

**RETRACTION OF THE CORRUPTOR'S POLITICAL RIGHT IN  
ISLAMIC CRIMINAL LAW PERSPECTIVE**



**THESIS**

**Submitted In Partial Fulfillment of The Requirement  
For The Degree of Bachelor of Islamic Law  
In Islamic Criminal Law**

**Arranged by:**

**Amanatus Sholihah  
1402026021**

**DEPARTMENT OF ISLAMIC CRIMINAL LAW  
FACULTY OF SHARIA AND LAW  
ISLAMIC UNIVERSITY OF WALISONGO SEMARANG  
2018**

## APPROVAL OF ADVISERS

Enclosure : 4 (four) copies

As for : Thesis Script

On behalf of Amanatus Sholihah

To:

The Dean Of Sharia and Law Faculty  
UIN Walisongo  
In Semarang

*Assalamu'alaikum wa rahmatullahi wa barakatuh.*

After I check and make a necessary improvements to this thesis, I send this thesis script of:

Name : AMANATUS SHOLIHAH  
Student ID Number : 1402026021  
Majoring : ISLAMIC CRIMINAL LAW  
Title : RETRACTION OF CORRUPTOR'S  
POLITICAL RIGHT IN ISLAMIC CRIMINAL  
LAW PERSPECTIVE.

Based on the information above, I beg the student's thesis can be examined immediately.

Please be advised and we say thank you.

*Wassalamu'alaikum wa rahmatullahi wa barakatuh.*

Semarang, May 22 2018

First Adviser  Second Adviser   
Dr. H. Agus Nurhadi, MA.  Drs. H. Mohamad Solek, MA.



RELIGION MINISTRY OF REPUBLIC INDONESIA  
ISLAMIC UNIVERSITY OF WALISONGO SEMARANG  
FACULTY SHARIA AND LAW

Prof. Dr. Hamka (Kampus III) street, Ngaliyan, Telp/Fax.  
(024)7601291, 7601291, Semarang 50185

**RATIFICATION**

Thesis of : Amanatus Sholihah  
Student ID number : 1402026021  
Majoring : Islamic Criminal Law and Politic  
Faculty : Sharia and Law  
Title : **Retraction Of The Corruptor's Political Right In Islamic Criminal Law Perspective**

This thesis has been examined and accepted for the faculty of sharia and law in satisfaction of thesis requirement for the degree of bachelor Islamic law on:

**The Seventh Of June, 2018**

Semarang, the Seventh of June, 2018

**Chairman of Examination**

Dr. Thalhathul Khair, M.Ag.

NIP. 197701202005011005

**First Examiner**

Dr. Akhmad Arif Junaidi, M.Ag.

NIP. 197012081996031002

**First Adviser**

Dr. H. Agus Nurhadi, M.A.

NIP. 196604071991031004

**Secretary of Examination**

Drs. H. Mohamad Solek, M.A.

NIP. 196603181993031004

**Second Examiner**

Moh. Khasan, M.Ag.

NIP. 197412122003121004

**Second Adviser**

Drs. H. Mohamad Solek, M.A.

NIP. 196603181993031004



## MOTTO

من رأى منكرًا فليغيره بيده، فإن لم يستطع فبلسانه، فإن لم يستطع فبقلمه وذلك أضعف الإيمان

*“Anyone who sees disavowal then let him prevent it with his hand, if he can not, then with his tongue, and if he can not (also), then with his heart.  
That is the weakest-weak faith.”*

(HR. Muslim, Al- Tirmidzi, Al Nasai and Ahmad)

## **DEDICATION**

I dedicate this thesis for:

1. My parents who always accompany, give a lot love, and pray me sincerely.
2. My little brother and sister, Achmad Chilmi Amin and Anindita Khairin Niswa who always give me support to do my best.
3. And you all.

## DECLARATION

I declare that this thesis does not contain opinions and substances which is written by another writer, besides an information that can be found in the references.

Semarang, May 22<sup>nd</sup>, 2018

Declarator,



Amanatus Sholihah

1402026021

## AN ABSTRACT

Corruption has been a crucial problems in Indonesia. Based on the survey 's results of the Political and Economic Risk Consultancy LTD. in 2018, the biggest corruption is in political aspect and it is committed by public holder. It should be given an exclusive attention by all sides, especially by goverment, both legislative institution and judicature institution for diminishing corruption act. One of ways to do is impose a serious punishment to corruptor such as retract their political right. Nowadays, the existence of it as additional punishment become a "hot" discussion and starting get a good interest. It is shown from the judge's verdict that imposes corruptor with it. Both in Islamic criminal law or positive law, corruption is forbidden deed. However, there is no explanation about retraction of political right as punishment for corruption in Islamic criminal law. Then, how is formulation of retraction of the corruptor's political right in the positive law and how is it in Islamic Law perspective?

The kind of this research is library research, by using normative method (doctrinal legal research), it is a study to analyze the law that is written in the book, as well as law decided by the judge through court proceedings. This research is also using statue and conceptual approach that is analyze all regulation and some lawyers doctrine relating to the retraction of corruptor's political right. These secondary resource as main data, main resource and tertiary resource as proponent data. Then analyzing data through the theory that is used.

Retraction of political right for corruption act regulated in the article 10, 35, 36, 38 and chapter XXVIII about malfeasance, article 437 of Indonesian criminal code, and in the article 17 and 18 of UU No. 31/1999 Jo. UU No. 2001 about corruption act in Indonesia.

In Islamic law perspective, retraction of the corruptor's political rights includes into *takzir 'alal ma'ash* punishment, called *al-hirman* that is retracting some of the rights lifted by Islamic Law. It does not break human right. In the Islamic criminal law known an additional penalty concept called *Al-'Uqubah At-Taba'iyah*, But the concept of additional

penalties in the positive law has a suitable with complementary penalties (*Al-Uqubah At-Takmillah*) concept. Both an additional penalties in the positive law or complementary penalties (*Al-Uqubah At-Takmillah*) require to be laid down in the verdict clearly when it imposed.

**Keyword: a corruption, an additional punishment, retraction of political right.**

## PREFACE

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15. All of parties who are supporting me in finishing my thesis that can not mentioned one by one. May Allah SWT always bless you all. Aamiin.

I have tried finish this thesis completely and I realize that there is so many deficiency and limitedness. Therefore, I do hope a criticism and constructive suggestion to completing this thesis.

Semarang, May 22nd, 2018

Writer,

Amanatus Sholihah  
1402026021

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### **DAFTAR PUSTAKA DAFTAR RIWAYAT HIDUP**

# CHAPTER I

## INTRODUCTION

### A. Background

Retraction of political right has been warmly talked by people especially by law expert. It is one of additional penalties that regulated in the article 10 letter a and b of the criminal code of Indonesia. But there is no definition of the retraction of political right clearly.<sup>1</sup> It is one of the citizen's right.<sup>2</sup> Then it is only imposed to the criminal act based on the judge's consideration that it should be. It purposes for frightening the offender and would not repeat their act in the future.

For some cases of corruption, retraction of political rights has been imposed by judge. The corruption cases of driving licence's simulator done by Djoko Susilo which is decided by a judge of the Supreme Court to repeal the active right and passive right in general elections.<sup>3</sup> Moreover, the Supreme Court, they were also strengthening the judge's verdict of the Court of Jakarta in advance that the main punishment is 18 years of imprisonment, a fine of 1

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<sup>1</sup> Haliva Muharosa, " *Tinjauan Yuridis Terhadap Pencabutan Hak Politik Bagi terpidana Korupsi Di Indonesia*," *JOM Fakkultas Hukum*, Vol. III Nomor 1, 2016, page 10.

<sup>2</sup> Nurul Qamar, *Hak Asasi Manusia Dalam Negara Hukum Demokrasi (Human Right In Democratiche Rechtsstaat)*, (Jakarta: Sinar Grafika, 2016), 3rd edition, page 98.

<sup>3</sup> The meaning of passive right is someone's right to voted in general elections. While active's right is someone's right to participate(vote) in general elections.

billion rupiah and additional punishment form of payment a replacement money of 32 billion rupiah.<sup>4</sup>

Other cases such as bribery of beef imports at the Ministry of Agriculture by the politicians of the *Partai Keadilan Sejahtera*, Luthfi Hasan Ishaq who was imposed by Supreme Court by a repealing of passive rights and the main punishment were exacerbated from 16 years to 18 years imprisonment and fine of a billion rupiah subsidair a year in imprisonment if the fine did not paid.<sup>5</sup> Repealing of Lutfi Hasan Ishaq's political right is different from Djoko Susilo, In this case, Lutfi Hasan Ishaq still has the right to elect in the general election. While Djoko Susilo has no both to elect and to be elected.

As we know, corruption has been a crucial problems in Indonesia. There are so many definition of it, in the Big Indonesian Dictionary comes from words that have bad meaning, that is broken, rotten, wear goods/money entrusted, can be bribed. In general, the term corruption has been referring to illicit or illegal activities for personal or group gain. However, the meaning of the word corruption undergoes development there is an emphasis on abuse of power.<sup>6</sup> According to Sayed Hussein Alatas, corruption is the subordination of the public interest under the interests of personal goals that include violations of norms, duties and general welfare, coupled with the extraordinary secrecy,

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<sup>4</sup> Sindonews.com," Putusan inkracht, KPK segera eksekusi Irjen Djok Susilo", <https://nasional.sindonews.com/newsread/880425/13/putusan-inkracht-kpk-segera-eksekusi-irjen-djoko-susilo-1404670664.>, access 13 January 2018.

<sup>5</sup> Syamsul Mahmudin, *Membunuh Karir Politik Koruptor Daging Sapi*, Forum Keadilan, 2014, page 12.

<sup>6</sup> Munawar Fuad Noeh, *Kyai Di Republik Maling*, (Jakarta: Penerbit Republika, 2005), page 1.

betrayal, deception and fidelity of the consequences suffered by community.<sup>7</sup>

Corruption should given an exclusive attention by all side because it is a biggest case which happen in all class, whether executive or legislative, central government or region government.<sup>8</sup> The survey results of the Political and Economic Risk Consultancy LTD.<sup>9</sup> in 2018 says Indonesia is the most third corruption countries at 7.57 degrees in Asia, after Cambodia and Vietnam in 8.13 and 7.90 degrees.

Based on that survey, the biggest corruption has been committed in politic sectors that reach 84 percent. It caused by a lot of public holders who should be transferring aspirations become a robbers of people's money.<sup>10</sup> It has been proven by the number of public holders who became a suspects or a convict of corruption cases. This phenomenon has shown a betrayal of the people's mandate. The steps that have been made by aggravating punishment have not yield an effective results, so a bravery law's maintain to give a punishment that really provide a retributive and deterrence effect for corruptors and as a warning to others.

The condition of corruption in Indonesia has reached the systemic phase. Like a disease, corruption evolved into three phase, elitist, endemic, systemic. In the elitist phase, corruption is still a typical social

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<sup>7</sup> Ruslan Renggong, *Hukum Pidana Khusus: Memahami Delik-Delik Diluar KUHP*, (Jakarta: Prenada Media Group, 2016), page 61.

<sup>8</sup> M.Nurul Irfan., *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah, 2014), Cet. 2, page 4.

<sup>9</sup> Political And Economic Risk Consultancy LTD., March 28 2018, No. 992.

<sup>10</sup> Chrisna Bagus Edhita Praja Dan Achmad Irmawan., "Pencabutan Hak Politik Terhadap Terpidana Korupsi Dalam Perspektif Hukum Tata Negara", *The 4<sup>th</sup> University Research Coloquium*, 2016, page 241.

pathology within the elite/official environment. At an endemic phase, corruption begins to spread to the broader society. While at the systemic phase, individuals within the system contract the same disease. Corruption in this country has been entering all social and politics sector, cultures, people's act and people's mindset.<sup>11</sup> These all should be realized that increasing of corruption number will be affect not only to the national economy, but also to society order. So the corruption can not be classified as ordinary crime, but it is an extraordinary crime.<sup>12</sup>

Regulation of the corruption Act in Indonesia which regulates specifically about Eradication of Corruption Act that is regulation No. 31 Year 1999 Jo. No.20 of 2001 and regulation No. 46/2009 on the Corruption Court. In article 2 paragraph (2) regulations No. 31/1999 written that if the corruption were doing in "specific condition" then the death punishment could be imposed. Moreover, Article 10 of the Criminal Code letters a and b mentioned that the criminal consists of principal and additional criminal punishment. An additional punishment herein include the reracting/repealing of certain rights, the deprivation of certain goods, and the announcement of the judge's verdict. Regarding the repealing of certain rights is described more detail in Article 35 paragraph 1 number 3, namely the repealing of the right to elect and be elected in the general elections held under general rules.<sup>13</sup> The implementation of additional penalties

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<sup>11</sup>M.Nurul Irfan., *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah, 2014), Cet. 2, page 5.

<sup>12</sup> Ermansjah Djaja., *Memberantas Korupsi Bersama KPK*, (Jakarta: Sinar Grafika, 2013), cet.2, page 28.

<sup>13</sup> Moeljatno., *Kitab Undang-Undang Hukum Pidana*, (Jakarta: Bumi Aksara, 2008), page18.

especially retracting of political rights form is corruptor who abusing politic power to certain circumstances and is intended to provide a deterrent effect to the corruptor.

In the punishment system, the imposition of punishment against the convict is a means to achieve the purpose of criminal law both in general and in particular, and has the effect of deterrence both special and general. So the consequences of criminal prosecution must be beneficial for both the convicted person and the public (win-win solution).<sup>14</sup> So that with such punishment, the principle of justice, benefit, and legal certainty is expected to be fulfilled properly.

In islamic law, there is *qisas/diyat*, both in soul and part of body's, *hudud* with its various include to sanction to suspect of *zinah*, drunkard, thief, robber, rebel, and apostate. Then there is certain about *takzir* that include all of wickness and infraction which has not rounded up in *qishash/diyat* and *hudud*.<sup>15</sup>

Meanwhile, discussing about the punishment, Islamic law based the formulation of punishment of crime on two basic aspects namely retribution and deterrence. In addition to the function of deterrence, the retributive function of a punishment becomes the conversation of Islamic criminal law expert, this is influenced by the many verses of the *Qur'an* which explicitly explain that punishment of criminals is in fact a reward for their actions.<sup>16</sup>

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<sup>14</sup> Warih Anjari., "Pencabutan Hak Politik Terpidana Korupsi Dalam Perspektif Hak Asasi Manusia", *Jurnal Yudisial*, Vol.8 Nomor 1, Desember 2015, page 27-28.

<sup>15</sup> M.Nurul Irfan., *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah, 2014), Cet. 2, page .8

<sup>16</sup> M.Khasan., *Reformulasi Teori Hukuman Tindak Pidana Korupsi Menurut Hukum Pidana Islam*, (Semarang: 2011) page 11.

Both in Koran or Hadith, they are not explain about corruption and its punishment clearly, but there were indicated corruptions in generally.<sup>17</sup> They are prohibition to take another properties badly. Moreover in hadis which spoken by Imam Ahmad that Our prophet SAW inveigh bribery act. This is an hadis:

لَعَنَ اللَّهُ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ الرَّاشِيَ وَالْمُرْتَشِيَ

Translation: “From Tsauban, he said: “Prophet SAW inveigh a briber, bribed”

Therefore both corruptions and its punishment has not arranged clearly by Islamic criminal law (*Syariat*). Thus the existence of additional penalties other than the principal punishment of the repealing of political rights is also a new thing in Islamic criminal law, given the threat of punishment contained in the *qishash* / *diyat* and *hudud* are only limited to the provision of fines and physical vengeance. Therefore, writer interested in researching it in the thesis entitled “**Retraction Of The Corruptor’s Political Right In The Islamic Criminal Law Perspectives**”.

## **B. Research Question**

The problem formulations of this research are:

- 1) How is the formulation of retraction of the corruptor’s political right?
- 2) How is Islamic criminal law perspective of the retraction corruptor’s political right?

## **C. The Goals Of Research**

The goals of this research are:

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<sup>17</sup> M.Nurul Irfan., *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah, 2014), Cet. 2, hal. 6

- 1) To know the provision of retraction of corruptor's political right.
- 2) To know Islamic criminal law perspective againsts the retraction of political right as the additional penalties to corruptors.

#### **D. The Significant Of Research**

The benefits of this research are:

a. For Academics

This research is expected to provide benefits to the development of Islamic criminal law theory, especially about the criminal act of corruption.

b. For Further Research

This research can be used as a framework in conducting further research, especially related to corruption.

c. For general publics

This research can be information about corruption and additional penalties in the form of revocation of political rights for corruptors in the perspective of Islamic criminal law to the general publics.

#### **E. Literature Review**

After some case about corruptions happen, The research about corruptions many talked by publics. Then the research about corruptions has been researched by some researcher before this research done. But from each research, there are difference both the result and the characteristic caused by its method and the main research that used included to this research. Therefore researcher explain some research that has the same theme, it aim to avoid the plagiarism against this research. The corruptions research that researcher found, are:

Thesis, written by Dian Rudy Hartono.<sup>18</sup> The title is “*Pencabutan Hak Politik Terhadap Koruptor Dalam Perspektif Nomokrasi Islam*”. On this thesis, Rudy explain that the retractions of politics right for corruptor is to save a justice, as protection form to general goodness and already appropriate to the principal of nomocracy in Islam. Because of The corruptors contravened the Islamic nomocracy principal by betraying mandate. In the context of implementation government, the mandate can be a power. In the context of governance administration, the mandate can be either power or leadership. Since power is a mandate, then strictly the holder of power is prohibited from abusing the powers mandated to him.

Journal, written by “Chrisna Bagus Edhita Praja dan Achmad Irmawan.<sup>19</sup> The title is “*Pencabutan Hak Politik Terhadap Terpidana Korupsi Dalam Perspekti Hukum Tata Negara*”. On this journal, Chrisna and Ahmad explain that the retractions of politics right is has fulfil a article 10 of the Criminal Code(KUHP) which explain an additional penalties in addition to principal penalties. The implementation of additional penalties on retracting political right form is not Human’s right violations, remain the corruption violated many people’s human right. In other hand, although the politic’s right regulated in contitution, but in human’s right regulations, the politics right categoried to derogable right. It mean this right can be violated by law enforcement for peoples justice.

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<sup>18</sup> Dian Rudy Hartono, “Pencabutan Hak Politik Terhadap Koruptor Dalam Perspektif Nomokrasi Islam”, *Skripsi* UIN Sunan Kalijaga, (Yogyakarta: 2016), ii, not published

<sup>19</sup> Chrisna Bagus Edhita Praja dan Achmad Irmawan, “Pencabutan Hak Politik Terhadap Terpidana Korupsi Dalam Perspekti Hukum Tata Negara”, 2016, hal. 241.

Journal written by Rendi Herlambang And Sigit Riyanto.<sup>20</sup> The title is “berjudul “ *Pencabutan Hak politik sebagai pidana tambahan bagi terpidana tindak pidana korupsi (Studi Kasus Putusan Mahkamah Agung Nomor 1195 K/Pid.Sus/2014 Atas Nama LHI)*”. On this journal, they explain that the retraction of political right as the additional penalties is optional sentence to be given, it means the judge is free to impose it or not the sentence to the convict. The parameter used by judge to impose the retraction of the political right are the positions of the accused, the characteristic of the crime, and the impact of crime. If the judge imposed this sentence, he must determine the period of the retraction of the rights appropriate with article 38 paragraph 1 of the criminal code.

Thesis written by Yosy Dewi Mahayanthi.<sup>21</sup> The title is “ *Dasar Pertimbangan Hakim Dalam Menjatuhkan Putusan Pencabutan Hak Pilih Aktif Dan Hak Pilih Pasif Terhadap Terpidana Tindak Pidana Korupsidalam Perspektif Hak Asasi Manusia*”. On this journal, she explain that the criteria of the retraction active and passive suffrages from corruption was if the offender is a political figures, so it called as political corruption. The retraction of active and passive suffrages did not violate the political right of corruption because it considered as violating human right and even called as *extraordinary crime*.

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<sup>20</sup> Rendi Herlambang And Sigit Riyanto, “ *Pencabutan Hak politik sebagai pidana tambahan bagi terpidana tindak pidana korupsi (Studi Kasus Putusan Mahkamah Agung Nomor 1195 K/Pid.Sus/2014 Atas Nama LHI)*”, Universitas Gadjah Mada (Yogyakarta:tp:tth)

<sup>21</sup> Yosy Dewi Mahayanthi. The title is “ *Dasar Pertimbangan Hakim Dalam Menjatuhkan Putusan Pencabutan Hak Pilih Aktif Dan Hak Pilih Pasif Terhadap Terpidana Tindak Pidana Korupsi dalam Perspektif Hak Asasi Manusia*”, *Skripsi*, Fakultas Hukum Universitas Brawijaya, (Malang: 2015).

Thesis written by Erma Lisna Wati.<sup>22</sup> The title is ““ *Pencabutan Hak Memilih Dan Dipilih Dalam Jabatan Publik Terhadap Narapidana Korupsi Di Indonesia Dalam Perspektif Hak Asasi Manusia*”. On this journal, Erma explain that the retraction does not violate human right, but necessary legal reform s by the legislature regarding the limitation of executions of political disenfranchisement so there is no conflict of norm and achieve he justice, legal certainty and benefits o those seeking the justice.

Journal written by Haliva Muharosa.<sup>23</sup> The title is “*Tinjauan Yuridis Terhadap Pencabutan Hak Politik Bagi Terpidana Korupsi Di Indonesia*”. On this journal, Haliva said that overview of juridical against retraction political rights for corruptor in Indonesia is an effort to combat a corruption in Indonesia. It is still considered about its importance. The enactment of the Criminal Supplementary Retraction Political Rights is basically aimed to scare - scare and provide a deterrent effect against corruption, so that people - those who had intended to corruption be afraid to commit so, especially when considering that Indonesia is the most corrupt countries in the world, the application of the criminal had to be firm, but remains selective and liver - liver. The right to vote and be elected to public office is one part of human rights, remove, eliminate or negate the

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<sup>22</sup> Erma Lisna Wati, “ *Pencabutan Hak Memilih Dan Dipilih Dalam Jabatan Publik Terhadap Narapidana Korupsi Di Indonesia Dalam Perspektif Hak Asasi Manusia*”. *Thesis*, Pasca Sarjana Universitas Udayana, (Denpasar: 2016), page ix.

<sup>23</sup> Haliva Muharosa, “*Tinjauan Yuridis Terhadap Pencabutan Hak Politik Bagi Terpidana Korupsi Di Indonesia*”, *JOM Fakultas Hukum*, Vol.III No.1, February 2016, page 1.

rights of citizens as a whole even though through the verdict is a violation of human rights.<sup>24</sup>

## **F. Research Methodology**

### **1. The Kind of Research**

The kind of this research is library research, that is using a normative method, called by doctrinal legal research,<sup>25</sup> where the sources of research is obtained from the secondary materials. In its research, the law concepted as what is laid down on regulations or norm that became a standards of human behavior. In this normative research, the writer researching against the synchronizations of the law starts from the existing regulations, and identifying a principal of Islamic ciminal law and certain regulations.

### **2. The Approach of Research**

The approach that used in this research is statue approach and conceptual approach. The statue approach is analyzing all regulation which has related to the retraction of corruptor's political right. Then the conceptual approach is analyzing some lawyers doctrine about the retraction of corruptor's political right.

### **3. The Resource of Research**

The kinds of researcher's research that used by researcher as standard to researching are:

#### **a. Primary Resource**

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<sup>24</sup> Haliva Muharosa., "Tinjauan yuridis terhadap pencabutan hak politik bagi terpidana korupsi di indonesia," *Kampar: JOM Fakultas Hukum Vol. III Nomor I*, 2016, page 1

<sup>25</sup> Sulistyowati Irianto and Shidarta (eeds), *Metode Penelitian Hukum: Konstelasi Dan Refleksi*, (Jakarta: Yayasan Pustaka Obor Indonesia, 2011), page 121-122.

The primary resources of this research is an article 10th, 35th paragraph (1st) number 3rd, and article 38th of Criminal code, article 18th paragraph 1st letter (d) of Regulation No. 31/1999 Jo. Regulations No. 20/2001 about Eradication of Corruption Act, *nash Alqur'an* and *hadist*, scholar's argument on Islamic book about retraction of political right in classic and contemporary fiqh.

**b. Secondary Resource**

The secondary materials of this research is *Al-Tasyri' Al Jina'iy Muqaranan Bil Wad'i* by Abdul Qadir Audah, other books of Islamic criminal law, books of corruption, journals of law, thesis, and other books that related to retraction political right.

**c. Tertiary Resource**

The tertiary materials of this research is the encyclopedia of law, laws dictionary, and big Indonesian dictionary(KBBI) and internet.

**4. An Analysis of Data**

Because of this research is a qualitative research that purpose to understand, interpretating, describing realities, then the method of analyze that used is deductive.<sup>26</sup> Deductive method is rationalyze start from data and general statement of concept retraction of political right for corruptor in Islamic criminal law perspective.

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<sup>26</sup> Sulistyowati Irianto and Shidarta (eeds), *Metode Penelitian Hukum: Konstelasi Dan Refleksi*, (Jakarta: Yayasan Pustaka Obor Indonesia, 2011), page 98-99.

## G. Systematic Writing

The general systematic of this research gave to reader, it means that the reader could be understand the description easily and give general explain completly about this thesis. It has five chapter that show up its each different point. The systematic of this thesis is:

**The first chapter** is an introduction. It contain a background of the problems how could this research should do. Then a problems formulation, it purpose to explain the main problems of this research clearly. Then the goals and benefits of this research to to explain how important this research is. While the literature review contain general review of the difference of this research among another. Then the method of research is systematize method and steps of the research. It purpose to explain the way of this research did. And the last is a systematic of this thesis.

**The second chapter** is explain about corruption and punishment in Islamic criminal law, classification of punishment Islamic criminal law, and the goals of punishment n Islamic criminal law.

**The third chapter** is describing the object of this research. Its contents are: Definition of Retraction of political right, the provision of retraction of political right in positive law, the urgency of retraction of political right implementation, the criteria of additional penaltes imposition to the corruptors, and some cases of retraction of political rights in Indonesia.

**The fourth chapter** is an analysis, by knowing the concept of retraction of political right as an additional penalties in the positive law, the writer will analyze it to find the categories which is suitable with Islamic criminal law (*Fiqh Jinayah*) perspective.

**The fifth chapter** is closing. This chapter contains final result from explanations of the previous chapters which has been elaborated in the research, and conclude the retraction of political rights on Isamic criminal law (*fiqh jinayah*) perspective.

## CHAPTER II

### PUNISHMENT OF CORRUPTION IN ISLAM

#### A. Corruption In Islamic Criminal Law

##### 1. *Al-Ghulul* (Embezzling)

*Ghulul* come from term الْعِلُّ - الْعَلَّةُ - الْعَلَلُ - الْعَلِيلُ.

According to Ibrahim Anis and Abdul Halim Muntasir in *Al-Mu'jam Al Wasit*, *ghulul* means betray in keeping property of war. Another term of *ghulul* is *ghanimah* means war loot.<sup>27</sup> Both has similar definition, that is dishonest deed which is inflict the state's financial loss directly.<sup>28</sup> Islamic law expert relating this definition with *Uhud* war in the 3rd of H. However, there were another *riwayat* informed that this definition is relating with *Badar* War wherein the red velveten was lost in this war.

Terminologically, *Ghulul* is embezzling money related belong to country and public property.<sup>29</sup> Prophet said:

مَنْ اسْتَعْمَلَنَا عَلَى عَمَلٍ فَرَزَقْنَاهُ رِزْقًا فَمَا أَحَدًا بَعْدَ ذَلِكَ فَهُوَ غُلُولٌ (رواه

ابو داود)

“Whoever that we lift as an employee to do something, and we pay them as its should have been. So what is they took over from it, it called *ghulul*”. (HR.Abu Daud)<sup>30</sup>

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<sup>27</sup> Abu Fida' Abdur Rafi', *Terapi Penyakit Korupsi*, (Jakarta: Penerbit Republika, 2006), page 30.

<sup>28</sup> M.Khasan., *Reformulasi Teori Hukuman Tindak Pidana Korupsi Menurut Hukum Pidana Islam*, (Semarang: 2011), page 68.

<sup>29</sup> M. Nurul Irfan, *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah,2012), page 81.

<sup>30</sup> M.Khasan., *Reformulasi Teori Hukuman Tindak Pidana Korupsi Menurut Hukum Pidana Islam*, (Semarang: 2011), page 70.

*Ghulul* is one of corruption that happened in Rasulullah era.<sup>31</sup> Nevertheless, *ghulul* has no physical punishment in this era, but moral punishment, such as the offender will not be prayed by moslems if he died, and the offender will embrassed in *akhirat*. Based on the explantion above, it shown that Rasulullah does not consider corruption as a criminal act which is the offender should be punished like *qishash* and *hudud*.<sup>32</sup>

Therefore, corruption can defined as *ghulul*, because they both are the criminal that is relating with public affair and power.

## 2. *Risywah* (Bribery)

*Risywah* derived from *masdar* “*risywah, rasywah or rusywah*” which has meaning *al ja’lu* (salary, reward or bribery)<sup>33</sup>. Terminologically, *risywah* is something given for blaming the truth or justifying the wrong.<sup>34</sup> *Risywah* has three main substances, a giver (*al-rasyi*), people who accepting bribe (*al-murtasyi*), and goods/property/ another object of bribery.

*Risywah* both in *Quran* and *hadith* is prohibited deed that cursed by Allah, it’s include to the *Al-ma’shiyyah* (prohibited deed by Allah).

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<sup>31</sup> M. Nurul Irfan, *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah,2012), page 88.

<sup>32</sup> M. Nurul Irfan, *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah,2012), page 87.

<sup>33</sup> Eryvn Kaffah and Moh Asyiq Amrulloh (eeds), *Fiqh Korupsi: Amanah vs Kekuasaan*, (Mataram: Solidarits Masyarakat Transparansi NTB, 2003), Page 276.

<sup>34</sup> M. Nurul Irfan, *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah,2012), page 89

The punishment is based on judge's considering, because *risywah* is included into *takzir*.

عن عبد الله بن عمر قال لعن رسول الله صلى الله عليه وسلم الراشي و المرتشي

“Prophet curses those who gave and took bribes”.

Based on the sectors of *risywah*, there were five divided of it:<sup>35</sup>

- 1) *Risywah* in law sectors, such as judicature mafia.
- 2) *Risywah* in economic sectors.
- 3) *Risywah* in pertaining to manpower.
- 4) *Risywah* in education sector.
- 5) *Risywah* in service sector.

Bribery, and its form are forbidden. Both giving and accepting present are one of bribes, it is also forbidden to public holders. Although, the giver has no relation against the case that they are handled.<sup>36</sup> Therefore, corruption has similar term with *risywah*, because both of them is using money or another present to get their mission.

### 3. *Ghasab* (using other property unexcusely)

In etimological, *ghasab* is taking something cruelly. While, terminologically *ghasab* is every effort for taking away another property clearly. According to Nurul Irfan, *ghasab* is taking another's property without an excuse and cruelly, sometimes it could be

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<sup>35</sup> Abu Fida' Abdur Rafi', *Terapi Penyakit Korupsi*, (Jakarta: Penerbit Republika, 2006), page 10.

<sup>36</sup> M.Khasan., *Reformulasi Teori Hukuman Tindak Pidana Korupsi Menurut Hukum Pidana Islam*, (Semarang: 2011), page 81.

committed clearly.<sup>37</sup> While, according to Baharuddin Ahmad and Illy Yanti, they compare *ghasab* with robbery in Indonesia. Because both *ghasab* or robbery is taking other rights cruelly and violently.<sup>38</sup>

*Ghasab* is prohibited deed. There was two explanation in *Al-quran*, An-Nisa verse 29 and Al-Baqarah verse 188.

وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ وَتُدْلُوا بِهَا إِلَى  
 الْحُكَّامِ لِتَأْكُلُوا فَرِيقًا مِّنْ أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنْتُمْ  
 تَعْلَمُونَ

*“And eat not up your property among yourselves in vanity, nor seek by it to gain the hearing of the judges that ye may knowingly devour a portion of the property of others wrongfully.”*(Al-Baqarah: 188)

There is no specific regulation about punishment of *ghasab*, therefore, *ghasab* include into Jarimah *Ta'zir*. Imam Al Nawawi classified punishment of *ghasab* based on the object of *ghasab* into three:

- a) Punishment for the object of *ghasab* which is totally

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<sup>37</sup> M. Nurul Irfan, *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah,2012), page 106.

<sup>38</sup> Baharuddin Ahmad and illy Yanti, *Eksistensi Dan Implementasi Hukum Pidana Islam Di Indonesia*, (Yogyakarta: Pustaka Pelajar(Anggota IKAPI), 2015), page 313.

The punishment of those cases is returning the things which is taken and *ta'zir* or *ta'dib* by the government.

- b) Punishment for the object of ghasab which is lost

Beside *ta'zir*, the suspect must be return and change which has been taken as price as thing which has taken.

- c) Punishment for the object which is lackly.

The suspect have to return and change the lack of things which have been taken.

#### 4. *Khianat* (betraying a mandate)

*Khianat* comes from term “*khaana-yakhuunu-khiaanatan*” means an attitude that can not be trusted/dishonest. Terminological, *khianat* is an attitude that defying the truth through betraying mandate or an engagement by an intention and secretly. According to Al-Raghib Al-Asfahani such as excerpted by Nurul Irfan that *khianat* and *al-nifaq* both has worst meaning.<sup>39</sup> While, according to Wahbah Zuhaili *khianat* is every deed that betraying an engagement and a trust that has been became a society custom.<sup>40</sup> There is no explanation about punishment of *khianat* explicitly like *risywah*,

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<sup>39</sup> Nevertheless, *khianat* used in the term a mandate and an engagement. While *al-nifaq* used in the term a debt, then both of them has relating each other.

<sup>40</sup> Wahbah Zuhaili, *Al-Fiqh Al-Islami Wa Adillatuh*, Vol. 8, (Beirut: Dar Al-Fikr, 1997), fourth edition, page 5876.

*ghulul*, and *ghasab*. Overthere, *khianat* categorised into *takzir*.<sup>41</sup>

In other perspective, corruption defined as position/power abusing. According to M.Khasan, position is *amanah*(mandate). Therefore, abusing *amanah*(mandate) called *khianat*. It is forbidden and disabled deed.<sup>42</sup> Betraying mandate is including to every property both kinds or prize(expensive or inexpensive).<sup>43</sup>

##### 5. *Sariqah* (Stealing)

*Sariqah* come from term “*saraqah-yasriqah-sarqan*” means taking another property secretly and trickery.<sup>44</sup> Terminologically, *sariqah* is taking away another property secretly from the owner. In this case, Abdul Qadir Audah explained the difference between small theft and big theft. In the small theft, taking property secretly (without permission and awareness from the owner). While, a big theft is taking property with owner’s awareness, but he is not permitting an offender to do it, so there is a violence substance.<sup>45</sup>

The punishment of *sariqah* is cutting hand off. Allah said:

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<sup>41</sup> M. Nurul Irfan, *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah,2012), page 112.

<sup>42</sup> M.Khasan., *Reformulasi Teori Hukuman Tindak Pidana Korupsi Menurut Hukum Pidana Islam*, (Semarang: 2011), page 70.

<sup>43</sup> M.Khasan., *Reformulasi Teori Hukuman Tindak Pidana Korupsi Menurut Hukum Pidana Islam*, (Semarang: 2011), page 78.

<sup>44</sup> A.W. Munawwir, *Kamus Al-Munawwir Arab Indonesi Terlengkap*, (Surabaya: Pustaka Progressif, 1997), XIV edition, page 628.

<sup>45</sup> Abdul Qadir Audah, *Tasyri’ Al-Jinaiy Al- Islamiy*, Vol.1 (Beirut: Muassasah Ar-Risalah,1992), page 514

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جَزَاءً بِمَا كَسَبَا  
 نَكَالًا مِّنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ

“And the thief, male and female; cut off the hands, as a recompense for hat they have earned, and a punishment from God. And God is the most powerful and wise”.(Al-Maidah: 38)

### 6. *Hirabah* (Robbery)

*Hirabah* comes from “*haaraba-yuhaaribu-muhaarabatun*” means fight against. Terminologically, *hirabah* is fight against an individual or a community with a weapon in the open place and clearly.<sup>46</sup> The punishment of *hirabah* is death punishment, crucifixion, cutting off hand and leg crossed, and isolation. These punishment is not facultative punishment, but main punishment that should be imposed totality.<sup>47</sup>

### 7. *Al-Maksu* (Illegal pickings)

*Al-maksu* come from term “*makasa-yamkisu*” means picking a tax. According to Muhammad Ibn Salim Ibn Said Babashil excerpted by Nurul Irfan, *al-maks* is a rule that decided by tyrannical leader relating to property.<sup>48</sup>

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<sup>46</sup> Abu Abdullah Muhammad Ibn Idris Asy-Syafi’iy, *Al-Umm*, Vol. 7, (Ttp: Maktabah Al-Kulliyah Al-Azhariyyah, 1961), page 265.

<sup>47</sup> Baharuddin Ahmad and illy Yanti, *Eksistensi Dan Implementasi Hukum Pidana Islam Di Indonesia*, (Yogyakarta: Pustaka Pelajar(Anggota IKAPI), 2015), page 319.

<sup>48</sup> M. Nurul Irfan, *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah,2012), page 129.

### 8. *Al- Ikhtilas* (pilfering).

*Al-Ikhtilas* is taking property without permission clearly and fastly, usually through violence and trickery.<sup>49</sup>

Therefore, the conclusion is corruption included to *jarimah takzir*. It has different terms in Islam. Nevertheless, they have similarities. It is taking away of another properties without any rights and an excuse.

## B. Punishment in Islamic Criminal Law

### 1. Definition of Punishment

The punishment in Arabic called '*uqubah*, it is means reprisal or punishment, in other dictionary it means punishment, criminal, retaliate, and arrest.<sup>50</sup> *Al-'Uqubah* comes from the Arabic term "*Aqb*" means something comes after something before, it is because of the punishment imposed after the criminal act has done. It is include to everything which harmed.<sup>51</sup> According to Abdul Qadir Audah<sup>52</sup>, the punishment defined as:

العُقُوبَةُ هي الجزاء المقرر لمصلحة الجماعة على عصيان أمر الشارع.

*"The punishment is retaliation which regulated to protect social order, because of an infraction of the Syara' provisions."*

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<sup>49</sup> M. Nurul Irfan, *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah,2012), page 137.

<sup>50</sup> Baharuddin Ahmad and Illy Yanti, *Eksistensi Dan Implementasi Hukum Islam Di Indonesia*, (Yogyakarta: PustakaPelajar(Anggota IKAPI), 2015), Page 293

<sup>51</sup> Abdur Rahman I Doi, *Tindak Pidana Dalam Syariat Islam*, (Jakarta: PT.Rineka Cipta,1992), first edition, page 5-6.

<sup>52</sup> Abdul Qadir Audah, *Al-Tasyri' Al Jina'iy Muqaranan Bil Wad'i*, juz 1, (Beirut: Dar Al-Kitab Al-Arabi, t.t), 67.

So the punishment is retaliation to the convict or to the person who has doing criminal act which causes distraction social order. That punishment is imposed by Imam or judge which purposed to rehabilitated the convict.<sup>53</sup> It is also necessary for society to respond to such acts with punitive measures sufficiently painful to deter the criminal from walking in the criminal path again and to deter others.<sup>54</sup>

## **2. Theory Of Punishment In Islam**

Punishment theory in Islam has a difference with secular punishment theory. The Islamic theory of punishment is a belief that comes from God's instruction laid down in the *Al-qur'an*. Based on the reciting of Islamic Law expert, they formulate the theory of Islamic Punishment into five terms.<sup>55</sup>

### **1) Retaliation/retribution (Al-Jaza')**

This concept explained that the offender should be punished according to his deed without pay attention to the utility of punishment, what the punishment's advantageous both to the society or the convict is. These all suitably with justice principles which requiring the same punishment with the offender's deed. Relating to it's concept, Allah speak in the Asy-Syura:40:

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<sup>53</sup> Baharuddin Ahmad and Illy Yanti, *Eksistensi Dan Implementasi Hukum Islam Di Indonesia*, (Yogyakarta: PustakaPelajar(Anggota IKAPI), 2015), Page 294.

<sup>54</sup> M. Cherif Bassiouni, *The Islamic Criminal Justice System*, (Chicago: Oceana Publications, INC, 1982), page 231.

<sup>55</sup> Oktoberrinsyah, *Tujuan Pemidanaan Dalam Islam*, (Yogyakarta: UIN Sunan Kalijaga), Page 26- 37.

وَجَزَاءُ سَيِّئَةٍ سَيِّئَةٌ مِّثْلُهَا ۖ فَمَنْ عَفَا وَأَصْلَحَ فَأَجْرُهُ عَلَى  
 اللَّهِ ۗ إِنَّهُ لَا يُحِبُّ الظَّالِمِينَ ﴿٣٨﴾

The term retaliation used by *Al-Qur'an* in the *hudud* crime, such as Al-Maidah verse 38 below:

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جِزَاءً بِمَا كَسَبَا نَكَالًا  
 مِنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ ﴿٣٨﴾

“And the thief, male and female; cut off the hands, as a recompense for hat they have earned, and a punishment from God. And God is the most powerful and wise”.(Al-Maidah: 38)

More over, the term above give an influence to the *ijtihad* of Islamic law expert (*fuqaha*). Such as Madzhab Syafi'iyah which said that the offender who has done some criminal act, then he should be punished by each punishment of it. Another aspect, the retaliation can be found in the unforgivable punishment, such as Fatimah Al-Makhzumiyah case. She has thieving and some of *sahabat* asked the Prophet to forgive her, then the Prophet criticizes them and asserted that the punishment should be imposed.

The retaliation has a legal standing In Islam. Nevertheless, it can not apply to all of Islamic criminal act. Therefore, the Islamic law expert said that retaliation is important thing, because the punishment should hold the justice principle

especially for victim. The victim's relief literally guaranteed by retributive concept. More over, this concept can also prevent the victim to retaliate that may causes another crimes.

## 2) Deterrence (*Al-Zajr*)

This concept is purposed to prevent the offender would not repeat in the future. This concept has been laid down in the Al-Qur'an Az-Zukhruf: 48

وَمَا نُزِيهِمْ مِّنْ آيَةٍ إِلَّا هِيَ أَكْبَرُ مِنْ أُخْتِهَا وَأَخَذْنَاهُمْ

بِالْعَذَابِ لَعَلَّهُمْ يَرْجِعُونَ ﴿٤٨﴾

That verse mean that Allah is not torturing people, but actually He reminding them to keep theirselves away from disgression and bad habit. The deterrence that became a goals of punishment can found into two aspect, these are general deterrence and special deterrence. The general deterrence tended to general society, it is purposed to they will not commit the criminal act because of its punishment. While the special deterrence tended to the offender, it purposed to prevent him from repeating his deed.

*Fuqaha* had been paid attention to the goals of this aspect in their settled punishment justification. Al Mawardi said that *hudud* concept is a tool to preventing people from doing prohibited acts of *syara'*. Its goals is obedience unto God. The same statement said by Kamal Ibn Al-Humam, that the punishment is, when it imposed then it will be prevent the other from the act. And if the implementation brought to an open place, the the general preventing will be

more effective. Relating to an open place, Allah speak in the An-Nur:2

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلَيْشَهَّدَ عَلَيْكُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ ﴿٢﴾

According to the verse above, *Ulama* said that every punishment could be impose in the open place. Moreover, there was said that the punishment should be imposed it in the open place, because it would be effective to prevent the other from doing prohibition act.

### 3) Reformation (*Al-Islah*)

One of goals of Islamic punishment is to restore the offender from willing to commit a criminal act in the future. Moreover, the *Fuqaha* said that it is a basic principle goals of Islamic punishment system. Allah speak in the Al-Maidah:38-39

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جِزَاءً بِمَا كَسَبَا نَكَالًا مِّنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ ﴿٣٨﴾ فَمَنْ تَابَ مِن بَعْدِ ظُلْمِهِ وَأَصْلَحَ فَإِنَّ اللَّهَ يَتُوبُ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ ﴿٣٩﴾

The fact shown that the reformation is a basic principle goals of Islamic punishment system, is *Fuqaha*'s perspective on imprisonment and exile punishment. Based on this goals, they

said that this punishment should be implementable till the offender repent his deed.

The reformation more clearly found in the *takzir* punishment. Since the goals of *takzir* is to reeducate and refrom the offender. Therefore, although a long life imprisonment is permitted, but it should be stopped when the offender has repent. Nevethless, this goal look like unefective aganist to recidivist.

#### 4) Restoration (Al-Isti'adah)

While in the reformation concept oriented to the offender, then the restoration is victim oriented. This goals is to restore the condition, reconciliating the victim (both individual and society) and the offender, and insisting him to responsible on his deed. Kathleen Daly, said that restorative justice is a method to response the criminal act with incriminate the offender and the victim to negotiating solution between them.

In Islam, there was *diyat* as the substitute punishment of *qishash* in the forgiveness case. Allah speak in the Al-Baqarah: 178

يَأْتِيهَا الَّذِينَ ءَامَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلَى  
 الْحُرِّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأُنثَىٰ بِالْأُنثَىٰ ۖ فَمَنْ عُفِيَ لَهُ  
 مِنْ أَخِيهِ شَيْءٌ فَاتَّبِعْهُ بِالْمَعْرُوفِ وَأَدِّءْ إِلَيْهِ بِإِحْسَانٍ ۗ  
 ذَٰلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ ۗ فَمَنْ أَعْتَدَىٰ بَعْدَ ذَٰلِكَ

فَلَهُ عَذَابٌ أَلِيمٌ ﴿١٧٨﴾

The victim's forgiveness followed by *diyat* paid by the offender is a reconciliation form that can allaying resentment and restoring condition between them.

##### 5) **Sins compensation (*At-Takfir*)**

One of differences between Islamic criminal law and western law is *ukhrawi* dimension. In the Islamic criminal law, when the people commit criminal act, he does not only imposed by *al-uqubat ad-dunyawiyyah* but also *al-uqubat al-ukhrawiyyah*. By imposing *al-uqubat ad-dunyawiyyah*, it purposed to falling out the sins. While in the western law, a punishment consider as abolition of guilty. Then it is more tended to psychological aspect than religious aspect. Therefore, herein known the concept "guilt plus punishment is innocence". The problem is, sometimes, the guilty does not realized by convict. Moreover he might thought that his deed is permitted, so there is no repent on hisself.

Therefore, in the Islamic criminal law perspective, the concept of punishment as sins compensation will be completed when it followed by repentance. Then, the horizontal and vertical forgiveness will be recieved. In adding a repentance element herein comes from the concept of *riddah* criminal act. When the Muslim apostate, he imposed by either death penalties or imprisonment penalties while he still in his intention to ally, he will never get forgiveness. Allah speak in the An-Nisa:48

إِنَّ اللَّهَ لَا يَغْفِرُ أَنْ يُشْرَكَ بِهِ وَيَغْفِرُ مَا دُونَ ذَلِكَ لِمَنْ

يَشَاءُ ۗ وَمَنْ يُشْرِكْ بِاللَّهِ فَقَدِ افْتَرَىٰ إِثْمًا عَظِيمًا ﴿٤٨﴾

In other hand, a repentance would not completely remove a punishment automatically although it has been done before he get caught. It would be difference with another case such as *hirabah*, the offender who has repented before he get caught, then Allah will forgive him. Allah speak in the Al-Maidah: 34

إِلَّا الَّذِينَ تَابُوا مِنْ قَبْلِ أَنْ تَقْدِرُوا عَلَيْهِمْ ۖ فَاعْلَمُوا

أَنَّ اللَّهَ غَفُورٌ رَحِيمٌ ﴿٦٤﴾

Nevertheless, that forgiveness is only relating to offences against Allah's right (vertical), while the individual and society it does not remove automatically. The robber that repenting his deed should be give goods back to the owner. Moreover, if there was murder in the robbery case, the convict should be qishash. The sins compensations found in the kafarat punishment clearly. And it was laid down by syari'at spesifically, it is only as sins compensation because of commit forbidden thing, neither word nor act.

### 3. Basic principle of punishments in Islamic criminal law:<sup>56</sup>

- 1) The punishment deter a people to do not commit a criminal act.
- 2) The limitation of punishment. It means to keep society order. If the society prosecutes an offender to be punish more longer, then he should be.
- 3) If the punishment purposes to protect society from the convict, then the punishment that should be imposed is death punishment or imprison him for a long life till he repent.
- 4) Every punishment which keeps social order it is a *syari'at* punishment.
- 5) Educates an offender and does not retaliate, but it means to reform.

The principle of punishments in Islamic Criminal Law:<sup>57</sup>

- 1) Justice, its means to fight the criminal act without pay attention to the offender.
- 2) Fight the criminal act and pay attention to the offender within.

### 4. The Goals Of Punishment In Islam

An Islamic law expert clasified the goals of punishment in Islam into:

- 1) To ensure the security of the necessities of life is the first and principal of *syari'at* (*dharuriyat*). In the human life. it is an urgent things, so it can not to be defiate. If it does

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<sup>56</sup> Ensikolopedia Hukum Pidana Islam, (Bogor: PT. Kharisma Ilmu), vol.III, page 20.

<sup>57</sup> Ensikolopedia Hukum Pidana Islam, (Bogor: PT. Kharisma Ilmu), vo. III, page 21.

not fulfilled, then the disorder of society life will happen anywhere. These necessities are called *al-maqasid al-khamsah*, its include: region, soul/life, mind, generation, and propety.

- 2) To ensure the secondary necessities of human life (*Hajiyat*). It is include to the important things to faciliate their necessities. If it does not fulfilled, it can not causes a society disorder. But it may causes a difficulty in our life.
- 3) To reform, to make a human life better (*tahsiniyat*). If it does not fulfilled, it would
- 4) Not make society's disorder. Reform means virtues, good manner, everything which complement the human life.<sup>58</sup>

While, according to Wardi Muslich, the goals of penalties defined into two, they are:<sup>59</sup>

- 1) To Preventing (Deterrent)
 

The purpose of preventing is arrest the convict to does not repeat their act. In other hand, it is also prevent the other person to does not do the similar act, because the punishment which imposed to the convict could be imposed to them. So the preventing has two function. First, to arrest the concickt. Second, to prevent the other person.
- 2) To Correct And To Educate

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<sup>58</sup> Topo Santoso, *Membumikan Hukum Pidana Islam*, (Jakarta: Gema Insani, 2003, page 18-19.)

<sup>59</sup> Ahmad Wardi Muslich, *Pengantar Dan Asas Hukum Pidana Islam Fiqh Jinayah*, (Jakarta: Sinar Grafika, 2004) page 137-139.

The second goals of penalties is to educate the convict to be better and then he realize his fault. In this point, it shown how Islam give attention to the convict is. In order to its goals, the penalties means to make the convict to realize that he should keep away from the criminal act does not because of the penalties, but because of Allah.

Therefore, according to the writer, the conclusion is punishment important thing to be enforce, because it is way to protect public interest or public benefit.

## **5. The classification of punishment in Islamic Criminal Law:**

- a) Based on relating to others punishment<sup>60</sup>
  - (a) Principal punishment (*Al-'Uqubah Al-Ashliyyah*). It is the principal punishment that has been set in a criminal act. For example the retaliation (*Qishash*) for the murdering or battering, and cutting off hands for theft.
  - (b) Subtitute punishment (*Al-'Uqubah Al-Badaliyyah*). It is a subtitute of the principal punishment which can not imposed because of the legal reason, example *diyat* as the subtitute of *qishash* and *takzir* as a subtitute of *hadd*. While actually, *diyat* is principal punishment for the voluntary killing (*Qatl Sibh Amd*) and *takzir* is a principle punishment for the *takzir* criminal act.<sup>61</sup>

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<sup>60</sup> Abdul Qadir Audah, *Tasyri' Al-Jinaiy Al-Islamiy Muqorronan Bil Qanuni Al-Wad'iy*, (Beirut: Muassasah Ar Risalah, 1996), page 632-633.

<sup>61</sup> Topo Santoso, *Asas-Asas Hukum Pidana Islam*, (Jakarta: PT. Raja Grafindo Persada, 2016), page 148.

- (c) Additional Punishment (*Al-'Uqubah At-Taba'iyah*), it is the punishment which following a principle punishment without any itself judgment. For example prohibition on receiving an inheritance for the murderer which killing their family, as the substitute of *qishash*, another example is prohibition to be witness in the *qadzaf* case. These punishment are not imposed by judgement, but it is a consequences of the *qadzaf* punishment.
- (d) Complementary Punishment (*Uqubah Takmillah*), it is the punishment which following the principle punishment and requiring itself judgment of the judge.

A complementary punishment and an additional punishment have a similar, because both of them is a consequences of the principal punishment. Then the difference between both of them is the judgment. In the complementary punishment, its self judgment of the judge is required. While an additional punishment is not required.

- b) Based on the judicial power in determining a type and an amount of punishment.<sup>62</sup>
- (a) The punishment has only one limit, means there is no limit, either maximum or minimum. This punishment can not be added or lessened. Example the flogging punishment as *hadd* punishment.
- (b) The punishment has the maximum and minimum limit, the judge has an authority to

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<sup>62</sup> Abdul Qadir Audah, *Tasyri' Al-Jinaiy Al-Islamiy Muqorronan Bil Qanuni Al-Wad'iy*, (Beirut: Muassasah Ar Risalah, 1996), page 633.

determining the suitable punishment between minimum and maximum of the punishment is, example either imprisonment or flogging to imposed in the case of *takzir* act.

- c) Based on the duty to impose the punishment.
  - (a) The punishment determined the kind and the amount, where the judge should do without any deducting and supplementing or changing the punishment (*Uqubah Lazimah*).
  - (b) The judge gave a choices to determine the suitable punishment<sup>63</sup> based on the condition and the act of the convict, because the punishment has not laid down yet (*Uqubah Mukhayyarah*).
  
- d) Based on the object of punishment.
  - (a) Physical punishment (*Uqubah Badaniyyah*), means the punishment that the object of it is human physical. For example: detain penalty, lashes/flogging and imprisonment.
  - (b) Psychic punishment (*Uqubah Nafsiyyah*), means the punishment that the object is his psychic. For example threaten, criticizes.
  - (c) Property punishment (*Uqubah Maliyyah*), means the punishment that he object is property. For example diyat/fine and confiscating.

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<sup>63</sup> From many kinds of punishment that has been laid down in the *syari'at*.

e) Based on the kinds of criminal act that threaten by punishment<sup>64</sup>

(a) *Hudud/hadd* punishment, is a sanction of law that has been set for the *hudud* act.

*Hudud* ( حدود ) is plural form by *hadd* ( حد ) (, in etimology means offences, prevention, and the final line from somethings purposed.<sup>65</sup> *Hudud* in terminology is:<sup>66</sup> الجرائم المعاقب عليها بحد “forbidden deed that threaten by punishment(had)”.

According to Muhammad Salim Al Awwa’, *hudud* is either commit or ommit something which is forbidden by *syara*’ and threaten by had. The word “*hudud*” used to mentioning a punishment.<sup>67</sup> Its punishment is Allah’s right.<sup>68</sup> The characteristic of *jarimah hudud* is punishment determinating by *syara*’ and there is no minimal limitation and maximal limitation. The kind of *hudud* are zina, defamation (*Qadhf*), drinking wine (*Khamr*), theft (*Sariqah*), robbery (*Hirabah*), apostasy (*irtidat/riddah*), rebel (*bughah*).<sup>69</sup>

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<sup>64</sup> Abdul Qadir Audah, *Tasyri’ Al-Jinaiy Al- Islamiy Muqorronan Bil Qanuni Al-Wad’iy*, (Beirut: Muassasah Ar Risalah, 1996), page 634.

<sup>65</sup> Rokhmadi, *Reformulasi Hukum Pidana Islam*, (Semarang: RaSAIL Media Group, 2009), page 19.

<sup>66</sup> Abdul Qadir Audah, *Tasyri’ Al-Jinaiy Al- Islamiy*, (Beirut: Muassasah Ar-Risalah,1992), I, page 78

<sup>67</sup> Rokhmadi, *Reformulasi Hukum Pidana Islam*, (Semarang: RaSAIL Media Group, 2009), page 19.

<sup>68</sup> *Hudud* is Allah’s right, means the punishment could not breakdown by victim or government.

<sup>69</sup> Ahmad Wardi Muslich, *Pengantar Dan Asas Hukum Pidana Islam*, (Jakarta: Sinar Grafika, 2006), edition 2, page 17-18.

- (b) *Qishash-diyat* punishment, is a sanction of law that has been set for the *qishash diyat* act.

The word *Qishash* is derived from an Arabic word *Qassa*,<sup>70</sup> it means “equality” or “equivalence”. It implies that a person who has committed a given violation will be punished in the same way and by the same means that he used in harming another person. Many western writers refer to *Qishash* as a retaliation, which connotes more vindictiveness or revenge than the redress of a wrong by equalizing the harm. There was five *Qishash* crime<sup>71</sup>:

- (1) Murder (*Qatl Al-Amd*).
- (2) Voluntary killing (similar to intentional killing or voluntary manslaughter) (*Qatl Sibh al Amd*).
- (3) Involuntary killing (*Qatl Khata'*)
- (4) Intentional physical injury or maiming (*Qatl Qa'im Maqam Al-Khata'*),
- (5) Unintentional physical injury or maiming (*Qatl bi-Sabab*).

Crimes of *qishash* fall into two categories, the first being homicide and the second, battering. Both intentional and unintentional homicide are included but the sanctions are different. The term killing includes unjustifiable and inexcusable

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<sup>70</sup> Hashim Mehat, *Islamic Criminal Law And Criminal Behaviour*, (Kuala Lumpur: Budaya Ilmu Sdn. Bhd., 1993), page 50.

<sup>71</sup> M. Cherif Bassiouni, *The Islamic Criminal Justice System*, (Chicago: Oceana Publications, INC, 1982), page 203.

homicide and for which there is either a element of intention or recklessness.

There is an alternative penalties, called the *Diyat*. It is a compensation to be paid by the wrongdoer or his family. It also known as money paid in compensation for bloodshed (blood money).<sup>72</sup> The principles of diyya finds analogous expression in the contemporary science of victimology, whereby victim compensation emphasizes decriminalization of the act and compensation of the victim as an alternative to the traditional punishment of incarceration.<sup>73</sup>

- (c) *Kafarat* punishment, is a sanction of law that has been set for some *qishash diyat* dan *takzir* crimes.
- (d) *Takzir* punishment, is a sanction of law which set to all of *takzir* act.

*Takzir* is *masdar* form from the term ‘*azara* that means refuse. In the terminology, it means preventing or teaching of the criminal act which does not defined in the *hadd*, *kaffarat* or *qishash*.<sup>74</sup> *Takzir* is defined as “discretionary punishment to be inflicted

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<sup>72</sup> Tahir Mahmood, *Criminal Law In Islam And the Muslim World*, (New Delhi: Institute Of Objective Studies, 1996), page 63.

<sup>73</sup> M. Cherif Bassiouni, *The Islamic Criminal Justice System*, (Chicago: Oceana Publications, INC, 1982), page 205.

<sup>74</sup> Moh. Khasan, *Reformulasi Teori Hukuman Tindak Pidana Korupsi: Menurut Hukum Pidana Islam*, (Semarang: IAIN Walisongo Semarang, 2011), page 30.

for transgression against Allah, or against an individual, for which there is neither a fixed punishment nor a penance or expiation (*kaffarat*) this definition excludes all sorts of crimes for which specific punishment is prescribed in the *Qur'an* and the *Sunnah*.<sup>75</sup>

*Takzir* has several connotations. The word literally means chastisement in the widest possible sense. However it signifies criminal punishment which is not legally fixed. Jurists consider *takzir* discretionary correction, rehabilitation or chastisement. According to Al-Mawardi, *takzir* defined as punishment inflicted in cases of offences for which the law (*shariah*) has no enacted written penalties. The rules relating to it differ depending upon who is inflicting it and upon whom it is inflicted. It has this point in common with written penalties; it too, is a means of reprieve and reprimand which varies with the nature of the offense; however, it differs from them in other respect.<sup>76</sup>

The classification or *takzir*:

- 1) Principal of *takzir* act, is criminal act which not categorised into *hudud*, *qishash* and *diyat*.
- 2) Criminal act that not imposed by certain punishment, that is imperfectly *hudud* act and its punishment can not to be imposed.

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<sup>75</sup> Muhammad Iqbal Siddiqi, *The Penal Law Of Islam*, (New Delhi: Shah Offset Printer, 1994), page 159.

<sup>76</sup> M. Cherif Bassiouni, *The Islamic Criminal Justice System*, (Chicago: Oceana Publications, INC, 1982), page 212.

- 3) *Qishash* and *diyat* does not threaten by certain punishment. It is criminal acts which can not to be imposed by *qishash-diyat*.

According to Abdul Qadr Audah, *Ta'zir* has divided into 3:

- 1) *Takzir alal- ma'ashi* (التعزير على المعاصي)

*Ta'zir* for the one who doing criminal. The criminal act is not related to “*haq adami*” but related to “*haq jama'ah*”. *Fuqoha'* has divided *al- ma'shiyah* into 3: *Al- ma'shiyah* which is punished by *had*. *Al ma'shiyah* which is punished by *kaffarat*. *Al ma'shiyah* which is punished by *takzir*.

- 2) *Takzir lil maslahatil amah* (التعزير للمصلحة العامة)

*Ta'zir lil maslahatil amah* is not related to the *ma'shiyah*. For example, *Ta'zir* for educating children who leave sholat. Prohibited the crazy people interact with general human. The aims is for public benefit(*maslahatil amah*.)

- 3) *Takzir alal Mukhaalifaat* (التعزير على المخالفات)

*Ta'zir ala al-Mukhalifat* is not related to someone who leave his obligation. But related to someone who did everything which is *makruh* than *sunnah*. The goal of punishment is for public benefit.<sup>77</sup>

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<sup>77</sup>Abdul Qadir Audah, *At- Tasyri' al Jina'i al Islami muqorranan bi al qanun al wad i*, Vol. 2, (Beirut- Libanon: Dar Al-Kutub al-Immiyah, 2011), page: 155.

In determining the punishment of *takzir*, the judge must observe certain conditions:

- 1) There is a *Hadith* of the Prophet which indicates the maximum limits that the punishment of *takzir* should not exceed.
- 2) The aim of punishment in *takzir* must be utilitarian, and never purpose for torturing, and it should be never reach the *hadd* punishment.
- 3) The *Imam* must be guided by the provisions and teachings of the *Qur'an* and *Sunnah*. Therefore he is not allowed to permit what is forbidden or forbid what is permitted by God.
- 4) Establishing *takzir* offences and their punishments must be carry a protection of society out.
- 5) *Takzir* punishment must be proportional to the crime.<sup>78</sup>

Kinds of *takzir* punishment:<sup>79</sup>

- 1) Admonition (*Al-Wa'zu*)  
Admonition means calling the transgressors attention to the fact that he has acted unlawfully. The purpose of it is to remaind te offender or to inform him of his misdedd.
- 2) Reprimand (*Al-Tawbikh*)  
Reprimand may be through any word or act which the *Qadi* feels sufficient to serve the purpose of *takzir*. Jurist usually refer to some

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<sup>78</sup> Tahir Mahmood, *Criminal Law In Islam And the Muslim World*, (New Delhi: Insitute Of Objective Studies, 1996), page 91.

<sup>79</sup> Muhammad Iqbal Siddiqi, *The Penal Law Of Islam*, (New Delhi: Shah Offset Printer, 1994), page 165-176.

specific words and acts as a means of reprimand.

3) Threat (*Al-Tahdid*)

Threat is *takzir* punishment which is supposed to serve its aims by making the offender fear the punishment with which he is threatened.

4) Boycott (*Al-Hajr*)

Boycott as a *takzir* punishment is recommended by the Holy Qur'an as under:

وَأَهْجُرُوهُمْ فِي الْمَضَاجِعِ وَأَضْرِبُوهُنَّ<sup>ط</sup>

“Refuse them to share their beds.” (An-Nisa:34)

5) Public Disclosure (*At-Tasyhir*)

*At tashhir* (Stigmatising) has been known as a punishment since the early days of Islam. According to Shurayh, a well-known Qadi who served during the reigns of Hadrat ‘Umar and Hadrat ‘Ali (Allah be pleased of them), the false witness must be publicly identified so as to warn public not to trust him. On this point all the jurist agreed, the means of *tashhir* were usually the taking of the offender, by some of the judges representatives to every part of the city and telling the people that he had committed an offence for which he had received a *takzir* punishment. The purpose of this punishment is to call the attention of the public to the fact that the offender is not to be trusted.

6) Fines And Seizure Of Property (*Al Gharamah Wal Musadarah*)

Fines were imposed as punishment in cases of *takzir* during the period of the Holy Prophet. The jurists are however, divided into three groups as to its legality. According to Imam Malik, the Imam Ahmad Ibn Hanbal, the Imam Abu Yusuf (the famous Hanafi Jurist), and some of the Syafi'i, financial punishments are allowed as *takzir*. It means the *Qadi* or ruler should keep the offender's money away from him until he has repented. They support this view by saying that nobody is allowed to take another's property otherwise than for a legal reason (*bi sabab asy-syar'i*). On the other hand, the jurist who deny financial punishment as a legal punishment claim that it was realized in the beginning of Islam but abrogated afterward.

7) Imprisonment (*Al Habs*)

There are two types of imprisonment in Islamic Law: imprisonment for a definite term and imprisonment for an indefinite term. Imprisonment for a definite term may be inflicted for minor offences, as the jurist prefer flogging as the punishment for major *takzir* offences. The minimum period for imprisonment is one day, and the maximum period, the majority agreed that the *Qadi* is free to determine the period of a definite term of imprisonment.

8) Flogging (*Al-Jald*)

Flogging is a common punishment in penal law of Islam. It is prescribed as a hadd punishment for the crime of *qadhf* (eighty lashes), and for adultery committed by an

unmarried person (a hundred lashes). According to Ibn Taimiyya and his companions is the most relevant view both practically and logically. In practice, they allow any suitable punishment and avoid the strict limitation imposed on the Ruler's power to inflict takzir punishment. From the logical point of view they limit the tradition about the number of lashes allowed for "non-hadd" punishment, to a particular area and are, therefore, not forced to use the abrogation claims as other Scholars do. This is also in harmony with a principle of Islamic Law, recommending the application of every legal verdict rather than its neglect.

9) The Death Penalty (*At Takzir Bil Qatl*)

The death penalty is usually imposed for the most heinous crimes. According to Islamic Penal Law it is the punishment of two hadd offences, as a retaliation and for homicide. The jurists, accordingly are normally against its infliction as a *takzir* punishment, but exceptional cases in which *takzir* by the death penalty is allowed are mentioned in the text of almost every school. However, it must be noticed that there are some traditions which allow the death penalty as a *takzir* punishment. The different views must be measured by these traditions. However, capital punishment should always be regarded as an extraordinary *takzir* punishment. Thus, it could only be imposed in cases of absolute necessity.

10) Isolation punishment (*At-Taghrib Wal-Ib'ad*)

Isolation punishment is one of the punishments of *zina*. But, it became a *takzir* punishment. This punishment is imposed to the convict which his deed give a worse influence, endanger and harming society. According to *Fuqaha*, isolation punishment has no time limit. They said that that it is based on the Imam/judge's verdict.<sup>80</sup>

11) Crucifixion punishment

Crucifixion is a punishment of *hirabah* that categorised into *hudud*. But in the *takzir*, crucifixion did not applied with death punishment. The convict crucified in aware condition, not forbidden to eat and drink or to take ablution, but he must pray with his gestures. The length of punishment, *Fuqaha* said that it should not longer than three days. The crucifixion is a physical punishment that means to educate and public disclosure the convict all at once.

12) Another punishment

*Takzir* punishment in Islamic Criminal Law is not limited only in the form of punishment mentioned above, but it submitted to the ruling government to determine it. That are:

- a. Retraction of employment right/dismissal (*Al-Azlu Minal Wazifah*). This punishment imposed to the public employment.

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<sup>80</sup> *Ensikolopedia Hukum Pidana Islam*, (Bogor: PT. Kharisma Ilmu), vol.III, page 96.

b. Retraction of certain right (*Al-Hirman*)

Some of the rights laid down by Islamic Law are lifted, for example the right to hold a certain position, to give an testify, to acquire the spoils of war.

c. Property deprivation (*Al-Musadarah*)

It shall include confiscation of the evidence of criminal acts and illicit goods.

d. Extermination (*Izalah*)

Exterminate any former/influence of the criminal acts or prohibited conduct. Such as wiping out buldings that are on the public roads and exterminate wine bottles.<sup>81</sup>

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<sup>81</sup> *Ensikolopedia Hukum Pidana Islam*, (Bogor: PT. Kharisma Ilmu), vol.III, page 99-101.



## CHAPTER III

### RETRACTION OF POLITICAL RIGHTS

#### A. Definition of Retraction Political Right.

Definition of retraction of political right is not defined in the regulation clearly.<sup>82</sup> Then, Definition of Political rights is the civil nations right to accept the liberty in the affair of politics such as the right to join society group, to show up the opinion which purposed to influence the policy and decision of government critically, and the rights that giving a choose in the general elections.<sup>83</sup>

Political rights is one of the national's right. It included to:<sup>84</sup>

1. Opinion and expression
2. Assembly and association
3. Take a part in government
4. Equal access to public service
5. Elect and be elected

In additional, Jimly Ash-shiddiqie said that the category of political rights which assurance according to Undang-Undang Dasar 1945 (basic constitutional of Indonesia) is include to the right to make an relationship, to join a society group, show an opinion up peacefully,

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<sup>82</sup> Haliva Muharosa, *Tinjauan Yuridis Terhadap Pencabutan Hak Politik Bagi terpidana Korupsi Di Indonesia*, Kampar: JOM Fakkultas Hukum Vol. III Nomor 1, 2016, page 10.

<sup>83</sup> Irfan Abubakar, Kalina Helmanita, dkk, *Agama dan Hak Asasi Manusia*, (Jakarta; Center For The Study Of Religion And Culture(CSRC) UIN Syarif Hidayatullah, 2009 ), page 31.

<sup>84</sup> Nurul Qamar, *Hak Asasi Manusia Dalam Negara Hukum Demokrasi (Human Right In Democratic Rechtsstaat)*, (Jakarta: Sinar Grafika, 2016), 3rd edition, page 98.

the right to elect and be elected in the legislative affair, and the right to be elected in the public affair.<sup>85</sup>

Political rights is categorized into derogable rights.<sup>86</sup> In the Indonesian Criminal Code (KUHP) Formulation, Retraction of political is one of additional penalties. Andi Hamzah said that because of it is an additional penalties, it could not stand alone, except in certain cases in the deprivation of certain goods. This additional penalties is facultative, in the sense it can be impose but not necessarily. But sometimes, it is imperative too, such as in the article 250bis, 261 and 275 of Indonesian Criminal Code (KUHP).<sup>87</sup>

Criminal law expert from Universitas Islam Indonesia(UII) Yogyakarta, M. Arif Setiawan said that In Indonesia, The retraction political rights included to an additional penalties. So it only impose to a convict related to politics potitions which took from general election, and could not be impose permanently. It should any limitation time, means how long it will be apply.<sup>88</sup> A spokesperson of Komisi Pemberantasan Korupsi(KPK), Febri Diansyah said that the retraction of political rights

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<sup>85</sup> Jimly Ashshidqie, *Konstitusi dan Konstitusionalisme Indonesia*, ( Jakarta: Sinar Grafika, 2010), page. 10.

<sup>86</sup> Derogable rights is the rights which can be deferred and limited to their fulfillment by country in the certain condition, or can be called by the limitation in the existing rights. Derogable rights arose with the ultimate goals of the state, but by considering all of elements and aspects that may affect to the politics stability and the security of country by putting democracy value and society interests. Look: Rizky Ariestandi Irmansyah, *Hukum, Hak Asasi Manusia Dan Demokrasi*, (Yogyakarta: Graha Ilmu, 2013), 1st edition, page 64.

<sup>87</sup> Andi Hamzah, *Asas-Asas Hukum Pidana*, (Jakarta: Rineka Cipta, 2008), revision edition, page 202.

<sup>88</sup> Tirto.id. *Ketika Pencabutan Hak Politik Tidak Mematikan Karir Politisi*, access 20 February 2018 from <https://tirto.id/ketika-pencabutan-hak-politik-tak-mematikan-karier-politisi-cnys>.

is a tool to prevent a corruption cases being repeated by same person.<sup>89</sup>

The political rights (to elect and be elected) that retracted is a certain rights which regulated in the KUHP, Such as to be a member of Legislative(DPR) or to be another public positions. In summary, retraction political right is retracted political right by judge that purposed to defendand has not an elect or to be elected or participated in the general election anymore as long as the judges verdict.

### **B. Provisions Of Retraction Political Rights.**

The retraction of political rights is regulated in the Indonesian Criminal Code(KUHP):

The kinds of punishment, explained in the chapter below:<sup>90</sup>

Article 10 : the punishment consist

- a. Principal punishment:
  1. Death punishment,
  2. Prisonary punishment,
  3. Confinement punishment,
  4. A Fine.
- b. Additional punishment:
  1. Retraction certain rights,
  2. Deprivation certain goods,
  3. Announce judges verdict.

The Provision of rights that is can be retract is expalined in the article below:<sup>91</sup>

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<sup>89</sup> Kompas.com. *KPK Harap Hakim Pikirkan Pentingnya Pencabutan Hak Politik Koruptor*, access 20 February 2018 from <http://national.kompas.com/read/2017/01/06/09374441/kpk.harap.hakim.pikirkan.pent.ingnya.pencabutan.hak.politik.koruptor> .

<sup>90</sup> Moeljatno, *Kitab Undang-Undang Hukum Pidana (KUHP)*, (Jakarta: Bumi Aksara, 2008), 27th edition, page 5-6.

article 35:

1. The convict's rights which is retracted by judge's verdict is certain in this regulation, or in the other general regulation is:
  - (1) The rights to hold public positions or certain positions;
  - (2) The rights to join an armed force;
  - (3) The rights to elect and to be elected in the general elections held under general rules;
  - (4) The rights to be advisor (*raadsman*) or to be an administrator according to law (*gerechtelijkebewindvoerder*) rights to be a guardian, supervisor's guardian, guardianship or supervisor's guardianship, against people who does not his biological child;
  - (5) The rights to exercise the authority of the father, to exercise guardianship of their own children.
  - (6) The rights to exercise the certain jobs (*beroep*)
2. The judge has no authority to firing an official from his post, if in the custom rules certain to another ruler to do.

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<sup>91</sup> Moeljato, *Kitab Undang-Undang Hukum Pidana (KUHP)*, (Jakarta: Bumi Aksara, 2008), 27th edition, page 18.

The provision about criminal act criteria that can be imposed by retraction of political rights is :

article 36:

The rights to hold public potitions or certain potitions, The rights to join an armed forced except in the case which explained in the second book could be retracted, in the case imprisonment because of malfeasance or a crime that violates the special obligation of the potitions, or because of use the power, an opportunity, or the means that given to convict caused by his potitions

In the case of retraction of political rights, the judge shall determine how long it be based on article below:

article 38:

1. If the retraction of rights is done, the judges must determine the length of it as follows:
  - (1) In the death penalties or long a life imprisonment, the length of retraction is long a life;
  - (2) In the imprisonment to certain times, the length of retraction is two years in minimum and five years longer than his principal punishment in maximum;
  - (3) In the fine case, the length of retraction is two years in

minimum and five years in maximum.

2. The retraction of rights shall come in to force on the day the judge ruling is executed.<sup>92</sup>

In the Regulation of the corruption Act in Indonesia No. 31 of 1999 Jo. No.20 of 2001 explained about additional penalties and its kinds:<sup>93</sup>

article 17:

Besides it could be imposed in the same manner purposed in the article 2, 3, 5, to 14, the offender could be imposed by an additional penalties as purposed in the article 18.

The regulation above means that the offender did corrupt in the same manner purposed in the article 2,3,5, to 14, treaten by:<sup>94</sup>

- a. A principal penalties as regulated in the article 2, 3, 5 to 14;
- b. An additional penalties as regulated in the article 18.

An additional penalties explained in the chapter below:

article 18:

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<sup>92</sup> Moeljatno, *Kitab Undang- Undang Hukum Pidana*, (Jakarta: Bumi Aksara, 2008), 27th editions, page 18-20.

<sup>93</sup> UU No. 31 Tahun 1999 Jo. UU No. 20 Tahun 2001 Tentang Pemberantasan Tindak Pidana Korupsi.

<sup>94</sup> R. Wiyono, *Pembahasan Undang-Undang Pemberantasan Korupsi*, (Jakarta: Sinar Grafika, 2012), 3rd edition, page 139.

1. In addition to an additional penalties that purposed in the criminal code, another additional penalties are:
  - a. Deprivation of tangible properties or intangible propeties, or not moving properties which used for or obtained from corrupt, included to his own business wherein the corrupt is done, as well as the price of properties that replacing the properties;
  - b. Repayment of a replacement money equal to the amount of properties that obtained from corrupt;
  - c. Closing all of or a part of his own business for a year in maximum;
  - d. Retraction all of or a part of certain rights or removal all of or a part of certain benefits, given by government to him.
2. If the convicted is not repay a replacement money in order to verse 1 (b) as long as a month in maximum after the judge's verdict announced, that has a permanent legitimate(inkracht), so his properties shall be confiscated by public prosecutor and auctioned to cover a replacement money up.
3. In the case of convicted has no enough properties to pay a replacement money that purposed in the verse 1 (b), so the convicted

imprisoned by imprisonment that is not longer than its principal penalties in order to this regulation, and the length of it has been determined by judge's verdict.<sup>95</sup>

An additional penalties purposed in the article 18 verse 1 letter (c) and (d), in essence is additional penalties according to chapter 10 letter b number 1 of Indonesian Criminal Code. Because it is an additional penalties, the provision herein the article 38 verse 2 of Indonesian Criminal Code shall also apply to the provisions obtained in the chapter 18 verse 1 letter (c) and (d). So, the additional penalties in the form closing business, retraction of certain rights, and removal of certain profits shall take effect on the day of the verdict announce. Thus an execution of additional penalties that purposed in the article 18 verse 1 letter (c) and (d) is not needed.<sup>96</sup>

Moreover, this is reinforced by decision of Supreme Court No.4/PUUVII/2009 stipulating that the retraction of political rights is considered as a constitutional, but must to be some extent,<sup>97</sup> An additional penalties that in the article 10 letter b (1) imposed by the judge verdict and given a time limit. Overthere the retraction of political rights shall gave a time limit or in the certain time

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<sup>95</sup> UU No. 39 Tahun 1999 Tentang Pemberantasan Tindak Pidana Korupsi.

<sup>96</sup> R. Wiyono, *Pembahasan Undang-Undang Pemberantasan Korupsi*, (Jakarta: Sinar Grafika, 2012), 3rd edition, page 143-144.

<sup>97</sup> Tirto.id. *Ketika Pencabutan Hak Politik Tidak Mematikan Karir Politisi*, access 20 February 2018 from <https://tirto.id/ketika-pencabutan-hak-politik-tak-mematikan-karier-politisi-cnys>.

or till the condition restored. The retraction of certain rights in the criminal law is not applying for long a life. Herein retraction of political rights means the rights to hold the position in public affair .<sup>98</sup>

The retractions of rights is only imposed to criminal act that threaten by an additional penalties in regulation. The length of it in the long a life penalties is long a life . While in the imprisonment and a confinement, the length of retraction is two years in the minimum and five years in the maximum longer than the principal penalties.

The status of public officer who corrupting is not retracted his right directly before the judge verdict. Herein the judge shall include the retraction of political rights as an additional penalties clearly.<sup>99</sup>

In other hand, Indonesia hold human rights up. Its shown on Pancasila as basic ideology and Undang-Undang Dasar 1945(UUD 1945) as the basic constitutional of Indonesia. It purposed to protect the citizen's rights and the citizen's constitutional rights. It included to the right to vote because it is one of basic right for citizens that should be fulfill by country. The political rights include right to elect and be elected, it explained in the UUD 1945:

article 27:

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<sup>98</sup> Putusan Mahkamah Konstitusi No. 4/PUUVII/2009.

<sup>99</sup> Haliva Muharosa, *Tinjauan Yuridis Terhadap Pencabutan Hak Politik Bagi terpidana Korupsi Di Indonesia*, Kampar: JOM Fakkultas Hukum Vol. III Nomor 1, 2016, page 11.

- (1) Every citizen is equal before the law and the government, respect the law, and the government without no except.
- (2) Every citizens has the right on getting job and life properly for human.

article 28 D verse (3):

Everyone has the right on getting equal chance in the government.

article 28 E verse (3):

Everyone has the right on alliance and assemble liberty, and show an opinion up.

The articles above explained that every citizen has the equal rights without any discrimination, and the government shall fulfill it, especially related to citizen's political right means to elect and be elected in the general election in Indonesia.

Moreover, the political rights is regulated in the UU No. 39 of 1999 about Human Rights in Indonesia:

article 23 verse (1):

Everyone has a right to be elect and has their own political conviction.

Then in the article 43,

Verse (1):

Every citizen has a right to be elect and be elected in the general election based on equality of right through voting directly, generally, freely, secretly, honesty, and fairly that appropriate to regulation rules.<sup>100</sup>

Verse (2):

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<sup>100</sup> UU No. 39 of 1999 about Human Right In Indonesia.

Every citizen has the right to join in the government directly or through the vice that chosen by their self freely, set fourth the way certained in the regulation.

Article 44:

Everyone, both individual or together has the rights to give an opinion, appeal, denunciation, and or suggestion to government in the clean governance, effective, and efficient, both by spoke or vote set fourth in the regulation.

Political Rights is avowed In The Other Regulation:

- a) The Universal Declaration Of Human Rights(UDHR)  
The Universal Declaration Of Human Rights(UDHR) ratified on 1948. Political rights explained in the article 21of UDHR:
  - (1) Everyone has the right to take part in the government of his country directly or through freely chosen representatives.
  - (2) Everyone has the right of equal access to public service in his country.
  - (3) The will of the the people shall the basis of authority of government; this will shall be expressed in periodic and genuine election, which shall be by universal and equal suffrage and shall be held by secret vote by equivalent free voting procedures.
- b) The International Covenant On Civil And Political Rights(ICCPR)

The International Covenant On Civil And Political Rights is legitimated by general assembly of PBB on 16 Desember 1966. Then Indonesia was just ratificate it in UU No. 12 Tahun 2005 on October 28th 2005, About ratification of international covenant of the civil and political rights.<sup>101</sup> Political rights explained in the:

article 3:<sup>102</sup>

The States Parties to the present covenant undertake to ensure to ensure the equal right of men and women to enjoyment all of civil and political rights set forth in the present covenant.

article 25:

Every citizen shall have the right and opportunity, without any distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affair, directly or thoughh freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

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<sup>101</sup> Ani W. Soejtpto, *Ham Dan Politik Internasional: Sebuah Pengantar*, (Jakarta: Yayasan Pustaka Obor Indonesia, 2015), first edition, page 186.

<sup>102</sup> International Covenant On Civil And Political Rights Of 16 December 1966.

- (c) To have access, on the general terms of equality, to public service in his country.

These all the regulations explaining about retraction of political rights and preserve of political rights. Both occur the debate among the law expert, because therein pro and contra perspective on retraction of political rights implementations. There is so many argument about it.

In the pro perspectives, herein the retraction of political right concepted as permanently penal. It purposed to create a justice for sure. There are two concepts expalining about it, these are:

1. Retractions through the regulation (UU).

In this kind, in the same manner as general election's regulation to apply, both legislative election(vide UU No. 8 Of 2012) and president and vice president(vide UU No. 42 of 2008), as well as governors and vice governors elections(vide UU No. 8 of 2015 jo. UU No. 10 of 2016). In those regulation found requisite norm to be elected, “ never imposed by an imprisonment based on the judges verdict which had been getting settled, caused by the criminal act threaten by 5 years of imprisonment and more”. This provision is *mutatis mutandis* in implementations.

2. Retractions through the judges verdict or based on Indonesian criminal code.

This kind come from the article 10 jo. article 35 jo. article 38 of criminal code related to an additional penalties. While to impose it, shall

through the judges verdict that appropriate to the article 35 verse 1 of criminal code.

Both of kind giving signal that the contitution in Indonesia has been regulating an exception(derogation) againts the states responsibility to fulfill the citizen's political rights, because therein any certain law condition. However, the concept of number 1 had been limited by Mahkamah Konstitusi on the verdict No. 14-17/PUU-V/2007, the verdict No. 4/PUU-VII/2009 and the verdict No. 42/PUU-XIII/2015, that in principles, Mk said that The norm which is inspected as conditionally unconstitutional, as long as it is not fulfill the requisite below:

1. Not prevail to elected official
2. The prevailing limited by 5 years since the convict's penalties has been finished.
3. An excepted to an eks convict who confront to public that he is an eks convict clearly and honesty
4. The convict is not residivis(repeated offender).

Moreover, the concept of retraction of political rights as explained in the number 2 has limited by article 35 of criminal code. Herein showing an additional penaties has time limit.

As a tool to ward off the criminal, the retraction of political rights does not means to retaliation or to curb people's political rights, but it means to prevent the people who has "legal defect" to hold the public potition in the certain times. If it has passed and the convict does

not repeat the criminal act, then the state should not curb his rights to develop his own potential to subservient the nation and the state.<sup>103</sup>

The retraction of political right means the right to elect and be elected in the public affair purposed to protect the society from the corruptly government, because the corruptor is a politic holder in usual. Over there, the corruption is categorized into extraordinary crime (in the general explaining of UU No. 31 of 1999 jo. UU No. 20 of 2001), so the enforcement of it has different way (extra ordinary enforcement). The imposition a retraction of political rights is an implementation of an extra ordinary enforcement, because of it is a part of human right, then the implementation should consider the principles of human right in advance and does not contradicting with positive law.<sup>104</sup>

According to Ali, The retraction of political rights must be considered as to restore disturbed balances that done by the convict. A restore disturbed balances is the goal of punishment that believed as the form of punishment related to nation culture, which considering the crime is not only physically disturbance but also spiritually.<sup>105</sup> The retraction of political rights, especially to the right to be elected as the public functionary is one of punishment form which is not

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<sup>103</sup> Ali Zaidan, *Kebijakan Kriminal*, (Jakarta: Sinar Grafika, 2016), page 336-337.

<sup>104</sup> Warih Anjari, *Pencabutan Hak Politik Terpidana Korupsi Dalam Perspektif Hak Asasi Manusia*, Jakarta: Jurnal Yudisial Vol. 8 No. 1 April 2015, page 37.

<sup>105</sup> Ali Zaidan, *Kebijakan Kriminal*, (Jakarta: Sinar Grafika, 2016), page 337.

distract the human right because it categorized to the derogable rights and the convict is not fulfill the mandate while holding the public funcionary. The goals of imposing this punishment is to keep a society justice and prevent the convict to can not repeat his act.<sup>106</sup>

In this perspectives, Asrul Sani, a member of commitee III of DPR RI said that the retraction of political rights to the corruptors is fair action. It should not for five years only, but it must be longer. And it applied to the convict who corrupting for him self, his family or his group in intention and consciousness.<sup>107</sup>

While in the contrary, the retraction of right is remain that there is a punishment which humiliate the human prestige. The retraction of national's right can causes an loss their civil rights(burgerlijke daad), and it prohibited by constitution. It regulated in the article 3 of BW and article 15 verse 2 of RIS Constitutions " there is no penalties that draw the people to loss their civil right or all of citizen's right".<sup>108</sup> A corruptors is a part of society that has the equality before the law and protected by states, especially related to human rights which is can not detracted. According to Budiardjo, The political rights means to elect and be elected categorized into freedom of thought and concience. An elect and be

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<sup>106</sup> Mimin Dwi Hartono, *Pencabuan Hak Politik Koruptor*, ( Asosiasi Alumni Program Beasiswa Amerika-Indonesia, edisi 23 maret 2017).

<sup>107</sup> Kompas.com, *Alasan Politisi PPP Setuju Pencabutan Hak Politik Untuk Koruptor*, access on february 20th 2018. From <http://nasional.kompas.com/read/2017/01/11/23424141/alasan.politisi.ppp.setuju.pencabutan.hak.politik.untuk.koruptor>.

<sup>108</sup> Chrisna Baus Edhita Praja dan Achmad Irmawan, *Pencabutan Hak Politik Terhadap Terpidana Korupsi Dalam Perspektif Hukum Tata Negara*, Magelang: The 4th Univerity Research Coloquium, 2016, page 246

elected means using minds and the conscience freely without an intervention from anyone. So the elect and be elected in the general election should not be limited.

The civil rights avowal and protect the fundamentally human right related to their status as the individual, while the political right related to public/society life.<sup>109</sup> Then it is a violation to the people's constitutional rights.<sup>110</sup> The international treaty agreed the abolition to the punishment which can humiliate of human rights.<sup>111</sup> To omit or detract the people's rights is one of discrimination and not relate to the human justice principle. The national's constitutional right to elect or to be elect is the right that guarantee by constitution and the international convention, so the limitation, deviation, and omitting of it, is infraction to the national rights.<sup>112</sup>

Giving punishment means detract certain people's rights as regulated on the article 10 of criminal code. The kind of punishment herein is a principal penalties (death penalties, imprisonment, confinement a fine) and additional penalties, especially a retraction of political rights means to elect and be elected related to human rights. Then its implementation must be

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<sup>109</sup> Bagir Manan, *Perkembangan Pemikiran Dan Pengaturan Hak Asasi Manusia Di Indonesia*, (Bandung: Penerbit PT.Alumni, 2001), page 101.

<sup>110</sup> Chrisna Baus Edhita Praja dan Achmad Irmawan, *Pencabutan Hak Politik Terhadap Terpidana Korupsi Dalam Perspektif Hukum Tata Negara*, Magelang: The 4th University Research Coloquium, 2016, page 246.

<sup>111</sup> E.Y. Kanter dan S.R. Sianturi, *Asas-Asas Huku Pidana Di Indonesia Dan Penerepannya*, ( Jakarta: Storia Grafika, 2002), page 15.

<sup>112</sup> Haliva Muharosa, *Tinjauan Yuridis Terhadap Pencabutan Hak Politik Bagi terpidana Korupsi Di Indonesia*, Kampar: JOM Fakkultas Hukum Vol. III Nomor 1, 2016, page 9-10.

considered a sincronization and harmonization to the human ringhts.<sup>113</sup>

An implementation of additional penalties especially the retraction of political right permanently is contradiction with some contexts. First, in the philosophical, it is incompatible with second paragraph of the pancasila “*kemanusiaan yang adil dan beradab*”. Second, the retraction of political rights means kill/loss the national’s civil right, and it is incompatible with an avowal, a homage, and a protection againts the human rights. Third, the implementation of it, describing an emotional law prosedure. It incompatible with penalties concept in Indonesia. Fourth, an Indonesia judicature corruption index still in the high level, so it apprehensive about its independent, if the retract of human rights had been applied permanently.

Retract people’s political rights has the impact to the loss of their space, access, and chance as the subject of law to participating in the public affair. More over, their existence have an avowal no more. This condition is not democratic states dream off.<sup>114</sup> According to John Locke dan Rosseau, the political rights means the right to elect and be elected categorize into the right to giving contribution on public affair which must be protected by government.<sup>115</sup>

Political rights regulated in the constitution purposed to protect an individual from the power abuse by govenment. Then, the political rights means to elect

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<sup>113</sup> Warih Anjari, *Pencabutan Hak Politik Terpidana Korupsi Dalam Perspektif Hak Asasi Manusia*, Jakarta: Jurnal Yudisial Vol. 8 No. 1 April 2015, page 29.

<sup>114</sup> Yuniar Riza Hakiki, dkk, *Konsepsi Pencabutan Hak Politik Bagi Terpidana Korupsi*, Yogyakarta, (Pengamat Muda, edisi 5 juni 2017).

<sup>115</sup> Vita Dwi Sakundiana, *Pencabutan Hak Politik Bagi Koruptor*, Safwaalmahyra.wordpress.com, Edisi 27 December 2016.

and be elected in the public affair is a part of natural rights and democracy that should be enforced. Over there the retraction of elect end be elected rights in the general election is an infraction to the democracy, if the goal of penalties (*straf soort*) is not considered and the way to impose it(*straf maart*) is not given a time limit.<sup>116</sup>

### C. Urgency Of Retraction Of Political Right Implementation.

Imposition sanction to the offender is means to combat criminal act. Overthere, there is another ways to combat the crime non penal. Combating criminal with giving a penalties is direct toward the suspect, so it easily to measuring the result is. In ideally, imposition a penalties shall inversely proportional with decreasing the criminal. But there is no data which showing it.

In the concept of penalties is to reach the justice, the utility and the certainty, either to the offender, to the victim and the society. The modern penalties goals using integrative models of criminal prosecution. According to Muladi, the reason is the complexity of penal's problems as the impact of pay attention effort on human rights and make a penal operational and functional. Overthere, the approach is multy dimensional approach. This approach is maintain a retributive effect either to the offender, to he victim, and the society.<sup>117</sup> It according to the concept of deffense social which giving more attention to the victim and society.

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<sup>116</sup> Warih Anjari, *Pencabutan Hak Politik Terpidana Korupsi Dalam Perspektif Hak Asasi Manusia*, Jakarta: Jurnal Yudisial Vol. 8 No. 1 April 2015, page 37.

<sup>117</sup> Warih Anjari, *Pencabutan Hak Politik Terpidana Korupsi Dalam Perspektif Hak Asasi Manusia*, Jakarta: Jurnal Yudisial Vol. 8 No. 1 April 2015, page 32.

Corruption act is one of an extraordinary crime. This crime is not only become a national problem, but also in the international. It caused by an impact of corruption that can distrust and hinder the development of country, threaten the society welfare, distrust an investment and an economic development and the stability of country.<sup>118</sup> In addition, the corruption considered as a caused of government disfunction, joblessness problems, and society disorder. Worstly, corruption can causes destitution massively, horizontal conflict, discrimination, and disparity of economic widely.<sup>119</sup>

Over there, the judge should consider a motive and an impact in the verdict. In this case, the judges verdict is the most important thing to create a justice through of giving penalties.<sup>120</sup> So the goals of penalties become a basic justification.<sup>121</sup> On the cases to prevent and fight the criminal act, the constitution has been regulating a retraction of all of or a part of rights that given by government to him in the chapter 18 verse 1(d) of UUPPK. One of retraction of rights that imposed by the judge to the corruptor is retraction of to elect and be elected rights.<sup>122</sup>

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<sup>118</sup> Vita Dwi Sakundiana, *Pencabutan Hak Politik Bagi Koruptor*, Safwaalmahyra.wordpress.com, Edisi 27 December 2016.

<sup>119</sup> Ahmad Khoirul Umam, Islam, *Korupsi, Dan Good Governance Di Negara-Negara Islam*, Jakarta: Jurnal Al-Ahkam Vo. 24 No. 2 Oktober 2014, page 196.

<sup>120</sup> Haliva Muharosa, *Tinjauan Yuridis Terhadap Pencabutan Hak Politik Bagi terpidana Korupsi Di Indonesia*, Kampar: JOM Fakkultas Hukum Vol. III Nomor 1, 2016, page 11.

<sup>121</sup> Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*, (Bandung: Citra Aditya Bakti, 2002), page 128.

<sup>122</sup> Yoshi Dewi Mahayanti, *Dasar Pertimbangan Hakim Dalam Menjatuhkan Putusan Pencabutan Hak Pilih Aktif Dan Hak Pilih Pasif Terhadap erpidana Tindak Pidana Korupsi Dalam perspektif Hak Asasi Manusia*, Thesis, Malang: Program Sarjana Ilmu Hukum Universitas Brawijaya, 2015.

According to John Rawls (1977) in the *A Theory Of Justice*, he categorised a justice into two form: First, liberty principle means everyone has the equality rights on the basic liberty, as wide as the other one liberty. Second, the difference principle means the law's goal is to organize a social imbalance reality and economic in the society. Overthere, the law must take the justice values in priority and more pay attention to the society on social aspect, economic aspect and political aspects then the justice caught.

According to Aradila Caesar, a researcher of law and judicature monitoring of ICW (Indonesian Corruption Watch) said that the retraction of political rights becomes an important penalty to do, since the corruption included to extraordinary crime and the corruptor often come from the political realm and tend to be able to elected in a general election after he passed the penalties. Based on ICW's data, during 2016, there are 573 corruption cases, only 7 cases that imposed by retraction of political rights as additional penalties. More over, the corruptor who come from the political realm is 39 of DPR/DPRD and 32 of Governors.<sup>123</sup> This phenomenon deserve to be a concern of society parties.

The retraction of political rights become a new instrument to give a deterrent effect for corruptor, since the other form of penalties is not effective to decrease the corruption, especially to hold a public office. This penalty does not the physical punishment, but it can be effective way to gives a deterrent effect to the

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<sup>123</sup> *Republika.co.id, ICW: Pencabutan Hak Politik Bagi Terdakwa Korupsi Masih Minim*, access 16 March 2018, from: [https://www.google.co.id/m.republika.co.id/amp\\_version/ombelf354](https://www.google.co.id/m.republika.co.id/amp_version/ombelf354)

corruptor.<sup>124</sup> The imprisonment, a fine, a replacement or a confinement does not reflect the losses caused by corruptor.

There is three point that should be concern about. First, a subject, the retraction of political rights is more relevant to imposed to the corruptor which holding a public office that elected by general election.<sup>125</sup> The position of corruptor has correlation with the political right that retracted, it means to corruptor does not hold a public office and repeat their act. Second, the limitation of retraction of political rights. It sould has no the time limit to imposed in an ideally. Because it become a learn and deterrent to the corruptor and society in generally. On the other hand, if it has the time limit, then it should be consider to the general election period. Third, there is principle needed by law enforcer to combating corruption.<sup>126</sup>

As for the other consideration, the retraction of political rights is catergorises into derogable rights as regulated in the chapter 28 J verse 2 of UUD 1945. The political right can be limited by constitutions, it purposed to protect the societies rights. Based on ICCPR provision, the states is allowed to detract or make a deviation from obligation to fulfill the rights. Those are

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<sup>124</sup> Vita Dwi Sakundiana, *Pencabutan Hak Politik Bagi Koruptor*, Safwaalmahyra.wordpress.com, Edisi 27 December 2016.

<sup>125</sup> On the other overview, the retraction of political right to corruptor can be imposed to the public officer which is proven a corrupt, although they do not elected in the general election. Moreover, all of corruptor which proven a corrupt can be imposed by retraction of political rights. It caused by the corruptors have an experiences to abusing a mandate. So they have a potential to repeat their act.

<sup>126</sup> Reza Syawawi, *Urgensi Pencabutan Hak Politik*, (Media Indonesia, edisi 25 Februari 2017).

in order to maintain the national's security and public order.<sup>127</sup>

#### **D. Criteria Of Imposition An Additional Punishment To Corruptor**

The criteria of additional penalties imposition means to elect and be elected rights in the general election can found in the judge's verdict of Mahkamah Konstitusi No. 14-17/PUU-V/2007 on judicial review of the chapter 58 letter F of UU No. 32 of 2004 about regional constitution (Perda) against basic constitution (UUD 1945) which regulating the retraction of an elect rights. Mahkamah Konstitusi limiting the prevailing of the verdict that contain two requisite in advance, these are it is not prevail to the *culpa levis* crime and the crime of political reason, become to the public official which elected in the general election only.

The criteria of retraction an additional penalties, both in active or passive are impose to the corruptor who has the political position wherein they corrupted by abusing their power. It called by political corruption which has the worst impact than other corruption form. The political corruption is to defend and extend the power. The constellation of power abuse and orderliness need of social-politics, both prosecute a suit control with power implementation. The government power give a mandate in the states assets distribution process, then on its process potentially a deviation that done by power holder that called corruption.<sup>128</sup>

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<sup>127</sup> Vita Dwi Sakundiana, *Pencabutan Hak Politik Bagi Koruptor*, Safwaalmahyra.wordpress.com, Edisi 27 December 2016.

<sup>128</sup> Yosy Dewi Mahayanti, *Dasar Pertimbangan Hakim Dalam Menjatuhkan Putusan Pencabutan Hak Pasif Dan Pasif Terhadap Terpidana Tindak Pidana*

## **E. Cases And Law Enforcement Of Retraction Of Political Rights In Indonesia.**

In Indonesia, retraction of political rights is one of additional penalties that given to corruptors. It has been done by judge in verdict. This phenomenon prove an progressiveness and objectivity of the judge on giving punishment, which is in usual the judge pass a fine and hold up the properties only as the punishment in addition to the principal punishment of corruptors.<sup>129</sup>

### 1) Setya Novanto Case

Setya Novanto is an ex chief of legislative. KPK announced him as the suspect of e-KTP supplying corruption between 2011-2012. He making estimation arrange of e-KTP project in 5.9 billion rupiah. Moreover, he and Andi Naronggong making an auction winner tricky. His deed causes a state financial loss in 2.3 billion rupiah.

Setya Novanto convicted by article 2 letter 1 subsidiary chapter 3 of UU No. 31 of 1999 changed by UU No. 20 of 2001 Jo chapter 55 letter 1(1) of criminal code. Then in the april 24 2018, he imposed by 15 years in imprisonment, a fine of 500 million rupiah, a substitute money of US\$ 7.3 million minus 5 billion and retracted his political right for five years.<sup>130</sup>

### 2) Djoko Susilo Case

Djoko Susilo is an ex Kakorlantas Mabes Polri (Kepala Korps Lalu Lintas Markas Besar Polisi

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*Korupsi Dalam Perspektif Hak Asasi Manusia*, (Jurnal Ilmiah: Universitas Brawijaya, 2015 ).

<sup>129</sup> [https://KlinikHukum\\_Pencabutan\\_Hak\\_Politik\\_Koruptor.html](https://KlinikHukum_Pencabutan_Hak_Politik_Koruptor.html) (Acces on february 20th, 2018).

<sup>130</sup> Tempo. co.*Begini Kronologi Kasus Setya Novanto*, access from <http://nasional.tempo.co/amp1041781/begini-kronologi-kasus-setya-novanto>.

Republik Indonesia). He caught by KPK(Komisi Pemberantasan Korupsi) and then he settled down as the suspect of SIM simulator supplying corruption of 2011.<sup>131</sup> He proven to commit a corruption and money laundering crime in the 2003-2010, and 2010-2012.

KPK round up him by article 2 and 3 of UU No. 31 Of 1999. That deed is committed by Djoko by disguising his property allegedly derived from corruption. His property is deemed incompatible with his profile as the Chief of the traffic corps (Kakorlantas Polri). He got 32 bilion rupiah from the winner of the SIM simulator tender, Budi Susanto-Director of PT. Citra Mandiri Metalindo Abadi (PT.CMMA). based on an auditor of BPK(Badan Pemeriksa Keuangan), his case caused the state losses of 121,830 bilion rupiah.

Based on verdict of Supreme Court(*Mahkamah Agung*) No. 537 K/Pid.Sus/2014, he imposed by 18 years imprisonment, a fine of 1 bilion rupiah, replacement money of 32 bilion rupiah and retracted his political rights with no time limit.<sup>132</sup>

### 3) Irman Gusman Case

Irman Gumsan is an ex Chief of DPD RI (Dewan Perwakilan Daerah Republik Indonesia). He proved to take a bribe of 100 milion rupiah from Director of CV Semesta Berjaya- Xaveriandy Sutanto and Memi. He proved to use his potition as Chief of DPD to arrange the purchase of imported sugar quota from

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<sup>131</sup> Catarina Darul Rosikah, Dessy Marliani Listianingsih, *Pendidikan Anti Korupsi: Kajian Antikorupsi Teori dan Praktik*, (Jakarta: Sinar Grafika, 2016), page 185.

<sup>132</sup> Kompas.com, *Ini Alasan Hak Politik Djoko Susilo Dicabut*, access on 28 February 2018 from <http://nasional.kompas.com/read/2013/08/21/1737178/Ini-Alasan-Hak-Politik-Djoko-Susilo-Harus-Dicabut>.

Perum Bulog to CV Semesta Berjaya and help Memi by receiving a profit of 300 rupiah per kilo of sugar that given to Perum Bulog.<sup>133</sup>

On the February 20th 2017, Irman imposed by 4.5 years imprisonment, a fine of 200 milion rupiah subsidiary confinement for 3 month and retracted his political rights for 3 years.

#### 4) Luthfi Hasan Ishaq Case

Luthfi Hasan is an ex president of PKS and member of committee I DPR RI. He proved to commit transactional relationship by used his potitions to receiving fee from beef entrepreneur, receiving fee of 1.3 bilion rupiah from President Director of PT INDOGUNA UTAMA, Elizabeth Liman through Ahmad Fathanah on 29 january 2013. He agreed to increase the beef import quota of 8000 ton to Suswoyo, the ministry of KEMANTAN (Kementerian Pertanian) which demanded by PT. INDOGUNA and its sub bussiness. He recieved a commitment fee of 40 bilion rupiah.<sup>134</sup>

Based on his act, he convicted by article 12 letter a of UU No. 31 of 1999 about corruption act changed by UU No. 20 of 2001 Jo. article 55 verse 1 letter 1 of criminal code. Then in the money laundering case, he is convicted by article 3 letter a, b, c and article 6 of UU No. 15 of 2002 about money laundering prevention, and article 3 and 5 of UU No. 8 of 2010 about money laundering act. These all according to

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<sup>133</sup> Kompas.com, *Hakim Cabut Hak politik Irman Gusman*, access 28 february 2018 from <http://nasional.kompas.com/read/2017/02/20/13135451/Hakim-Cabut-Hak-politik-Irman-Gusman>.

<sup>134</sup> Catarina Darul Rosikah, Dessy Marliani Listianingsih, *Pendidikan Anti Korupsi: Kajian Antikorupsi Teori dan Praktik*, (Jakarta: Sinar Grafika, 2016), page 188.

consideration that his property deemed incompatible with his profile as DPR member.

On September 15th 2014, Based on the verdict of Mahkamah Agung No. 1195 K/Pid.SUS/2014, Luthfi Hasan imposed by 18 years imprisonment, a fine of 1 billion rupiah subsidiary confinement of 6 month and retracted his political rights especially to be elected on general election for no time limit.<sup>135</sup>

5) Anas Urbaningrum Case

Anas Urbaningrum is an ex general chief of Partai Demokrat. The judge argue that he commit the money laundering crime in the Hambalang Project, which threaten by article 12 letter a of UU TTPU Jo. article 64 verse 1 of criminal code, article 3 of UU No.8 of 2010 about Money Laundering and article 3 letter 1 UU No.15 of 2002 Jo UU No.25 tahun 2003.<sup>136</sup>

Based on the verdict of Mahkamah Agung No. 1261 K/Pid.Sus/2015, He imposed by MA by 14 years imprisonment, a fine of 5 bilion rupiah subsidiary confinement of 1.4 month, shall pay the replacement money of 57.592 bilion rupiah subsidiary confinement of 4 years, and retracted his political rights.<sup>137</sup>

6) I Putu Sudiartana Case

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<sup>135</sup> Liputan6.com, MA perberat vonis LHI: 18 Tahun penjara dan hak politik dicabut, access 28 february 2018, from <http://news.liputan6.com/read/2105857/ma-perberat-vonis-lhi-18-tahun-penjara-dan-hak-politik-dicabut>.

<sup>136</sup> Catarina Darul Rosikah, Dessy Marliani Listianingsih, *Pendidikan Anti Korupsi: Kajian Antikorupsi Teori dan Praktik*, (Jakarta: Sinar Grafika, 2016), page 197-199.

<sup>137</sup> Ambaranie Nadia Kemala Movanita, kompas.com, "*Hukuman Diperberat, Anas Siap Melawan Vonis MA*", Access February 28th 2018 from <http://nasional.kompas.com/read/2015/06/09/10483531/Hukuman.Diperberat.Anas.Siap.Melawan.Vonis.MA>.

I Putu is an ex former of committee III DPR RI who come from Partai Demokrat, he was accused of having recieved 500 million rupiah from bussinesman related to an specially alocation exertion (PAK) of facilities and infrastructure activities in the province of West Sumatera on APBN-P2016. Moreover, he recieved a gratification<sup>138</sup> 2.7 billion rupiah from some people in phase. Based on his act, he accused by article 12 B UU No. 31 of 1999 Jo. UU No. 20 of 2001 About Decreasing of Corruption Act.<sup>139</sup>

On the march 8th, 2017 imposed by imprisoment for 6 years, a fine of 200 milion rupiah, a three months subsidiary of confinement, a replacement money of 300 milion rupiah and his political rights to be retracted for 5 years.<sup>140</sup>

#### 7) Rachmat Yasin Case

Rachmat Yasin is an ex regent of Bogor. He proven violate the article 12 A of UU No. 31 of 1999 changed by UU No. 20 of 2001 about corruption act eradiction Jo. article 55 verse 1 letter 1 Jo. 64 verse 1 of criminal code. He recieved a bribe of forest ruislag covering an area 2,754 hectares with PT. Bukit Jonggol Asri (PT. BJA) about 4.5 bilion rupiah.

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<sup>138</sup> Based on constitution, on article 12 B and 12 Number 20 year 2001, gratification means giving in wider sense of definition which involves money, goods, discount, commission, loan with no interest, traveler check, overnight facility, tourism journey, free medication, and other facilities.

<sup>139</sup> Kompas.com, *Selain Terima Suap, Putu Sudiartana Didakwa Terima Gratifikasi Rp. 2,7 Milyar*, Access 2 March 2018, from <https://nasional.kompas.com/read/2016/11/16/16223921/selain.terima.suap.putu.sudia rtana.didakwa.terima.gratifikasi.rp.2,7.milyar>.

<sup>140</sup> Tirto.id. *KetikaPencabutan Hak Politik Tidak Mematikan Karir Politisi*, access 20 February 2018 from <https://tirto.id/ketika-pencabutan-hak-politik-tak-mematikan-karier-politisi-cnys>.

The judge of Tipikor Bandung imposed him by 5.6 years of imprisonment, a fine of 300 million rupiah, three months subsidiary of confinement and his political rights retracted for two years longer than his principal penalties. This verdict is lighter than the prosecutor's presecution which prosecuting him to imposed by 7.5 years of imprisonment, a fine of 300 milion , three months subsidiary and retract the political rights for three years longer than the principal penalties.<sup>141</sup>

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<sup>141</sup> Sandi Indra Pratama, *Bekas Bupati Bogor Di Hukum 5,5 Tahun Penjara*, (CNN Indonesia, edisi 27 November 2014).



## CHAPTER IV

### AN ANALISYS OF RETRACTION CORRUPTOR'S POLITICAL RIGHT BASED ON ISLAMIC CRIMINAL LAW (FIQH JINAYAH)

#### A. Formulation of Retraction Corruptor's Political Right

Retraction of rights is one of an additional penalties in the Indonesian Positive law. It is laid down in the article 10 letter b of Criminal Code (KUHP):<sup>142</sup>

Article 10 letter b: Additional punishment:

4. Retraction certain rights,
5. Deprivation certain goods,
6. Announce judges verdict.

Based on this regulation, the retraction of political rights included to an additional penalties (letter b point 1). Then, it might be imposed beside the principal punishment, if the judge consider that it should be. There was a provision regulating a kind of rights which can be retracted by judge, that is laid down in the article 35 of Indonesian criminal code:

Article 35:

1. The convict's rights which is retracted by judge's verdict is certain in this regulation, or in the other general regulation is:
  - (1) The rights to hold public positions or certain positions;

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<sup>142</sup> Moeljatno, *Kitab Undang-Undang Hukum Pidana (KUHP)*, (Jakarta: Bumi Aksara, 2008), 27th edition, page 5-6.

- (2) The rights to join an armed force;
  - (3) The rights to elect and to be elected in the general elections held under general rules;
  - (4) The rights to be advisor (*raadsman*) or to be an administrator according to law (*gerechtelijkebewindvoerder*) rights to be a guard, supervisor's guard, guardianship or supervisor's guardianship, against peoples who does not his biological child;
  - (5) The rights to exercise the authority of the father, to exercise guardianship of their own children.
  - (6) The rights to exercise the certain jobs (*beroep*)
2. The judge has no authorized to firing an official from his post, if in the custom rules pertained to another ruler to do.

In the point 1 (1) and (3), there was mentioned that the right to hold a public position or certain position and the right to elect and to be elected can be retract by judge in the some cases. This retraction called retraction of political right. Because both the right to hold a public position or the right to elect and to be elected in the general election are civil's right. And the state has been guaranteeing them. Such as in the article 27, 28 D verse (3), 28 E verse (3). Moreover, the general assembly of PBB legitimating the International Covenant On Civil

And Political Rights (ICCPR) in the article 25: *“Every citizen shall have the right and opportunity, without any distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affair, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on the general terms of equality, to public service in his country.”*

From the regulation, the political right is every citizen’s right without any discrimination. It means that retraction of political right is prohibited thing. That’s why, this punishment warmly discussed by law expert and human right activists.

#### Article 36:

The rights to hold public affairs or certain positions, The rights to join an armed force except in the case which explained in the second book could be retracted, in the case of imprisonment because of malfeasance or a crime that violates a special obligation of the positions, or because of use the power, an opportunity, or the means that given to convict caused by his positions.

In the article above explained about the reason of retraction rights. the reasons is malfeasance and crimes that violates a special obligation of the positions, or because of use the power, an opportunity, or the means that given to convict caused by his positions. From that

explaining, we know that corruption is one form of malfeasance by abusing power. Moreover, in this chapter there was “*except in the case which is explained in the second book could be retracted*”. Its means, retraction rights as an additional punishment is only impose when the constitution is regulate it. In the chapter XXVIII about malfeasance, article 437 of Indonesian criminal code has been regulating it: “*in the imprisonment that has been explaining in the article 415, 419, 420, 423, 424, 425, 432 (2), and 436 (1), can be imposed by retraction right based on article 35 (3) and (4)*”. From this explanation, we know that corruption is one of malfeasance acts, so reraction of the corruptor’s political right is legal.

In the case of retraction of political rights, the judge shall determine how long it be based on article below:

article 38:

1. If the retraction of rights is done, the judges must determine the length of it as follows:
  - (1) In the death penalties or long a life imprisonment, the length of retraction is long a life;
  - (2) In the imprisonment to certain times, the length of retraction is two years in minimum and five years longer than his principal punishment in maximum;
  - (3) In the fine case, the length of retraction is two years in

- minimum and five years in maximum.
2. The retraction of rights shall come in to force on the day the judge ruling is executed.<sup>143</sup>

In the article 38, there was explained about the length of punishment. Its means that if corruptor's imposed by retraction political rights, then, it should be determined the length of it. Based on the provision above, the length of retracting corruptor's political rights is five years in maximum. The writer does not agree with this provision, because by giving time limit for this punishment, the corruptors may have the chances to commit their deed (after they finish their punishment) in the future. Then, according to the writer, its should not has no time limit for retraction corruptor's political right. So the corruptors would not repeat their deed again, because they have no chances to do.

Retraction political right is not only regulated in the Indonesian criminal code, but also in the regulation of the corruption act in Indonesia No. 31 of 1999 Jo. No. 20 of 2001.

Article 17: "Besides it could be imposed in the same manner purposed in the article 2, 3, 5, to 14, the convicted could be imposed by an additional penalties as purposed in the article 18."

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<sup>143</sup> Moeljatno, *Kitab Undang- Undang Hukum Pidana*, (Jakarta: Bumi Aksara, 2008), 27th editions, page 18-20.

The regulation above means that the convicted did corrupt in the same manner purposed in the article 2,3,5, to 14, threaten by:<sup>144</sup>

- a. A principal penalties as regulated in the article 2, 3, 5 to 14;
- b. An additional penalties as regulated in the article 18.

An additional penalties explained in the article below:

Article 18:

1. In addition to an additional penalties that purposed in the criminal code, another additional penalties are:
  - a. Deprivation of tangible properties or intangible properties, or not moving properties which used for or obtained from corrupt, included to his own business wherein the corrupt is done, as well as the price of properties that replacing the properties;
  - b. Repayment of a replacement money equal to the amount of properties that obtained from corrupt;
  - c. Closing all of or a part of his own business for a year in maximum;
  - d. Retraction all of or a part of certain rights or removal all of or a part of certain benefits, given by government to him.

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<sup>144</sup> R. Wiyono, *Pembahasan Undang-Undang Pemberantasan Korupsi*, (Jakarta: Sinar Grafika, 2012), 3rd edition, page 139.

2. If the offender is not repay a replacement money in order to verse 1 (b) as long as a month in maximum after the judge's verdict announced, that has a permanent legitimate (inkracht), so his properties shall be confiscated by public prosecutor and auctioned to cover a replacement money up.
3. In the case if the offender has not enough properties to pay a replacement money that purposed in the verse 1 (b), so the convict imprisoned by imprisonment that is not longer than its principal penalties in order to this regulation, and the length of it has been determined by judge's verdict.<sup>145</sup>

Based on the regulation above, the imposition of retraction of political right to corruptor is properly decision. Consider that corruption is the worst deed and the impact of it. But, in the article 17 above, there is word "could be imposed by an additional penalties" so the imposition of it in the corruption cases is facultative. It means that the judge should not impose it to all the corruption offender, it only based on their consideration.

Moreover, There is "certain rights" in the article 18 verse 1(d), means it is not only the rights that written in the article 35 verse 1 of criminal code, because if it does not like that, there is no rules such as in the article 18 verse 1 (d) needed. Therefore, the purpose of "certain

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<sup>145</sup> UU No. 39 Tahun 1999 Tentang Pemberantasan Tindak Pidana Korupsi.

rights” in the article above is the rights that given by government to the corruptor, that is not regulated in the article 35 verse 1 of the Indonesian criminal code.

After the explanation above, we know that in the some corruption cases, the judge has been imposed the offender by retraction of political rights as additional penalty. It is suitably with regulation of corruption act in Indonesia UU No. 31 of 1999 Jo. UU No. 20 Of 2001, chapter 17: “Besides it could be imposed in the same manner purposed in the article 2, 3, 5, to 14, the convicted could be imposed by an additional penalties as purposed in the article 18.”

## **B. Retraction of The Corruptor’s Political Right In Islamic Criminal Law Perspective**

Relating to retraction of political right as additional penalties for corruptor, Islamic criminal law did not regulate it both in the *hudud* punishment or *qishash-diyat* punishment. But in the Islamic criminal law, there is *takzir* concept. Wherein regulating a criminal act which did not laid down by *syara*’, and the authority of punishing settled by rulling government.

Takzir has three kinds, there are *takzir ‘alal ma’ashi*, *takzir lil maslahatil ‘amah*, and *takzir ‘alal mukhtalifaat*. From the definition of each *takzir*’s kind, retraction of the corruptor’s political rights is include to *takzir ‘alal ma’ashi*. Because in this kind, the act and punishment that is given is relating to the *haq adami* (individual) and *haq jama’ah* (society). Moreover, corruption is forbidden deed that included into *ma’shiyah* that threaten by *takzir*.

In the concept of *takzir* punishment, there are twelve kinds:<sup>146</sup> admonition (*al-Wa'zu*), reprimand (*al-tawbikh*), threat (*al-tahdid*), boycott (*al-hajr*), public disclosure (*al-tasyhir*), fines and seizure of property (*al-gharamah wal-musadarah*), imprisonment (*al-habs*), flogging (*al-jald*), the death penalty (*at-takzir bil-qatl*), isolation punishment (*at-taghrīb wal-ib'ad*), crucifixion punishment, and another punishment. From those kinds, the retraction of political rights included to the another punishment especially retraction of certain right, it called *al-hirman*. In this category, the right that can be retract is only the right that lifted by Islamic law, it is include the right to hold certain position. The word "certain position" mean position in the public affair. While, the retraction of political right for corruptors also purposed to prevent them from holding the position in the public affair. Then the concept of retraction certain right either in the Indonesian positive law nor in the Islamic law has the same concept and goals.

In addition, the urgency of retracting corruptor's political right is to reach the justice, the utility and the certainty, both to corruptors or to the victims, its means the society. It is suitably with *maqasid syariah* which maintain general goodness, means *dharuriyyat* (primary necessity), *hajiyyat* (secondary necessity) and *tahsiniyyat* (tertiary necessity).

Retraction of the corruptor's political right is suitable with *dalils*:

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<sup>146</sup> *Ensiklopedia Hukum Pidana Islam*, (Bogor: PT. Kharisma Ilmu), vol.III, page 99-101.

*“a detriment should be destroyed”*

Because of corruption is the worst deed and it give bad influences for all aspects, then it is should be destroyed from the society. One of ways to do is imposed the corruptor’s by retraction their political right for no time limit. its mean, not to eliminate the corruptor from society, but to avoid their deed. Moreover, there was also *dalil*:

دَرَّةُ الْمَفَاسِدِ مُقَدَّمٌ عَلَى جَلْبِ الْمَصَالِحِ<sup>148</sup>

*“repeling a detriment is previous than taking goodness”*

Either retracting of the corruptor’s political right or punishing them by physical punishment is more important? From *dalil* above, we can conclude that retracting of the corruptor’s political rights is more important. Because, by retracting their political right, they would not commit corruption in the future. Then the detriment will not occur and the society can be avoided from disorder. By repeling a detriment, the goodness will follow.

Corruption should be not exist, because of it is one of an extraordinary crime. That not only become a national problem, but also in the international. The impact can causes a distrust and hinder the development

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<sup>147</sup> Hasbiyallah, *Fiqh Dan Ushul Fiqh*, (Bandung: PT. Remaja Rosdakarya, 2013), page 136.

<sup>148</sup> A. Ghozali Ihsan, *Kaidah-Kaidah Hukum Islam*, (Semarang: Basscom Multimedia Grafika, 2015), page 86.

of country, threaten the society welfare, disrupt an investment and an economic development and the stability of country. That is why corruptors suitable to be imposed by close punishment such as retraction of their political right. Imposed them by close punishment, the detriment will less than before.

Moreover, if the retraction of political right looks as punishment, Islamic criminal law has been formulating it. First, retraction of political right as retaliation/retribution (*al-jaza'*). In this concept, the purpose of imposition a retraction of political right is to retaliating corruptors without pay attention to the victim. In this cases, the victim means general society. Nevertheless the corruptor might be cured, but this concept is not suitably with the basic principle of punishment which explain that the punishment purposed to protect society from the convict and to keep society order, in other word called "fight the criminal act and pay attention to the convict within."

Second, retraction of political right as deterrence (*al-zajr*). In this concept, the purpose of retracting political right is to prevent the act repeated in the future and warn the public. Not only to the corruptor, but also it paid attention to the other(general society). This punishment's concept is emphasized to keep society order through the punishment. It means that the other people would not commit the same act because of they have knew what the punishment will impose to them. Relating to retraction of political rights when it has imposed to corruptors especially to the politics corruptor, it will give a cure effect. Because they could not hold a public position neither the position that have abused nor another public position in the future. In addition, the

satisfaction of victim (general society) and the justice will fulfill by impose this additional punishment.

Third, retraction of political right as reformation (*al-islah*). This concept actually tended to a principal punishment, such as an imprisonment. But, the goals of it is suitably with imposition a retraction of political right as an additional punishment for corruptor. This punishment might reform a convict's guiltiness, and reeducate them that the act which committed is forbidden deed. In the reformation (*al-islah*) concept, there was provision that the corruptor has repent, then their punishment should be stopped. It is suitably with provision of retraction of political rights for corruptor that a year in minimum and five years in maximum since the convict's penalties has finished. Through this length of punishment, it expected that corruptors would be repent their deed.

Fourth, retraction of political right as a restoration (*al-isti'adah*). This concept is victim oriented. It means that imposition of retraction political right for corruptor is a tool to protect general society from them. Because of by impose it, there is no way to corruptor repeated their forbidden deed and not inflict . Nowadays, *Al-isti'adah* concept has similar with restorative justice concept. Because the goals of *al-isti'adah* and restorative justice is to restore the condition, and insisting them to responsible on their deed.

Fifth, retraction of political right as a sins compensation (*At-takfir*). Corruption is the worst deed, that's why corruptor must imposed by cured punishment. By impose a retraction of political right as additional

penalties, it purposed to falling out the corruptor's sins and they will realize their guilt. Since the punishment as sins compensation, although corruptors imposed by various punishment (*al-uqubat ad-dunyawiyyah*), but they must be imposed by *al-uqubat al-ukhrawiyyah*. The prophet said:

لَعَنَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ الرَّاشِيَّ وَالْمُرْتَشِيَّ وَالرِّشَّاءَ يَعْني بَيْنَهُمَا  
 “From Tsauban, he said: “Prophet SAW inveigh a  
 briber, bribed, and intermediaries both of them.”

According to hadist above, corruption categories into big sins. This deed is forbidden in all its elements. Neither a briber, a bribed, nor the people connecting them. The Prophet has been inveigh corruption because of its impact is so massively. Even the corruption has no precise term in Islamic criminal law, but there are some explanation about this deed's concept such as *khiyanat*.<sup>149</sup> Because of corruption usually committed by abusing mandate. According to Nurul Irfan<sup>150</sup>, *khiyanat* is betraying agreement, breaking or subtracting another people rights, especially in the *muamalah* cases. In Islamic criminal law, *khiyanat* included to *takzir* crime and the punishment is death penalty.

By retracting corruptor's political right, it will gives good impact to society. Just called *dharuriyyah* (primary), *hajiyyah* (secondary) and *tahsiniyyah*

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<sup>149</sup> *Khiyanat* is verbal noun (*masdar*) form from the term ( خَانَ - يَخُونُ - خِيَانَةٌ ) that means unbelieved person. Such as laid dow in the Holy Qur'an:

يَتَأَيُّبُ الَّذِينَ ءَامَنُوا لَآ يَخُونُوا اللَّهَ وَالرَّسُولَ وَخَوَّنُوا أَمْنَتِكُمْ وَأَنْتُمْ تَعْلَمُونَ ﴿٥٧﴾

<sup>150</sup> M. Nurul Irfan, *Korupsi Dalam Hukum Pidana Islam*, (Jakarta: Amzah, 2014), page 112.

(tertiary) necessities, those all would be fulfilled. According to Cherif Bassiouni<sup>151</sup>, the punishment must have the following three objectiveness: justice, general deterrence, and reformation and rehabilitation. Since corruption is deemed to be a challenge to prevailing values of society and a violation of the national disorder, the punishment of it must also seek justice for the society. This is not imply that punishment is nothing more than the thoughtless impulse of the revenge. Rather, the search for justice entails a measured response which serves as an index of social values and progress. Satisfaction for the society is a necessary part of that search, which in turn plays a important role in the process social control.

The deterrent function of retracting coruptor's political right as additional punishment serves as a warning to the public not to commit corruption, to forbid society from imitating it, and to guarantee the safety of those refrain from corruption. Public deterrence is not achieved merely by defining the corruption and prescribing its punishment. It depends essentially on the speed with thich the accused is tried and punished.

The goal of justice and deterrence in no way diminish the goal of reformation, for its importance in Islamic Law is not disputed, and its realization reflects to broadening of man's horizons and the nobility of his aspirations. Thus, the rehabilitation and reeducation of the corruption must be considered during the punishment stage to the degree it is compatible with the actual punishment imposed.

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<sup>151</sup> M. Cherif Bassiouni, *The Islamic Criminal Justice System*, (Chicago: Oceana Publications, INC, 1982), page 229.

Islamic jurists consider punishment as a deterrent before the act and the suppression after it. Thus, knowledge of punishment is intended to prevent the commission of criminal act, and its execution thereafter should prevent the criminal from engaging in similar conduct in the future.

Another term of corruption in Islamic criminal law<sup>152</sup> is *ghulul*<sup>153</sup> (embezzling), *risywah*<sup>154</sup> (bribery), *ghasab*<sup>155</sup> (taking away another person's property compulsively), *sariqah* (stealing/theft)<sup>156</sup>, *hirabah* (robbery), *al-maks*<sup>157</sup> (illegal tax), *al-ikhtilas*<sup>158</sup>

<sup>152</sup>Baharuddin Ahmad, *Eksistensi Dan Impletasi Hukum Islam Di Indonesia*, (Yogyakarta: Pustaka Pelajar, 2015), page 310-321

<sup>153</sup> *Ghulul* come from term عَمَلٌ - يَغْلِيْلُ and the verbal noun الْعَالِي - الْعَالِيَّةُ - الْعَالِي that means thirsty or get heated. But in the term of corruption, it mean traitorous in the distribution of property. This definition taking from Ali Imran: 161.

وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ وَتُدْلُوا بِهَا إِلَى الْحُكَّامِ لِتَأْكُلُوا فَرِيقًا مِّنْ أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنْتُمْ تَعْلَمُونَ ﴿١٦١﴾

<sup>154</sup> *Risywah* come from term رِشْوَةٌ - يَرْشُو - رِشْوَةٌ that mean wages, present, bribery. In terminology *risywah* is something that given to approve and straighten wrong way.

<sup>155</sup> *Ghasab* come from term غَصَبٌ - يُغْصِبُ - غَصَبًا that mean taking away another person's property compulsively. It is laid down in the An-Nisa: 29

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَن تَرَاضٍ مِّنكُمْ وَلَا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا ﴿٢٩﴾

<sup>156</sup> The similar of corruption and stealing/theft is in taking another properties. But if it learned more, they are difference between them. The substance of stealing is the property must be in careful protection of another and it is not in the offender's authority. While in the corruption, the properties is in the offender's authority, even he has a less of it.

<sup>157</sup> *Al-maks* come from مَكْسٌ - يَمْكِسُ - الْمَكْسُ that mean taking tax, deceive. In this case, taking tax compulsively. It is laid down in the Asy-Syura: 42.

(corruption), *al-ihthab*<sup>159</sup> (deceive). All of terms are *takzir* crimes and must be imposed by *takzir* punishment except *sariqah* and *hirabah*. Nevertheless, According to majority of *Ulama Hanafiyah* there is no analogy in the *hudud*. So comparing *sariqah* and *hirabah* against corruption is not suitable. Therefore, cutting hand off did not permitted to be imposed to corruptor. Because there is no *nash* that explaining it, because there is a basic principle in *Fiqh jinayah*:

لَا جَرِيمَةَ وَلَا عُقُوبَةَ إِلَّا نَصَّ فِي جَرَائِمِ الْهُدُودِ

“there is no crime and punishment but provision (*nash*) in advance in the *hudud*.”

However there is no analogy in *hudud*, but according to writer corruption and *sariqah* has same concept, that is stealing another property secretly and intentionally. The difference between them is only authority. In *sariqah* case, the offender has no right on property at all. While in corruption case, corruptor might has right on property, either little or many more. Overthere, corruption committed by abusing power/authority. Then, cutting hand off can used by judge as consideration to the corruptor’s punishment.

Because of corruption included into *takzir* crimes, then the punishment of it is on the authority of judge. The punishment should contain a morality sanction, social sanction, and sanction in the *akhirat*.

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<sup>158</sup> *Al ikhtilas* come from خَلَسَ- يَخْلِسُ- خَلْسًا mean robbing and deceive. It is laid down in the Al-Baqarah: 188.

<sup>159</sup> *Al ihtihab* نَهَبَ- يَنْهَبُ- نَهْبًا mean deceive, compulsionary. *Al-ihthab* did not laid down in the Al-Qur’an clearly, such as *ghulul*, *ghasab*, *al-maks*, and *al-ikhtilas*. But this term implied in the Al-Baqarah: 188.

Although corruptors has imposed by imprisonment punishment, retracted their political rights, and moreover, they must respectable their deed in the *akhirat*. Allah determine this punishment. Therefore, in the explanation above mentioned that repentance needed as sins compensation. Such as laid down in the Asy-Syura: 42

إِنَّمَا السَّبِيلُ عَلَى الَّذِينَ يَظْلِمُونَ النَّاسَ وَيَبْغُونَ فِي الْأَرْضِ بِغَيْرِ  
الْحَقِّ أُولَئِكَ لَهُمْ عَذَابٌ أَلِيمٌ ﴿٤٢﴾

*“And the sins of despot to the people and exceedly in the ground without rights. They will get extremely torture.”*

According to verse above, the morality value is the despotism with its kinds is forbidden and the offender threaten by extremely sanction in *akhirat*. Because of despotism and corruption has the same concept that are damaging general society order, therefore the *al-uqubat ad-dunyawiyyah* of corruptions should be extremely too. Considering in the other verse also explained about it:

وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ وَتُدْأَلُوا بِهَا إِلَى الْحُكَّامِ  
لِتَأْكُلُوا فَرِيقًا مِّنْ أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنْتُمْ تَعْلَمُونَ ﴿١٨٨﴾

*“And eat not up your property among yourselves in vanity, nor seek by it to gain the hearing of the judges that ye may knowingly devour a portion of the property of others wrongfully.”*(Al-Baqarah: 188)

Based on those explanation, retraction of political right for corruptors as an additional penalties is more suitably as deterrence (*al-zajr*) than other theory. Because in this theory emphasizing in the two aspects. First, for general deterrence, it mean that the punishment (retraction of political rights) that has been imposed to corruptor will educate the other. Then they would not commit the act that can distract society order and his self. Second, for corruptor deterrence. By imposing retraction of political right to corruptor, it would be cured. Because they have no occasion to access in public affair in the future. It is suitable with the requisite to be a public holder, such as in the UU No. 8 Of 2012 (legislative election), UU No. 42 of 2008 (president and vice president election), UU No. 8 of 2015 jo. UU No. 10 of 2016 (governor and vice governor election), those are mentioning “never imposed by an imprisonment based on the judges verdict which had been getting settled, caused by the criminal act threaten by 5 years of imprisonment and more”.

Retracting corruptor’s political right is one way to prevent and become a manifestation of law enforcer in the create the penalties goals, means the justice and combating corruption. By limiting corruptor’s political access, it can labelling them. But, this additional punishment still unusual to be practiced. It is only imposed to some corruptor. Based on ICW (Indonesian Corruption Watch), there are 217 corruption cases since 2012, but only 7 cases of them which imposed by retraction of political rights as an additional penalties. It shown that imposition a retraction political right is less than the other kind of additional penalties.

According to my opinion, because of corruption categorised as the extraordinary crimes, imposition a retraction of corruptor's political right should be implemented in every political corruption cases. Based on the result of the International Institution Political and Economic Risk Consultancy LTD's survey says that Indonesia is the most third corruption countries at 7.57 degrees in Asia, after Cambodia and Vietnam in 8.13 and 7.90 degrees. Moreover, we should know that politics is the biggest sector of it. Therefore, the length of retracting political right has no limitation. But on the verdict of Supreme Court (*Mahkamah Konstitusi*) No. 14-17/PUU-V/2007, herein settled down a time limit for retracting corruptor's political right. It is a year in minimum and five years in maximum after they finish their principal punishment.

In the cases of Setya Novanto, Djoko Susilo, Irman Gusman, Hasan Ishaaq, Anas Urbaningrum, I Putu Sudiartana and Rachmat Yasin, a writer appreciate the judge that has been imposed him by retraction political rights with no time limit such as Djoko Susilo and Luthfi Hasan Ishaaq's cases. Considering on the impact of their deed which influencing the states stability and distracting society order. Indonesia requires an extreme handling, large and serious political will from the ruling government. It is necessary than just make a regulation. But the implementation of it is more important. In addition, encouraging law's enforcement authorities to combat corruption in assertive, bravely, and indiscriminate ways are needed. Moreover, a political rights included into derogable right. Then it might be retracted by rulling government.

Moreover, In Islamic criminal law (*fiqh jinayah*), there is additional penalties concept, called *Al-'Uqubah*

*At-Taba'iyah*. Both the concept of additional penalties in positive law or Islamic law are a punishment which following a principal punishment. But, therein a differences between them. In the positive law, if an additional penalty is imposed, it is must laid down in the verdict, because both principal punishment and additional punishment are not relating each other. While in the Islamic criminal law, an additional penalty does not requires it. It just a consequences of the principal punishment and the implementation of it is automatically. It means that when the principal penalty imposed, so an additional penalty will be follow it. It caused by in the Islamic criminal law, a principal punishment and an additional penalty has been certain what the kind is in a provision. For example, the punishment of *qadzaf*, the offender imposed by eighty stripes as a principal penalty and he will no excuse to be a witness as an additional penalty. Such as laid down in the Holy Qur'an:

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ  
فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ  
الْفَاسِقُونَ ﴿٤﴾

“ *And Those who launch charge against chaste women and produce not four witnesses (to support their allegations), flog them with eighty stripes. And reject their evidence even after. For such men are wicked transgressors*”. (An-Nur: 4)

Moreover, in Islamic criminal law known a complementary punishment (*Al-Uqubah At-Takmillah*).

It has similar concept with an additional penalty, that is a punishment following a principal penalty. But therein differences between them. If the verdict does not requires when impose an additional penalty, then in the complementary punishment is requires. That is why, writter said that the concept of additional penalty in the positive law more suitably with complementary penalties (*Al-Uqubah At-Takmillah*) concept than an additional penalties (*Al-'Uqubah At-Taba'iyah*) in the Islamic criminal law (*fiqh jinayah*).



## CHAPTER V

### CLOSING

#### A. Conclusions

1. Formulation of retraction of the corruptor's political right regulated in Indonesian criminal code, in the article 10 (about the punishment) letter b, article 35 verse 1 letter (1) and (3), article 36, article 38 verse 1 letter (1), (2), and (3). While in the chapter XXVIII about malfeasance, article 437 of Indonesian criminal code: "In the imprisonment that has been explaining in the article 415, 419, 420, 423, 424, 425, 432 paragraph (2), and 436 paragraph (1), can be imposed by retraction right based on article 35 paragraph (3) and (4)". Moreover, it is regulated specifically in the article 17 and 18 of UU No. 31/1999 Jo.UU No. 2001 about corruption act in Indonesia.
2. Based on on *fiqh jinayah* perspective, retraction of political right for corruptor includes into *takzir 'alal ma'ashi* punishment, especially retraction some rights (*al-hirman*), that is retracting some of the rights lifted by Islamic Law.  
In the Islamic criminal law known an additional penalty concept called *Al-'Uqubah At-Taba'iyah*, But the concept of additional penalties in the positive law has a suitable with complementary penalties (*Al-Uqubah At-Takmillah*) concept. Both additional penalties in the positive law or complementary penalties (*Al-Uqubah At-Takmillah*) requires to be laid down in the verdict when it imposed.

## **B. Suggestions**

1. Corruption is really the worst criminal ever. It can destruct society order and his self. Therefore, as a citizen, we should keep ourself and our family by religion value. Moreover to the law enforcers to be brave and assertive in their duty on combating corruption. Especially the judge who judging the cases. They should brave and indiscriminate to punish the corruptor by severe punishment and impose them by retraction of political rights as additional penalties without any intimidation from another part.
2. I realize that there is so many deficiency and limitedness in this thesis. Therefore, a criticism and constructive suggestion are required and I do hope, this thesis can be used as a framework in conducting further research, especially related to the corruption and its punishment.

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## DAFTAR RIWAYAT HIDUP

### A. Data Diri

Nama : Amanatus Sholihah  
TTL : Tuban, 25 Juli 2018  
Jenis kelamin : Perempuan  
Agama : Islam  
Golongan Darah : O  
Kewarganegaraan : Warga Negara Indonesia (WNI)  
No. HP : 085235471123  
E-mail : amanatussholihah80@gmail.com  
Alamat asal : Ds. Maibit Rt:04 Rw:01 kecamatan Rengel  
Kabupaten Tuban  
Ayah : Agus Priyanto  
Ibu : Suwati  
Saudara : Achmad Chilmi Amin

### B. Riwayat Pendidikan

1. MI Roudlotut Thalibin Maibit Lulus Tahun 2008
2. Mts Negeri Rengel Lulus Tahun 2011
3. MAN 1 BOJONEGORO Lulus Tahun 2014
4. UIN Walisongo Semarang Lulus Tahun 2018

### C. Pengalaman Organisasi

1. Generasi Baru Indonesia (GenBI) Bank Indonesia Jawa Tengah  
2016-2017
2. KEMPO Dojo Miftakhul Jannah UIN Walisongo.
3. IKAJATIM 2014-2016