

THE URGENCY OF ARRANGEMENTS FOR THE PROTECTION OF WITNESSES IN CONSTITUTIONAL CASES IN THE PERSPECTIVE OF HUMAN RIGHTS

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Abstract

The witness is one type of evidence used in the Constitutional Court at the stage of proof, however when witnesses testify in court, witnesses experience threats to violence, while the laws and regulations in Indonesia have not been regulated and researchers have not found previous research that examines and analyzes witness protection in constitutional cases. The purpose of this study is to examine and analyze the urgency of witness protection in constitutional cases from the perspective of human rights. This research uses normative juridical research, with a case and statutory approach. The primary legal materials used are the Human Rights Law, the Witness and Victim Protection Law, and the Constitutional Court Law, Pancasila, and the 1945 Constitution of the Republic of Indonesia. Secondary legal materials are journals, books, and others. The interpretation used is grammatical and systematic. The results of his research show that witness protection is the fulfillment of the rights that must be owned by witnesses, while in the Constitutional Court Law only regulates the fulfillment of witness obligations such as being required to attend court and if not present they will be summoned by force, while in the Pancasila framework there must be a balance between rights and obligations and In the 1945 Constitution of the Republic of Indonesia, the fulfillment of the right not to be tortured, the right to be free from discriminatory treatment, the right to personal protection, so that the State is obliged to fulfill these rights. Policy makers immediately formulate the protection of witnesses in constitutional cases for the realization of justice, certainty and benefit.

Keywords: Witness Protection, Constitutional Cases, Human Rights

I. INTRODUCTION

The Constitutional Court (MK) is one of the judicial institutions mandated in the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), while the MK's authority is based on Article 10 paragraph (1) of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court is the review of laws against the 1945 Constitution of the Republic of Indonesia, to decide on disputes over the authority of state institutions whose authority is granted by the 1945 Constitution of the Republic of Indonesia, to decide on the dissolution of political parties, and to decide disputes regarding the results of the general election. 10 paragraph (2), namely the Constitutional Court gives a decision on the opinion of the DPR that the president and/or vice president are suspected of having violated the law.

The parties who can submit an application to the Constitutional Court are those who consider their constitutional rights to be impaired due to the enactment of the law. The party in question can be an individual Indonesian citizen, an indigenous community unit as long as it is still alive, a private/public legal entity, or a state institution.

The Constitutional Court further stipulates in Article 3 PMK Number 06/PMK/2005 concerning Guidelines for Proceeding in Cases of Judicial Review. Asshiddiqie suggests there are three conditions that must be met for the validity of the legal status (*legal standing*) the applicant in the case of judicial review of the Constitution in the Constitutional Court, namely:

"The four persons or legal subjects mentioned above (individual citizen, customary law community unit, a legal entity public or private, and state institutions), must first prove that their identity does meet the requirements as referred to in Article 51 of Law Number 24 of 2003. Second, the party concerned must prove that he or she does have certain guaranteed rights or certain powers specified in the 1945 Constitution. Third, the constitutional rights or authorities in question are indeed proven to have been harmed by the enactment of the Law that concerned."¹

In addition, an example of a party submitting an application to the Constitutional Court is the presidential and vice presidential candidate pairs, for example the Prabowo-Sandiago Uno pair Number 02 through their attorneys, submitting a request for dispute resolution of disputes over the results of the 2019 presidential and vice presidential elections as applicants, the General Elections Commission (KPU) is the respondent and for Presidential candidate Number 01 as a related party and the lawsuit recorded in the Constitutional Court registration Number 01/PHPU-PRES/XVII/2019, according to Spokesperson for the Prabowo-Sandiago Uno camp, Dahnil Anzar Simanjuntak said that the reason for filing disputes over election results because:

"There are many inputs, inputs from regions such as Central Java, East Java, Bali, then Papua, NTT, then North Sumatra, these regions have prepared a lot of evidence of fraud violations which are structured, systematic, massive, and brutal (TSMB),"²

on the basis of this, his legal counsel submitted an application for accompanied by several evidences in the form of letters or writings, witnesses, and experts. Meanwhile, the evidence provided for in the Procedural Law of the Constitutional Court is: a. letters or writings; b. witness testimony; c. expert testimony; d. statement of the parties; e. instruction; and f. evidence in the form of information that is spoken, sent, received, or stored electronically with optical devices or similar. Applicants who submit evidence have a minimum standard of at least 2 pieces of evidence out of the 6 pieces of evidence that have been mentioned.

According to Prabowo-Sandiaga Uno's attorney, Bambang Wijdayanto, he thought he had some evidence, such as documents, witnesses, and experts. The minimum requirements for evidence of course have been met, but at the time of entering the evidence stage at trial, the witness was presented to provide information on alleged violations when the election was held on April 17, 2019, it turned out that the witness felt threatened by an unknown person whose purpose was to prevent him from giving evidence. testimony at the trial.

"Agus Muhammad Maksum as a fact witness for the Prabowo Subianto-Sandi Legal Team in the 2019 presidential election dispute trial at the Constitutional Court (MK) said that he had received death threats. Agus Maksum, who is also a

researcher on the Permanent Voters List (DPT) at the national level, said the threat he received had spread to his family. It happened around April 2019. "Once it came to me, my family about the threat of 'killing', said Maksum in a hearing at the Constitutional Court Building, Jakarta, Wednesday (19/6)."³

The testimony of the witness that he was threatened with death was presented before the judge. However, Judge Aswanto was of the view that if the witness felt threatened, he could report it to the police. *Seriously threatened with life safety, why not report it,*" in⁴ fact the Constitutional Court itself can provide protection to witnesses through the Witness and Victim Protection Agency (LPSK). this is based on the cooperation of the Constitutional Court and LPSK by making a Memorandum of Understanding Number 6/PK/2018: Number NK-01/2/LPSK/3/2018 concerning Strengthening Institutional Capacity in the Protection of Witnesses and Victims. This Memorandum of Understanding is the basis for providing protection for the witness.

In addition, according to Wilma Silalahi, the basic footing of providing witness protection is concentrated on the application of human rights at the 2019 Presidential Election PHPU trial, witnesses have the right to security for witnesses who are presented at the Court but only while in the Court building is for witnesses to provide information properly in accordance with what was experienced., can be seen, and can be proven without influence⁵. Meanwhile, according to the researcher, the rights granted by the Constitutional Court are not a guarantee that witnesses can give information freely because before entering the trial they have received threats and after being released from the Court's trial, they are likely to be threatened. Because it is a series of security processes that should not be separated and LPSK itself does have the authority to provide witness and victim protection, in accordance with the mandate in Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Victim Witnesses (UU Law No. PSK), but there is a limitation on the scope of cases handled by LPSK, namely criminal cases only, while witness Agus Muhammad Maksum is a witness in the realm of PHPU cases or not criminal cases. However, on the other hand, witnesses have an obligation to be present at the trial and have legal consequences if they do not comply with the summons. Can be summoned by force and even sentenced to imprisonment. So this is what makes researchers to examine and analyze how the urgency of the protection of witnesses in constitutional cases in the perspective of human rights?

II. LEGAL MATERIALS AND METHODS

The research method used is normative juridical, *statute approach and case approach*, this law approach will open up opportunities for researchers to study whether there is consistency and conformity between a law and the law other or between the law and the constitution or between the regulation and the law.⁶ technique of collecting legal materials with literature studies that have relevance to the laws and regulations governing the object of this study. Meanwhile, the legal interpretation used is a systematic and grammatical interpretation.

III. RESULT AND DISCUSSION

Witness testimony is information given by someone who knows, sees, feels, or even experiences an event related to the case examined by the panel of judges. Therefore, witness testimony is needed to find out the truth about a fact.⁷ Witness testimony is presented in the trial of constitutional cases based on proportions according to the type of case. For example, in a case of judicial review, witness testimony is required to prove the *legal standing of the applicant* in relation to the loss of rights he has suffered from the enactment of the law. In addition to cases of impeachment of the President and/or Vice President, witness statements are required to prove whether it is true that the President and/or Vice President committed a violation of law in the form of treason against the state, corruption, bribery, other serious crimes, or disgraceful acts, and/or not. again fulfills the requirements as President and/or Vice President as referred to in the 1945 Constitution of the Republic of Indonesia. The testimony of the witnesses presented is not enough because one witness is presented because the principle of still applies *unus testis nullus testis* or one witness is not a witness. Therefore, it is advisable to present at least two witnesses. In addition, it is added with one other evidence such as letters or writings, expert statements, statements of the parties, instructions, other evidence in the form of information that is spoken, sent, received, or stored electronically with optical devices or similar.

In the evidence in the trial of constitutional cases, it can be called applying "the teaching of limited free evidence".⁸ It is said to be free because the judge can freely determine the burden of proof that something will be given.⁹ This means that the applicant and the respondent can jointly submit the evidence they have or only one party. However, in its development, it turned out that in the submission of evidence at the trial, problems were found, namely the presence of witnesses who allegedly experienced threats, as was the case when the applicant from the Presidential Candidate and/or Vice President Prabowo-Sandi presented a witness in a dispute over the 2019 general election results at the Constitutional Court. . One online media quoted that the witness in question was as follows:

“Agus Muhammad Maksum as a fact witness for the Prabowo Subianto-Sandi Legal Team in the 2019 presidential election dispute trial at the Constitutional Court (MK) said that he had received death threats.

Agus Maksum, who is also a researcher on the Permanent Voters List (DPT) at the national level, said the threat he received had spread to his family. It happened around April 2019.

"Once it came to me, my family about the threat of 'killing', said Maksum in a hearing at the Constitutional Court Building, Jakarta, Wednesday (19/6)."¹⁰

From the news above, of course, the question is whether there is witness protection in the judicial process, the Constitutional Court has made a *memorandum of understanding* /Memorandum of Understanding with the Witness and Victim Protection Agency (LPSK) Number 6/PK/2018 & Number NK-01/2/LPSK/03/2018 concerning Strengthening Institutional Capacity in the Protection of Witnesses and Victims. in essence, the memorandum

of understanding contains that LPSK has the authority to provide witness protection as referred to in Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims.¹¹ supported by the opinion of the LPSK Spokesperson who said that "But if the Constitutional Court decides that several witnesses need to be protected, it can be carried out with LPSK," said Mardiansyah, adding, "Moreover, both institutions have MoUs and it can be elaborated."¹² Whereas in the PSK Law the witnesses who are given protection are witnesses to criminal cases, non-criminal cases cannot be given the same protection as constitutional cases. This is based on Article 2 of the PSK Law which states "this law **provides protection for Witnesses** and Victims in all stages of **the criminal justice process** within the judiciary." It is clearly written that only witnesses in criminal cases are given protection. According to the researcher, the Constitutional Court and LPSK in making a memorandum of understanding have contradicted the PSK Law and the memorandum of understanding cannot be the basis for LPSK to protect witnesses in constitutional cases. Sjachran Basah called "*abus de droit*" (arbitrary actions), namely the actions of officials who are not in accordance with objectives outside the environment of statutory provisions. This opinion implies that to assess whether there is abuse of authority by testing how the purpose of the authority is given (principle of speciality). Acting arbitrarily can also be interpreted as using authority (rights and power to act) beyond what should be done so that the action is contrary to the provisions.¹³

The researcher found that there was a study that examined witness protection, namely the immunity rights of witnesses in disputes over the results of the general election written by Siti Nurhalifah and M. Chaerul Risal, in the results of their research, that:

"Protection of witnesses, especially legal protection for witnesses, has been regulated in laws and regulations. invitation, namely Law Number 13 of 2006 concerning the Protection of Witnesses and Victims."¹⁴

The author then relates the right of immunity in the perspective of *siyasa syar'iyah* which is written, that:

"The right of immunity of witnesses in Islam is part of the *hifzh al-Aql*, Islam grants the right to freedom of thought and the right to express opinions as well as to express them to all mankind."¹⁵

The results of the research by Siti Nurhalifah and M. Chaerul Risal stated that the immunity rights of witnesses in disputes over the results of the general election have been regulated in the PSK Law. . So that researchers do not agree with the results of research by Siti Nurhalifah and M. Chaerul Risal. From what the researcher has stated and refutes previous studies that examine witness protection. So it is clear that there is a norm vacuum.

In the absence of a norm, the researcher will examine and analyze the protection of witnesses in constitutional cases from the perspective of human rights. Human rights are defined by Jariome J. Shestack in *The Philisophical Foundation of Human Rights* explaining that human rights are rights that are inherent in humans because of human rights and human nature, namely:¹⁶

“What do we mean by human 'rights'? lets us focus initially on the word 'human'. To speak of 'human' rights requires a conception of what rights one possesses by virtue of being human, of course we are not speaking here of human in the self-evident sense that those who have them are human, but in the sense that in order to have them, one need only be human”

Meanwhile, Jimly Asshidiqqie argues that human rights are rights that are universally recognized as rights inherent in humans because of the nature and nature of human birth as human beings, namely the rights to enjoy freedom from all forms of slavery, oppression, dispossession, persecution or any other treatment that causes humans to not be able to live properly as humans.¹⁷

According to Article 1 point 1 of Law Number 39 of 1999 concerning Human Rights (UU HAM), in writing what is meant by human rights are:

"Human Rights are a set of rights that are inherent in the nature and existence of humans as creatures of the Supreme Duties. One and is His gift that must be respected, upheld and protected by the legal state, government, and everyone for the sake of honor and protection of human dignity.

From the expert opinion according to Jariome J. Shestack, Jimly Asshidiqqie, and the Human Rights Law, the researcher can conclude that human rights are rights of every human being that are inherent since birth and the guarantee of these rights is regulated in a regulation. The regulation of human rights in Indonesia is regulated in:

The Universal Declaration of Human Rights was accepted and announced by the UN General Assembly on December 10, 1948 through resolution 217 A (III) which was ratified by Indonesia into Law Number 12 of 2005 concerning Ratification *International Covenant On Civil And Political Rights* (International Covenant on Civil and Political Rights), Civil rights and political rights in question, namely:

- a. Right to life, liberty and personal security
- b. Right to movement
- c. Right to nationality
- d. Right to association and association
- e. Right to have property rights

and others.

Witnesses who are threatened, of course, need protection, so that when examined from a human rights perspective, based on Law Number 12 of 2005 concerning Ratification of the *International Covenant On Civil and Political Rights International Covenant on Civil and Political Rights* (Politics, Rights that can be owned by witnesses are **rights personal freedom and security**. (Article 9), This right is based on the fact that when a witness is about to, is currently, or has given testimony in a trial of a constitutional case, he or she may not be under

pressure and must freely give information based on what is known, seen, heard, and experienced. In addition, it is very important to guarantee personal security because if it turns out that the witness experiences threats and violence with the enactment of the right to personal security, preventive measures will be taken according to the procedures that have been regulated. The security of witnesses is part of the right to defend their lives. The right to life (Article 6) is the most basic human right for every human being. The nature of the existence of this right is *non-derogable rights*. The right to life is perhaps the most basic value of modern civilization.¹⁸

According to Law Number 39 of 1999 concerning Human Rights (UU HAM), the rights that can be owned by witnesses, namely:

Article 3 paragraph (2)

"Everyone has the right to recognition, guarantees, protection and fair legal treatment and obtain certainty the law and equal treatment before the law."

Article 4

"The right to life, the right not to be tortured, the right to freedom of person, thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person and equal before the law, and the right not to be prosecuted on the basis of retroactive law. is a human right that cannot be reduced under any circumstances and by anyone."

Article 8

"Protection, promotion, enforcement, and fulfillment of human rights are primarily the responsibility of the Government."

The rights obtained by witnesses according to article 3 paragraph (2), article 4, and article 8 have been clearly regulated, such as witnesses having **guaranteed protection and fair legal treatment**. However, the protection guarantee is only regulated in the Human Rights Law. When compared to the witness protection arrangements that have been regulated in the PSK Law, the Law has limitations, namely only providing protection guarantees for witnesses in criminal cases, while witnesses are not criminal acts such as witnesses in constitutional cases. given protection. It is clear that witnesses in constitutional cases get unfair treatment with witnesses in criminal cases. In fact, guaranteeing the fulfillment of protection is the responsibility of the government (article 8) (especially the legislature and executive). According to the researcher, regulators have the assumption that criminal cases are in the realm of public law, meaning that it regulates public interests, which have a correlation between citizens and the state where it can be said that the law regulates the public interests of its citizens. Through instruments owned by the state, the Witness and Victim Protection Agency (LPSK) was established as a manifestation of the presence of the state.

On the eve of the peak of LPSK's 13th anniversary, President Jokowi gave a speech that:

“Jokowi believes that LPSK will always provide protection and services for witnesses and victims. The existence of LPSK is part of realizing state responsibility in the field of law and the fulfillment of human rights.”

President Jokowi's speech as the Head of State and also as a policy maker in the realm of executive power has confirmed the existence of LPSK, however Jokowi considers LPSK's responsibility as the responsibility of the state to provide protection for witnesses as a basic part of fulfilling human rights. So that the presence of LPSK as regulated in the PSK Law should not limit itself to only protecting witnesses of criminal acts, but witnesses in constitutional cases have the right to be given protection.

A witness in a constitutional case must be present to give testimony at the trial, if he does not come, he will be summoned a second time.¹⁹ So that the witness cannot refuse to give information, even if for any reason it is not justified. According to the researcher, the content of the norm "witnesses and experts who are summoned must be present to provide information" as regulated in article 42 is the fulfillment of witness obligations, while the fulfillment of rights has not been regulated in the Constitutional Court Law at all. So that witnesses are only charged with obligations without being given rights. When examined from the perspective of Pancasila and the 1945 Constitution of the Republic of Indonesia, as stated by Barda Nawawi Arief, that to formulate a *grand design* of the legal system and national legal politics on the basis of the 1945 Constitution of the Republic of Indonesia as the constitutional basis and Pancasila as the philosophical basis²⁰, Pancasila and the 1945 Constitution of the Republic of Indonesia are inseparable and as the direction of national law development.

The arrangement of witnesses in constitutional cases that have been found in the Constitutional Court Law turns out to be only limited to regulating obligations. This is contrary to the values of Pancasila and the 1945 Constitution of the Republic of Indonesia. In the relevant Pancasila precepts, the fifth principle is "**justice** social for all Indonesian people". The word **justice** which is the focus of the researcher that justice in question is the fulfillment of rights and obligations that are balanced and go together, should not only prioritize the fulfillment of obligations or vice versa rights are put forward. So that the arrangement of witnesses in the Constitutional Court Law does not reflect justice according to Pancasila in the fifth precept because it only imposes an obligation to attend, but does not coincide with rights such as providing guarantees of protection. According to Satjipto Rahardjo, legal protection is to provide protection for human rights that have been harmed by others and that protection is given to the community so that they can enjoy all the rights granted by law.²¹ Although the Constitutional Court Law does not regulate witness protection, the Constitutional Court has attempted and initiated to cooperate with LPSK to provide witness protection in civil cases based on the MOUs made by the two institutions. Researchers are of the view that what the Constitutional Court and LPSK are doing is a progressive action. This is the weakness of the legislation and the researcher agrees with Sudikono Mertokusumo's opinion that "There is no complete and clear regulation. Legislation which is intended to regulate the activities of human

life, the activities of human life are so broad, that the types and numbers are no longer counted.²²

Constitutionally regulated in the 1945 Constitution of the Republic of Indonesia, there are several articles relating to witness protection. the following article is meant:

in the fourth paragraph it is written "The Government of the State of Indonesia which protects the entire Indonesian nation)

Article 28D

- (1) Everyone has the right to recognition, guarantee, protection, and legal certainty that is fair and equal treatment before the law.**)

Article 28I

- (1) The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on a retroactive basis are human rights that cannot be reduced under any circumstances.**)
- (2) Everyone is free from discriminatory treatment on any basis and is entitled to protection against such discriminatory treatment.**)
- (4) Protection, promotion, enforcement , and the fulfillment of human rights is the responsibility of the state, especially the government.**)
- (5) To uphold and protect human rights in accordance with state principles In a democratic law, the implementation of human rights is guaranteed, regulated, and set forth in laws and regulations. **)

Article 28G

- (1) Everyone has the right to protection of himself, his family, honor, dignity, and property under his control, and has the right to for a sense of security and protection from the threat of fear to do or not do something which is a human right. **)

In the fourth paragraph, Article 28D, Article 28I, and Article 28G have been clearly and comprehensively regulated, starting from the right to life, the right to life, and the right to life. not to be tortured, the right to be free from discriminatory treatment, the right to personal and family protection. The guarantee for these rights must be fulfilled by the State, especially the Government. The position and role of the state as a human rights holder has clearly shown that all aspects concerning respect, protection, fulfillment and promotion of human rights are the responsibility of the state. If the state cannot carry out its obligations as a human rights holder, the state will be labeled as having committed human rights violations. This condition has given birth to a principle of *state responsibility* where the state can be held accountable for human rights violations that befell a group or individual. Broadly speaking, the responsibility of the

state will arise if the state has taken an act that is considered wrong internationally.²³ Witness protection according to the 1945 Constitution of the Republic of Indonesia has a strong reason to be regulated, because both Pancasila and the 1945 Constitution of the Republic of Indonesia have legitimized the guarantees of every citizen, especially witnesses, in addition to being strengthened by the Law on Human Rights and the Law on Civil and Political Rights which are adopted from international human rights instruments, it is very relevant between Pancasila and the 1945 Constitution of the Republic of Indonesia as the direction of national law development and following the development of international human rights.

IV. CONCLUSION AND SUGGESTION

The regulation of witnesses in the Constitutional Court Law only imposes a burden on witnesses to be present at the trial, while witness protection has not yet been regulated. Although the Constitutional Court has made an MOU with LPSK regarding the authority of LPSK to be able to provide protection for witnesses in constitutional cases, this cannot be the basis for LPSK to provide protection because LPSK in the PSK Law only protects witnesses in criminal cases. while the constitutional case is not a criminal case, so that the MOU made by the Constitutional Court and LPSK is in conflict with the PSK Law. Thus, the researcher finally examines and analyzes the urgency of the regulation of witness protection in constitutional cases in the perspective of human rights.

Based on the Law on Human Rights and the Law on the Convention on Civil and Political Rights, everyone has the right to a sense of security, freedom, the right to life, guaranteed protection and fair legal treatment. In addition, according to Pancasila and the 1945 Constitution of the Republic of Indonesia, Pancasila in the fifth principle of "**justice** social for all Indonesian people" says that justice means the fulfillment of rights and obligations in a balanced way, while the Witness in the Constitutional Court Law is only limited to fulfilling obligations without being accompanied by witness rights. So there needs to be witness rights such as being given protection. In the fourth paragraph of the 1945 Constitution of the Republic of Indonesia, it is written "Government of the State of Indonesia that protects the entire Indonesian nation", Article 28D, Article 28I, and Article 28G have been clearly and comprehensively regulated, starting from the right to life, the right not to be tortured, the right to be free from discriminatory treatment. , the right to personal and family protection. These rights can be the basis for regulating witness protection.

Suggestions from researchers, Witness protection arrangements must reflect Pancasila, the 1945 Constitution of the Republic of Indonesia as the direction of national law development and in accordance with human rights principles. The legislature and executive must immediately revise the Constitutional Court Law, add norms regarding the protection of witnesses in constitutional cases and the PSK Law to expand the scope of protection from constitutional cases. So that the realization of justice, certainty and benefit for witnesses to constitutional cases.

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