

**LAW ENFORCEMENT ON CRIMINAL ACTIONS TO  
PROSPECTIVE PARTICIPANTS OF HAJJ AND UMROH  
THROUGH DETERRENCE AND INCAPACITATION  
THEORY APPROACH**

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***ABSTRACT***

*The Indonesian government opens the involvement of the private sector in organizing the Hajj and Umrah pilgrimages. High public interest for Umrah has the potential to cause legal problems if it is not managed properly. There have been many cases of fraud under the guise of an umrah service organizer, demanding a real legal action breakthrough. The method used in this research is the normative research method. This paper aims to analyze, through the use of the theoretical paradigm of Deterrence and Incapacitation, which is expected to be able to affirm legal solutions that can prevent criminal acts from occurring and provide a deterrent effect to the perpetrators. The results of this study indicate that in the process of law enforcement against fraudulent acts of Hajj and Umrah pilgrims in Indonesia, various weaknesses and shortcomings are still found. This is reviewed starting from the root of the problem, law enforcement factors, the investigation process to the*

*formulation of criminal arrangements that are not sufficient for upholding law and justice against the phenomenon of fraudulent acts of prospective Hajj and Umrah pilgrims.*

**Keywords:** *Law Enforcement, Hajj And Umroh, Deterrence And Incapacitation Theory Approach.*

## **Introduction**

Going to the holy land of the Baitullah is the dream of every devout Muslim. Especially for the habits of Muslims in Indonesia, this is reflected that every year the cycle of Hajj and Umrah is increasing. Hajj and Umrah are one of the acts of worship in Islam that require various preparations; physical, spiritual to financial, and technical. In technical terms, the trip to Baitullah requires the services of an Umrah travel agency. When Indonesia was still under the Dutch colonial administration, all processes of organizing the Hajj and Umrah were held centrally by the Dutch.<sup>1</sup> However, when Indonesia was established as a sovereign country, from 1948 to 1982 the Indonesian government took full control of the organization of Hajj and Umrah, until in 1982 the private sector was again permitted by the government to operate to organize Hajj and Umrah. This was also followed by the issuance of regulations, namely Law no. 17 of 1999 which contains rules, services, protection, and coaching for Hajj and Umrah participants.<sup>2</sup> The

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<sup>1</sup>Fauzan, A, "Pelayaran Angkutan Jamaah Haji di Hindia Belanda (Tahun 1911-1930)", *Buletin Al-Turas*, Vol. 22 No. 1, 2016, h. 1-24. <https://doi.org/10.15408/bat.v22i1.2926>.

<sup>2</sup>UU No. 17 Tahun 1999 tentang Penyelenggaraan Ibadah Haji.

decentralization of the implementation of Hajj and Umrah is an economic liberalization policy that aims to open up competition and equitable distribution of economic growth and prosperity.<sup>3</sup> In essence, the government wants to involve the private sector broadly in economic benefits while at the same time giving burdens and demands to the private bureaus organizing the Hajj and Umrah pilgrimages to be responsible for fulfilling and protecting all rights of service users or prospective Hajj and Umrah participants.

In the implementation of Umrah in Indonesia, there is competition between Umrah service companies in meeting the potential and demands of Umrah consumers.<sup>4</sup> Umrah travel companies are competing to attract prospective Umrah pilgrims in various ways, especially in terms of promotion. Starting from price offers, services, added value to sub-standard Umrah travel packages. The Association of Muslim Hajj and Umrah Organizers of the Republic of Indonesia (Amphuri) stated that the lower (minimum) rate that has been set follows the annual exchange rate.<sup>5</sup> There is also price relativity that is influenced by several factors such as season, if it is held in a certain season such as a national holiday period or a big day, then it has a significant effect. Other factors included in the package, such as airline,

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<sup>3</sup>Achmad Nidjam, "Akuntabilitas Informasi Biaya Penyelenggaraan Haji", *Jurnal Ilmu Administrasi: Media Pengembangan Ilmu dan Praktek Administrasi*, Vol. 14, No. 1, 2017.

<sup>4</sup>Fadhilah, L., "Strategi Dan Manajemen Travel Haji Dan Umroh Studi Analisis Persaingan Travel Haji Dan Umroh Kota Medan Dalam Pelayanan Dan Kualitas Untuk Meningkatkan Jumlah Konsumen", *Al - Muamalat: Jurnal Hukum Dan Ekonomi Syariah*, Vol. 4, No. I, 2019, h. 1-24.

<sup>5</sup>Anggie Ariesta, "AMPHURI Sebut Referensi Biaya Umrah Jamaah Indonesia Mulai Rp20 Juta", dalam <https://www.inews.id/finance/bisnis/amphuri-sebut-referensi-biaya-umrah-jamaah-indonesia-mulai-rp20-juta>.

hotel class, type of food, and others also have an effect.<sup>6</sup> In addition, the credibility and integrity of the Umrah organizing company can also be seen by the Regulation of the Minister of Religion Number 18 of 2015 concerning the Organization of the Umrah Worship Trip which in its implementation is required to pay attention to two sides.<sup>7</sup> First, in the country, namely; payment of ONH deposits to banks, processing of Umrah files, availability of equipment, Sharia consultations, health checks and guidance on rituals. Second, in the holy land namely; consumption, transportation, accommodation, and health facilities. In practice, there are still many indicators that are not fulfilled by several umrah organizing bureaus. The same thing is still true among consumers who do not pay attention to these indicators and are easily tempted by the low prices offered.

In Indonesia until now, one of the most common criminal acts is fraud and embezzlement of prospective hajj and umrah registrants.<sup>8</sup> It is not difficult for criminals to commit fraudulent activities for prospective Umrah pilgrims to smooth out their actions in the field. The higher the public's interest in performing Umrah, this is exploited by several individuals with only communication skills which can then convince others, the number of victims eventually continues to grow.<sup>9</sup> The crime of

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<sup>6</sup>Nidjam, A., "Akuntabilitas Informasi Biaya Penyelenggaraan Haji", *Jurnal Ilmu Administrasi: Media Pengembangan Ilmu dan Praktek Administrasi*, Vol, 14, No. 1, 2017, h. 69-81. <https://doi.org/10.31113/jia.v14i1.6>.

<sup>7</sup>Peraturan Menteri Agama Nomor 18 Tahun 2015 tentang Penyelenggaraan Perjalanan Ibadah Umrah.

<sup>8</sup>Liputan6.com, "5 Hal Kasus Penipuan Percepatan Keberangkatan Haji 2019", dalam <https://surabaya.liputan6.com/read/4034181/5-hal-kasus-penipuan-percepatan-keberangkatan-haji-2019>.

<sup>9</sup>Zaenul Arifin, Sri Endah Wahyuningsih, and Sri Kusriyah, "Proses Penegakan Hukum Terhadap Pelaku Tindak Pidana Penipuan Dan Atau Penggelapan Berkedok Biro Jasa Ibadah Umroh Dengan Biaya Murah (Studi

fraud is a crime with objects or goods to be owned, in services for personal or group use.<sup>10</sup> The substance of fraud is the sale of promises, by which people (consumers) are misled. Thus, the victim is willing to surrender his property to the perpetrator of the fraud. The category of a fraud crime is "material delict" which means that for its perfection there must be a result as stipulated in the Second Book of Chapter XXV article 378 of the Criminal Code in conjunction with Article 64 paragraph (1) of the Criminal Code.<sup>11</sup> Contemporary facts show that cases of fraudulent Umrah pilgrims still occur in Indonesia.<sup>12</sup> For example, what had attracted public attention in 2017 were the thousands of victims of prospective Umrah pilgrims from the Hajj and Umrah First Travel Bureau where this case was handled directly by the Criminal Investigation Unit of the National Police Headquarters.<sup>13</sup> Still, in the same year, the Umrah organizing bureau named Reach Alatas Wisata in Central Java with an estimated loss of Rp. 500 million.<sup>14</sup> Likewise in the case of CV Iqra Management, the director was caught in a fraud

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Kasus Pada Penyidik Sat Reskrim Polrestabes Semarang)", *Jurnal Hukum Khaira Ummah*, Vol. 12, No. 4, 2017.

<sup>10</sup>Soesilo, R., *Kitab Undang-Undang Hukum Pidana (K.U.H.P.) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, (t.t: Politeia, 1956).

<sup>11</sup>Andrisman, T., *Delik Tertentu Dalam KUHP*. (Bandar Lampung: Universitas Lampung, 2011).

<sup>12</sup>Prihanto, S., "Penegakan Hukum Terhadap Tindak Pidana Penipuan Calon Jemaah Umroh", *Jurnal Hukum Khaira Ummah*, Vol. 12, No. 4, 2017, h. 884–890.

<sup>13</sup>Mantalean, V., "First Travel Akan Ajukan PK, Minta Aset yang Dirampas Negara Dikembalikan Halaman all", dalam <https://megapolitan.kompas.com/read/2020/08/10/12565791/first-travel-akan-ajukan-pk-minta-aset-yang-dirampas-negara-dikembalikan>, diakses pada 10 Agustus 2020.

<sup>14</sup>Purbaya, A. A., "141 Jemaah Umrah Gagal Berangkat, Bos Travel di Semarang Ditangkap", dalam, from <https://news.detik.com/berita/d-3399541/141-jemaah-umrah-gagal-berangkat-bos-travel-di-semarang-ditangkap>, diakses pada 30 Agustus 2021.

case for Umrah pilgrims which was carried out with the gas station business partnership mode.<sup>15</sup> For the crime of fraud, the prosecution was charged with using the fraud article, namely Article 378 in conjunction with Article 65 (1) of the Criminal Code because customers have been cheated on an ongoing basis. The location of the oddity that occurs is that Indonesia already has regulations in Law Number 13 of 2008 concerning the Implementation of the Hajj which includes, for example, criminal provisions for those who violate the Act<sup>16</sup>. Meanwhile, Indonesia is a legal state that adopts the principle of *lex specialis derogat legi generali*, which interprets law with special laws overcoming general laws.<sup>17</sup> In this case, the orientation of punishment has not fully led to a deterrent effect on the perpetrators. Or because of the competence of law enforcement human resources (HR) who are less careful in using the law as a tool to bring justice to victims.<sup>18</sup>

Various cases of fraudulent Umrah candidates worth billions of dollars have been revealed, which raises special attention to the many weaknesses of the Public Prosecutor (JPU) and the panel of judges, which can be seen from the

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<sup>15</sup>Tipu Puluhan Jemaah Umroh, Direktur CV Iqro Divonis 2,5 Tahun Bui., dalam <https://news.detik.com/berita-jawa-tengah/d-2661577/tipu-puluhan-jemaah-umroh-direktur-cv-iqro-divonis-25-tahun-bui>, diakses 30 Agustus 2021.

<sup>16</sup>Diah Gustiniati, Rini Fathonah Novi Ratnawati, "Upaya Penanggulangan Terjadinya Penipuan Yang Dilakukan Biro Perjalanan Umroh (Studi Kasus Kota Bandar Lampung)," *JURNAL POENALE*, 2018.

<sup>17</sup>Saputra, A., "Tak Dirampas Negara, Aset Travel Umrah Ini Dikembalikan ke Calon Jemaah", dalam <https://news.detik.com/berita/d-4800219/tak-dirampas-negara-aset-travel-umrah-ini-dikembalikan-ke-calon-jemaah>, August 30, 2021

<sup>18</sup>Rumadan, I., "Peran Lembaga Peradilan Sebagai Institusi Penegak Hukum Dalam Menegakkan Keadilan Bagi Terwujudnya Perdamaian", *Jurnal RechtsVinding*, Vol. 6, No. 1, 2017, h. 69. <https://doi.org/10.33331/rechtsvinding.v6i1.128>

indictment of the public prosecutor to the trial verdict. This is exacerbated by the absence of an understanding of corporate criminal liability and money laundering. As in the case of Muhammad Nassa, who is the Director of PT Lintas Utama Sukses, apart from being sentenced to 17 years in prison, his assets were also confiscated as a form of money laundering.<sup>19</sup> In principle, with the implementation of corporate criminal liability and money laundering, the potential for charges can be expanded not only to individuals but also to corporations and their assets obtained from crimes so that the hope of achieving criminal objectives can be realized. The purpose of criminal law is viewed from the thoughts of Herbert L. Packer, concluding that the outline of the purpose of punishment is twofold, namely to provide suffering and prevent crime.<sup>20</sup> In his theory, Parker explained that the Integrated Theory of Criminal Punishment gave birth to the Deterrence and Incapacitation paradigms.<sup>21</sup>

Deterrence is a form of sentencing that is based on the premise that punishment that causes pain cannot be justified unless the punishment results in good things.<sup>22</sup> Classically is a preventive effect, it is hoped that the presence of pain in punishment can prevent two aspects, namely; the actual aspect

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<sup>19</sup>Saputra, A. (n.d.). Tak Dirampas Negara, Aset Travel Umrah Ini Dikembalikan ke Calon Jemaah. detiknews. Retrieved August 30, 2021, from <https://news.detik.com/berita/d-4800219/tak-dirampas-negara-aset-travel-umrah-ini-dikembalikan-ke-calon-jemaah>

<sup>20</sup>Packer, H., *The Limits Of The Criminal Sanction*. (t.t: Stanford university press, 1968).

<sup>21</sup>Depersis, D. S., & Lewis, A., "A Consideration of Three Types of Burglars: Based on the Thinking of Herbert Packer, Rawls, Norval Morris, and Samuel Donnelly", *The International Journal of Human Rights*, Vol. 12, No. 2, 2008, h. 253-260. <https://doi.org/10.1080/13642980801899683>

<sup>22</sup>Osinga, F., & Sweijs, T. (Eds.), *NL ARMS Netherlands Annual Review of Military Studies 2020: Deterrence in the 21st Century—Insights from Theory and Practice*, (t.t: T.M.C. Asser Press, 2021) <https://doi.org/10.1007/978-94-6265-419-8>.

after the fact of the convict being sentenced and the pre-event aspect with threats that are general to the audience. This theory supports the principle of *lex specialis derogate legi generali* to apply Law Number 13 of 2008 concerning the Implementation of the Hajj against perpetrators of fraudulent acts of Umrah pilgrims, by law enforcement. Furthermore, incapacitation is the basis for punishment so that criminals are made incapable or have no potential to do the same thing anymore.<sup>23</sup> This theory directly supports the existence of corporate criminal liability because the results of fraud are enjoyed by all members of the corporation, but when the case is revealed only a few people or even only one person has been convicted, this makes the corporation still have the potential to commit criminal acts again. This study wants to provide an overview of a new paradigm in law enforcement for criminal acts in the form of fraud or embezzlement to Hajj and Umrah participants, namely through a deterrence and incapacitation approach in the hope of being a supporter that can encourage the creation of a more affirmative criminal law enforcement environment towards the goal. punishment, especially related to criminal acts against Hajj Umrah participants in Indonesia.

The legal study in this article uses normative legal research which is legal research by examining library research materials or secondary data composed of various legal materials.<sup>24</sup> The legal materials used by the authors in this study were obtained from the primary law material namely Law no. 17 of 1999 which contains rules, services, protection, and

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<sup>23</sup>Pereboom, D., "Incapacitation, Reintegration, and Limited General Deterrence", *Neuroethics*, Vol. 13, No. 1, 2020, h. 87-97. <https://doi.org/10.1007/s12152-018-9382-7>

<sup>24</sup>Peter Mahmud Marzuki, *Penelitian Hukum Cetakan Ketujuh*, (Jakarta: Kencana Prenada Media Group, 2014).



coaching for Hajj and Umrah participants. Secondary Legal Material is a library material containing information about primary materials, such as Abstracts, Indices, bibliographies, government issuance, and other references. The subject of this research study is the scope of problem identification with the approach of laws and regulations that are correlated with legal issues that are the research topic. Qualitatively analyzed research that produces descriptive data on legal principles which are affirmed with supporting the legal theory (content). Conclusions are drawn deductively which concludes some special things that are connected by theories. This study examines the paradigm of deterrence and incapacitation theory in law enforcement against criminal acts against Hajj and Umrah participants.

### **Factors Causing Criminal Acts of Hajj and Umrah Participants**

In Indonesia, several causes affect the quality of law enforcement, in criminal acts in which the community has a criminal justice system or a system of criminal justice which generally consists of the police, prosecutors, and judges who are integrated into one unit.<sup>25</sup> According to Prihanto, the phenomenon of criminal acts of fraud against Hajj and Umrah participants is influenced by several causes so that many victims of crime occur from prospective Hajj and Umrah participants, namely:<sup>26</sup>

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<sup>25</sup>Yudho, W., & Tjandrasari, H., "Efektivitas Hukum Dalam Masyarakat", *Jurnal Hukum & Pembangunan*, Vol. 17, No. 1, 2017, h. 57–63. <https://doi.org/10.21143/jhp.vol17.no1.1227>

<sup>26</sup>Prihanto, S., "Penegakan Hukum Terhadap Tindak Pidana Penipuan Calon Jemaah Umroh", *Jurnal Hukum Khaira Ummah*, Vol. 12, No. 4, 2017, h. 884–890.

(1) Legal Factor. The reality in the field shows that sometimes the practice of administering law contradicts legal certainty with justice because the formulation of the conception of justice still smells abstract while normatively, legal certainty has been determined by procedure. Discussions regarding legislation will not be separated when reviewing law enforcement for the criminal act of fraud for Umrah pilgrims. In terms of the criminal act of fraud itself has been regulated by the Criminal Code, but when it comes to specific cases, such as the problem of organizing Umrah, this has also been regulated by Law Number 13 of 2008 concerning the Organizing of Hajj which also contains criminal provisions for pilgrim fraud. umrah. Therefore, in its application, it is required to be guided by the principles that apply in a country to override and use something in law enforcement.

(2) Factors of Law Enforcement Apparatus. One of the vital things that influence the law enforcement process is the mentality of law enforcement officers because good and correct regulations without quality enforcers are problematic in the success of law enforcement<sup>27</sup>. Therefore, qualified human resources (HR) of law enforcement officers, especially in personality and morals, are needed to avoid failures in law enforcement such as; irregularities, abuse of investigative authority, making personal gains from taking sides with the wrong party, which in the results in the suspect or convict being released from the appropriate legal entanglement.

In addition, some things affect the performance of law enforcement officers, especially the Police technically as

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<sup>27</sup>Kukuh Dwi Kurniawan, "Pemberlakuan Plea Bargaining Sistem Sebagai Alternatif Penyelesaian Perkara Pidana Untuk Tujuan Menyelesaikan Konflik", *Jurnal Yurisprudence*, Vol. 10, No. 2, 2021, <https://journals.ums.ac.id/index.php/jurisprudence/article/view/12949>.

follows: (a) One important basis in the settlement of a crime is an examination. Reports of criminal acts are confirmed by potential suspects and witnesses in the examination stage. As in the case handled by the Criminal Investigation Unit Investigator of the Semarang Polrestabes, based on research, M, Abdul Munir has been examined by the Police who were later named suspects. The next process is the Semarang City Resort Police investigator tasked with uncovering the crime, which investigators are required to arrest the perpetrators of the crime and enforce the law. However, this task became less than optimal due to lack of evidence because the witness was not cooperative in summoning the police for various reasons. (b) The police also have difficulty making arrests because the majority of Umrah organizers are not native to the city.<sup>28</sup> (c) The related Umrah Organizing Bureau is not registered with any government agency, either at the Tourism Office, Ministry of Religion, or others in Semarang City, thus making it even more difficult to investigate the perpetrators of fraudulent Umrah pilgrims<sup>29</sup>. (d) There is also a lack of coordination between law enforcement officials. This causes information from victims to overlap, even though in the investigation stage, information is vital.<sup>30</sup> In coordination between institutions, more effective cooperation with the Office related to the implementation of Umrah is needed. And also so that the relevant agencies, promote and tighten data collection to minimize cases caused by unauthorized organizing bureaus.

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<sup>28</sup>*Ibid.*

<sup>29</sup>Muhammad Nuri, "Pragmatisme Penyelenggaraan Ibadah Haji Di Indonesia," *Salam: Jurnal Sosial dan Budaya Syar-i*, Vol. 1, No. 1, 2014.

<sup>30</sup>Syalsabila Ramadhini, Syamsudin RS, and Asep Iwan Setiawan, "Pola Pengawasan Kepala Seksi Penyelenggaraan Haji Dan Umrah Dalam Meningkatkan Kinerja Pegawai", *Tadbir: Jurnal Manajemen Dakwah*, Vol. 2, No. 1, 2017.

(3) Facilities and Supporting Factors in Law Enforcement. The development of technology over time also makes criminals act in increasingly sophisticated ways and means. This ultimately requires law enforcement to involve appropriate supporting facilities and facilities<sup>31</sup>. The current reality is that Indonesia has not been able to meet these demands. Such as police education practices that are too conventional and have not been matched with adequate software<sup>32</sup>. When dealing with criminal acts related to Cyber Crime, the investigation process is hampered less or perfectly, so that in some cases, the authority is given to the prosecutor until the police are judged to be technically juridical. However, improvements are still ongoing, so that in some areas the Police, Prosecutors and Courts have begun to have more adequate law enforcement facilities and developments in case handling technology.

(4) Community Legal Awareness Factor. The level of awareness and legal compliance in the community also influences the law enforcement process, because law enforcement starts from the community and aims to achieve a peaceful society<sup>33</sup>. In law enforcement against the fraudulent act of Umrah pilgrims, the community indirectly helps make it easier for criminals to continue to act. This is because people still tend to be tempted by fantastic price offers, rather than

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<sup>31</sup>Nidjam, "Akuntabilitas Informasi Biaya Penyelenggaraan Haji".

<sup>32</sup>Arni Rizqiani Rusydi et al., "Application of Good Corporate Governance Principles in Public Regional Hospital of Haji, Makassar," *International Journal of Innovative Technology and Exploring Engineering*, Vol. 9, No. 1, 2019.

<sup>33</sup>Fitria Esfandiari, "New Normal as an Opening Door to State Financial Stability through the Post-PSBB Tourism Sector", *Salam*, Vol. 8, No. 5, 2021, h. 1513-1526, <http://journal.uinjkt.ac.id/index.php/salam/article/view/22487>.

paying attention to applicable legal indicators. People are still easy to believe only with small and simple empirical evidence such as word of mouth that states the goodness of service and the credibility of an umrah organizing bureau. The usual modus operandi of Umrah bureaus is to provide real, good service at the start. Then deploy marketing agents such as the multilevel marketing (MLM) system which in the end the congregation is the last registrant with a large number who become the target of prey<sup>34</sup>. This makes the fraudsters and embezzlers of the Umrah Jama'ah funds get huge profits personally.

(5) Cultural Factors. The culture of the local community influences legal events in the area<sup>35</sup>. Like the culture of the Indonesian people, which have a high interest in Hajj and Umrah, it creates great economic potential in it. This is not a problem if it is accompanied by high legal awareness in the community. However, what has happened so far is the opposite. Unfortunately, this is certainly taken advantage of by people who have bad intentions and then take the opportunity to become fraudulent elements of the Umrah Jama'at at the expense of the fate of others. However, like many other factors, this can be changed by continuing to raise public awareness of the law.

### **The Paradigm of Deterrence Theory in the Organization of the Hajj**

In the system of criminal justice in Indonesia, there is a role from the Prosecutor's Office, the Police, and the Court. The

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<sup>34</sup>Khotibul Umam, Zainal Abidin, and Farid Firmansyah, "Analisis Perlakuan Biaya Penyelenggaraan Ibadah Haji Dalam Perspektif Akuntansi", *Jurnal Akuntansi, Ekonomi Dan Manajemen Bisnis*, Vol. 7, No. 2, 2019.

<sup>35</sup>Moh Soehadha, "Struggle For Identity and Social Image of Haji: Study on Life History of Social Construction of Haji in Sasak Community, Lombok, NTB", *ESENSIA: Jurnal Ilmu-Ilmu Ushuluddin*, Vol. 18, No. 1, 2018.

case of the criminal act of fraudulent Umrah pilgrims that was revealed made the police the front line in the law enforcement process. The investigation stage in the law enforcement process by the police still tends to put forward the fraud article contained in the Criminal Code. For example, in the case of law enforcement against CV Iqro Management who was charged with Article 378 in <sup>36</sup>conjunction with Article 65 (1) of the Criminal Code because it was revealed to have deceived the congregation on an ongoing basis<sup>37</sup>. It should be noted that Indonesia is a legal state that adheres to the principle of legal interpretation *lex specialis derogat legi generali* (Lex). Concerning that principle, the prosecution of perpetrators of criminal acts of fraudulent Umrah pilgrims that occurred in Indonesia should always in all cases use Law Number 13 of 2008 concerning the Implementation of the Hajj.<sup>38</sup>

Courses which is regulated in the Criminal Code or a combination of criminal provisions if there is more than one criminal provision allow police investigators to choose one of the provisions used. So in the case of CV Iqro Management, investigators should have used Law No. 13 of 2008 concerning the Organization of the Hajj which contained more severe provisions for fraudulent Umrah pilgrims. Because the *Concursus* in the Criminal Code states that if there is more than one criminal provision, one of the toughest provisions is used

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<sup>36</sup>Dwi Kurniawan dkk Kukuh, "Additional Criminals To Corporations As An Efforts To Create Criminal Impact With Decision", *SALAM: Jurnal Sosial dan Budaya Syar-i*, Vol. 8, No. 6, 2021, <http://journal.uinjkt.ac.id/index.php/salam/article/view/23386>.

<sup>37</sup>*Ibid*.

<sup>38</sup>Prihanto, S., "Penegakan Hukum Terhadap Tindak Pidana Penipuan Calon Jemaah Umroh", *Jurnal Hukum Khaira Ummah*, Vol. 12, Vol. 4, 2017, h. 884–890.

from the main criminal<sup>39</sup>. It should also be remembered that using the *concursum* of the Criminal Code is also related to the principle of *lex specialis derogate legi generali* which is reflected in Article 63 of the Criminal Code with the statement that if an act is subject to a general crime but there are special criminal provisions, the special criminal provisions are selected.

The following is an excerpt of the criminal provisions against the fraudulent act of hajj pilgrims contained in Chapter XV of Law Number 13 of 2008 concerning the Implementation of the Hajj, precisely in article 63 paragraph (2). Article 45 paragraph (1) regarding the obligations that must be fulfilled by Umrah organizers to Umrah pilgrims. For the Umrah Service Organizing Bureau that violates or does not fulfill its obligations, the criminal provisions are contained in Article 64 paragraph (2) of Law Number 13 of 2008 concerning the Organization of the Hajj. The non-applicability of the principle of *lex specialis derogate legi generali* in several cases of law enforcement for the fraudulent act of Umrah pilgrims makes the author believe that it is necessary to use a paradigm for several legal theories among law enforcement in criminal acts of fraud for Umrah pilgrims. One of them is a theory from the idea of an American legal expert and criminologist, named Herbert Leslie Packer. In his work "Integrated Theory of Criminal Punishment" there is a Theory of Deterrence which Packer himself is not entirely sure that this theory is suitable to be applied in all aspects of crime.<sup>40</sup> However, there is an affirmation from the

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<sup>39</sup>Arifin, Wahyuningsih, and Kusriyah, "Proses Penegakan Hukum Terhadap Pelaku Tindak Pidana Penipuan Dan Atau Penggelapan Berkedok Biro Jasa Ibadah Umroh Dengan Biaya Murah (Studi Kasus Pada Penyidik Sat Reskrim Polrestabes Semarang)."

<sup>40</sup>Depersis, D. S., & Lewis, A., "A Consideration of Three Types of Burglars: Based on the Thinking of Herbert Packer, Rawls, Norval Morris,

Deterrence Theory on the problem of enforcing the criminal act of fraud for Umrah pilgrims who were not charged with Law Number 13 of 2008 concerning the Implementation of the Hajj.

H.L Packer is a utilitarian criminal law expert, so he is very careful in forming this theory of Deterrence.<sup>41</sup> There are five approaches to assessing justification in the criminal process, namely; Retribution, Utilitarian Prevention, and Behavioral Prevention.<sup>42</sup> Deterrence theory is a form of sentencing goals based on the premise that punishment that causes pain cannot be justified unless the punishment results in good things. Deterrence is classically a preventive effect, it is hoped that the presence of pain in punishment can prevent two aspects, namely; the actual aspect after the fact of the convict being sentenced and the pre-event aspect with threats that are general to the audience. The idea of Deterrence Theory also has the potential to be applied excessively so that H.L. Packer urges people to pay attention to the estimation of the limits of rational reasoning. The location of the strength of this Deterrence Theory is that if it is successful in its application it will have a broad repressive impact and bring benefits.<sup>43</sup>

The affirmation of the deterrence theory on the reality of law enforcement of criminal acts of fraud for Umrah pilgrims in Indonesia lies in that when the Deterrence theory is empowered among law enforcement, there will be a uniform certainty when enforcing the law on fraudulent Umrah pilgrims, namely by

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and Samuel Donnelly", *The International Journal of Human Rights*, Vol. 12, No. 2, 2008, h. 253–260. <https://doi.org/10.1080/13642980801899683>.

<sup>41</sup>Packer, H. (). *The limits of the criminal sanction*. (t.t: Stanford university press, 1968)

<sup>42</sup>*Ibid*.

<sup>43</sup>Setiawan, M. A., "Kajian Kritis Teori-Teori Pembenaaran Pemidanaan", *Jurnal Hukum IUS QUIA IUSTUM*, Vol. 6, No. 11, 1999, h. 97–107.



always adhering to the principle of *lex specialis derogate legi generali* and apply Law Number 13 of 2008 concerning the Organization of the Hajj. It is known that the criminal provisions for fraudulent Umrah pilgrims in Article 378 in conjunction with Article 65 (1) of the Criminal Code compared to Article 45 and Article 63 of Law Number 13 of 2008 concerning the Implementation of the Hajj are more severe in terms of criminal provisions. This strongly reflects the Theory of Deterrence which is burdensome and results in prevention. Prevention can be created when law enforcement has the certainty to impose the toughest criminal provisions so that it can create doubts for perpetrators of criminal acts to repeat or for parties who will commit crimes.

### **Paradigm of Incapacitation Theory as Criminal Liability of Hajj and Umrah Organizing Companies**

Corporations are legal subjects that have not yet been recognized in the Criminal Code, according to some legal scholars, this is because the Criminal Code is still based on the principle of "*Societas Delinquere Non-Potest*" which can be called "*The University of Delinquere Non-Potest*".<sup>44</sup> In addition to containing the general provisions section, the Criminal Code also contains several provisions regarding offenses related to the existence of corporate entities. Corporations or associations of business entities and legal entities have the same potential to act criminally like individual humans so that they can be sentenced to be responsible for what has been made from the

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<sup>44</sup>Weigend, T., "*Societas Delinquere Non Potest? A German Perspective*", *Journal of International Criminal Justice*, Vol. 6, No. 5, 2008, h. 927-945.

point of criminal law<sup>45</sup>. Developments show that through civil law organizations such as corporations, humans can use them to commit a crime, this ultimately affects several formulations of offenses in several laws. Until finally there are regulations related to corporations or legal entities as subjects of criminal law.<sup>46</sup>

The discussion of the concept of corporate responsibility will be more complete if it is stated about who, when, and what form the request for criminal liability takes. Whatever the model of responsibility that will be applied, criminal liability will touch on two theories, namely; Strict Liability and Vicarious Liability Theory.<sup>47</sup> If you try to refer to strict liability, then the case of fraudulent Umrah pilgrims can be held more accountable because it does not only prosecute individuals but also their corporations. As in the case of PT First Travel, which is “alive”, it can be held accountable, which is a civil manner must return the cost of departure for prospective Umrah pilgrims<sup>48</sup>. However, the Depok District Court stated that First Travel's assets were confiscated by the state following Article 39 in conjunction with Article 46 in conjunction with Article 194 of the Criminal Code, and were not returned to prospective Hajj and Umrah pilgrims. At the cassation level, the Supreme Court through Decision Number 3096K/PID.SUS/2018, dated January 31, 2019, also decided the same thing.<sup>49</sup> Or in the case

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<sup>45</sup>Ramadhini, RS, and Setiawan, “Pola Pengawasan Kepala Seksi Penyelenggaraan Haji Dan Umrah Dalam Meningkatkan Kinerja Pegawai.”

<sup>46</sup>Eddy, O. H., *Prinsip-Prinsip Hukum Pidana*, (t.t: Cahaya Atma Pustaka, 2016).

<sup>47</sup>Priyatno, H. D., *Sistem Pertanggungjawaban Pidana Korporasi: Dalam kebijakan legislasi*, (t.t: Prenada Media, 2017)

<sup>48</sup>“First Travel Lakukan Upaya Hukum Luar Biasa, Minta Asetnya Dikembalikan,” dalam <https://nasional.kontan.co.id/news/first-travel-lakukan-upaya-hukum-luar-biasa-minta-asetnya-dikembalikan>.

<sup>49</sup>*Ibid.*

of fraudulent Umrah candidates worth billions of dollars which have been revealed to be carried out by PT Lintas Utama Sukses (PT Linus), it raises special attention to the many weaknesses of the Public Prosecutor (JPU) and the panel of judges which can be seen from the indictment of the public prosecutor to the procession. the judge. This is exacerbated by the fact that there is no agreement on the concept of corporate criminal responsibility. This is important considering the case of Muhammad Nasa who has claimed to be the Director (PT Linus) and as the organizer of Umrah<sup>50</sup>. With the implementation of the concept of corporate criminal liability, the potential for charges can be expanded not only to individuals but also to corporations. In this way, the hope of achieving the criminal objectives can be realized.

Speaking of idealism, to answer these problems, legal certainty is needed regarding the laws and regulations governing the concept of corporate responsibility, especially regarding the implementation of Umrah in Indonesia. The law has been able to underlie legal practices that impose criminal liability on corporations but with the fact that there are clear instruments and formulations related to corporate criminal liability, it is very difficult to realize at the law enforcement level. It can be seen how few cases entangle corporations in the Court. It is hoped that the next policy will provide clarity so that it can result in a corporation being subject to sanctions and liability that are incapacitated.

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<sup>50</sup>"Merasa Ditipu, Ratusan Calon Jamaah Umroh Geruduk Kantor PT Linus Di Cikini," last modified 2014, <https://news.detik.com/berita/d-2513827/merasa-ditipu-ratusan-calon-jamaah-umroh-geruduk-kantor-pt-linus-di-cikini>.

## **Conclusion**

In Indonesia, crimes in the form of fraud are threatened with criminal sanctions which in law enforcement are considered to still lack a deterrent effect on violators, because, in the enforcement of criminal law, it is not enough to regulate an act in the law. But it takes the role of law enforcement officers as implementers of the provisions of the law, especially institutions that have the authority to handle a crime such as the police, courts, and prosecutors. The use of the Deterrence and Incapacitation Theory paradigm among law enforcers is expected to provide justice and assist law enforcement for the fraudulent act of Hajj pilgrims in Indonesia. The use of the paradigm of deterrence and incapacitation theory can take the form of socialization to affirm legal principles to criminal liability related to corporations organizing Umrah.

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