

# Legal Protection for Whistleblower in Criminal Justice System of Indonesia

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**ABSTRACT** — *The witness's position in the criminal justice process occupies a key position, as seen in Article 184 of the Criminal Procedure Code. As the primary evidence, of course, the impact is felt if, in a case, the witness is not obtained. The importance of the position of witnesses in the criminal justice process has begun since the beginning of the criminal justice process. It must be recognized that the unfolding of cases of violation of the law is mainly based on information from the public. Likewise, in the next process, at the prosecutor's level until finally in court, witness testimony as the primary evidence becomes the judge's reference in deciding whether a defendant is guilty or not. However, the protection of Witnesses who are classified as whistleblowers to uncover criminal events that carry a risk of safety is not regulated in the legal system in Indonesia. This study aims to find and design legal norms as a legal basis for the protection of whistleblowers in disclosing their statements. This study uses normative juridical methods based on secondary data using a conceptual approach, philosophical approach, and comparative approach.*

**Keywords:** *witness, whistleblower, criminal procedure, evidence*

## I. INTRODUCTION

Law No. 8 of 1981 concerning Criminal Procedure Law, from now on better known as the Criminal Procedure Code or KUHAP, was born to realize the ideals of national law, namely having a new Criminal Procedure Act, which has the characteristics of codification and unification based on Pancasila and the 1945 Constitution. Because, as is known, the criminal procedure law that applies before the Criminal Procedure Code is the Het Herziene Inlandsch Regulation or HIR (Staatsblaad Year 1941 Number 44), which was initially intended to improve criminal procedural law for Raad van Justitie. So, Het Herziene Inlandsch Reglement or HIR is not intended to achieve a single unit of criminal procedure law, because, in addition to the Het Herziene Inlandsch Regulation or HIR that applies to Raad van Justitie, criminal procedural law for Landrad also applies. [1].

Pride arose after our legislative body succeeded in creating a Criminal Procedure Code replacing HIR, which was seen as colonial. There are even those who say the Criminal Procedure Code is a masterpiece. Indeed, if you know the speed in the process until it turns into law, it is a masterpiece. But if we see the weaknesses and weaknesses, then we must say this work must be perfected in a short time. Some of the gaps are precisely because they still imitate the outdated HIR provisions [2].

The former Attorney General, MA Rachman, revealed who said that the Criminal Procedure Code had so far created compartmentalization of law enforcement officers so that what was called the integrated system of handling criminal cases (integrated criminal justice system) did not materialize. Also, the spirit contained in the Criminal Procedure Code has so far been aimed at protecting the interests of perpetrators of crime rather than those of justice seekers [3].

According to Roswita Oktavianti and Riris Lois, it must be acknowledged that the presence of the Criminal Procedure Code is intended by lawmakers to "correct" past judicial practice experience that is not in line with the enforcement of human rights under HIR rules, while at the same time giving legal rights to suspects or defendants for defending their interests in the legal process. Not infrequently, we hear the groans of experiences in the HIR period, such as prolonged arrest without end, detention without a warrant, and explanation of the alleged crime. Likewise, the "extortion" of recognition by the examiner (verbalisant) [4].

The problem that is sometimes encountered in criminal justice processes is that, in the practice of criminal cases, it sometimes appears that the person presented in court is the only witness. Whereas in the criminal court, the principle of *unus testis nulus testis* applies, which means that one witness is not a witness, so that if it is not supported by other evidence, then the judge's decision will be in the form of a ruling free from all charges.

The witness's position in the criminal justice process occupies a key position, as seen in Article 184 paragraph (1) of the Criminal Procedure Code. As the primary evidence, of course, the impact is felt if, in a case, the witness is not obtained. The importance of the position of witnesses in the criminal justice process has begun since the beginning of the criminal justice process. Disclosure of cases of lawlessness is mostly based on information from the public. Likewise, in the next process, at the prosecutor's level until finally in court, witness testimony as the primary evidence becomes the judge's reference in deciding whether a defendant is guilty or not. So, it is clear that witnesses have a huge contribution in efforts to uphold law and justice [5]. Such a vital witness position seems to be very far from the attention of the public and law enforcement. It turns out that this attitude is indeed in line with the opinion of the legislators, who do not expressly protect witnesses and victims in the form of granting several rights, such as those of the suspect/defendant. In the Criminal Procedure Code, as a legal provision for

criminal proceedings in Indonesia, the suspect/defendant has several rights that are explicitly and specifically regulated in a separate chapter. On the other hand, for witnesses, including victim-witnesses, there are only several articles in the Criminal Procedure Code that give rights to witnesses. Still, their rights are always associated with suspects/defendants. So, the rights possessed by witnesses are less than the rights owned by suspects/defendants.

The condition of the witnesses included victims, who were in a weak position. Instead, the Criminal Code threatens the criminal if witnesses do not come to provide information after receiving a summons from law enforcement. Furthermore, the Criminal Procedure Code requires witnesses to swear and promise before providing information, the purpose of which is that witnesses can provide information in earnest with what is known, whether seen, heard, or experienced by witnesses - even though *de auditu* has recognized the flow. Talking about obligations in law is undoubtedly closely related to human rights, in this case, is the right of witnesses, so the law provides witness rights in the form of protection for witnesses themselves.

International practice, the statutes of international tribunals, and tribunals recognize the importance of this testimony before this jurisdiction is protected by it. They have developed protective measures that will be guaranteed for a statement before, during, and after court proceedings, taking into account the need to protect the right to a fair trial for the accused. This jurisprudence is an essential resource for international criminal courts and procedures for witness protection [6].

The state must give guarantees of protection to witnesses (both as witnesses as victims and witnesses not as victims) as part of citizens in the process of law enforcement. Article 9 of the 1966 International Covenant on Civil and Political Rights proposes the right to freedom and security of persons. This right is strengthened by Article 3 of the Universal Declaration of Human Rights (together with the right to life) Article 5 of the European Convention and Article 7 of the American Convention [7].

One of the reasons why the importance of the regulation is since various crimes with increasingly sophisticated *modus operandi* are committed by individuals or organizations that are very neat. At the same time, the development of the criminal justice system is not in tune with the development of the crime. The criminal justice system is sometimes late and unprepared in anticipating the pace and growth of various crimes with changing modes. For this reason, there is a need to reform the criminal justice system so that it can anticipate various patterns of crime that occur. The success of a criminal justice process is highly dependent on the evidence that has been successfully revealed or proven in the judicial process, especially about witnesses [8].

However, since the amendment of Law No. 13/2006 through Law Number 31 of 2014 concerning Amendment to Law Number 13 of 2006 concerning Protection of Witnesses and Victims (Law No. 31/2014), it does not give any significance to witness protection, especially witnesses who are positioned as whistleblowers (whistle).

Until the promulgation of Law No. 31/2014, the legislators do not also include legal protections against whistleblowers, but only to the extent of justice collaborators.

Based on the description above, the researcher proposes the formulation of the problem "How is the formulation of legal norms in providing legal protection to whistleblowers?"

## II. RESEARCH METHOD

The research method used for this research is the type or specification of descriptive-analytical research. Through case studies, secondary data is collected, data collection through documentation studies, or library materials. Documentation study is a research that attempts to collect written data by examining written articles that are related to the problem that is being the object of this research. In this study, researchers will compare with the common law system of the United States of America or American States such as Canada and the United State of Michigan, The State of New South Wales of Australia, and the United Kingdom of England, because they have first had a Witness & Victim Protection Act and a special law on whistleblowers.

## III. FINDINGS AND DISCUSSION

In general, researchers in Indonesia make many mistakes in interpreting whistleblowers as a legal concept. Mistakes in interpreting a legal concept will lead to an error of thinking, and in the end, interpreting the concept will lead to a misguided flow of logic and misleading conclusions [9]. For example, the fallacy carried out by Rusli Muhammad [8] in his research entitled "Regulation and Urgency of Whistleblowers and Justice Collaborators in the Criminal Justice System," confirms that the existence of Article 10A of Law No. 31/2014 further emphasizes the protection rights for whistleblowers and justice collaborators. A misconception made by Nixon, Syafruddin Kalo, Tan Kamello, and Mahmud Mulyadi [10] in his research entitled "Legal Protection of Whistleblowers and Justice Collaborators in Efforts to Eradicate Corruption" which confirms the following:

"In Indonesia, there are no regulations that specifically regulate whistleblowers and justice collaborators. Although explicitly the rules regarding legal protection for whistleblowers and justice collaborators have been contained in Article 10 of Law no. 13 of 2006 concerning Witness and Victim Protection Institutions and the Supreme Court Circular No. 4 of 2011 concerning Treatment of Criminal Reporters (whistleblowers) and witness collaborators (justice collaborators), both of these rules have not been able to protect the existence of Whistleblowers and Justice Collaborators. "

In that conclusion, as Rusli Muhammad, also described the concept of the whistleblower to the idea of "Reporting" in Article 10 - in Law No. 13/2006, and Article 10A — in Law No. 31/2014. Although the mistake of thinking about the concept of the whistleblower was also derived from the

error of thinking of the idea of the whistleblower it turned out to be from Abdul Haris Semendawai [11] in the Journal of Witness and Victim Protection which emphasized the following:

"Even though Article 10 of Law No.13 of 2006 does not specifically mention the reporter as a Whistleblower, but what is meant by the reporter in the explanation of this Act is the person who provides information to law enforcement regarding a criminal act."

Based on the views as mentioned earlier, it turns out that the fallacy of the concept of the whistleblower is equated with the idea of 'Reporter' precisely derived from an authoritative text issued by the public authorization namely the Legislature through Law No. 31/2014 jo Law No. 13/2006 and the Supreme Court through the Supreme Court Circular No. 4 of 2011 concerning the Treatment of Whistleblowers and witnesses in collaboration (Justice Collaborator).

An understanding of the concept of a whistleblower should begin with the belief that the idea originates from the common law system, so it is not original to the Indonesian legal system. So, we need first to understand the philosophical foundation of regulating whistleblowers in common law systems [12].

According to the Whistleblower Protection Act 1989 (WPA 1989), the United States explains, "A whistleblower is a present or former employee or member of an organization who reports misconduct." The first Whistleblower Protection Act in the US was created in 1912 and is known as the Lloyd-Lafollette Act, where a federal employee gets legal protection to give Congress information there is a crime that harms the country. In the 1970s and after that many more of the same laws were made by Congress in various fields to prevent violations of the law and protect such as clean water, toxic materials, waste, nuclear to corporate fraud [13].

Based on WPA 1989, which confirms "that any disclosure of information from an employee is kept confidential if" confident enough "there is evidence of" violation of law, regulation or regulation "or evidence of" mismanagement, financial waste, and abuse of authority, or substantial and specific danger to "protected" public health or safety. Then such disclosure is not prohibited by law or, if necessary, must be kept confidential by the Executive Order. " [14]

According to The Whistleblowers Protection Act 469 of 1980 (WPA 469/1980) of the United States of Michigan, which confirms "Employees who report violations or suspected violations of state, local, or federal law." In (WPA 469/1980), provide a scope of scope that "An Act to protect employees who report violations or suspected violations of state, local, or federal law; to protect employees who participate in hearings, investigations, legislative inquiries, or court actions; and to prescribe remedies and penalties. "What is meant by" employee "in Section 1 (a) WPA 469/1980 is" a person who receives wages or other rewards as stated in the contract, both written and oral, express or implied. Employees include someone employed by the State or

other State Institution except those classified as civil service.

Whereas the form of protection provided, as contained in Section 2 of WPA 469/1980, is a Whistleblower protected from acts of dismissal and other discrimination by the Employer / Business Owner, only because the employee reports on suspected violations of the law, or when an employee is requested by Public bodies to participate in investigations, hear or answer questions either from the public authority or from the court.

In other parts of the world, Australia, for example, contains regulations on whistleblowers in the Public Disclosure Act 92 of 1994 (PIDA 92/1994), the State of New South Wales, Australia. As explained by the NSW Association of Nurses and Midwives that "In New South Wales, the 1994 Public Interest Disclosure Act (Act) establishes the conditions and conditions for making protected disclosures. The object of this Act is to encourage and facilitate disclosure, to public interest, from corrupt behavior, maladministration, serious and substantial waste, violations of government information, and violations of local government financial interests in the public sector. [15] Although PIDA 92/1994 emphasizes that Whistleblowing is referred to as protected disclosure or public interest disclosure, nevertheless, not all reports of serious errors or errors will be protected disclosures.

Protection against Whistleblowers is contained in Article 20 and Article 21 of the Public Disclosure Act 92 of 1994, which includes provisions for maintaining the confidentiality of his identity, no criminal or civil liability, protection from defamation, protection from retaliation, and conditional protection if his name is made public to the media.

Like the State of New South Wales of Australia, the United Kingdom of England also regulates the Whistleblower in the Public Interest Disclosure Act 1998 (PIDA 1998) which explains "An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimization and for connected purposes."

Whereas the matters that are qualified for disclosure under Part IVA Article 43B Paragraph (1) of the Public Interest Disclosure Act 1998 are as follows:

- a. that a criminal offence has been committed, is being committed or is likely to be committed,
- b. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- c. that a miscarriage of justice has occurred, is occurring or is likely to occur,
- d. that the health or safety of any individual has been, is being or is likely to be endangered,
- e. that the environment has been, is being or is likely to be damaged, or
- f. that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

However, there is a limitation for a whistleblower in Article 43B Paragraph (2), which confirms, "A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it."

The existence of the whistleblower is a long debate concerning moral issues and good management behavior. As stated by Patrice Cailleba and Sandra Charreire Petit who concluded that the existence of a paradoxical duality namely "Firstly, anybody who hesitates to report something, as defined by the Sapin II Law, finds themselves at odds with the principle of loyalty to their employer on the one hand, and with being true to their own ethical principles, on the other. This is the first individual moral paradox. In parallel, the company is required to set up suitable systems to deal with this kind of disclosure, whilst at the same time keeping confidential the identity of the whistleblower whose very actions might bring down the reputation and even the economic welfare of the company. This is the second moral paradox, which is organisational. Finally, the managerial paradox is characterised by the fact that companies require their employees, and in particular their senior managers, to be more autonomous, to take more responsibilities and to defend its values. At the same time, companies are increasingly wary of their employees' freedom of speech and of their potentially negative impact in case they detect a misalignment of the strategic discourse with the everyday behaviour of their colleagues." [16]

The conclusions given by Patrice Cailleba and Sandra Charreire Petit show that there is a dispute between whether someone who complains is an embodiment of the truth value that exists in him or indicates shows a violation of the collective consensus that is the goal of the organization as a betrayal. However, at the same time, there was an unwillingness to misleading the disclosure effort. The urgency of the regulatory push is also due to efforts to misery the whistleblower. As revealed by Mathieu Bouville through his research based on empirical data from various studies as follows [17]:

"Alford (2007) notes that "theirs is an act of considerable consequence, especially when one considers that among fired whistle-blowers, most will lose their homes and ultimately, their marriages"; Rothschild and Miethe (1999) indeed found that over half the whistleblowers they interviewed had family problems. That Gunsalus (1998) wrote an article entitled "How to blow the whistle and still have a career afterward" is significant. Rothschild and Miethe found that two-thirds of whistleblowers "lost their job or were forced to retire" and "were blacklisted from getting another job in their field." Consequently, two-thirds of them also had severe financial problems. They also found that 84% suffered from "severe depression or anxiety" and over two-thirds of them also had "declining physical health." A whistleblower mentioned by Oliver (2003) "estimates that his legal costs have exceeded \$130,000." Alford (2007) sees suffering as an essential part of whistle-blowing: "the whistleblower is defined by the retaliation he or she receives. No retaliation and the whistleblower is just a responsible employee doing her job to protect the company's interest." If "often the protest is most effective if one has already resigned from the organization" (Harris et al., 2005, p. 206) then one can

only choose between total self-sacrifice and partial and pointless self-sacrifice."

The data above shows the philosophical reasons for the urgency of regulating the existence of a person to make it as a "reporter," to the secrecy of one's existence.

The interesting thing is precisely the regulation of whistleblowers in Indonesia, which is claimed to have an arrangement in Law No. 31/2014 jo Law No. 13/2006. Article 10 of Law No. 31/2014 jo Law No. 13/2006 confirms the following:

- (1) Witnesses, Victims, Perpetrators' Witnesses, and/or Reporting Parties cannot be prosecuted, both criminal and civil, for their testimony and/or reports that will, are being, or have been given unless the statement or report is given in good faith;
- (2) If there are lawsuits against Witnesses, Victims, Perpetrators, and/or Reporters on testimonies and/or reports that will be, are being, or have been given, the lawsuits must be postponed until the case he reports, or he provides testimony has been decided by the court and obtain permanent legal force;

Meaning in Article 10, paragraph (1) of Law no. 31/2014 jo Law No. 13/2006 shows an indication that the legal concept regarding the whistleblower has been accommodated through the idea of 'Reporter,' which is composed of the phrase "... cannot be prosecuted both criminal and civil by reporting, witnesses that will, are, or have been given." This indicates that the concept of 'Reporter' is identical to the idea of the whistleblower. However, in essence, Article 10 paragraph (1) of Law no. 31/2014 jo Law No. 13/2006 is only an illusion because there are phrases that reduce the privilege of a whistleblower by using the phrase "... unless the testimony or report is not given in good faith."

Misconception regarding the formation of the whistleblower concept in Law No. 31/2014, which amends Law No. 13/2006, according to the Researcher, actually shows the existence of the fallacy, namely Article 10 paragraph (2) of Law no. 31/2014 jo Law No. 13/2006 is a form of whistleblower disclosure by conducting a confrontation of evidence that weakens the reporting of a whistleblower so that opportunities for the reported to make a counter-claim.

Whether or not the evidence is proven, the report should have been preceded by an investigation and investigation mechanism until finally, it reaches the prosecution process before the trial. That is, technically, the validity of a whistleblower's reporting cannot be measured from whether it is proven or not. The irreversibility of the reporting is not an indication of bad faith. Therefore, whether or not good faith should be measured during the investigation and investigation. Thus, with the emergence of legal norms in Article 10, paragraph (2) of Law no. 13/2006 shows an indication of 'disclosure' of the Reporter's identity. The sign of the 'disclosure' of the whistleblower's identity is revealed from the semantic meaning of the phrase "... the legal claim must be

postponed until the case he reports, or he gives testimony has been decided by the court and obtained permanent legal force", wherein the phrase "... the law .... "is connected to Article 10 paragraph (1) of Law no. 31/2014 jo Law No. 13/2006 on the phrase ".... cannot be prosecuted legally ..." and is related to the structuralist meaning that every report there must be a Reporter. Thus, the concept of 'Reporter' in Article 10 of Law No. 31/2014 jo Law No. 13/2006 is not a representation of the idea of the whistleblower.

Researchers understand that there are concerns about reporting that is deliberately made to discredit someone, so each reporting recipient institution must be cautious in giving the whistleblower status. Therefore, every report that comes in through the whistleblowing mechanism, testing in good faith, is a burden on the obligations of the institution in the process of Investigation, without any liability to disclose the identity of the whistleblower, to avoid counter-claims. Protection of identity against whistleblowers is a respect for truth values that are believed to exceed organizational consensus *vis a vis* the public interest.

Philosophical thought, in essence, has been adopted by the Criminal Code, which is applied through the principle of concordance, especially in Article 165 of the Criminal Code. The authoritative text contained in Article 165 of the Indonesian Criminal Code requires every citizen to report a potential presence - even if it is limited to mens rea, which is detrimental to the public interest. However, of course, we understand that the mode and motive of a criminal act will always develop. Hence, the value contained in Article 165 of the Criminal Code is a pre-assumption (*vorurteil*) of the construction of legal arguments for the enforcement and regulation of whistleblowing mechanisms in Indonesia.

#### IV. CONCLUSION

Based on the description above, several new legal norms are needed, first, to reduce Article 10 paragraph (2) of Law no. 31/2014 jo Law No. 13/2006, namely by removing the concept of 'reporter' and the idea of 'reporting' in the legal norms. As a result, only witnesses and victims have made arrangements for testing lousy faith through the examination process at the court hearing; secondly, it must contain new legal norms that confirm the identity of the Reporting Party, insofar as it relates to public interest, must be kept confidential; third, secondary legal norms are needed as sanctions for the 'disclosure' of the identity of the Reporting Entity; fourth, charging the institution receiving the report to verify the description in the investigation process; sixth, imposes an obligation on the state to provide maximum protection for the Reporting Party in all life and livelihoods.

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