

# The System of Proof is Reversed Against Corruption Offenses According to Islamic Law and Indonesia Law

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# The System of Proof is Reversed Against Corruption Offenses According to Islamic Law and Indonesian Law

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**Abstract**--Corruption is an extraordinary crime (extra ordinary crimes), so that extra-enforcement is needed. One of the efforts in the eradication of corruption in Indonesia is the application of a reverse proof burden system. In the aspect of Indonesian criminal law, the burden of reverse proof of corruption has been carried out and regulated in Article 12B, Article 12C, Article 37, 37A, Article 38A and 38B of Law No. 31 of 1999 Jo. Law No. 20 of 2001 concerning Eradication of Corruption Crimes. In the aspect of Islamic law, the application of the reverse proof burden system falls into the category of ta'zir based on government policy (ulil amri). The burden of reversing proof is implicit in the Qur'an, sura Yusuf, verses 26-29. However, in applying the inverse proof system, jurists use istihsan in making ijthid on contemporary social problems.

**Key words**--Reverse Proof System, Corruption, Islamic law, Indonesian law.

## I. INTRODUCTION

Corruption in Indonesia has become a culture and almost all regions in Indonesia, both at the central, provincial, district and municipal governments, are corrupt practices with various forms of modus operandi. [1]. The rapid development of corruption in Indonesia, is inseparable from the political system that requires political costs that are not small in number. This can cause each head of government both central and regional governments to try to reverse the costs that have been incurred in ways that conflict with the law.

Based on Indonesia Corruption Watch (ICW) records, in 2010-2017 there were 215 regional heads who were suspected of corruption cases [2]. These cases occur in a variety of modus operandi, such as project budget play, bribery of budget approval, corruption in procurement of goods and services, licensing bribery and case handling in court. This number is considered to be quite high, but it is predicted that in the following years this number will continue to increase.

In the aspect of law enforcement, the criminal proof system which places the burden of proof on the Public Prosecutor is deemed ineffective in ensnaring perpetrators of corruption in Indonesia because the mode of operation is increasingly organized, systematic and structured [3]. According to Indriyanto Seno Adji, systemic corruption or institutional corruption is one form of crime that is difficult to prove, which thrives in line with economic, legal and political power [4].

Mien Rukmini said that corruption was classified as an extraordinary crime by measuring that corruption was systemic, endemic and had a very broad (systematic and widespread) impact that not only harmed state

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finances but also violated the social and economic rights of the wider community [3]. Therefore, it needs a comprehensive extra ordinary measures effort in overcoming it.

In order to overcome the difficulty of proof, the government has issued several laws which justify the application of a reverse verification system to corruption. Seno Adji is of the view that implementing an inverted proof system is easier to do and shows more concrete results [5]. Mahfud MD said that law enforcement officers always experience difficulties in carrying out proof of corruption cases so that the government is expected to prioritize strengthening the reverse proof system in the existing corruption eradication laws. [6].

The reverse proof system is expected to be able to simplify the process of proving corruption in court. In the positive law aspect of Indonesia, the application of the reverse burden of burden system is contrary to the principle or principle of proof of criminal law in general but the reverse proof system is still applied to facilitate the process of proof of corruption offenses in court. However, how is the concept of the proof system reversed in the perspective of Islamic law. Researchers are very interesting to do this comparative study because Islamic law as a law sourced from Allah SWT regulates thoroughly all aspects of law, including the reverse proof system.

## II. METHOD

This research is legalistic, doctrinal or normative. Normative research aims to find, explain, assess, analyze systematically facts, principles, concepts, theories, laws so as to find knowledge and new ideas to be suggested as a change or renewal [7]. However, this study only uses a comparative law approach with the aim of comparing the concept of an inverse proof system according to Islamic law with positive law. [8].

Based on the research approach used, this study uses primary data that consists of legislation and court decisions. In the aspect of Islamic law, the data used are sourced from Islamic law, namely al-Qura`an, al-hadith, ijmak and qiyas which are related to the reverse verification system. In addition, this study also uses secondary data that includes legal documents such as legal journals, reports, papers, textbooks, theses, dictionaries, encyclopedias and data collection via internet networks. Both of these data sources are found through literature studies that contain a lot of legal literature relating to the research being carried out.

Proof is a very important aspect in law enforcement. A person cannot be convicted before there is a process of proof and fair trial [9]. The verification process is an attempt to find the truth rather than a legal event, so that the evidence becomes a benchmark to determine whether someone is guilty or innocent [10]. In the book "The Proof of Guilt: A Study of the Criminal Trial of English," Williams believes that releasing ten guilty people is better than giving wrong to someone innocent [11].

In the legal aspect of proof, one of the most important things is who or which institution has the burden or responsibility to prove the accused's guilt. Siti Zalikhah said the burden of proof is the responsibility that lies with those who accuse someone of a mistake that causes harm to themselves [12]. If someone postulates a fact, the person concerned must prove it to convince the court of the existence of that fact [13]. Gabbo David Byrne interprets the burden of proof as a responsibility to present evidence to a court relating to the facts of the case in accordance with the stage of evidence needed [14].

In the field of court procedural law, the burden of proof lies with the Public Prosecutor (JPU). Hayt and Groeschel also shared the same where almost all criminal cases, the burden of proof lies with the Prosecutor [15].

However, the defendant also has an obligation to prove his case in order to deflect or deny any facts that the prosecutor has charged him. In criminal proceedings, the judge gives the opportunity for both parties to submit various evidences and test the evidence brought by the parties before the court [16].

The principle of proof as above is the same as that adopted by Indonesia through Law No. 8 of 1981 concerning the Criminal Procedure Code which states that "whoever indicts is the one who is burdened to prove that the charges are true". This principle arises from the application of the principle of presumption of innocence as an important principle in the Criminal Procedure Code. This principle is contained in Article 8 of Law No. 4 of 2004 Jo. Law No. 48 of 2009 concerning Judicial Power, which states that every person is considered innocent until his mistake is proven by a court decision that has permanent legal force.

However, can the burden of proof be transferred to the defendant to prove the case. Transferring the burden of proof to the accused is often referred to as the reverse burden of proof or the reversal of the burden of proof (*omkering van het bewijslast*). The reverse proof system, is a system of evidence used for Anglo-Saxon countries and aims to facilitate certain cases. This proof system is very limited to certain cases which are very difficult to prove, so that a system that actually contradicts with universal principles or principles regarding proof is adopted. [17].

There are some circles who equate the term reversal of the burden of proof with the burden of proof reversed paired in English with the shifting burden of proof. In essence, the two terms are different. If a shifting burden of proof is defined as a "shift of burden of proof" , then a reversal of burden of proof is defined as "reversal of the burden of proof." This verification system is to provide an opportunity for the defendant to prove his innocence in committing a criminal act of corruption, and if the testimony of a person or defendant is true, the judge can consider the statement as at least beneficial to the defendant, or vice versa can harm the defendant's self if the information is not true.

In the theoretical aspect, the burden of reverse proof is either limited or impure and the reverse proof system is absolute. The reverse proof system is limited, even if a person or defendant has proven himself innocent, under certain conditions before the court, the Public Prosecutor is still obliged to prove the guilt of the defendant as he was charged. Under the burden of pure reverse proof, the defendant has the right to prove his innocence, but if the defendant cannot prove that, then the judge can sentence him. According to Seno Adji, the reversal of the burden of proof purely or absolutely in the Indonesian legal system is only in the criminal act of corruption devoted to the gratification and reporting of the assets of the State administrators [18].

In the corruption eradication law, the burden of proof is reversed regulated in Article 12B, Article 12C, Article 37, 37A, Article 38A and 38B of Law No. 31 of 1999 Jo. Law No. 20 of 2001 concerning Eradication of Corruption Crimes. For example, in Article 37 (2) of Law No. 31 of 1999 Jo. Law No. 20 of 2001 stipulates that "In the event that a defendant can prove that he did not commit a criminal act of corruption, the evidence is used by the court as a basis for stating that the indictment is not proven."

However, the application of proof is reversed in Law Number 31 of 1999 Jo. Law No. 20/2001 concerning Eradication of Corruption is limited and balanced. In the Explanation of the law, it is explained that the notion of "reverse proof which is limited and balanced" is that the defendant has the right to prove that he has not committed a criminal act of corruption and is obliged to provide information about all his assets and the

property of his wife or husband, children, and assets objects of every person or corporation that is suspected to have a relationship with the case in question and the public prosecutor is still obliged to prove their indictment.

According to Munawar, the explanation for the "limited" or "special" reversal of the burden of proof is [19]:

- a. The system of reversing the burden of proof is only limited to criminal acts of "gratification" related to "bribery" (bribery) and not to other offenses in corruption.
- b. Other offenses in Law No. 31 of 1999 determined in Article 2 to Article 16 the burden of proof remains with the Prosecutor.
- c. The system of reversing the burden of proof is only limited to "seizure" of offenses alleged against anyone as stated in Article 2 to Article 16 of Law No. 31 of 1999. It should also be stressed that the system of proof of alleged violations in Article 2 through Article 16 of Law No. 31 of 1999 is still given to the prosecutor. If in the prosecutor's claim the defendant is deemed to have committed a violation of one of these criminal acts and is subject to seizure of his property, the defendant is obliged to prove that his assets did not originate from criminal acts of corruption.
- d. Any reversal of the burden of proof is limited to the application of the *Lex Temporis* principle, namely that this system cannot be enforced retroactively because of the potential for human rights violations, violations of the principle of legality, and giving rise to what is called the *Lex Talionis* principle (revenge).
- e. That the burden of proof reversal system is limited and is not permitted to deviate from the principle of *Daad daderstrafrecht* (no penalty without error).

One of the considerations is to apply a system of reversing the burden of proof on corruption, because corruption is difficult to prove. This is because the perpetrators have a high level of education, are very professional in their fields, hold positions and power and generally the perpetrators have a very good understanding of the work environment and have a formula to avoid tracking corruption, and they are very neat in hiding evidence of their crimes. [20]. Therefore, some experts classify corruption as extraordinary crime (extraordinary crime)[21], so that requires extraordinary handling as well (extraordinary measures) with one of them through the application of a reverse proof system [22].

### III. RESULT AND DISCUSSION

In Islamic law, a judge must not decide on a case without a proof process being preceded. However, who has the obligation to prove the case that is being tried in court. In court, generally those who have the obligation to prove a case are the accuser, plaintiff or prosecutor (*Mudda'i*) that the defendant (*al-mudda'a 'alayh*) committed the crime. If the plaintiff is unable to prove it, the claim is rejected or cannot be accepted so that the defendant is free from all burdens and responsibilities [23]. This is due to the implications of the existence of the principle of presumption of innocence that is adhered to by Islamic criminal law as well as adhered to in Indonesian criminal law. The principle of presumption of innocence means that everyone is considered innocent of an evil deed, unless proven guilty by a court of law for a crime without any doubt [24]. If a reasonable doubt arises, a person who commits a crime must be released. This is in accordance with the hadith of the prophet Muhammad SAW, that [25]:

"If only humans were given whatever they sued, of course everyone would sue what he wanted, both soul and property, but the oath was imposed on the defendant."

The principle of presumption of innocence puts mudda'iy (accuser, plaintiff, prosecutor) in a weak position and puts the mudda'a 'alaih (defendant, defendant, defendant) in a strong position. Therefore, to state that the defendant is guilty, the accused must bring witnesses who meet the requirements or other strong evidence. While the logic of the principle of proof is reversed, the defendant who is indicated guilty is found guilty unless he can prove his innocence. The application of reverse proof clearly contradicts this rule .

Although there is no explicit evidence of an inverse system in Islamic criminal law, several verses in al-Qura`an indicate that it is possible to apply a reverse proof system as in the Al-Ma'idah verse 108, An-Nisa', verse 135 and surah Joseph, verses 26-29. The most phenomenal legal event in the reverse proof aspect is the case of allegations of adultery alleged by Zulaikha to the Prophet Yusuf A.s. Allah SWT in surah Yusuf verses 26-29 says:

"Yûsuf said" he tempted me to subdue myself (to him), "and a witness from the woman's family gave his testimony," if his robe is torn in the face, then that woman is right and Yûsuf is among those who lie. If the robe of his shirt is torn behind, then that woman is the one who lies, and Yûsuf is among the righteous. " So when the woman's husband saw the robe of Yûsuf's robe being torn behind him he said "indeed (the incident) is among your (my wife's) deception. Surely your deceit is great. " (Hai) Yûsuf "turn away from this, and (you, my wife) beg for forgiveness for your sins, for you are indeed of those who do wrong."

Budi Kisworo said that this story shows how difficult it is to prove this case because there were no witnesses who saw the incident so that it has implemented a reverse proof system. Zulaikha's accusation can be refuted by Yûsuf's statement through the fact that the evidence can explain the true state of the event, namely by observing the condition of the clothes that Y dipakaisuf was wearing at that time. Yûsuf then showed his torn shirt in the back as proof that he would avoid being seduced by Zulaikha, but pulled by Zulaikha from behind. The Egyptian authorities accepted Yûsuf's proof and rejected Zulaikha's accusation, then he decided that what was wrong was Zulaikha [26].

The difficulty in proving this has ruled out the basic principle in proving that puts the evidentiary obligation to law enforcers (Prosecutors and Judges), precisely which proves to be the accused party or the defendant. Prophet Muhammad Rasulullah SAW said which means [27]:

"If two parties to a dispute sit in front of you, then you should never make a decision so that you hear (the information) of the other party (the second party) as you hear (the statement) from the first party. Because actually it will further clarify the judicial process that you are holding. "

Based on the hadith above, it can be concluded that, reverse evidence can also be applied in Islamic law, because in the proof process to find the truth about a case there is no limit in giving testimony in court. In providing information, the parties to the litigation are given the same opportunity because the purpose of criminal evidence is that there is clarity in a case so that it does not give harm to the other party. In Islamic law, the realm of regulation against corrupt acts is ta`zir [28]. Likewise, the application of the burden of proof is reversed against corruption. In various Islamic legal instruments, it is not found explicitly mentioning the application of a reverse proof system of corruption so that the regulation is reversed to the government by taking the source of istihsan

law. Sources of legal istihsan often used to find a way out of the crush of social problems that occur in the midst of community life. In addition, istihsan provides a space for mujtahid not to apply general legal provisions for certain cases as an exception [29].

According to Yusuf, among the ulama of ushul fiqh, there were two camps in responding to the existence of istihsan as mashodir al-ahkam. Those who reject and those who accept have the same argument. Scholars who reject istihsan as a source of law say that there is a concern if a mujtahid is trapped in rejection of the text and prefers rational just reasoning. The supporters of this rejection of istihsan opinion actually only reject istihsan which is only based on logic alone. Shafi'iyah specifically in this matter mentioned that the problem of istihsan was merely a redactional difference (khafaf lafzhy) and not a substantial difference of opinion. even Imam al-Shafi'i himself turned out to use istihsan in some of his ijihad [30].

The use of istihsan can actually be said to represent the convenience provided by Islam through its Shari'a, especially if istihsan is associated with emergency conditions. Imam Shafi'i who redactionally rejects istihsan, but in his application cannot deny istihsan as a source of law in order to realize the principle of 'adam al-haroj. Therefore, with this special foundation, reverse evidence of corruption cases can still be justified in Islamic law. In al-Turuq al-Hukmiyyah he also stressed [31]:

"If the signs of justice are clear, by whatever means then that is the Shari'a and the religion of God. Because Allah (swt) knows better, wiser and fairer to determine certain rules in explaining justice and its signs while there are other ways that are clearer and stronger. Allah has explained that what is important is to establish justice itself among his servants and so that people behave fairly. Therefore, whatever method is taken to uphold justice, it is the will of religion and does not contradict it. "

In Islamic law, the jurists use several methods to provide the possibility of an inverted proof system that can be applied to corruption. There are two approaches given by al-Madzhaib al-Tsalatsah in discussing the application of an inverse proof system [32]:

1. The approach of al-qadha 'bima yazh-haru min qara'in al-ahwal wa al-amarat (a legal decision based on conditional indications and signs of zahir).

This approach aims at the decision of a judge or prosecutor who is not based on evidence presented by the prosecutor (bayyinatu al-mudda'iy) or oaths delivered by the prosecuted party (yaminu al-mudda'a 'alayhi). However, it is based on the qara'in al-ahwal wa al-amarat al-zahahirah (because of traditions and clear signs). This concept first departed from al-qa'idah al-ushuliyyah Imam Malik who received mursal munasib or al-mashalih al-mursalah (benefit which has no argument which considers it mu muabar) as one of the illat in establishing law. However, although the initial concept of this system departed from the opinion of al-Imam Malik, this concept became more broadly modified in the thought of Ibn al-Qayyim al-Hanbali (751 H) in his book al-Thuruq al-Hukmiyyah and then further developed by Ibn Farhun al-Maliki (799 H) in his book Tabshirat al-Hukkam, and was further developed by al-Tharabulisi al-Hanafi in his book Mu'in al-Hukkam.

In this concept, a person can be charged with law without having clear evidence, but based on clear signs found by a judge. Included in this context is the case of the Prophet Yusuf As, he was declared as the right party because it was discovered that the one who ripped the back of the shirt, and if the shirt was torn from the front, it was declared as the guilty party. Ibn Qayyim mentioned that in all matters, Islamic sharia aims to explain the truth

even in any way and will not reject the truth in any form if there is a clear argument about it. Because with such rejection the rights of God or his servants will be lost or disturbed. And the birth of truth does not only depend on certain matters [33]. Therefore, it is not necessary to determine special rules in explaining the truth if there are other rules that can provide the same role without looking at differences.

## 2. Political approach (al-siyasah al-syar'iyah),

This approach is based on legal decisions on the basis of politics in accordance with sharia demands (siyasah syar'iyah). According to Ibn al-Qayyim and later quoted by other schools, siyasah there are two kinds, namely siyasah who are unjust, then the sharia forbids it and the two just siyasah, which can punish a wrongdoer, reject many abuses (including corruption), scare those who like to do damage and can be an intermediary to al-maqashid al-syar'iyah, then Islamic Shari'ah requires it in an effort to uphold the truth [34].

One example of this political approach is what Sayyidina 'Ali bin Abi Talib did, when someone reported a case to him [35]:

"They left with my father, then they returned, while my father did not return. Then I asked them about my father, they answered, "Your father is dead". Then I asked about my father's great wealth, they answered, your father did not leave anything. Then we reported them to Qadi Shuraih, then Qadi swore them and then released him because they had sworn. Then, Sayidina 'Ali called in some police to arrest them. Each person is held by two policemen. Ali advised them not to talk to their friends. Ali called his secretary, then called someone from them. Ali said to him, "You tell me about this child's father, on what day he went out with you, where he rested with you, how he left with you, with what illness he died, what happened to his treasure, who bathed and buried him, who is the imam of the prayer, and where it is buried. His secretary wrote what was the answer. Then replace the one to be asked with the same question until finally finished. It turned out that their answers were different so in the end they were killed.

What is done by Qadhi Syuraih is legally Shari'ah right, but politically the Qadhi Syuraih's actions appear to be very weak in an effort to reveal the facts and truth. In the al-Madzahib al-Tsalatsah approach, it gives flexibility to the judges in al-siyasah al-syar'iyah to seek the truth with various methods of proof but not to violate the shari'ah, including by applying a reverse proof system that places the evidentiary obligation on the part of the party the accused.

In the aspect of the corruption case, this method can be reflected in the case of Ibn al-Lutbiyyah narrated by Imam al-Bukhari, that the Prophet (SAS) sent Ibn al-Lutbiyyah as amil zakat in the tribe of Banu Sulaim. After coming to the Messenger of Allah and he counted it, Ibn al-Lutbiyyah said, "This is for you, and this is for me as a gift from them". Hearing this expression Rasulullah SAW said, "Try to sit in your father and mother's house so that this gift comes if you are right" (H.R Bukhari). The same case also happened during the Caliphate of Umar Bin Khatthab r.a. the case began when an amilnya returned to Medina with a very large fortune. He divided the treasure in half, half had to be given to Baitul Mal and the other half to himself [36].

In Islamic law, the category of punishment for perpetrators of corruption is ta'zir based on government regulations (ulil amri) because the sanctions are not explicitly mentioned in the Qur'an and Sunnah. Through a political approach, the ruling party or the government can implement a reverse proof system by asking officials as defendants to explain their wealth improperly by reason of misunderstanding. The mutation verdict for the



official can be carried out if it is seen in a condition that the official is a place of “financial stopover” of the state and various interests of the people so that the opportunity for acts of corruption by exploiting personal interests is huge.

In Indonesia, reverse proof is an important issue in combating corruption. Many views state that the existing evidentiary system is considered ineffective to ensnare perpetrators of corruption so that changes are needed to the existing substantiation system [32]. To address this problem, the Indonesian Ulema Council (MUI) in the National Conference (Munas) in 2010 issued a fatwa regarding the reverse proof [37]. Based on the MUI fatwa, the scholars agreed to allow the implementation of a reverse verification system to eradicate corruption in Indonesia. The MUI fatwa aims to facilitate the evidentiary process in court. The application of a reverse proof system is possible to uphold public goodness so as to encourage the acceleration of the eradication of corruption in Indonesia.

Based on the above analysis, the principles of proof in Islamic law are not much different from the laws in force in modern times. In fact, many of them have adopted Islamic law itself. Although there are differences, the two legal systems, namely Islamic law and positive law recognize and apply an inverse proof system with various conditions.

#### IV. CONCLUSION

Based on the discussion above, this study concludes that:

1. Reverse proof of corruption in a positive legal perspective regulated in Law No. 31 of 1999 which was later revised by Law No. 20 of 2001 concerning Eradication of Corruption Crimes. This law has implemented a reverse proof system but is still limited. The application of reverse evidence can be seen in Article 12B, Article 12C, Article 37, 37A, Article 38A and 38B of Law No. 31 of 1999 Jo. Law No. 20 of 2001 concerning Eradication of Corruption Crimes.
2. In the aspect of Islamic law, the application of the burden of proof is reversed against criminal acts of corruption included in the category of ta`zir where no explicit argument is found regulating in this regard. Implicitly, the reverse proof was found in the case of adultery that Zulaikha accused the prophet Yusuf A.s. The incident is told in the Koran Surah Yusuf, verses 26-29. However, in determining the legal basis for applying the burden of proof reversed, jurisprudents take the path of ijthad using istihsan. Istihsan provides room for mujtahids not to apply general provisions for certain cases as an exception. In addition, there are two approaches given by al-Madzhaib al-Tsalatsah in discussing the application of an inverse proof system, namely the al-qadha 'bima yazh-haru min min qara'in al-ahwal wa al-amarat approach (legal decisions based on indications- conditional indications and signs of zahir) and political approaches in accordance with sharia requirements (siyasah syar'iyah).

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