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STUDY ON THE REVERSE BURDEN OF PROOF BY ISLAMIC LAW AND POSITIVE LAW (A Normative Study)

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Abstract

One of the Indonesian government main agendas to eliminate the corruption, collusion, and nepotism (KKN). Why? Because KKN especially corruption in the Republic of Indonesia has become a culture. In fact it has become a life style. The lawyers argue that the cause of corruption in Indonesia, among others, as follows: First, the citizens consider that the government slow to solve the problem of corruption. Second, the lack of real government to take steps to curb corruption. Thirdly, the problem of corruption eradication in Indonesia is very complex. Not balanced between the public expectations with legal procedures to be followed. Society requires that all cases of alleged corruption to be resolved; While necessary to complete the correct legal procedures. Fourth, according to the study, Indonesia is the most corrupt country, but when the judicial process against corruption cases held, it appears that Indonesia became the country's most free of corruption. So as to overcome these problems, one solution offered is to apply the principle of Proof Reversed as an effective alternative for resolving cases of alleged corruption in Indonesia. Actually there are many causes of corruption in Indonesia, but only as a writer recruit four images of the "face" of investigating the case in order to law enforcement and justice in Indonesia; how truth and justice it is now very difficult to find. Then the question arises, why is that? Experts searching for the answer, and many of those who conclude that lies the problem which is the legal system in Indonesia. In investigating a criminal case, Indonesia has adopted a presumption of innocence. The principle is to treat the suspect as a clean, honest, and without fault until proven otherwise. This means that law enforcement officials are obliged to prepare strong evidence before hand to strengthen its claim to be "ensnare" suspects with criminal provisions. In fact, to obtain such evidence, in the case of corruption, is a job that "extra" is difficult, because the perpetrators of corruption are usually those who "know" about the law.

Keywords: Evidence Upside, Islamic Law and Positive Law.

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A. INTRODUCTION

One of the main agenda of the Indonesian government is combating corruption. The agenda is a top priority. Why? Because KKN especially corruption in the Republic of Indonesia has become a culture. In fact it has become a life style. Because it has become the nation’s culture and life style of Muslim-majority Indonesia (Muslims) recorded by the Political and Economic Risk Consultant (PERC) as the most corrupt nation in Asia. The facts show that Indonesia is a country at No. 6 in the world’s most corrupt of 159 countries surveyed by Transparency International (TI).²

From a study of 159 countries in the world, Indonesia ranks 137 or sixth from the bottom to the corruption perceptions index (CPI) of 2.2. Scale in the CPI is 0 to 10 score (a score of 10 indicating the rank of the cleanest). Indonesia got the same value with the State Azerbaijan, Cameroon, Ethiopia, Iraq, Liberia and Uzbekistan. In Southeast Asia, only Myanmar, with a score of 1.8, which ranks worse than Indonesia, making Indonesia became runner up most corrupt country in Southeast Asia.³ Ironic, really sad. Even if corruption is done by people who consider themselves Muslims, do not blame Islam. Therefore, Islam is not to tolerate such acts of corruption. Even Islamic organizations like NU, Muhammadiyah, and other Islamic organizations have been beating the drums of jihad against corruption, especially corruption. For the largest Islamic organization, corruption worse than terrorists. Corruption has plunged this nation to the brink of collapse.⁴

Earlier, on 18 September 2000 at 19:30 s/d. 20:00 pm, TVRI broadcast dialog (Conference call) with the topic of Corruption, Collusion and Nepotism (KKN). There source persons invited are Mr. P.Hutasoit (Member MPR), Mr.Ramelan, (Jampidsus), and Mr. Teten Masduki (Chairman ICW). From interviews resource

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³Ibid
persons that can be drawn some conclusions as follows: First, assessing Society (via audience response) that the government is slow in resolving the problem of corruption. Second, According to a resource assessment (P. Hutasoit), less tangible government measures in combating corruption. Third, the problem of corruption eradication in Indonesia is very complex. Not balanced between the expectations of the community with legal procedures to be followed. Society requires that all cases of alleged corruption resolved soon, while to complete the necessary legal procedures correctly. Fourth, according to the study, Indonesia is the most corrupt country, but when the judicial process against corruption cases held, it appears that Indonesia became the country's most clean of corruption. "This is ridiculous," said Teten Masduki. He then describes the solution of Proof Reversed as an effective alternative for resolving cases of alleged corruption that occurred in Indonesia.

Actually there are many points that can be drawn from the dialogue session, but only as the author recruit four images of the "face" of investigating the case in the frame work of law enforcement and justice in Indonesia; how truth and justice it is now very hard to find. Then the question arises, why is that? Experts searching for the answer, and many of those who conclude that lies the problem of which is the legal system in Indonesia. In investigating a criminal case, Indonesia has adopted a presumption of innocence. With that principle of law enforcers should treat the suspect as a clean, honest, and without fault until proven otherwise. This means that law enforcement officials are obliged to prepare strong evidence first in order to strengthen its claim to be "ensnare" suspects with criminal provisions. In fact, to obtain such evidence, in cases of corruption, is a job that "extra" hard, because the perpetrators of corruption are usually those who "know" about the law.

The presumption of innocence is consistent with the principles of justice because it contains elements of the protection of Human Rights (HAM). Protection of Human Rights is already properly enforced because both Islamic law and positive law supports very concerned about the implementation of this issue. However, one thing that will be realized by any legal system is the establishment of a sense of justice in
society, because only by upholding the joints of justice that the life of human society can be safe, calm, and peaceful.

The crime of corruption, collusion, and nepotism said Taufik Abdullah as "as old as the organization of powers".\(^5\) Corruption, collusion, and nepotism are concepts that can only be imposed in the context of the organization, whether in the form of companies, political parties, union sports, and etc., and of course more importantly, the country.\(^6\)

Corruption occurs because individuals who served as "a public servant" of abusing his position for personal enrichment to the detriment of the state and society. In this regard, the actions of collusion, corruption and nepotism are also forms of abuse that position. Collusion or conspiracy means to establish cooperation with outside parties to benefit illegally from the public or state-owned assets. While nepotism leave their position or public office on the consideration of family connections, or ideological, or regional/tribal, rather than on considerations of career and expertise.

Since the establishment of this Republic, Indonesia has issued many laws and regulations relating to efforts to eradicate corruption. The rules are: (1) Regulation No.Military Ruler Prt/PM-06/1957 (2) of Regulation Ruler War Army Centre No.Prt/013/Peperpu/013/1958 on Investigation, Prosecution and Investigation of Corruption Offence, (3) of Government Regulation in Lieu of Law No.24/Prp/Year 1960 on Investigation, Prosecution and Investigation of Corruption, (4) of Law No.3 of 1971, and Law No.31 of 1999 which was amended by Law No.20 of 2001 on Corruption Eradication. However, the crime of corruption, collusion and nepotism still on going. As if these regulations are not able to reduce the human passion to take the property/profit illegally. Threatened criminal punishment for perpetrators of corruption does not make them flinch or fear. Perhaps because not many examples of

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\(^6\)Ibid.
the application of appropriate punishment (in the sense of justice) against perpetrators of corruption offenses so that people do not feel afraid of him. Or on the contrary, many examples of corruption that are not bound by the law because of clever actors "orchestrating" the evidence that his actions did not "smell" by law enforcement officials.

According to Article 2 (1) of Law No. 31 of 1999 as amended by Act No. 20 of 2001, that the definition of corruption is the act of enriching himself or another person or a corporation that can harm state finances or the country's economy. In terms of the magnitude of the losses suffered by the state, corruption is actually very harmful to the state, so it can be equated with acts of terrorism, sabotage and so on.

KKN actions taken very sophisticated, so law enforcement officials track down that an action belongs to the category of corruption often have difficulty. Finally they failed to "ensnare" these actors to his demands are rated by a panel of judges did not have strong evidence, while the public had already "branded" that they were indeed as perpetrators of corruption.

As has been the author pointed out above, that the presumption of innocence in fact it is built on the principle of the protection of Human Rights. That is, everyone is entitled to legal protection that he is righteous and innocent as long as there is no evidence to suppose other wise. However, whether that protection also needs to be given to some one who has "invisible people" acted against the law (the detriment of society) while evidence for his actions are not detected by law enforcement officials because of clever actors cover the imposture? Is Human Rights it can be used as a weapon to defeat the values of truth and justice in society. Which should take precedence in the event of a conflict between the two?.

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Martiman Prodjohamidjojo, Application of Evidence Upside in Delic Corruption (Act No. 31 of 1999), Bandung: Mandar Maju, 2001, p.51
In connection with the protection of individual rights is, in any Islamic jurisprudence there is a similar principle, as stated by Ali Ahmad al-Nadwi, that, "Basically, a person is free from responsibility".\(^9\) That is, in principle, the law provides protection to every one not provide proof of the rights that exist on her or on her status as individuals who do not carry out acts against the law requires that he is responsible for his actions. In other words, property rights that exist in a person and the status of "cleanliness" one of the elements against the law are protected by law until there is evidence to believe otherwise. This rule is in accordance with human nature at birth do not have any free any responsibility. According to Islam that human beings are sacre dare not burdened by inherited sin or responsibility due to the actions of their parents. The burden of responsibility is a logical consequence of the rights owned or actions that done.

Further more, with regard to the protection of the rights of every person, in the Hadith of the Prophet Muhammad, there is the principle regulating burden of proof when it gets right to the objection from the other party.\(^10\) Hadith is as follows:

\textit{Meaning: From Ibn Abbas, that the Prophet Muhammad. He said: "If given to man what digugatnya (claim), surely he will demand every thing that is desired of both life and property. Therefore, the information requested to the plaintiff and the oath imposed on the defendant." (Transmitted Baihaqy).}

This hadith related to the problem the burden of proof imposed on the parties who claim to have the rights of others, and the burden of proof to the party accused person acted against the law, while those who deny (the defendant/accused) are only required to swear that he actually voted the rights holder, or as clean of elements against the law.

Instructions contained in the above hadith consistent with the principle of \textbf{presumption of innocence}. That means that in order to uphold the values of truth, textually, the legal system in Indonesia is consistent with the system running at the

\(^9\) Ali Ahmad al-Nadwi, \textit{Al-Qawaid al-Fiqhiyyah}, Beirut: Dar al-Qalam, 1994, p. 120

\(^{10}\) TM. HasbiAsh-Shiddiqie, \textit{Mutiara Hadith VI}, Jakarta: BulanBintang, 1979, hlm.112.
time of the Prophet. But why at the time of the Prophet, the values of truth and justice that can be enforced and benefit the whole society, while at the present time is not? So, the answer is related to public morality. Public morality now is far different from the time of the Prophet. Public morality at the time of the Prophet have not been polluted by materialistic life. Society at that time was very religious, firmly adhere to religious teachings, honestly, telling the truth, trustworthy, and more than that they are more afraid receive punishment in the here after than in obtaining physical agony in this world. Therefore, they would not do or say any thing to cover up the truth. Many examples of this are found in history. Indonesian society today is not too much if people say the opposite of the Prophet's time, so it is not surprising that people are not afraid of the imposture origins lie undetected, people do not hesitate to cheat to obtain abundant wealth. If it is so, it is still relevant on the principle of presumption of innocence is absolutely in the interest of upholding the truth in Indonesia, and how the application commands of the Prophet in the above hadith. Here the problems that need research to obtain the correct answer so that law enforcement is not halting or even deadlocked.

B. ISSUES

In accordance with the above title, the main problem that will be studied in this research are:

1. How should the application of the principle of pre-guessing the innocent in resolving a case of corruption in Indonesia?
2. Is reversed evidence in law enforcement and justice can be justified by Islamic law and positive law?
3. What are the principles developed by the Islamic law and positive law in providing protection against Human Rights?
C. METHODS

This study is a normative legal research, the first step that the author did was to collect books and writings relevant to the title to obtain the necessary data and theory in accordance with the problems. With the collected data will be expected to be able to identify problems at once explain that became the focus of discussion. Discussion is directed to the analysis of the material provisions of criminal procedure as well as the arguments and rules of fiqh, which became the basis of reasoning in solving legal issues. Of course, the focus is to seek answers to whether the reversed burden of proof set forth in Article 37 of Law No. 31 of 1999 as amended by Act No. 20 of 2001 could be justified by positive law and Islamic law or not.

For data processing, the method to be used to express and explain various aspects of the discussion is to use the content analysis method (content analysis), with the approach of literal-philosophical and sociological. The point is in addition to knowing their chapters or rules (proposition) that explicitly regulates the issue, also understanding of the meaning contained or objectives to be achieved through a rule or proposition can be revealed. In the mean time, public morality Events Indonesia needs to be taken into consideration, however, because a good law is a law that is rooted in the community is a reflection of the people's will. In addition, it also used a comparative method to determine how positive reviews law and Islamic law.

D. DISCUSSION

Reversed burden of proof is a principle of thinking in which every person is deemed wrong that proved his innocence. Thus, this principle not require the prosecution to prove the guilt of the defendant, but the defendant must prove that he is not guilty of any criminal charge against him.

This principle is usually formulated with the words "until the Contrary is proved".\(^{11}\) Included in this instance, the state of a person who is less healthy mind (insanity), then this principle assumes that every one healthy mind until there is

evidence to the contrary. To declare that a person is in a healthy state of mind, the defendant must prove.

Enforcement of this principle is essential to all criminal acts clearly constitute a violation of Human Rights. But enforcement in certain cases, such as cases of corruption\textsuperscript{12} is something that should be justified. Therefore, in Article 37 of Law No. 31 of 1999 as amended by Act No.20 of 2001, the use of this principle explicitly regulated. However, the definition contained in Article 37 of the Act is different from the notion of proof as has been mentioned above. Understanding of proof in Article 37 are thinking about the right of suspects to provide advance information to the judge regarding the rights or circumstances that exist in itself before the public prosecutor filed a proof of some thing that they are demanding the court.

More about the wording of Article 37 of Law No. 31 of 1999 as amended by Act No.20 of 2001 are as follows:

1. The defendant has the right to prove that he was not guilty of corruption.
2. If the defendant can prove that he was not guilty of corruption, it shall be used as a profitable thing for him.
3. The defendant shall provide information about the entire possessions and property of the wife or husband, children, and property of any person or corporation who all allegedly had relations hip to the case in question.
4. If the defendant does not prove the wealth disproportionate to his income or source of additional wealth, such information can be used to strengthen existing evidence that the defendant has committed the crime of corruption.
5. In the circumstances referred to in subsection (1), paragraph (2), (3) and (4), the public prosecutor is still obliged to prove the charges.\textsuperscript{13}

\textsuperscript{12}Article 2 (1) of Law No. 31 of 1999 to explain the meaning of corruption: "Any person who acts unlawfully enrich themselves or another person or a corporation that can harm the country or economy of the State". Article 3 states: "Any person who with the intention of enriching him self or another person or corporation, abuse of authority, opportunity or means available to him because of the position or positions that can be detrimental to the State or the State's economy.

\textsuperscript{13}Martiman Prodjohamidjojo, \textit{Application of Evidence Upside in Delik Corruption}, Bandung: Mandar Maju, 2001, p.144.
Article 37 From the above can be seen that there versed burden of proof is required by Act No.31 of 1999 as amended by Act No. 20 of 2001 is proof that the upside is limited and balanced, as well as the use of negative verification system according to the legislation. Is said to be limited because of the method of proof is only limited to acts of corruption, not to the general crime. Said to be balanced because the defendant has the right to prove that he did not do acts of corruption and shall provide information about the entire possessions and property of the wife or husband, children, and property of any person or corporation who all egedly had relationship to the case in question, and the public prosecutor still be obliged to prove the charges that the defendant has committed acts of corruption resulting in state losses. The negative verification system according to the legislation is meant as fore seen by Article 294 HIR paragraph (1) where the judge may convict if the judges get a conviction with valid evidence that there had been criminal acts committed by the defendant. In other words, the judge's decision must be based on the judge's conviction about the occurrence of corruption and the defendant as the perpetrator of the crime, and the conviction that arise because of their legitimate evidence presented at the triale it her by the defendant or by the public prosecutor.

1. Urgency Application of Principle of Proof Reversed According Positive Law

Indeed, the target to be achieved through the principle reversed burden of proof of this is how to resolve the cases of corruption that seemed very difficult to resolve because of the lack of evidence that can be submitted by the public prosecutor to "ensnare" some one who supposedly people that concerned have being uilty enrich them selves resulting economicl osses to the state or country. Clearly, that this principle is only in tended for special criminal cases, namely corruption. Thus, the burden of proof is a deviation from the principle that applies in the Criminal Procedure Law in Indonesia.

Some thing that must be considered in the application of reverse burden of proof of this is how to keep the boundaries of rights of the defendant with the
authority and the judiciary, among the judges as an auditor and breaker case and the public prosecutor's duty to uphold the law and justice. There are two interests that must be protected balanced; protected the interests of the accused for their human rights and interests of the state to prosecute a person suspected of committing a crime. As an Indonesian law states must base all their policies, including in the matter of justice is always to the law. In fact, the legal function of which is to protect Human Rights. One form of the Rights of Man should get legal protection is the right person to be regarded as innocent (well), and the right to be recognized property exist in a person or family as belonging to a legitimate until proven no proof to the contrary, However, the application of the principle reversed burden of proof of this, these rights according to most of the public and legal experts do not obtain full protection. This is the problem, whether this principle can already be regarded as a violation of Human Rights or not.

When seen in the practice of implementation of the principle of presumption of innocence, especially in dealing with cases of alleged corruption, but many have problems that many of the cases of alleged corruption that can not be proved by the prosecutor. Thus, according to the authors there are several factors that cause it to be, among others:

First, lax moral bonds in general our society today makes one of the reasons why corruption is very difficult to prove. The phenomenon is visible now is officials to easily obtain additional wealth of facilities it occupies the position or positions. But, as tracked by law from which they derive their wealth, there were no indications that lead to acts that harm the state or state economy. Then the question arose among the public, where wealth? Think of them as a person who is clean of acts that can harm the country or harm the economy of the state, as required by the principle of presumption of innocence little heart is not received. However, they told her all his fortune in the court room as the demands of the reversed burden of proof, it can be considered (by some people) violates Human Rights.

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Second, intelligence actors manipulate evidence and willingness to prejure them selves so as to suggest that the attackers were able to "prove" that they them selves do not commit acts of corruption, the more difficult for judges/prosecutors to uphold justice.

Third, there is the perception among legal experts about understanding the meaning of Human Rights is likely to be interpreted in the context of a liberal state law, has enabled a person hiding behind the notion circumvent the sake of "entrapment" of the law. Though the Indonesian state does not follow the pattern of that thinking.

Fourth, it is usually a case of alleged corruption of this newly "smell" by law enforcement officials after so long ago, that is, after visible anomalies on the physical-managed projects, or the life style of actors tend to luxurious and excessive compared with the situation before the relevant act in the off certain position, or after a report from the public. These are the things that is very important to be discussed in order to provide moral and legal force to the reverse the burden of proof will now be developed in the justice sector in Indonesia.

In our neighboring country, Malaysia (since 1961) to enforce the principle of reversed burden of proof to prosecute. cases of alleged corruption, and also in the United Kingdom (1916), this principle is also applied in order to tackle cases of alleged corruption.¹⁴

As noted earlier, it is in this connection there are two interests equally have to obtain legal protection, namely individual interest and the common interest/community/country. Most Western countries that respect Human Rights, it will be objected to the application of reverse burden of proof of this. This is understandable because of their views on Human Rights was based on the capitalist mindset that always put individual interests above the interests of others. Therefore, it is only natural that they do not agree with the application of this principle. However, the

Indonesian state adopts not the case. Indonesia laying Human Rights parallel to the rights of the community/country. This means that individual rights should still be acknowledged its existence, but when the public interest requires, then the individual rights it should be defeated.

In Sapta Prasetya KORPRI for example, we can find such a thing. In one item oath by servants, much less an official, the "Giving priority to public interests above personal interests, or group" etc. This shows that in individual rights can, and even should the future when faced with the rights of the community/country.

In the case of corruption, we perceive that there are rights of peoples/nations that allegedly violated by the individual that is the perpetrator. This perception we need to wake up because "the public eye" noticing irregularities were done by the suspect in obtaining additional property that is not proportional/balanced with a source of income/office facilities provided by the state. People may also notice that the projects undertaken for public facilities, for example, does not comply with quality standards prevailing in society. "Vision" of such a society that, when left not respected by law enforcement officers could have turned into a pathy towards the government's call, and even cause antipathy towards the program launched by the government, especially against officials who "saw" it.

And if it is allowed to drag on, it will be a source of social unrest that could lead to vertical conflict and disintegration. Therefore, the reversed burden of proof so needs to be applied in cases of alleged corruption to be settled fairly under applicable law. The indication stating that the state of Indonesia as the most corrupt country in the world, as well as the statement of the journal Foreign Reporting by Amin Rais stated that corruption is the way of live in Indonesia\textsuperscript{15}, but when it held hearings in court to hear cases-the corruption cases that law enforcement officers can not be prove aviolation of the act, indicating how helpless our judicial institutions exposing the case. This situation can not be allowed to drag on. And among the many

causes of the proliferation of cases of alleged corruption and the inability of the judiciary to uncover such cases to completion, according to the author, is a proof of this lies in the system, which is effective implementation of the principle of reversed burden of proof. Although Article 37 of Law No. 39 of 1999 as amended by Act No. 20 of 2001, have included cases of alleged corruption of evidence procedure by using the principle reversed burden of proof, but its application is still not fully. This is presumably because there are still many people or legal experts who argue that the implementation of the principle reversed burden of proof that violate Human Rights. However, fact is not the case. The principle of reversed burden of proof is very much protect Human Rights. Therefore, the suspect was given ample opportunity to prove that his wealth was not the result of corruption. The suspect was not intimidated or pressured so claimed, but they were given a chance in order to explain in detail the assets held. Thus, the reversed burden of proof in fact has nothing to do with Human Rights. Thus confirmed by Romli Atmasasmita.\textsuperscript{16} If the reversed burden of proof has been reversed can be implemented effectively, undoubtedly cases of alleged corruption in Indonesia can be solved well.

\section*{2. Application of Principle of Proof Reversed Conception in Islamic Law}

In Islamic law, the principle adopted in laying the burden of proof is the same as the positive law, which is requires that the prosecutor as a public prosecutor to present evidence to support their legitimate charges. However, Islamic law does not cover the fixed price that obligation. That is, an exception as it occurs in the positive law is also applied in Islamic law, even the case that can be worn reversed burden of proof was not on property maintenance issues, but the problem accusation defames any person or defamation cases can be applied this principle. For example, in the Qur'an mentioned the example of the case, which is as revealed in story of Yusuf and Zulaikha verse of Surah Yusuf (26) - (29), which means (more or less):

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"Yusuf. He was teasing me to submit my self (to him) ", and a witness from her family testified: If his shirt is torn from the front, then she was right, and Joseph among those who lie. And if his shirt is torn from behind, then the woman that is a lie, and Yusuf including those right. And when the woman's husband saw Yusuf's shirt torn from behind, he said: "Surely (the event) it is among the deceit fulness of you, indeed you are very big deceit". (Hi) Yusuf: "Turn away (keep it secret) it, and (ye hat wife) Please Forgive your sins, because thou among those who do wrong."

Fragments displayed Qur'an it is describing the scene between Zulaikha court proceedings as accuser and Yusuf as defendants. Zulaikha accused Yusuf in the presence of ruler of Egypt (which incidentally as Zulaikha husband) that he had been courting her so that she would prostituted themselves to it. Yusuf rejected the allegations and explained that what really happened was the opposite of that is alleged. One suggested that the royal family seen evidence that could explain the exact circumstances of the incident, which is subject to the conditions that worn Yusuf. If the tear in the front, then Yusuf who have the initiative or to invite him astray it.

However, if torn at the back, then Zulaikha wrong. Yusuf then showed his shirt torn at the back as proof that he would shy away from seduction Zulaikha Zulaikha but pulled back. Egyptian authorities receive proof of Yusuf and Zulaikha denied the charges, so as to decide that which one is Zulaikha.

Exposure of the Qur'an shows that when the case is very difficult to be decided because there was no evidence that could befiled by the accuser in trial to streng then his allegations, the judge may ask the accused to present evidence about some thing that are legally disputed it. This meant that not to happen judges deciding cases only according to his conscience alone, without constituted by the evidence right under the laws of his decision.

Supposedly, in the above case, Zulaikha who must demonstrate that what is alleged to Joseph was right. However, because the charge was not accompanied by evidence, while the case is very important because it concerns the authority of a head of state, Joseph asked to prove that he is clean of any alleged by Zulaikha. When
Joseph could prove that he was not as alleged by Zulaikha, the ruler of Egypt and believe that Yusuf was innocent and that the authorities subsequently ruled that the wrong is Zulaikha (his wife). Further more Egyptian ruler asked Yusuf to be secret cases that actually occur in order to maintain the dignity and honor of himself and his wife, and also sent to the Zulaikha (his wife) in order to repent and beg forgiveness.

Procedural Law principle that can be drawn from the story of Yusuf and Zulaikha above is that:

First, there is the application of that principle in positive law usually called "reversed burden of proof", where evidence is not requested to the prosecution, but to the defendant. This principle is taken because the prosecution had difficulty presented evidence. However, even this is limited only to those cases very important that a very broad impact on society, such as the case of allegations of immoral within the royal family, as disclosed in the paragraph above.

Second, in the case of adultery charges apply (immoral) could be applied the principle reversed burden of proof because usually these are rare cases immoral evidence to corroborate the allegations. It seems, are important in this regard is how to bring in the evidence that can clarify the real situation, or at least close to the truth the case is being heard it, so that the tool-evidence that judges have come to understand and gain confidence has occurred crime and the culprit it is the defendant.

To that end, the judge sentenced the perpetrators of such crime. Strictly speaking, do not let the judge decide case is not based on the evidence, but only by volition/her conscience alone.

Third, the Islamic Courts Procedural Law does not differentiate between the civil criminal cases. The principles apply to both legal matter was the same. For example, with regard to the third point, for example in the case of goods loans. If a claim to borrow items from another person then he stated the item was returned, but the owner of the goods refused the claim and said it had not received are fund, then sued the borrower, then the judges should ask the borrower to prove that he really had
to restore the goods. If, the borrower can prove it, then the judges should reject the lawsuit. But, otherwise, the judge had to be in favor of the owner of the goods.

In the above cases, the defendant was asked to prove the truth of his statement in which he had returned the goods. This is because the statement of the borrower is still not sure (yet can generate confidence). What is certain/sure is that he has borrowed items to the owner of the goods. Therefore, he evidentiary burden. Another case if someone sues someone else borrows the goods, then the proof borne by the plaintiff, because of the strong/confident in this case is that a person basically has no loans to any one.

In other cases, for example the problem of grants. For instance there is a donate the goods to one of his heirs. When the grantor has died, other heirs claim that when the grant or to grants tuff he was ill and therefore grants invalid. They demanded that the goods have been don at edit restored its status as in heritance. Grantees reject the claim and asserted that the goods are supplied when grantor in a healthy state, and therefore alegitimate grants. In such circumstances the judge must order the defendant (grantee) to prove that his denial, not to the claimant (other heirs). According to Imam Maliki and Shafi'i.

Analysis of the above cases is that which is certain/sure in the case of grants above is the provision that all the relics of his status as heir to the treasure tirkah (inheritance). With the recognition of the wealth that has been granted to the defendant, the defendant must prove that there has been a legal act grant or donated goods to him and legal actions were legitimate because grant or done in a healthy state. If he can not prove it, then stuffs back to the original status, which is as goods/inheritance.

According to the hadith of the Prophet Muhammad explicitly. does not provide justification for the application of the basics of reverse burden of proof. However, from some garinah (manual) it can be seen that the real principle is justified by Islam. Indeed, in the description contained ushuliyah rules or principles that govern the application of a rule. The rule states: "The law (date) depending on the
presence or absence of 'illat.\textsuperscript{17} Another rule that is similar to the above stated: "The change in the law was based on the changes of the times, places and circumstances."\textsuperscript{18}

In the hadith of the Prophet Muhammad, narrated by Imam Muslim from Ibn Abbas as mentioned above, the Prophet said:

\textit{Meaning: From Ibn Abbas, that the Prophet SAW. He said: "If given to any man who sued him, he would have the desired demand every thing of both life and property. Therefore, the information requested to the plaintiff and the defendant is charged oath" (H.R. Baihaqy).}\textsuperscript{19}

Can be understood and be forgiven the Prophet Muhammad. Imposes the burden of proof to the plaintiff because it is so fair. However, there are things to look behind the words of the Prophet. It is a condition of the Muslim community when the tradition was issued, spoken by the Prophet. It is important to know because the condition of the society of which became 'illat or basic legal enactment.

The condition of the Muslim community when this tradition is pronounced in a state that is very conducive. They are people who have faith and always uphold the values of truth, honesty, and fairness. They are more afraid of the sanctions ukhrawi of the earthly sanctions. Therefore, they do not want to tell lies, and do not want to hide the fact that there is because they believe it would be bad for the min the here after. Although they can lie to the Prophet in order to escape punishment in the world, for example, but they do not want to do it because they are sure that the punishment of the Here after is more severe and more devastating when compared to the punishment in the world, though the punishment was the death penalty. In fact, they are requested to immediately sentenced to the world on him when they are already doing a sin. The case occurred in a male adulterer prove it. The case is as follows:

\textit{Meaning: From Abu Hurairah he said: It came a man facing the Prophet when he was in the mosque and said: O Messenger of Allah, I have committed adultery. Prophet then looked away from him. The situation was repeated up}

\textsuperscript{17}The definition of 'illat within the meaning of fiqh is a situation of social conditions or can be used as an excuse objective legal enactment.


\textsuperscript{19}Muhammad Fuad Abdul Baqi, Op.Cit, p. 192.
to four times. Then told the man to testify (to take an oath = mention of Allah) four times. Then the Prophet said: Are you insane? No, he replied. Are you a muhshān?20, Said the Prophet. Yes, replied the man. Prophet then said (to his Companions): Bringt his person, and stoning was he!21 (Transmitted by Bukhari).

On the other events that happen to a woman, too, show thus:

A woman facing the Prophet and said: O Messenger of Allah, I committed adultery (while showing a fetus in the womb). He then turned to face the other direction. The woman was then directed his view to the Prophet and said: O Messenger of Allah, I committed adultery. So repeated up to four times. And on the fifth time the Prophet then asked: Are you crazy? No, the woman replied. He asked again: Do you muhshān? Yes, replied the woman. Prophet then told her to go home to have the baby first. After a woman is giving birth, she came back to face the Prophet asking sentenced. Prophet did not want to pass sentence up on it, and told that she was taking care of her baby until he can eat by him self. After his son was able to feed him self, he came to see the Prophet, and the Prophet was then asked his companions to stoning for her. After that Prophet mensha latkan his body.

Such is the state of the faith of the Muslims at that time so that when applied the presumption of innocence is something very right. When reminded of lying and must not violate the laws of God, they soon realized and return to the right path. The case with the two women tailors the shoes how such things. When one woman who claims to be a needle by colleagues that when he impaled him self reminded that God’s wrath against those who distort the facts, then the woman conscious and admitted his guilt. Conditions of such a society are becoming illat or legal reasons the application of the principle of presumption of innocence, so it is natural that every individuals acquire full legal protection that he should be regarded as a person who is clean, as the legitimate holder of the rights, etc. From the condition of society as that

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20 Muhshān is a term in Islamic jurisprudence that is given to some one who never carry out the ceremony, he could have been divorced or still in the marriage bond.
of the Prophet Muhammad, issued a judicial principle that: "The proof that required on the plaintiff, and the oath imposed on the defendant," 22

The plight of today is not an exaggeration to say the opposite of the time of the Prophet. While it has been previously advised to always tell the truth, do not lie, and so on, people are still not afraid of her origins lie to escape punishment, or people did not hesitate to eliminate evidence that bad behavior is not known. Similarly, people dare to collude, falsified correspondence, receipts, or any thing else as long as it can obtain property or benefit him. If the circumstances of these communities will continue to apply the principle of presumption of innocence, where as the prevailing tendency to lie is so apparent in today's society, then according to the definition contained in the rules of the above mentioned method is no longer appropriate or at least can not be applied to all types of criminal act. That's because there is no legal illat (doubtful) and therefore, the law provisions also needs to be reassessed.

So, take there versed burden of proof way to resolve those cases that is difficult because of the limitations of the legal evidence, it can be justified by Islam because of the way that is seen to bring serious benefits in general. Even if this means being the only alternative that can ensure the realization of the common beneficiaries, then not only can, but should.

Judging from the reviews ushul jurisprudence, in fact, desired by Islamic law generally is the maintenance of rights, both individual rights, community rights, and the rights of God. Indeed, when we talk about these rights, you will see a clear distinction between the rights of which are taught by Islam the rights acquired in the positive law. The difference lies in the basic principles developed by the respective legal systems. Islamic law is grounded in view of the need to realize the common good (communal), not only benefit the individual, while positive law is dominated by the view of the need to protect individual interests, although not deny the need to maintain social interests.

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22 ibid. Hlm. 192.
Thus, no doubt that the goals to be achieved by Islamic law is the benefit of mankind. This objective proclaimed by Islam so that people gain true happiness, physical and mental, worldly-ukhrawi. However, sometimes due to the limitations of human ability to uncover the meaning contained in the text of Revelation and the Hadith, because the sound was to tied to the text (nass), as promoted by the understanding of orthodoxy, it is then the benefit that proclaimed it just becomes empty jargon.

In embryonal tendency orthodoxy textual and formalistic have started since the beginning of Islam. Recorded in history that when Sawad (Iraq) conquered, many spoils that can be controlled by Muslims (of which agricultural land). Umar as the caliph then consulted with his companions to establish utilization. The majority of friends who are represented by Bilal bin Rabah and Abdul Rahman bin 'Auf found that agricultural land should be distributed to soldiers in the war as well as the instructions of Allah. In Surat al-Hashr paragraph (7) and a practice done by the Prophet., which means (more or less):

*Meaning: Any spoils (fai) that God has given to His Messenger from the people of the town ships, is for God, for the Messenger and to kindred, orphans, the poor and those who are on the way, so that it may not merely circulate between the rich among you. What is given to you then accept the Apostle, and nothing forbids you then leave; and fear Allah, verily Allah is severe torment.*

Umar as Caliph disagrees with it, and he intends to let the land was owned by local people with conditions they have to pay the fees (kharaj) specific to the country and not distributed to the soldiers. Umar consideration is to leave the land in private hands will be more benefit than distribute them to soldiers. Because, with that fertile land and distributed to the army, not necessarily the land can be explored either because they are not accustomed to work on it, so consequently crops could decrease. But by letting the land controlled by the population, then there are some serious

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23Orthodoxy is a flow of thought in Islam that is strongly tied to the sound of revelation text or the Hadith.
benefits to be gained, first, people do not lose their livelihoods; second, agricultural products can still be maintained because they have been accustomed to cultivate the land, and the third, the state earn income from retribution with drawal tilling of the land that could be used to finance/hire soldiers and other purposes. What do Umar that in textual impressed ignored the provisions Surat al-Hasyar (7) and the Sunnah of the Prophet. In other words, Umar put aside reason and more favor reason lafdziyah maknawiyah (ie substantial beneficiaries) who felt more strongly. That means that Umar prioritize the consideration of beneficiaries rather than formal legal elements. And indeed that pedestal end (ghayah) Shari'ah is the realization of the benefit. Al-Dawalibi as sorted, wherever there is the benefit, that is where the law of Allah. standing. Because human welfare that is the basis of the establishment of Islamic law, then Mahmassani leave are view that has become a norm that makes sense if the law that changed due to changing times and circumstances as well as the influence of that social phenomena.

Thus it seems clear that the fundamentals of building Islamic legal thought is the benefit of humanity as a whole. So, every thought, whether based on clear texts or simply based on the analysis logic, as long as you ensure the realization of the benefit of humanity, in the eyes of Islam, are legitimate, and the Muslims are bound to pick up and make it happen. On the contrary, thought or ijtihad results that conclusively does not support the assurance of benefit, let alone be able to open up the possibility of kemudharatan, in the eyes of Islam, is imperfect, and Muslims should prevent it. From the exposure of the clerics at the top can be affirmed again that Islam that
intended to realize the benefit of mankind, and the desired benefit not only the world, but until the hereafter.\textsuperscript{28}
A. Conclusion

From the description of the background and the discussion that has been described can be summarized as follows:

First, that the application of the principle of presumption of innocence in criminal investigating judge actions in general, there are still weaknesses. Among these weaknesses is the lack of distinction between cases-criminal cases is clear the perpetrators and the type of actions with those cases that are still unclear actors and the type of criminal act. As a result, the proceedings of those cases that it is clear the perpetrators and the type of actions that should be shortened, there should be slow so that the results of law enforcement becomes slow. In fact, people want to immediately know the results. The presumption of innocence can not be applied to specific cases, such as cases of corruption, collusion and nepotism. Investigation against corruption case is regulated by Article 37 of Law No.31 of 1999 as amended by Law No.20 of 2001, because in the case of corruption, because usually the time interval between the time of the act with the on set of allegations has happened acts of corruption is relatively long, it evidences that indicate the occurrence of such acts is usually removed by the suspect, and instead had "engineered" too new evidence that explains the absence of an unlawful act has been done suspects.

Second, to solve it can be pursued alternative ways, which is reversed burden of proof. The cases are very difficult to obtain evidence, such as rape should also apply this principle because the victim usually does not want to report it to the authorities because it involves the good name of him self. So if a person good woman had been willing to report some thing that happened, but that would tarnish his good name, even the future at stake, should presumably be considered to apply the reversed burden of proof so that justice can be enforced. Thus, the consideration is
not on special or particularly a criminal act, but in the presence or absence of evidence as a means to reveal the truth so that justice can be enforced.

Third, the principle developed by Indonesian law and Islamic law in order to maintain the relationship between the individual and society in order to create a sense of peace, order and security of social life is that which is most important to get the priority is the protection of community rights, not individual rights. It was based on the consideration that although the rights of individuals recognized its existence, but these rights are limited by the interests of the larger collective. So, when there is a conflict between two interests of individual rights with community rights, must have actions that most benefit society. In the view of Islamic law, the principle of reversed burden of proof apply to cases that are difficult to prove because of the absence/difficult to obtain evidence such as corruption, is a must. Islam considers that truth and justice as an essential condition the realization of the benefit of living in a society absolutely enforced. While the method reversed burden of proof is the way in which the proceedings to achieve truth and justice. If the level in this way there are some conflicting interests, it must have a way that contributes least to kemudharatan. Islam respects and protects the rights of individuals, but if the individual rights that contrary to the right people, then in the Islamic view of individual rights must be defeated.

B. Suggestions

1. It should be held firmly against imposing restrictions on the presumption of innocence is. That restriction is that cases-criminal cases is obvious forms and perpetrators as a criminal act the perpetrator is caught, then no longer need to apply this principle. Thus, the trial could be shortened because of the state of his case which is already not need much in need of proof, so that the "results" of drug law enforcement as his sense of justice in society can be accomplished. However, incases like this do not need to apply the principle of reversed burden of proof.
2. Those cases are difficult to obtain evidence such as rape, enforced burden of proof should be reversed impartial as required by Article 37 of Law No. 31 of 1999 as amended by Act No. 20 of 2001, but the corruption cases, collusion, and nepotism reversed burden of proof should be applied absolutely. That is, the burden of proof is fully charged to the defendant. Prosecutors do not have evidentiary burden. Prosecutors only filed charges and lawsuits, and may assess whether the evidence submitted by the defendant that lawful or not. So, who actively seek evidence was the defendant.
REFERENCES


Himpunan Fatwa Majelis Ulama Indonesia, Jakarta, 2010.


Mas’udi, Masdar F., Meletakkan Kembali Maslahat Sebagai Acuan Syari'at. Dalam Ulumul Qur’an No. 3. VOL. Yl. 1995.


Media Indonesia, No. 8015 Tahun XXXIII.


Muhammad Fuad Abdul Baqi, Al-lu’lu’ wa al-Marjon, Jilid II, Beirut: Dar al-Fikr, tt.


