational basis of *maslahah* application within the criminalization of Article 2 paragraph (1) and Article 3.

Moreover, by considering the element "may harm the state finance or state economy" within such corruption, the application of *maslahah* in the form of *jalb al-masâlih* (realizing public interests) and *dar' al-mafâsid* (preventing and eliminating harms) is clearly discerned. The impact of state losses or economic losses caused by the corruption is very harmful for microeconomy as well as macroeconomy. At a micro-economic level, some impacts caused by the corruption are (a) declining public life quality; (b) reducing state income; (c) increasing public expenditure; (d) decreasing public health quality due to declining expenditure for health; and (e) lowering performance of the industrial and economic sectors. While at macroeconomic level, corruption produces some great impacts, namely (a) declining national economic growth; (b) escalating inflation rate; (c) reducing investment rate; (d) degrading Rupiah exchange rate; and (e) lowering performance of national banks. All efforts aimed at preventing and overcoming "the state finance or economic losses" are the realization of *maslahah* in form of *jalb al-masâlih wa dar' al-mafâsid*, that is the main element of *maslahah* within the criminalization of Article 2 paragraph (1) and Article 3.

Meanwhile, Article 2 paragraph (2) of Law Number 31 of 1999 jo. Law Number 20 of 2001 regulates some magnifier factors of criminal punishments within any corruption according to Article 2 paragraph (1). Such factors refer alternatively to provisions as follow: (a) the corruption is carried out on emergency management funds; or (b) the corruption is carried out on national disaster management funds; or (c) the corruption is carried out on widespread social riot management funds; or (d) the corruption is carried out on

economic and monetary crisis recovery funds; or (e) the corruption is carried out as a repetitive crime. It may be argued that on Islamic criminal law perspective, Article 2 paragraph (1) constitutes a domain of the ta'zir criminalization. Thus, on Islamic criminal law perspective, Article 2 paragraph (2) also may be considered as part of the ta'zir criminalization.

In the view of Islamic criminal law, so far as in the scope of ta'zir criminalization, capital punishment is indeed possible to be imposed for certain criminal acts which are extremely destructive. Nevertheless, capital punishment of ta'zir criminal punishment remains disputed by many Islamic law scholars, in which some scholars do not absolutely allow the application of such punishment and other scholars legitimize it at certain circumstances, such as the formidable destructive effect it causes as well as repeating the crime. In connection with Article 2 paragraph (2) above, there are special circumstances that should be fulfilled by a corruption to be sentenced with capital punishment, and such circumstances meet the criteria of most destructive effect it causes and circumstances of repeating the crime. Thus, Article 2 paragraph (2) of Law Number 31 of 1999 jo. Law Number 20 of 2001 contained the application of *jalb al-masâlih wa dar 'al-mafâsid* (realizing public interest and preventing as well as eliminating harms).

Meanwhile, "bribery corruption" is regulated within Article 5 paragraph (1) letter (a), Article 5 paragraph (1) letter (b), Article 13, Article 5 paragraph (2), Article 12 letter (a), Article 12 letter (b), Article 11, Article 6 paragraph (1) letter (a), Article 6 paragraph (1) letter (b), Article 6 paragraph (2), Article 12 letter (c), and Article 12 letter (d). On the Islamic law perspective, bribery (*risywah*)-within the Qur'an and Sunnah-is clearly forbidden and considered as *ma'siyyah* (immoral). It refers to the Qur'an Surah al-Baqarah/2:188 and Sunnah that stipulated a prohibition of bribery (*risywah*). Therefore, it may be criminalized under the category of ta'zir criminalization.

In case of perpetrator of bribery corruption stipulated by such articles above, there are 5 (five) types of perpetrator of active bribery corruption, namely (a) person, including individual and corporation, (b) civil servant, (c) state apparatus, (d) judge, and (e) lawyer; and there are 4 (four) kinds of perpetrator of passive bribery corruption, namely all those mentioned above but person (that includes individual and corporation). Based on this provision, the scope of corruptive acts becomes narrower for any perpetrator of bribery corruption to deny and dodge, whereas the passive person concerned and a non-civil

servant is often positioned as a loophole for a person involved in corruption to escape from the law. To restrict an act of any corruptor is clearly aimed at the realization of optimal legal effectiveness so that the strategy of corruption eradication is achievable with results expected by all people, especially the anti-corruption society. So, the criminalization of the twelve articles contains the meaning of *jalb al-masâlih wa dar 'al-mafâsid* (realizing public interests and preventing as well as eliminating harms). It constitutes the manifestation of *maslahah* contained within overall 12 (twelve) articles.

From the viewpoint of the *maslahah* theory, the twelve articles represent the application of *maslahah* that includes the absorption of some legal maxims of Islamic law, namely "*la darar wa la dirâr*" (it is forbidden to bring harms to your own self and the others); "*al-darar yuzâlu*" (all harms must be prevented and eliminated) and "*yutahammal al-darar al-khâss li daf' al-darar al-'âmm*" (any particular harm may be tolerated in order to avoid and eradicate any public harm). The destructive impact of bribery corruption is surely very terrible. It results in a high cost economy as well as the state losses. Such corruption perpetrator has deposed state assets originally planned for the development of social welfare. The destructive impact of such corruption spreads to all aspects of the national life, including micro-economy, macroeconomy, and banking business, and even international economy. The contents of some Islamic legal maxims has been accommodated by the substance of the 12 (twelve) articles; and therefore, *maslahah* has been applied in an effort at providing the rationality of all kinds of corruptions contained within such twelve articles.

Meanwhile "corruption of power abuse" is regulated by Article 8, Article 9, Article 10 letter (a), Article 10 letter (b), and Article 10 letter (c). On the perspective of Islamic law, "corruption of power abuse" stipulated in 5 (five) articles may be identified by referring to the issue of *gulûl* (manipulation) and *gasysy* (fraudulent) strictly prohibited by both the Qur'an and Sunnah. Thus, it is *ma'siyyah* (immoral), so it may be criminalized in the name of ta'zir criminalization.

Afterward, how is *maslahah* applicable in such criminalization? To find an answer of this question, it is necessary to provide an explanation of the basis of the criminalization rationality of Article 8, Article 9, Article 10 letter (a), Article 10 letter (b) and Article 10 letter (c). The criminalization of the five articles certainly has its own basic rationality. As well known, the phenomenon of "corruption of power abuse" becomes the dominant trend of various corruptions in

Indonesia, which hereupon gives an extraordinary share to a tremendous corruption that any regime do along the history of this our beloved country. By using the criminalization of the 5 (five) articles above, such corruption may be eliminated, so it may ultimately save the state finance and economy in order to realize a prosperous Indonesian society. Meanwhile, in terms of the perpetrators of various corruptions, they addressed by the five articles, namely (a) civil servant and (b) non-civil servant; and it means that the five articles have comprehensive meaning, which hereupon gives an optimal anti-corruption effect. So, there is the meaning of *jalb al-masâlih wa dar 'al-mafâsid* (realizing public interests and preventing as well as eliminating harms) within the criminalization of the five articles; and it constitutes a kind of *maslahah* application.

It is further reinforced by a tendency to apply substantively some Islamic legal maxims, namely: *al-darar yuzâlu* (all harms must be prevented and eradicated) and *yutahammal al-darar al-khâss li daf 'al-darar al-'âmm* (particular damage may be tolerated in order to avoid and eradicate public damage). The man whom targeted by the provisions of the five articles is civil servant and non-civil servant. When a corruption is limited to civil servant, non-civil servant will absolutely be saved from such rule; and it clearly has some negative impacts, namely desecrating sense of public justice, increasing quantity of corruption crimes, erasing the deterrent effect, and impairing the authority of the law. This side is the damage (*darar*) that must be prevented and overcome despite having to sacrifice individual interest. Therefore, the criminalization of the five articles actually contains the meaning of the implementation of the legal maxim of *al-darar yuzâlu* and the legal maxim of *yutahammal al-darar al-khâss li daf 'al-darar al-'âmm*. This is clearly a kind of the *maslahah* (public interest) application.

Meanwhile "corruption of extortion" is regulated by Article 12 letter (e), Article 12 letter (g), and Article 12 letter (f). On the perspective of Islamic law, "corruption of extortion" regulated within 3 (three) articles may be referred to the extortion identified by the Qur'an and Sunnah as *akl al-mâl bi al-bâtil* (consuming other's property in unlawful way) and *al-gasb* (consuming other's property without his/her permission). Thus, it is *ma'siyyah* (immoral), so that it may be criminalized by type of *ta'zîr* criminalization.

Later, does the *maslahah* application exist? In the view of the *ta'zîr* criminalization on "corruption of extortion", the *maslahah* application should be seen in terms of the rationality of such criminalization shown as follow. Firstly, in the case of "corruption of

extortion", "civil servant" or "state apparatus" is positioned as active actor, so it indicates that the position as "civil servant" or "state apparatus" is indeed vulnerable to corruptive behavior affecting reduction of the state finance. Secondly, "corruption of extortion" has tarnished the life of the state, especially the state finance and economy, which then afflicts the life of many people. Thirdly, "corruption of extortion" causes material losses to victims of this corruption. The criminalization of "corruption of extortion", thus, clearly contains the meaning of *jalb al-masâlih wa dar 'al-mafâsid*, in which the interests protected are the public interest (*maslahah 'âmmah*). This is clearly a kind of the *maslahah* application.

At the same time, "fraudulent corruption" is regulated by Article 7 paragraph (1) letter (a), Article 7 paragraph (1) number (b), Article 7 paragraph (1) letter (c), Article 7 paragraph (1) letter (d) Article 7 paragraph (2) Article 12 letter (h). The criminalization of "fraudulent corruption" regulated by 6 (six) articles may clearly be analyzed by the *maslahah* theory. On the perspective of Islamic law, doctrinally "fraudulent" is clearly forbidden and prohibited as seen in the messages of the Qur'an and Sunnah. So, "fraudulent" is considered as part of the *ta'zîr* criminalization on the grounds that it is *ma'siyyah* (immoral). On this basis, "fraudulent corruption" may be categorized as a crime of *ta'zîr*.

Then, does the application of *maslahah* exist in this criminalization of "fraudulent corruption"? This may be found by analysis of the basis of the criminalization rationality. Theoretically, it is shown as follows. Firstly, in the "fraudulent corruption", "building contractor", "building consultant" and "seller of building materials" are qualified as active actors so this indicates that the position is "building contractor", "building consultant", and "seller of building materials". "It is indeed vulnerable to corruptive behavior, such as joint craptiness committed by project officials who are being worked on, that in fact impacts the erosion of country's finances. Secondly, "fraudulent corruption" tarnishes the life of the country, especially the finance and economy of the country, which subsequently afflicts the lives of many people. Thirdly, "fraudulent corruption" causes any harm to the victim addressed by the fraudulent. These three things clearly illustrate the application of *jalb al-masâlih wa dar 'al-mafâsid* (realizing public interest and preventing as well as eliminating harms) so that the *maslahah* is indeed applicable.

Regarding "corruption of interests conflict in procurement", it is contained within Article 12 letter (i). On the perspective of Islamic law, "interests

conflict of procurement" is prohibited. This prohibition may be found by the messages of the the Qur'an and Sunnah asserted an obligation of maintaining the mandate as well as a prohibition of betraying it. On the perspective of Islamic criminal law, doctrinally any act related to interests conflict of procurement may be criminalized by using the category of ta'zir criminalization.

Then, how is the maslahah applicable within the criminalization? This must be traced through a basis of the rationality of criminalization of "corruption of interests conflict of procurement". Regarding this case, it may be argued that the involvement of civil servants or state apparatus in a corruption often starts from chartering, procuring or renting that they manage or supervise, in which their position as managers or supervisors of the projects creates an unfair climate of business competition when civil servants or bureaucracy officials participate in the projects because of interests conflict. Therefore, their participation should be prohibited by the criminalization. This constitutes a kind of maslahah contained within the criminalization of Article 12 letter (i). So, it is more a manifestation of sadd al-dzarī'ah (rational prevention) which in fact contains maslahah.

Regarding "gratification corruption", it is regulated by Article 12B jo. Article 12C Law Number 20 of 2001. On the perspective of Islamic law, the gratification (hadāya al-ummāl) is seen as a form of gulūl (manipulation and unlawful); and therefore it is considered a kind of ma'siyyah (immoral). This is contained within the messages of Sunnah prohibiting gratification. On the perspective of Islamic criminal law, the gratification may be criminalized, namely by incorporating it within the domain of ta'zir criminalization because the gratification is ma'siyyah (immoral).

Then, how is the maslahah applicable? In this relation, the maslahah application exists in the basic of the rationality as follow. Firstly, the prohibition of gratification may close an opportunity for greater corruption. Secondly, gratification is often misused for a purpose of legal misconduct. Thirdly, gratification corruption may contribute a high-cost economy. It is why maslahah is applied within the criminalization of "gratification corruption".

It is "other criminal acts related to corruption" regulated in Article 21, Article 22, Article 23, and Article 24 of Law No. 31 of 1999. Article 21 criminalizes "obstructing an interrogation in corruption court session ". On the perspective of Islamic law, "preventing, obstructing or thwarting, directly or indirectly, into indictment, prosecution

and interrogation of the suspected, the accused and witnesses in corruption court" (as described within the criminalization of Article 21) may be doctrinally referred to the prohibition of arbitrary that is a kind of ma'siyyah (immoral) and is strictly forbidden by the Qur'an and Sunnah.

After that, may it be criminalized on the basis of the Islamic criminal law? On the perspective of Islamic criminal law, each kind of ma'siyyah (immoral) may be criminalized; and therefore, "directly or indirectly preventing, obstructing, or thwarting into indictment, investigation, prosecution, and interrogation of the suspected, the accused or witness in court session" may be criminalized by the ta'zīr criminalization.

Later, the question is how does the application of maslahah (public interest) exist within the criminalization of Article 21? It requires an explanation of the basis of the criminalization rationality. It explained that "directly or indirectly preventing, obstructing, or thwarting into investigation, prosecution, and examination of interrogation of the suspected, the accused or witness in court session" caused harm as follows. Firstly, It is to overthrow the authority of the criminal justice institution. Secondly, it exacerbates the image and performance of law enforcement so that it decreases the authority of the law. Thirdly, save the court from social anarchy. All this hereupon weakened an act of eradicating corruption completely. Moreover, the qualification of crime of Article 21 ("obstructing interrogation in court session") aims to create a smooth interrogation of corruption cases so that the law enforcement may be effective, which subsequently determines the overall success of corruption eradication. Moreover, if the corruption case relates to influential officials or entrepreneurs, the tendency to hinder an audit process is very prominent. So, the criminalization of Article 21 is in accordance with the principle of jalb al-masālih wa dar 'al-mafāsīd (realizing public interests and preventing as well as eliminating harms). Thus, it clearly illustrated the maslahah application within Article 21.

It is important to question how does the application of maslahah come within the criminalization of Article 22 ? On the perspective of Islamic law, "not giving information or giving false information" may be referred to "lying" which is doctrinally a prohibited act, in accordance with the messages of the Qur'an and Sunnah. Thus, it may be concluded that "not giving information or giving false information" is unlawful so that it is ma'siyyah (immoral). On the perspective of Islamic criminal

law, because it is a kind of ma'siyyah (immoral), "not giving information or giving false information" is properly criminalized, and so it is relevant to apply the ta'zir criminalization.

Then, how is the *maslahah* applicable? It may be traced through the basis of the criminalization rationality of Article 22. In the view of the *maslahah* theory, it may be said that the *maslahah* is applicable within Article 22. It considered "not giving information or giving false information" as a crime and this consideration aims to obtain perfect evidence, including information, for solving corruption cases that are being interrogated. Therefore, the act of "not giving information or giving false information" may be sentenced with criminal punishment for its perpetrator. From this perspective, the criminalization of Article 22 is in line with the principle of *jalb al-masâlih wa dar 'al-mafâsid* (realizing public interests and preventing as well as eliminating harms). It clearly illustrates the kind of the application of *maslahah* within Article 22.

The *maslahah* application is also indicated by the qualification of the crime of Article 23. The qualification of the corruption of Article 23 aims to provide legal protection for both the person concerned and the state assets. In interrogating corruption cases, it is very possible for state officials to abuse a power which is detrimental to some parties. Therefore, anticipatory act is needed so that there is no losses for the parties due to abuse of power related to corruption cases. It is the form of *maslahah* applicable within Article 23. It is clear that in the criminalization of Article 23, the principle of *jalb al-masâlih wa dar 'al-mafâsid* (realizing public interests and preventing as well as eliminating harms) is really applicable.

Considering the criminalization of the acts of Article 24, it may be asked that how is *maslahah* applicable within it? On the perspective of Islamic law, "opening up the secrets of others" may be doctrinally correlated to betraying (*khiyânah*), as opposed to the integrity (*amânah*), as obtained in the Qur'an and Sunnah. On the perspective of Islamic criminal law, "betraying the mandate" (*khiyânah*) is a domain for the ta'zir criminalization. Thus, "opening up the secrets of others" criminalized by Article 24- on the perspective of Islamic criminal law- may be considered as a crime of ta'zir.

The question arises then that how is the *maslahah* (public interest) applicable within the criminalization of Article 24? This issue demands an explanation on the basis of the criminalization of Article 24. There are at least 3 (three) arguments that underlie the criminalization rationality. Firstly, opening of the

informant's identity will endanger his safety, especially when the corruption perpetrators are desperate people to achieve their goals. Secondly, if they are not criminalized, the public will feel afraid of report any case related to corruption because themselves are always threatened when their identities as informants are announced. Thirdly, maintaining the confidentiality of the informant's identity is very important for achieving effectiveness of corruption eradication. Moreover, the consideration of article 24 aims to protect the safety of the informant's related to corruption. In case of corruption, involving the influential people are often carried out in various ways by the perpetrators, including the way of violence or the threat of violence to the person who informed (the informant) a corruptive act, so that it is not revealed. Informants may be subjected to a terror so that life of their personal and family is disrupted, uncomfortable and under threat of violence. In order to anticipate that it will not come, it has to underlie Article 24 rationality. It clearly illustrates the meaning of *jalb al-masâlih wa dar 'al-mafâsid* (realizing public interests and preventing as well as eliminating harms). Thus, all are essentially a form of *hifz al-nafs* (protection of soul) and *jalb al-masâlih wa dar 'al-mafâsid*. Here is a real form of the *maslahah* application.

4.2 The Relevance of *Maslahah* to Formulation of Criminal Punishment

The *maslahah* (public interest) theory accommodated in the Islamic criminal law considered that the various punishments of the Indonesian Anti-Corruption Law above may be considered as a domain of the ta'zir punishment; and it is also a logical consequence of considering corruption as a category of the ta'zir crimes. Because of the character of its flexibility, the category of the ta'zir crimes may be changed and developed according to the needs and demands of the real situation so that the rationality aspect of it plays a very important role; and from this perspective, *maslahah* comes to reality. The various punishments of the Indonesian Anti-Corruption Law may be seen as containing the *maslahah* application in form of *jalb al-masâlih wa dar 'al-mafâsid* (realizing public interests and preventing as well as eliminating harms) because the punishment is aimed at saving the state finance and economy in order to realize social welfare. Moreover, the various punishments may also be considered to have accommodated *maslahah* in form of defending the public interests by protecting

the state assets from the corruption of anyone through the enactment of fair and effective criminal punishments. This is in line with one of the elements of *maslahah*, namely *hifz al-mâl* (protection of property), in which the protected interests is the public ones (*maslahah 'âmmah*).

On the perspective of Islamic criminal law, criminal punishments of the Indonesian Anti-Corruption Law may also be considered to have contained *maslahah*. Theoretically, it is recognized that the determination of the criminal punishments of various corruptions-as introduced by of the Indonesian Anti-Corruption Law-has considered an aspect of rationality in form of the punishment objectives and its effectiveness, and of the social costs analysis. In terms of the punishment objectives, it may be said that the Indonesian Anti-Corruption Law has considered (a) the purpose of prevention, namely preventing criminal acts; (b) the purpose of resocialization and rehabilitation, namely to educate the convicted by providing guidance so that he/she is good and useful human being; (c) the purpose of social reform, namely to resolve any conflict caused by any criminal act, to restore social balance, and to bring a sense of peace in a society. In terms of effectiveness of the punishment, imprisonment and fine-from the past till now-have been still applied in various criminal law systems prevailing in the world; and it means that imprisonment and fine are recognized for its effectiveness. In the case of social costs analysis, imprisonment and fine bring effect of social benefit, which are relatively superior to social losses happened. So, it constitutes the application of *maslahah* in the formulation of criminal punishments of the Indonesian Anti-Corruption Law, especially considering that criminal punishments for any corruption are included in the domain of *ta'zir* punishments that is dynamic, relative and flexible. In this case, the punishment is given in the name of the state; it is "authorized". It means that any punishment should come from the state institution that is legally authorized.

In the view of Islamic criminal law, the provisions of fine enacted for corporation in case of corruption may be considered to have accommodated *maslahah*. This form of *maslahah* is indicated by a rationality that underlies the provisions of fine. It illustrates the *maslahah* application to the formulation of the provisions of complementary criminal punishments found within the Indonesian Anti-Corruption Law.

According to Islamic criminal law, the provision of complementary criminal punishments within the Indonesian Anti-Corruption Law also represented the application of *maslahah*. Theoretically, it is

recognized that the provisions of complementary criminal punishments have considered an aspect of its rationality based on the purpose of punishment in form of fulfilling sense of social justice and means of public protection. It is clearly a manifestation of the *maslahah* elements, namely *jalb al-masâlih wa dar 'al-mafâsid* (realizing public interests and preventing as well as eliminating harms) in which the protected interests is the public ones (*maslahah 'âmmah*). It is a form of *maslahah* application to the formulation of the provisions of complementary criminal punishments within the Indonesian Anti-Corruption Law.

4.3 The Relevance of Maslahah to Corporation's Criminal Liability

On the perspective of Islamic criminal law, the notion of criminal liability (*mas'uliyah jinâ'iyah*) is closely related to the notion of legal person (*mahkûm 'alaih*); and it means that both notions interconnect to concept of legal imposition (*taklîf*) and concept of legal capability (*ahliyyah*), and both concepts constitute a domain of *usûl al-fiqh* (Islamic legal theory). In the view of *usûl al-fiqh*, a man or a woman who is positioned as a legal person is human being (*insân*). Before having the quality of criminal liability, any person should firstly obtain the legal capability (*ahliyyah*). Meanwhile, the legal capability may be obtained only if the person meets certain requirements: sensible (*'âqil*) and adult (*bâlig*). The sensible (*'âqil*) refers to any person who has his/her own functional perfection of common sense, while the adult (*bâlig*) refers to age maturity, marked by the attainment of 17 years old or having dreamed an intercourse or having got married. If the requirements are fulfilled by any person, then he/she is considered as a legal person (has the legal capability), and therefore he/she has the criminal liability (*mas'uliyah jinâ'iyah*).

It should be noted that in the Islamic law system, legal liability-in form of criminal liability-is closely related to the theological issues, namely the doctrine of *hisâb* (audit of all human being) before God's court-a notion that distinguishes the Islamic legal system from the secular one. Therefore, only human being may be asked for his/her own accountability.

On this basis, the doctrine of Islamic criminal law stipulates that the quality of criminal liability is basically owned by human being. This is the meaning of the principle of individuality of criminal liability (*syakhsyyat mas'uliyah jinâ'iyah*) adopted by the Islamic criminal law system. However, in the development of the world's legal systems in this

contemporary times, the notion of the corporation crime arises. In case of corporation crime, its actual perpetrator is individual who commits, for or on behalf of the corporation, or for the corporation's interests. Afterwards, how does the Islamic criminal law respond to this issue?

In exploring the view of the Islamic criminal law above, it is necessary to understand formerly what is the function of the criminal rules of the criminal law system. In normative-doctrinal way, the criminal rules of the criminal law system exist in order to carry out some preventive and repressive functions. As already stated, in case of corporation crime, the actual perpetrator is a person who commits, for or on behalf of, the corporation, or for the corporation's interests, while the corporation becomes the formal perpetrator. Therefore, the criminal punishments set are addressed to the two perpetrators of the crime that has been committed, namely the actual perpetrator and the formal one. For the actual perpetrator, the prime criminal punishment is imprisonment and fine. Whereas the formal actor is subjected to the prime criminal punishment in form of fine and complementary criminal punishments in forms of (a) revocation of business license, (b) seizure of proceeds of crime, (c) revocation of legal entity of the corporation, (d) dismissal of management, and/or (e) a ban on the management to establish the same corporation. From this view, it seems clear that in case of corporation's crime, those who are legally responsible are in fact human being, so that a person should also be accountable before God's court in the hereafter. While corporation as the formal perpetrator is still accountable for non-personal accountability (*syakhsiiyah ma'nawiiyah*) to fulfill a sense of justice. So, from this point of view, the rules of corporation's criminal liability in the corruption crime are in line with the Islamic criminal law doctrine.

It is necessary to be revealed further that how is *maslahah* applied in the corporation's criminal liability. It may be explained as follows. Firstly, the provisions of the corporation's criminal liability may eliminate a tendency of contemporary crime mode, especially corruption conducted with absence of the person in order to be free from legal pursuit. Secondly, the punishment imposed to the corporation as the legal person aims to create justice and legal certainty in the public life and personal one. Thirdly, criminal punishment set for corporation has potential to become source of state income that may be used to make all people prosper as large as possible.

5 DISCUSSION

The study of the application of the *maslahah* theory in the context of Indonesian criminal law policy is appropriate to be carried out continuously so it may prove that Islamic criminal law is indeed compatible with the Indonesian context and modernity.

The study also deserves to be intensified among many institutions of Islamic higher education so as to be able to obtain adequate scientific contributions in the framework of "Islamization of national criminal law" or "nationalization of Islamic criminal law" through the application of the theory of *maslahah*.

Through this study, it is expected that there will be understanding among Muslims-especially some groups who are very enthusiastic and ambitious with the formalization of Islamic *shari'a*-that Islamic criminal law has been and may be applied in Indonesia through the application of the theory of *maslahah* with transformation way, without a need to establish an "Islamic state" or make "Islam as the basis of the state"-a notion aspired by certain Islamic exponents and organizations.

All components of the Muslim community, especially the Muslim legislative members, need to understand the concept of *maslahah* application in the framework of the transformation of Islamic (criminal) legal norms into the Indonesian (criminal) legal system so that they are able to realize a religious Indonesian legal system, in accordance with the mandate of Pancasila and the 1945 Constitution.

6 CONCLUSIONS

It may be concluded that the theory of *maslahah* (public interest) has the pattern of relevance to the Indonesian Anti-Corruption Law. Such relevance implies that Islamic criminal law has undergone a transformation through the *maslahah* application into the Indonesian criminal law system, which hereupon has reflected the integration of the Islamic law into State's Law. Such relevance also implies that Indonesian special criminal legislation has experienced islamization by means of the *maslahah* application in the rules it contains. Such pattern of *maslahah* relevance is indicated by the findings confirmed that the *maslahah* application has been proven within the criminalization aspect of the Indonesian Anti-Corruption Law; that the *maslahah* application has also been proven within aspect of formulation of the various criminal punishments of the such law, that the *maslahah* application has also

been proven within the concept of corporation's criminal liability of it.

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