

Juridical Implication of Overlapping Legal Protection for Whistleblowers in Narcotics Case in Indonesia

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Abstract

According to Act Number 13 of 2006 on Protecting Witnesses and Victims, there are two legal subjects comprising witnesses and victims. Moreover, legal subjects according to Act Number 31 of 2014 concerning Protecting Witnesses and Victims are extended in scope into five: witnesses, victims, Perpetrators as witnesses, whistleblowers, and experts. Whistleblowers, as in Act, are those who report or submit information to legal authorities concerning a crime that has taken place, is taking place, or will take place. The legal protection provided consists of personal safety, family safety, and protection for asset and from physical harm raised from the case reported. This protection is provided to encourage individuals to bravely report a narcotic criminal case. Narcotic crime is defined as an illicit act of using substance or drug extracted or obtained from plants or non-plants where the substance could degrade or affect consciousness, kill pain, and cause addiction.

Keywords: legal protection, whistleblower, narcotic crime

1. Introduction

Criminal cases are getting more common to take place among societies.¹ Law enforcement principally begins with investigation and ends up with court ruling. The success of law enforcement of a case investigation heavily relies on the existence of evidence that is determining in the investigation of a crime.

Testimonies from witnesses is evidence that plays a very essential role in revealing a crime.² In an organised crime, for example, a person fitting the requirement as a witness is that living near the site where the criminal act may have taken place. This person, commonly known as a whistleblower, meets the requirement to testify to reveal an illicit act. It sometimes starts from one's conscience for a person to be brave to report a crime, and it is also true that those whistleblowers deserve legal protection provided by the state.

Article 5 of Act Number 31 of 2014 concerning Protection for Witnesses and Victims suggests that an institution responsible to give protection for witnesses and victims (hereinafter LPSK) is authorised to provide legal protection for whistleblowers of a criminal case, including those in narcotic crime. However, based on Article 100 of Act Number 35 of 2009 concerning narcotics, Indonesian National Police is also responsible to provide the legal protection for equal case.

These two different views in the articles have led to the absence of legal certainty for whistleblowers. Therefore, there is a doubt arising in the mind of the whistleblowers as by which institution the whistleblowers will expect to be legally protected regarding narcotic-related case. This sets juridical implication where overlapping of the two institutions takes place.

2. Literature Review

2.1. General Definition of Whistleblower

In English, a person who reveals a crime is defined as a whistleblower. In a simple way, it analogically looks like a football referee who blows the whistle to reveal a foul occurring in a football game, or it can be analogised by a traffic police who blows his whistle when he found a rider break the traffic rule.

In Black's Law Dictionary, whistleblower is defined as a person who reveals a fact of criminal case, while Act Number 31 of 2014, an amendment of Act Number 13 of 2006 concerning Protection for Witnesses and Victims, tends to use the term *pelapor* (in Indonesian) as equal to whistleblower, a person who reports a case to an authority.

Article 1 Paragraph (4) of Act Number 31 of 2014 concerning Amendment of Act Number 13 of 2006 concerning Protection for Witnesses and Victims states: "A whistleblower is a person who reports or submits information to a legal authority over a criminal case that will take place, is taking place, or has taken place."

Every person is likely to become a whistleblower, but everyone seems to also be aware that it takes

¹ Arif Barda Nawawi, *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara* (Semarang : CV : Ananta, 1994), p. 11.

² Article 1 Number 26 and 27 of Criminal Code.

courage to report. It is commonly known that reporting a crime to the police may also lead to a consequence where the whistleblower's life, family, and his/her assets may be threatened. In narcotic crime, the whistleblower might put his/her safety at risk since he/she might be exposed to the threat of groups of crimes or narcotic mafia because it is regarded as extraordinary crime.

John McMillan suggests that the courage of whistleblowers has brought them to the spotlight at international level.¹ However, Elizabeth argues:

“There are several general factors over existing cases of whistleblowers. Some come from a family that has grown in the middle of the environment filled with true morality to determine what is right or wrong, either the environment is religious or secular. It is quite obvious that values reflected from behaviour and ethics are passed through generation; on the contrary, it is quite tragic when they have to face threats, cruelty, and even risk of defamation while they have done something right.”²

In line with public awareness of moral obligation in terms of reporting a crime, legal protection for whistleblowers is essential; especially in an extraordinary crime such as narcotic case.

2.2. Whistleblower in Narcotic Crime

A whistleblower in narcotic case can either come from a society or a victim of narcotic crime,³ where the whistleblower helps reveal the narcotic crime. Every citizen and victim of narcotic crime who becomes a whistleblower deserves a protection for his/her safety, family's safety, and for his/her assets, and it is to guarantee that the whistleblower is protected from any physical or psychological threats regarding the case reported.⁴

3. Legal Protection for Whistleblowers in Act concerning Protection for Witnesses and Victims

Legal protection provided for whistleblowers is regulated in Article 5 of Paragraph (1) and Article 10 Paragraph (1) of Act Number 31 of 2014 concerning Amendment of Act Number 13 of 2006 concerning Protection for Witnesses and Victims. Article 5 Paragraph (1) states that whistleblowers deserve to:

- a. get protection for safety for themselves, their family, and their asset, and be guaranteed that they are protected from any threats regarding testimony that they will give, are giving, or have given;
- b. participate in choosing and determining the form of protection and security;
- c. testify without any coercion;
- d. be provided with a translator;
- e. not to be entangled with questions
- f. be informed about the case progress;
- g. be informed about court ruling;
- h. be kept confidential;
- i. get a new identity
- j. be provided with a temporary residence;
- k. be provided with a new place to live in; and
- l. be covered with transportation cost as needed.

Furthermore, Article 10 Paragraph (1) states:

“...a whistleblower cannot be legally sued over his/her testimony or report he/she will give, is giving, or has given unless it is given without good faith.”

4. Legal Protection for Whistleblowers in Act of Narcotics

Article 100 Paragraph (1) of Act Number 35 of 2009 on Narcotics states:

“... a whistleblower and his/her family deserves protection provided by the state from anything that harms his/her life and assets before the enquiry, after the enquiry, or when the enquiry is in progress.”

Article 100 Paragraph (2) further states:

¹ Quentin Dempster, *Whistleblowers; Para Pengungkap Fakta* (Jakarta : ELSAM-Lembaga Studi dan Advokasi Masyarakat, 2006), p. 238.

² *Ibid.*, p. 245.

³ Research result by the author in National Narcotics Agency, Polri, and LPSK.

⁴ Article 5 of Law Number 31 of 2014 concerning Protection for Witnesses and Victims.

“Further provision concerning how the protection should be provided by the state as intended in Paragraph (1) is regulated in Government Regulation.”

Government Regulation Number 40 of 2013 concerning Implementation of Act Number 35 of 2009 concerning Narcotics Article 38 mentions that Indonesian National Police is responsible for giving protection for whistleblowers of narcotic cases.

5. Overlapping Legal Protection for Whistleblowers of Narcotic Crime

It is obvious that legal protection for whistleblowers plays an essential role in European countries as developed countries and Indonesia as a developing country. The quality of the people of a state, especially in a developing country, heavily relies on the level of their education and knowledge. The legal protection also plays its significant role in law enforcement in a state. Law enforcement is not separable from law since legal protection provision must be performed by an entity responsible for it for a maximum provision.

The issue over legal protection for whistleblowers should not be overlooked, as it is likely to be regarded as a global matter. Barack Obama once validated Act regulating protection for whistleblowers of criminal cases in November 2012 in Whistleblower Enhancement Act.¹ In present time, protection for whistleblowers is considered significant. It has been heard frequently that the presence of a whistleblower is to help investigation, where it is expected that a case could be handled up to *intellectual dader* and criminal organisation leader.

In Indonesia, there seems to be a tug of war between LPSK and National Indonesian Police in terms of the issue regarding authority to provide protection for whistleblowers of criminal case. The existence of LPSK seems to be a two-way phenomenon. On one hand, there seems to be an opportunity given to settle any dispute emerging in the process of law enforcement. On the other hand, it seems to take over the authority of another institution of law enforcement which sometimes fails to bring a whistleblower to its presence.²

Apart from Article 100 Paragraph (1) and Paragraph (2) of Act Number 35 of 2009 concerning Narcotics, the authority of Indonesian National Police is also regulated in Article 5 Paragraph (1) of Act Number 2 of 2002 concerning Indonesian National Police stating that Indonesian National Police is a state instrument that is responsible for the security and the social order in the society. Moreover, it also serves as to enforce the law, provide protection and services to its people to establish a better security in Indonesia.

Moreover, Act Number 2 of 2002 on Indonesian National Police also regulates tasks and authorities of Indonesian National Police as provided in Article 13, Article 14, and Article 15 of Act Number 2 of 2002. Article 13 mentions that the main tasks of the Indonesian National Police are as follows:

- a. providing security and guarantee social order in society;
- b. enforcing law; and
- c. providing protection and services to society.

The substance of the main tasks of giving protection, and public services stems from the position of the police as part of government's instrument which is aimed for public service.³

Article 14 Paragraph (1) letter I states “the main duties mentioned in Article 13 involves protecting body and soul, protecting asset and property, protecting societies and environment from social order-related issues and/or disaster, including providing assistance where human rights are still prioritised.”

Act Number 2 of 2002 implies that Indonesian National Police is responsible for giving protection for the citizens of Indonesia from threats or physical threats, dishonour, loss of asset, and disaster. The protection is given in preventive action in law enforcement. Giving protection for witnesses and/or victims (whistleblowers) or for their family and for their assets is based on provisions in the following Acts:

- a. Act Number 26 of 2000 concerning Human Rights Court;
- b. Act Number 20 of 2001 concerning Amendment of Act Number 31 of 1999 concerning Corruption Eradication;
- c. Act Number 23 of 2002 concerning Child Protection;
- d. Act Number 25 of 2003 concerning Amendment of Act Number 1 of 2002 concerning Money Laundering Eradication;
- e. Act Number 15 of 2003 concerning Terrorism Eradication;
- f. Act Number 23 of 2004 concerning Domestic Violence Eradication;

¹ Kohn, Stephen M. , Michael D. Kohn, and David K. Kolapinto, *Whistleblower Law : A Guide to Legal Protections...Op., Cit.*

² An interview conducted by the author with several victims of narcotic abuse as victims in a drug dependence hospital (RSKO), Cibubur-Jakarta.

³ Momo Kelana, *Undang-Undang Kepolisian Nomor 2 Tahun 2002, Latar Belakang dan Komentar Pasal Demi Pasal* (Jakarta : PTIK Press, 2002), p. 77.

- g. Act Number 21 of 2007 concerning Human Trafficking Eradication;
- h. Act Number 35 of 2009 concerning Narcotics

From the above explanation, there seems to be *a quo*¹, and there seems to be tug of war and overlapping of authorities between LPSK and Indonesian National Police, where the authority of LPSK is regulated based on the provision of Act Number 31 of 2014 concerning Protection for Witnesses and Victims, while the authority of Indonesian National Police as enquirers is regulated in Act Number 35 of 2009 concerning Narcotics and Act Number 2 of 2002 concerning Indonesian National Police.

6. Juridical Analysis of Overlapping Bodies regarding Legal Protection for Whistleblowers of Narcotic Crime

Principally, legal protection provided for whistleblowers can be described as giving a set of rights in terms of providing security for an individual, a family, and asset, and protection from any physical and psychological threats regarding the criminal report that is given, is being given, or will be given where the whistleblowers are protected in a safe place. The juridical implication of the overlapping of bodies responsible for giving legal protection for whistleblowers in narcotic-related crime is that it creates confusion over which body a whistleblower will decide to have in order to be legally protected. This overlapping has violated human rights.

To grow the awareness of people in order to be willing to participate to reveal a crime, the government needs to create positive climate by bringing legal certainty to whistleblowers. Legal protection given is in the form of a set of rights for the whistleblowers along the ruling process.

Along the process of providing legal protection, agreement among Indonesian National Police, Public Prosecutors, BNN, and LPSK has been made. Gradually, law enforcers come to their agreement over the establishment of LPSK to provide legal protection for whistleblowers. However, the agreement is regarded insufficient to serve as fundamentals on which an authority is based.²

Providing legal protection must be along with providing legal certainty according to the theory of legal protection *per se*, in which the theory is related with public services.³ Roscoe Pound suggests that law as a tool of social engineering.⁴ Human interests involve protection and a demand that has to be met by people in a legal scope.

Roscoe Pound classifies three protected human interests as follows:

1. Public interest;
2. Social interest;
3. Private interest;⁵

One of the theories regarding legal protection for whistleblowers is the theory of legal certainty initiated by Gustav Radbruch, where he suggests that law should embrace three identities as follows:⁶

1. The principle of legal certainty (*rechtmatigheid*). This principle sees from juridical perspective.
2. The principle of justice in law (*gerechtigheit*). This principle sees from philosophical perspective, implying that justice is about equal rights among people before the court.
3. Principle of legal benefits (*zwechmatigheid*) or *doelmatigheid* or utility.

Article 44 of Act concerning Legal Protection for Witnesses and Victims states that after the Act on Protection for Witnesses and Victims took into effect, laws and regulations concerning whistleblowers have remained applicable as long as they are relevant to Act concerning Protection for Witnesses and Victims. Article 44 of Act concerning Protection for Witnesses and Victims leads to more potential where the absence of legal certainty to give legal protection may occur. Article 44 of Act concerning Protection for Witnesses and Victims has infringed the principle of legal certainty that characterises Indonesia. This leads to overlapping legal protection for whistleblowers of narcotic crime. Therefore, it is suggested the lawmaker (the House of Representatives of Indonesia) revise Article 44 of Act concerning Protection for Witnesses and Victims.

¹ The term 'quo' is defined as 'the aforementioned'. A quo is often used to refer to previous discussion (the case in dispute).

² An interview with a Vice Head of LPSK in LPSK office Cijantung-Jakarta.

³ Salim dan Erlies Septiana Nurbani, *Penerapan Teori Hukum pada Penelitian Tesis dan Disertasi* (Jakarta : PT. RajaGrafindo Persada, 2013), p. 266.

⁴ Roscoe Pound, *Tugas Hukum* (Jakarta : Bhratara, 1965), p. 12.

⁵ Lily Rasyidi, *Filsafat Hukum* (Bandung : Remadja Karya, 1988), p. 228-231.

⁶ Dwika, *Keadilan dari Dimensi Sistem Hukum*. Retrieved from <http://hukum.kompasiana.com>, on 24 July 2014.

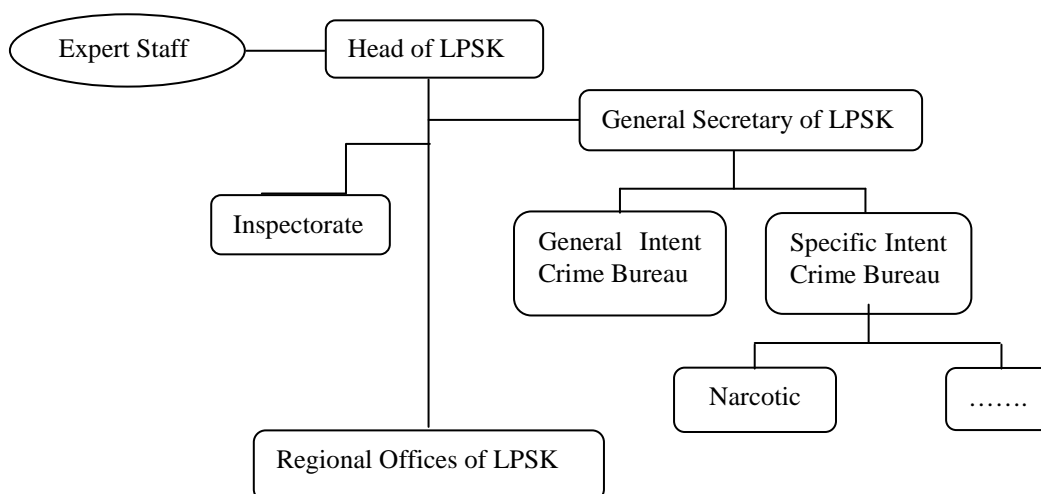
Legal certainty is reflected in Article 28D Paragraph (1) of the 1945 Constitution of the Republic of Indonesia stating: “Every person shall have the right of recognition, guarantees, protection, and certainty before a just law, and of equal treatment before the law.” Legal certainty and equal treatment before the law is the main principle of the state of law (the rule of law) as stated in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, “Indonesia is a state of law”. Legal certainty is a pre-requirement and must not be violated.

The principle of legal certainty serves as one of characteristics of the rule of law, in which there are principles of legality, predictability¹, and transparency. It is obvious that the rule of law is described as a legal system in which rules are clear, well understood, and fairly enforced.

7. Form and Pattern of Institutions providing Legal Protection for Whistleblowers of Narcotic Crime in the Future (*Ius Constituendum*)

To avoid any overlapping potential, single legal protection institution is required in order to provide legal protection for whistleblowers in narcotic criminal cases in the future. This institution provides one door legal protection service, meaning that the protection is provided by only one institution: Witnesses and Victims Legal Protection Institution (LPSK). This is the only institution authorised to protect whistleblowers in both general intent crime and specific intent crime as in narcotic crime. The intended legal protection can be seen in the following:

Diagram 1.
Single Legal Protection Institution²



To support the function of LPSK as an institution authorised to protect legal protection for whistleblowers, several regional offices need to be established especially in the area where narcotic criminal cases are high in number. It is clearly shown in the diagram that the Head of LPSK is responsible to delegate authorities down to the LPSK offices in regional areas. In addition to its function as a delegator, the Head of LPSK is also responsible to coordinate other law enforcers (Indonesian National Police), while LPSK offices in regional areas hold their administrative responsibility under the Head of LPSK. Moreover, Secretary General is responsible to coordinate bureau of law such as the bureau of general intent crime and specific intent crime in order to cooperate to provide protection services. Specific intent crime bureau embraces narcotic-related crime, corruption, terrorism, and serious violation of human rights. However, this paper is only focused on narcotic-related criminal cases.

Article 28 regulates the qualification of whistleblowers who deserve legal protection, while Article 29 of Act concerning Protection for Witnesses and victims regulates the procedures required to propose legal protection to LPSK where to get the protection, a request proposal needs to be submitted to LPSK, followed by the assessment to determine whether a person deserves the legal protection. This process certainly requires time for LPSK to decide.³ Requesting legal protection is another barrier for those living far from LPSK centre located

¹ Predictability is something that can be predicted

² An interview with a Vice Head of LPSK, Mr. Edwin Partogi in LPSK office Cijantung-East Jakarta on August 16, at 14.15 western Indonesian time

³ *Ibid.*

in Jakarta, which leads to lack of efficiency and effectiveness.

It is essential that LPSK be given full authority to coordinate with other elements of legal enforcers to secure and protect whistleblowers in a criminal case when they testify at court. Moreover, LPSK should also have authority to supervise during the investigation, enquiry, or the trial.¹

To keep existing, LPSK requires a sub-system of criminal justice like other law enforcers, in which integrated criminal justice system could be introduced.²

In Narcotic criminal cases, LPSK is expected to be able to coordinate with Indonesian National Police to avoid and anticipate any potential overlapping in terms of the provision of legal protection for whistleblowers in narcotic criminal cases.

8. Conclusion

To come to the legal certainty where LPSK is regarded as the only institution authorised to provide legal protection for whistleblowers, revision of Article 44 of Act concerning Protection for Witnesses and Victims³ is required in order that LPSK can serve as a single legal protection institution.

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¹ Agus Takariawan, *Perlindungan Saksi dan Korban* (Bandung : Pustaka Reka Cipta, 2016), p. 318-319.

² *Ibid.*

³ Article 44 of Act concerning Protection for Witnesses and Victims: when this Act was enacted, laws and regulations regulating protection for witnesses and/or victims was declared applicable as long as it is relevant to the Act per se.