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Legal Obstacles Hampering Effective Law Enforcement in Corruption Cases

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Introduction

The perpetrator of a wrongdoing should be punished and the victim of the wrongdoing should be compensated. This paper assesses how far this principle is carried out in law enforcement against corrupters.

There are lots of criteria that can be used to measure the effectiveness of law enforcement in corruption cases. This paper sticks to the basic role of law in using the criteria. Accordingly, the law enforcement in corruption cases will be deemed effective, if it results in appropriate sentences being imposed upon corrupters and adequate compensation being given to the state as the victim that suffers financial or economic loss caused by corruption.

There are lots of obstacles hampering the effectiveness of law enforcement in corruption cases. This paper discusses only one kind of them, namely, the legal obstacles or the ones that emanate from or relate to law provisions to be enforced in corruption cases. At the end of the discussion this paper tries to describe some submissions aimed at removing these obstacles for the purpose of the enforcement of law in corruption cases being more effective.

Lenient sentences

Observing the practice of criminal law enforcement against corrupters in China, we have to admit that our courts tend to impose lenient sentences upon our corrupters. While in China a number of corrupters have been executed to death, in Indonesia no corrupter has been imposed with death penalty, even though, like Chinese law, Indonesian law allows death penalty to be imposed upon corrupters under certain aggravating circumstances. (See Article 2, paragraph 2, of the Law on the Eradication of Corruption).

The law also allows the court to impose life sentence upon anyone who is convicted of having committed corruption. So far the numbers of corrupters that have been imposed with life sentence can still be counted by fingers. The tendency to impose lenient sentences is found not only in the ordinary courts (like the District Court) but also in the special court established by law to adjudicate corruption cases that are investigated and prosecuted by the Corruption Eradication Commission (KPK).

The lenience of sentence is extended by the corrupt practices in prison administration. Rumors say that by paying a certain amount of money to prison officers a rich inmate, like a convicted corrupter, may have good accommodation in prison, where he can occupy an air conditioned room, communicate by hand phone, watch good TV programs, and leave his cell at times.

Judging from any sentencing theory, lenient sentences in corruption cases are unacceptable. From retribution theory stand point, a lenient sentence is not compatible to the grave injurious effect of corruption; from preventive theory view point, a lenient sentence has no deterrent effect; and from corrective theory point of view, a lenient sentence is not adequate to educate a convicted corrupter to become a law abiding citizen. Hence, the practice of imposing lenient sentences upon corrupters should speedily be terminated.

Lenient substitute sentences

Indonesian law states that the judgment in a corruption case may contain an order to the defendant (corrupter) to pay for compensation to the state. (See Article 18, paragraph 1 sub b of Indonesian Law on the Eradication of Corruption). The failure to fulfill this order is threatened by a substitute imprisonment sentence.

Article 18, paragraph 3, of the Indonesian Law on the Eradication of Corruption states that the maximum substitute imprisonment sentence is the same as the maximum imprisonment sentence threatened for corruption acts. This means that Indonesian law allows a judge to impose imprisonment sentence for life or for twenty years upon a corrupter who fails to fulfill the judgment for paying compensation to the state. However, so far we have never found a judgment that imposes imprisonment sentence for life or for twenty years upon a corrupter as the substitute sentence for the failure to pay for the compensation. Most of the corrupters are imposed with substitute imprisonment sentence for less than five years.

The effect of this practice is detrimental to the effort to secure adequate compensation for the state as the victim of corruption. Lenient substitute sentences that are imposed upon corrupters for their failure in paying compensation to the state do not encourage convicted corrupters to fulfill their legal obligation for compensating the financial or economic loss of the state.

Non enforcement of certain law provisions

The Law on the Eradication of Corruption contains a good provision that can be used to confiscate corrupter's assets in order to secure the adequate compensation for the state. The Article is Article 38B that obligates a corrupter defendant to explain the sources of his assets that are not written in the indictment filed by the Public Prosecutor. If the defendant fails to show the lawful sources of these assets, the court should deem the assets as having come from corruption, so that the judge has every right to order the confiscation of the assets. To facilitate the enforcement of this provision, paragraph 5 of this article obligates the presiding judge to open a special court session aimed at examining the lawfulness of the sources of the corrupter defendant's assets. - Even though this provision has come into force since the enactment of Law No. 20 of 2001 on 21 November 2001, no court has ever enforced this article.

Article 38B of the Law on the Eradication of Corruption is not the only law provision that is never enforced. The followings are some examples of such kinds of law provisions:

- Article 1100 of the (Indonesian) Civil Code states that any debt of a dead man is inherited by his heir(s). A corrupter that has not fully compensated the state for the loss it suffers due to the corruption should be considered as a debtor. Accordingly, by virtue of Article 1100 of the Civil Code, the debt (due to not fully paying the compensation to the state) is transferred to his wife, son and daughter upon the death of the corrupter. So far there has

been no lawsuit filed against any corrupter's heirs in order to force them to fulfill their legal obligation as the heirs of a dead corrupter that had not yet fully compensated the state's loss due to the corruption he committed during his life.

The enforcement of this provision is useful to handle the cases of corrupters who are unwilling to compensate the loss suffered by the state. Convicted corrupter Andrean Waworuntu, for example, has clearly stated that he is unwilling to pay for the compensation. "There is no need for me to pay for the compensation, because I have been imprisoned for life" says Mr. Waworuntu. (See KOMPAS daily, 23 August 2007, at page 5). To impose the substitute imprisonment sentence upon Mr. Waworuntu as stated by Article 18, paragraph 3, of the Law on the Eradication of Corruption is also impossible, since Mr. Waworuntu has been imposed with life sentence. The only possibility left in handling this case is, accordingly, to implement Article 1100 of the Civil Code by demanding the payment of the compensation to Mr. Waworuntu's wife and child(ren) upon Mr. Waworuntu's death.

- Supreme Court Regulation No. 1 of 2000 states that a debtor of a debt amounted at Rp 1 billion or more can be locked in a certain premise, if he has no good intention to pay his debt. The period of the lock is 6 months that can be extended for another 6 months by the order of the court. So far no debtor has been locked in the enforcement of this Supreme Court Regulation.

The obstacle to implement this Regulation in corruption cases is caused by the narrow interpretation of the meaning of "debtor". A debtor is interpreted as someone who borrows some money from another. Accordingly, a corrupter cannot be categorized as a debtor of the state, since he never borrows any money from the state.

We should use wider interpretation in this regard. A debtor means everyone that has not fulfilled his financial obligation. Hence, a corrupter who has not yet fully compensated the state's loss is also a debtor, so that the provisions in the Supreme Court Regulation No. 1 of 2000 can be enforced to him and to his heirs.

- Article 3, paragraph 2, of Law no. 1 of 1995 on Limited Liability Company states that a share holder can be held personally responsible if he is involved in an unlawful act committed by his company. Even though lots of companies' directors, managers or employees have been convicted in corruption cases, no lawsuit has been filed against share holders in the implementation of Article 3, paragraph 2, of the Law on Limited Liability Company.

At least in theory we may say that **had** Article 38B of the Law on the Eradication of Corruption, Article 1100 of the Civil Code, Supreme Court Regulation No. 1 of 2000, and Article 3 of the Law on Limited Liability Company **been** implemented in practice, the enforcement of law provisions aimed at confiscating assets in corruption cases to secure the compensation of state's losses **would have been** more effective.

Incomplete law provisions and contradicting ones

Article 38B of the Law on the Eradication of Corruption is a kind of incomplete law provision. This provision obligates only a corrupter defendant to explain the lawful sources of his assets. This is different with the provision of article 18, paragraph 1, of the old law on the eradication of corruption (Law No. 3 of 1971), which imposed the same obligation not only upon a corrupter defendant, but also upon his spouse(s), kid(s), and every person as well as

legal entity who has relation with the corrupter. Admittedly, this old provision, too, had never been enforced in practice when Law No. 3 of 1971 was still in force.

Law provisions in the Civil Code relating to the transfer of a debt from a dead debtor to his heirs are also incomplete. Article 1057 of the Civil Code allows an heir to refuse to accept the inheritance of his predecessor. This refusal results in the heir being freed from both the assets and the liabilities of his dead ancestor. Accordingly, an heir of a dead corrupter will be freed from the obligation to compensate the state's loss, if he uses his right under article 1057 of the Civil Code by refusing to accept the inheritance from the dead corrupter.

The provisions of the Civil Code relating to the refusal to accept an inheritance are incomplete, because there is no provision regulating under what condition the court is allowed to refuse the petition of refusal to accept an inheritance. It is unfair for the court to grant the petition of a corrupter's heir to refuse the inheritance, if the petitioner has lots of assets of which the values are excessive if compared with his lawful sources of income. Accordingly, we need the enactment of law provisions obligating an heir of a dead corrupter to explain the lawful sources of his assets before the court, if he files a petition to refuse the inheritance. The failure to show the lawful sources of the assets should result in the court rejecting the petition.

Our law provisions relating to the transfer of debt to the heirs are also contradicting. On the one hand, under Article 1100 of the Civil Code we may say that the liability of a dead corrupter to pay for compensation to the state is fully transferred to the corrupter's heirs, on the other hand the Compilation of Islamic Law provides partial liability, wherein an heir is liable to pay his predecessor's debt only at the same amount of the value of the inheritance he receives from his predecessor.

Law provisions on the petition to review the final and binding judgment are also contradicting. The provision in the Code on Criminal Procedures states that the review petition can be filed only by a defendant or his heir, but the provision in the Law on Supreme Court states that any party in a legal case is eligible to file a petition to review the final and binding judgment.

Incomplete law provisions as well as contradicting ones are detrimental to the efforts to conduct effective law enforcement in corruption cases, because they make confusion to law enforcers.

The flight of assets

In many corruption cases, the effort to seize the assets of a corrupter in order to secure the compensation for the state financial or economic loss, fails because the assets have been transferred to other persons or have been hidden abroad. This fact does not justify law enforcers to give up. A financial intelligence unit should be established and world wide cooperation among financial intelligence units should be organized. The goal of these activities is to trace the whereabouts of all assets directly or indirectly linked to corruption cases.

If a corrupter's asset is still located in Indonesia, but the ownership of the asset is transferred to another person, a lawsuit should be filed in an Indonesian court aimed at annulling the transfer of the asset's ownership and confiscating it to secure the compensation for the state. If the asset is located abroad, especially in states with the Common Law system, the petition for Mareva Injunction and Full Discovery Order should be filed to a relevant court in that state.

Lots of states have ratified the United Nations Convention Against Corruption (UNCAC) and the Convention has also entered into force. Accordingly, in our efforts to secure the compensation for the state's losses due to corruption, we can implement the provision of Article 53, paragraph (b) of UNCAC that states:

“Each State Party, in accordance with its domestic law:

(a)...

(b) Take such measures as may be necessary to permit its Court to order those who have committed offences established in accordance with this Convention to pay compensation or damage to another State Party that has been harmed by such offence”.

The provisions of Article 31, paragraph 1, sub paragraph (a) of UNCAC is also beneficial for our efforts in this regard. This provision states:

“1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable the confiscation of:

(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds”

Accordingly, if a corrupter's asset is located in a state that has ratified the UNCAC, a petition or lawsuit can be filed either to the government of the state where the asset is located, or before the relevant court of the state, demanding for the issuance of order or judgment obligating the corrupter to pay for the compensation to the injurious state as well as threatening the confiscation of the corrupter's asset. This kind of petition or lawsuit is justifiable under provision of Article 54, paragraph 1, sub paragraph (c) of UNCAC that states:

“Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

(a) ...

(b) ...

*(c) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property **without a criminal conviction** in cases in which the offender cannot be prosecuted by reason of death, flight or absence or other appropriate cases”.*

(Note: bold and underline is added).

Admittedly, to enforce the provisions of UNCAC on the confiscation of corrupters' assets is also not free from obstacles. The wording of the Convention does not secure the immediate implementation of the Convention's provisions, since the enforcement of the Convention's provisions is subject to the provision of the domestic law governing the state where the Convention is to be enforced. Consequently, a provision of the Convention cannot be enforced in a state, if the domestic law of the state does not allow such enforcement. In this

case the provisions of the domestic law should be amended or modified first prior to the enforcement of the Convention's provision.

Submissions

Observing the legal obstacles hampering the effective enforcement of law provisions in corruption cases as discussed above, the followings are the writer's submissions:

1. Severer sentences should be imposed upon corrupters. Imprisonment for less than 10 years should become the history of the past. In future, the statistical data should show that the average of sentences imposed in corruption cases is not less severe than the ones imposed in narcotic or drug trafficking cases. Whereas the effectiveness of severe sentence in the prevention of corruption is still debatable, severe sentences produce a certainty, namely, the public acceptance that the sentences in corruption cases are appropriate if compared with the grave injurious effect caused by corruption.
2. The substitute sentence imposed upon a corrupter for the failure to pay for the compensation to the state should also be severer than the ones that have been imposed upon so far. Life sentence should become the substitute sentence for the obligation to pay compensation to the state amounted at Rp 100 billion or more. The court judgment should clearly state that a certain amount of payment for the compensation (say it, 50%) results in the change of the life sentence into imprisonment for 20 years. The judgment should also state that the payment of compensation to the state for a certain amount results in the reduction of the period of the imprisonment sentence. This practice encourages convicted corrupters to perform his obligation to compensate the state's financial or economic losses.
3. The practice of providing lenient treatment in prison for corrupter inmates should be abolished. Tight official and social supervision on the treatment of prison inmates should be conducted to ensure that the treatment of corrupter inmates is the same as the treatment for pick-pocket inmates. This practice prevents corrupters from undermining imprisonment sentences.
4. Certain provisions of law that so far have not yet been enforced should be implemented in practice. Article 38B of the Law on the Eradication of Corruption should be enforced by obligating a corrupter defendant to explain the source of every asset he has. Failure to show the lawful source of the asset should result in the asset being considered to derive from corruption, and, hence, should be confiscated.

Article 1100 of the Civil Code should be enforced by filing a lawsuit against the heir of a corrupter who has not yet compensated the state's loss until the corrupter's death.

Article 3, paragraph 2, of the Law on Limited Liability Company should be enforced by filing a lawsuit to the share holders of a limited liability company, if the company is involved in a corruption case.

The Supreme Court Regulation No. 1 of 2000 should be enforced by filing a petition to the court to lock anyone who is legally obliged to compensate the loss of the state due to corruption, if he has no good intention to fulfill his obligation.

These practices support the effort to secure the compensation for the state's financial or economic loss.

5. Incomplete law provisions should be completed, whereas contradicting law provisions should be harmonized.

We should have law provisions obligating a heir of a corrupter to show the lawful sources of his assets; considering the assets to have been derived from his predecessor's corruption if the lawful sources cannot be identified; and rejecting the petition to refuse the inheritance that is filed by a corrupter's heir who fails to show the court the lawful sources of his assets.

We should have law provisions stating that the debt of a corrupter due to failure in fully paying the compensation to the state is transferred in full to the corrupter's heir, even though the value of the inheritance he receives from the dead corrupter does not meet the amount of the compensation the dead corrupter had to pay.

6. The provisions of UNCAC should be implemented in cases where corrupters' assets are located in states that have ratified the Convention.

In these states, the provisions of the Convention can be used as the legal basis for filing the lawsuit or petition aimed at having the assets confiscated and the ownership of the assets transferred to the state where the corruption takes place.

In non ratifying states, a lawsuit aimed at confiscating the assets can be based on the doctrine stating that the provisions of a worldwide ratified convention (like UNCAC) should be regarded as "the general principles of law recognized by civilized nations", and that the court is obliged to enforce not only written law provisions, but also unwritten ones like "the general principles of law recognized by civilized nations".

7. Efforts have to be taken in order to have domestic law provisions that support the enforcement of the provisions of UNCAC.

Conclusion

As discussed in the beginning of this paper, to punish the perpetrator of a wrongdoing and to compensate the loss suffered by the victim of the wrongdoing is the basic role of law. The failure to impose appropriate sentences upon corrupters, and the failure to adequately compensate the state as its victim is, accordingly, the failure to materialize the essential role of law in corruption cases.

To correct this failure, people tend to opine that the main factor of the failure is the incorrect or incomplete law provisions. Accordingly, it is necessary to enact new law that amends incorrect law provisions and completes the incomplete ones. Experience has taught us that the enactment of new law requires a long and expensive legislative process.

Experience has also taught us that legal precedents are also effective in correcting the incorrect law provisions as well as in completing the incomplete ones. Mareva Injunction, for example, is not a product of a new law (legislation), but a product of a court precedent.

Court precedents are found in court judgments that are rendered by judges. This does not necessarily mean that other legal professionals, like public prosecutors, government attorneys or advocates play no role in the production of court precedents. In many cases, court precedents are initiated by public prosecutors, government attorneys or advocates prior to being found in court judgments.

In relation to the confiscation of assets in corruption cases we may say that Indonesian law allows the confiscation of the following assets:

1. Assets that emanate from corruption;
2. Assets that belong to a corrupter;
3. Assets that belong to any person that is linked to corruption case;
4. Assets that belong to any legal entity that is involved in corruption case;
5. Assets that belong to a corrupter's heir;
6. Assets that belong to a share holder whose company is involved in corruption case.

As discussed above, the confiscation of the previously mentioned assets in order to secure the adequate compensation to the state as the victim in corruption cases is hampered by certain legal obstacles. It is the task of the law enforcement agencies to remove these obstacles, either by drafting new laws, or by initiating court precedents that are effective to remove these obstacles.