

The Implementation of Obstruction of Justice Concept in Indonesia Legal System

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ABSTRACT: Indonesia, as a state party of UNCAC (Law No. 7 Year 2006) and Palermo Convention (Law No. 5 Year 2009) about Transnational Organized Crime, has obligation to create Implementing Legislation through municipal Law. One of the aspect that shall be regulated in the Implementing Legislation is the Obstruction of Justice which is a new concept for Indonesia legal system. As the new concept, the Obstruction of Justice has not been completely implemented in Indonesia Legal System. For example, Indonesia has legislation that regulated in general an act to interfere in the giving of testimony or to induce false testimony but there is no clear legislation that regulated the protection for the Law Enforcement officer from intimidation or interfere their official duties as specified in the Obstruction of Justice Concept. Moreover, the Obstruction of Justice in Indonesia legal system has not been regulated in one specified Legislation but it is spreaded inside and outside Indonesian Penal Code. Therefore, to gain full understand about the concept and how to sychronize and harmonize the concept in Indonesia Legal system, this paper will describe the Obstruction of Justice Concept in accordance with the International convention and then compare its implementation in Indonesia with that other countries.

KEYWORDS: *obstruction of justice, indonesia legal system*

Introduction

More than a decade after the corruption law and Corruption Erredication Commission (KPK) were established in 2001 and 2002 respectively, corruption is still a big problem in Indonesia. Most of corruption cases involve perpetrators who have big power such as executive, legislative, and also law enforcer. In 2013, out of 70 cases handled by the KPK, 21 cases involves legislative, eksekutif, and law enforcers. 7 cases involved Public Services. In fact, number of cases handled by KPK in 2013 is almost double than that of 2012.

Some practices used by the prepetrator to obstruct the completion of the case are including but not limited to creating conflict and hiding corruption asset and witness. For example, in the early investigation stage of Driver Simulator Graft case, which involved Djoko

Susilo¹, a conflict rised between KPK and Indonesian Police Department. Both claimed to have authority to investigate the case. Another example is bribing graft case that involved Banten State governor Ratu Atut Chosiyah who stand accuse of paying Constitutional Court Chief Justice to overturn the victory of opposing opponent in Lebak regency election. In this case, KPK presumed that Atut defence lawyers hid the witness and assets.² In both Djoko Susilo and Atut cases, the court process were interfered. The law enforcer can hardly prove the elements of crime because of the obstructions of justice.

Obstruction of Justice is one of crimes, which were criminalized by Palermo Convention. Indonesia ratified Palermo Convention through Law No 5 year 2009. As a state party of Palermo Convention, Indonesia has responsibility to implement regulation in Palermo Convention. Indonesia shall criminilize obstruction of justice through national law. This process is in line with Indonesian Constitution 1945, article 11, stated that signing process which follow by ratification shall be legalized by law either by harmonization of law or synchronization of law.³

However, the Palermo Convention does not require the state party to make specific legislation for the crimes regulated in the convention as long as the state party have clear regulation about the crimes. Out of four core crimes regulated in the convention, Indonesia just criminalized 2 (two) crimes, which are corruption, regulated through Law No 20 year 2001 jo Law No 31 year 1999, and money laundering, regulated by Law No 8 year 2010. The Obstruction of Justice itself has not yet regulated in specific law even though some norms related to obstruction of justice already regulated in some law. For instance, in Articles 216 -222 Indonesian Penal Code, Article 21- 23 Indonesian Corruption Acts, Article 37 Law No 13 year 2006 about Witness and Victims Protection

Therefore, to gain full understand about the concept and how to snychronize and harmonize the concept in Indonesia Legal system, this paper will describe the Obstruction of Justice Concept in accordance with the International convention and then compare its implementation in Indonesia with that other countries.

¹ 2013, KPK Tangani 70 Kasus, <http://www.nasional.kompas.com/read/2013/12/30.2149106/2013.KPK.Tangani.70.Kasus>, last visited at 24 Maret 2014, pukul 10.40.WIB.

² KPK Bidik Penghalang Penyidikan, <http://www.kpk.go.id/id/berita/berita-sub/1761-kpk-bidik-penghalang-penyidikan>, last visited at 26 Maret 2014, pukul 00:31 WIB.

³ Romli Atmasasmita, *Hukum Pidana Internasional: Dalam Kerangka Perdamaian dan Keamanan Internasional*, Fikahati Aneska, 2010, P.6.

PALERMO CONVENTION

Palermo Convention 2000, one of international instrument that regulating transnational organized crimes, was adopted by Resolution of the United Nations General Assembly No 55/25 on 15 November 2000 and entry into force on 29 September 2003. This convention criminalize four core criminal offences including participating in organized criminal group,⁴ money laundering⁵, corruption⁶, and obstruction of justice. In addition to the criminal offences, the convention regulated three protocols on trafficking in person, smuggling migran, and trafficking of firearms. The convention also categorized serious crimes⁷, which is "a conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty"

The existence of Palermo Convention is reaction to expansion of transnational organized crime that needing law enforcement in transnational way through international cooperation to against transnational organized criminal group.⁸ Palermo Convention define "transnational" as:⁹ not only offences committed in more than one State, but also those that take place in one State but are planned or controlled in another. Also included are crimes in one State committed by groups that operate in more than one State, and crimes committed in one State that has substantial effects in another State. .

The aim of Palermo Convention itself, like explained in Article 1 is to enhance cooperation among states in combating and preventing transnational organized crime more effectively. ¹⁰ Related to promote cooperation among state party, every state should took the necessary measures to ensure the implementation of its obligations under this Convention¹¹, it is including criminalize four core crimes that regulated in Palermo convention.¹²

The first core crime is participation in organized criminal group, where "organized criminal group" defined as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other

⁴ See Article 5 Palermo Convention

⁵ See Article 6 Palermo Convention

⁶ See Article 8 Palermo Convention

⁷ Article 2 (b)

⁸ Kofi A. Annan, in *Foreword* "United Nations Convention Against Transnational Organized Crime and The Protocols Thereto"

⁹ Article 3 Palermo Convention

¹⁰ Article 1 Palermo Convention

¹¹ Article Pasal 34 para 1 Palermo Convention

¹² Article 34 (1), Article 5 (1), Article 6, Article 8 Article 23 Palermo Convention

material benefit.¹³ Other definition of organized criminal group is a company with crime basis, which working to obtain financial benefit from illicit activities and make it sustainable by using threat, monopoly and corruption.¹⁴

Second crime is money laundering¹⁵ which is an offence that used by organized criminal group to change the illegal financial benefit become legal. Actions are categorized as money laundering when committed intentionally The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action; The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.

The third crimes, is corruption. Often, Organized criminal group used corruption to smooth their activities. Bribery and other corruption acts used by them to make an opportunity and to protect their activities from law enforcer and other authorities. Palermo convention did not defined corruption but just explained about active and passive bribery and also participation as an accomplice in either offences.

The last is obstruction of justice, to maintain their position, power and wealthiest, organized criminal group did a lot of thing to obstruct criminal legal system. There is no justice, if law enforcer, witness and victim intimidated, threatened or corrupt. There is no international cooperation if important party not protective enough.

OBSTRUCTION OF JUSTICE IN PALERMO CONVENTION, UNCAC AND THE IMPLEMENTATION IN OTHER COUNTRIES

The regulation of obstruction of justice in Palermo Convention is stipulated in article 23. Palermo Convention defined obstruction of justice as "...when committed intentionally: (a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention; (b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by this Convention".

¹³ Article 2 para (a) Palermo Convention

¹⁴ www.nw3c.org, *Organized Crime*

¹⁵ Article 6 Palermo Convention

The act can be categorized as obstruction of justice in accordance with the convention only if the act of obstruction of justice can be linked with the article 5,6 or 8 of the convention. The objective of the arrangement is to prevent the obstruction of law enforcement process of the crime regulated in the article 5,6, and 8.

Article 23 (a) does not explicitly specified the object of obstruction of justice. But implicitly, the object are witness and victims of the crime. The conclusion is based on the perpetrator objective which is to influence or interfere the witnessing and providing evidence process.

Article 23 (b) specified that the object of the obstruction of justice is the justice of law and the enforcement official that related to criminal act. However, the definition of justice of law and the enforcement official can be different from one state to another. Some state defined the justice of law and enforcement official as a persons who are in the legal system, such as judge, jury, or any member of the court including the arbitrator, interpreter, and the lawyer. United States specifically described who are the object of obstruction of justice which are grand jury or petite jury, every officer in a every stages of American Court¹⁶, criminal investigator¹⁷ include financial officer¹⁸ and "subpoena for records"¹⁹ also individual acting as an officer, director, agent or officer of business of insurance which their activities affecting to international trade.

There are two big thing regulated in Article 23 Palermo Convention related to object of crimes there are witness and evidence²⁰ and judicial officer and law enforcer.²¹ The goal of the first one is to protect witness and victims. The report and testimony of witnesses and victims need to be able to prosecute and penalize the perpetrators of the crime, so the cooperation of witnesses and victims is essential to achieve the objectives of this provision although criminals will perform a variety of ways to deter witnesses and victims to testify in court.²² Related to the scope of protection, the protection afforded by the Convention is not limited to witnesses and victims who will testify at the hearing related to a crime but includes the family and the closest of witnesses.²³

¹⁶ Sec 1503 "Obstruction of Criminal Investigation" in 18 U.S.C. Article 1501 – 1508;

¹⁷ Sec 1510 (a) "Obstruction of Criminal Investigation" in 18 U.S.C. Article 1501 – 1508; describe category of "criminal investigator" every individual has authority on behalf of departement, agency, or US Army to investigate or prosecution before US Criminal Law

¹⁸ Sec 1510 (b) "Obstruction of Criminal Investigation" in 18 U.S.C. Article 1501 – 1508; .

¹⁹ Sec 1510 (b) (1) and (2) "Obstruction of Criminal Investigation" in 18 U.S.C. Article 1501 – 1508;

²⁰ Article 23 (1) Palermo Convention

²¹ Article 23 (2) Palermo Convention

²² Model Legislative Provisions against Organized Crime, p. 166-167

²³ Article 24 (1)

The existence of the provisions of Article 23 of the obstruction of justice should be viewed more broadly, including how the mechanism of protection to be afforded to witnesses, victims and court officials, including law enforcement. In comparison, Article 79 of the Criminal Code of Albania provides protection specifically to the deputies, judges, prosecutors, defense counsel, police, armed forces or government officials who experienced crime (murder) when they are carrying out their duties, including the complainant, witnesses, and parties harmed by a criminal act.

Besides the Palermo Convention, Article 25²⁴ of the Convention against Corruption (UNCAC) also criminalizes the obstruction of justice, concept of obstruction of justice in the UNCAC as same as the Palermo Convention. Criminalization of obstruction of justice in the UNCAC is mandatory for the state in which the state has a duty to implement it in national legislation.²⁵ Therefore, the state must do the criminalization of arranged crime in the UNCAC, including obstruction of justice. For a state that has been regulated, must ensure that the existing arrangements are in accordance with what is stipulated in the UNCAC, if necessary, the State may perform the Amendment.²⁶

Background setting obstruction of justice in the UNCAC same as the Palermo Convention, because justice can not be achieved or resolved if the judge, jury, witness or victim intimidated or threatened. If evidence can not be obtained by investigators, prosecutors and courts, a serious crime may not be known or convicted.²⁷ Terms obstruction of justice in the UNCAC is also related to the provisions on the protection of witnesses and victims, whistleblowers and international cooperation.

Similar with the scope of acts in the Palermo convention, the scope of acts that can be categorized as an obstruction of justice within the UNCAC is not limited in any proceedings but may occur before the start of the trial, even extended to all official governmental proceedings, including pretrial process. Bribery is not part of the provisions of article 25 (b) of UNCAC and Article 23 (b) Palermo Convention, bribery of public officials under Article 15 of UNCAC.

²⁴ (a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention; (b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to offences covered by this Convention"

²⁵ Article 65 UNCAC

²⁶ Model Legislative Provisions against Organized Crime, p. 76

²⁷ Model Legislative Provisions against Organized Crime, p. 89

OBSTRUCTION OF JUSTICE IN INDONESIAN CRIMINAL LAW SYSTEM

Indonesia, as a state party to the Palermo Convention,²⁸ has the obligation, under international law, to criminalize a certain number of behaviors mentioned in said convention. What through national criminal law must be criminalized includes: corruption, money laundering, involvement in an organized criminal group, obstruction of justice and other behaviors found in the additional protocols (trafficking in persons and smuggling of migrants). In this section we will focus on how Indonesia regulates obstruction of justice in fulfillment of its international obligation.

Palermo Convention (on Transnational Organized Crime) defines *obstruction of justice* as: "*the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding*" and "*the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official*". The intent of the perpetrator is thus directed to illicitly influence the production of evidence in a criminal proceeding, albeit limited only to those related to specifically those criminal behavior explicitly referred to by the convention. The means by which influence is exerted are: 1. physical force; 2. threats or intimidation; 3. promise, offering or giving of an undue advantage (bribing). And these should be directed against potential witnesses, justice and law enforcement officials. The definition thus limits the scope of types of behavior considered criminal. The overall purpose apparently is to offer protection to potential victims and, more importantly, warrant a fair and just criminal justice proceeding, especially in relation to the eradication of transnational organized crimes.²⁹

As indicated above, as a state party, Indonesia is under the obligation to criminalize the above behavior under its national criminal law. Up to present we can find no specific regulation (acts/statutes) or criminal provisions which explicitly refer to the Palermo Convention. In other words, it is not at all clear whether as state party Indonesia has already fulfill its international obligation to criminalize obstruction of justice in regard to the eradication of particular offences. On the other hand, even before the signing of the Palermo Convention in 2009, Indonesia already enacted a number of statutes (relating to eradication of corruption, money laundering, human trafficking, and witness and victim protection) which contain criminal provisions prohibiting comparable (not precisely containing the same elements) behaviors. Similar actions were already construed as crimes under national law.

²⁸ Act No 5/2009 on the Ratification of The United Nations Convention Against Transnational Organized Crime

²⁹ Article 1 United Nations Conventions against Transnational Organized Crime.

The Corruption Act (no. 39/1999) criminalize the deliberate prevention, obstruction or directly-indirectly made to fail the investigation process, indictment or court examination, and only those in regard to witnesses or suspect/defendants. Nonetheless the act does not penalize the similar behavior targeting public officials (justice or law enforcement officials).

On the other hand, the Money Laundering Act (18/2010), only penalize illegal/illicit intervention involvement hindering the fulfillment of PPATK's (The Indonesian Financial Transaction Report and Analysis Center). This act does not provide protection for witness or victim. Meanwhile, the Human Trafficking Act (no. 21/2007) provides a more comprehensive package. It penalizes persons who deliberately physically attack witness or court officials; and deliberately prevent, obstruct or made to fail directly or indirectly the investigation process, indictment and court examination of witnesses and suspects/defendants.

The Witness and Victim Protection Act (no. 13/2006) criminalizes the forcing of one's wish or intent, using violence or any other means which results in the vulnerability of witnesses and/or victims. In other words, criminalized are those behaviors which obstruct the fulfillment of the state's responsibility to protect witnesses and/or victims. However, it does not specifically targeted law enforcement officials as persons to be protected.

In addition, the Indonesian Criminal Code (arts. 216-222 under the title: crimes against public officials) contains general provision prohibiting obstruction of justice and/or contempt of court. Here both actions are not yet differentiated and the general intent apparently is to protect public officials when performing their respective duties. It is thus not focused on ensuring the effort at truth finding and dispensing justice in a criminal proceeding.

CONCLUSION

Indonesia has ratified Palermo Convention in 2009, and its two protocols in 2009 and 2010, and thus is under the obligation, through its national law, to criminalize participation in organized criminal group, corruption, money laundering, trafficking in persons, and smuggling of migrants and obstruction of justice in relation to the law enforcement against those specific crimes mentioned earlier. Specifically in relation to obstruction of justice, the main finding is that similar criminal provisions, although not precisely the same, are found scattered in a number of national law enacted before 2009. Consequently even before 2009, the national law has already recognized obstruction of justice as a separate crime. It is thus unnecessary for Indonesia to provide a separate act criminalizing obstruction of justice in fulfillment of its obligation under the Palermo Convention.

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