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Confiscation of Corrupted Assets by Means of in Rem Approach against Illicit Enrichment

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Abstract
The dynamics of corruption crime is closely related to the economic development of any State. In those developing countries – including Indonesia – corruption practices have become so massive and offensive, whereas on the other side the efforts to recover those stolen assets by means of criminalizing corruption is not easily carried out. Those corruptors have extraordinary access that are so difficult to detect, both in their actions to hide those stolen assets and in performing money laundering of their corruption crime. The eradication of corruption crime is not solely depends on the penalization of those actors, but on how such State loss can be recovered maximally. Accordingly, corruption eradication must be conducted by means of extraordinary measures and by relying on extraordinary legal instruments. One out of those instruments is special regulation, which enable the confiscation of assets owned by public officials that belong to illicit enrichment. Legal instruments to be applied surely related to the legal politic of the State, namely the model of corruption eradication and recovery of State finance. The model that is applied at the present focuses more on in rem approach which lays stress on the confiscation of corrupted gains. Such model is known as Non-Conviction Base (NCB) Asset Forfeiture or Civil Forfeiture. It applies against the cases of illicit enrichment. The UNCAC 2003 allowed the confiscation of stolen assets in case a public official unable to explain the source of his or her assets increase in relation to his or her lawful income. The Indonesian legal system regarding enforcement against corruption crime still be based on the in persona concept. Meanwhile, serving the interest to recover the State financial loss due to corruption crime, a paradigm shift is required, namely the in rem approach. Such approach enable the control of illicit enrichment by means of the Report on Public Officials Assets (LMKPB) and the application of assets tracing principle.
Keywords: Assets confiscation, In rem, illicit enrichment

1. Introduction

Corruption has become more than an ordinary crime. It disrupts economic development and bring along a high loss on state income. Accordingly, corruption as a crime has been identified as a crime against humanity and as an extraordinary crime, because it degrade the achievement of people's welfare. Therefore legal enforcement efforts against corruption require a special strategy and a chain of extraordinary measures, supported by progressive legal instruments.

At the present corruption eradication has been focused on three main actions, namely prevention, eradication and corrupted assets recovery. In other words, corruption eradication aimed not only at the actions of prevention and or penalization, but included also the actions to recover the corrupted state assets, that have been illicitly gained through such extraordinary crime. Such actions can be assumed as restorative actions, aimed at the smooth achievement of a just and prosperous society. The practice of international law indicated that the confiscation of assets corrupted and criminal law instruments are relied on for such corrupted assets recovery.

Corrupted asset recovery have become an urgent issue in the eradication of corruption crime. It means, that the success of corruption crime eradication is not measured solely on the degree of penalizing the corruptors, but also by the recovery of those corrupted state assets. The urgency as such corrupted assets recovery, especially for the developing country such as Indonesia, should be considered pursuant the reality that corruption is an usurpation of state assets while such assets are urgently required for reconstruction and rehabilitation of public life through economic development. It is a dire reality that the implementation of such asset recovery still far from optimum. The data issued by the KPK (Corruption Eradication Commission) indicated that during the year of 2009-2014, the KPK recovered only Rp. 72.697.955.063. During the first semester of 2014 the state suffered a loss of Rp. 3,7 trillion due to corruption, while during the second semester the said loss was Rp. 1,59 trillion (http/www.tribunenews.com.).

To overcome such issue, there exists a breakthrough or new regulation concerning the mechanism of seizure and confiscation of illicit gained assets, including the gains of corruption crime. It is called the mechanism of Non-Conviction Based (NCB) Asset Forfeiture or Civil Forfeiture.

The said mechanism stated that there should be criminals who are defined by valid and ending legal decree as individuals who have committed a crime as the prerequisite that must be fulfilled for the seizure and confiscation of not only the means but also the crime gains. By means of such mechanism it is possible to seizure and confiscate any and all assets which were deemed being gained as proceeds of crimes, as well as other assets

that were supposed can be or have been used as instrumentalities in carrying out any crime. Such new mechanism can also be used as an alternative for obtaining compensation or money restitution for any state loss. Through such mechanism, those latter on found assets that have not been registered yet, can be seized and confiscated without relying on any new legal degree. Such stipulation on NCB Asset forfeiture or Civil Forfeiture is urgent and should be timely applied as proper solution of corruption eradication in Indonesia (Muhammad Yusuf 2012).

The United Nations Convention Against Corruption (UNCAC) of the year 2005 has defined the issue of state assets recovery due to corruption. Article 20 of the said UNCAC has defined the unreasonable assets of public officials gained through illicit enrichment. Such stipulation allows the seizure and confiscation of assets in case the said public official unable to explain the source of such assets in relation to his or her lawful income.

Indonesia belongs to those State Parties which has signed and ratified the said UNCAC by means of the Law Number 7 of the year 2006 on the Endorsement of UNCAC. The stipulation on illicit enrichment, however, has not been applied as criminal delict as set forth in the Law on the Corruption Crime. As a State Party, Indonesia is obliged to formulate a stipulation on illicit enrichment. Such obligation has been set forth in Article 20 of UNCAC, which stated that, "… such party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence".

Pursuant such stipulation on illicit enrichment, those assets that are unreasonably gained by a public official can be seizured and confiscated in case the said public official can not reasonably explained the source of his or her assets increase in relation to his or her lawful income. The stipulation on the said assets seizure and confiscation must be deemed as an urgent issue, due to the close relationship between the status of a public official and the increase of his or her assets which should be reported in the Report on the Assets of Public Official (LMKPN).

Up to the present, there were 44 states out of 193 states which have formulated legal instrument equal to a law on illicit enrichment. Thirty nine Party states out of those 44 states have used imprisonment and or detention measures. Some of those State Parties were China, Malaysia, Brunei, Macao, India, Bangladesh and Egypt. Such stipulation on unreasonable enrichment indicated the number of those public officials who owned assets that are beyond their lawful income (Alvon Kurnia Palma *et al* 2014).

Those developing countries, including Indonesia, are experiencing constraints in legal enforcement of the said issue, due to the lack of legal regulations that stipulated the seizure and confiscation of assets through Non Conviction Base. Accordingly, regulations are required pursuant Non Conviction Base for the recovery of stolen assets, which define legal mechanisms concerning the freezing, seizure and confiscation of assets without proper legal proof in relation to such criminal cases (Lilik Mulyadi 2003)

2. Discussion

2.1 Recovery Assets Theory

There is no stipulation in the UNCAC as mentioned above that explained about the corrupted assets recovery. In this relation, Matthew M. Fleming (2005) was the opinion that at the international level there is no mutually agreed upon definition on assets recovery. Fleming (2003) himself gave no definition on the issue. Me just stated that the corrupted assets recovery is the process of freezing, seizure and confiscation of rights on those assets which are illicitly obtained. Fleming also explained that such assets recovery should consists of first, assets recovery includes the process of freezing, seizure and confiscation of ownership rights; second, those seizured, confiscated and freezed of ownership rights should covers the gains as well as the profits of any and all criminal deeds; third, one of the purpose of such freezing, seizure and confiscation is to prevent those corruptors to use the gains of their criminal deeds that may enable them to carry out other criminal deeds.

The efforts to recover those assets obtained through criminal deeds within the framework of state loss recovery by the corruptors is in line with utilitarianism, (K. Bertens 2000) as suggested by Jeremy Bentham, namely the principle of utility, which aspired the greatest happiness of the greatest number of people. Bentham also the opinion that the aims of Law is to provide the assurance of the happiness for individuals. Bentham has proposed a crime classification based on the crime impact as can be measured as the damages or sufferings toward the victims and or the society (Satjipto Rahardjo 2000). In this relation, I rely on the utility theory as stated by Michael Levi (2004) which can be formulated as follows,

a. Prophylactic consideration, namely to prevent the should be corruptors to gain control over assets that may be illicitly owned to carry out another crime in the time to come.
b. Propriety consideration, namely that those corruptors have no valid rights of those illicitly gained assets.
c. Priority consideration, namely that the state possessed the priority right to claim those assets illicitly gained by those corruptors.
d. Proprietary consideration, namely that the state owned the reasonable right on those illicitly gained assets.

Thomas Aquinas has stated the opinion that it is just for the state to recover those corrupted assets. His basic opinion was general justice or justitia generalis. Meant by justitia generalis is the justice pursuant the will

of the Law which should formulated the public interest (E. Sumaryono 2000).

The doctoral dissertation of Purwaning M. Yanuar suggested a theory on the recovery of state financial loss as related to the theory of social justice, namely the theory of assets recovery. The theory of assets recovery is a legal theory which tries to explain the legal system concerning assets recovery based on the principle of social justice which set forth the competency, duty and responsibility to the state and her legal institutions to render protection and chance for the individuals of society to strive for their prosperity. Such theory has been based on the basic principle, give the state what is her due. Within such sphere of state rights there were the state obligations which constitute the individual rights of society members, so that there is an equal principles, give the people what is their due (Purwaning M. Yanuar 2007).

The new legal paradigm is the opinion that there is no separated entities, but all those entities should able to interact with other entity serving the main aims to implement the existing public interests. Within such responsive legal approach more possibilities may be developed for a dialogue, that may provide new outlooks on the existence of pluralistic views on the reality.

In the eradication of corruption crime which focused on the state financial loss recovery, an idea is required which pinpoint the utility aspect. Satjipto Rahardjo was the opinion that the prevention and eradication of corruption is not suffice through the conventional actions, it must be managed differently and beyond the normalcy of other crimes handling (Satjipto Rahardjo 2006). The Law should match the latest development, able to solve such dynamic of changes and able to serve people's interests based on the principle of morality and human resources as legal enforcers (Satjipto Rahardjo 2006).

Assets recovery is something impossible that should be realized by the State through her legal political power (Padmo Wahyono 1986). Such political role is of decisive power in defining the application of Law in the community, especially in the enforcement of corruption eradication. Adi Andoyo ever stated that an unclear legal politic shell produced legal norms whether as Laws or regulations that are contraire in terminus and accordingly no clarity in their implementation (Adi Sulistiyono 2008).

2.2 Assets as Subject of Crime

The discourse on assets has become an interesting issue in relation to the idea on the confiscation of corrupted assets, an illicit enrichment deed, without criminal procedure. In other words, new idea is under way to carry out confiscation pursuant the in rem concept. Such in rem confiscation differs from the in personal model. The object of in personal confiscation is the individual or personal. Such confiscation is a part of legal sentencing. The asset confiscation is based on the proven crime committed by the accused. There should be nexus between the accused, the crime and assets. The in rem asset confiscation requires no such nexus, the object of confiscation is the asset itself. To proof the accused crime is not the base of such assets confiscation. This confiscation mode is used serving the turnover of the burden to prove (Paku Utama 2011).

Accordingly, it may become clear those basic difference between the in rem and in personal concept, that refers to the assets as subject of crime. The acknowledgment of assets as subject of crime is not known by the in personal concept.

The extant criminalization system of corruption crimes as a whole Indonesia still referees to the principle of retributive justice, which is also known as in personal approach (Marwan Effendi 2014).

The Law Number 9 of the Year 2013 on the Prevention and Eradication of Terrorism Financing Crime, it is implicitly acknowledged that assets are acknowledged as the subject of crime.

The prevention and eradication of Terrorism Funding used the term fund as identic with the term asset. The author is the opinion that in relation to corruption crime, the term asset and fund has the same meaning.

3. The Application of Illicit Enrichment

The instrument for Reporting Public Officials Assets is useful in valuing the reasonable of assets owned by them. The obligation of any and all public officials to report their assets is stipulated in :

a. Law Number 28 of the year 1999 of Clean and Free From Corruption, Collusion and Nepotism of this Public Officials.
b. Law Number 30 of the year 2002 on the Commission for Corruption Eradication.
c. Decision of Commission for Corruption Eradication (KPK) Number KEP 07/KPK/02/2005 on the Procedure of Registration, Inspection and Announcement of Report on the Assets of Public Officials.

Stipulation on the reporting the assets of public officials has been also stated in UNCAC 2003. Article 8 paragraph (1) stated that, "each state party shall endeavor, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declaration to appropriate authority regarding inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials. The core of the issue is that any and all public officials are obliged to engineer a system that enable the public officials to report on their assets, investments, including ratification's, which may trigger

conflict of interest. The application of the Report of Public Officials' Assets closely related with the illicit enrichment regulation, especially regarding the money laundering crime and corruption as predicate crime. The Report on Public Officials' Assets is very useful in detecting the unreasonable increase of assets of those public officials, which enable the finding of crime gains.

The Commission on Corruption Eradication (KPK) has released the latest report on public officials' assets as per March 8, 2016, as shown in Table 1. The total number of executive public officials who have reported their assets were 153.229 persons (71.26 percent), the legislative public officials from national and regional levels were 3.659 persons (27,28 percent), the judicative public officials who never reported their assets were 63.871 persons (28,74 percent), of those legislative public officials were 9.755 persons (72.72 percent), the judicative officials were 1.441 persons or 12.43 percent, while those of state owned corporations from national and regional levels were 5.577 persons or (20.76 percent).

Table 1. Report of Public Officials Assets

Institutions	Number of Persons	Reporting	No Reporting	Never Reporting
Executive	222.046	97.624 (43.97)	60.605 (27.29)	63.871 (28.74)
Legislative	13.414	1.527 (11.38)	2.312 (15.89)	9.755 (72.72)
Parliament	545	342 (62.75)	134 (24.59)	69 (12.66)
Senat	124	108 (87.10)	6 (4.84)	10 (8.06)
Regional Parliament	12.745	1.077 (8.45)	1.992 (15.63)	9.676 (75.92)
Judicative	11.593	2.253 (19.43)	7.899 (68.14)	1.441 (12.43)
State Owned Corporations	26.861	14.453 (53.81)	6.831 (25.43)	5.577 (20.76)
Total	**273.914**	**115.857**	**77.467**	**80.590**

Sources : Kompas, March 17, 2016

It can be seen from the data stated above that the reporting of public officials assets is not proper yet. There were 80.590 public officials who never reported their assets from the total number of 273.914 persons. One of the reason there to is improper assets tracing that enable the finding of illicit enrichment, so that proper evaluation can be gained (Endang Usman 2011). On the other side, there is no mechanism of sanction agains those violators.

Regarding the state assets recovery, the Drafting Team on the Amendment of the Law on Corruption Crime has set forth the concept of confiscation of those assets which are deemed obtained through corruption crime without a prior binding and valid court decree. The concept on assets confiscation without penal process has been contained in the draft of the Law on the Assets Confiscation which has been submitted to the Agency for Pecuniary Transactions (PPATK), the Ministry of Law and Human Rights since 2011. The principles used in service of assumption on illicit enrichment is deductive logic, the issue to be investigated is the crime that enable the obtaining of unreasonable assets. It relies on the turnover proof as lower standard of proof. The quality of such standard is lower compared with the standard of criminal court proof. It uses the proving standard that is similar to those of commercial court, but it applies the proof turnover principle, because assets confiscation is based on in rem principles and not principle of in personal. What are traced is such case constitute the assets of corrupted gains, which are related to criminal law, and not the person who committed such crime. The application of the principle on illicit enrichment is expected to make the effort related to corruption eradication become more effective (Tempo.com 2013).

At the theoretical level, the application of illicit enrichment standing in face to face position with the Indonesian criminal Law system, which up to the present did not acknowledged yet that the offenders assets constitute a separate criminal law subject from the offender's legal status as an accused. Such fact indicates that Indonesian criminal law system still relied on in personal concept.

Serving the law enforcement improvement against corruption crime and maximizing state assets

recovery, such in rem model should be contained in the Draft of the Law on the Assets Confiscation. Such Law should be treated as the umbrella act for the Law on Corruption Eradication and the Law on Prevention and Eradication of Money Laundering Act.

The stipulation as contained in UNCAC 2003 provides the chance for Indonesian legal system to adopt in rem principle the Law on Corruption eradication. (www.trijurnallemlittrisakti.co.id. 2016) Such principle is aimed at the assets as object, and not on persons. Those illicit gains through corruption are treated as subject of law and not as object. That is the consequence of in rem approach in the corruption eradication. By means of such in rem model the eradication of corruption shall be more effective in the recovery of stolen state assets. The model enable the recovery of any and all assets that are deemed illicitly obtained by means of confiscation. The application of in rem principle provides strategic approach enable effective actions through assets tracing carried out by the legal authorities. Beside those report on assets by public officials, the report on unreasonable enrichment can be used as source of information that lead to actions against illicit enrichment.

4. Conclusion

The optimum realization of legal enforcement against corruption crime as indicated by the state loss recovery is a condition sine quanon. The reality in Indonesia as can be seen indicated that corruption eradication still unable to recover the State pecuniary loss at the maximum, while corruption has developed as such, both in its quality and quantity. In other words, there exists a discongruence between das Sollen and das Sein, what is ought to be and the reality.

The efforts to confiscate stolen assets is verily dependent on the legal politic of a State. The present day concept on the Legal politic of a State. The present day concept on assets confiscation is based on Indonesian applied legal system that relies on valid and binding court decree. The acknowledgment of illicit enrichment by the UNCAC 2003, which is a mandatory it is necessary for Indonesia to set fort regulation in the Law on Assets Confiscation. In rem model constitutes and appropriate means serving the recovery of State pecuniary loss. Through such regulation on illicit enrichment, the Agency of Monetary Transactions (LHKPN) can become more effective in its actions to define those assets that were lawful income of a public official.

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