

DIPLOMATIION AS ONE OF THE ALTERNATIVES TO RETURNING CORRUPTION ASSETS ABROAD

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ABSTRACT

Massive and widespread of corruption has resulted in arduous efforts to eradicate corruption in Indonesia. Law enforcers, especially the Indonesian Corruption of Eradication Commission, continue to work to recover assets, in particular state funds misappropriated by corruption. Although, to this day, stolen public money located overseas has not been fully accessible to Indonesian law enforcement. In fact, Indonesian law enforcers would rather focus their efforts on recovering the stolen public money which is stored within the domestic jurisdiction. In addition, corruptors remain very good at hiding their money abroad to evade Indonesian law enforcement. This study was conducted to analyze the Indonesian legal framework of mutual legal assistance to recover stolen Indonesian public money stored offshore. Additionally, this study considers the possibility of the use of diplomatic channels as an effective legal remedy to recover the stolen public money stored outside the jurisdiction of Indonesia.

Keywords: Asset Recovery, Public Money, Mutual Legal Assistance, Corruption.

INTRODUCTION

Corruption is a criminal offence that until now has not been completely resolved by the Indonesian Government. In 2017, the Transparency International Institution's Corruption Index placed Indonesia at number 90 with 37 points. Total state losses in 2017 amounted to 6.5 trillion rupiah, an increase of 1.5 trillion compared to 2016. 576 total cases were handled in 2017. This figure has increased compared to 2016, in which there were a total of 486 cases (Indonesian Corruption Watch, 2017). The trend of corruption cases continued upward from 2014 to 2017 (Indonesian Corruption Watch, 2017). Those trends have become sign representing more vigorous prosecution of corruption cases.

Massive and widespread corruption practices persist because of weaknesses in the legal field. One of these weaknesses is that corruptors divert their assets abroad to avoid domestic law enforcement. In practice, law enforcement agencies are constrained by jurisdiction (Wouters, Ryngaert & Cloots, 2013) and the lack of bilateral cooperation (Kendall, 2011) to facilitate the recovery of stolen assets.

This article examines the laws and regulations in Indonesia related to possible legal remedies to return misappropriated public money from abroad. This study will elucidate whether normatively there can be an implementation in terms of hunting down the corruptors' money abroad. If normative enforcement is still weak, this article will present the possibility of alternative avenues for effectively and efficiently return corruptors' money hidden abroad.

This article has two important problem formulations: First, the extent that Indonesian legislation normatively regulates legal remedies for returning the money of corruptors from abroad? Second, is there any legal effort that can be done by Indonesia as an alternative method to recover corruptly-acquired funds from abroad?

RESEARCH METHODS

This study used normative juridical methods. In addition, this study used statute approach and conceptual approach. The statute approach were carried out to analyze the laws and regulations in Indonesia related to legal efforts to return corruptors' assets from abroad. The conceptual approach was used to apply the diplomacy concept to solve the legal issue of returning of corruptors assets across jurisdictions

DISCUSSION

Indonesian Legal Framework

Since the reformation era in beginning in 1998, Indonesia has had a strong commitment to combatting corruption. To show such commitment, Indonesia has established specific statutes to eradicate corrupt practices in the country. Such specific laws actually mention the possibility of trans-border cooperation to gain access to information to locate parties convicted of corruption and/or to repatriate their assets to Indonesia.

The Indonesian Corruption Eradication Commission is empowered by the law to conduct cooperative investigations and prosecution for corruption cases with other countries (Law Number 30 Year 2002). Other law enforcement agencies are also authorized to conduct formal joint anti-corruption actions with other foreign state agencies. As an example, article 89 of Law Number 8, Year 2010, on the Prevention and Eradication of Money Laundering (the "Money Laundering Law") states that the Indonesian Financial Transaction Reports and Analysis Center (PPATK) may cooperate with the other similar foreign state agencies to exchange information related to the suspect international transactions (Article 89 Law Number 8 Year 2010).

Indonesia's domestic laws seem to prioritize the utilization of formal cooperation rather than in-formal cooperation. Law Number 30, Year 2002, only mentions that bilateral or multilateral cooperation are the only available options for international cooperation (Article 13 Law Number 30 Year 2002). The Money Laundering Law prefers to use the formal cooperation as the first step. If this step cannot be done successfully, the Law refers to the mutual legal assistance and reciprocal principle. However, there has been no further technical guidelines on how to perform informal cooperation.

Adding further difficulty, the situation is the same in the Law on Mutual Legal Assistance (Law Number 1 Year 2006). This law gives authority for the Minister of Law and Human Rights to request legal assistance from foreign authorized agencies (Law Number 1 Year 2006). In addition, the Minister also has authority to file a request follow up the court decision to the requested state in order to seizure the asset of corruptor (Article 22 & 23 Law Number 1 Year 2006). Although this law provides an integrated procedural system for how to obtain legal assistance from other countries, the law encourages law enforcers to first exhaust formal cooperation options (Law Number 1 Year 2006).

RECENT CASES

Even where the Law on Mutual Legal Assistance provides a specific procedure to restore stolen Indonesian public assets abroad, law enforcers still face great difficulty returning stolen public assets back to the country. Corruptors generally come from white-collar groups (Ryder, 2018). They understand very well how to keep the money hidden from tracking by the Indonesian Government. They use systematic, elegant methods, and legal loopholes (Isra,

2009) in Indonesia to protect their stolen funds. The most common way is to use financial engineering or money laundering through investments managed by offshore banking centers (Chaikin, 2009). This causes cross-investigations to become prohibitively complex and expensive.

Some countries having different legal systems offer distinct advantages for corruptors. Countries such as The Cayman Islands, Nauru, Bermuda, Bahamas, Vanuatu, and Monaco (Gravelle, 2009; Unger & Ferwerda, 2008; Dharmapala & Hines, 2009, p. 1058-1068), are example of countries offering full protection and confidential guarantees of any transactions, transfers, or ownership of financial assets, regardless of their provenance (Karikari, 2014). Corruptors use these offshore tax havens to shield criminal activity and criminal tax evasion (Zucman, 2014). Blanketed in these legal protections, stolen public financial assets located in these tax haven countries will remain untouchable by law enforcers (Spencer & Sharman, 2007, 35-49).

The main challenge to enforcing final court judgments in other countries is the length of time required. In the Century Bank corruption case, for example, men had been convicted of committing corruption, facing 15 years in prison and the obligation to pay restitution in the amount of 3.1 trillion Rupiah (Public Attorney *vs.* Waraq & Rizvi, 2011). In 2010, the Indonesian government then brought the legally binding (*inkrakht*) judgment to the Hong Kong High Court to be enforced under Hong Kong jurisdiction. The Hong Kong High Court granted Indonesia's petition to seize the assets owned by the convicts in Hong Kong amounting to US \$ 4,075,000 (Secretary for Justice *vs.* Rizvi & Al Waraq, 2010). Up until now, the court's decision has not been executed because the convicted or the Century Bank shareholder filed a lawsuit before the Arbitration Tribunal Organization of the Islamic Conference on the basis that Indonesia had committed human rights violations in the case of the seizure of their assets in Hong Kong (Waraq, 2014). The subsequent arbitration ruling in favor of the claimant resulted in the postponement of the asset repatriation of the Century Bank asset from Hong Kong.

DIPLOMATIC CHANNEL AS AN ALTERNATIVE

The difficulty in pursuing corrupt assets has caused Indonesia to focus more on seizing assets stored within Indonesia rather than those that have been taken abroad. From 2005 to 2017, the value of all monetary assets returned was still small at 1.9 trillion rupiah (Fachrudin, 2017). Half of that amount is the result of financial asset recovery from abroad or around 942.478 billion rupiah (Fachrudin, 2017). In addition, Indonesia has only a limited number of bilateral cooperation agreements on mutual legal assistance. Only four countries including Australia (Treaty Australia & Republic of Indonesia, 1995), China (Treaty Republic of Indonesia and China, 2000), South Korea (Treaty Republic of Indonesia & Republic of Korea, 2014), and Hong Kong (Treaty Republic of Indonesia & Hongkong, 2008) have agreed upon mutual legal assistance in criminal matters. This means that utilizing formal cooperation tends to be a time-consuming process. Since 2015, Indonesia has been negotiating with Switzerland on mutual legal assistance in criminal matters, but with no resulting of agreement until now. At the Southeast Asian regional level, Indonesia also has agreed to a multilateral treaty among Brunei, Cambodia, Lao People's Democratic Republic, the Philippines, Singapore, and Vietnam on mutual legal assistance in criminal matters (Law Number 15 Year 2008). However, its implementation has faced a range of barriers including the lack of capacity of law enforcement and asymmetry of criminal legal system among countries within the region (Nguyen, 2012).

Reflecting on the difficulties of finding corrupted assets abroad, this study highlights the use of diplomatic channels (Chatterjee, 2010) as legal alternative. These diplomatic

channels contain the use of effective diplomatic communication to confiscate corruptors' funds abroad. Diplomats as the frontline of Indonesia in other countries can strengthen their functions and tasks to enhance their experience of diplomacy to address the Indonesian stolen assets in other countries.

Efforts through diplomatic channels in the case of ECW Neloe, Hendra Radjasa, Adrian Kiki Ariawan, and Maria Pauline Limowa (Kejaksaan Republik Indonesia, 2018) shows the effective result of receiving detailed information about their assets directly from the authorized agencies of other countries.

The case of Adrian Waworuntu describes the best practice of Indonesia in the use of diplomatic channels to request the asset seizure to the United States authorized agency. In 2004, the Indonesian Consulate General in Los Angeles sent information by facsimile No. RR-38/Los Angeles/X/04 dated October 21, 2004, to request information from the FBI that Adrian H. Waworuntu invested in the United States amounting to 12 million US dollars (Badan Pembinaan Hukum Nasional, 2010). FBI at that time, responded to the request after Indonesia met the procedures under the FBI conditions (Badan Pembinaan Hukum Nasional, 2010).

This diplomacy can also be carried out by being involved in pursuing an international regulatory framework that makes it easy for countries in the world to track and withdraw financial assets stored by corruptors. This multilateral rule would certainly be very easy in practice and could encourage participating countries to have a real role in shaping anti-corruption legal mechanisms at the international level as regulated in UNCAC.

CONCLUSION

Indonesian law enforcement has sought to eradicate corruption in various ways ranging from the establishment of an anti-corruption institution (Corruption Eradication Commission) to the seizure of assets of corruptors both domestically and abroad. However, legal remedies for seizing corruptors' assets abroad face difficulties due to their relationships with other countries' jurisdictions and, at the same time, the sophisticated techniques of corruptors in hiding their assets abroad. For these reasons, the expropriation of financial assets of corruptors abroad can be effective and efficient by employing diplomatic channels, strengthening the functions and roles of Indonesian diplomats abroad. Of course, there must be a formal coordination among law enforcement agencies, state agencies, and the Foreign Ministry. If necessary, a task force team could be established at each embassy to track the financial assets of corruptors abroad and actively communicate with other countries to return these assets to the state treasury.

SUGGESTION

This study proposes two important recommendations: First, there shall be joint task force to coordinate between state agencies including the Foreign Ministry, police department, Commission Eradication Committee, and Ministry of Legal and Human Rights Affair. This task force must be under the supervision of President and must delivered their report to President and public as part of their transparency work. Second, Indonesian diplomats must be provided detail information including data of corruption cases handled by the Indonesian legal enforcers.

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