

RECOVERY OF PROCEEDS OF CORRUPTION: THE INDONESIAN AGO'S POINT OF VIEW

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I. BACKGROUND

The past decades have witnessed profound social, political and economic change in Indonesia. However, significant challenges to development remain. As indicated by the data provided by a widely respected international non-government agency headquartered in Berlin, Transparency International's (TI) Corruption Perception Index in 2014, corruption problems in Indonesia can be clearly seen. Indonesia was ranked 107 out of 175 countries, with estimated losses of USD 900 million.

In addition to that, narcotics and drug dealing and trafficking has increased in the last decade, according to research conducted by the University of Indonesia in collaboration with The National Anti Drugs Agency (BNN). Their research indicates that the personal and social cost of illegal drug use came to the figure of USD 5 million in 2012.

The research of the Food and Agriculture Organization (FAO) also showed that illegal fishing in its territorial waters cost Indonesia around USD 60 million annually while the Indonesian Ministry of Marine and Fishery data showed that only USD 3.1 million could be recovered, or barely 2% of the loss.

The situation worsened according to the data of the Indonesian Ministry of Forestry and the State Audit Body, which showed that in 2010 Indonesia suffered a loss of USD 3.1 millions from illegal logging and lost around 2.1 million hectares of land subsequently.

The several assets or wealth-related crimes mentioned above are proof that these crimes constantly and continuously become the main problems for the Indonesian national economy in general and the welfare of its people. The victims include children in need of education, patients in need of hospital treatment, and most of all the members of society who contribute their share and deserve assurance that public funds are being used to improve their lives.

II. PROBLEMS

There are at least three underlying problems that highlighted the urgent need of establishing an asset recovery and management office. First, the law enforcement agencies are still using the "offenders approach" as their main methods of enforcing the law. This approach focuses on physical punishment or in other words sending the offenders to prison even though

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some types of financial punishment such as pecuniary compensation, fines and asset forfeiture are recognized by the Indonesian Criminal Code.

Unfortunately, such punishment is only applied in corruption cases and is hardly requested by prosecutors in other cases while, from the figures above, it is known that there are several cases that cause bigger losses.

Facts have shown that such approach is not effective since physical punishment has only little deterrent or curative effects on the offenders who commit crimes based on assets. This is because (the second problem) some of the Indonesian law enforcement officials, with the exception of the personnel of the Indonesian anti-corruption commission (KPK) as they are well paid and fully facilitated, are still plagued with corrupt practices such as receiving bribes. With access to their assets, the offenders have no difficulty to negotiate their sentences and arrange favourable terms for their imprisonment, albeit illegally.

The third problem is that there are blind spots within the court rulings and asset management system. Relatively poor management and vague practices for handling crime-related assets tripled with weak court rulings led to the missing and unaccountable assets controlled by the prosecutors.

III. ALTERNATIVE SOLUTION

The Attorney General's Office has a slightly different approach. The new approach is no longer putting all the weight on physically punishing the offenders but taking a more balanced approach by simultaneously applying a two-prong strategy, that is: punishing the offenders while at the same time severing the offenders' access to their illegitimate assets. The underlying principle in applying this approach is to send a clear and unambiguous message to the asset-related criminal offenders as well as to the potential offenders that "crime does not pay."

Offenders who commit these types of crime are usually rational persons who make rational choices. When they understand that the cost of committing crime is much bigger than its benefit, they tend to avoid being involving in such crime.

The INDONESIAN AGO is now well aware that abuses of power are widely practiced by law enforcement officers in many fields, include the corrupt practices in handling crime-related assets at all levels (from the investigation stage all the way to the execution stage). There is a pressing and practical need to develop a working unit with a different working philosophy, a unit that works transparently and is accountable as well as effective and efficient so the problems of compromising the integrity or abusing power can be minimized or avoided if possible.

The Asset Recovery Centre of the Indonesian AGO developed a system that eradicates, or at least limits, the presence of blind spots during the process of asset management and disposal, and in turn makes the Indonesian AGO the major contributor of non-tax state income.

IV. WHY THE INDONESIAN AGO?

The Indonesian AGO is granted with pro-justice (for justice) rights. This means in relation to criminal matters, the service has the authority to enforce law against offenders, the offenders' accomplices, as well as taking legal action as deemed necessary with respect to crime-related assets. Indonesian domestic law (Law of Criminal Procedure, Law Number 8 of 1981) contains provisions about confiscation and forfeiture of crime-related assets. However, it is silent about the value of such assets. The said provisions have been in force since the enforcement of this law, i.e., since 1981. Any action with the intention to hinder or to disrupt the prosecutors is considered as the obstruction of justice, and the prosecutors are able to utilize the strong and long arm of the law to severely deal with such action. One has to bear in mind that asset recovery in this context is a pro-justice action and can only be carried out by the agency granted with pro-justice rights. The right to prosecute is exclusive to the public prosecutors (*dominus litis*).

The Indonesian criminal justice system does not recognize private prosecution or police prosecution. The only state actor allowed to prosecute is the public prosecutor. The AGO has the widest coverage in the criminal justice system in the context of asset recovery if compared to other law enforcement agencies since they are present in every stage of criminal procedure, from the beginning, that is the investigation all the way to the final stage, that is, the execution of court ruling.

The INDONESIAN AGO has the most comprehensive instruments compared to other law enforcement agencies when it comes to asset recovery. While other agencies are limited to acting on criminal matters, the INDONESIAN AGO can act in both criminal and civil matters. Through its investigating, prosecuting and executing arms, the service handles the criminal matters and through its civil and administrative arms (state's attorneys) handles civil matters. Note has to be taken that the most comprehensive civil and administrative functions of law enforcement are exclusive to the INDONESIAN AGO. No other agencies carry out similar functions.

The structural networking of the INDONESIAN AGO, with the Attorney General's Office as the centre, spans across the archipelago covering a jurisdiction the size of the European continent, or the distance between New York on the east coast and Los Angeles on the west coast of America. Serving Indonesia with its 33 provincial offices, almost 400 hundred district offices and almost 90 sub-district offices, the INDONESIAN AGO has the potential to recover assets in the most effective and efficient ways compared to other agencies.

The law not only confers the authority to confiscate and to forfeit crime-related assets to the INDONESIAN AGO, it also bestows the Attorney General, *ex officio*, with the authority to manage and to dispose such assets. Such authority is delegated to the Deputy Attorney General for Advancement, and currently day-to-day execution of the asset managing and disposing rights is executed by the asset recovery working unit of the Indonesian AGO, which is answerable to the Deputy Attorney General.

To address the doubts whether the prosecutors have the authority to carry out the handling of assets, the notion of assets should firstly be clarified in this context. Here, assets mean those

related to certain crimes. The Code of Criminal Procedure, Article 1, paragraph 16, explains that assets are those in connection with a criminal offence. These assets are subject to foreclosure. The act of foreclosure referred to in this article is a series of actions taken by the investigators to take over and or to keep under their control assets related to offences as means of evidence in investigation, prosecution and trial. It is clear here that law enforcement officials can only carry out actions taken against the assets, since their actions are pro-justice acts. Law enforcers referred to in this case are investigators of the Indonesian National Police, certain civil servants, the KPK/Corruption Eradication Commission and the AGO (for cases of corruption and severe human rights violations).

The handling of assets is not only at the stage of investigations but also prosecution. During the prosecution process, prosecutors also have jurisdiction to handle assets, because within the Indonesian justice system, prosecution authority is the *dominus litis* (domain) of the AG. Regardless of the transfer of suspects and cases during the trial stage, assets, which are evidence, remain under the control of the prosecutors of the AGO.

A. Executorial Authority

A binding court ruling is still executed by the prosecutors in the Attorney General Office, including the assets that have been decided by the court. Similar to the prosecution, which is the *dominus litis* of the Attorney General, the execution of final and conclusive court rulings (*incraacht*) is also within the authority of the Attorney General. This is the justification and legitimacy for the Attorney General Office to act as the Asset Recovery Office in line with its duties and functions in the investigation; as public prosecutors who receive the transfer of assets from investigators, and as the executor who executes court rulings and or decisions, and to carry out a settlement in accordance with a court order or disposal.

Asset recovery is performed at all of these pro-justice stages, so that the strategy to punish the offenders while at the same time separating them from their assets by severing the offenders' access to their illegitimate assets can be done simultaneously. This asset recovery process includes tracing, securing, maintaining, confiscating, and repatriating the assets.

V. MANAGEMENT AUTHORITY

State-owned assets are those obtained at the expense of the state budget revenue and expenditures or from other legitimate acquisition. According to the Government Regulation, state-owned assets obtained from other legitimate acquisition means the assets which are relevant to the context of asset recovery, namely assets acquired under legal provisions or assets obtained according to a final and conclusive court ruling (*incraacht*). In the context of the Attorney General Office, the Attorney General as the head of the institution has *ex officio* status as the "user of assets", but functionally, the Deputy Attorney General for Development carries out the authority and responsibility as the user of assets to the head of financial bureau, whose functions include: managing state revenue and money as well as non-tax state revenue of the Attorney and managing confiscated assets.

Through the Ministry of Finance Regulation regarding the Management of State-Owned Assets from the State Confiscated Assets and Gratuities, the Minister of Finance acknowledges and affirms the Attorney's pro-justice asset management function, that the Attorney General is the Administrator of State confiscated assets. The Asset Recovery Centre is specifically designed to handle asset recovery matters within the pro-justice authority of the Attorney General Office of Indonesia. The main vision of this centre is to ensure the recovery of the ill-gotten assets from the beginning of the investigation to the execution and maximizing the return to the country.

VI. INFORMAL CHANNELS ARE ALSO IMPORTANT

Recovering proceeds of crimes is complex. The process can be overwhelming for even the most experienced of practitioners. It is exceptionally difficult for those working in the context of failed states, widespread corruption, or with limited resources. That is why the Indonesia AGO is active in both formal and informal international networks, such as CARIN, the Camden Asset Recovery Interagency Network, as the only high profile informal network in the world (the Indonesian AGO is the only Asian country to join CARIN). The Indonesian AGO held the presidency of ARIN AP (a CARIN-type informal network for Asia and the Pacific countries) for 2014. The Indonesian AGO believes that such informal cooperation is absolutely important in sharing the efforts to trace and recover assets as well as guidance on MLA requests (for The Formal Action). The bottom line is that if offenders can establish a network to commit crimes, then the law enforcement institutions should also carry out their task in an integrated way.

The Attorney General Office, through the Asset Recovery Centre of the Indonesian AGO, enjoys strategic advantages in having pro-justice measures as well as management and disposal of crime-related assets under one roof. Firstly, the prolonged and unnecessary red tape can be minimized since it is relatively easier for units to cooperate if they are under one line of command. Secondly, considering the egocentric attitudes of law state/government agencies, the separation of pro-justice action from management and disposal is problematic. The advancement of vested interests and the communication barrier creates a problem in coordinating efforts. This is an ingredient for disastrous practices of handling assets.

VII. CONCLUSION

The objective of the Asset Recovery Centre of the Indonesian AGO is to cut or to keep away the criminals from access to their assets. This measure is expected to reduce the number of financial crimes seeking wealth or assets. In the end, the Asset Recovery Centre of the Indonesian AGO will do its part to be an instrument to hamper wealth- or asset-oriented crimes, especially corruption, by recovering proceeds of crime, and it might be one of the solutions for returning the country's lost assets.