

THE EFFECTIVENESS OF CONFISCATION OF CRIMINAL ASSETS IN FAIR LAW ENFORCEMENT

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ABSTRACT

Asset confiscation is an important part in the prevention and eradication of criminal acts. However, in reality, very few court decisions made on financial crimes are associated with the Criminal Act of Money Laundering (Indonesian, UUTPPU), despite the high number of related crimes reaching the court (the number is much higher for cases that are still at the stage of investigation), such as corruption and others. The implementation of UUTPPU as a criminal law approach alone is not really effective in the confiscation of proceeds of crime. This lack of effectiveness is caused by the fact that when judges of fraud cases decide to confiscate the asset of the offender, the confiscated asset will be handed over to the state instead of the victims. In addition, finding material truth as proof in a criminal case is relatively difficult. The hindering factors faced by law enforcers in asset confiscation include the inappropriate existing laws and regulations and the lack of efforts by law enforcers to identify and map the assets or property of suspects and other parties suspected of being connected to the suspect in the suspected corruption case. The process of identifying and mapping assets is followed by a series of preliminary and full investigations to recover state financial losses incurred as a result of the alleged corruption against the suspect.

Keywords: Effectiveness, Asset Confiscation, Justice

INTRODUCTION

Reform movement has sparked enthusiasm and desire in Indonesian people to make changes in all areas of life, including the field of law enforcement, which has so far been considered the weakest area. The powerlessness of law enforcement can be perceived in most domains, both related to legislation and law enforcement activity. It is understandable that some people think law enforcement in Indonesia is “going nowhere.” Some of the causing factors include uncertainty about where and how to start and which and what kind of law enforcement should be the priority. Does it have to begin with the legislation or law enforcement officials?

The issue of where to start law enforcement reform was put forward by Muladi when he served as the Minister of Justice. Muladi was of the opinion that legal and justice reform is imperative in Indonesia, as it has been long desired by most Indonesians. However, such reform is not simple; rather, it is a very broad and complex matter (Adami, 2006).

People have to be aware that law enforcement and criminal justice are a series of lengthy processes that can involve various state agencies or officials. Criminal law enforcement will involve the police with their investigative role, the public prosecution office, the court, and the correctional institution (Andi, 2005). Criminal law enforcement reform must also be able to compensate or even, when possible, to anticipate and prevent the emergence of crimes against human rights which are more complex and extensive. This argument is in line with Roscoe Pound’s idea of “law as a tool of social engineering.” (Barda, 2008).

Criminal law enforcement is certainly inseparable from the enforcement of law and justice, which is a series of relatively long processes involving various authorities and agencies or other law enforcement institutions. Especially in the field of criminal law enforcement, the roles of the police as the investigative institution, prosecutors, court officials such as judges, and correctional institution officers are vital. They form a holistic system along with their respective institutional structure and authorities, which are demanded to enforce a just law. As a state based on law (*rechtstaat*), Indonesia must provide its people with a fair legal protection to ensure of their welfare and prosperity, which is one of the primary goals and interests of people who live in a society, nation, and state (Galles, 2005).

Law enforcement is also closely related to criminal procedure law and evidence law. M. Yahya Harahap in his book entitled *Pembahasan Permasalahan Dan Penerapan KUHAP: Pemeriksaan Sidang Pengadilan, Banding, Kasasi, dan Peninjauan Kembali* (Discussion of Problems and Application of the Criminal Procedure Code: Trial Hearing, Appeal, Cassation, and Review), states that evidence is a problem that plays a role in trial hearing (Faisal, 2014). The defendant's fate is determined by the proof offered in the trial. If the evidence offered as stipulated by law is "insufficient" to prove the defendant was guilty of the accused crime, the defendant will be discharged. On the other hand, where there is sufficient evidence, as regulated in Article 184 of the Criminal Procedure Code (Indonesian, KUHAP), the defendant will be declared "guilty" and sentenced (Law Enforcement of Corruption by Law Enforcers for the Creation of Legal Order, 2017).

In Indonesia, corruption is considered a crime that can destroy the life of the people and the state. The state losses caused by corruptions have been at a very alarming level. This extraordinary crime has been a major obstacle to the sustainability of development in Indonesia (Law Enforcement of Corruption by Law Enforcers for the Creation of Legal Order, 2017). The crime also threatens the ideals of the state, thus demanding a more serious legal handling. For this reason, law enforcers at all levels: investigators, public prosecutors, and judges have made efforts to recover the losses by optimizing the recovery of state financial losses, which are charged to the suspect/defendant by forfeiting/confiscating their property for the payment of compensation in accordance with the Law No. 31 of 1999, Article 18, paragraph 1, letter b, stipulating that "payment of compensation, the amount of which shall not exceed the amount of assets obtained through such criminal acts of corruption." This provision has been frequently applied by law enforcers. To ensure the principle of legal certainty, the amount of compensation is usually determined by the amount the suspect/defendant has obtained from his/her corruption. However, this provision has begun to lose its popularity in line with the people's demand to impoverish the suspect/defendant/convicted of corruption, in accordance with Law No. 8 of 2010 concerning the crime of money laundering and encouragement of the legalization of reverse burden of proof.

Nowadays, fraud cases have been rampant in Indonesia, causing enormous losses to the victims. One of them is the case of First Travel, where Umrah pilgrims suffered significant losses, because even though the criminal has been convicted, the victims cannot recover their losses because the judge decided the asset confiscated from the convict was to be handed over to the state. With this decision, the victims did not receive any compensation for their losses. The decision is in accordance with the current criminal procedure law. In this law, there is no regulation that in a criminal case resulting in losses to the victim, the confiscated property of the perpetrator must be handed over to the victim.

Against this background, the following problem has been identified: “How is the effectiveness of the application of asset confiscation in the perspective of justice?”

LITERATURE REVIEW

Effectiveness is a measurement that is based on a sense of achievement of the predetermined goals or objectives. In legal sociology, law serves as a tool of social control, to create a balance and harmony between stability and change in society. In addition, it functions as a tool of social engineering, as a means of reform in society. Law can play a role in transforming people's way of thinking, from traditional into rational or modern. Legal effectiveness is essentially aimed to make the law effective.

Justice is the goal of law; in other words, law must be able to realize justice. Thus, an understanding of justice can be seen from an understanding of the law. Just as justice is subjective in nature, which is manifested by subjective law, law is a social instrument that is dynamic, in line with the development of society.

The concept that justice is legal justice is expressed in the doctrine of legal science: *Fiat justitia, ruat coelum* (let justice is done, though the heavens should fall). Every judge or court is expected to provide justice based on the prevailing law even though the sky will fall. In Lord Denning's words: “if justice is done, the heavens should not fall. They should rejoice.”

Equating justice to legal rules is the easiest way to understand justice. Legal rules are used to promote justice in 2 (two) ways: first, they introduce a number of moral norms as legal norms and establish norms in the legal system as a justice system. Second, the justice system is established through a number of institutions defined by the legal rules (Hari, 2003). Justice can manifest if it is carried out based on law (Mochtar, 2002). It will manifest as long as the people follow the rules. This is the oldest concept of justice. However, Cicero also warned: “The more laws, the less justice,” because justice should be the basis for law. Meanwhile, ratio or reason is the basis of the search for justice. A state that manipulates law to suppress its people was the background of Cicero's view. What is considered very fair by the government is in fact very unfair for the people (extreme justice is extreme injustice) (Yahya, 2005).

Andi Hamzah mentioned 4 (four) different theories of proof, namely the Positive Law theory (*Positief Wettelijke Bewijstheorie*), the judge conviction theory (*Intime Conviction*), the restricted judge theory (*Laconviction Raisonee*), and the negative law theory (*Negatief Wettelijke*) (Myren, 1988).

Similarly, M. Yahya Harahap classified the proof theory into Conviction Intime, Conviction-Raisonee, proof based on positive law, and proof based on negative law (*Negatief Wettelijk Stelsel*) theories (Lamintang, 1984).

Martiman Prodjohamidjojo divided theory of proof into traditional theory which consists of negative theory, positive theory, and free theory; and modern theory, which is divided into proof theory with mere conviction, based on positive law, proof based on negative law, conviction based on logical reasoning or restricted judge conviction, proof based on negative law, and reverse burden of proof (Ramelan, 2006).

Meanwhile, P. A. F. Lamintang divided law of evidence into *negatief-wettelijke stelsel*, *positief wettelijke system*, and conviction intime (Romli, 2013). Adami Chazawi divided law of evidence into judge conviction (*Conviction in Time*), restricted judge conviction or based on logical reasons (*Conviction in Raisonee*), proof based on positive law (*Positief Wettelijk Bewijstheorie*), and a limited system of evidence (*Negatief Wettelijk Bewijstheorie*).

Furthermore, Ansorie Sabuan, Syarifuddin Pettanasse, and Ruben Achmad distinguished among positive law (Positief Wettelijke Bewijs Theorie), judge conviction (Conviction Intime/Conviction Raisonee), and proof based on negative law (Negatief Wettelijke Bewijs Theorie).

Hari Sasangka and Lily Rosita divided the law of evidence into Conviction in Raisonee, the negative evidence system, and the positive evidence system. Ramelan divides the law of evidence into positive law theory (Positief Wettelijk Bewijstheorie), judge conviction (Conviction Intime), restricted judge conviction (Conviction in Raisonee), and negative theory (Negatief Wettelijk Bewijstheorie).

Essentially, based on theoretical and practical benchmarks, in the Criminal Procedural Law, there are 3 (three) theories of evidence. The principle of reversing the burden of proof against the criminal acts of corruption in the Indonesian criminal law system is linked to the 2003 United Nations Convention against Corruption. The negative law/evidence theory (Negatief Wettelijke Bewijs Theorie) will still be applied to a suspect of corruption. The principle of “proof beyond a reasonable doubt” is considered not contradictory to the principle of presumption of innocence with 2 (two) pieces of evidence plus the conviction of the judge in imposing a crime. This is so because it is important to maintain a high regard for the human rights of the suspect by maintaining the principle of presumption of innocence and the principle of legality. In other words, the principle of beyond a reasonable doubt is implemented in the process.

Reversal of the burden of proof through this path of civil asset recovery is regulated in the 2003 United Nations Convention against Corruption. The negative law/evidence theory, According to Romli Atmasasmita, the change in the strategic policy highlighting the recovery of assets derived from corruption is explicitly stated in the preamble to the 2003 Convention, paragraph 8, which reads: “Determined to prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets and to strengthen international cooperation in asset recovery.” This statement is a logical consequence of the previous statement in paragraph 3 which reads: “concerned further about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, amid that threaten the political stability and sustainable development of those States.”

Based on the provisions contained in Chapter V concerning Asset Recovery, especially the Article 53 up to Article 57 of the 2003 United Nations Convention against Corruption, the recovery of assets from corruption can be carried out directly (direct recovery) and indirectly (indirect recovery). As a consequence of the provisions, there has been a shift in the legal means from criminal law to civil law. However, recovery of asset will ultimately be performed for the public interest (the state and the people). Theories applied in this paper are used as a tool of analysis of the two main problems in this dissertation, forming a holistic framework of thinking to analyze "The Principle of Reversing the Burden of Evidence against Corruption in the Indonesian Criminal Law System Post the 2003 United Convention Nations against Corruption."

METHOD

The research employed the normative juridical approach, that is determining certain norms/standards for a phenomenon by examining secondary data and discussing the crime of money laundering linked to Law No. 10 of 2010 regarding the Criminal Act of Money Laundering. The data were analysed with qualitative juridical methods, collected from the literature and field studies, compiled systematically, and presented descriptively. The research

focuses more on secondary data analysis or literature review supported by primary data from field studies.

RESULTS AND DISCUSSION

Confiscation of assets or paying for compensation has noble objectives. However, in contrast to the "noble" intentions, the regulations regarding the penalty for compensation are not clear. Law No. 3 of 1971, namely Article 34 letter c, and its replacement, Law No. 31 of 1999 as well as its amendment, Law No. 20 of 2001, Article 18, only regulate compensation in one article. The lack of regulations regarding compensation has caused various problems, one of which is difficulty in determining the amount of criminal compensation that can be imposed on the defendant.

The process of recovering State's financial losses is performed through criminal asset forfeiture/confiscation system. The system has proven to be inefficient and ineffective in terms of the time and costs that must be borne by the state. The recovery of asset by the state from corruption convicts can only be carried out through criminal law by first proving the crime through a court with permanent legal force unless the suspect or the defendant dies. This happens because the reverse burden of proof in recovering the assets obtained through corruption has not been clearly regulated. In the context of legislation in Indonesia, criminals are obliged to prove that their asset is not derived from a crime. This is regulated in Article 77 of the Criminal Act of Money Laundering. The law should have explicitly regulated the consequences of the reverse burden of proof by the defendant. However, based on Article 77 in conjunction with Article 78 of the Criminal Act of Money Laundering, there is no certain procedure or at least regulation of the consequences of such reverse burden of proof.

To understand why the law enforcement for money laundering in Indonesia is still not optimally effective, it is necessary to review the predicate intention of the criminalization or eradication of money laundering. In terms of legal principles, the basis for law enforcers in dealing with money laundering is the regulations contained in Article 74 and Article 75 of the Criminal Act of Money Laundering. These legal rules have not allowed law enforcers to enforce the law according to the appropriate procedures, without making any deviations. Law enforcers also play a vital role in the functioning of the law in society. Even when the regulations are well-made, if the quality of law enforcers is still low, law enforcement cannot be optimally performed. Many law enforcers are still under qualified, as can be seen from their low educational background and the inappropriate recruitment process as well as the lack of integrity.

Facilities or infrastructure are also a very important factor in ensuring the effectiveness of a regulation, primarily the physical facilities, which can function as a supporting factor for law enforcement.

The most influential factor is the stage of investigation in accordance with Article 74 and Article 75 of the Criminal Act of Money Laundering. To enforce the law against the practice of money laundering requires good cooperation from all elements of the Criminal Justice System, which in this case consists of the police, prosecutors, judges, and also the Indonesian Financial Transaction Reports and Analysis Centre as well as The Corruption Eradication Commission and Public Prosecutor's Office in corruption cases. More specifically, the institutions of Criminal Justice System and the Financial Transaction Reports and Analysis Centre are required to collaborate and work in harmony. However, it seems that problems persist in law enforcement against money laundering.

The results of the analysis of transactions or suspicions of money laundering are submitted to the police (the Corruption Eradication Commission and the Prosecutor's Office for

corruption cases). In reality, the three institutions should conduct more preliminary investigations before the case can be fully investigated. This process means that the results of analysis reported by the Financial Transaction Reports and Analysis Centre cannot be used as evidence because they still have to be followed up with preliminary and full investigations by the law enforcers. In addition, during the preliminary and full investigations, the Financial Transaction Reports and Analysis Centre is not authorized to block the financial accounts, meaning that the results of their analysis are not very significant.

According to the Criminal Act of Money Laundering, the Financial Transaction Reports and Analysis Centre has the authority to investigate suspicious financial transactions in the crime of money laundering. Its primary functions include repository function, analysis function, and as a clearing house, namely it serves as an institution that facilitates the exchange of information on suspicious transactions.

However, it needs to be emphasized that in the investigation process, the police (or the Corruption Eradication Commission and the prosecutor's office for corruption), do not always have to wait for reports or results of investigations from the Financial Transaction Reports and Analysis Centre. It is strongly possible for the police to conduct a preliminary investigation into allegations of money laundering. As an instance, so many corruption cases have currently been exposed. The Police, Corruption Eradication Commission, and the Prosecutor's Office should have taken the initiative to trace the flow of funds first, without having to wait for the Financial Transaction Reports and Analysis Centre to provide reports.

Law No. 8 of 2010 concerning the Criminal Act of Money Laundering has not regulated differences in interpretation that often occur among law enforcers. Article 74 and Article 75 of the Law regarding the Definition of Predicate Crime especially contain multiple interpretations with their own consequences for the law enforcement system in Indonesia. For example, a defendant is accused of having committed corruption X as well as money laundering. Referring to the definition of predicate crime, what can be proven by law regarding the crime of money laundering is related to the criminal act of corruption X. The question is, what will happen if in its development it is revealed that another activity of money laundering has occurred from another corruption crime and/or other types of criminal acts.

Another obstacle that will inevitably arise is that there is no mechanism that directly regulates when a corruption that is handled in collaboration between the Corruption Eradication Commission and the Prosecutor's Office also involves money laundering not included in Article 74 and the Law on Criminal Act of Money Laundering. In this case, there is a legal vacuum because the Commission and the Prosecutor's Office are not authorized to handle money laundering; meanwhile, corruption and money laundering should be tried simultaneously with cumulative charges. Eventually, the professionalism of judges plays a vital role in disclosing the money laundering case, given that pragmatic and innovative approaches must be taken due to the difficulty of proof.

CONCLUSION

The confiscation of proceeds from criminal acts in the law enforcement in Indonesia based on the Criminal Act of Money Laundering alone is ineffective because when there is a victim of fraud, the judge will decide the confiscated property of the perpetrator will not be given to the victim but handed over to the state instead. Besides, proof in a criminal case is relatively difficult, where material truth is sought. The obstacles faced by law enforcers in the asset confiscation system include the inappropriate laws and regulations and the lack of efforts by law enforcers to identify and map the assets or property of suspects and other parties suspected of

being connected to the suspect in the suspected corruption. The follow-up process involves a series of preliminary and full investigative activities to recover state financial losses incurred as a result of the alleged corruption crime against the suspect.

Suggestions

More serious efforts should be made by law enforcement officials in recovering state financial losses. To this end, a legal policy in the form of legislation is needed. Revisions of the Criminal Act of Money Laundering should also be made to make asset confiscation more effective. Mental revolution is also needed among state officials to help prevent them from committing crimes.

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