



The Right Non-Self-Incrimination and Epistemology of Criminal Witnesses

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Abstract

The absence of a clear normative interpretation related to witnesses who are also criminal perpetrators in the Indonesian court has controversy on the theoretical level. In practice, practitioners adopt a concept known in other countries. However, in adopting ideas from other countries, practitioners are often trapped in practitioners' paradigms. They are translating the perpetrators' witnesses such as crown witnesses, justice collaborators (JC), and whistleblowers (wb,) are not the concepts comprehensively. In the end, the witness being denied the rights of the perpetrators, namely right non-self-incrimination. The paper offers a concept for finding solutions in the use of witnesses who are also as criminal perpetrators in epistemological basis. These considerations are used to provide a coherent way based on the principle to justify the use of witness evidence from the criminal perpetrators. The purpose is to accord with the principle of due process of law, not to clash the principle of non-self-incrimination in proving the search of real truth.

A. Introduction

The criminal justice system as a framework is an activity to enforce criminal law and maintain social order.¹ Looking for material security as the goal of the criminal justice system is not only to punish

¹ Okky Chahyo Nugroho, "Peran Balai Pemasyarakatan Pada Sistem Peradilan Pidana Anak Ditinjau Dalam Perspektif Hak Asasi Manusia," *Jurnal HAM* 8, no. 2 (December 15, 2017): 161-74, p. 163. DOI: <http://dx.doi.org/10.30641/ham.2017.8.161-174>.

the perpetrators of crime which in the process is to ignore the rights of the suspect/defendant. Even though this suspect/defendant has violated the law, but human rights as human beings cannot be eliminated. The enforcement of human rights in the rule of law state is necessary, especially in Indonesia.² The effort to respect and protect human rights is a mutual obligation and responsibility between the community, government and the state.³

Law enforcement has a large role in guaranteeing the truth of the law and in respecting human rights.⁴ In current law enforcement practices, it is still common for law enforcement officials to use their authority too far which results in an unfair criminal justice process because the rights of the suspect/defendant have been violated. Law enforcement is intended to improve order and legal certainty in society. Still, one of the rights of the suspect/defendant that is often violated is the right non-self-incrimination.

Based on the principle of the Criminal Procedure Code (KUHAP) which adheres to the due process of law in the law enforcement process, in addition to giving authority to law enforcers to act, the Criminal Procedure Code also protects the human rights, especially the right of suspects/defendants.⁵ The use of witnesses as evidence based on the principle of due process of law as contained in the Criminal Procedure Code creates a dilemma for law enforcement officials, especially public prosecutors. The difficulty is between the right of the state to sue and protect the rights of suspects/defendants, or to seek material truth to uphold justice. So it needs a concept that can accommodate these two interests. Based on careful consideration, the decision to use the suspect/defendant as a cooperative witness can realize the fair value of justice, certainty and benefit.

² Sumitro Sumitro, "Implementasi Hak Asasi Manusia Dalam Sistem Peradilan Pidana Indonesia," *Lex Et Societatis* 6, no. 1 (April 18, 2018): 21-28, p. 21.

³ Felishella Earlene and Jesslyn Evelina Tandrajaya, "Sengketa Penguasaan Tanah Antara Warga Kapuk Poglar RT 07 / RW 04 Jakarta Barat Dengan Polda Metro Jaya Ditinjau Dari Perspektif Hak Asasi Manusia," *Cepalo* 3, no. 2 (November 25, 2019): 55-62, p. 37. DOI: <https://doi.org/10.25041/cepalo.v3no2.1844>.

⁴ Yayan Indriana, "Pengembalian Ganti Rugi Keuangan Negara Pada Perkara Tindak Pidana Korupsi," *Cepalo* 2, no. 2 (September 12, 2019): 115-122, p. 119. DOI: <https://doi.org/10.25041/cepalo.v2no2.1769>.

⁵ Firman Saputra. A, "Pelaksanaan Perlindungan Hak Tersangka Dalam Memberikan Keterangan Secara Bebas Pada Tingkat Penyidikan Di Kepolisian Sektor Limapuluh Kota Pekanbaru", *JOM Fakultas Hukum* 3, no. 2, (2016): 1-15, p. 2.

Based on that background, this paper offers a concept to view sincerely into the right non-self-incrimination and view witnesses who are also criminals. So that the true nature of values can be obtained from them, then it is establishing a connecting bridge to create a fair legal process in the context of due process of law. Comprehensively to solve the problems of law enforcement at this time related to a separate study of various paradigms about witnesses who are also perpetrators of crime and the right non-self-incrimination,⁶ So it does not describe partial and coherent arguments. The discussion on these problems uses the post-positivism paradigm that is built based on the reality of experience and observation.⁷

The methodology uses a normative approach, statute approach, case approach, historical approach, and comparative approach with philosophical studies. The concept studied in this paper is the epistemology concept of legal science which includes: (1) issues of origin knowledge (2) issues of what appears and their nature (3) issues of verification.⁸ To get a strong foundation is a prerequisite for science.

B. Discussion

1. Non Self Incrimination

In implementing criminal procedural law, law enforcement officials are required to be careful, because besides, as a source of authority, procedural law also involves the dignity protection of human rights. In the context of human rights, it must be understood that human rights are a set of fundamental moral principles and their justification is at the level of moral philosophy which initially developed in western society.⁹ Whereas in the Indonesian legal

⁶ Paradigm as the central philosophical system or main, which includes (the premise) ontology, epistemology, and specific methodologies that cannot be interchangeable. Soetandyo, *Critical Theory, Critical Legal Theory, dan Critical Legal Studies, lecture material on the Doctor of Law program* (UNDIP, Semarang, 2003), 2.

⁷ Adji Samekto, *Pergeseran Pemikiran Hukum Dari Era Yunani Menuju Postmodern* (Jakarta: Konstitusi Press, 2015), 182.

⁸ Harold H. Titus, *Persoalan-Persoalan Filsafat*, translated by H. M. Rasjidi (Jakarta: Bulan Bintang, 1984), 187-188.

⁹ According to Jhon Locke as the father of human rights, even though there is an agreement of the establishment a community or state, the people still have natural rights as Indianable rights, while the state or government must not interfere or deprive these natural rights, such as life, liberty and property rights. Lihat Bagir Manan dan Susi Dwi Harijati, "Konstitusi dan Hak Asasi Manusia", *Padjadjaran Jurnal Ilmu Hukum* 3, no. 3, (2016): 448:467, p. 450. DOI: <https://doi.org/10.22304/pjih.v3.n3.a1>.

system, human rights have epistemological justifications because Indonesia adheres to the principles of the rule of law. So, human rights are located as ideal norms in the Indonesian law which are explicitly stated in the Constitution of the Republic of Indonesia.¹⁰

Indonesia, as the rule of law, has implemented the principles of human rights protection in criminal procedural law, such as the principle of presumption of innocence. The principle is given to the suspect/defendant as the right of the law not to give an answer (the right to remain silent) and provide information that criminalizes themselves (non-self incrimination).¹¹ However, normatively the principle of the right to remain silent and the new right non-self-incrimination are explicitly reflected in Article 66 of the Criminal Procedure Code which states that the suspect/defendant is not burdened with proof obligations and Article 189 paragraph (3) of the Criminal Procedure Code which states that the defendant's information can only be used for himself so that the implications cause multiple interpretations and result in the protection not being seen clearly.

To see the urgency of protecting these principles, so fundamental thinking is needed to get the unity of thought. At the doctrinal level, the right to remain silent and not to give a damning statement has the unity of thought that originates from the right to remain silent, which according to the principle:¹²

- a. The right to remain silent to protects the defendant in the entire criminal process, which includes interrogation, trial, and hearing the verdict.
- b. The right to silence to protect the defendant only from forced disclosure of testimonials, but it does not apply to physical evidence.

¹⁰ The Constitution of the Republic of Indonesia which stipulates the recognition of the protection of human rights and protection of human dignity is listed in Article 28 I of the 1945 Constitution (Second Amendment).

¹¹ Romli Atasasimita, *Logika Hukum Asas Praduga Tak Bersalah*, <http://m.tokohindonesia.com/publikasi/article/322-opini/2400-logika-hukum-asas-praduga-tak-bersalah>, accessed on March 5, 2020.

¹² Alex Stein, *Self-Incrimination, Forthcoming in Procedural Law and Economics*, in Chris W. Sanchirico, *Encyclopedia Of Law And Economics* (U.K.: Cheltenham, UK, Gerrit De Geest: Edward Elgar Publishing Limited, 2011), 5. See also Richard A. Bierschbach & Alex Stein, "Overenforcement", *Georgetown Law Journal* 93: 1743-1775, 2005, p. 76.

- c. The right to remain silent (a privilege that prohibits making conclusions which can be detrimental to the non-disclosure of information) does not apply in a civil court.
- d. Nor it can extend testimony which can lead to punishment for witnesses outside of his testimony.
- e. The right to silence can be ruled out when the police attend an ongoing emergency.
- f. Protection of the right not to criminalize themselves is only given to individuals and does not apply to corporate entities.

Whereas specifically, the right non-self incrimination is a privilege that not only protects incriminating information but also for evidence that tends to incriminate defendants and witnesses at all stages of the examination by law enforcement officials. Therefore this privilege is very personal, and this privilege only applies to individuals and does not apply to all legal subjects such as corporations, unions, partnerships.¹³ So its implementation, it is impossible for a suspect/defendant to blame himself in his statement. Still, in his position as a witness in a separate file (splitting), it admits to committing an act he denied himself.¹⁴ Because the prohibition of making a suspect/defendant into a crime also comes from the principle of the state, through the public prosecutor who accuses a person of justice, the burden of evidence in public prosecutor hands. So the defendant cannot be forced to help the public prosecutor's obligations.

According to the common law system, the establishment of the non-self crmination doctrine is based on the principle of "*nemo tenetur nemo tenetur se ipsum accusare*" which is the principle of protection of human dignity. So logically, as a person has the right not to be forced to make statements that criminalize themselves.¹⁵ But at the beginning of its development, the doctrine of self-Incrimination had deep conceptual confusion. Then, in the case of *Schmerber v. California*, the court codified this basic principle *dichotomically*, that the self-incrimination clause only applies to evidence that incriminates oneself in criminal cases, but can be forced to provide tangible or

¹³ Christopher Osakwe, *The Bill Of Right For The Criminal Defendatin In American Law*", dalam, Jhon A Andrews, *Human Right In Criminal Procedure A Comparative Study*, ed., (Boston/London: Martinus Nijhoff Publisher, The Hague, 1982), 274.

¹⁴ Indriyanto Seno Adji, *KUHAP Dalam Prospektif* (Jakarta: Diadit Media, 2011), 95.

¹⁵ K. Rogall, *Der Beschuldigteals Beweismittelgegensichselbst. Ein Beitragzur Geltung des Satzes 'Nemotenetur se ipsumprodere'* im Strafverfahren 67 (1977). R. Müller, *Neue Ermittlungsmethoden und das Verbot des Zwangszur Selbstbelastung*, 28 EuGRZ 546, 2001.

physical evidence.¹⁶ The concept of evidence dichotomy has criticism from experts and practitioners because the testimonial or physical dichotomy is against the purpose of the self-incrimination clause,¹⁷ and the theory of self-incrimination by finding evidence or by physical evidence has a difference.¹⁸ But then Michael S. Pardo offered a defence of the difference between physical evidence and evidence of testimony on an epistemological basis.¹⁹

In the United States, the recognition of the self-incrimination principle has been explicitly stated in the fifth amendment to their constitution. That in any crime is given the privilege not to provide evidence that incriminates themselves.²⁰ The existence of moral principles in their duties, the police and public prosecutors can take legal action after there is extraordinary power from court officials because the task of public prosecutors is not only to punish but also to ensure that justice can be carried out.²¹ In the implementation phase in the process of examining criminal cases in the United States, law enforcement first notifies the defendant's rights by the Miranda rule. Likewise, in the U.K., before examining the defendant at any level of examination, it must be said that the suspect has the right to remain silent and not answer.²²

Whereas in the Netherlands which adopts a civil law system, in its legal system it provides protection for suspects/defendants wherein the examination process, if the suspect/defendant feels compelled to provide information, then the defendant will be given the right to

¹⁶ Nita A. Farahany, "Incriminating Thoughts", *Stanford Law Review* 64, (Februari 2012): 352.

¹⁷ Charles Gardner Geyh, "The Testimonial Component of the Right Against Self-Incrimination", *CATH. U. L. REV* 36, (1987): 612 (*finding the testimonial/physical framework at odds with the purposes of the Self-Incrimination Clause*)

¹⁸ B. Michael Dann, "The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence from a Suspect", 43 S. CAL. L. REV. 597, 598, 611 (1970)

¹⁹ Michael S. Pardo, "Self-Incrimination and the Epistemology of Testimony", *CARDOZO L. REV* 30, (2008): 1023.

²⁰ Luis Hendri, *Pernyataan Hak Asasi Amerikadan Makna Internasional (The United States Bill of Right Significance)*, translated by Budi Prayitno dan Abdullah Alamudi (Jakarta: Dinas Penerangan Amerika Serikat (USIS), 1995), 27.

²¹ Livingstone Hall, *Hak Tertuduh Dalam Perkara Pidana*, "Dalam Ceramah Radio oleh Profesor-Profesor Harvard Law School, Disusun oleh Harold J. Berman, translated by (Jakarta: Gregory Churchill, J. D, Tatanusa, 2008), 50-56.

²² Mien Rukimini, *Perlindungan HAM Melalui Asas Praduga Tak Bersalah dan Asas Persamaan Kedudukan dalam Hukum pada Sistem Peradilan Pidana Indonesia* (Bandung: P.T. Alumnii, 2000), 90.

submit a review to the examining judges.²³ Universally, the principle of the right non-self incrimination has been accommodated in the International Covenant on Civil and Political Rights (ICCPR),²⁴ Which provides a guarantee for suspects/defendants not to force in providing information to incriminate themselves and admit their actions.²⁵ Based on the ICCPR and perspectives in common law and civil law countries, it can be clearly illustrated that each person accused of a crime is given the right to guarantee not to force in giving evidence against himself or to admit his guilt.

2. Definition of Witnesses in the Legal Context

Criminal procedural law is closely related to witnesses, where almost all criminal case evidence always relies on examining witness statements.²⁶ Testimonials evidence is the first sequence as evidence. That evidence also has a vital role in obtaining facts in a criminal case, through knowledge to get logical evidence based on the discovery of available facts so that it can form a consistent construction.²⁷ So, it is almost impossible in proving criminal law seeking material truth without witnesses' testimony. Judicially, witnesses according to the Criminal Procedure Code are people who provide information at each stage of the examination of a case that is seen, heard, and experienced by themselves.²⁸ From some definition above, the grammatical meaning of the witness (language) is using the syntactic method. A witness is a subject that has a functional structure and a role that appears in the form of a verb category that is active and non-cited so

²³ Romli Atmasasmita, "Logika Hukum Asas Praduga Tak Bersalah", *Loc. Cit.*

²⁴ On February 23, 2006, Indonesia officially became a State Party in two leading human rights conventions, namely the International Covenant on Economic Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Thus, the two covenants began to become active and legally binding (entry into force) for Indonesia since May 2006. This ratification was enacted after the Indonesian Council ratified the two covenants into law, namely Law No. 11 of 200 (ICESCR) and Law No. 12 of 2006 (ICCPR). With this ratification, Indonesia became the 156th country to ratify the ICCPR and 153th country for ICESCR from a total of 191 UN member states.

²⁵ In Article 14 paragraph (3) g, states that: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantee, in full equality: (g). Not to be compelled to testify against himself or to confess guilt."

²⁶ Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP*, (Jakarta: Sinar Grafika, 2002), 286.

²⁷ Andi Hamzah, *Pengantar Hukum Acara Pidana Indonesia* (Jakarta: Ghalia Indonesia, 1983), 34.

²⁸ See Article 1, number 26 of Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP).

that the witness has a functional role and coordinates directly with his actions.²⁹ Systematically, the definition of witnesses can be seen in Article 1 number 26 and number 27 *juncto* Article 65, Article 116 paragraph (3) and paragraph (4), and Article 184 paragraph (1) a. However, in the subsequent legal development based on the Constitutional Court Decision Number 65 / PUU-VIII / 2010, the meaning of the witness was expanded concerning the importance of the witness not in whether they saw, heard, or experienced a criminal case their self, but in the relevance of their testimony in the criminal case being processed. According to legal doctrine, witnesses can become a piece of evidence. Still, the witness testimony must be given at the time of trial,³⁰ And to provide information in the trial. A witness must fulfil the formal requirements as stipulated in Article 160 paragraph (3) of the Criminal Procedure Code and the material requirements as Article 1 number 27 of the Criminal Procedure Code.

From the definition above, philosophically the witness's testimony is a tool to build legal facts (reconstructing) a criminal case from what a witness saw, heard or experienced himself about the case. A witness statement is very dominant in determining the existence of an alleged crime committed by a person, so that the witness testimony occupies an essential position in terms of evidence, and to obtain real truth with the honest and precise a complete truth of a criminal case by applying the provisions of criminal procedure law. To find the perpetrators who can be prosecuted for violating the law, and then ask for an examination and court decision to find out the evidence of the crime and prosecuted the person can be blamed.³¹ To evaluate the truth of a witness's testimony, the judge must seriously pay attention to; 1) Match between witnesses' statements with one another; 2) Match between witness statements and other evidence; 3) Reasons that may be used by witnesses to provide certain information; and 4) Ways of life of witnesses and witnesses' decency, as well as everything that in general can affect whether or not the information is trusted (Article 185 paragraph 6 of the Criminal Procedure Code).

²⁹ Frans Sayogie, "Pemaknaan Saksi dan Keterangan Saksi dalam Teks Hukum Analisis Putusan Mahkamah Konstitusi Nomor 65/PUUVIII/2010", *Mimbar Sejarah, Sastra, Budaya, dan Agama* 23, no.1, (2017): 103-120, pp. 113-114.

³⁰ Indrianto Seno Adji, *KUHAP dalam Prospektif* (Jakarta: Diadit Media, 2011), 112.

³¹ Andi Hamzah, *Hukum Acara Pidana Indonesia* (Jakarta: Sinar Grafika, 2011), 8.

3. Epistemology of Witness Perpetrators

The witness is not a criminal, but in the development of crime, there is a state of law enforcement that requires witness testimony to prove a crime. To find material truth and to support the evidence, the concept of witnesses who are also the perpetrators of the criminal is known as the crown witness, justice collaborator, and whistleblower.

a. Crown Witness

Various terms know crown witnesses in several European countries, as the Dutch call, it *kroongetuige*, in Germany as *kronzeuge*. Italy initially called the crown witness with *pentito*, but now it was changed to *collaboratore della giustizia*, Great Britain called it *supergrass*, while France called it *to repent*.³² Historically, the crown witness was applied in mainland Europe by taking the witness concept of a queen/king in England which depicted with several perpetrators of crime, and then one of the perpetrators gave evidence to the other perpetrators. The promise of forgiveness would be given. Whereas in the context of American law known as state witnesses, the meaning of this evidence is provided by a person who participates in crime to punish other perpetrators, so as a reward is a forgiveness or reduction in punishment.³³

In contrast to the concept applied in Europe and America, in Indonesia, the crown witness is mistakenly interpreted where the defendants who participated (*medeplegen*) whose cases are further separated to become witnesses, are called crown witnesses.³⁴ Based on the Supreme Court Decision,³⁵ as *judge Juris* who did not forbid a friend of the defendant who took part in committing a criminal act as a witness on the condition that the testimony is given in a separate file (splitting).³⁶ Despite further developments in the case of the workers'

³² P J P. Tak, "Deals with Criminals: Supergrasses, Crown Witnesses and Pentiti", *European Journal of Crime, Criminal Law and Criminal Justice* 5, no. 1, (1997): 2-26, p. 2. DOI: <https://doi.org/10.1163/157181797x00121>.

³³ P. J. P. Tak, *De Kroongetuige En de Georganiseerde Misdaad, S Gouda Quint – D. Brouwer en Zoon, Arnhem*, (1994), 3.

³⁴ Andi Hamzah, *Pengantar Hukum Acara Pidana Indonesia, Op. Cit.*, p. 271.

³⁵ Decision of the Supreme Court Number: 1986 K / Pid / 1989 dated March 2, 1990.

³⁶ Ali Boediarto, *Kompilasi Abstrak Hukum Putusan Mahkamah Agung Tentang Hukum Pidana*, Jakarta: Ikatan Hakim Indonesia, 2000, pp. 40-43. Definition of the witnesscrown in the decision "That the public prosecutor is allowed by law to submit a friend of the defendant who participated in the criminal act as a witness in the District Court, on condition that this witness in his position as a defendant, is not included in the case file provided with testimony (splitting)".

figure of Marsinah, the Supreme Court stated that the crown witness was contrary to criminal procedural law that upheld human rights. However, in practice, the concept that placed each defendant who participated in the crime of being a witness in a separate case is still the meaning of the crown witness.

b. Justice Collaborator

In the development of Indonesian law which views crime is increasingly complex, especially become serious problems and threats. It is necessary to take practical steps in exposing criminal acts by providing exceptional protection and treatment to people who help law enforcement officials.³⁷ Then the Supreme Court of the Republic of Indonesia through Circular Number: 4 of 2011 accommodates witnesses of perpetrators who cooperate with law enforcement by calling as a justice collaborator. Justice collaborator is defined as someone who is not the main actor in a criminal act of corruption, terrorism, narcotics, money laundering, human trafficking and other organized criminal acts that provide significant evidence is revealing a higher criminal offence and returning the proceeds of a criminal offence, they can be given relief punishment by considering the sense of justice.³⁸

Based on this circular, a justice collaborator cannot be applied in all criminal acts, and the rewards for the witnesses who collaborated in the form of sentence relief can be implemented in the judge's decision based on an evaluation of the evidence provided. The return of proceeds of crime that results in leniency, not necessarily because the person concerned became a justice collaborator. If seen from the essence of the concept of justice collaborator, it puts the aim of confirming earlier criminal acts and returning the results of criminal acts (follow the money and follow the suspect) in the implementation of cooperation with cooperative witnesses.

c. Whistleblower

Unlike the two other concepts above which require witnesses also be perpetrators of crime, in the concept of whistleblowers according to

³⁷ See Point 1 and 2 of the Circular Letter of the Supreme Court of the Republic of Indonesia Number: 05/Bua.6/Hs/SP/VII/2011, regarding Circular Letter Number: 04 of 2011 concerning Treatment for Reporters of Crime and Whistleblowers Justice Collaborators in Certain Criminal Cases.

³⁸ See MA Circular Letter (SEMA) No. 4 of 2011.

Supreme Court Circular Letter (SEMA) No. 4 of 2011, whistleblowers are interpreted as people who know and report criminal acts of corruption, terrorism, narcotics, money laundering, trade, human trafficking, and other organized criminal acts, but the reporter is not a criminal offence reported:³⁹ But it does not rule out the possibility of a whistleblower in subsequent developments not only as a reporter but also a part of the crime itself or part of other criminal acts. As when Nazarudin revealed irregularities in the Hambalang case, on the other hand, Nazarudin was involved in many other corruption cases and the Susno Duaji case which revealed tax cases but in other criminal acts he was also proven to have committed two criminal acts of corruption. Contrast to justice collaborators and crown witnesses, based on criminological point of view. It takes courage to become a Whistleblower because of the crimes to be exposed within their environment.⁴⁰ Considering that the information submitted by a whistleblower will have the potential to expose a crime, law enforcement officials must protect whistleblowers in return for their submitted information.⁴¹

If examined more deeply based on the above description, the meaning of justice collaborator in SEMA No: 4 of 2011 which also refers to Law No. 13 of 2006 concerning Protection of Witnesses and Victims has a legal terminology context. The meaning of justice collaborator is congruent with the meaning of the crown witness as known in European countries because justice collaborator occurs in the criminal act of inclusion and testimony delivered by the justice collaborator in court as a witness, not a defendant,⁴² And morally motivated to become a justice collaborator because of the rewards in the form of punishment reduction, in contrast to whistleblowers who are morally volunteered to open the veil of crime.⁴³

³⁹ *Ibid.*

⁴⁰ Abdul Haris Semendawai, *Memahami Whistleblower* (Jakarta: Lembaga Perlindungan Saksi dan Korban, 2011), 2-3.

⁴¹ Indriyanto Seno Adji. *KUHAP Dalam Prospektif*, *Op.Cit.*, p. 190. See also Mardjono Reksodiputro, "Pembocor-rahasia (Whistleblower) dan Penyadapan-rahasia (*wiretapping, electronic interception*) dalam Menanggulangi Kejahatan di Indonesia", *Paper on Center for Leglslacy, Empowerment, Advocacy and Research (CLEAR) Conference in Hotel Le Meridien*. August 3, 2010.

⁴² Eddy O.S. Hiariej, "Tetap Dijatuhi Pidana Bilamana Terlibat dalam Kejahatan", *Newsletter Komisi Hukum Nasional* 10, no. 6, (2010).

⁴³ Marjon Reksodiputro, *Beberapa Catatan tentang Justice Collaborator dan Bentuk Perlindungannya*, <http://mardjonoreksodiputro.blogspot.com/2013/11/beberapa-catatan-tentang-justice.html>, accessed on June 10, 2020.

4. Collaboration Witnesses Who Are Also Criminal Offenders

Witnesses perpetrators in the sense of a crown witness and justice collaborator in Indonesia criminal trial have legally accepted methods, even though no law normatively regulates them. To realize a fair legal process according to the principle of due process of law, so it is necessary to reconstruct the meaning of the witnesses of the perpetrators because in criminal justice not only to apply the law formally but also contains protection of the rights of suspects/defendants. In the context of the witnesses' perpetrators, some rights cannot be neglected, namely the right non-self-incrimination. The essence of the evidence of witnesses perpetrators is needed by the public prosecutor who represents the state as a tool (evidence) to establish legal facts to reconstruct a criminal act to reveal a more significant case. So in the context of protecting human rights, the state must protect the rights of individuals, in this case, the rights of witnesses perpetrators, because only the state has the power to protect individual rights.⁴⁴

By observing the historical aspects and crown witness's definition in other countries is to avoid the violations of the right non-self-incrimination, there is a crucial point to make the witnesses perpetrators as evidence with the volunteerism of the witnesses themselves. Afterwards, collaboration can occur between the public prosecutor and the witnesses. They are also perpetrators of a criminal offence with the aim of the public prosecutor getting evidence that can uncover a more significant crime. Perpetrators who become witnesses get rewarded because this witness evidence sourced from knowledge with a different character from physical evidence that speaks for itself.⁴⁵ To ensure this evidence is obtained without force or violence, exclusionary rules can be presented during the trial as a control mechanism that can be tested in court. According to Indonesia law, illegal evidence cannot be accepted, and the indictment invalidated.⁴⁶

⁴⁴ See understanding of human rights according to Mardjono Reksodiputro in Mardjono Reksodiputro, *Hak Asasi Manusia Dalam Sistem Peradilan Pidana* (Jakarta: Pusat Pelayanan Keadilan Dan Pengabdian Hukum (d/h Lembaga Kriminologi) Universitas Indonesia, 2007), 25.

⁴⁵ Kate Stith, "Introduction: Wherefore The Privilege?" *Cardozo Law Review* 30, no. 3, (2008-2009), p. 718.

⁴⁶ Artidjo Alkostar, *Kebutuhan Responsifitas Perlakuan Hukum Acara Pidana dan Dasar Pertimbangan Pemedanaan Serta Judicial Immunity* (Jakarta: Papers in the Supreme Court Rakernas with the Courts of All of Indonesia, September 18-22, 2011), 1. See also Bagir

In countries that have applied exclusionary rules such as the United States, the United Kingdom, and the Netherlands, it is clearly stated that illegal evidence does not have the power to become evidence.⁴⁷

The statements of the witnesses perpetrators do not have perfect evidence character. To ensure that the statements of the witnesses perpetrators can be used as evidence, the public prosecutor must be able to ensure that there is another evidence mutually compatible and corroborates the statements of the witnesses perpetrators, or known as corroborating evidence so that the facts are postulated can be maintained if a rebuttal occurs.⁴⁸ It is becoming a fundamental principle because, in the regulations on the current evidence, it is stated that to establish a proper fact which states the defendant is the perpetrator, he must fulfil the requirements for independent evidence obtained from two different pieces of evidence (*different soul*).⁴⁹ Even in England, the judge requires evidence from accomplices must be supported by other corroborating evidence because the law in the U.K. does not recognize doctrine, so there are no exceptions to illegal evidence.⁵⁰

Based on the explanation above, the right non-self-intimation and epistemology of the witness perpetrators, that can be seen to put the witnesses perpetrators as evidence can be obtained by connecting the bridge as a way to balance the dilemma of the suspect/defendant right and the state rights. Prosecution by voluntary cooperation between the public prosecutor and the crown witness can proceed through this mechanism. The state can prosecute more significant cases while the privilege of the ring non-self-incrimination is not ignored because there has been an agreement made from the beginning. As an understanding of privilege against self-incrimination,

Manan, "Penegakan Hukum Dalam Perkara Pidana", *Varia Peradilan-Media Hukum Ikatan Hakim Indonesia (IKAHI)* 296, (July 2010), p. 17.

⁴⁷ Luhut M.P Pangaribuan, *Lay Judges dan Hakim Ad Hoc: Suatu Studi Teoritis Mengenai Sistem Peradilan Pidana Indonesia* (Jakarta: Universitas Indonesia Fakultas Hukum Pasca Sarjana, 2009), 169. See also P. J. P. Tak, *The Dutch Criminal Justice System. (The Netherlands: golf Legal Publishers C.B. Nijmegen, (2008), 107.*

⁴⁸ Terence Anderson, David Schum, and William Twining, *Analysis Of Evidence, Second Edition, (U.K.: Cambridge University Press (Cambridge CB2 2 R.U., 2005), 382.*

⁴⁹ See *United States v. Awan*, 2010 U.S. App. LEXIS 12084 (2d Cir. N.Y. June 14, 2010). <http://witnesses.uslegal.com/corroborator/> accessed on June 10, 2020. See also Terence Anderson, David Schum, and William Twining, *Analysis of Evidence* (Cambridge UK: Cambridge University Press, 2005), 107.

⁵⁰ John A. Andrews, *Human Right In Criminal Procedure A Comparative Study* (Boston/London: Martinus Nijhoff Publisher, The Hague, 1982), 100.

from Christopher Osakwe, who stated that privilege related to the right non-self-incrimination does not apply if the defendant has been tried. The witnesses have been forgiven in the agreement, and the state has given the relief of prosecution.⁵¹ In the context of due process of law, a balance can be obtained between the right of the state to sue with the protection of the suspect/defendant,⁵² whereas to measure that balance, justice must be given.⁵³

C. Conclusion

Universally in the International Covenant on Civil and Political Rights and the perspectives of common law and civil law countries, every person accused a crime is given a right non-self incrimination that guarantees not to be a force in giving evidence that could incriminate himself or plead guilty.

Witness testimony is a tool to establish legal facts (reconstructing) a criminal case from what a witness saw, heard or experienced himself. The witness statement is very dominant in determining the existence of an alleged crime committed by a person. In meaning, the justice collaborator is congruent with the meaning of the crown witness who is known in European countries with moral motivation to get rewards in the form of reduction punishment. This is different from morally voluntary whistleblowers called to open the veil of crime.

Based on the explanation above, the right non-self-intimation and epistemology of the witnesses perpetrators, that can be seen to put the witnesses perpetrators as evidence can be obtained by connecting the bridge as a way to balance the dilemma of the suspect/defendant right and the state rights. Prosecution by voluntary cooperation between the public prosecutor and the crown witness can proceed through this mechanism. The state can prosecute more significant cases while the privilege of the ring non-self-incrimination is not ignored because there has been an agreement made from the beginning.

⁵¹ Christopher Osakwe, *The Bill Of Right For The Criminal Defendatin In American Law*, in, *Human Right In Criminal Procedure A Comparative Study* (Boston/London: Martinus Nijhoff Publisher, The Hague, 1982), 374.

⁵² Bagir Manan, *Menegakkan Hukum Suatu Pencarian* (Jakarta: Asosiasi Advokat Indonesia, 2009), 60-161. See also Theo Huijbers, *Filsafat Hukum Dalam Lintas Sejarah* (Yogyakarta: Kanisius, 1982), 202.

⁵³ Darji Darmodiharjo and Shidarta, *Pokok- Pokok Filsafat Hukum* (Jakarta: Gramedia Pustaka Utama, 1999), 159.

References

- Adji, Samekto. *Pergeseran Pemikiran Hukum dari Era Yunani Menuju Postmodern*. Jakarta: Konstitusi Press, 2015.
- Alex Stein, *Self-Incrimination, Forthcoming in Procedural Law and Economics*, in Chris W. Sanchirico, *Encyclopedia of Law And Economics*. U. K: Cheltenham, UK, Gerrit De Geest: Edward Elgar Publishing Limited, 2011. 5.
- Alkostar, Artidjo. “Kebutuhan Responsifitas Perlakuan Hukum Acara Pidana dan Dasar Pertimbangan Pemidanaan serta Judicial Immunity”. Paper in the Supreme Court Rakernas with the Courts of All of Indonesia, Jakarta, September 18-22, 2011.
- Anderson, Terence, David Schum, and William Twining. *Analysis Of Evidence*. Cambridge University Press, Second Edition, Cambridge UK, 2005.
- Andrews, John A. *Human Right In Criminal Procedure A Comparative Study*. Boston/London: Martinus Nijhoff Publisher, The Hague, 1982.
- Atmasasmita, Romli, 2013. *Logika Hukum Asas Praduga Tak Bersalah*. <http://m.tokohindonesia.com/publikasi/article/322-opini/2400-logika-hukum-asas-praduga-tak-bersalah>.
- Bierschbach, Richard A. & Alex Stein, “Overenforcement”, *Georgetown Law Journal* 93, 2005: 1743-1775.
- Boediarto, Ali. *Kompilasi Abstrak Hukum Putusan Mahkamah Agung Tentang Hukum Pidana*. Jakarta: Ikatan Hakim Indonesia, 2000.
- Dann, B. Michael, “The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence from a Suspect”, *S. CAL. L. REV* 43, (1970): 597-598.
- Darmodiharjo, Darjidan Shidarta. *Pokok- Pokok Filsafat Hukum*: Jakarta: Gramedia Pustaka Utama, 1999.
- Farahany, Nita A. “Incriminating Thoughts”, *Stanford Law Review* 64, Februari 2012, 1970.
- Felishella Earlene and Jesslyn Evelina Tandrajaya, “Sengketa Penguasaan Tanah Antara Warga Kapuk Poglar RT 07 / RW 04 Jakarta Barat Dengan Polda Metro Jaya Ditinjau Dari Perspektif Hak Asasi Manusia,” *Cepalo* 3, no. 2, November 25, 2019: 55–62, p. 37. DOI: <https://doi.org/10.25041/cepalo.v3no2.1844>.
- Firman Saputra. A, “Pelaksanaan Perlindungan Hak Tersangka Dalam Memberikan Keterangan Secara Bebas Pada Tingkat Penyidikan Di Kepolisian Sektor Limapuluh Kota Pekanbaru”, *JOM Fakultas Hukum* 3, no. 2, 2016:1-15.

- Geyh, Charles Gardner. "The Testimonial Component of the Right Against Self-Incrimination", *CATH. U. L. REV* 36, 1987: 611-612.
- Hall, Livingstone, "Hak Tertuduh Dalam Perkara Pidana," In the Radio Lecture by Harvard Law School Professors, Compiled by Harold J. Berman, Translated by Gregory Churchill, J. D, Tatanusa, Jakarta, 2008.
- Hamzah, Andi. *Hukum Acara Pidana Indonesia*. Jakarta: Sinar Grafika, 2011.
- Hamzah, Andi. *Pengantar Hukum Acara Pidana Indonesia*. Jakarta: Ghalia Indonesia, 1983.
- Harahap, Yahya. *Pembahasan Permasalahan dan Penerapan KUHAP*. Jakarta: Sinar Grafika, 2002.
- Hendri, Luis, *The United States Bill of Right Significance*, dialih bahasa oleh Budi Prayitno dan Abdullah Alamudi, 1995. *Pernyataan Hak Asasi Amerika dan Makna Internasional*. Jakarta: Dinas Penerangan Amerika Serikat (USIS).
- Hiariej, Eddy O. S. "Tetap Dijatuhi Pidana Bilamana Terlibat dalam Kejahatan". *Newsletter Komisi Hukum Nasional* 10, no.6, 2010.
- Howard Jr, Roscoe C and Lisa A. Rich. "A History of Miranda and Why It Remains Vital Today". *Val. U. L. Rev* 40. 2006.
- Huijbers, Theo. *Filsafat Hukum Dalam Lintas Sejarah*. Yogyakarta: Kanisius, 1982.
- Indriana, Yayan. "Pengembalian Ganti Rugi Keuangan Negara Pada Perkara Tindak Pidana Korupsi," *Cepalo* 2, no. 2 (September 12, 2019): 115-122. <https://doi.org/10.25041/cepalo.v2no2.1769>.
- Itus, Harold H. *Persoalan-Persoalan Filsafat*. Jakarta Bulan Bintang, Jakarta, 1984.
- Kepaniteraan Mahkamah Agung RI, *Surat Edaran Mahkamah Agung No. 4/2011*. Accessed on <http://kepaniteraan.mahkamahagung.go.id/peraturan/10-sema/191-sema-no-14-tahun-2010-dokumen-elektronik-sebagai-kelengkapan-berkas-kasasipk-.html>
- Lubis, M. Sofyan. *Prinsip Miranda Rule Hak Tersangka Sebelum Pemeriksaan*. Jakarta: Pustaka Yustisia, 2010.
- Manan, Bagir dan Susi Dwi Harijati. "Kontitusi dan Hak Asasi Manusia". *Padjadjaran Jurnal Ilmu Hukum* 3, no. 3, (2016). DOI: <https://doi.org/10.22304/pjih.v3.n3.a1>.
- Manan, Bagir. *Menegakan Hukum Suatu Pencarian*. Jakarta: Asosiasi Advokat Indonesia, 2009.

- Okky Chahyo Nugroho, “Peran Balai Pemasyarakatan Pada Sistem Peradilan Pidana Anak Ditinjau Dalam Perspektif Hak Asasi Manusia,” *Jurnal HAM* 8, no. 2, December 15, 2017: 161–74. DOI: <http://dx.doi.org/10.30641/ham.2017.8.161-174>.
- Osakwe, Christopher. *The Bill of Right for the Criminal Defendatin In American Law*, in *Human Right In Criminal Procedure A Comparative Study*, Jhon A Andrews, ed. Boston/London: Martinus Nijhoff Publisher, The Hague, 1982.
- Pangaribuan, Luhut M.P. *Lay Judges dan Hakim Ad Hoc: Suatu Studi Teoritis Mengenai Sistem Peradilan Pidana Indonesia*. Jakarta: Universitas Indonesia Fakultas Hukum Pasca Sarjana, 2009.
- Pardo, Michael S. “Self-Incrimination and the Epistemology of Testimony”. *CARDOZO L. REV* 30, 2008.
- Reksodiputro, Mardjono, *Beberapa catatan tentang Justice Collaborator dan Bentuk Perlindungannya*, accessed on <http://mardjonoreksodiputro.blogspot.com/2013/11/beberapa-catatan-tentang-justice.html>.
- Reksodiputro, Mardjono. “Pembocor-rahasia (*Whistleblower*) dan Penyadapan-rahasia (*Wiretapping, Electronic Interception*) Dalam Menanggulangi Kejahatan di Indonesia”, *Paper on Center for Legislacy, Empowerment, Advocacy and Research (CLEAR) Conference in Hotel Le Meridien*. August 3, 2010.
- Reksodiputro, Mardjono. *Hak Asasi Manusia Dalam Sistem Peradilan Pidana*. Jakarta: Pusat Pelayanan Keadilan dan Pengabdian Hukum (d/h Lembaga Kriminologi) Universitas Indonesia, 2007.
- Rogall, K, *Der Beschuldigteals Beweismittelgegenschselbst. Ein Beitragzur Geltung des Satzes ‘Nemotenetur se ipsumprodere’ im Strafverfahren* 67, 1977. R. Müller, Neue Ermittlungsmethoden und das Verbot des Zwangszur Selbstbelastung, 28 EuGRZ546 ,2001.
- Rukmini, Mien. *Perlindungan Ham Melalui Asas Praduga Tak Bersalah dan Asas Persamaan Kedudukan dalam Hukum pada Sistem Peradilan Pidana Indonesia*. Bandung: Alumni, 2000.
- Sanyoto, “Penegakan Hukum Di Indonesia”, *Jurnal Dinamika Hukum* 8, no. 3, 2008: 99-204.
- Sayogie, Frans. “Pemaknaan Saksi dan Keterangan Saksi dalam Teks Hukum Analisis Putusan Mahkamah Konstitusi Nomor 65/PUUVIII/2010”. *Mimbar Sejarah, Sastra, Budaya, dan Agama* 23, no.1, (2017).

- Semendawai, Abdul Haris. *Memahami Whistleblower*. Jakarta, Lembaga Perlindungan Saksi dan Korban, 2011.
- Seno Adji, Indrianto, *KUHAP dalam Prospektif*, Diadit Media, Jakarta, 2011.
- Soetandyo, *Critical Theory, Critical Legal Theory, dan Critical Legal Studies, Lecture Material on the Doctor of Law program*. Semarang: UNDIP, 2003.
- Stith, Kate. "Introduction: Wherefore The Privilege?". *Cardozo Law Review* 30, no. 3, 2008-2009.
- Sumitro Sumitro. "Implementasi Hak Asasi Manusia Dalam Sistem Peradilan Pidana Indonesia," *Lex Et Societatis* 6, no. 1, 2018: 21-28.
- Tak, P J P. "Deals With Criminals: Supergrasses, Crown Witnesses and Pentiti", *European Journal of Crime, Criminal Law and Criminal Justice* 5, no. 1, 1997: 2-26.
- Tak, P. J. P. *The Dutch Criminal Justice System. (The Netherlands : Aolf Legal Publishers CB Nijmegen*, 2008.
- Tak, P. J. P. *De Kroongetuige En de Georganiseerde Misdaad, S Gounda Quint –D .Brouwer en Zoon, Arnhem*, 1994.
- United States v. Awan*, 2010 U.S. App. LEXIS 12084 (2d Cir. N.Y. June 14, 2010).<http://witnesses.uslegal.com/corroboration/> accessed on June 10, 2020.
- Verhaa, J. W. M. *Asas-Asas Linguistik Umum*. Yogyakarta: Gadjah Mada University Press, 1996.

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