

The Protection of Whistleblower and Justice Collaborator in the Case of Narcotics in Indonesia: A Review

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Abstract- The misuse and illicit narcotics (drugs) trading in Indonesia have become serious problem in Indonesia. To mitigate this problem, the Government of Indonesia has developed many government institutions to handle the problem. However, the ideal concept to protect the so called whistleblowers and the justice collaborators have not yet been determined especially towards requirement remission given to them. This paper based on the review studies aims to discuss the nature of protections and conditions that should be given to the whistleblowers and justice collaborators. The study argued that the protection given for the whistleblowers and justice collaborator should be based on the regulations that have been made by the GOI. Also, it was found that there are three things that need attention by the GOI. First, whistleblower should be given protection as soon as possible. Second, the information from the whistleblowers can be used as initial evidence sufficient to reveal the crime syndicate. The third is that if the whistleblower provides information that could be used to dismantle crime syndicates totally, then this can be used as a potential excuse to remove the criminal charges. Thus, much remain to be done by the GOI to protect the whistleblowers and the justice collaborators in the case of illegal drugs.

IndexTerms— whistleblowers, justice collaborator, protection, narcotics.

I. INTRODUCTION

The rapid global trends of drug abuse and illicit drug trafficking have made the Government of Indonesia paid serious attention to these problems. The reasons of the rapid growth of illegal drugs trafficking were due at least two factors. The first is because of the free sale of chemical substances in pharmacies and in other chemicals stores. The second is because of the lack control of the GOI on chemical or narcotics industries. These conditions still continue and become a serious threat in Indonesia and other countries as well.

For that reasons, tight control on the misuse of drugs and its distribution is a must for the Government of Indonesia (GOI). The relevant government bodies to do this control include the Food and Drug Monitoring Agency (BPOM) and the Indonesian National Narcotics Agency (BNN RI), while the police institution in particular should control the import of chemicals. By doing these actions, the circulation of drugs will be known and hopefully will be mitigated.

However, the control action to prevent and eradicate the abuse and the illicit trafficking of drugs need concrete steps. These steps should be integrated and coordinated not only at national level, but also at regional and international levels.

This is simply because the drug trafficking is generally not carried only by an individual alone, but was also done in group or in the form of corporations. In fact, it was organized by well organized crime syndicates. In addition, drug trafficking is done trans-nationally by using highly sophisticated technology as the modus operandi. In short, the drug crime has become a serious threat for human life in Indonesia (Santrawan, 2012).

Apart from the above problems, there are other problems. The first problem was associated to the protection concept towards whistleblowers and justice collaborators. The second relates to the conditions that have to be determined in regards with the remission requirements for the whistleblowers and justice collaborators.

As there was limited studies that discussed the above problems, this paper, based on literature reviews aims at discussing those two problems. Note that, the main data source of this review is taken mainly from the relevant regulations and laws. These regulations are then analyzed based on the views advanced in the literatures and the author's knowledge and experiences. However, before the above issues are discussed, the following section 2 will first briefly address the definition of protection and role of society in preventing the misuse and the illegal trading of drugs. Section 3 deals with type of protection given to whistleblowers and justice collaborators. Note that, views and arguments that were advanced in the literatures on this subject was also discussed and highlighted. This is followed by the mechanism of protection in section 4. Finally, concluding remarks are drawn in section 5.

II. TYPE OF PROTECTION AND THE ROLE OF COMMUNITY IN HANDLING DRUG CRIMES

Every human being must be protected, respected and enforced in order to improve human dignity, prosperity, happiness, and intelligence and justice as stated in the Article 2 of Law No. 39 of 1999 on Human Rights. The types of protection can be grouped into two, that are, a legal protection and special protection. Legal protection can be in the form of immunity that was granted to the party of individuals that is able to provide data, facts, and testimony. The special protection, however, was given to whistleblowers and justice collaborators who provide facts to the GOI in order to cope with any possible threats that endanger them.

The protection of whistleblowers and justice collaborator who uncover a drug case that was done systematically is given since the investigation conducted. This investigation usually takes longer time than prosecution and court proceedings for

the investigation. It is simply because prosecution and court proceedings relate to administrative aspects. However, to protect the rights of a whistleblower and justice collaborator, both parties does not need to be present in the judicial process. Also, for the benefit of evidence in judicial process, investigators can obtain evidence from a whistleblower and justice collaborator in the form of documentary evidence and the testimony of the witnesses. This method aims to protect witnesses or other individuals from any physical threats and other threats.

The meaning of threats has been defined in the Law No. 31 of 2014 on the Protection of Witnesses and Victims, Article 1 point 6. It was defined as any action that cause direct or indirect results to the witnesses and / or victims so that they are forced to do or not to do something in respect of their testimony in a court.

The community, however, also plays important role in preventing drugs or narcotics crime. Their role is to prevent and eradicate of the misuse and illegal trading of drugs and narcotics. Their role of the community is manifested in the form of: a. the right to seek and obtain any information regarding alleged narcotic crime occurred; b. the right to obtain services in the search for, obtain and provide information regarding the alleged of narcotic crime to law enforcement officers who handle narcotic crime cases; c. right to advice and views in a responsible manner to law enforcement officers who handle narcotic crime cases; d. the right to obtain answers to query the report that was given to law enforcement within a period of 30 days; and e. the right to obtain legal protection in the event.

For the later role, this includes the following: a) to realize any rights as outlined in paragraph a, b, and c above; b) to present in the process of investigation and in the court as a witness or expert witness, in accordance with the provisions of the legislation in force; c) the community has the right and responsibility in the prevention and eradication of narcotics; d) the rights and responsibilities as stipulated in the legislation as well as in accordance to the norms of religion and other social norms; and e) comply to the procedures of public participation in the prevention and eradication of narcotics as outlined in this Article.

III. FORMS OF PROTECTION FOR WHISTLEBLOWERS AND JUSTICE COLLABORATORS

The whistleblowers and justice collaborator are protected by the government regulation. In the regulation that was signed together by the Ministry of Law and Justice, Police Institution, Anti-Corruption Commission, the Chairman of the Witness and Victim Protection Agency, and the Witnesses, it was stated that there are 4 forms of protection given to the Whistleblowers and justice collaborator as outlined in Article 6, paragraph 1 of the Joint Regulation of the Ministry of Justice, the Police, the Corruption Eradication Commission, Chairman of the Institute of the Witness and Victim Protection. These four forms of protection to whistleblowers and justice collaborator are as follows.

(1). Physical and physic Protections. A whistleblower and a Justice Collaborator have risks. These risks include threats, terror and even physical violence to him/herself or to his/her family. These risks become mounting particularly if the case that was handle belongs to organized crime, which used to

have a mass followers or those who have power in the government bureaucracy. Thus, both the whistleblowers and justice collaborators will potentially have intimidation not only to his/her self, but also to his/her family.

The kind of protection that will be received by the whistleblower and / or justice collaborator has been determined in the government rule. The relevant rule that organized this matter is the Act no. 13 of 2006. The types and nature of the protection are as follows : (a.) Personal security, family, and property protection; (b) protection in regard to his/her participation in general election; (c) provide information without pressure; (d) obtain an interpreter; (e). get information about the progress of the case; (f) get information about the court decision; and others. The detail rules of the protection that need to be given to the justice collaborators and the whistleblowers can be seen in the special witness institution locally called LPSK. However, the presence of the LPSK should be treated case by case especially if this institution will burden the government budget on one hand, and will have an overlap authority with any units related to these tasks (Ahmad Mujahidin, 2007; Lilik Mulyadi, 2013).

2. Special Handling

Protection in the form of special handling for justice collaborator will be given after there is an approval from law enforcement officers in accordance with the stages of handling (the investigator, prosecutor or judge). The nature of the special handling that will be given to the justice collaborators and the whistleblowers was not limited to physical and psychic protection, but there are other special treatment in the form of: a. Special place of detention, confinement or imprisonment of suspects, the accused and / or other inmates of the crime which is expressed in terms of the Cooperating Witness Actors detained or undergo a criminal entity; b. Filing the case as much as possible is done separately by the suspect and / or the other defendants in the case were reported or disclosed; c. Obtain a delay prosecution for him/her self; d. Obtaining delay legal proceedings such as the investigation and prosecution that may arise because of the information, statements and / or testimony that is given; and e. Can testify before the trial without showing his face or without showing identity (Lilik Mulyadi, 2013).

3. Legal protection

Legal protection referred here is the protection of "legal status", as stipulated in Government Regulation No. 71 of 2000. The form of protection of legal status technically can include the rehabilitation of the individual name and status and the delay or the cancellation of individual status before any legal proceedings against the corruption case was completed. In other words, the legal process of corruption cases should take precedence over claims of defamation by the suspect against the reporting witness of corruption. However, protection against "legal status" is canceled if the results of investigations and inquiries have sufficient evidence to strengthen the reporting witness involvement in corruption were reported and witnessed it. So in this case, the reporting witness will be given security protection throughout the investigation process of corruption criminal justice.

It is worth to note that the protection arrangement for the legal status stipulated in Government Regulation No. 71 of 2000 was in line with the Article 10 paragraph (1) and (2) of Law No. 13 of 2006. In this article it was stated that:

(1) Witnesses, Victims, and the complainant cannot be said guilty by law based on the reports or testimony that is still on the process;

(2) A witness who is also a suspect in the same case cannot be exempt from criminal prosecution if he/she has been proved legally and convincingly guilty, but his/her testimony can be considered by the judges in lighten his/her sentences.

Basically, the form of protection between the justice collaborator and whistleblower is different from each other. This is in accordance with Article 10 of Law No. 13 of 2006 as mentioned above. This article says : Whistleblower or a reporting witness cannot be prosecuted based on reports and testimony. While justice collaborator or a suspect witness in the same case cannot be exempt from criminal prosecution if it is proven legally and convincingly guilty. However, his/her testimony can be considered by the judge.

Legal protection can be in terms of immunity that will be given to the complainant and witnesses which further cannot be sued civilly or criminally as long as she/he testifies or reports truly. The application of the concept of protection of cooperating persons can be found in Article 10 paragraph (1) of Law No. 13 of 2006. This article can be considered as the policy of the criminal law (penal policy), which is very appropriate given the evidence of a criminal offense committed with a modus operandi that is systematic and organized. However, it will be a difficult task for the public prosecutor or the police if a criminal act has no evidence in the form of witnesses who saw themselves, to hear themselves or experience of an offense where the actors perform actions in a neat and organized. Besides, it often happens the main perpetrators give "counter attack" when they were reported by whistleblowers and justice collaborator.

Against the above phenomena, the Article 10, paragraph (1) of Law No. 13 of 2006 can assist the whistleblower or justice collaborator to stay focused to seek the criminal facts criminal without being weighed down by legal cases reported. This article is supported by the Article 15 of the Law Number 30 Year 2002 on Corruption Eradication Commission. In this article it was stated that the Eradication Commission of corruption obliges to provide protection to witnesses or whistleblowers who report or provide information concerning acts of corruption. This further is also supported by the Supreme Court Circular No. 4 of 2011 that stipulates that when the complainant reported criminal offenses was also reported, the handling of the case on the reports submitted by the complainant criminal offense take precedence over statements from the reported.

4. Appreciation

Protection in the form of appreciation for whistleblowers and justice collaborator plays a great importance to the efforts to create a conducive condition to the disclosure of organized crime in the context of community involvement. This appreciation is given not only to appreciate efforts in the law enforcement, but also to stimulate others to do the same valuable things to enforce the law and order. The appreciation to the whistleblower has been regulated in many legislation, including the Regulation No. 71 of 2000.

The right to recognition, security, protection, fair legal certainty and equal recognition before the law have been outlined in the Constitution, particularly in the Article 28D paragraph (1) of the 1945 amendments. In this constitution, it was stated that every person has the right to recognition,

security, protection and legal certainty as well as equal recognition before the law. The same provision is also contained in Article 3 (2) of Law Number 39 of 1999 on Human Rights. It was stated that everyone has the right to recognition, security, protection and the process of law and to obtain legal certainty and equal treatment before the law. Provisions concerning the same guarantee is contained in the general explanation item 3 letter a Criminal Procedure Code states that the same treatment on every person before the law by not holding the difference in treatment.

Security, protection and fair legal treatment and equal treatment before the law contained also in Article 9 and Article 10 of Law Number 48 Year 2009 on Judicial Power. The Article 8, for instance stated that : (1) Every person suspected, arrested, detained, prosecuted, or appear before the court shall be presumed innocent until there is a court ruling that declared his guilt and has obtained permanent legal force. (2) In considering the severity of the crime, the judge should also consider the nature of good and evil from the defendant. Whilst in the Article 9, it was stated that: 1) Every person arrested, detained, charged or prosecuted for no reason based on law or by mistakes, he/she has the right to demand compensation and rehabilitation.(2) Officials who knowingly commits acts as referred to in paragraph (1) shall be punished in accordance with the provisions of the legislation. (3) The procedure of prosecution of compensation, rehabilitation, and the imposition of compensation stipulated in the legislation.

In the regulations mentioned above, there are already guaranteed protection of human rights regarding security, protection and the process of law and to obtain legal certainty and equal treatment before the law. This shows that the issuing of Act No. 31 of 2014 is intended to provide security, protection and fair legal treatment and to obtain legal certainty. Although the Act No. 31 of 2014 does not mention clearly about the notion of whistleblower and justice collaborator and not also clearly mention that this law protects the rights of whistleblowers and justice collaborator, but when it linked with the provision of Article 1 paragraph 1 of the Act number 39 of 1999 on human rights, this appears to be no difference.

Other law that regulates protection for witnesses and victims was the Law No. 8 of 1981 on the Law of Criminal Procedure Code (KUHAP). However, this law can be said to be very minimal and uneven when compared with arrangements regarding the suspects or the accused. This is not surprising since the establishment of the Criminal Procedure Code at that time influenced by the intensity of interests between the law enforcement agencies. Even if there is a clause protection of human rights, it is still limited. In this law, the central position of the witness is seen only for the sake of proof, not protection.

The protection given to the whistleblower and justice collaborator was specifically can be seen in the Law No. 31 of 2014 on the Protection of Witnesses and Victims. This can be found in the article 10 and Article 10A. The Article 10, for instance, stated : (1) Witnesses, Victims, Perpetrators Witnesses, and / or Rapporteur cannot be prosecuted based on the testimony and / or reports, unless the testimony or the report rendered in good faith. 2) In the event of a lawsuit against the Witness, Victim, Witness Actors, and / or Rapporteur on the testimony and / or reports that will be, is being, or has been granted, the lawsuit shall be postponed until

the case on whom he or she testified had decided by the court and obtained permanent legal force. Similarly, in the Article 10A I laws stated that :

(1) Witness Actors can be given special treatment in the process of examination and appreciation of the evidence given;

(2) Handling specifically referred to in paragraph (1) in the form of : a. Separation of the place of detention or point out a sentence between Witness Actors with the suspect, the defendant, and / or inmates who revealed the crime; b. Witness filing separation between files with file Performers suspects and defendants in the investigation and prosecution of criminal offenses are expressed; and / or; c. Testified before the court without dealing directly with the defendant revealed criminal acts.

(3) Recognition for the witness referred to in paragraph (1) in the form of: a. Lightening of sentences; or b. Parole, additional remissions and other prisoners' rights in accordance with the provisions of the legislation for the Witness prisoners Performer status.

(4) To obtain an appreciation of lightening of sentences referred to in paragraph (3) letter a, the Agency provides a written recommendation to the public prosecutor for possible inclusion in its claim to the judge

(5) To obtain an award of parole, an additional remission, and the other prisoners' rights referred to in paragraph (3) b, the Agency provides a written recommendation to the minister to organize the administration in the field of law.

The provisions of Article 10 has essentially adopted the position of the reporting crime (whistleblower) and a witness who cooperated (justice collaborator) and the shape of the legal guarantees for witnesses who may at the same time as the suspect / defendant can be given a reward in the form of the consideration of judges in relieving the sentence imposed to him if it is found legally and convincingly guilty.

To become a whistleblower, a protection request submitted reporter, either its own initiative or at the request of the competent authority, will be examined by the Witness and Victim Protection Agency. Even within the provisions of Article 10 did not specifically mention the complainant with the terms of the reporting crime (whistleblower), but what is meant by the complainant in the explanation of this law is a person who provides information to law enforcement about a crime. This is also the same with the protection of the justice collaborator as in the Article 10 and Article 10 A in that the Agency can granted if the following : 1. The information is considered important; 2. The threat level is harmful; 3. There is a letter from medical team or a psychologist; 4. There is a track record committed crimes by witnesses and / victim (Article 28 of Law No.13 of 2006).

IV. PROTECTION MECHANISM

Law on protection of witnesses and victims divides the protection and assistances differently. In terms of the protection, it was regulated in the Article 5, while in terms of assistances it was regulated in the Article 6. The mechanism for the protection is given in the Article 18. In this article, it was stated that the protection should be applied by witnesses / victims on their own initiative or by the competent authority and the decision to grant protection is given in writing by the Agency no later than 7 working days from the proposed protection.

The method to apply for the protection is organized by the Witness Protection Agency (LPSK). The procedure to apply for the protection request was in the Regulation No. 6 of 2010 of the Article 9. In this article it was stated : (1) The applicant should addressed the protection request to the chairman of the Agency by letter or a request that was made by the competent authority as referred in Article 4 paragraph (3) b, then the chairman of the Agency forward the request to the relevant division called UP2 of the Agency to do further research on the completeness of the requirements according to the provisions of this regulation. (2) In the case to obtain the fulfillment of the request completeness for protection, the UP2 division of the Agency can coordinate to an official authority or to the applicant. (3) in addition to the requirements referred to in Article 6 and Article 7, UP2 of the Agency may request additional data or information related to his/her case, namely, letter of examination (BAP); the testimony of the case, letters from the police or the Prosecutor or the Court, letters of reports or information to the relevant officials such as the police, the State Commission, the Central Government, Local Government, related on his testimony as a reporter, and a letter from the relevant authorities about the case.

The application that has been accepted will be further submitted to UP2 (Unit Receipt of Application) by the chairman of the Agency. UP2 is a unit that has tasks to accept protection request by the applicants. While the Agency's decision whether or not the protection request was accepted or rejection will be informed no later than 7 days after the application for protection was filed. If the agency accepted the protection request, the applicants should signed the statement to follow the terms and conditions of the protection of witnesses and Victim. This statement can be found in the Articles 29 and the detail of the conditions to have protection was regulated in the article 30 paragraph (1) of Law No. 13 of 2006. In this article it was regulated that : a. the witnesses and / or victims have to have willingness to testify in court proceedings; b. the willingness of witnesses and / or victims to comply with the rules relating to safety; c. the willingness of witnesses and / or victims to not relate in any way by someone other than the approval of the Agency, as long as he is under the protection of the Agency; d. Witness obligations and / or the victim not to tell anyone about her whereabouts under the aegis of the Agency. Note the detail of the type of the witness has been advanced in the literature. (see, for instance, Hiariej, 2006; Firman Widjaya, 2012).

However, Hiariej (2006), found that there are unclear and lack of sharpness in the formulation of the position of witnesses and suspects, and under what conditions a witness becomes a suspect when at the same time also existed as reporter. The formulation was lead to multiple interpretations, even it can be potentially unconstitutional interpretation and legal uncertainty. Furthermore, Hiariej (2006) stated that Article 10 Paragraph (2) of Act 13 of 2006 is contrary to the spirit of the whistleblower. This is simply because this article does not meet the principles of protection against a whistleblower, where it was still to be sentenced to a criminal when involved in the crime.

Also, Hiariej (2006) argued that the Article 10 of Paragraph (1) and Paragraph (2) of the Law No. 13 / 2006 have three confusion. First, it relates to a witness who is also a suspect in the same case would deprive the defendant execution. Second, the ambiguity in relation to who will be

tried in advance or be tried simultaneously. But in the year 2011 SEMA 4 has been explained that the suspect cases were disclosed or reported to be prior to trial than cases complainants are also offenders. Third, the provision of Article 10 Paragraph (2) of Act 13 of 2006 contradicts with Paragraph (1) in the article of the same Act in that it states that witnesses, victims, and the complainant cannot be prosecuted legally.

Historically, the crime reporter or whistleblower has closely linked to mafia-style criminal organizations such as in Italy. This organized crime committed by the Mafioso (the mafia members) to engage in the heroin trade and growing in various parts of the world. We also know the similar organizations in various countries such as the Mafia in Russia, cartel in Colombia, triads in China, and the Yakuza in Japan. Due to the strong network of the criminal organizations, they can master the various sectors of power, whether it is executive, legislative and judicial branches of government including law enforcement officers. Not infrequently the syndicate uncovered the courage of one of their members who defected and leak their crimes to law enforcement authorities. Mafia member who defected and leaked the crime to law enforcement officials called a whistleblower in the hope, he/she can be exempted from criminal prosecution. Thus, the provision of Article 10 paragraph (2) was contrary to the spirit of the whistleblower.

Furthermore Firman Wijaya (2012) argued that there are three things related enforce why whistleblowers need attention: (1) whistleblower should be given as soon as possible protection so that he will not killed; (2) information from the whistleblower can be used as initial evidence sufficient to reveal the crime syndicate and (3) if the whistleblower provide information that could be used to dismantle crime syndicates totally, then this can be used as an excuse to remove the criminal charges.

It can be concluded that the provisions of Article 10 paragraph (2) does not meet the elements of the protection. This is because the whistleblowers can still be punished if she/he involved in the crime. Therefore, it seems this provision only gives protection to the complainant half-hearted. This is because the whistleblower in question is the whistleblower that is classified as not part of the perpetrators. If the whistleblower is part and perpetrators, based on Article 10 paragraph (2) of whistleblower, he/she cannot be exempt from criminal prosecution.

The provisions of Article 10 paragraph (2) of Act 13 of 2006 only applies to a witness who cooperated (justice collaborator) that is a part and actors who want to cooperate to disclose criminal offenses that occur in the hope of getting leniency, whereas the whistleblower which is part of the offender cannot be protected and would become the suspect.

The existence of Article 10 paragraph (2) raises the issue of fairly fundamental and able to become polemic both in term of law and policy for the law enforcement process. The article 10 of paragraph (2) also raises legal uncertainty and do not satisfy the justice for the people and cannot provide legal protection for whistleblowers.

According to Abdul Haris (2010) that article 10 paragraph (2) were appropriate and in line with the SEMA 4 Year 2011. Abdul Haris explained that someone who is part of the perpetrators accountable for the mistakes he had done, even though she/he disclosed the fact. However, she/he must be

given compensation in terms of punishment and safeguard both legally and physically.

V. CONCLUDING NOTES

Implementation of restorative justice would require creativity prosecutor to develop restorative programs. This is important to minimize the disputes settlement in court. In that context, the prosecutor is required to leverage or build strategies or approaches to problem-oriented. This indeed is not an easy task because it shifts the paradigm of the prosecutor who had been considered a "case of processors" into a "problem solvers", involving the community. The public prosecutor has been precisely tend to pass resolution of cases through the formal criminal justice process to obtain a court decision which is legally binding rather than completing the restorative models.

With restorative justice, traditional patterns as it should be seen as an alternative to the settlement of social problems, which arise as a crime or offense in touch with the interests of the victims, their families or communities affected. Thus, when the judicial process is in the frame prosecution, this cannot meet the interests of the victims, families and communities affected by the crime. This suggests that the creativity toward restorative justice model application becomes inevitable, although the telescope's criminal procedure code has not obtained justification.

Beside the above traditional problems of the criminal justice system, institutional barriers faced by the prosecutor becomes a success of failure variable of the implementation of restorative justice in the prosecution stage. As stated by Yudi Kristiana that the duties and authority of the prosecutor used an approach bureaucratic, centralized and hierarchical system of command and accountability. The prosecutor's decision as a form of control at the prosecution stage, at the level of bureaucracy it may distort the settlement of the case in the context of restorative justice, as done or not in the child delinquency cases or domestic violence. This is especially when the diversion criteria was not specified in legislation or in the general policy of the prosecutor. Therefore, internal changes via the Attorney General policy is an important factor in functioning restorative justice till to the Criminal Procedure Code provides the basis explicitly.

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