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THE STUDY OF MUTUAL LEGAL ASSISTANCE MODEL AND ASSET RECOVERY IN CORRUPTION AFFAIR

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Abstract

The release of Indonesia Corruption Watch stated that the value of state losses due to corruption cases increased significantly from 2016 to 2017. Through Sociolegal research, this study utilizes a purposive random sampling technique. Data collection techniques used in-depth interviews, observation, documentation and Focus Group Discussion. The data analysis technique uses Miles and Huberman's interactive analysis. Based on the new mechanism, this study succeeded in revealing the positive aspects of the regulation of seizure of assets resulting from corruption in foreign countries based on the Mutual Legal Assistance Agreement. The research produced findings on the functioning of law enforcement agencies and related institutions in Indonesia in an effort to seize assets resulting from corruption and money laundering stored abroad. In more detail, based on the conception of the reality of cooperation, it is known that in the context of eradicating criminal acts of corruption, failure to return assets resulting from corruption can be said to reduce the 'meaning of punishment' against corruptors. The development of such thinking implies that the eradication of corruption lies not only in the prevention and punishment of corruptors, but also includes actions that can restore asset recovery due to extraordinary crimes. Deprivation of assets resulting from corruption is primarily carried out abroad through Mutual Legal Assistance is a mechanism of international cooperation relating to investigations, prosecutions, and hearings in court proceedings in accordance with the provisions of the state legislation requested

Keyword: Mutual Legal Assistance; Asset Recovery; Corruption

INTRODUCTION

Corruption as an action taken to pursue profit for themselves is actually a matter of social injustice and is a crime against the welfare of the nation and the state. Therefore, efforts to uncover the crime, find the perpetrators and put the perpetrators in prison, are apparently not effective enough to suppress the level corruption if it is not

accompanied by efforts to seize assets resulting from corruption. For this reason, what Cesare Beccaria conveyed through his book On Crimes and Punishments (1764) regarding his view that the imposition of criminal sanctions should be designed (designed) to a certain level to eliminate the benefits obtained by the perpetrators (Hylton, 1998). Beccaria's thoughts turned out to be very relevant when faced with the release of Indonesia Corruption Watch (ICW) which mentions the value of state losses due to corruption cases increased significantly from 2016 to 2017. Staff of the Investigation Division, Wana Alamsyah, said, throughout 2017 there were 576 cases of corruption with state losses reaching Rp 6.5 trillion and a bribe of Rp 211 billion (Dessy Suciati Saputri dan Nur Aini, 2018).

Therefore, in the context of eradicating criminal acts of corruption, failure to return assets resulting from corruption is said to reduce the "meaning" of punishing corruptors (Saldi Isra, tt). The development of such thoughts implies that the eradication of corruption lies not only in preventing and punishing corruptors, but also includes actions that can restore the state's financial losses (asset recovery) as a result of these extraordinary crimes. One model that is now being developed to carry out the recovery of state financial losses is Mutual Legal Assistance. The seizure of assets resulting from criminal acts of corruption that occur abroad through Mutual Legal Assistance is an international cooperation mechanism relating to investigations, prosecutions, and examinations in court hearings in accordance with the provisions of the requested state legislation.

On Monday, February 4, 2019, Minister of Law and Human Rights (Menkumham) Yasonna Laoly signed a Mutual Legal Assistance (MLA) Agreement between Indonesia and the Swiss Confederation at the Bernerhof Hotel, Bern, Switzerland. The RI-Swiss MLA Agreement is the 10th MLA agreement signed by the Government of the Republic of Indonesia. Before Indonesia entered into an MLA agreement with ASEAN, Australia, Hong Kong, the PRC, South Korea, India, Vietnam, the UAE, and Iran (Rini, 2019).

Based on a juridical perspective, the RI-Swiss MLA agreement is an extraordinary achievement of mutual criminal assistance, and is a very important historical success of diplomacy, considering that Switzerland is the largest financial center in Europe. In the next stage, the importance of this bilateral agreement is as a legal cooperation platform, particularly in the government's efforts to eradicate corruption and return assets from the results of corruption (Asset Recovery). In line with this, the MLA Agreement can be used to combat crime in the field of taxation (tax fraud) as an effort of the Government of Indonesia to ensure that Indonesian citizens or legal entities comply with Indonesian tax regulations and do not commit tax evasion or other tax crimes.

But there is one thing that is quite interesting throughout the duration of this mutual legal assistance agreement, namely the existence of Indonesia's proposal, that the signed agreement adheres to the retroactive principle. The principle allows to reach out to criminal acts that have been carried out prior to the entry into force of the agreement as long as the court's decision has not been implemented. it is understood that efforts to recover assets obtained from criminal acts of corruption tend not to be easy to do. The perpetrators of corruption have extraordinary broad access and are difficult to reach in hiding or doing money laundering of the results of criminal acts of corruption (Basel Institute on Governance, tt). With regard to the new MLA mechanism and the retroactive idea, this study aims to comprehensively comprehend the theoretical background of the regulation of seizure of assets resulting from criminal acts of corruption abroad based on Mutual Legal Assistance Agreement.

RESEARCH METHOD

Judging from the type of research, the drafting of this research belongs to Sosiolegal research (Warassih, 2007). In this study, a purposive random sampling technique was used to find suitable speakers in qualitative research (Danim, 2002) from the Attorney General's Office of the Republic of Indonesia, Police Headquarters, KPK, Ministry of Law and Human Rights, Ministry of Foreign Affairs and PPATK and several Consulates Generals of foreign countries (Australia, Switzerland, Malaysia) who have formed MLA cooperation with Indonesia. Data collection techniques using in-depth interviews, observation, documentation and Focus Group Discussion (FGD) to subsequently drawn conclusions (Sudarto, 2002). As for data analysis techniques using interactive analysis as stated by Miles and Huberman (Milles and Huberman, 1984).

FINDING AND DISCUSSION

Uncovering the theoretical background of a developed model, the first and foremost step that must be taken is to compile a variety of literature that forms the dialectical basis for the emergence of such a model. Therefore, based on reference tracing and review of studies on new ways taken to recover state financial losses (asset recovery) through mutual legal assistance (MLA), one of which was stated by Beccaria. Through his book On Crimes and Punishments (1764), Beccaria expressed his view that the imposition of criminal sanctions should be designed (designed) to a certain level to eliminate the benefits gained by the perpetrators. Beccaria's thoughts in the following year period were elaborated by many figures, for example by Calebresi and Ronald Coase, publishing their writings titled 'Unlawful acts (torts)' and social costs. Both writings are the first attempt at how to apply economic analysis to law (Posner, 1998). Economic analysis of the law increasingly developed after Garry Becker linked it to the problem of crime, racial discrimination and so forth (Posner, 1998).

This economic analysis of the law changes the legal thinking especially in relation to understanding a rule of law, even the practice of law. As proof, by the 1990s there was at least one economist teaching staff in the best law faculties in North America, and some of them were in Western Europe. They took doctoral education, both Ph.D in economics and doctorate (Dj) in the field of law. Not a few of the legal journals published many writings using this economic approach, in fact there were several journals that specifically addressed this issue. This influence continued and gained momentum when in 1991 and 1992, two prominent economists, Ronald Coese and Gery Becker, received nobel prizes in economics. Because of this achievement, Bruce Acker said that the economic approach to law was the most important development in legal thinking in the twentieth century (Robert Cooter dan Thomas Ullen, 2000)

Based on this economic approach to law, in a more practical context in enforcing criminal acts of corruption, awareness emerged that the magnitude of state financial losses resulting from criminal acts of corruption was not very comparable with the magnitude of repayment of state financial losses from corruption. Such awareness carries the consequence that the recovery of state financial losses must be made as optimal as possible in any way that can be justified according to law. In principle, the right of the state must return to the country for the welfare of the people.

Observing the reality in current law enforcement practices, the amount of return on state financial losses is very far from the amount of financial losses

experienced by the state due to criminal acts of corruption. Even if it is compared with efforts to carry out law enforcement in eradicating criminal acts of corruption, the recovery of state financial losses as such is still very lame. Comparing data released by ICW with data released by Kompas, for example. Can be observed from the statement of the Investigation Division Staff, Wana Alamsyah, who said that during 2017 there were 576 cases of corruption with state losses reaching Rp 6.5 trillion and Rp 211 billion in bribes (Dessy Suciati Saputri dan Nur Aini, 2018) while Kompas reported in 2018 the Eradication Commission Corruption (KPK) proposed an additional budget of Rp 432.05 billion for 2019. Previously, the KPK budget ceiling was Rp 813.45 billion. With this additional budget submission, the total budget submitted by the KPK for 2019 is Rp 1.25 trillion (Devina Halim, 2018). Examining such conditions, of course more optimal law enforcement is needed.

At the same time, today the eradication of corruption is focused on three main issues, namely prevention, eradication, and return of assets resulting from corruption (asset recovery). This development is meaningful, the eradication of corruption lies not only in preventing and punishing corruptors, but also includes actions that can restore state financial losses (asset recovery) as a result of these extraordinary crimes. Failure to return assets from corruption can reduce the "meaning" of punishing corruptors (Saldi Isra, tt). Efforts to recover assets obtained from these criminal acts of corruption tend not to be easy to do. The perpetrators of corruption have extraordinary broad access and are difficult to reach in hiding or money laundering (moneylaundering) the results of corrupt acts (Basel Institute on Governance, n.d.). In such a condition, once again a more optimal law enforcement is needed in eradicating corruption on the one hand, and adequate asset returns on the other.

Therefore the mutual legal assistance model (MLA) is adopted as an effort that is believed to be more optimal in recovering state financial losses (asset recovery), especially those stored abroad. As theoretically conceived, Mutual Legal Assistance is a mechanism of international cooperation relating to investigations, prosecutions, and hearings in court hearings in accordance with the provisions of the requested state legislation. However, how can the optimization of law enforcement be rooted in his theoretical study?

In this part of the study, a review of such matters is the focus of its review. Such a theoretical study starts from the main principle in optimal criminal law enforcement, which is based on the idea of maximizing social welfare (Klerman, 2002)(Nuno Garoupa and Daniel Klerman, 2002). The government in designing policies, including policies prohibiting certain actions (in abstracto), must pay attention to the maximum profit that will be obtained. In the context of economic analysis of criminal law, social welfare can be pursued by taking into account the amount of profits obtained by the perpetrators from carrying out prohibited acts, minus the losses caused by those acts, and expenditures incurred in law enforcement (Nuno Garoupa and Daniel Klerman, 2002). Losses due to this crime include social losses incurred, costs that must be incurred by potential victims to prevent them from becoming victims, and losses directly experienced by victims . Meanwhile, the costs of criminal law enforcement include the costs of prevention, disclosure, arrest, and the imposition of criminal sanctions (Cohen, 2000). All of that must be measured and compared with the amount of profit obtained by the perpetrators from committing a crime.

Therefore, if the losses due to a crime (after being cashed) and the costs that must be incurred by the government to tackle the crime through law enforcement officers are apparently greater than the amount of profits derived by the perpetrators from the results of committing a crime, then the optimization of law enforcement will

not happen. Therefore, what needs to be done is to use other instruments in order to prevent the crime from happening. In other words, the actions to be banned and in fact the costs of law enforcement when violations occur are greater than the benefits to be obtained, it should not be prohibited and overcome with criminal legal instruments. Another thing that needs to be done is to enhance the possibility of the perpetrators of criminal offenses to be arrested, convicted, and sentenced to severe crimes, because with that social welfare can be realized.

When the possibility of being arrested is high, then law enforcement will be optimal, because there will not be many people who commit a crime, and thus there will not be much cost to overcome the crime and finance the operationalization of law enforcement. Likewise with the possibility of being convicted with a high crime that exceeds the profit obtained by the perpetrator (Friedman, 1993). Because with that, the perpetrator will bear all the costs of his actions. This thinking is generally called efficient punishment (Friedman, 1993).

Based on an economic analysis of criminal law, there are two models that can be used to realize optimal criminal law enforcement, namely shaping the individual's apportunities and shaping the individual's preferences. In the first formulation has the conception that a person rationally chooses the opportunities that exist to realize the greatest satisfaction based on the available choices. While the second has the conception that a person will act rationally as long as the choices he has are complete, and he will choose the opportunity in which there is the greatest advantage based on the choices he has (Dau-Schmidr, 1990). Someone will commit a crime based on their opportunities and choices. When there is a great opportunity, so that a person does not commit a crime, what must be done is to increase the possibility of being arrested, convicted and sentenced with a large (severe) criminal sanction as well. Likewise when the choices for committing a crime are complete, he will have many opportunities to commit a crime. Only then will criminal law enforcement be optimal, so that social welfare, which is the main goal, can be realized. In addition, efforts can be made to equalize the opportunity, both the opportunity to commit a crime and the opportunity not to commit a crime (Dau-Schmidr, 1990).

When the opportunity between committing and not committing a crime is the same, then the costs required in law enforcement when a crime occurs will be optimal. There won't be many people who commit a crime. Criminal law enforcement that can reduce crime rates is said to be optimal, and it is said to prevent crime (Dau-Schmidr, 1990). Optimal criminal law enforcement in the economic analysis of criminal law must be within the limits that are still tolerated, so as not to cause what is called over-enforcement. Excessive law enforcement occurs when the total number of criminal sanctions imposed on violators exceeds the optimal number of prevention efforts. Excessive law enforcement can also occur when the loss to be incurred by the offender exceeds the expected preventive effort from imposing sanctions on him (Bierschbach, 2005). When someone harms another person by 1,000 dollars, it will be said to be excessive if he is given a criminal sanction of a fine of 3000 dollars, if a fine of 2000 dollars is said to prevent him from committing a crime. Excess that will arise if criminal law enforcement does not pay attention to aspects of prevention that are expected to be able to prevent someone from committing a crime is the potential human rights violations committed by law enforcement officers against the perpetrators. It is possible for the perpetrators of criminal offenses to exceed the maximum limit of the mistakes committed. Through such a conception, the MLA modeling is trying to be built to provide a balanced "reward" while at the same time having the effect of preventing corruption which results in crimes being hoarded abroad.

CONCLUSION

Based on the MLA modeling as stated earlier, this study succeeded in uncovering the positive aspects of the regulation of seizure of assets resulting from criminal acts of corruption abroad based on Mutual Legal Assistance Agreement. The research also resulted in the findings of the function of law enforcement institutions and related institutions in Indonesia in efforts to seize assets resulting from criminal acts of corruption and money laundering that are stored abroad, such as in the Innospec case, Alstom case, the case of electronic ID cards in Malaysia and the alleged bribery of former Garuda president director. It can also be concluded that based on the conception of the reality of cooperation, it is known that in the context of eradicating criminal acts of corruption, failure in returning assets resulting from corruption can be said to reduce the 'meaning of punishment' against corruptors. The development of such thinking implies that the eradication of corruption lies not only in preventing and punishing corruptors, but also includes actions that can restore state financial losses (asset recovery) as a result of these extraordinary crimes.

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