

CORRUPTION INVESTIGATION AND INTERNATIONAL COOPERATION

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I. INTRODUCTION

After more than 15 years of implementing *reformasi*,¹ corruption remains to be one of the most problematic issues in Indonesia. Indeed, the prevention and eradication of corruption is a complicated task. Corruption is still a systemic problem hampering the nation's efforts to advance the national development. It is a high value political campaign as it often involves high level officials, both from the government and political parties' elites. The eradication of corruption continues as one of the priorities determined by the nation. However, the complexity of corruption cases and the unavailability of effective resources reduce the promotion of the effort, despite a higher corruption perception index earned this year.²

For Indonesia, *reformasi* needs to continue and legal reforms must be a priority. With stronger legal frameworks, it is expected that the eradication of corruption would produce more achievements. Indonesian society demands that corruption be eliminated from the country, a wish that stimulates innovation and capacity to increase numbers of successful prosecution of corruption cases, both from the aim of punishing the offender and recovering the proceeds of crime.

Investigation is an important part of criminal proceedings to achieve the goal of having a successful case. Legislation, as a legal basis, will guide investigators in conducting their responsibilities in collecting evidence and in finding the suspect. Investigation must follow lawful procedure and must be conducted in line with the rules of evidence to make it admissible and usable in court proceedings.

II. CORRUPTION INVESTIGATION

A. Legislation on Investigation and Admissible Evidence

Investigation of corruption cases is provided in Law No. 31 Year 1999 as amended by Law No. 20 Year 2001 on the Eradication of Corruption Crime. In relation to *Komisi Pemberantasan Korupsi* (the Corruption Eradication Commission, or the KPK), Law No. 30 Year 2002 on the KPK also provides power regarding investigation. However, investigation is generally governed in the Indonesian *Kitab Undang-Undang Hukum Acara Pidana* (Criminal Procedure Code, or KUHAP). KUHAP defines investigation and breaks down details on how investigatory power should be conducted. As corruption is classified as "a special crime", the rules of procedure are provided in legislation outside KUHAP, for instance in the area of money laundering, terrorism, etc.

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¹ *Reformasi* is an era of promoting democracy and good governance in all aspects of the society. It refers to the time of the fall of Suharto in May 1998 as a starting point. *Reformasi* is also considered as a mile stone for the modern history of Indonesia.

² "At Least 360 Indonesians jailed for corruption: VP", *The Jakarta Post* [online], (31 Oct. 2013) <<http://www.thejakartapost.com/news/2013/10/31/at-least-360-indonesians-jailed-corruption-vp.html>> accessed 27 Dec. 2013. Indonesia's ranking has improved to 87th out of 176 countries on The Global Competitiveness Index 2012-2013.

Nevertheless, the general rules of the Criminal Procedure Code apply when there is no special rule provided in the anti-corruption law.

Types of evidence are pivotal because they establish the scope of evidence admissible in criminal proceedings, particularly when a case is prosecuted before a judge. Indonesian criminal law recognizes the following types of evidence:

- Witness testimony
- Expert testimony
- Letters (including written documents)
- Indication
- Defendant testimony (confession or denial)³

In addition to those five types of evidence, the anti-corruption law introduces new forms of evidence: evidence in the form of electronic or digital documents. These two types of evidence are provided in Article 26A Law No. 20 Year 2001 on the amendment of Law No. 31 Year 1999 on the Eradication of Corruption Crime. The inclusion of documents is to avoid disputes that documents containing pictures or images would not be construed as “letters” as governed by KUHAP.

The KPK is considered to be a new investigative body, established under the spirit of *reformasi*. It has been provided with powers to strengthen its function against corruption; powers that do not apply to the two other counterparts: *Kejaksaan* (Attorney-General’s Office-AGO) and *Kepolisian Negara Republik Indonesia* (Indonesian National Police-POLRI). The law provides authorization for the KPK, both investigators and prosecutors, to conduct the following actions in any criminal proceedings:

- tap into communication lines and record conversations;
- order the relevant institution to ban an individual(s) from travelling abroad;
- request information from banks or other financial institutions about the financial details of a suspect or defendant;
- order banks or other financial institutions to block accounts suspected to harbor the gains of corrupt activities of a suspect, defendant, or other connected parties;
- order the superior of a suspect to temporarily terminate the suspect from office;
- request data on the wealth and tax details of a suspect or defendant from the relevant institutions;
- temporarily halt financial transactions, trade transactions, and other forms of

³ As provided in Article 184 KUHAP.

contract, or to temporarily annul permits, licenses, and concessions owned by suspects or defendants, assuming that preliminary evidence points to connections to a corruption case currently being investigated;

- request assistance from Interpol Indonesia or the law enforcement institutions of other nations to conduct searches, arrests, and confiscations in foreign countries;
- request assistance from the Police or other relevant institutions to conduct arrests, confinements, raids, and confiscations in corruption cases currently under investigation.⁴

B. Advancing Prosecution of Corruption Cases: Targeting Stolen Assets

1. Anti-Money-Laundering Regime

Indonesia has improved its legislation against money laundering by passing Law No. 8 Year 2010 on the Prevention and Eradication of the crime of money laundering. It provides a breakthrough on the investigation of money-laundering offences by allowing the investigator of the predicate crime to simultaneously conduct investigation of the money laundering case; an issue that was previously complained about when the previous law only provided power to investigate money-laundering crimes to police investigators.

2. Recovering Stolen Assets

One of the approaches to increase the deterrent factor in the fight against corruption is promoting asset recovery and using the anti-money-laundering provisions to confiscate illegal assets owned or controlled by the defendant. Asset recovery has become an important method for law enforcement agents, prosecutors and judges to remove tainted assets of corrupt officials or their co-offenders from the private sector. Recovering stolen assets can be done through a few channels such as criminal proceedings, civil proceedings or mediation (non-litigation). What is lacking however is that the Indonesian law has not criminalized corruption in the private sector; hence, it is difficult to extend the arms of anti-corruption to the other side of combating corruption.

3. Approach to Investigation: Follow the Money

In the past, prosecution of corruption cases targeted punishment of the defendants; hence, neglecting the other aspect of the case: recovering the proceeds of corruption. Nowadays, asset recovery has become one of the strategic approaches in achieving more successful prosecution. Combined with the anti-money-laundering provisions, the eradication of corruption continues to pursue convictions that include confiscation or compensation to the state in the event that the offence has resulted in state financial loss. To simplify this approach, Indonesian investigators and prosecutors are implementing the concept of “follow the money”, meaning that not only are the offenders punished, but also the money and financial capacity must be taken away. This would reduce number of situations where the convicted person enjoys privileges during the sentencing or takes benefits from the proceeds of crime he or she has committed.

C. Investigation Bodies

1. Kejaksaan (AGO)

The AGO was the only investigator of corruption cases when Law No. 3 Year 1971 on the Eradication of the Crime of Corruption was implemented. In 1981 Indonesia passed a new

⁴ Article 12 Law No. 20 Year 2002 on the Commission on the Eradication of Corruption Crime can be found at <<http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814420.pdf>>.

codification of the criminal procedure law (KUHAP); hence, the types of evidence applied in criminal proceedings, including at the investigation phase. Implementing this law of criminal procedure, the AGO investigators basically took a conventional approach when it came to the investigation of corruption cases. This is understandable because KUHAP restricts evidence to the five categories mentioned above.

In practice, it was inevitable that investigators from the AGO, the only investigative power left to the prosecutor office regarding financial crimes, relied on interviewing witnesses and experts from the state or the government auditors. In 1999, and as amended in 2001, a new form of evidence was introduced in the anti-corruption law as mentioned above. Electronic and digital evidence have since been recognized as types of evidence admissible at trial in support of a defendant's guilt.

2. *Kepolisian (POLRI)*;

Police investigators gained power to investigate corruption cases in 2002 when Law No. 2 Year 2002 on the Indonesian National Police was enacted. Similar to its counterpart at the AGO, police investigators must follow all procedures in the anti-corruption law and KUHAP. Because it is quite a new role, police investigators are still promoting their efforts to produce more corruption cases to be submitted to the prosecutors.

With the ability to investigate all crimes in accordance with the legislation, POLRI may develop its capacity in fighting financial crimes by optimizing all facilities to develop investigation and build a solid case before submitting it to the prosecutors' office. The sharing of information throughout the *International Criminal Police Organization* (ICPO) can contribute to the investigation of transnational cases concerning corruption.

3. *Komisi Pemberantasan Korupsi (KPK)*

The KPK was introduced in 2003 to respond to public demand to address the impacts of corruption in day-to-day life. People wanted a new agency that would deal progressively with corruption. In line with the development of the anti-money-laundering regime, the KPK built an effective agency responsible for prevention and the eradication of corruption, adding yet another super-investigative body to the arena of combating corruption.

The approach of investigation can be done through a different way because the legislation provides a special mechanism for the KPK. It has been given power to intercept or record communication without court or judicial officer approval. Therefore, the KPK is privileged in the sense that it may use more powerful tools in developing corruption cases. Another powerful tool is the ability to freeze any bank account concerning the suspect, the defendant or any other implicated party.

D. Investigative Methods to Conduct Effective Investigation

Collecting evidence is a key process in an investigation. Hence, some investigations require more patience than others. Finding suspects can be difficult; sometimes they are determined in the beginning, but it is not uncommon to find suspects at a later stage of the investigation. Because the law states that financial information can only be obtained concerning suspects or defendants, it is hard to gain information on financial intelligence without support from other institutions such as *Pusat Pelaporan dan Analisis Transaksi Keuangan* (Indonesian Financial Transaction Reports and Analysis-PPATK). This is one of the challenges in establishing evidence of a financial crime such as corruption.

Whistle-blowers or cooperative witnesses can play a great role in reducing the challenge in tackling corruption. The establishment of *Lembaga Perlindungan Saksi dan Korban* (Victim and Witness Protection Agency-LPSK) allows key and cooperative witnesses to be protected. This helps investigators when developing the case and collecting evidence.

Methods of investigation generally can be defined into the following:

1. Interviewing Witnesses

Witnesses are one of the key elements for guiding investigations in the right direction. Basically, Indonesia adopts the principle of *unus testis nullus testis* in which one-witness testimony is insufficient testimony to convict a defendant. It means that there must be two witnesses for the evidence to become valid. This applies in corruption cases. Because corruption can involve crimes other than bribery, a witness may play a key role in establishing facts regarding the crime. Particularly, when it involves the element of state financial loss, investigators need information from insiders; hence, witnesses' testimony will be important at the early stage of investigation. In contrast, when it involves bribery or being "caught in the act", other methods of investigation are more helpful.

2. Obtaining Expertise on Technical Matters

Experts in corruption cases are relevant and required because of the fact that prosecutors must prove that the corrupt act has resulted in state financial loss. Therefore, auditors and forensic accountants play a great role in helping prosecutors bring the cases before judges. This contribution of experts who have technical knowledge of the matter helps investigators prepare the cases. However, there is concern over the increased role of criminal law experts. Their testimony often contradicts each other and depends on who is inviting the experts to the court hearing. What often happens is they disagree over the state financial loss. It is important to highlight that experts' testimony aims to help the court in establishing material facts. Hence, the opinions of academic experts should be avoided. The court must rely only on technical experts to establish whether a state financial loss exists. In these cases, an auditor, a forensic accountant or an IT expert will be more relevant.

3. Collecting Financial Intelligence and Documents

Corruption is a financial crime. Financial information on suspects or persons implicated in the corrupt acts is needed to develop the case and broaden the scope of investigation. With the development of Financial Intelligence Units' (FIU) networks, Indonesian law enforcement agents can strengthen their investigation by using information and analysis available on PPATK. Bank statements or other documents are also useful to establish the trail of the proceeds of crime and to help investigators follow the illegal money.

PPATK also can play a great role as a trigger to investigate corruption cases, because it collects suspicious transaction reports from financial institutions and other reporting parties. Therefore, its analysis, which is later submitted to the national police and the AGO, may become a key lead in a corruption case.

4. Conducting Surveillance, Interception and Recording

The corruption investigators basically are equipped with power to conduct surveillance, communication interception or recording. However, the privilege is given to KPK to intercept or to record communication without court approval. Indeed, the power given to KPK has led to successful high profile cases that primarily involve bribery.

III. INTERNATIONAL COOPERATION

A. International Asset Recovery

The legal actions for pursuing asset recovery are various. They include the following mechanisms:

- domestic criminal prosecution and confiscation, followed by an MLA request to enforce orders in foreign jurisdictions;
- NCB (non-conviction-based) confiscation, followed by an MLA request or other forms of international cooperation to enforce orders in foreign jurisdictions;
- private civil actions, including formal insolvency process;
- criminal prosecution and confiscation or NCB confiscation initiated by a foreign jurisdiction (requires jurisdiction over an offence and cooperation from the jurisdiction harmed by the corruption offences); and
- administrative confiscation.⁵

Indonesia should avoid problems of investigating cross-border corruption by dedicating the necessary resources to pursue the stolen assets abroad. It should be a special agency or unit dealing with the investigation, and asset recovery consists of financial investigators, prosecutors, state attorneys, auditors, forensic accountants and other competent authorities involved in asset recovery issues. Specialized agencies or units within existing agencies should be given the resources to satisfy their mandate to facilitate asset recovery, bearing in mind that the central authority does not become involved in financial investigations or in criminal proceedings but is mainly an administrative authority.⁶

Investigators also must take advantage of the developments in the area of international legal cooperation, to enable assistance from other countries. Establishing the trail of the money and other necessary financial intelligence is important to demonstrate the link between the proceeds of corruption and the criminal conduct done by the accused. *Mutual legal assistance* (MLA) is an effective method of gathering evidence and conducting criminal proceedings. Informal cooperation is even crucial to cope with the challenges of differences in a domestic legal system. Global networks against money-laundering, such as Egmont Group or ICPO, are also helpful in broadening the investigation in order to achieve maximum results.

B. Technical Assistance

Technical assistance is addressed in Chapter VI of *the United Nations Convention against Corruption* (UNCAC) on technical assistance and information exchange. Indonesia has ratified UNCAC. The aim of technical assistance is to help countries, including Indonesia to recover their assets by providing technical assistance agreed on by the parties. The assistance must meet the specific needs of the actual case and of course the local context. The donors must also consider paying lawyers' fees, so as to avoid countries abandoning their efforts to trace assets and cooperate with the requested State, because they lack the necessary

⁵ Jean-Pierre Brun et al., *Asset Recovery Handbook* (The World Bank, 2011) 9.

⁶ Kevin M. Stephenson et al., *Barriers to Asset Recovery* (The World Bank, 2011) 31.

financial resources. Eventually, helping the requesting government to use the recovered funds properly, or monitoring the use of these funds, is crucial so as to avoid further misuse.⁷

In relation to the availability of dedicated resources, it is important therefore to encourage Indonesia to dedicate specific resources to conduct improvements in capacity building and other related matters. Technical assistance includes more than technical advice and the transfer of expertise. In many cases it involves support for institutional and cultural changes. Strategic planning and prioritization should be carried out taking local context into account. The development of UNCAC's implementation brings about guidelines and knowledge, so it opens ways of sharing of experience and exchange of information.⁸

Effective technical assistance is required to change the way of thinking of investigators, prosecutors or even judges where possible⁹ to promote the implementation of UNCAC in practice. The change required in our law enforcement agencies leads naturally to the need for an increase in capacity and expertise to carry out the work. Almost all countries, whether developed or developing, have deficiencies in capacity and expertise in the areas of MLA and asset recovery cases. Corrupt officials across the world have exploited this. The solutions may include political will, capacity building and funding.¹⁰ Changing the way of thinking, however, requires more than these solutions. It needs a comprehensive policy across the whole system, including the strengthening of investigative capacities of the agencies involved in the fight against corruption. Increasing skills and expertise will make international cooperation in investigating cross-border corruption and asset recovery more achievable.

IV. CONCLUSION

Corruption investigation is not an easy task. It needs resources, skills and expertise. Approaches, strategies and techniques must follow the development of technology as well as the complexity of the crime. Indonesia has extended its types and scope of evidence that is governed by criminal procedure law to include new types of evidence such as electronic and digital evidence to support investigative abilities. These opportunities must not be ignored and must be promoted in line with the current policy to emphasize the anti-money-laundering provisions.

Indonesian society demands stronger prosecution of corrupt officials both on the sentencing and the recovery of the proceeds of corruption. Therefore, achievements in handling corruption cases are now determined by the ability to punish the offender through sentencing and confiscating the proceeds of the crime. Despite challenges in proving the trail of money, investigators should exercise all available resources in collecting evidence, so the facts described in the indictment are clear and complete. Solid evidence will help prosecutors in defending the case against high-profile defence lawyers. Combining domestic investigation abilities and international cooperation in criminal matters will enhance the capacity of the

⁷ Anne Lugon-Molin, "Assets Recovery: Concrete Challenges for Development Assistance", in Mark Pieth (ed.), *Recovering Stolen Assets* (2008) 298.

⁸ Nikos Passas, "UNCAC, Technical Assistance and Development Efforts" in Mark Pieth (ed.), *Recovering Stolen Assets* (2008) 294.

⁹ Some years ago, it was not easy to invite judges to attend trainings, particularly because of concerns over judicial independence; a judge should not be told what to do in handling cases. However, it has become more common in Indonesia that judges will join trainings together with prosecutors and other practitioners.

¹⁰ Alan Bacarese, "Tracing, Freezing, Confiscating, and Repatriating the Proceeds of Corruption", the 6th Regional Seminar on Making International Anti-Corruption Standards Operational, Paper presented at ADB/OECD Conference in Bali, Indonesia, 5-7 September 2007, 124.

investigators, increase the possibility of producing a successful case, and practical and real experience for future improvements.

Lacking expertise and skills can be a great obstacle for handling a complicated corruption case. Therefore, it is necessary for Indonesia to keep advancing capacity-building projects under technical-assistance cooperation. The shift in the way of thinking among key players in the criminal justice system requires consistent training and education to balance the need of appropriate response to the systemic problem of corruption. The fact that Indonesia now has three agencies responsible for investigating corruption cases may lead to more success in the prosecution of high-profile corruption cases.