



## PROTECTION OF WITNESSES AND VICTIMS OF CERTAIN CASES BASED ON EQUALITY BEFORE THE LAW PERSPECTIVE

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### Abstract

Protection of witnesses and victims of criminal acts can cause particular problems in implementing witness and victim protection. The author finds several problems. The first problem is that protection for witnesses and victims of criminal acts in some instances results in witnesses and victims in other crimes being unable to apply for rights. The second problem is that the protection of witnesses and victims of criminal acts in some instances closes the opportunity for cases outside of criminal cases such as civil cases, state administration cases to obtain similar rights. The third problem is the conflict of norms between Article 5 paragraph (2) Law No. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims with Article 224 paragraph (1) Criminal Code. In this context, the writer uses the relevant principle as a tool of analysis, namely the principle of equality before the law.

The author is of the view that the protection of witnesses and victims of criminal acts in some instances is not under the principle of equality before the law, so the author has the following ideas: (1) Editors provide must change rights to witnesses and victims of crime in some instances in the protection of witnesses and victims (2) Protection of witnesses and victims should not only be for criminal cases but must also cover must always maintain cases outside of criminal cases, (3) Fulfillment of obligations and granting rights must always be maintained in balance (4) Renewal of protection for witnesses and victims must be contained in statutory regulation.

Keywords: Protection, Witnesses and Victims, Equality before the Law.

### A. Introduction

The sentence of Indonesia's state as a constitutional state is in the editorial staff of the 1945 Constitution, to be precise in Article 1 paragraph (3) of the 1945 Constitution. This editorial office implies that it must always be based on the law in all state life that we carry out in principle. To create an effective law, a judicial institution was formed as a means for the public to seek justice and get proper treatment before the law. Some institutions consistently provide

protection legally. Also, some institutions supervise law enforcement officers so that they can implement law enforcement can be implemented based on Pancasila.

As the rule of law is based on Pancasila, Indonesia must have individual aims and objectives, namely to realize the life order of our country that is safe, peaceful, comfortable, prosperous, and always based on law. Every citizen's legal position is guaranteed to achieve harmony, balance, and harmony between individuals' interests and those of the common or community. The concept of the constitutional state of Pancasila implies a legal system that is established based on the principles and rules or norms contained in the values contained in Pancasila as the basis of social life.

Changes in the Indonesian legal system that occurred after the amendments to the 1945 Constitution had considerable implications for the Indonesian constitutional system. These changes were implemented by forming and changing state institutions. This is done with the intent and purpose to carry out the supervisory and balance functions in the government system. The goal is to prevent the abuse of power by the government.

One of the emerging institutions is the Witness and Victim Protection Agency or *Lembaga Perlindungan Saksi dan Korban* (LPSK). The Witness and Victim Protection Agency (LPSK) was formed based on Law No. 13/2006 on Witness and Victim Protection. LPSK has the duty and authority to provide protection and assistance to witnesses and victims. The scope of protection by the LPSK is at all stages of the criminal justice process so that witnesses and victims feel safe when giving testimony.

The rights of witnesses and victims need to be considered to support the settlement of cases that are being pursued. The state is obliged to pay attention to the protection of witnesses and victims, of course, with the institution's supervision that is given the authority, namely the LPSK. The rights of witnesses and victims are contained in Article 5 paragraph (1) of Law no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims. The article states that:

“Witnesses and Victims have the right:

1. Obtain protection for the safety of his personal, family, and property, and are free from threats regarding the testimony he will, is being, or has given;
2. Participate in the process of selecting and determining the form of security protection and support;
3. Provide information without stress;
4. Got a translator;
5. Free from entangling questions;
6. Get information about the progress of the case;
7. Get information about court decisions;
8. Get information in case the convict is released;
9. Anonymity;
10. Got a new identity;
11. Find a temporary residence;
12. Got a new residence;
13. Obtain reimbursement of transportation costs as needed;
14. Get legal advice;
15. Get temporary living expenses until the end of the protection period; or
16. Get assistance.”

The rights contained in Article 5 paragraph (1) Law no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims did not necessarily get witnesses and victims in all cases. Only certain types of criminal acts have the rights listed in this Article 5 paragraph (1) Law no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims. Article 5 paragraph (2) UU no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims states that:

“The rights as referred to in paragraph (1) are granted to Witnesses and/or Victims of criminal acts in some instances following the Decree of the LPSK”.

The above provisions clearly state “in certain cases”. This explains that in UU no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims, some conditions must be met to apply for protection to the LPSK. The most vital requirement to apply for witness and victim protection is that the person becomes a witness and/or victim of a crime that the LPSK has determined as a criminal act in some instances.

The existence of Article 6 paragraph (1) of Law no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims has stated the types of criminal acts that are allowed to obtain rights. The following reads Article 6 paragraph (1) of Law no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims, that:

“Victims of serious human rights violations, victims of criminal acts of terrorism, victims of criminal acts of trafficking in persons, victims of torture, victims of crimes of sexual violence, and victims of severe abuse, apart from having the right as referred to in Article 5, are also entitled to:

1. Medical assistance; and
2. Psychosocial rehabilitation assistance and psychologists.”

Provisions Article 6 paragraph (1) of Law no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims tends to prioritize handling certain types of criminal acts. It raises concern for the author if the case that occurs is not a criminal offence classified as a particular criminal case. Witnesses and victims in ordinary cases are also very likely to receive the same threat of violence against witnesses and victims of criminal acts in some instances. For example, witnesses and/or victims of chicken theft receive violence threats that are more or less the same as witnesses and victims in certain criminal cases. It would be very unfair if witnesses’ and victims’ protection in ordinary cases were differentiated from the protection of witnesses and victims in certain criminal cases. Based on the above background, the writer wants to convey the formulation of the problem: (1) is the protection of witnesses and victims of certain criminal cases per the principle of equality before the law? (2) How is the protection of witnesses and victims by the principle of equality before the law? The type of research used in compiling this paper is normative or doctrinal legal research. Normative legal research prioritizes library research. In the study of normative law, the law is seen as a norm, whether it has a positive form (*ius constitutum*) or one that has not been positive (*ius constituendum*).<sup>1</sup> Therefore, in normative legal research, the data source is only secondary data, consisting of primary legal materials, secondary legal materials, and tertiary legal materials.<sup>2</sup>

<sup>1</sup> Soetandyo Wignjosoebroto, in Derita Prapti Rahayu, “DELIK IZIN LINGKUNGAN YANG TERBAIKAN”, *Jurnal Yudisial* 8, no. 2 (2015): 209-228, 217, DOI: 10.29123/jy.v8i2.53

<sup>2</sup> Derita Prapti Rahayu, *Metode Penelitian Hukum* (Yogyakarta: Thafa Media. 2020), 88.

The author analyzes the data obtained using the normative analysis method. What is done in interpreting the research material based on legal notions, legal norms, legal theories, and doctrines relating to the subject matter raised by the author? Legal norms are needed as central premises, then correlated with relevant facts (legal facts) used as minor premises. Through the syllogistic process, conclusions will be obtained about the problem.

## B. Discussion

### 1. Principles of Equality Before The Law

*Equality before the law* is described in the book Normative Criminal Procedure Law, Toritis, Practices, and Problems owned by Lilik Mulyadi. In the book, it is stated that:

“..... this principle is one of the manifestations of the rule of law (Rechstaat) so that there must be equal treatment for everyone before the law (*gelijheid van ieder voor de wet*).”<sup>3</sup>

The explanation that reinforces the above statement is related to the treatment by the criminal procedure law. In this book, it is mentioned again that:

“Strictly speaking, the criminal procedural law does not recognize any regulations that give special treatment to the accused (*forum prevelegiatum*) so that the court will judge according to the law without discriminating against people.”<sup>4</sup>

Understanding the principle of equality before the law is provided in Andi Sofyan’s book entitled An Introduction to Criminal Procedure Law. In this book, it is explained that:

“The principle of equality before the law (equality before the law) means that everyone is treated equally without differentiating between social level, class, religion, skin color, rich, poor and others before the law or the court adjudicates according to the law without discriminating person.”<sup>5</sup>

More clearly, this principle is also contained in Article 27 of the 1945 Constitution, which states that:

“All citizens are equal in law and government and are obliged to uphold the law and government without exception.

Using extensive interpretation, the author provides his analysis that the existence of equality principles *before the law*, in essence, can be attached not only to the accused or suspect. This applies to every citizen, including witnesses and victims, in settlement of cases in court.

### 2. Problematics Protection of Witnesses and Victims of Certain Criminal Cases Based on Principles Equality Before The Law

The position of witnesses in the criminal justice process occupies a key position, as seen in Article 184 of the Criminal Procedure Code.<sup>6</sup> Criminal law cases that are submitted to court but without the presence of witnesses can cause bias in the judge’s decision.<sup>7</sup> The importance of the role of witnesses in law enforcement, especially criminal law, has its consequences for the people

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<sup>3</sup> Lilik Mulyadi, *Normatif, Teori Hukum Acara Pidana Toritikal, Praktek dan Masalah* (Bandung: Alumni, 2017), 17.

<sup>4</sup> *Ibid.*

<sup>5</sup> Andi Sofyan, *Hukum Acara Pidana Sebuah Pengantar* (Jakarta: Fajar Interpratama Mandiri, 2014), 11.

<sup>6</sup> Mamay Komariah, “PERLINDUNGAN HUKUM SAKSI DAN KORBAN OLEH LEMBAGA PERLINDUNGAN SAKSI DAN KORBAN (LPSK)”, *Jurnal Ilmiah Galuh Justisia* 3, no 2 (2015): 229-245, 232, DOI: 10.25157/jigj.v3i2.421.

<sup>7</sup> Wiwik Afifah, Gusrin Lessy, “PERLINDUNGAN HUKUM TERHADAP ANAK SEBAGAI SAKSI DALAM SISTEM PERADILAN PIDANA ANAK”, *DIH: Jurnal Ilmiah Hukum* 10, no. 20 (2014): 63-75, 67, DOI: 10.30996/dih.v10i20.358.

who are made witnesses, be they victim-witnesses and reporting witnesses, and other witnesses in proving the perpetrator of a criminal act.<sup>8</sup> Lack of legal protection for victims can cause victims to become passive and tend to be non-cooperative with officers.<sup>9</sup> Therefore granting rights to support the settlement of cases is essential. The granting of rights to witnesses and victims of certain criminal cases is clearly stated in Article 5 paragraph (2) of Law no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims. The article states that:

“The rights as referred to in paragraph (1) are granted to Witnesses and/or Victims of criminal acts in certain cases following the Decree of the LPSK.”

This article shows that those who are entitled to achievement, in this case, the rights, are the legal subjects stated in the article, namely witnesses and victims who are related to specific criminal acts. As for individual criminal acts as mentioned by Article 6 paragraph (1) Law no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims. The article states that:

“Victims of serious human rights violations, victims of criminal acts of terrorism, victims of criminal acts of trafficking in persons, victims of torture, victims of crimes of sexual violence, and victims of severe abuse, apart from having the right as referred to in Article 5, are also entitled to:

- a. Medical assistance; and
- b. Psychosocial rehabilitation assistance and psychologists.”

More specifically, those who get the rights stated in Article 5 paragraph (1) and Article 6 paragraph (1) Law no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims is a legal subject as mentioned in Article 6 paragraph (1) Law no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims.

The criminal justice system’s working pattern, which is apathetic towards the interests of victims of crime, cannot be separated from legislative policies in the field of law and the criminal justice system.<sup>10</sup> The community is placed in a relatively complicated position in responding to this provision. The author tries to correlate it with Article 224 of the Criminal Code. If we look at Article 224 of the Criminal Code, which reads:

Anyone who is summoned according to the law will be a witness, expert, or interpreter, deliberately failing to fulfil an obligation which, as long as the law must be fulfilled in that position, shall be punished:

- a. In a criminal case, with a maximum imprisonment of nine months.
- b. In other cases, the maximum imprisonment of six months.

The article above shows that the public is obliged to come immediately to fulfil the obligation to become a witness, expert, or interpreter when the competent authorities need it. The question arises, what if the people who are witnesses receive threats of violence from certain

<sup>8</sup> Josefhin Mareta “ANALISIS KEBIJAKAN PERLINDUNGAN SAKSI DAN KORBAN (POLICY ANALYSIS OF WITNESS AND VICTIM PROTECTION)”, *Jurnal Ilmiah Kebijakan Hukum* 10, no. 1 (2016): 105-115, 106, DOI: 10.30641/kebijakan.2016.V10.105-115.

<sup>9</sup> Rena Yulia, “PERLINDUNGAN HUKUM TERHADAP KORBAN KEJAHATAN PADA PROSES PENYELIDIKAN DAN PENYIDIKAN DALAM SISTEM PERADILAN PIDANA”, *Jurnal Hukum & Pembangunan* 49, no. 3 (2019): 661-670, 664, DOI: 10.21143/jhp.vol49.no3.2193

<sup>10</sup> Nahdiya Sabrina, “PERLINDUNGAN DAN PEMENUHAN HAK KORBAN TINDAK PIDANA DALAM SISTEM PERADILAN PIDANA”, *Jurnal Cakrawala Hukum* 7, no.2 (2016): 229-237, 231.

parties? Even though the community cases are not criminal cases as stated in Article 6 of Law no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims. The protection of witnesses and victims has a vital role in the criminal justice process. The testimony of witnesses and victims free from fear and threats can reveal a criminal act.<sup>11</sup> The fair legal process is essentially the spirit of the criminal justice system itself.<sup>12</sup> On the one hand, the state obliges the public to come as witnesses, but the state seems to let go when people get violent threats. The existence of the principle of equality before the law does not materialize in this context.

### **3. Mechanism Grant of Witnesses and Victims' Rights in Protection of Witnesses and Victims following the Principles of Equality Before The Law**

The main elements built into the definition of victims include two crucial things: first, the subject of victims, which includes individuals or groups, and second, aspects of loss and suffering caused by an act against the law.<sup>13</sup> The victim's position as not a party to a criminal case results in the inadequate protection of his rights.<sup>14</sup> This should be understood more broadly as a human right. The protection of crime victims is closely related to the protection of human rights.<sup>15</sup> Based on the authors' problems, the authors try to construct the right solution to overcome the norms' conflict. Construction can also be defined as the arrangement (model, layout) of a building (bridge, house, and many more.)<sup>16</sup> With all the challenges LPSK, of course, we must understand that this institution's task is not an easy task. Limited human resources, then limited supporting factors, are faced with so many cases. Apart from that, all legislators should still make regulations that substantially fulfil the principle of equality before the law.

A good understanding of legal principles will produce a more concrete set of principles or principles.<sup>17</sup> Editors who prioritize witnesses and victims in certain criminal cases should be removed because they are not under the principle of equality before the law. Borrowing Lawrence M. Friedman's theory of the legal system, law enforcement's effectiveness and success depend on three elements of the legal system that must be fulfilled, namely the substance of the law, the legal structure, and the legal culture. Suppose they still do not comply with principles in terms of substance or regulations. How will the legal system be adequately implemented? Indeed this is

<sup>11</sup> Ernita Larasati, "ANALISIS PERLINDUNGAN HUKUM TERHADAP SAKSI DALAM PEMERIKSAAN PERKARA PIDANA (Studi di Wilayah Hukum Bandar Lampung)", *Thesis Faculty of Law, Universitas Lampung*, (2017), 4.

<sup>12</sup> Agus Takariawan, *Perlindungan Saksi dan Korban*, (Bandung: Pustaka Reka Cipta, 2016) p. 177.

<sup>13</sup> Abdul Haris Semendawai, "Hak-Hak Korban Pelanggaran HAM Yang Berat (Tinjauan Hukum Internasional dan Nasional)", *Jurnal Hukum Ius Quia Iustum* 16, no. 2 (2009): 253-267, .256, DOI: 10.20885/iustum.vol16.iss2.art6.

<sup>14</sup> Adil Lugianto, "REKONSTRUKSI PERLINDUNGAN HAK-HAK KORBAN TINDAK PIDANA", *Masalah-Masalah Hukum* 43, no. 4 (2014): 553-560, 553. DOI: 10.14710/mmh.43.4.2014.553-559.

<sup>15</sup> Bill Clinton P. Simanjorang, "REALISASI LEMBAGA PERLINDUNGAN SAKSI DAN KORBAN (LPSK) DALAM MEMBERIKAN PERLINDUNGAN TERHADAP SAKSI DAN KORBAN DI DAERAH", *Jurnal Universitas Atmajaya Yogyakarta*, (2014): 1-14, 8.

<sup>16</sup> Language Center, In Derita Prapti Rahayu, "REKONSTRUKSI PARTISIPASI MASYARAKAT DALAM PERIZINAN PERTAMBANGAN RAKYAT BERBASIS NILAI KEARIFAN LOKAL (Studi Kasus Izin Pertambangan Rakyat di Kabupaten Belitung Timur)", *Prosiding Seminar Hukum dan Publikasi Nasional (Serumpun)* 1, no. 1 (2019): 446-457, 449.

<sup>17</sup> Yokotani, "MEKANISME SELEKSI DEWAN PENGAWAS KOMISI PEMBERANTASAN KORUPSI DALAM PERSPEKTIF CITA HUKUM PANCASILA", *Progresif Jurnal Hukum* 13, no. 2 (2019): 115-133, 120, 10.33019/progresif.v13i2.1452.

our collective responsibility to oversee the amendment of Article 6 of Law no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims.

Regulatory synchronization needs to be done in response to this so that there is no conflict of norms in its application. The thing that happened to Article 6 Law no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims with Article 224 paragraph (1) of the Criminal Code should not have happened legislators understood this situation. Judging another view of Barda Nawawi Arief, the incessant public spotlight and criticism of the decline in the quality of criminal law enforcement are not aimed at a decline in the ability and intellectual maturity to control the norms of criminal law but instead is aimed at the decline (erosion) of values. So it seems that the immaturity of these values/souls is the primary concern of the community and should also be the concern of all legal higher education institutions.<sup>18</sup> When the study of criminal law is solely focused on the study of norms, and apart from studying the values that inspire it, such a study is a partial, lame, and even dangerous study.<sup>19</sup>

In simple terms, this fact emphasizes that the system is part of the context of legal development. Therefore development also involves a system. Theoretically, a national legal system involves sub-systems: “national legal substance”, “national legal structure”, and “national legal culture”.<sup>20</sup> Law does not move in a value-free vacuum, but it is in a particular social order and living humans.<sup>21</sup>

### C. Conclusion

Giving rights only to witnesses and victims of certain crimes in protecting witnesses and victims does not reflect the principle of equality before the law. The problem is that granting witnesses and victims' rights to certain crimes causes the submission of requests for protection of witnesses and victims related to cases other than certain crimes that cannot be filed. At the same time, witnesses and victims of crimes outside of certain criminal cases may also have the same or even more significant violence threat. The second problem is the conflict of norms between Article 6 Law no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning Protection of Witnesses and Victims with Article 224 paragraph (1) of the Criminal Code. Article 224 paragraph (1) of the Criminal Code provides an obligation for the public to come as witnesses when information is needed, be it a criminal case or others, but when there is a threat of state violence such as hands-off if the case is not included in the classification a criminal offense in some instances.

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<sup>18</sup> Barda Nawawi Arief, “Several Aspects of the Development of Criminal Law Science (Welcoming a New Generation Indonesian Criminal Law)”, *Inauguration Speech for Professor of Criminal Law, Faculty of Law, Diponegoro University*, (Semarang: Pustaka Magister, 2011), 59-60. See also Muhammad Rustamaji, *Dekonstruksi Asas Praduga Tak Bersalah (Pembaruan Rumusan Tekstual Norma dan Isi Nilai)*, (Yogyakarta: Thafa Media, 2019), 1.

<sup>19</sup> Barda Nawawi Arief, In Esmi Warassih Pudjirahayu, et.al, “WEWENANG KOMISI PEMBERANTASAN KORUPSI DALAM PENGHENTIAN PENYIDIKAN DAN PENUNTUTAN PERSPEKTIF INDEPENDENSI”, *University of Bengkulu Law Journal (UBELAJ)* 5, no. 1 (2020): 35-46, 40, DOI: 10.33369/ubelaj.5.1.35-46.

<sup>20</sup> Barda Nawawi Arif, In Sulaiman, Derita Prapti Rahayu, “PEMBANGUNAN HUKUM INDONESIA DALAM KONSEP HUKUM PROGRESIF”, *Jurnal Hermeneutika* 2, no. 1 (2018): 128-139, 135, DOI: 10.33603/hermeneutika.v2i1.1124.

<sup>21</sup> Satjipto Rahardjo, In Derita Prapti Rahayu, “BUDAYA HUKUM PANCASILA DALAM HUKUM PERTAMBAHAN RAKYAT SEBAGAI BAGIAN PEMBANGUNAN SISTEM HUKUM NASIONAL”, *Kanun Journal of Law* 16, no. 1, (2014): 85-102, 88.

With the application of witness and victim protection that reflects the principle of equality before the law, the idea is that: (1) Giving rights only to witnesses and victims of certain criminal cases must be abolished immediately, (2) Synchronization of regulations must always be observed, (3) The fulfilment of obligations and the granting of rights must be kept in balance. (4) The renewal of protection for witnesses and victims must be outlined in statutory regulation.

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