

Opportunities to Implement Mutual Legal Assistance in Criminal Law Enforcement in Indonesia

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Abstrak: *Studi tentang Mutual Legal Assistance (MLA) di berbagai negara di belahan dunia telah banyak dilakukan. Akan tetapi, bagi negara Indonesia, hal ini adalah hal yang baru. Maka penulisan artikel ini bertujuan untuk menelaah Mutual Legal Assistance dari persepektif undang-undang dan kontrak sosial. Penelitian ini mempelajari tentang metode untuk mendapatkan keterangan saksi warga negara asing. Penulisan artikel ini menggunakan metode penelitian hukum normatif, dengan pendekatan konseptual dan perundang-undangan. Teknik analisis bahan hukum yang digunakan dalam penulisan artikel ini adalah dengan studi kepustakaan. Hasil dari penelitian ini adalah dapat diketahui bahwa warga negara asing berhak untuk menolak memberikan keterangannya di depan pengadilan Indonesia, serta tidak ada konsekuensi yuridis apapun. Berdasarkan fenomena tersebut, menyebabkan kurangnya alat bukti yang sangat penting dalam pemeriksaan perkara pidana yakni keterangan saksi.*

Kata Kunci: *Witnesses Testimony, Foreigners, Mutual Legal Assistance*

Abstract: *Studies on Mutual Legal Assistance (MLA) in various countries around the world have been carried out.*

However, for Indonesia, this is a new thing. So this article aims to examine Mutual Legal Assistance from the perspective of law and social contracts. This study explores methods for obtaining witness statements of foreign nationals. The writing of this article uses a normative legal research method, with a conceptual and statutory approach. The technique of analyzing legal materials used in writing this article is literature study. The results of this study are that it can be seen that foreign nationals have the right to refuse to give their statements before an Indonesian court, and there are no legal consequences whatsoever. Based on this phenomenon, it causes a lack of evidence that is very important in the examination of criminal cases, namely witness statements.

Keywords: *Keterangan Saksi, Warga Negara Asing, Mutual Legal Assistance*

INTRODUCTION

The phenomenon of crime in Indonesian society has developed from time to time following the development of society. The crimes that occurred in Indonesia were originally in the form of conventional crimes, and now crimes in Indonesia have developed into contemporary and transboundary crimes.¹ The development of crime is influenced by several factors, the most dominant of which are globalization, and the development of information and communication technology.² This situation brings new challenges in law enforcement, not only in the country where the case occurred, but also law enforcement in the international sphere. In the practice of international crimes, the methods and means used usually exceed the territorial limits of a country, so that law

¹ Romli Atmasasmita. 1997. Tindak Pidana Narkotika Transnasional dalam Sistem Hukum Pidana Indonesia. Citra Aditya Bakti. Bandung. p. 36.

² James O. Finckenauer. 2000. Meeting the Challenge of Transnational Crime. National Institute of Justice Journal July. Washington. p. 3.

enforcement against transnational crimes does not involve only one country.³ For example, with the presence of the perpetrator and the evidence that is not within the borders of the country where the incident occurred, of course, law enforcement using ordinary methods will be difficult, because it collides with the principle of state sovereignty which is the biggest challenge for law enforcement officials.⁴ In particular, in this context, it is how to present witnesses of foreign nationals who are abroad to provide information during the trial process in Indonesia.

In response to these problems, it is clear about the importance of effective international cooperation in relation to national and transnational crime issues.⁵ One type of international cooperation that can be used in law enforcement and can exchange information is mutual criminal assistance.⁶ Therefore, in 2006 Indonesia passed the Law of the Republic of Indonesia Number 1 of 2006 concerning Mutual Legal Assistance in Criminal Matters or hereinafter referred to as the MLA Law to provide a legal basis for cooperation between Indonesia and the state. others in requesting and/or receiving requests for assistance from foreign countries. However, the presence of the MLA Law as an alternative solution to law enforcement in the modern era seems there are still challenges that must be faced in its implementation because the provisions in the law have not been able to overcome them.⁷

Examining more in depth from Article 14 paragraph (2) of the MLA Law it is stated that, "In the event that the person whose presence is requested as referred to in paragraph (1) is willing to give testimony and travel to Indonesia, the Minister may make arrangements with the foreign country to:

1. bring the person to Indonesia;
2. return the person to a foreign country; or

³ Mohammad Irvan Oliy, 2005. Sempitnya Dunia, Luasnya Kejahatan? Sebuah Telaah Ringkas Tentang Transnational Crime. *Jurnal Kriminologi Indonesia* Vol. 4 No. 1 September, p. 14-27.

⁴ Marfuatul Latifah. 2016, Penunjukan Otoritas Pusat dalam Bantuan Timbal Balik Pidana di Indonesia. *Jurnal Negara Hukum* Vol. 7 No. 1 Juni, p. 54.

⁵ Supriyanta, 2008, Perkembangan Kejahatan dan Peradilan Pidana. *Jurnal Wacana Hukum* Vol. VII No.2 Oktober, p. 19.

⁶ Marfuatul Latifah, *Loc. Cit.*

⁷ Yudha Bhakti, Ajarotni Nasution, dan Omon, 2010, Analisis dan Evaluasi Hukum Terhadap Undang- Undang Nomor 1 Tahun 2006 tentang Bantuan Timbal Balik dalam Masalah Pidana. BPHN Kemenkumham RI. Jakarta, p. 3-4

3. other related matters.

According to this provision, it can be understood that the witness is allowed to refuse or has no obligation to provide assistance in the form of a statement or testimony in a trial in Indonesia. Further regulated, in Article 16 of the MLA Law, witnesses of foreign nationals who are in Indonesia or not yet in Indonesia are given immunity from law and special rights, namely they cannot be subject to sanctions under Indonesian law if they are not willing to fulfill assistance. This is done because foreign nationals have the right not to be subject to the law in Indonesia but to the law of their country, but if the witness refuses to testify at the Indonesian trial, there is no provision for sanctions from the country of origin either.

This provision clearly makes it difficult for the applicant country, in this case Indonesia, to obtain information or testimony from a person because before providing assistance in the form of testimony, the witness is asked first whether the witness is willing to testify at the trial process in Indonesia or not. This has the potential for requests for assistance from the Indonesian state to be unfulfilled. In fact, based on Article 159 paragraph (2) of Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP) it is stated that testimony is a "legal obligation" for everyone. Witnessing and giving testimony before a court is the main duty or obligation of a witness. If the witness refuses to comply with this obligation, he or she will be subject to criminal penalties under applicable law. It should be, every country requires someone to give testimony in order to reveal the facts of a crime. In carrying out this testimony, the witness must be given protection by his country.⁸ Moreover, protection for witnesses who are also perpetrators (justice collaborators) who are foreign nationals, each country must provide protection so that the disclosure of a criminal case can run as well as possible.

⁸ Oktavianus Garry Runtuwene. 2012. Hak dan Kewajiban yang Mengikat Terhadap Saksi di dalam Praktik Persidangan Pidana. *Lex Crimen* Vol. 1 No. 4 Oktober-Desember. p. 151.

METHOD

The writing of this article uses a normative legal research method, with the nature of prescriptive analysis. The approach used in this legal research is a conceptual approach and a statutory approach. The legal material analysis technique used in writing this article is literature study.

RESULT AND DISCUSSION

Crime develops along with the development of human civilization, and technology. The development of crime can be seen from the modus operandi, perpetrators, and the consequences it causes, crimes that were previously conventional have become more modern and use sophisticated tools. Individual criminals turn into groups/syndicates and are organized and have international networks.⁹ The era of globalization which is supported by advances in science and technology in the fields of transportation and telecommunications which is increasingly sophisticated, in addition to providing positive benefits for humans, also has a negative impact because it also affects the development of crime. Criminals and their proceeds can easily and quickly move from one country to another.¹⁰

As an effort to prevent and overcome transboundary crimes that arise, one form of cooperation was born in the form of agreements and laws called Mutual Legal Assistance in Criminal Matters. As conceptualized theoretically, Mutual Legal Assistance is

⁹ Budiman Peranginangin. 2005. "*Pengalaman Indonesia Dalam Menangani Permintaan Mutual Legal Assistance in Criminal Matters*". (makalah disampaikan dalam International Workshop on Mutual Legal Assistance Issues, 28-29 September 2005). Jakarta.

¹⁰ Irma Sukardi. 2012, Mekanisme Bantuan Timbal Balik dalam Masalah Pidana (Mutual Legal Assistance) dalam Perampasan Aset Hasil Tindak Pidana Korupsi Berdasarkan UU No. 1 Tahun 2006 tentang Bantuan Timbal Balik dalam Masalah Pidana. Tesis. Fakultas Hukum Program Pasca Sarjana Universitas Indonesia, Jakarta, p. 27.

a mechanism for international cooperation with regard to investigation, prosecution and examination in court in accordance with the provisions of the requested country's laws and regulations.¹¹ Cooperation based on the agreement can be divided into multilateral conventions such as the United Nations Convention Against Corruption (UNCAC) and the ASEAN Mutual Legal Assistance Treaty (AMLAT), while cooperation without convention uses the provisions of mutual criminal assistance applicable in each country and letters of rogatory.

Following up on this, in 2006 Indonesia issued Law Number 1 of 2006 concerning Mutual Assistance in Criminal Matters (Law MLA) which has been in effect since March 3, 2006.¹² In this case, MLA is an extension of efforts to prove in Indonesia which has been regulated so far. in Article 184 of the Criminal Procedure Code, which has now expanded its provisions, particularly for the presence and presence of witnesses.

The establishment of the MLA was motivated by the factual conditions that as a result of differences in the criminal law system between several countries, which resulted in inaction in criminal investigations.¹³ For example, the differences in the legal systems of countries in the world are regarding the criminal justice system, namely the "Due Process Model", on the one hand there are those who adhere to the "Crime Control Model" system. The Due Process Model which focuses more on the protection of human rights for suspects, creates a long bureaucracy in criminal justice. Meanwhile, the Crime Control Model emphasizes the efficiency and effectiveness of criminal justice based on the presumption of innocence.¹⁴ On the other hand, the legal system also includes

¹¹ Giri Suprapdiono, 2012, Developing International Cooperation: A Need for Expediting Mutual Legal Assistance, *Jurnal Opinio Juris* Vol. 11 No. 01 Mei-Agustus 2012, p. 65.

¹² Yudha Bhakti, Ajarotni Nasution, dan Omon, *Loc. cit.*

¹³ Irma Sukardi, *Op.cit* hal. 18.

¹⁴ Herbert L. Packer, 1968, "Two Models of The Criminal Process". Reprinted from *The Limits of the Criminal Sanction* by Herbert L.Packer. Stanford University Press, p. 4-8.

differences between the terms of the crime referred to, such as the dual criminality principle.¹⁵ From the example of the difference in legal systems, MLA is present as a solution in the form of cooperation between countries or the formation of laws for countries that want to regulate it. Article 5 of the MLA Law also stipulates that if there is no agreement, this assistance can be carried out based on the principle of reciprocity or good relations between the two countries.

MLA is one of the current law enforcement processes that does not only involve one country but can involve two or more countries in the world. They have the same passion for fighting crime even though it occurs in other countries by providing various kinds of assistance that will be requested. Article 11 s.d. Article 17 of the MLA Law regulates the assistance of testimony from foreign nationals who are abroad at the request of the Indonesian Government to foreign countries. In addition to using MLA, Indonesian law enforcers also have international cooperation networks with law enforcement agencies from other countries or often referred to as agency to agency. For example Interpol, Asset Recovery Inter-Agency Network Asia Pacific by the Attorney General's Office, and so on. This collaboration is an informal collaboration that has proven to be faster, more efficient and accurate in obtaining evidence. In order for the evidence to become valid evidence before the court, the informal request can be followed up through a formal channel, namely MLA. The condition is that the requesting country must have complete and good data beforehand from investigation to investigation to strengthen investigations in handling a case, so that the requested country is willing to help to provide maximum assistance¹⁸. Thus, MLA plays a very important role in preventing and eradicating transnational crime as an alternative solution to presenting evidence in this context, witnesses who are abroad to attend a trial in Indonesia.

¹⁵ Irma Sukardi, *Op.cit*, p. 22.

Observing the three indicators above, it can be seen that MLA in general in the law enforcement process in Indonesia has at least three main functions. However, the thing to understand is that the entire MLA system is essentially a plea for help. So, whether the request is granted or not, it still depends on each country, especially the country to be requested.

Examining the MLA Law, the law does not stipulate in special provisions or articles regarding the mechanism for submitting requests for testimony and how to present witnesses in court proceedings in Indonesia. The MLA Law only regulates in general the procedures that must be followed and the forms of assistance that can be provided. The stages of the MLA process in this context, requests for witness testimony and efforts to present witnesses in the trial process are regulated in Article 9 paragraphs (2) to d. Article 15 of the MLA Law. The provision states that Indonesian law enforcers can request a statement from a person or testimony by coming to the requested country in terms of the investigation process. Meanwhile, in the process of prosecution or trial, law enforcers can request the presence of the person voluntarily to give their testimony before an Indonesian court. If the witness is not willing to attend the trial examination process in Indonesia, the witness can provide his/her statement via teleconference or a written statement which will be read out by the public prosecutor during the trial process. In addition, witnesses are given immunity and special rights as stipulated in Article 16 of the MLA Law. If the witness is not willing to fulfill the assistance, then the witness cannot be subject to sanctions under Indonesian law. On the other hand, this provision results in potential requests for assistance being unfulfilled. The MLA Law and the MLA agreement between Indonesia and other countries have no provisions that oblige the giving of testimony. And there is no provision for criminal sanctions if the witness refuses to give a statement or refuses to be present in the trial process.

Article 159 paragraph (2) of the Criminal Procedure Code states that, being a witness is a legal obligation, if he refuses to be

a witness in a court hearing (which is one of the formal requirements for giving testimony), he can be subject to criminal penalties based on the provisions of the applicable law.¹⁶ In order to prevent witnesses from being present at the trial even though the witnesses are abroad, witnesses can provide their statements virtually via teleconference, as has also been regulated in Article 13 of the MLA Law. However, it would be nice if the witness was willing to be present in person at the judicial process in Indonesia. So that court officials such as judges, legal advisers, public prosecutors, and defendants can cross-examine directly. In addition, court officials can also guarantee directly that in giving their testimony, witnesses are free from intervention or threats from any party with assistance that has been determined by the two countries

Observing the description, the obligation of foreign nationals to be witnesses and be present at Indonesian courts can be reviewed through the social contract theory as proposed by Thomas Hobbes, John Locke, and J.J. Rosseau. They basically say that the social contract is the granting of part of the rights of citizens to citizen leaders. In this context, the leader gives his mandate to law enforcement. When the law enforcers act as representatives of the state to enforce the law, they still need the help of citizens. In this case, not only Indonesian citizens but also foreign nationals by asking for help through the government of the foreign country.¹⁷

For example, there is a witness who is unwilling to come or testify to country A because of the corona virus, if country A wants to continue to receive the witness's testimony, the witness asks to be facilitated by means of a teleconference or examination in country B. Then, a written statement is made signed by the witness

¹⁶ Rina Sulistiani. 2013. Tinjauan Mengenai Penggunaan Hak Ingkar dan Saksi *A De Charge* dalam Hukum Acara Pidana. *Jurnal Verstek* Vol. 1 No. 2. Surakarta. p. 139.

¹⁷ Muhammad Rustamaji. 2019. Susur Galur Wewenang dan Tanggungjawab Presiden dalam Sistem Peradilan (Telaah Teoretis Penegakan Hukum dan Keadilan). Makalah disampaikan pada FGD Kerjasama FH UNS dengan Lembaga Pengkajian MPR RI, 11 Juli 2019.

and the enforcer. the law of country A so that later the witness's testimony will be read out during the trial process in country A. In this case, the witness argues that he has given up some of his rights to his country and has also paid taxes, for example, then he has the right to ask for the facility to be facilitated. This social contract theory, when linked to the principles of the MLA Law, gives the meaning that the state has the right to regulate, represent some of the rights of its citizens, and can impose sanctions only on its own citizens. So that foreign citizens are not subject to the laws of other countries and cannot be sanctioned because they have the right to provide assistance voluntarily and their rights are definitely protected by their own country. So, the social contract applies to each country, not across countries. However, if the witness is not willing to give testimony or be present at the trial, the request for assistance will not be fulfilled. Thus, giving testimony should be an obligation for citizens because witnesses are bound by a social contract with their country. In carrying out its obligations, the country where the witness lives will certainly provide the necessary protection and facilities. In order for a foreign citizen witness who is abroad to be willing to attend and give testimony at the trial, the requesting country must convince the witness by detailing the relevant case, the assistance to be requested (other than what the witness has the right to refuse and be punished), the purpose of the request for assistance, identity and functions that carry out investigations, prosecutions, and judicial processes, facilities and protection to be provided.

CLOSING

Mutual Legal Assistance (MLA) in general in the law enforcement process in Indonesia has at least 3 main functions, namely as a method to respond to the dynamics of crime, as a solution that bridges legal system differences, and as a joint embodiment in dealing with global or cross-border crime. However, the thing to understand is that the entire MLA system is essentially

a plea for help. So, whether the request is granted or not, it still depends on each country, especially the country to be requested.

Regarding the procedure for giving witness testimony in the trial process, if the witness is not willing to be present to give testimony at the trial, the witness cannot be subject to sanctions under Indonesian law. Here it can be seen that when the MLA serves as a bridge for the presence of witnesses of foreign nationals who are abroad, in the trial process in Indonesia in the context of a social contract, it is still necessary to have willingness, permission, and the provision of adequate facilities from the country concerned to facilitate witnesses. in giving testimony in other countries.

Thus, reformulation is needed regarding witness obligations in law enforcement and incorporates the MLA concept as an extension of the evidentiary process in preparing the Draft Criminal Procedure Code (RUU KUHAP). It is hoped that the request for assistance from the requesting country to the requested country can be fulfilled.

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