

LEGAL PROTECTION OF WITNESSES TO OBTAIN ADVOCATE ASSISTANCE IN THE INVESTIGATION PROCESS

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Abstract (size 12)

The development of the times has made the dynamics of law in Indonesia follow suit, so that legal products are truly useful, provide certainty and justice. This makes regulations outside the Criminal Procedure Code and regulations from the Chief of Police appear to respond to all changes in legal dynamics that develop in society. As is the case with regard to legal protection for witnesses to obtain advocate assistance during the investigation process. This research was conducted using a normative juridical approach with the aim of getting an overview and explanation of whether a witness must be accompanied by an advocate at the Investigation stage as well as legal protection for witnesses at the investigative stage in criminal proceedings. The Investigative Process, the aim is none other than to protect the rights of witnesses. So that it is necessary to make changes to the criminal procedural code that are more modern according to the times and provide a sense of justice for society and protection of human rights.

Keywords: *Advocates, Legal Assistance, Witnesses, Investigations.*

Introduction

Indonesia is a state of law. The founding fathers when established the Unitary State of the Republic of Indonesia (NKRI), formulated that Our country is a country of law (*rechtsstaat*) and not a country that is based on power (*machtsstaat*).¹ Therefore, the law should serve as a framework for organizing and completing various problems in running the wheel of life in society, nation and society patriotic.

Every rule and order that is regulated is based on the principle of legal certainty and justice in realizing a safe, peaceful and happy society. Didi Nazmi Yunas simply defines that a state of law is a state based on law and justice for its citizens. All the authority and actions of the apparatus of the state or the authorities solely eyes based on law or in other words regulated by law.¹ regulated in the Preamble to the Constitution of the Republic of Indonesia in 1945 the 4th (fourth)

¹ Didi Nazmi Yunas, *Conception of the State of Law*, (Padang, Angkasa Raya, 1992), p.11.

paragraph which reads "Protect the entire Indonesian nation and all of Indonesia's bloodshed, promote public welfare, educate the life of the nation and participate in carrying out world order. Therefore, these goals must be realized for the sake of the implementation of the goal real country.

In everyday life, humans cannot be separated from social activities societal. Various activities become polarizing in one's life continues. Someone who is active in society is different from that someone who is apathetic in his environment. Aloof and anti-societal nature usually trigger negative actions that can lead to criminal acts. Especially for someone who is not deep in religious knowledge, so the levels his faith decreased when desire and lust were already turbulent in the middle ongoing community activities. This is the cause Crime is rampant and threatens people's comfort and safety those around him.² the. The conditions required should be conditions arising from and in social life on his awareness which is commonly called by law.³

Bad or unpleasant behavior towards other people can trigger a disturbance of the comfort and calm that is carried out by individual/group/legal entity in terms of the Book of Laws Criminal (KUHP) is called a criminal act. The term crime is translation of the term strafbaar feit in the Criminal Code The Netherlands which is currently applied as a national law through the principle concordance, thus changing its form to become the Book of Laws Criminal (KUHP).⁴

The Indonesian National Police is one of the enforcement agencies law, because the Indonesian National Police aims to realize internal security which includes the maintenance of security and public order, order and law enforcement protection, protection and service to the community, as well as fostering it society that upholds human rights. This is in accordance with Article 4 Law of the Republic of Indonesia Number 2 of 2002 concerning The State Police of the Republic of

² Herimanto, Winarno, Social Sciences and Basic Culture, (Jakarta, Bumi Aksara, 2008),p.45.

³ Sri Warjiyati, Understanding the basics of Law, (Jakarta, Prenada Media Group, 2018),p.10.

⁴ Suyanto, Introduction to Criminal Law, (Yogyakarta, CV. Budi Utama, 2018), p.15.

Indonesia, security and order can Well created when everyone is willing and able to comply with the rules The existing law is the Criminal Procedure Code.⁵ assist witnesses in the examination phase of the investigation. Criminal Code only provide an opportunity for legal advisers to accompany the suspect in the news Examination Program with limited conditions, just to see and just listen during the examination, this is regulated in Article 54 of the Criminal Procedure Code. Meanwhile, there is no regulation for witnesses in the Criminal Procedure Code.witnesses in the Criminal Code.

Being a witness is the duty of every citizen, but witnesses too have the rights to be protected as regulated in the law. However Not all witnesses understand the law and not all witnesses understand their rights in the criminal justice process. Witnesses are still considered as objects of examination whose rights are often violated to obtain legal protection when disclosing the material truth about a criminal incident. By Therefore, the witness at the time of being asked for his statement to disclose material truth about a criminal incident at every stage in the process judiciary, such as investigations, investigations, prosecutions and trial examinations court, requires assistance from legal advisors/advocates for consult the law and protect witnesses against outside circumstances procedures (out of procedure) carried out by the authorized apparatus, however often in the process of examining witnesses prohibited by the examiner to be accompanied Legal Counsel/Advocate on the grounds that the witness' rights are not regulated in The Criminal Procedure Code (KUHAP).

Whereas in Article 27 paragraph (1) letter a Regulation of the Chief of Police Number 8 2009 concerning Implementation of Human Rights Principles and Standards in Implementation of Duties of the State Police of the Republic of Indonesia expressly stated that "every officer who conducts examination of witnesses, the suspect or the examinee must: a. provide an opportunity for witnesses suspect or examinee to contact and be accompanied by a lawyer before inspection starts. Provisions regarding witness assistance are limited to before examination, so that it

⁵ Leden Marpaung, Principles-Theory-Practice of Criminal Law. (Jakarta, Sinar Graphic, 2005), p. 3

has not touched the substance of essential assistance, which actually happened in the assistance of the Minutes of Examination.

In Article 1 Number 1 Law No. 18 of 2003 concerning Advocates confirms that, an Advocate is a person whose profession is providing legal services, both internally and externally or outside the court that meets the requirements based on the provisions this law.

Then, in Article 1 Number 2 of Law No. 18 of 2003 it states, form of legal services provided by advocates, in the form of providing consultations law, legal aid, exercising power of attorney, representing, accompanying, defending, and take other legal actions for the client's legal interests.

Article 18 of Law No. 39 of 1999 concerning Human Rights confirms, every person being examined has the right to receive legal assistance from the moment investigation until there is a court decision that has legal force remains. The meaning of legal subject "everyone" means including witnesses. And meaning "legal assistance" includes assistance by an advocate.

Regarding article 54 of the Criminal Procedure Code, which is the main reference for investigators, it is prohibited witnesses accompanied by legal advisers/advocates have been discussed several times Even Chair Pradi once gave input to the DPR RI to amend Article 54 KUHAP and currently this article is being tested in the Constitutional Court which is in filed by Octolin H Hutagalung and 11 other Petitioners

Sub Title

1. Should Witnesses Be Accompanied by Advocates at the Investigation Stage?

A witness in a legal case is a person who gives testimony or statements before investigators or courts. The existence of saksi in the process of resolving cases is very important because he will give information according to what he saw, felt and experienced so facilitate investigators to determine the perpetrators of crimes. Such that set forth in article 1 point 26 of the Criminal Procedure Code which reads:

“Witnesses are people who can give useful information the interests of investigation, prosecution, and justice regarding a criminal case that he himself heard, he saw himself and he experienced himself.”

In this way, the presence of witnesses is important, but often people who do being a witness is not valued so that rights are ignored for get assistance by legal advisors to avoid pressure, intimidation and violence from both interested parties. In practice, witnesses are often under pressure from internal investigators

obtaining information on Sari Sasaki, this happened because there was no assistance from third parties or Advocates who mediate and at the same time act as supervisors so that the process of applying the law is in accordance with applicable regulations and uphold human rights.

The Criminal Procedure Code has laid down the "foundation of legal principles and approaches inspection at all levels, with the Accusatoir system. Criminal Procedure Code placing suspects and defendants at each level of examination as human beings who have human rights and dignity.⁶

To come to the belief that one can be designated as suspect, the investigator must examine the evidence, starting from witness statements, expert statements, letters, and other evidence. To be called worthy as evidence, the testimony of the witness is at least two witnesses, and must be The quality of the testimony is also checked, not just the presence of witnesses. How to behave and the decency of witnesses, the relationship between witnesses and potential suspects, so that effect on the statement. Similarly, the testimony of an expert, must The quality of the information is also seen, not just the expert's testimony.

Such a description shows how easy and simple the process is Determination of the suspect. In fact, someone who has been named as a suspect In fact, some of their human rights have been taken away. Plural occurs within law enforcement practices, suspects in criminal acts who are threatened with imprisonment of more than five years will be subject to detention by the investigator. Detention which should be understood as an authority that is only

⁶ Bambang Tri Bawono. “Juridical Review of the Rights of the Suspect in Examination Introduction”, *Journal of Law*, 2011 26, 2, p. 559.



used if absolutely necessary necessary, in practice understood as the right to detain persons. Suspect, even his family, still have to face social sanctions, for example exclusion and stigmatization. In fact, the distance between someone's designation a suspects and decisions from courts that have permanent legal force establish him guilty, actually still far away. Not even a bit of him who was eventually acquitted by a court decision. Normatively it is true that the determination of the suspect is sufficient based on two evidence. The suspect's statement can be ignored, because the suspect or the accused have the right to repudiate. Once there are two pieces of evidence, reason is enough to identify someone as a suspect. There is no obligation to check suspects, even as witnesses. It's not even mandatory for investigators to examine witnesses or mitigating experts proposed by the parties the suspect, because bringing in witnesses and experts is only the right of the suspect after named as a suspect, not previously or as a potential suspect. Access to being accompanied by an Advocate is not as easy as it should be. Although a suspect may be subject to various restrictions on human rights owned, does not mean he can be treated arbitrarily so the impression that all his rights as citizens have been completely lost. Restrictions on the rights of citizens in a country based on law, according to "Mardjono is only permissible if justified by law itself through a fair criminal justice process (due process of law). as opposed to an arbitrary process or an arbitrary judicial process arbitrary".⁷

If the provisions of Article 56 paragraph (1) are not fulfilled, then the examination considered not fulfilling the requirements required by law so as to result indictment is unacceptable. This is in accordance with jurisprudence Supreme Court, including:

1. Decision of the Supreme Court of the Republic of Indonesia No. 1565 K/Pid/1991 dated 16 September 1993 which basically states, "if the terms of the request are not fulfilled as well as the investigator did not appoint a legal adviser for suspect since the beginning of the investigation, then the demands

⁷ Arief Setiawan's Opinion in the Constitutional Court Decision Number 21/PUU- XII/2014, p. 45.



of the public prosecutor are stated suspect since the beginning of the investigation, then the demands of the public prosecutor are stated not acceptable”

2. Decision of the Supreme Court of the Republic of Indonesia with No. 367 K/Pid/1998 dated 29 May 1998 which basically stated "that if not accompanied by legal adviser at the investigative level is contrary to Article 56 Criminal Procedure Code, until the investigation and public prosecutor's dossier is null and void by law and therefore the demands of the public prosecutor can not be accepted, though examination at trial court accompanied by a legal adviser.”
3. Supreme Court Decision No 545 K/Pid.Sus/2011, dated March 31 2011 stated “That during the examination the defendant was not accompanied by counsel law, while the search warrant and Statement of the 15th December 2009 it turned out to have been made by Officials who did not commit this action was carried out by another officer, thus the news agenda for examining the accused, minutes of illegal search and legally flawed so that the Prosecutor's indictment was made on the basis of news the event becomes invalid and legally flawed as well.”

The law will be said to apply and have a juridical basis if The rule of law has a hierarchical legal basis. In relation to Examination of potential suspects currently has a legal basis, the decision of the Constitutional Court, although it must also be said that it was not in form the verdict of the decision but sounded in its consideration. Therefore The decision of the Constitutional Court is final and binding, so the content is appropriate decisions are obeyed primarily by law enforcement. In KUHAP itself, based on provisions of Article 114, it is stated that prior to examination of person suspected of having committed a crime, the investigator is obliged to notify to him about the right to obtain legal assistance, especially for criminal acts punishment with a penalty of more than five years. According to Syarifuddin Petanasse, "the importance of giving suspects the right to legal assistance before being examined is related to the possibility that he was detained after becoming a suspect



The analogy, and in fact, something that is not prohibited means permissible. As an advocate's clothing when accompanying his client is not mentioned by KUHAP "must wear a tie". The fact that advocates are free to wear a tie or not. Something that is not expressly regulated or prohibited in procedural law left to the dynamics and needs of practice in the field. In a state of not currently dealing with a legal process, everyone has the right to ask legal advice or legal consultation from an advocate. Especially when confronted with the legal process, moreover entitled.

Concretely, witnesses can ask for legal advice directly from an advocate or advocates take the initiative to provide legal advice or advice to witnesses, without intends to direct the witness to provide information beyond the things seen, heard and experienced. So, the witness must be accompanied by an advocate at the investigation stage, so that the process the law is running well and correctly

From the description above, the authors argue that certainty is needed clear law regarding the assistance of advocates to witnesses more specifically witnesses who have the potential to become suspects. In order to materialize the concept harmonious supervision of the judicial process starting from the stage of investigation until the decision, it is also necessary to accommodate and acknowledge the existence of an Advocate as one of the law enforcers to accompany witnesses at the investigation stage in police.

2. Legal Protection for Witnesses at the Investigation Stage

Legal protection for witnesses is very important investigative stage. Witnesses are one of the most important parts of the process settlement of a case, so that legal protection for those who being a witness is very necessary so that they can provide information calmly and without fear.

The law does give authority to the police to enforce law in various ways, both preventive and repressive in the form of coercion and prosecution. In the process of police investigation tends to be repressive, This tendency causes police duties to be closely related to use violence as a way to overcome obstacles in investigations to obtain confessions or information from witnesses, suspects, or



others witnesses who have the potential to become suspects or are called potential suspects regarding a crime. Talking about potential suspects has not yet been regulated in the Criminal Procedure Code, but in judicial practice there is already the term suspect candidate, as in the Decision of the Constitutional Court Number 21/PUU-XII/2014 in legal considerations. To protect witnesses or suspects from action arbitrary investigators, the Criminal Procedure Code regulates: protection of human rights, particularly in relation to the rights of suspects and the accused as regulated in Chapter VI (Article 50 to Article 68) of the Criminal Procedure Code. Although the rights of suspects are clearly regulated in the Criminal Procedure Code, however In practice, there are often violations of the rights of suspects by law enforcement officials concerned. For suspects who lay the law will find it difficult to ask for or claim the rights they have Therefore the investigator is obliged to provide detailed information regarding the rights owned by witnesses/prospective suspects or those who have become suspects particularly informing rights during the legal process. In The Criminal Procedure Code has regulated the obligation of investigators to notify the rights of rights that are owned by witnesses or suspects but the provisions governing them regarding the obligations of investigators are often violated, especially obligations the investigator informs the suspect's right to obtain legal assistance (Art 114 KUHAP).

Article 1 paragraph (3) of the 1945 Constitution confirms that Indonesia is a state law. The idea of a rule of law state as a general principle is adhered to in state administration which, among other things, is characterized by the principle of due process of law constitutionally guaranteed. Accordingly, one The rule of law principle is recognition, guarantee, protection, and fair legal certainty and equal treatment before the law.

The principle of due process of law as a manifestation of the recognition of human rights human beings in the criminal justice process is a principle that must be upheld by all parties, especially for law enforcement agencies. Embodiment respect for human rights is carried out by providing equal position,



included in the criminal justice process, especially for witnesses, suspects, defendants and convicts in defending their rights collectively balanced.

In Law no. 13 of 2006 concerning Witness Protection and Victim. Article 5 Paragraph (1) letter 1 of this law clearly states that witnesses have the right to get legal advice. The right of witnesses is again emphasized in Paragraph (2) which reads: Legal advice referred to in Law No. 13 of 2006, if referring to the Criminal Procedure Code and Law No. 18 of 2003 concerning Advocates, is entitled provided by an Advocate or legal adviser.

In addition, in Article 18 of Law No. 39 of 1999 concerning Human Rights asserted, every person being examined has the right to receive legal assistance since during the investigation until there is a court decision that has legal force still. The meaning of legal subject "everyone" means including witnesses. And meaning "legal assistance" includes assistance by an advocate.

When the threat of punishment is over five years and the suspect is incapacitated then the investigator has the obligation to appoint a legal adviser for accompanies the suspect, so that based on the letter of appointment as legal counsel, a lawyer or advocate will accompany the suspect during the investigation process, but when presented by a lawyer or advocate to accompany the suspect, the suspect flatly refused to be accompanied and will face the problem that is alleged to the suspect. So that the investigator makes an official report on the refusal of the appointment of legal aid signed by the suspect and known by the legal adviser appointed by the investigator. So the investigator's obligation to appoint legal counsel is dead.

The suspect's right to be accompanied by legal counsel has been determined in Article 54 of the Criminal Procedure Code and these rights are obliged to be granted by investigators in accordance with the provisions of Article 56 paragraph (1) of the Criminal Procedure Code, namely regarding obligations the investigator provides legal counsel for the suspect:

1. Cases where the suspect is threatened with capital punishment or imprisonment fifteen years or more.



2. Cases in which the suspect is incapacitated are subject to a five-year sentence or more but less than fifteen years who do not have own legal counsel.

Especially for allegations that are threatened with imprisonment five years or more, the suspect should not just be just notified of his right to obtain legal aid as referred to in Article 54 KUHAP jo Article 114 KUHAP, but more than that the suspect must accept right to obtain legal assistance from the beginning of the investigation process as emphasized in Article 56 paragraph (1) of the Criminal Procedure Code which states: "Officials concerned at all levels of examination in the mandatory judicial process appoint legal advisers for them". Obligation to appoint advisers law as contained in Article 56 paragraph (1) of the Criminal Procedure Code is a obligations that are imperative, the Investigator is not only obliged to notify of the suspect's right to obtain legal assistance, but investigators are obliged to appoint legal advisers for suspects.

In terms of the formalistic legal thinking approach, the provisions of Article 56 paragraph (1) KUHAP, as explained in M. Yahya Harahap's book, explains Article 56 paragraph (1) of the Criminal Procedure Code contains various aspects of legal issues, namely:

1. Contains aspects of human rights values, in accordance with the "universal" human rights declaration emphasized that the presence of Legal Counsel accompanied the Suspect or the Defendant is an inherent value in human beings. With thus ignoring this right is contrary to human rights values;
2. Fulfillment of this right in the judicial process at all levels of examination becomes an obligation for the officials concerned, so they ignore it the provisions of Article 56 paragraph (1) of the Criminal Procedure Code result in the results of the examination illegal and null and void;
3. Whereas Article 56 paragraph (1) of the Criminal Procedure Code as a provision that has human rights values has been appointed as one of the benchmarks for Miranda Rule or Miranda Principle which confirms if the investigation, prosecution, or trial, the suspect or defendant is not accompanied by legal counsel, then in accordance with the Miranda rule, the examination is invalid or void by law/null and void.

Respect for human rights is the most important thing a criminal case that is alleged to have violated the provisions of which is punishable by five sentences years or more, therefore investigators must obey the rules and principles.

Of all the discussions above, in the Criminal Procedure Code, especially Article 54 has not been included regarding assistance by advocates for witnesses or potential suspects, but in other laws such as Article 18 of Law No. 39 of the year 1999 concerning Human Rights and Regulation of the Chief of Police No. 8 of 2009 concerning implementation of the principles and standards of Human Rights of Witnesses/Prospective Suspects, the suspect to contact and be accompanied by an advocate before the examination started. However, this is often not implemented by law enforcement officials this is a penikik, as a result all the legal processes that occur give space the occurrence of violations of the law also eliminates the rights of witnesses/candidates suspects or suspects themselves. So it really needs to be seen reconsider all applicable regulations so that human rights violations do not occur Humans are witnesses or suspects, and all the rules are harmonized related so that there is no debate at the implementation level.

Conclusion

1. Advocate assistance arrangements for witnesses during the investigation stage are not contained in the Criminal Procedure Code. But in the Law more especially as Law No. 39 of 1999 concerning human rights is listed related witness assistance. In the world of practice, the assistance of legal advisors to witnesses in the investigation stage, especially in the case of witnesses who have the potential to become suspects very important. Given that witnesses who have the potential to become suspects are sometimes difficult to identify summoned when immediately determined to be a suspect and often the investigator's practice apply pressure to violate procedures. Through media assistance by advocates to witnesses who have the potential to become suspects will make the investigation process run relatively smoothly.
2. Legal protection for witnesses is often neglected, such as the right to receive equal treatment before the law as well as the right to be accompanied by an

Advocate during investigative process. Given that in Law no. 39. 1999 concerning Human Rights emphasized that every person under investigation has the right to receive legal assistance from the time of investigation until there is a court decision that has permanent legal force, against witnesses began to be enacted and several decisions of the constitutional court that offended the status of potential suspects, and the Chief of Police Regulation No. 8 of 2009 stipulates that accompaniment is mandatory by legal counsel.

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