

SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS

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I. INTRODUCTION

The nature of corruption and organized crime nowadays, has transformed into extraordinary and sophisticated crime that intermingled with economic crime such as money laundering, fraud, or tax embezzlement. Unfortunately, corruption has impacted to national stability and security of societies.

Therefore, the importance of witness become crucial in the investigation and prosecution of the corruption cases, and they might provide great help for law enforcement officer such as police and prosecutor to reveal the case and put the perpetrator behind the bars. However, becoming a witness or reporting person is not an easy task since they may face threats, intimidation, physical abuse, even death, not only for themselves but also for their families, especially on crimes related with drug cartel or organized crimes.

Fighting against corruption is one of national objectives of Indonesian government; therefore the protection of witness especially in corruption cases becomes a great concern of the government. This paper will discuss the condition of witness and whistle-blower protection in Indonesia as well as the Indonesia legislations enacted, in order to support the protection of witness and whistle blower and also obstacles and challenges regarding the implementation of the law.

II. INDONESIAN LEGAL FRAMEWORK

A. Relevant Legislations

1. Law 13/2006 regarding the Protection of Witnesses and Victims

The Law is the foundation for protecting witnesses and victims. The law enacted in order to protect the rights of witnesses and victims in the crime proceeding and in line with the article 32 and 33 of United Nations Convention Against Corruption that stipulates the obligation for every state party to provide effective protection for witness, experts, victims and reporting person from potential retaliation or intimidation including his/her family or any person close to them. Indonesia has ratified this convention in 18 April 2006 by Law 7/2006.

Specifically Law 13/2006 defines any person who can obtain the protection and any assistance. Pursuance to article 1, the person defines as follows:

- (i) Witness is any person who is eligible to give testimony in accordance with preliminary investigation, investigation, prosecution and in court examination regarding criminal cases that they, by their own, hear, see, and/or experiencing.
- (ii) Victim is any person who suffers inflictions, physically and mentally, and/or economic loss caused by a crime;
- (iii) Family is any person who is blood and/or marital related to the witness or victim.

Where in the explanation of article 10 para.1 defines Reporting person as any person who provides information to the law enforcer regarding criminal cases and crown witness is a witness who is also a suspect who provides assistance to reveal criminal cases that he/she involves.

Furthermore, the law stipulates that witness and victim have rights as follows:

- (i) Having protection for the security of his/her own life, family, and belongings, also free from any threats regarding their testimony;

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- (ii) Participating in selecting any kind of protection or security support;
- (iii) Giving testimony without any pressure;
- (iv) A translator;
- (v) Free from any leading questions;
- (vi) Any information regarding the case progress;
- (vii) Any information regarding court decision;
- (viii) Any information regarding the release of the convicted person;
- (ix) Having new identities;
- (x) Having new place to live;
- (xi) Access to counselor;
- (xii) Having allowance during their protection until the protection program is over.

However, not every case would be placed under the protection program of witness and victims. The protection program for witness is only given in some particular cases. The case that required protection will be decided by the Protection of Witness and Victim Agency. Some particular crimes that might need protection for their witness and victim are corruption, narcotics, terrorism, and any other crimes that put witness and victims in endangered situation (the explanation of article 5 sub 2).

2. Law 31/1999 regarding Eradication of Corruption

As mentioned earlier, corruption in Indonesia has become extraordinary crime; therefore the task of the law enforcement officer is getting harder. The prosecutor has big challenge to bring the corruption case every successful for prosecution. Witness and reporting person become very crucial as they can provide any data or testimony that may support the evidence of the case.

The necessity of securing witness and reporting person is stipulated by the Law 31/1999. Article 31 (1) stipulates that “in investigation and examination before the court hearing, witnesses and any other persons concerned with corruption cases shall be prohibited from mentioning the name or the address of the reporting person, or other matters which may reveal the identity of the reporting person”. Where in the paragraph 2 states that “prior to the convening of a trial, the witness and other such persons shall be notified of the prohibition as referred to in paragraph (1)”.

For the obstruction of justice, the law criminalizes the perpetrator as stated in article 21 that “any person intentionally preventing or obstructing, or directly or indirectly make failure the investigation, prosecution and examination or the suspect or defendant or witness in corruption case, is liable to minimum three years imprisonment and not exceeding of twelve years and/or fine of Rp. 150,000,000 (one hundred and fifty million Rupiahs) and not exceeding of Rp. 600,000,000 (six hundred million Rupiahs). (source: <http://www.hamline.edu/apakabar/basisdata/2000/03/13/0022.html>).

3. Law 35/2009 regarding Narcotics

The law 35/2009 was enacted by Indonesian government in order to face the illicit drugs crime that become more sophisticated, transnational and supported by very stable organization. Every year the victim of drugs abuse is increasing, therefore the law should be more applicable to the current condition and situation.

Regarding protecting witness, the law stipulates in article 100 that witnesses, reporting persons, investigators, prosecutors and judges in regards of the narcotic crime shall have the protection by the state from any threat that endangered their life, and/or their belongings, before, during and after the proceeding of crime”.

4. Law 15/2003 regarding the Eradication of Terrorism Crime

The act of terrorism brings terror, fear, violence, and victims not only life but also belonging of society. The post traumatic of terrorist attack in Indonesia was one reason for the government to enacted Law 15/2003. In the law, the state shall provide the protection for witness, investigator, prosecutor and judge and their families from the possibilities of any endanger threat (article 33) and like the law of corruption, law 15/2003 also criminalize the obstruction of justice as stipulated in article 20 that every person who use the force or threat to intimidate investigator, prosecutor, lawyer and/or judge that may disturb the process of

crime is liable of minimum three years of imprisonment that not exceeding to fifteen years of imprisonment.

B. Institution related to Witness and Victim Protection

The protection of witness and victim in the criminal justice system of Indonesia are in the stage of investigation, prosecution and examining before the court. On every stage of prosecution, the law enforcement has duty to secure their witness and victims. However, since 2006 as the government enacted law 13/2006, the authority to securing witness and victims was also given to the new agency called Protection of Witness and Victim Agency (PWVA).

Therefore the institution relates with the witness and victim protection as follows:

1. Investigator

During the investigation, Indonesian Police as investigator for major crimes must comply Law 8/1981 regarding criminal procedure law, that stipulates the investigator shall hand over the complete case brief, the defendant and the evidence to the public prosecutor. And a complete case brief requires at least two witness as one witness is not sufficient to prove that an accused is guilty of the act he/she conducts. In case, one witness willing to give testimony however the other witness refuses to stand before trial in regards for his/her safety, this means that the police only have one witness. Therefore, the requirement for witness protection in the investigation stage is crucial. Though, the law does not stipulate specifically regarding the procedure to protect and secure the witness, Indonesian police has resources, safe house and human resources to secure the witness and victims in coordination with the PWVA.

Furthermore in article 113 of the Law 8/1981 regarding Criminal Procedure stipulates that under reasonable reason, a witness may not perform in the investigator's summons, and then the investigator will visit the witness to conduct the investigation. Law enforcement officer may use the article in order to protect the witness. Though the article does not clearly determines "the reasonable reasons", a witness may only absence under any reasons that admissible by the investigator for instance because of awareness of serious threat.

2. Prosecutor

Also, regarding criminal procedure law mentioned above, it is the obligation of prosecutor to bring the witness before the court for examining. Therefore, the prosecutor have burden to the witness presence. For corruption case, the prosecutor also has authority to investigate, and the obtain witness to support the investigation, however, unlike the police that have resources to protect witness and victim, prosecutors do not have resources to secure the witness and victim, for instance the safe house. Since prosecutors do not have the capacity, generally prosecutors maintain cooperation with the police and the PWVA in securing their witness before, during and after the court.

3. Judge

In examining the case, judges hear the testimony of witnesses. For the reason of the safety of the witness, judges in a trial can deliver a decree that the witness shall be put under witness protection program. Though it is not stated clearly, judges at trial have authority to do so.

In order to secure the witness, both Law of Criminal Procedure and Law 13/2006 regulate the absence of the witness before the court in giving his/her testimony. Article 162 of the criminal procedure law stipulates that testimony of the witness can be read before the court under several circumstances such as the witness is pass away, the location of the witness is far from the court, or may not present under reasonable reasons. Furthermore, the sworn testimony that is read before the court has the same value with the testimony of the under oath witness before the court.

Article 9 of Law 13/2006 protects witness who feels under serious threat, for giving testimony in writing or by electronic devices. The writing testimony should be given before competent authority and should be signed, while testimony by electronic devices should be made with the assistance of competent authority. However the use of communications technology before court is not common in Indonesia. The reason of this situation is because the use of technology must be supported by sophisticated technology. Lack of budget would constraint the use of technology before the court. This means that the witness must present

in the court, however to protect their safety, usually the court would be guarded by policemen on the base of the level of security. Another obstacle is some judges do not familiar in examining witness testimony without witness presence, especially in big cases, generally judge requires the witness to present before the court therefore they can question the witness in person to find the truth.

Furthermore, in article 176 of criminal procedure law states that if the defendant acts inappropriately judge has authority to remove the defendant from the court, after judge warns the defendant and he/she do not listen to judge. If the defendant continues to act improperly after warned by judge, then judge can remove the defendant and made the decision without the defendant presence instead. Judges also have authority to remove certain spectators if they think that spectators' presence will intimidate the witness in giving testimony. Not even spectator, media as well.

Lastly, Judges also have discretion to lighten the punishment of a person who coordinates with law enforcer in the successful of prosecution.

4. Protection of Witness and Victim Agency (PWVA)

As stipulated in article 11, Law 13/2006, PWVA, established as an independent agency and shall be responsible directly to the President. PWVA is a new agency that is put in the criminal justice system besides investigator, prosecutor and judge. The objectives of the establishment of PWVA is to provide security for witness and/or victim in order to give testimony in every stage of prosecution whether it is in investigation stage, prosecution or examining before court. The protection is given to the person who will give the testimony in court; in the progress of his/her testimony of after they give the testimony for a certain criminal cases.

In giving service to the community, PWVA takes the request from society who needs protection or assistance by email, letter, and telephone, in person or through law enforcement. PWVA will register the request and ask the person to complete the document. The requesting person must sign the letter of consent to follow the legislation and requirement under the witness and victim protection program. During the program the witness must not communicate in whatsoever way with any person unless under the PWVA permission. After the person submit his/her request, within 30 days PWVA will consider the request has been completed or not. If the person can comply the requirement, within 7 days PWVA will decide whether the request should be granted or denied.

Up to 2009, so far PWVA has registered 84 requests as follows:

NO	CASES	YEAR	
		2008	2009
1	Corruption	3	19
2	Homicide	1	10
3	Land dispute	1	9
4	Domestic violence	-	6
5	Torture and abuse	-	4
6	Fraud and counterfeiting	-	4
7	Sexual assault (rape)	2	3
8	Kidnapping	-	2
9	Election crime	-	2
10	Defamation	1	1
11	Shooting	-	3
12	Human rights abuse and environment	-	1
13	Unlawful detention	-	1
14	Bribery	-	1

15	Unlawful act	1	-
16	Embezzlement of migrant worker fund	-	1
17	Money politic	1	-
18	Malpractice	-	1
19	Embezzlement and Money Laundering	-	1
20	Negligence	-	1
21	Interception	-	1
22	The damage of pray house	-	1
23	Mal administration of public service and law enforcement	-	1
24	Selling of government asset	-	1
Sum		10	74
Total		84 cases	

Source: 2009 LPSK annual report

III. CURRENT SITUATION REGARDING WITNESS AND VICTIM PROTECTION

A. Citation of Related Cases

1. Incompetency of PWVA

On 14 March 2009, a Director of state owned company was murdered in his car after playing Golf. The victim was shot to death by two people. After investigation, the police found at least seven people involved in the murder, one of them was media business tycoon, high ranking policeman, and the other was the head of state commission. Police also found a key witness who was the wife of the victim. The police secured the woman in a safe house; however controversy rose after the police protection. Should the woman secured by PWVA as an independent agency? The police made an argument that it was their duty to secure the key witness, on the other hand critiques was pointed to PWVA for the incompetency to secure the key witness and victim.

2. Conviction of Whistle-blower

A high ranking policeman, report to the press about the enormous tax embezzlement scandal that connected to the employee of tax office in Jakarta. The suspect has arrested and allegedly taking bribery from many big companies. Unfortunately the whistle-blower was convicted and arrested for corruption cases related to one of the company he reported. The general asked for protection in the safe house; however the police did not release the general to PWVA and argued that even though he was a whistle-blower he also a suspect for corruption case, therefore he could not get the protection under the witness and protection program by PWVA.

The general asked for judicial review to the court of article 10 para.2, Law 13/2006 that stipulates a witness who also a suspect in the same case, may not be released from criminal charge if he/she is proofed guilty, however his/her testimony can be used as consideration by the judge for lightened the sentence. He argued that since he was a whistle-blower he could not be prosecuted on the same case. However the judges came to the decision that the general may not be mitigate from his status as a defendant, however, if he found guilty, the court will consider lightening the sentence.

B. Problems in Witness and Victim Protection Program

Both cases above show the problem regarding the implementation of the law of the protection witness and whistle-blower.

1. The Role of PWVA

Though, the existence of PWVA has been legalized in Law 13/2006 however the agency is rather new. The case above has shown that as a new agency, PWVA has a big assignment in protecting witness and victim, therefore, the existence of the PWVA must be supported by the other agencies such as Police, Prosecutor, Judge and Lawyer. The failure of PWVA to protect the key witness does not mean that the agency has incapability however there is a gap between the new law and agency with the older institution.

PWVA must be more aggressive in socializing its existence and build a good coordination and cooperation with the other institutions. In the first example of case, the woman chose to go to the police for protection rather than to PWVA, at the same time, the police did not report the condition of the women to PWVA, as an agency that is responsible in protecting witness. It is shown that the existence of the agency is quite unfamiliar either in the society or among the government institutions.

2. The Protection of Whistle-blowers

Indonesia does not have the regulation related to the protection of whistle-blower. There is still a controversy regarding the definition of whistle blower itself. Article 10 (2) Law 13/2006 only touches upon witness who take position as a suspect as well, on the same case. The article clearly states that the witness cannot be released from charge if he/she is proofed guilty, however his cooperation in revealing the case would be considered by judge to lighten his sentence. One of the legal experts in Indonesia, Harkristuti Harkrisnowo says the reason not to release the punishment is that there is a big concern of the condition as a whistle-blower might be used as an advantage by any person who conducts a crime to free from the punishment. For instance a person who conducts the bribery might use his position as a whistle-blower to report the case he involved to be released from his/her punishment.

Another Indonesian expert Yusril Ihza Mahendra says that the definition of whistle-blower in Indonesia has a different meaning. Whistle-blowers in Indonesia are not involved in the crime, where in common law countries, a whistle-blower is a person who involved in the crime reporting his/her conduct to the law enforcement.

Though the concept of whistle blower is not recognized in Indonesia, accordance with the progress to revise Law 13/2006, there is a big concern in the community to protect the whistle-blower in the future, because the general as mentioned in related cases above had succeeded in revealing the corruption case of billion Rupiah.

IV. CHALLENGES IN SECURING PROTECTION OF WITNESSES AND VICTIMS

In the future, in line with the transformation of serious crimes such as corruption and organized crime to become more sophisticated and difficult to reveal, the need to protect the witness will be more important. At the same time, the challenges will be bigger as well. The challenges in protection of the witness as follows:

1. Different Perspectives among Law Enforcement

The different perspectives among law enforcement will become a crucial issue. The difference will lead to conflict between law enforcement; therefore the good coordination among law enforcement is salient. So far, PWVA has signed some Memorandum of Understanding between another agencies and law enforcement officers such as Attorney General Office and Police. Recently PWVA has signed Letter of Commitment in Bali on December 1, 2010. In the future cooperation must be expanded to more agencies and institutions in order to show the existence of the PWVA and its authority among agencies but also to the community in the protection of witness and victim, therefore in the future a Standard Operational Procedure in protecting witness can be arranged between agencies.

2. Working across the Indonesian Territory

As a new agency, PWVA is demanded to broaden their area not only around the capital city because

serious crime such as corruption is conducted in every region, therefore the support from the government and law enforcement is needed. With the assistance from local government and law enforcement, PWVA may work together to get access to rural community. Besides the support from the government regarding fund is also needed, because it may be time consuming and money consuming in order to obtain data and to investigate witness who lives far from the head office of PWVA.

3. Competent Human Resources

Securing protection of witness is not an easy duty, the competent human resources is needed to comply the authority of PWVA. A well trained agent with good education background is the basic need of PWVA, a person who not only has highly competency but also a good approach skill to the witness and victim.

4. Technology Support

The support of technology is a needed in the courtroom, just in case a witness cannot testify directly before the court. However applicable regulation also needed in supporting the use of technology in court examine.

V. CONCLUSION

Preventing corruption and organized crime requires not only good investigation and prosecution of the crime, but also the protection of the witness and victims. However, securing protection of witness it is not an easy assignment, the coordination, cooperation and same perspective between law enforcement and related agencies is needed. The enactment of Protection Witness and Victims Law and the agency in Indonesia is a turning point in the development of protecting witness.

Even though, Indonesia has some incapability regarding legislation and resources; however the challenges would be eliminating in the future for instance by revising the law in the issue of whistle-blower and reporting person.

RESOURCES

RI Law Number 8 year 1981 regarding Criminal Procedure
RI Law Number 35 year 2009 regarding Narcotics
RI Law Number 15 year 2003 regarding Eradication of Terrorism Crime
RI Law number 31 year 1999 regarding Eradication of Corruption
RI Law number 13 year 2006 regarding Protection of Witnesses and Victims

Kesaksian, Media Informasi Perlindungan Saksi dan Korban, Edisi 1 Januari-Februari 2010.

Abdul Haris Semendawai, SH, LLM, *Program Perlindungan Saksi dan Tantangannya di Indonesia*, Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crimes.

Sent Rani Julianti to Independent Agency

<http://www.primaironline.com/berita/detail.php?catid=Peradilan&artid=serahkan-rani-juliani-kepada-lembaga-yang-lebih-netral>

Key Witness under the Wrong Hand,

<http://majalah.tempointeraktif.com/id/arsip/2009/08/24/LU/mbm.20090824.LU131228.id.html>

Is Susno Deserved Protection?

<http://www.antikorupsi.org/antikorupsi/?q=content/17411/layakkah-susno-dilindungi-sebagai-saksi>

I am not a Whistle-Blower

<http://www.mediaindonesia.com/read/2010/10/10/173514/16/1/-Yusril-Saya-bukan-Whistle-Blower>

Indonesia does not have Regulation regarding Protection of Whistle-Blowers

<http://www.mediaindonesia.com/read/2010/08/19/163244/16/1/Indonesia-tidak-Punya-UU-Perlindungan-Whistle-Blower>