

## RECONSTRUCTION OF INCOMING EXTRADITION IN INDONESIA AND THE NEED FOR INTER-STATE COOPERATION IN CRIMINAL MATTERS

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### ABSTRACT

*There is a necessity to reconstruct Indonesia's law enforcement to transnational fugitives especially perpetrators of money laundering with international dimension in Indonesia. This is because hitherto the decision to extradite is bestowed in executive branch as stipulated in Act No.1 of 1979 on Extradition. Hence, the consideration for the government to extradite is more on political concern rather than judicial bearing. This practice could be deemed undermining human rights and creating legal uncertainty as it could exceed beyond admissible time as stipulated in Criminal Procedural Code (KUHAP) due to unlimited of the grace period of time on the issuance of the Presidential Decision regarding the incoming extradition. This research is doctrinal and field study. Based on findings in the field, some fugitives were detained more than that of stipulated in the regulation. In the future the incoming extradition request in Indonesia shall be based on the court's decision to ensure full protection of human rights and enhance legal certainty to the person who is subject of the extradition and to the requested country.*

*Keywords: extradition, executive order, incoming extradition, human rights.*

### INTRODUCTION

One of the fundamental aspects in Indonesia's extradition law is that the decision to request an extradition of fugitives to foreign state is through an executive order.<sup>1</sup> It means that the final decision of extradition request, particularly incoming extradition to Indonesia, is fully on the hand of President as the chief executive. As such, an extradition request by Indonesia could be considered a more political based request rather than judicial. In upholding this practice, Indonesia could undermine the protection human rights since an executive order deprive the person subject to extradition from their right to challenge such order, as in fact, challenging such request is paramount for human rights protection and serve as a legal remedy.

Moreover, presidential decree on extradition request usually offer legal uncertainty regarding the validity period of such decree. In effect, this situation often implicated to the detention period of the suspect or fugitive which is longer than the detention period provided in the Code of Criminal Procedure that constitute a violation against Human Rights.

Extradition is juridical issues, although extradition request is intertwined with political aspect, such as relation between states. To certain degree, the instrument of extradition is debated frequently in either legal or political instrument.<sup>2</sup> However, if observed from the substance, extradition is essentially juridical issues. Critical consideration on judicial aspect of extradition can be seen on whether the crime committed by the suspect fulfills the double criminality principles, contains *ne bis in idem* aspect, relates to political or military crime, and level of penalization.

In the discussion of extradition, we are surely discussing person[s] which considered as fugitive in the foreign jurisdiction for the crime committed in the requesting state. A person, who is a fugitive based on foreign power, in Indonesian territory for a crime committed outside Indonesia jurisdiction will incur the right for legal authority in Indonesia to arrest and repatriate the person concerned to the state where the crime is committed. This matter is made based on an official extradition request to Indonesia. Whether extradition request will be accepted or rejected, it fully depends on presidential consideration.

Human Right and legal certainty relating to the incoming extradition in Indonesia is essentially questioned. This matter relates to the void of time period for President to issue the presidential decree on extradition and, at the same time, President is also not bound to the existing judicial order. Non-commitment of President to the judicial order on acceptance or rejection of an incoming extradition request affirming domination of political dimension or political consideration of extradition in Indonesia.

It is the time for all of these problems to be reconstructed because no matter how the law enforcement to international-dimensioned crimes in Indonesia particularly regarding incoming extradition, Human Rights issue may not be ignored. The importance of Human Rights should be observed because the existence of individual is only deemed as object of the international cooperation in criminal issues to date and Human rights issues in international relationship context tend to be deemed only as national issues of the state concerned rather than international issues.<sup>3</sup> Human Rights is universally international issues and each state is obliged to protect and respect the Human Rights. Therefore, it is time to make an effort of reconstruction of incoming extradition in Indonesia to ensure the protection of Human Rights and legal certainty. That effort is made through a legal reform to strengthen the participation of judicial order by placing the final decision on incoming extradition in the domain of the judicial branch rather than in executive branch.

<sup>1</sup> See Explanation of Act No.1 of 1979 on Extradition.

<sup>2</sup> Extradition request can be rejected if it relates to political, military crimes, lack of double criminality principles or gap of punishment demand in each State, etc. Read more on Article 5-17 of Act. 1 of 1979 on Extradition.

<sup>3</sup> Guy Stessens, *Money Laundering, A New International Law Enforcement*, UK, Cambridge University, 2002, p.256.

## DISCUSSION

Issues relating to the extradition around the world are generally full of Human Rights aspect. A person escaping into a foreign country, and thus becoming a fugitive in foreign jurisdiction, is possibly caused by a common and usual crime or related to other issues such as political dispute, war or rebellion and other causes. A person to be fugitive in other jurisdiction for political disputes, such person generally has status as asylum seeker. The asylum seeker should be traditionally protected. Giving a political asylum to foreigner, escaping his own country because of political issues, is deemed as expression of state sovereignty.<sup>4</sup>

However, in this writing, we are only discussed the transnational crime actors deliberately escaping to avoid a lawsuit in which the crime is committed (fugitives from justice). Therefore, the law enforcement over the fugitive handed to the requesting state to be judged and brought to justice later becomes more relevant because each person committing crime, wherever it takes place, should be principally handed to the requesting state or tried by the state where the criminal hides in accordance with “*aut punere aut dedere*” principle.<sup>5</sup>

When a fugitive is caught in a foreign territory or in another jurisdiction, such person can be extradited to the requesting state as state having criminal jurisdiction over the actor.<sup>6</sup> However, a fugitive to be extradited remains to have rights to challenge such extradition order. This matter is important as a part of protection and respecting of human rights in which the fugitive has the right to access to justice.

However, human rights are often deemed as domestic issues of the requesting state, and rights of fugitive are often set aside and categorically considered as an object of international cooperation. This reality encourages the European Human Right Court to confirm that violation against human rights on international cooperation is never be allowed.<sup>7</sup>

The necessity to underline human rights protection in extradition process is correlated with the uncertainty of waiting period for the issuance of presidential decree for extradition. Unfortunately, Law No. 1 of 1979 regarding Extradition, is silent on this very important issue. In effect, many person that are waiting to be extradited to other jurisdiction has been put behind the bars for years without certainty of detention period, even though the Code of Criminal Procedure regulate that detention period shall respectively be 40 days (investigation), 60 days (District Court), 60 days (High Court), and 60 days (the Supreme Court. In total, detention period, including its extension, shall not more than 400 days. Prisoner[s] that has been imprisoned exceed more than the time allowed according the Code of Criminal Procedure shall be of course freed for the sake of law.<sup>8</sup>

In the case of Sayeed Abbas Azad bin Sayed Abdul Hamid,<sup>9</sup> Australian fugitive, he has been arrested by Indonesian Immigration on July 31, 2009 and extradite on August 13, 2015. In total, it took six years for the extradition process of Mr. Hamid to Australia to be finalized or, at least, 542 days from the issuance of the verdict by the District Court of South Jakarta in 2013 to on his extradition to Australia.<sup>10</sup>

Likewise in the case of the fugitive of the name of Lim Yong Nam, a Singaporean citizen wanted by the United States of America. From his arrest on 23 October 2014 until the verdict of Batam District Court<sup>11</sup> on 20 April 2015 and to the issuance of Presidential Decree No.3 of 2016 on 1 February 2016 that decide the person to be extradited to the United States of America on 31 March 2016, he has had been put in the jail for 507 days. These facts show a clear violation against Human Rights and contradicts with the detention period stipulated in the Code of Criminal Procedure, that is 400 days – from the arrest to permanent legal force (*inkracht van gewijsde*).<sup>12</sup>

These facts show a deprivation of the suspect’s rights of freedom and independence and violation against Human Rights in the context of the inter-jurisdiction law enforcement in Indonesia,<sup>13</sup> even though, it is clear that such arrest and detention shall be made in full responsibility, taking into account that morally, detention act is a ruthless undertaking which shall only be imposed to a person based on a judicial verdict.

The ignorance to the human rights aspect in extradition process in Indonesian system in the context inter-state cooperation is confirmed by the information source in Indonesian National Police Headquarter – Hubinter Division. It was stated that the aspect of Human Rights in the context of inter-state cooperation through MLA instrument and extradition had often neglected

<sup>4</sup> Ivor Standbrook and Clive Stanbrook, *Extradition Law and Practice*, 2nd Edition, New York, Oxford University, 2000, p.3.

<sup>5</sup> See J.G Starke, *Pengantar Hukum Internasional*, 10th edition, Jakarta, Sinar Grafika, 1989, p.470.

<sup>6</sup> In Vienna Convention 1988 regarding Money Laundering, it mentions that the implementation of extradition should be observing domestic law of the state concerned. It means that this convention does not set aside implementation of criminal jurisdiction of the state concerned relating to extradition. See Article 15 paragraph (5) and Article 16 of Vienna Convention 1988.

<sup>7</sup> European Court of Human Rights, Case Soering v. UK, Judgment of July 1989. Publ. ECHR Series A.No.161, in Guy Stessens, *Op Cit*, p.256.

<sup>8</sup> See Article 26 of the Code of Criminal Procedure.

<sup>9</sup> The Afghanistan fugitive extradited by Indonesian Government to Australia is based on Presidential Decree of the Republic of Indonesia No.17 of 2015 alleging People Smuggling to Australia.

<sup>10</sup> <http://www.interpol.go.id/id/berita/696-warga-negara-afghanistan-sayed-abbas-azad-diekstradisi-ke-australia> accessed 24.07.2018.

<sup>11</sup> See Judgment of the District Court of Batam, Case Number: 01/Pid.Ekst/ 2015/PN.BTM, dated 20.04. 2015.

<sup>12</sup> See Article 24 to 28 of Code of Criminal Procedures relating to detention period.

<sup>13</sup> See Code of Criminal Procedures regarding detention.

and less observed as many fugitives placed in jail for a period of more than 2 (two) years, pending the issuance of presidential decree for the extradition process.<sup>14</sup>

Observing such reality, the incoming extradition request in Indonesia in the future need to be changed or reconstructed. The norm and exiting rules indicating that the judicial order on extradition is only works as an advisory opinion for the President relating to such request.<sup>15</sup> Since the authority of the Presidential Decree is basically a *beschikking* norm, it is clearly indicated that this political consideration is more influential than juridical consideration.

Therefore, it is the timely to reform Act No. 1 of 1979 regarding Extradition as it stipulates that the extradition request is not the product of judicial order but executive order. In this context, court is expected to be an institution having authority to reject or accept the incoming extradition request and the judicial order then shall bind the President. By shifting such paradigm on incoming extradition, from executive order into judicial order, international cooperation on extradition would be expected to reduce the violation of human rights.<sup>16</sup>

## COMPARISON WITH EXTRADITION PRACTICE IN AUSTRALIA

Practice in which the court becomes interpreter to the incoming extradition request could be seen in the practice of extradition in Australia. This matter is observed from the decision on extradition to several Indonesian fugitives escaping to the Kangaroo country, such as Adrian Kiki Ariawan and Hendra Rahardja.<sup>17</sup>

Australian Law indicates that the executive order regarding extradition can be challenged through court.<sup>18</sup> Extradition as a process to hand over fugitive to Requesting State initially determined by the Australian Attorney General pursuant to Section 16 Extradition Act. That extradition determination is then scrutinized by Australia Magistrate. The decision of the Magistrate in approving extradition request could be later challenges in Federal Court or Supreme Court of a State or Territory.<sup>19</sup> This mechanism is obviously seen from the Indonesia experience when requesting extradition of the fugitive Adrian Kiki Ariawan who escape to Australia in 2010.<sup>20</sup>

Extradition request from Indonesian Government to Australia regarding the fugitive Adrian Kiki Ariawan was approved by the Australian Minister of Justice. Approval from the Australian Minister of Justice was then opposed by the fugitive in the District Court of Perth in Western Australia stating that the Indonesian judicial order was made without his attendance and against his will so that led to violation of his human rights. The Court of Perth granted Adrian Kiki Ariawan's lawsuit by annulling the Australian Ministerial Decree of Justice. This case continued to the level of Supreme Court of Western Australia which affirmed the judgment of the District Court of Perth. However, at the cassation level of High Court of Australia, Adrian Kiki Ariawan's objection was rejected by reaffirming the decision of Australian Government to extradite to Indonesia.

In the case of the Hendra Rahardja, who also escaped to Australia, the decision of Australian Government to extradite him to Indonesia was challenged in the court. Initial extradition request from Indonesia to Australia began on June 1999 when Hendra Rahardja was detained by the Australian Federal Police at the request of the Indonesian National Police through an assistance of the Interpol. Hendra Rahardja, at that time in Sidney Australia, was alleged to have committed money laundering crime in Sidney from the illegal money committed in Indonesia. Over the detention of the Federal Police Australia, Hendra Rahardja filed objection to the court rejecting the extradition to Indonesia. However, Judgment of the Federal Court of Australia New South Wales District Registry No.N531 of 2000 dated August 1, 2000 decides to reject Hendra Rahardja's objection and hence affirm the decision to extradite this fugitive to Indonesia.<sup>21</sup>

From here it is seen that the judgment to reject or accept the incoming extradition request in Australia which decided by the Australian Ministry of Justice, as branch of executive, may be opposed or challenged to the court. This matter is clearly reflecting Human Rights protection in extradition process. This is opposed to Indonesia extradition process where extradition request may be directly approved by Indonesian Government without a judicial process. In many instances, a judicial process is found, however, a final decision is still in the hand of the President. This is because the judicial order contemplated does not bind President. In other words, President as head of executive is the highest institution having authority to accept or reject incoming extradition request in Indonesia.

<sup>14</sup> Interview between writer and interviewee in Indonesian National Police Headquarter (Hubinter) on November 26, 2016 it is said that several fugitives who are fluently in Bahasa Indonesia due to detention period of years without limit in the jail.

<sup>15</sup> See Sejarah pembentukan Undang-undang No.1 tahun 1979 tentang Ekstradisi, Jakarta, Dirjen Hukum dan Perundang-undangan Kemhumkan, 1978, p.70.

<sup>16</sup> Guy Stessens, *Op Cit*, p.253

<sup>17</sup> <https://nasional.tempo.co/read/13097/australia-siapkan-ekstradisi-hendra-rahardja>, accessed 24.07. 2018.

<sup>18</sup> Rules about Extradition and Mutual Legal Assistance in Australia provided in Extradition Act 1988 and Mutual Legal Assistance in Criminal Matter 1987.

<sup>19</sup> <https://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Extradition/Pages/default.aspx>, accessed 24.07.2018.

<sup>20</sup> Pursuant to Judgment of High Court, Case Number: 71/PID/2013/PT.DKI dated 2.06.2013 Adrian Kiki Ariawan was judged and trialed in absentia or without present in court (in absensia) and adjudicated to have been in fault to do corruption crime and sentenced to life. See : [https://www.kejaksaan.go.id/unit\\_kejaksaan.php?idu=2&sm=3](https://www.kejaksaan.go.id/unit_kejaksaan.php?idu=2&sm=3), accessed 24.07.2018.

<sup>21</sup> Fugitive Hendra Rahardja is alleged to have committed in money laundering crime in Australia in which the money is alleged committed from corruption crime in Indonesia during he served as shareholder and also as commissioner of Bank Harapan Sentosa (BHS) in which it finally was liquidated by Indonesian Government on November 1997. This fugitive was rumored to have passed away at the time of extradition process from Australia causing this fugitive has not ever been extradited to Indonesia.

## APPLICATION OF RECIPROCITY PRINCIPLE AND JUDICIAL COOPERATION IN CRIMINAL MATTERS

Current transnational crime actors may operate inter-jurisdiction. Transnational criminal actors immediately may commit a crime in a state and also may escape to another jurisdiction to avoid legal prosecution. Therefore, the law enforcement to these inter-state fugitives desires a role of court relating both incoming extradition and out-coming extradition in Indonesia. Keeping in mind that all this time in pursuit of fugitives abroad more relies on cooperation law enforcement officer rather than through a judicial cooperation through verdict of the court, this causes legitimate legal basis to the state in which a fugitive hides in order to surrender the actor to the requesting state.

With reference to the absence of legal basis, it is admitted by an official of Embassy of the Republic of Indonesia in Singapore who stated that the Singapore government may not surrender a fugitive to any requesting state if there is no evidence based on judgment of the court in which it has permanent legal force proving a person's crime and legal status and in Singapore as known as "the rule of law".<sup>22</sup> Therefore, in the future, Indonesian law officer should be completed with a national court order having function as legal basis for foreign state to surrender a fugitive.

Such national court order may be deemed as legal product of judicial body of a sovereignty State to prove a legitimation to be implemented in the foreign jurisdiction based on reciprocity principles. Admission and implementation of a court order to the inter-state fugitives based on reciprocity principle may enable the exchange of fugitives through inter-judicial cooperation. However, it is also admitted that the issues relating to the inter-state sovereignty aspects in the framework of inter-state law enforcement often become an obstacle, especially a progress of information technology often makes it difficult for law enforcement officers to enforce the law to international fugitives.<sup>23</sup>

Admission and implementation of a criminal judgment in foreign jurisdiction through reciprocity principle of inter-judicial cooperation is not impossible in globalization flow. Such cooperation has been successful implemented in the civil cases, particularly relating to foreign arbitration judgment as referred to in New York Convention 1958.<sup>24</sup> The foreign arbitration judgment may be admitted and implemented in the foreign jurisdiction as long as it is not on the contrary to laws and public orders of the requested state.<sup>25</sup> In Indonesia, the admission and implementation of the foreign arbitration are admitted as provided in Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Settlement.<sup>26</sup>

## CONCLUSION

There is no legal certainty and little protection of human rights in the incoming extradition request in Indonesia as the existing rules confine the extradition decision into the executive order and not the product of judicial institution, as provided in Act No.1 of 1979 regarding Extradition. Therefore, the decision on the incoming extradition request tends to be more based on political consideration of the president than juridical consideration. This normative rules has been implicated to the legal uncertainty on waiting period of the issuance of presidential decree for extradition. This has led to detention period that exceed regulation provided in Code of Criminal Procedure on detention and hence, obviously a violation against human rights.

Indonesian national criminal policy particularly relating to incoming extradition should be revised to ensure the protection of Human Rights and provide legal certainty. A clear duration on how long a presidential decree for extradition would be issued need to be stipulated explicitly in order to erase unlimited detention period of the suspect.

In the future, the incoming extradition request should be placed in the judicial order rather than executive order. This judicial order could also cushioned Indonesia's request to other jurisdiction and more likely to be implemented in foreign jurisdiction through inter-judicial cooperation in the field of criminal matters based on reciprocity principle.

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<sup>22</sup> The interview was made by the writer in Embassy of the Republic of Indonesia in Singapore, dated 23.09.2016.

<sup>23</sup> See Francis Fukuyama, *The Origin of Political Order*, New York, Farrar, Strauss and Giroux, 2011, p.12.

<sup>24</sup> New York Convention 1958 on *Recognition and Enforcement of Foreign Arbitral Awards*. This convention has been ratified by Indonesian Government through Presidential Decree No.34 of 1981.

<sup>25</sup> Admission and Implementation of foreign judicial order in the field of civil and commercial in the European Union may be done as confirmed in "Brussels I Recast" 2015, in Paul Beaumen and Lara Walker, "Recognition And Enforcement In Civil And Commercial Matters In The Brussels I Recast And Some Lessons From It And The Recent Huge Convention For Huge Judgment Project", *Journal of Private International Law* (2015), Volume 11 No.1, p.31-63.

<sup>26</sup> See Articles 65-69 Act No.30 of 1999 regarding Arbitration and Alternative Dispute Resolution stating that execution of foreign arbitration award in Indonesia is legally recognized and enforceable as it is not contrary to public order and regulation.