Cross–Border Law Enforcement Against Money Laundering Suspects In South East Asia Nations (Asean) Through “Mutual Legal Assistance” And Its Interaction To Asean Economic Community

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Abstract: Money laundering has developed into a trans-national crime which unsettles international community. The advancement of technology facilitates the money laundering into a transnational crime and high-tech crime. This cross-border crime is a common enemy, since it brings overwhelming and opposite economic consequences among countries in the world. Given the cross-border nature of this crime, the effectiveness of law enforcement in prosecuting the perpetrators or fugitives in other countries is questionable. The customary legal framework between two states in handling such criminal lies in extradition treaty. However, concluding extradition treaty is a difficult task, in particular among countries in Southeast Asia. Moreover, the execution of extradition treaty has always been crammed by obstacles which arose from different interest between requesting and receiving country. In this regard, the need to reconstruct the law enforcement framework and mechanism in eradicating this crime is paramount. In Southeast Asia, strengthening law enforcement among countries in tackling this trans-national crime is imperative, especially in ensuring legal cooperation would enhance the economic development of ASEAN member states in the midst of ASEAN Community. While agreement on the extradition treaty between or amongst Southeast Asia seems difficult to progress, ASEAN member states have agreed on a mutual legal assistance treaty in 2004 (MLA). This study is aimed to show the use of MLA as an alternative instrument to enforce money laundering crime. This research is conducted through a Doctrinal approach to answer money laundering’s configuration in Indonesia and ASEAN and the possibility of using MLA as an alternative instrument for the extradition treaty.

Keywords: Money Laundering, Extradition, ASEAN Economic Community,

1. Introduction

One of the negative impacts of globalization in relation to legal aspect is increasing of trans-national crimes such as cross-border money laundering and internet crimes or high-tech crimes. It is affected by the advancement of information technology which makes a state borderless and connects the state and individuals all around the world. In fact, the advancement of technology is taken advantage by trans-national criminals to perform their act in various States and also make them easier to move between locations or run away to another State’s jurisdiction to avoid prosecution of the Country in which the crime is committed. This condition results in an international fugitive phenomenon. The trans-national crime issue is currently deemed by the international community as the enemy of all mankind (hostis humanis generis. The money laundering as part of cross-border crimes significantly ruins the order of life, global financial system, and economy of nations in the world. Therefore, a collective cooperation amongst states to eradicate this crime, mainly its perpetrator, especially in South East Asia region, is absolutely needed.
Law enforcement against the money laundering criminal to a foreign jurisdiction (cross-border money laundering fugitives) often faces an obstacle. It is due to lacks of global criminal law that can regulate this type of crime internationally. As we can see from how hard a number of Indonesian fugitives who are currently still hiding in Singapore and they are untouchable by the law due to no extradition treaty between the two states, so it results in impunity to the criminal impunity. However, the non-existence of extradition should not have been an obstacle for them to cooperate and the existence of the extradition does not always guarantee that the fugitive will be handed over to the requesting state. This fact results in doubt on the effectiveness of the extradition instrument. Therefore, it is necessary to create an alternative instrument for the extradition through Mutual Legal Assistance (MLA) which is linked to a fact that all ASEAN member states have signed the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters of 2004 (MLAT 2004) which the scope of this cooperation covers aspects of locating and identifying suspects. By the MLAT 2004, the Indonesia and Singapore should have been held a cooperation to find and turn in the fugitives to Indonesia.

In this essay, it will be discussed on what is the possibility of the MLA instrument to become an alternative for the extradition treaty in cross-jurisdiction law enforcement against cross-border money laundering criminal in ASEAN and the relation thereof to ASEAN economic cooperation.

2. Methodology

This research is categorized as doctrinal (normative) research with qualitative nature. As a qualitative research, this research relies on digging and giving the meaning of reality occurred. As a doctrinal research, it still relies on normative premise contained in legal norm linked to the reality in the field. As the doctrinal research, this research will further be analyzed through primary and secondary data. The primary data in this research covers legal instrument related to the research, while the secondary data is obtained by observation, interview, case research and reference study.

3. Findings

The money laundering like the other high-tech crime is a trans-national crime not recognizing state borders (borderless). A perpetrator can go into the internet from all over the world without being found out the location at which he/she commits the crime. It results in many difficulties for law enforcement to reveal the crime identity and motive and also the impact and implication on jurisdiction and legal system in various states. The money laundering and high-tech crimes characteristics including money are anonymity, global reach across jurisdiction, transient evidence and crime at network speed aspects. An effort to prevent money laundering at global level is starting to be intensively committed in line with establishment of Financial Action Task Force–FATF followed by various international conventions such as the UN Convention Against Organized Crimes of 2003 and several other conventions. In Indonesia, the effort to cope with the trans-national crime especially the money laundering crime was started by the enactment of the Law No.15 of 2002 as amended by the Law No. 25 of 2003 and ultimately amended by the Law No.8 of 2010 concerning Money Laundering.

The Money Laundering as part of international crime has become a common concern amongst states that cannot be separated from a fact that numerous money laundering criminals are escaping abroad to avoid prosecution in the state where the crime is committed by taking advantage of the non-existing of the extradition treaty amongst the relevant states. Learning from experience already had by Indonesia, which has not had the extradition treaty yet with Singapore, it has caused many Indonesian criminals escaping to the island country which until now they cannot be extradited. This fact is a form of permission to do crime and denial of fair and civilized humanity values because it has become some kinds of impunity without punishment against the criminals. However, historically whether the extradition treaty exists or not, pursuant to moral and international law principles, a criminal must be turned in by the State in which the crime exists to the State where the crime is committed (aut dedere aut punire) as suggested by Hugo de Groot (Grotius) – a forerunner in
natural law doctrine. Therefore, the non-existence of the extradition treaty should not have become an obstacle to enforcing the law against the running fugitives wherever they are. By considering the condition, it should be important to consider other mechanisms that can complete the lack of the extradition treaty.

In this case, in fact, there is a legal instrument having a context similar to the extradition treaty, but it just has different scope. The instrument is the 2004 ASEAN Treaty on Mutual Legal Assistance in Criminal Matters (2004MLAT) which its scope covers cooperation in “identifying and locating suspects” referring to an individual that can be interpreted as law enforcement against the individual physically. The importance of an MLA legal institution made effective in order to eradicate the trans-national crime in ASEAN region is a logical consequence by enforcing ASEAN Free Trade Area-AFTA which was starting to be in effect in 2012 and ASEAN Economic Community (AEC) in 2015 and already gave a positive impact on the economic development in the region by the implementation of investment, trade, and working freedom in ASEAN region. The economic cooperation advancement should be strengthened by a legal integration in ASEAN region through the implementation of free-movement of judgment concept, namely a concept mutually acknowledged and the execution of foreign judgment in criminal matters in regard to the criminal in the territorial jurisdiction of each ASEAN country on a reciprocal basis.

In a context of the MLA implementation in Indonesia, basically, there is no legal norm that operationally provides a procedure for the MLA implementation, either with respect to foreign MLA or the MLA proposed by Indonesia to a foreign country. The provision of the Law No. 1 of 2006 concerning Mutual Legal Assistance in Criminal Matters and the Law No. 15 of 2008 concerning Ratification of ASEAN Treaty on Mutual Legal Assistance in Criminal Matters do not regulate on how the MLA shall be implemented. This condition causes the law enforcements have a different point of view in construing and implementing this provision especially with respect to criminal fugitives running away abroad. On the other side, a non-juridical element effect in implementing the 2004 MLA T such as economical, political, and social factors are hard to avoid. In fact, the 2004 MLA T as a form of an international (regional) treaty has a hard law nature which should be complied with or implemented by the treaty signatory members. Upon the existence of the 2004 MLA T, then the non-existence of extradition treaty especially in the context of between Indonesia and Singapore can be coped with. At least, by the existence of the 2004 MLA T, then it will be no more obstacles in the performance of law cooperation between the two states. The use of MLA as the instrument that completes the extradition treaty needs to be modified to settle the existing issues. The modification can be done by way of:

a. Extension to Scope of the MLA

The scope of the 2004 MLA T needs to be extended to enforcement aspect especially to the criminal by making the criminal search and pursuit aspect effective as referred to in letter (j) locating and identifying witnesses and suspects.

b. The MLA as an Instrument that Completes the Extradition Treaty

The MLA instrument can be propositioned as an instrument that completes the extradition treaty. Hypothetically, the MLA instrument can be a co-existence and supplement to the extradition treaty. It means that the MLA is functioned in the event of the non-existence of extradition and they complete each other in the event of the existence of extradition.

c. Implementation of Free Movement of Judgment Concept

The free movement of judgment concept is a concept of recognition and enforcement of a judgment of a foreign court reciprocally in the relevant state. This concept is in line with current tendency requiring an international criminal law order that can be implemented internationally. This concept can be deemed as an antithesis of absolute sovereignty in relationship amongst nations in international law.
d. Reconstruction of Execution Mechanism

The implementation of the free movement of judgment concept in the context of cross-jurisdiction law enforcement in South East region wishes for a judicial institutional role. The role is highly strategic especially in relation to MLA and extradition requests to a foreign state (outgoing MLA & extradition) and an MLA and extradition requests to Indonesia (incoming MLA & extradition).

In addition to the foregoing modification, there are also doctrines that can penetrate the non-existence of extradition treaty such as, among other things: i) state common interest principle; ii) good neighbor principle; iii) Pacta Sunt Servanda principle; and iv) interdependence principle. The doctrines show that cooperation amongst the states to turn in each other’s fugitives without the existence of extradition treaty often gives a maximum result without deeming that extradition is not an essential and absolute condition.

4. Conclusion

The non-existence of extradition treaty amongst states is often taken advantage by cross-border money laundering fugitives to avoid prosecution from the State in which the crime is committed. This condition causes impunity to the criminals. The impunity to the criminals especially the cross-border money laundering and corruption fugitives, in turn, will have impacts such as disturbance of state economic system and damaging global finance foundations. Failing to capture the money laundering criminals by a reason of the non-existence of extradition treaty reflects a highly substantive and ineffective law which therefore became an alternative instrument to the extradition treaty, namely the Mutual Legal Assistance (MLA) instrument. Along with the signing of the 2004 ASEAN Treaty on Mutual Legal Assistance in Criminal Matters by all ASEAN member states, the MLA instrument which is basically a co-existence and supplementary instrument to the extradition treaty enables it to be implemented to capture the criminals through modification of MLA extension to enforcement aspect and through implementation of the free-movement of judgment concept, namely a concept regarding court judgment exchange or mutual recognition and enforcement of foreign judgment in criminal matters related to cross-border money laundering criminals on a reciprocal basis in ASEAN region. This concept is a form of realization of legal integration in ASEAN region designated to support economic cooperation or economic integration through single market in ASEAN region in the framework of ASEAN Economic Community (AEC).

5. References

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