

The Implementation of the Suspect's Right to be Assisted by Legal Counsel

Arif Rahman*) and Umar Ma'ruf**)

*) Faculty of Law, Universitas Islam Sultan Agung (UNISSULA) Semarang, E-mail: independentprosperous0808@gmail.com

***) Faculty of Law, Universitas Islam Sultan Agung (UNISSULA) Semarang

Abstract.

The objectives of this study are: to find out and analyze the application of the suspect's right to be accompanied by legal counsel. To find out and analyze the sanctions or legal consequences if the suspect is not accompanied by legal counsel at the time of examination, especially at the investigation level. To find out and analyze the factors that hinder the implementation of the suspect's right to be accompanied by legal counsel. The method used by the researcher is empirical juridical approach and the specifications in this study are descriptive. The sources and types of data in this study are secondary data obtained from library studies. Based on the results of the study that the application of the suspect's right to be accompanied by legal counsel ishas not gone well, there are still cases of suspects who are not accompanied by legal advisors and their rights as suspects are neglected. Because the coordination between investigators and legal advisors is not good, this can be seen from the examination of the suspect before being attended by the suspect's legal advisor. Sanctions or legal consequences if the suspect is not accompanied by legal counsel at the time of examination, especially at the level of investigation. As a result, the demands of the Public Prosecutor cannot be accepted. In this case, the decision states that if the conditions of the request are not fulfilled, such as the investigator does not appoint legal counsel for the suspect from the beginning of the investigation, the demands of the Public Prosecutor are declared unacceptable. Factors that hinder the application of the suspect's right to be accompanied by legal counsel are as follows: There is still a lack of understanding from law enforcement officials regarding the protection of human rights for suspects, many elements of violence are found in the preparation of the Official Report of Examination (BAP). Lack of coordination and support from law enforcement officers such as police, prosecutors, judges in informing the rights of suspects, one of which is the right to obtain legal assistance. There are no sanctions for police officials, especially investigators when they neglect or do not carry out their obligations as regulated in Article 56 of the Criminal Procedure Code.

Keywords: Application; Legal Counsel; Rights; Suspect.

1. Introduction

Indonesia was idealized and aspired by the founding fathers as a State of Law (Rechtsstaat/The Rule of Law). In Article 1 paragraph (3) of the 1945 Constitution, it is stated that "the State of Indonesia is a State of Law". In a state of law, the state recognizes and protects the human rights of every individual regardless of their background, so that everyone has the right to be treated equally before the law (equality before the law).¹

The Republic of Indonesia as a democratic legal state and upholds human rights, everyone has the right to have equal treatment and protection by the laws

¹Adnan Buyung Nasution, (2007), *Bantuan Hukum, Akses Masyarakat Marginal Terhadap Keadilan (Tinjauan, Sejarah, Konsep, Kebijakan, Penerapan dan Perbandingan di Berbagai Negara)*, Lembaga Bantuan Hukum Jakarta, p. 97.

and regulations in force in this country. Therefore, for every criminal act or violation of the law that is alleged, the suspect is also entitled to receive the necessary legal assistance in accordance with the principle of the rule of law. The principle of the rule of law contains the principle of "equality before the law" and "presumption of innocence" or also known as the principle of presumption of innocence.²

Every citizen has the same position before the law without exception which includes the right to be defended (access to legal counsel), to be treated equally before the law (equality before the law), justice for all (justice for all).³In order to seek justice, it is often only accessible to those who have an upper secondary education level and an upper middle economic status as well. Recognizing that the ability of human resources and the economy is less likely to make the process of seeking justice for underprivileged people considered difficult, so the term Legal Aid has emerged in the justice system in Indonesia. The provision of legal aid itself is regulated in Act No. 16 of 2011 concerning Legal Aid.⁴

The police is a subsystem in the criminal justice system which is sufficient to determine the success and work of the entire system in providing services to the community. This is because the police is a subsystem that is directly related to criminals and the community, so that the duties and responsibilities of the police can be said to be greater than other subsystems.⁵

The implementation of legal aid cannot be separated from legal rules that can guarantee law enforcement. The legal rule that guarantees the implementation of legal aid is the Criminal Procedure Code (KUHAP) which has appointed and placed suspects and defendants in an equal position as God's creatures who have complete dignity and humanity. In addition, Act No. 4 of 2004 concerning Judicial Powers, especially Article 37 to Article 39 also provides protection for everyone involved in a case has the right to obtain legal assistance through an advocate and advocates are obliged to assist the settlement of cases by upholding law and justice.

Based on Article 54 of the Criminal Procedure Code, it can be concluded that this article determines the right of every person to obtain legal assistance whether that person is economically capable or not. This legal aid is also expected to prevent unfair and inhumane treatment of suspects or defendants who are classified as poor or what is commonly called due process of law.⁶

Although it has been regulated in positive law in Indonesia, in reality the problem of implementing Article 56 paragraph (1) of the Criminal Procedure Code is still very risky in the implementation of law enforcement in Indonesia. According to M. Sofyan Lubis, approximately 80% of cases that fall into the

² Djoko Prakoso, (1985), *Eksistensi Jaksa di Tengah Masyarakat*, Ghalia Indonesia, Jakarta, p. 28.

³ Ahmad Muntolib, Sri Endah Wahyuningsih, 2017, *Peran Bantuan Hukum Dalam Proses Peradilan Pidana Di Kabupaten Blora*, Jurnal Hukum Khaira Ummah Vol. 12. No. 3 September Unissula

⁴ Article 3 letters a and b of Act No. 16 of 2011 concerning Legal Aid.

⁵ Eddy Santoso, Sri Endah Wahyuningsih, Umar Ma'ruf, 2018, *Peran Kepolisian Dalam Sistem Peradilan Pidana Terpadu Terhadap Penanggulangan Tindak Pidana Perjudian*, dalam Jurnal Daulat Hukum Volume 1 (1), Published Master Of Law, Faculty of Law Unissula, p. 182, <http://jurnal.unissula.ac.id/index.php/RH/article/view/2632/1981>

⁶ Yudha Pandu, (2004), *Klien & Advokat Dalam Praktek*, Abadi, Jakarta, p. 43.

categories required by Article 56 paragraph (1) of the Criminal Procedure Code have been investigated without being accompanied by legal counsel. For example, in cases where the penalty is 5 (five) years or more, it turns out that many suspects are at the investigation stage without being accompanied by legal counsel as outlined in Article 115 of the Criminal Procedure Code.⁷

The implementation of legal aid provided by the state to legal aid recipients is an effort to realize constitutional rights and at the same time as the implementation of a legal state that recognizes and protects and guarantees the rights of citizens to the need for access to justice and equality before the law. Legal aid is also a legal service that aims to provide legal protection and defense of the constitutional rights of the suspect/defendant from the time he is detained until a court decision with permanent legal force is obtained. What is defended and given legal assistance is not the fault of the suspect/defendant, but the right of the suspect/defendant to avoid arbitrary treatment and actions from law enforcement officers. So, even though the suspect/defendant is proven to have committed a crime,⁸

The objectives of this study are: to find out and analyze the application of the suspect's right to be accompanied by legal counsel. To find out and analyze the sanctions or legal consequences if the suspect is not accompanied by legal counsel at the time of examination, especially at the investigation level. To find out and analyze the factors that hinder the implementation of the suspect's right to be accompanied by legal counsel.

2. Research Methods

The method of this research approach, which is used by the author is empirical juridical research, which is a type of sociological legal research and can be called field research. Field research is carried out by examining applicable legal provisions and what happens in reality in the community.⁹ Legal research is to find out the process of occurrence and the process of working law in society by examining the relationship between law and other social institutions using social science research techniques.¹⁰ The research specification is descriptive, namely research that provides a concrete or clear and clear picture. The sources and types of data in this study are secondary data obtained from library studies.

3. Result and Discussion

3.1. Implementation of the Suspect's Right to be Accompanied by Legal Counsel

The history of legislation in Indonesia, if it is related to human rights issues, respect for the suspect's human rights is also a respect for human rights, which at the time of the implementation of HIR (*Herziene Inlandsch Reglement*) had not

⁷M. Sofyan Lubis, (2010), *Prinsip Miranda Rule: Hak Tersangka Sebelum Pemeriksaan: Jangan Sampai Anda Menjadi Korban Peradilan*, Pusaka Buku, Jakarta, p. 15.

⁸ Angga and Ridwan Arifin, 2018, *Penerapan Bantuan Hukum Bagi Masyarakat Kurang Mampu*, Diversi Jurnal Hukum, Volume 4, No. 2, p. 227.

⁹ Bambang Waluyo, (2002), *Penelitian Hukum dalam Praktik*, Sinar Grafika, Jakarta, p. 15.

¹⁰ Masruhan, (2013), *Metode Penelitian Hukum*, Hilal Pustaka, Surabaya, p. 128.

been a concern. Article 50 to Article 57 of the Criminal Procedure Code stipulates that the right of a suspect or defendant to obtain legal assistance from a legal adviser can be granted at every level of examination and in the context of rapid distribution of justice for everyone, which is carried out quickly, cheaply and simply.¹¹

In the current Criminal Code, the punishment is regulated in Chapter II Articles 10-43. Based on Article 10 of the Criminal Code, the types of crimes are the first, the main punishment, which consists of the death penalty, imprisonment, imprisonment, fines, and imprisonment.¹²

Law enforcement continues, but the post-reform legal paradigm shift is a phenomenon that greatly influences the political arena and constitutional life in Indonesia. But on the other hand, the law is not yet fully capable of satisfying thirst in the midst of its thirst for justice and the welfare of the people. There are still many legal cases that have not been completely resolved so that it affects people's trust in law enforcement. Such a phenomenon has caused a lot of debate, especially regarding the relevance of law enforcement to the values of social justice and public welfare.¹³ With these conditions, it is necessary to increase the role of law enforcement in law enforcement.¹⁴

The provision of legal assistance in the investigation process is closely related to a principle in criminal procedural law, namely the "principle of presumption of innocence" which is the principle which states that anyone suspected or investigated, arrested, detained, prosecuted and examined in court must be deemed innocent except based on a judge's decision with valid and convincing evidence stating his guilt and the decision has permanent force.¹⁵ The rights of citizens (civil rights) are the right of a person to defend himself and claim his rights by recognizing the principle of togetherness of his position in the law (equality before the law) and through a fair legal process (due process of law) which in this case is criminal justice process mechanism.¹⁶

In the process of resolving criminal cases, one of the rights of suspects and defendants is the right to obtain legal assistance, in addition to other rights such as receiving an examination, the right to be notified of their faults, the right to be immediately brought to court, the right to obtain the fairest judge's decision, the right to have family visits and others.

¹¹ Hamzah, Andi, (2008), *Hukum Acara Pidana Indonesia*, Sinar Grafika, Jakarta, p.12

¹²Hulman Siregar, 2018, *Rumusan Pidana Dan Pemidanaan Tindak pidana Korupsi Yang Merugikan Keuangan Negara Serta Permasalahan Dalam Penerapannya*, dalam Jurnal Daulat Hukum Volume 1 (1), Published Master Of Law, Faculty of Law Unissula <http://jurnal.unissula.ac.id/index.php/RH/article/view/2626/1975>

¹³Gunarto, 2014, *Agenda Penegakan Hukum dan Relevansinya Bagi Pembangunan Bangsa*, Jurnal Pembaharuan Hukum Volume I, No.1, p. 1.

¹⁴Setyo Langgeng, 2018, *Peran Advokat Sebagai Penegak Hukum Dalam Mendukung Terwujudnya Sistem Peradilan Pidana Terpadu Dalam Penegakan Hukum Pidana Di Indonesia*, dalam Jurnal Daulat Hukum Volume 1 (1), Published Master Of Law, Faculty of Law Unissula, p. 138 – 156, <http://jurnal.unissula.ac.id/index.php/RH/article/view/2628/1977>

¹⁵ Ramelan, (2006), *Hukum Acara Pidana Teori dan Implementasi*, Sumber Ilmu Jaya, Jakarta, p.9.

¹⁶ Harahap, M. Yahya, (2008). *Pembahasan Permasalahan dan Penerapan KUHAP, Penyidikan dan Penuntutan*, Sinar Grafika, Jakarta, p. 15

In practice, especially in criminal cases, the application of the provision of legal aid is very often neglected. Suspects whose cases are referred to in Article 56 of the Criminal Procedure Code, in fact at the investigation stage until the examination at the trial are not accompanied by legal counsel, in fact there is a trend that often occurs, namely for suspects to be asked to sign a statement of rejection of legal counsel. Even though the word "mandatory" in Article 56 of the Criminal Procedure Code is very clear and has an imperative meaning.

The application of the suspect's right to be accompanied by legal counsel has not been going well, there are still cases of suspects who are not accompanied by legal advisors and their rights as suspects are ignored. Because the coordination between investigators and legal advisors is not good, this can be seen from the examination of the suspect before being attended by the suspect's legal advisor. This happens because many people do not know their rights as Indonesian citizens, especially the right to obtain legal assistance for those involved in criminal cases or cases from the investigation stage. In addition, there are often obstacles or obstacles in assisting suspects during the investigation stage of the examination process.

3.2. Sanctions or legal consequences if the suspect is not accompanied by legal counsel at the time of examination, especially at the level of investigation

In the context of the right to legal assistance, the Criminal Procedure Code guarantees the right of a suspect or defendant to be accompanied by legal counsel at every level of examination as regulated in Article 114 in conjunction with Article 56 paragraph 1 of the Criminal Code.

If article 54 of the Criminal Procedure Code is studied further, it becomes clear that in principle the right to legal assistance is recognized, but it is not included in the "mandatory" rights. There are certain conditions or conditions that must be met before the right to legal aid becomes "mandatory". These conditions relate to:¹⁷

- Financial ability); and
- Threat of punishment for suspected criminal acts as referred to in Article 56 paragraphs (1) and (2).

The problem with legal aid from the Criminal Procedure Code is that there are no consequences law/legal consequences in violation of the right to legal aid. The point is that the state's obligation to provide legal assistance as regulated in Article 56 of the Criminal Procedure Code is not followed by a legal consequence if the obligation fails to be fulfilled by the state.

The legal consequences can be seen from several decisions of the Supreme Court (Jurisprudence) which state as follows:¹⁸

- The decision of the Supreme Court of the Republic of Indonesia No. 1565 K/Pid/1991 dated September 16, 1993, which basically stated, "if the

¹⁷OC Kaligis, Op. cit, p. 239

¹⁸<http://www.hukumonline.com/berita/baca/lt56c5525fc80e6/refleksi-pelaksanaanbantuan-hukum-dan-praktik-advokat-pohon-mangga-broleh--jecky-tengens->, accessed on 19 February 2022, at 14.45 wib.

requirements of the request are not fulfilled, such as the investigator does not appoint legal counsel for the suspect from the beginning of the investigation, then the claim of the public prosecutor is declared unacceptable."

- The decision of the Supreme Court of the Republic of Indonesia No. 367 K/Pid/1998 dated May 29, 1998 which basically stated "that if you are not accompanied by legal counsel at the investigation level, it is contrary to Article 56 of the Criminal Procedure Code, until the BAP investigation and the public prosecutor are null and void and therefore the prosecution's claim generally unacceptable, even though the examination in court is accompanied by legal counsel."
- Decision of the Supreme Court of the Republic of Indonesia No. 545 K/Pid.Sus/2011 stated "That during the examination the Defendant was not accompanied by a Legal Counsel, while the Minutes of Search and Statement dated December 15, 2009 were apparently made by an official who did not take such action but by another officer; Therefore, the Minutes of Examination of the Defendant, the Minutes of Search are invalid and legally flawed, so that the Indictment of the Prosecutor made on the basis of the Minutes of Investigation becomes invalid and legally flawed as well."

The logic of thinking of the judges contained in the Jurisprudence above. The basis or basis for examination at trial is an indictment. The indictment is based on the minutes of examination (BAP) in the police. The BAP must be true and valid.

One of the indicators of the correctness and validity of the BAP is the fulfillment of the suspect's rights, namely his right to be accompanied by a legal advisor at the time of examination (right to legal assistance). So, if these rights are not fulfilled, then the BAP is invalid. And so on, allegations, demands and decisions that are produced or based on an invalid BAP become invalid as well. It has been stated that the Criminal Procedure Code does not regulate what the legal consequences will be if the rights of the suspect/defendant to legal assistance are not fulfilled. The legal consequences are only stated in several decisions of the Supreme Court Decisions which become Jurisprudence as mentioned above.

Yahya Harahap stated that the decision of a criminal case in theory and in practice is very dependent on the indictment, because the indictment is the basis for judges in examination before the trial, and then becomes the basis for judges in formulating legal considerations and decisions. In addition, the MA RI Jurisprudence No: 68K/KR/1973, 16 December 1976 stated that the judge's decision must be based on the formulation of the indictment.¹⁹

The indictment itself, which contains various verbal descriptions of the crime allegedly committed by the defendant, must be prepared based on materials/facts, then drawn and concluded from the results of the investigation that has been officially stated in the BAP which was delegated by the investigator to the Prosecutor's Office. From these materials/facts, the public prosecutor will put it in an indictment to indict a defendant in a criminal case trial.

Underlying the habit of investigators who always harass and ignore the rights of suspects/defendants in the Criminal Procedure Code, as is usually the case with this Defendant and other defendants, especially with regard to the implementation

¹⁹Harahap, Yahya, M, (1988), *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*. Gramedia, Jakarta, p. 415

and application of Article 56 paragraph (1) of the Criminal Procedure Code are often tolerated by judges, so that habits This continues without any awareness and understanding from investigators and public prosecutors. Thus, it is demanded that the Panel of Judges take this problem seriously so that it does not become a habit and is continuously carried out by investigators and public prosecutors so that it is very detrimental to the rights of the suspect which has been guaranteed by the Criminal Procedure Code.

It is also clear and unequivocal in Article 56 paragraph (1) of the Criminal Procedure Code, which implies the obligation for investigators and public prosecutors to appoint legal counsel for suspects/defendant, but investigators intentionally ignore the rights of suspects/defendant, even though they are known and should be known by investigators and Public Prosecutor, the Defendant's actions are threatened with charges of Article 114 paragraph (2) or Article 112 paragraph (2) of Law no. 35 of 2009 concerning Narcotics with a minimum penalty of 5 years and a maximum sentence of death.

Sanctions or legal consequences if the suspect is not accompanied by legal counsel at the time of examination, especially at the level of investigation. As a result, the demands of the Public Prosecutor cannot be accepted. In this case, the decision states that if the conditions of the request are not fulfilled, such as the investigator does not appoint legal counsel for the suspect from the beginning of the investigation, the demands of the Public Prosecutor are declared unacceptable.

3.3. Factors that hinder the application of the suspect's right to be accompanied by legal counsel

KUHAP which is often referred to as the Indonesian nation's master piece in the field of law²⁰, provides a very large protection of human rights, by regulating in detail the rights that are owned and can be obtained by suspects and defendants during the process of examining their cases.

The granting of rights to suspects and defendants is also followed by setting certain obligations to law enforcement officers, so that the rights of suspects and defendants can be realized in practice. The granting of rights to the suspect/defendant is not merely a manifestation of the protection of human rights (HAM) in the Indonesian criminal justice system, but is also an embodiment of the principle of presumption of innocence, which was previously laid down in Act No. 4 of 2004 (Law on Judicial Power).²¹

Recognition of the principle of presumption of innocence requires the recognition of the principle of equality of arms, which is reflected in the provision of equal opportunities between the public prosecutor and the suspect/defendant in a legal fight. It is in this connection that the granting of rights to the suspect/defendant by the Criminal Procedure Code becomes relevant.

With the recognition of these rights, the position of the suspect, the defendant in public becomes the same as the public prosecutor (who in this case represents the interests of the state/society). The process of examining the case is open (due to the presence of legal advisors), which means there is indirect control

²⁰Oemar Seno Adji, (1994), *KUHAP Sekarang*, Erlangga, Jakarta, p. 55.

²¹Ibid., p. 63.

(horizontally) in the legal fight process, so that there will be a due process of law (fair legal process) in the examination of criminal cases according to the Criminal Procedure Code. This is important to prove in practice, because the protection of human rights in the criminal law process will not mean anything if the rights that have been allocated to the Criminal Procedure Code cannot be implemented in practice.

Likewise with the protection of human rights for suspects/defendants, there should be no discrimination in treatment because the state guarantees individual rights, the only right that can be lost from a person with the status of a "suspect" perpetrator of a crime is the right to freedom of movement, because the law to authorize law enforcement officers to arrest and detain a suspect/defendant if there is sufficient preliminary evidence.²²

However, this authority does not result in the loss of other rights of an individual with the status of a suspect, because the Criminal Procedure Code has strictly regulated the rights of the suspect/defendant of a criminal act during the examination process of the case.

However, in its implementation in the field, there are still factors that hinder the application of Article 56 paragraph (1) of the Criminal Procedure Code for suspects at the investigation stage. The factors that hinder the application of the suspect's right to be accompanied by legal counsel are as follows:

- There is still a lack of understanding from law enforcement officials regarding the protection of human rights for suspects, many elements of violence are found in the preparation of the Examination Report (BAP), this shows that law enforcement officers do not really understand how important the protection of the rights of suspects is, so that the consequences from that they will easily violate the rules contained in the Criminal Procedure Code. Likewise, the interpretation of the articles in the Criminal Procedure Code are sometimes more tailored to their interests regardless of the rights of the suspect.
- Lack of coordination and support from law enforcement officers such as police, prosecutors, judges in informing the rights of suspects, one of which is the right to obtain legal assistance. This can be seen from the infrequent requests for lawyers by law enforcement officers, both police and prosecutors to provide legal assistance when a client who is economically incapable is faced with a criminal case with a criminal penalty of more than 5 (five) years. Investigators prefer that the suspect is not accompanied by legal counsel and this is usually legitimized by the statement of the client who does not want to be accompanied by an advocate when investigated, even if the client wants to be accompanied by an advocate, usually the law enforcement officers show an unfriendly attitude to the advocate who accompanies them.
- There are no sanctions for police officials, especially investigators when they neglect or do not carry out their obligations as regulated in Article 56 of the Criminal Procedure Code.

²²Mardjono Reksodiputro, (1994), *Hak Asasi Manusia Dalam Sistem Peradilan Pidana*, Pusat Pelayanan Keadilan dan Pengabdian Hukum, Jakarta, p. 10.

4. Conclusion

The application of the suspect's right to be accompanied by legal counsel has not gone well, there are still cases of suspects who are not accompanied by legal advisors and their rights as suspects are neglected. Because the coordination between investigators and legal advisors is not good, this can be seen from the examination of the suspect before being attended by the suspect's legal advisor. Sanctions or legal consequences if the suspect is not accompanied by legal counsel at the time of examination, especially at the level of investigation. As a result, the demands of the Public Prosecutor cannot be accepted. In this case, the decision states that if the conditions of the request are not fulfilled, such as the investigator does not appoint legal counsel for the suspect from the beginning of the investigation, the demands of the Public Prosecutor are declared unacceptable. Factors that hinder the application of the suspect's right to be accompanied by legal counsel are as follows: There is still a lack of understanding from law enforcement officials regarding the protection of human rights for suspects, many elements of violence are found in the preparation of the Official Report of Examination (BAP). Lack of coordination and support from law enforcement officers such as police, prosecutors, judges in informing the rights of suspects, one of which is the right to obtain legal assistance. There are no sanctions for police officials, especially investigators when they neglect or do not carry out their obligations as regulated in Article 56 of the Criminal Procedure Code.

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