

## DETERMINATION OF STATUS AS A WITNESS OF COOPERATING ACTORS (JUSTICE COLLABORATOR) AND THE RIGHT TO CRIMINAL LENIENCY IN THE LAWS AND REGULATIONS IN INDONESIA

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### Abstract

The objective of this research as to analyze judge's consideration in determining the justice collaborator. This research is a normative legal research using case study approach. This research will examine court reasoning or consideration in order to reach decision. The research prioritizes literature review by data compiling originating from library and other source. The research result finds that there is no similar understanding amongst law enforcers in applying legislation so that it needs a forum to create similar understanding amongst law enforcers in reading and applying regulation of justice collaborator, in order to get certainty for the suspect or the accused who is willing to become a justice collaborator that he/she will have leniency of criminal penalties. This will encourage the suspect or the defendant to cooperate in revealing the criminal act of corruption completely.

### Abstrak

Peran saksi pelaku yang bekerjasama (*justice collaborator*) diperlukan untuk mengungkap tuntas tindak pidana korupsi yang merupakan kejahatan terorganisir. Hak justice collaborator untuk mendapatkan penghargaan berupa keringanan pidana telah diatur dalam Undang-Undang LPSK, Peraturan Bersama dan Surat Edaran Mahkamah Agung. Agar peran justice collaborator dalam memberikan informasi dapat optimal diperlukan kesamaan pemahaman di antara para penegak hukum mengenai aturan hukum yang mengatur tentang pemberian status sebagai saksi pelaku yang bekerjasama (*justice collaborator*) dan hak-hak saksi pelaku yang bekerjasama, sehingga tersangka atau terdakwa yang bersedia menjadi saksi pelaku yang bekerjasama benar-benar mendapatkan perlindungan dan penghargaan yang menjadi haknya. Hal ini akan mendorong seorang tersangka atau terdakwa bersedia menjadi saksi pelaku yang bekerjasama (*justice collaborator*).

### INTRODUCTION

The witness position is very important in criminal case examination process. This is proved by the Article 184 KUHAP formulation which placed the witness statement in the first place of valid evidence list according to KUHAP. In the criminal case, the witness statement evidence is the main evidence. We could say that there is no criminal case escapes the proof of witness statement evidence. Almost all criminal case examinations are relying on the witness statement examination.

Article 1 number 26 KUHP regulates that “what is meant by witness is the person who can provide statement for investigation, prosecution, and trial of a certain criminal case which he/she by himself/herself hears, sees, and experiences”.<sup>1</sup>

Beside the witness as regulated in KUHP, UU No.31 Year 2014 On the Change of UU No.13 Year 2006 On Protection of Witness and Victim regulates also about perpetrator witness that is “the suspect, defendant, or convict who cooperate with the law enforcer in revealing a criminal act in the same case”. In dealing with criminal act of corruption appears the term of Justice Collaborator or cooperative perpetrator witness. The Supreme Court issues circular letter (SEMA) Number 4 Year 2011 to provide instruction to the judges in order to give special treatment to the persons categorized as cooperative informant and perpetrator witness in the form of giving reduction of criminal sentence or other legal protections.

Criminal act is a common social problem faced by many countries. From time to time, crimes are developing in terms of criminal type, subject, or how to commit crimes. In its development, crimes are not only done by individuals, but can also done by corporate and in organized manner.

The criminal act of corruption is one of the organized crimes. In handling criminal act of corruption appears some terminologies such as justice collaborator which in the Act is described as cooperative perpetrator witness. The appearance of “character” of this justice collaborator emerges new hope in handling criminal act of corruption, since with the cooperative witness who also perpetrator it is hoped that the criminal act of corruption case could be revealed completely.

Considering the nature and character of criminal act of corruption which are very complicated, so we need extraordinary efforts to handle and eradicate it. One of the efforts so that criminal act of corruption may be thoroughly investigated is using the cooperative perpetrator witness position. This willingness of the perpetrator witness to cooperate is rewarded by the Act among others by reducing the criminal sentence.

Although Act rules the cooperative justice collaborator to be awarded reduction of criminal sentence, but in practice the regulation about reduction of criminal sentence award for justice collaborator is not fully in operation. There are still court sentences which are not considering the defendant status as justice collaborator.

## RESEARCH METHOD

This research is a normative legal research using case study approach “i.e. case study on certain case from various legal aspects”. Case approach is done “by analyzing to the cases in connection with the faced issue which already become the court decisions with permanent legal force. In this research reasoning or court consideration to reach a decision will be analyzed. “According to Muladi, analyzing the judge’s decision is always interesting, since the judicative product is an outcome of a quite complicated social process”. This research is a normative legal research which prioritizing literature study by compiling data from library or other sources. The analyzed data are secondary data in the form of.<sup>2</sup> The analyzed data are secondary data in the form of:

1. Primary Legal Material is legal material which has authoritative nature means that it has authority. Primary legal material consists of regulations, official records or minutes in making the regulations and judge’s decision.
2. Secondary Legal Material in the form of all publications about legal which are not official documents. Publications of legal covers text books, legal dictionaries, legal journals and

1 M. Yahya Harahap. 2000, *Pembahasan Permasalahan dan Penerapan KUHP, Pemeriksaan Sidang Pengadilan, Banding, kasasi dan Peninjauan Kembali*, Sinar Grafika, Jakarta. Hal.264.

2 Soerjono Soekanto & Sri Mamudji. 1985, *Penelitian Hukum Normative Suatu Tinjauan Singkat*, (Jakarta:Raja Grafindo Persada) Hal.1. 2 *Ibid.*. 6

comments on court decisions.

Main data to be analyzed in this research is secondary data compiled from literature study by analyzing, studying, and processing literatures, regulations, or articles dealing with the problem to be researched. Data analysis uses qualitative data analyzing technique. The qualitative data analysis technique is "data analyzing method by grouping and selecting data derived from field research according to its quality and truth then being organized systematically, and analyzed using deductive thinking method afterwards, connected to the theories and literature studies (secondary data), and finally concluded in order to answer the problem formulated in this research".

## DISCUSSION

### A. Understanding of Justice Collaborator

Act No.31 Year 2014 On the Change of Act No.13 Year 2006 On Protecting the Witness and Victim regulates about who is meant by Perpetrator Witness is suspect, defendant, or convict who cooperates with law enforcers to reveal a criminal act in the same case. (Article 1 Number 2). In Article 1 Number 3 Joint Regulation of Republic of Indonesia's Minister of Law and Human Rights, Attorney General, Police Chief, Corruption Erradication Commission, Head of the Witness and Victim Protection Agency Number M. HH-11.HM.03.02, Number PER-045/A/JA/12/2011, Number 1 Year 2011, Number KEPB-02/01-55/12/ 2011, Number 4 Year 2011 On Protection For Informant, Reporting Witness, and Cooperative Perpetrator Witness is regulated that cooperative perpetrator witness is the witness who also a perpetrator of a certain crime act who is willing to cooperate with the law enforcer to reveal a crime act happened or to be happened to return assets or proceeds from a criminal act to the state by giving information to law enforcer and testifying in court proceedings as well. That Joint Regulation also regulates that to get protection as cooperating perpetrator witness must comply with followings:

- a. Criminal act to be revealed is a serious and/or organized crime act,
- b. Give significant, relevant and reliable information to reveal a serious and/or organized crime
- c. Not the main perpetrator in the crime to be revealed.
- d. Willingness to recover the stolen assets got from the crime concerned, which is stated in written statement, and
- e. There is a real threat or concern about any threat, pressure, physically or psychologically toward the cooperative perpetrator witness or the family if the crime is disclosed according to the actual circumstances.

### B. Regulation on Justice Collaborator in Indonesian Regulations

Regulation on justice collaborator is a something new in Indonesia. The early idea to regulate it in domestic regulation can be traced in President Instruction Number 9 Year 2011 On National Act Plan of Corruption Prevention and Erradication Year 2011. There are little explanation to be dug about the background of that regulation importance, but it is undeniable that it is regulated in United Nations Anti Corruption Convention and Indonesia as the state party is obliged to implement it.

The idea to empower the suspect or defendant to give information and cooperate in

<sup>3</sup> *Ibid.*

<sup>4</sup> Muladi, 1995, Kapita Selekta sistem Peradilan Pidana, BP Universitas Diponegoro, Semarang, hal.105

<sup>5</sup> Hermawan Wasito, 1997, Pengantar Metodologi penelitian Buku Panduan Mahasiswa, PT Gramedia Pustaka Utama, Jakarta

<sup>6</sup> Op. Cit, hal141.

<sup>7</sup> Abdulkadir Muhammad, Hukum dan Penelitian Hukum Cet. I, Bandung : PT. Citra AdityaBakti, 2004, hal.50

<sup>8</sup> Abdul Haris Semendawai, 2016, Penetapan Status Justice Collaborator bagi Tersangka atau Terdakwa dalam Perspektif Hak Asasi Manusia, PADJADJARAN Jurnal Ilmu Hukum Vol 3 Nomor (ISSN 2460-1543)(e-ISSN 2442-9325) h. 47110 *Ibid.* H 483.

disclosing transnational organized crime in Indonesia is based on some reasons. First, difficulty to disclose transnational organized crime as this crime is done by so organized, planned, and undercover criminal organization that needs insiders' information to disclose the crime. They could provide enough proof to the law enforcer if they would openly give information and testimonies. Furthermore, the law enforcer could use those proofs to demand criminal responsibility to the crime perpetrator with more important role. Second, the practice of using the suspect and defendant's information has been implemented in some countries such as United States of America and some European countries, e.g. Italy. And the cases handled had succeeded in disclosing and unraveling several mafia organized crimes. Third, in order to protect human rights of the Suspect or Defendant as regulated in some International Human Rights instruments ratified by Indonesia. Justice collaborator in Indonesia is regulated in some regulations i.e.:

1. Act Number 13 Year 2006 On Protection of Witness and Victim as changed in Act No.31 Year 2014 On the Change of Undang-Undang No.13 Year 2006 On Witness and Victim. Although protection to justice collaborator has been arranged in Act No.31 Year 2014, but act a quo is only arranging the special handling in investigating process to the justice collaborator, separated from the suspect, defendant, or convict whose crimes are revealed, and awarding the testimony given. This awarding is in the form of penalty leniency or parole, additional remission, and other convict's rights.
2. Circular Letter of Supreme Court Number 04 Year 2011 On Treatment For the Whistleblower And Justice Collaborator In Certain Crime.
3. Joint A/JA/12/2011, Number 1 Year 2011, Number KEPB-02/01-55/12/2011, Number 4 Year 2011 On Protection For Informant, Reporting Witness, and Cooperative Perpetrator Witness.

In above regulation we could say that the justice collaborator status granting may become the Regulations of Republic of Indonesia's Minister of Law and Human Rights, Attorney General, Police Chief, Corruption Erradication Commission, Head of the Witness and Victim Protection Agency Number M. HH-11.HM.03.02.year 2011, Number PER-045/.

Reason of reduction of criminal sentence given to the perpetrator. In KUHP we also know the reasons to give reduction of criminal sentence, among others are attempted crime and assistance. In crime court, judge may consider perpetrator's virtue as mitigating circumstances.

The legal instrument to regulate justice collaborator is quite complete. In the regulation it is arranged that there is a reward or award in the form of reduction of criminal sentence for justice collaborator. Although the legal instrument is provided, its real practice of justice is not fully smooth. In some cases somebody who is appointed as justice collaborator did not get reduction of criminal sentence.

Tipikor Court decision toward defendant Andi Agustinus a.k.a.Andi Narogong in the E-KTP project corruption, judge sentenced eight (8) years of prissoning, fine of 1 billion Rupiah subsidiary six (6) months in prisson, plus pay replacement money of 1.186 billion Rupiah. In his judgment the panel of judges thought that in that case, the defendant bluntly pleaded guilty and revealed other perpetrators. With this reason, Panel argued that quite reasonable to state the defendant as justice collaborator. However in the decision the panel of judges would remain completely consider the defendant's action and its effect.

At the appeal level, High Court sentenced 11 years of prissoning, fine of 1 billion Rupiah

9 Hermawan Wasito, 1997, *Pengantar Metodologi penelitian Buku Panduan Mahasiswa*, PT Gramedia Pustaka Utama, Jakarta

10 Op. Cit, hal141.

11 *Ibid.*

12 Abdulkadir Muhammad, *Hukum dan Penelitian Hukum* Cet. I, Bandung : PT. Citra AdityaBakti, 2004, hal.50

13 Pasal 4 Peraturan Bersama.

14 Abdul Haris Semendawai, Penetapan Status Justice Collaborator bagi Tersangka atau Terdakwa dalam Perspektif Hak Asasi Manusia, PADJADJARAN Jurnal Ilmu Hukum Vol 3 Nomor 3 Tahun 2016 ( ISSN 2460-1543)(e-ISSN 2442-9325) h. 471

15 *Ibid.* H 483.

16 Arsil et.al (Tim Laporan Bedah Kasus), Laporan Bedah Kasus Tindak Pidana Korupsi pada Pengadaan dan Pemasangan Solar Home System, Direktorat Jenderal Listrik dan Pemanfaatan Energi, Departemen Energi dan Sumber Daya Mineral Republik Indonesia, MaPPI FHUI, 2015, hal.40

17 *Ibid.* hal 55-56

subsidiary six (6) months detention, plus pay replacement money of 1.186 billion Rupiah subsidiary three (3) years detention. In the decision, High Court cancelled Andi Narogong's status as justice collaborator. The panel argues that the defendant role was so dominant in this case, starting from budgeting and even in the E-KTP project implementation that the state lost trillion of rupiah, and that the defendant was categorized as the main perpetrator.

At the cassation level, Supreme Court sentenced 13 years of imprisonment, fine of 1 billion Rupiah subsidiary six (6) months detention, plus pay replacement money of 1.186 billion Rupiah subsidiary three (3) years in prison.

Another example is corruption crime case of the defendant Kosasih Abbas in corruption case of SHS installment for Fiscal Year 2007 and 2008. "In Tipikor Court decision to the defendant Kosasih Abbas in the case of procurement and installation of SHS (Solar Home System) fiscal year of 2007-2008 sentenced him to four (4) years imprisonment and penalty of 150 million Rupiah subsidiary three (3) months detention and obliged to pay replacement money of 550 million Rupiah". In the decree judge did not mention and did not consider Kosasih's status as justice collaborator.

The judge only considered the defendant Kosasih's position in the mitigating circumstances that the defendant pleaded his deeds and came clean in front of the court so he was considered cooperative, served as government employee for quite a long time, was polite in court, and had family dependents. There was no decisive consideration saying that Kosasih as JC as mentioned by the prosecutor.

Court sentence is supposed to give 'new breakthrough' in terms of constructing mitigating circumstances for Kosasih by considering 'public prosecutor's demands' and decisively said that Kosasih is a justice collaborator, through those mitigating circumstances.

The DKI High Court's sentence in Kosasih Defendant case upholds the Tipikor Court's decision. In his decision High Court Judge considered Kosasih role as Justice Collaborator. In Cassation level, Supreme Court reject the cassation of the applicant and sentenced five (5) years of imprisonment reduced by jail term and fined 200 million Rupiah subsidiary six (6) months of detention and replacement money amounts to Rp. 2.388.975.500 subsidiary 1 year detention. In Maluku infrastructure corruption case, by Verdict No.21/Pid.Sus/TPK/2016/PNJktPst, the defendant Abdul khoir was sentenced four (4) years of imprisonment and fined 200 million Rupiah subsidiary 5 months of imprisonment. This sentence is higher than sentenced by the prosecutor. In his consideration the judge saw that from the bribe giver perspective the defendant role was more active than other defendants. This enforced the defendant role that was so central amongst other perpetrators that the panel of judge considered the defendant is the main perpetrator. Then in the determination of justice collaborator was not considered in the sentencing process. DKI High Court in verdict No.48/Pid.Sus-TPK/2016/PT DKI considered that the defendant was not categorized as main perpetrator so that it was very fair to award such justice collaborator with reduced criminal sentence. High Court sentenced him imprisonment of two (2) years and six (6) months and fined of 200 million Rupiah subsidiary 5 months of detention.

In the said court verdict we see that there is no same understanding amongst the law enforcers in reading and applying the act so that a forum is needed to create the same understanding of the law enforcers in reading and applying the regulation on justice collaborator. This forum will prevent refusal of the approved justice collaborator status by cancellation by other law enforcer; and will give certainty to the suspect or defendant who are willing to become justice collaborator that he will get reduction of criminal sentence. This will encourage the suspect or defendant to cooperate in revealing corruption crime completely. Besides, to make optimum corruption crime law enforcement, regulation on justice collaborator should be stronger and binding all parties of law enforcement. It could be in form of Presidential Decree or Act which bind all parties of law enforcement. Moreover the severity of the judge punishment for the defendant must based on regulation stated in Article 28 Section (2) Act No.48 year 2009 On Justice Power and must also based on the good and evil traits of the defendant.

The grant of justice collaborator status needs careful consideration. The conditions as ruled in the act must be fulfilled. The grant of justice collaborator status must not only caused by the one's cooperation during the case investigation and examination process in court.

## CONCLUSION

As the closure it could be concluded that the justice collaborator role is needed to disclose organized corruption crime. The right of justice collaborator to be awarded by reduction of crime sentence has been regulated in the Act of LPSK, Joint Regulation and Circular Letter of Supreme Court. In order to bind all parties of law enforcement a regulation on justice collaborator is needed in the form of an Act. Besides, understanding about governing law on justice collaborator status granting so that suspect or defendant who agrees to become a justice collaborator really accept his right to be protected and awarded. This will encourage suspect or defendant to become justice collaborator.

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