

"THE URGENCY OF HORIZONTAL SUPERVISION (JUDICIAL SCRUTINY) OF LEGAL AID IN PRE-TRIAL AS PART OF THE HUMAN RIGHTS OF SUSPECTS"

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Abstract

This study examines the urgency of horizontal supervision (judicial scrutiny) of legal aid in pre-trial. Legal aid is a principle contained in the due process of law. The research method used in this study is normative research with a conceptual approach and a case approach. Horizontal supervision in the current pre-trial concept does not include legal aid as an object of judge's authority so that for suspects who are not accompanied by legal counsel as required by Article 56 of the Criminal Procedure Code, the assessment must be submitted to the trial examination. Furthermore, how should horizontal supervision of legal aid provide human rights guarantees to suspects? Horizontal supervision carried out by pre-trial judges or in the future through the concept of Preliminary Examining Judges, it is appropriate to provide a balance between the great power of the apparatus administering the pre-trial function, with the human rights of suspects, including legal aid which is a universal right, so that due process of law can be achieved.

Keywords: *Legal Aid, Horizontal Supervision, Human Rights*

INTRODUCTION

Legal aid is a fundamental aspect of the criminal justice system. The criminal justice system requires the creation of due process of law, with the goal of ensuring the protection of human rights and preventing abuse of the judicial process. The spirit of due process of law as the foundation of the criminal justice system is reflected in the enactment of Law Number 8 of 1981 concerning Criminal Procedure Code (KUHP). This represents a fundamental change, shifting the principles adopted from the principle of *inquisitor* to become the principle of *accusatoir*,¹ which places suspects or defendants as subjects of examination by the criminal justice system and encourages the formation of the Criminal Procedure Code which allows for horizontal supervision of coercive actions as restrictions on personal freedom or liberty. Horizontal oversight, or judicial scrutiny, can be traced back to the Habeas Corpus Act, which began to address the coercive dimension of the criminal justice system. Adopting this principle, derived from common law practices, pretrial institutions were established, granting "horizontal oversight" over the implementation of coercive measures.² In Indonesia, the concept of habeas corpus has been adopted in pre-trial institutions as horizontal supervision of criminal case examinations in the context of investigations carried out by the Police and prosecution by the Prosecutor's Office or the pre-trial stage, but the judicial authority held in the existing criminal justice system is very limited and confined to formal-administrative matters. Pre-trial proceedings have normatively experienced dynamics marked by Constitutional Court Decision Number 21/PUU-XII/2014, by expanding the authority of judges in pre-trial proceedings as regulated in Article 77 in conjunction with Article 77. Article 1 number 10 of the Criminal Procedure Code, so that it becomes: a. The validity or otherwise of an arrest, detention, termination of investigation or termination of prosecution; b. Compensation and/or rehabilitation for a person whose criminal case is terminated at the investigation or prosecution stage, and c. the validity

¹Sugiharto, Indonesian Criminal Justice System, Semarang: Unissula Press, 2012, p. 4.

²Lovina and Sustira Dirga, Judicial Scrutiny through the Preliminary Examining Judge in the Criminal Procedure Code Draft Bill, Jakarta: Institute for Criminal Justice Reform (ICJR), 2022, p. 9.

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or otherwise of the determination of a suspect and the validity or otherwise of a search and seizure. Even though there has been an expansion of objects, in the end, the horizontal supervision that pre-trial aims to achieve is still inadequate and has not provided human rights guarantees to suspects because there are still human rights aspects in the pre-trial phase that in fact have not been regulated as pre-trial objects as in the concept of judicial scrutiny that has been adopted by developed countries. Legal aid itself is not regulated as an object of pre-trial proceedings even though the Criminal Procedure Code has outlined the principles regarding legal aid in its official explanation as stated in Article 54 of the Criminal Procedure Code and Article 56 paragraph (1) of the Criminal Procedure Code. In these articles, the implications of not fulfilling the legal aid aspect at the pre-trial stage are not explained. The absence of legal aid at the pre-trial stage which makes the public prosecutor's indictment null and void and subsequently the public prosecutor's prosecution cannot be accepted is a legal doctrine and judicial practice. This creates a weakness in the criminal justice system when the legal aid aspect is not included in the object of pre-trial proceedings as a horizontal supervisory authority of the judge. The suspect must still be transferred to the court for his main case and the legality of detention cannot be assessed. The absence of a horizontal supervisory function by judges regarding legal aid means that the guarantee of human rights for suspects can be taken away by the state authorities that carry out the functions of investigation and prosecution, even though human rights are human rights from birth, and are not given by the state or anyone else, so that human life is protected from injustice, arbitrariness, and suffering through the enforcement of these basic rights.³

RESEARCH METHODS

In solving this legal issue, the ability to identify legal problems, reason, analyze, and then solve legal issues is required. The type of research used by the author as legal material is by using normative legal writing that conceptualizes law as what is written in legislation (law in books) or law as rules or norms that are benchmarks for human behavior that are considered appropriate. The research reviewed by the author in this study is prescriptive research, which is intended to provide arguments for the results of the research that has been conducted. The author uses a conceptual approach (conceptual research) and a case approach (case approach). The legal material analysis technique used by the author in this legal research is the technical analysis of material with the syllogism method that uses a deductive thinking pattern. The use of this deductive method starts from the submission of a major premise, then continued with the submission of a minor premise. From these two premises, a conclusion is then drawn.⁴

FORMULATION OF THE PROBLEM

1. What is the impact on suspects who do not receive legal assistance at the pre-trial stage?
2. How should horizontal supervision of legal aid provide human rights guarantees to suspects?

RESULTS AND DISCUSSION

1. The Impact of Suspects Not Receiving Legal Assistance at the Pre-Trial Stage

The official explanation of the Criminal Procedure Code outlines the following principles:⁵

1. Equal treatment of every person before the law without making any distinction in treatment.
2. Arrests, detention, searches and confiscations shall only be carried out based on written orders by officials authorized by law and only in cases and in the manner regulated by law.
3. Every person who is suspected, arrested, detained, prosecuted and/or brought before a court must be considered innocent until a court decision declares his guilt and has permanent legal force.
4. Anyone who is arrested, detained, prosecuted or tried without a reason based on law and/or due to a mistake regarding the person or the law in force must be compensated and rehabilitated from the investigation stage and law enforcement officials who intentionally or through negligence cause the legal principles to be violated must be prosecuted, punished and/or given administrative penalties.
5. The judiciary must be carried out quickly, simply and at low cost, and must be implemented consistently at all levels of the judiciary.

³Kristianto, Agustinus Edy and A. Patra M. Zen., *Guidelines for Legal Aid in Indonesia*. Jakarta: Obor Indonesia Foundation, 2009, p. 33.

⁴Peter Mahmud Marzuki, *Legal Research*, Jakarta: Kencana, 2017, p. 78

⁵Maroni, *The Face of Human Rights in Criminal Justice*, Lampung: Anugrah Utama Raharja, 2018, pp. 24-25.

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6. Every person involved in a case must be given the opportunity to obtain legal assistance which is provided solely to carry out the interests of defending himself.
7. From the time of arrest and/or detention, a suspect must be informed of the charges and legal basis for the charges against him, and must also be informed of his rights, including the right to contact and request assistance from a legal advisor.
8. The court examines criminal cases with the defendant present.
9. Court hearings are open to the public except in cases regulated by law.
10. Supervision of the implementation of court decisions in criminal cases is carried out by the head of the court concerned.

All of the suspect's rights are regulated in Articles 50 to 68 of the Criminal Procedure Code and every law enforcement officer is obliged to respect these rights. Specifically, legal aid can be found in Articles 54 to 56 of the Criminal Procedure Code. The Criminal Procedure Code grants suspects or defendants the right to receive legal aid or appoint legal counsel, and it is the obligation of every official at every level of judicial proceedings to respect the rights of suspects or defendants as part of a fair trial and human rights guarantees. Normatively, the principle of legal aid has become an integral part of the criminal justice system. However, the practice of implementing pre-trial functions with excessive power is inconsistent with the human rights guarantees granted to suspects. Examples of this are found in Decision Number 60/Pid.Pra/2019/PN.Mdn, Interim Decision Number 43/Pid.Sus/2019/Pn.Yyk and Decision Number 63/Pid/2019/PT JAP, which will be described as follows:

First, Medan District Court Pretrial Decision with register number 60/Pid.Pra/2019/PN.Mdn, in one of its considerations, the sole pretrial panel stated that during the examination, Petitioner I and Petitioner II (Feriatu Sinulingga and Rian Amanda) were not accompanied by Legal Counsel as per Article 54 of the Criminal Procedure Code, were never given an Arrest Warrant and Detention Warrant as well as a copy of the Examination Report. The verdict in the *quo case* stated that the Petitioner's Request was granted and stated that the actions of Respondent III (Head of Medan Sunggal Sector Police) in determining the Petitioners as suspects were invalid and not based on law and had no binding legal force.

Second, Interlocutory Decision Number 43/Pid.Sus/2019/Pn.Yyk. The Panel of Judges at the Yogyakarta District Court issued an interlocutory decision by granting the exception of Defendant Edi Supriyanto Bin Hartono's Legal Counsel that, "The Defendant's examination at the investigation level was not accompanied by a legal counsel" and determined that the examination of the case of Defendant Edi Supriyanto should not be continued. The interlocutory decision was decided after there was an objection from the defendant's legal counsel, one of the points of which was that the defendant's examination at the investigation level was not accompanied by a legal counsel as regulated in Article 56 paragraph (1) of the Criminal Procedure Code. The panel of judges considered that the violation of the defendant's rights, who at that time still had the status of suspect, to be accompanied by a legal counsel, caused the subsequent process carried out by both investigators and public prosecutors to be invalid, so that the indictment in this case was also declared invalid because it had been made based on a legally flawed process.

Third, Jayapura High Court Decision Number 63/Pid/2019/PT JAP which is an appeal decision from Manokwari District Court Decision Number 14/Pid.B/2019/PN Mnk. The decision provides a ruling stating that the public prosecutor's indictment on behalf of the defendant Kartu Kuning Yoman Alias Yogor is null and void. The panel of first instance judges is of the opinion that the results of the investigation in the form of an investigation report in this case are invalid and null and void. Thus, the Public Prosecutor's indictment is also null and void and the prosecution of the Defendant cannot be accepted. At the appeal level, the Jayapura High Court took over all the considerations of the Panel of First Instance Judges and upheld the decision of the Manokwari District Court.

The three decisions above provide an illustration that legal aid does not have the certainty that its fulfillment can be examined. what stage. At the pre-trial stage, although legal aid is not included in the object of the pretrial, the sole pretrial judge in case number 60/Pid.Pra/2019/PN.Mdn used the reason that the suspect was not accompanied by legal counsel as stipulated by the Criminal Procedure Code as one of the considerations for the invalidity of the suspect's determination. The above consideration is casuistic, meaning that normatively, the judge does not have the authority to test the suspect's right to legal aid in the pre-trial stage. The criminal justice system provides horizontal oversight of legal aid which can be carried out during the trial examination. The panel of judges needs to substantively assess the processes that form the basis of the indictment or prosecution. However, suspects who are detained must wait for an interim decision or even a final decision, resulting in protracted detention. In 1988, the UN General

Assembly promulgated the Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment. One of the clauses formulated in this Body of Principles emphasized that any detained person or their defense counsel may take action in accordance with applicable law to challenge the lawfulness of their detention in order to obtain their release without delay.⁶ The Body of Principles provides an implication a contrario that for any unlawful detention, any person detained can obtain release, including suspects who are not accompanied by legal counsel during the investigation. Ideally, not only coercive measures as a restriction of individual freedom that require horizontal oversight, but also every action of investigators that has the potential to reduce or even eliminate human rights guarantees, needs to be the object of examination by judges so that the fulfillment of human rights violated by the authority carrying out the pre-trial function does not require it to be granted at the trial examination stage. Pre-trial not only assesses the administrative-procedural actions of investigators or prosecutors but also provides a substantive assessment of pre-trial. Thus, pre-trial in its horizontal oversight function can ensure the implementation of every element of the criminal justice system remains in accordance with procedures and does not deny substantive justice.

2. Horizontal Supervision of Legal Aid Provides Human Rights Guarantees to Suspects

Legal aid is a fundamental aspect inherent in every person facing the law, as a result of the principle of presumption of innocence, which is embedded in due process of law. Criminal procedural law limits the state's powers in investigative and prosecutorial functions to ensure the enforcement of human rights for suspects.

A fair trial process or one with the spirit of due process of law must contain at least six important elements, namely:⁷

1. *Notice*, which means that the suspect has the right to be officially and in writing informed about the judicial process that will involve him so that he can prepare the necessary defense steps.
2. *Hearing*, This is a right that originally came from the common law legal system, which means that no one can be punished without being given an opportunity to be heard and he must be given the opportunity to defend himself in court (the person must be allowed his day in court).
3. *Counsel*, namely the right to obtain legal aid.
4. *Defense*, namely the right to defend oneself, both in relation to accusations and to reveal another side of an event (the right of disclosure) which may not have been previously known.
5. *Evidence*, that if there is evidence that is permitted and the use of which is unfair, the accused must be given the opportunity to reject evidence that is detrimental to him and to submit other evidence to protect himself, including a prohibition on misusing evidence that was obtained illegally, and
6. *Fair and impartial court*, or fair and impartial justice which is a very important and fundamental element.

In addition to the principles mentioned above, the UN General Assembly in 2013 established the UN Guidelines Principle on Access to Legal Aid in the Criminal Justice System. The first principle regulates the right to legal aid. It explains that the right to legal aid is a crucial element in the functioning of the criminal justice system in a state governed by the rule of law. The right to legal aid is the foundation for other rights, including the right to a fair trial, and is an essential guarantee for ensuring the achievement of fundamental justice and public confidence in the criminal justice process. The second principle, among other things, regulates the obligations and responsibilities of the state to ensure the fulfillment of this right by allocating the necessary human and financial resources for the legal aid system. In addition to ensuring a fair trial, legal aid for every citizen embodies access to justice, which is the implementation of guarantees of equality, protection, and equal treatment before the law. Based on the principles above, it can be concluded that legal aid is a universal right and a crucial element in the criminal justice system, reflecting due process of law and equality before the law. In fulfilling this obligation, the state is obligated to guarantee the availability of legal aid for everyone involved in criminal matters. In the Indonesian criminal justice system, there are at least five main elements responsible for their respective functions, which can be broken down into five roles, namely: the investigative function (police authority), the prosecution function (prosecutor's authority),

⁶Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment or Collection of Principles on the Protection of All Persons under Any Form of Detention or Imprisonment 1988 Principle 32 paragraph (1).

⁷Warc Weber Tobias and David Petersen, Pre Trial Criminal Procedure: a Survey of Constitutional Rights, lecture material on the Criminal Justice System at the Postgraduate Program, UI Jakarta, pp. 210-213.

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the judicial function (supreme court/court authority), the correctional function (correctional institution/Ministry of Law and Human Rights authority) and the legal aid function (advocates). All of these elements, in carrying out their functions in a coordinated manner, can build and realize the criminal justice system. In countries that have a competent criminal justice system, the principle emphasized in the criminal justice mechanism is the principle of equality of arms between lawyers and public prosecutors, as well as providing the possibility for the defense team to play an active role.⁸ It is emphasized that, "the principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee", in the context of the Indonesian criminal justice system it is stated that, "National and international laws have corresponding regulations that, in the judicial process, everyone should be treated the same before the law and guaranteed due process of law. These principles of individual recognition and equality before the law are enshrined in unequivocal terms in Articles 3, 4, and 5 of Law 39 Year 1999. The suspects or defendants have the right to cross examine the prosecution's witnesses as well as the right to present favorable witnesses for the defense who receive equal treatment by the court. The right to equal treatment, especially in equal presentation of witnesses or evidence, affirms the significance of the application of the equality of arms principle in criminal justice".⁹

Apart from the fact that legal aid is a requirement for the due process of law to work in the criminal justice system, the criminal justice system must also be able to provide balance and coordination between the powers of each law enforcement apparatus with their respective principles that must be upheld, in line with the principle of equality of arms. In the criminal justice system, the Criminal Procedure Code has outlined the principles stated in the official explanation of the Criminal Procedure Code, one of which explains, "every person involved in a case must be given the opportunity to obtain legal assistance which is solely provided to carry out the interests of defending himself." In relation to human rights, there are basically 2 (two) basic rights in humans, namely: (a) human rights are rights that are inherent in humans and fundamentally exist since humans were born, are permanent and primary, cannot be revoked, do not depend on the presence or absence of other people around them, (b) statutory rights are rights that are given by law specifically to human individuals, so that their regulations must be clearly stated in statutory regulations. By seeing that every human being has the right/is entitled to legal assistance when involved in a legal process, then these rights include both of the things above.¹⁰

The pretrial institution accommodated in the Criminal Procedure Code as a form of horizontal supervision, in this case is an institution that focuses on efforts to protect the dignity (human rights) and protection for those suspected of committing a crime, so that its position in the criminal justice system should not only be understood as an instrument for "administrative completeness examination", but ideally, and furthermore, it should be more of an instrument for "substantial examination" in order to find justice, benefit and legal certainty for the interested parties (suspects).¹¹ Legal aid as an object of horizontal supervision has been included in the 2012 Draft Criminal Procedure Code.¹² as stated in Article 111 paragraph (1) point 6 (six)¹³ which in the clause states that the authority of the "preliminary examining judge" is to examine suspects or defendants who have the right or are required to be accompanied by a lawyer. Former Supreme Court Justice Komariah E. Sapardjaja believes that the existence of Preliminary Examining Judges is a very good and ideal thing in law enforcement efforts. Komariah also stated that

⁸Salman Luthan, Andi Samsan Nganro, and Ifdhal Kasim, *Pretrial in Indonesia: Theory, History, and Practice*, Jakarta: Institute for Criminal Justice Reform, 2014, pp. 20-21.

⁹David Cohen (ed.), *Interpretations of Article 156a of the Indonesian Criminal Code on Blasphemy and Religious Defamation (A Legal and Human Rights Analysis)*, Jakarta: Indonesian Institute for the Independent Judiciary (Institute for the Study and Advocacy of Judicial Independence – LeIP) In collaboration with WSD Handa Center for Human Rights and International Justice Royal Norwegian Embassy in Jakarta and East West Center, 2018), p. 85., in Widati Wulandari and Tristam Pascal Moeliono, *Dictum Jurnal Kajian Keputusan Mahkamah* Edition 16 - December 2024., p. 27.

¹⁰Wiranata, IGAB, *Human Rights (Children) in Reality, Qua Vadis*, in Muladi: *Human Rights, Essence, Concept and Implications in the Perspective of Law and Society*. Bandung: Refika Aditama, 2005.

¹¹Maesa Plangiten, *The Function and Authority of the Pretrial Institution in the Indonesian Judicial System*, *Lex Crimen*, vol. II, no. 6 (2013), pp. 33-34

¹²Draft Law of the Republic of Indonesia Number ... Year ... concerning Criminal Procedure Law draft 11 December 2012 Article 111 paragraph (1).

¹³Andi Hamzah, *The Relationship between Investigators and Public Prosecutors in the Criminal Procedure Code (RKUHAP)*, Jakarta: Media Hukum dan Keadilan Teropong, 2014, p. 125

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the existence of commissioner judges is a very good and ideal thing in law enforcement efforts because with the presence of commissioner judges, it is hoped that in the future there will be no more incidents such as wrongful arrests, revocation of examination reports (BAP) in court because the defendant felt that during the examination he was pressured or forced to confess.¹⁴In fact, things like wrongful arrests, the withdrawal of the examination report (BAP) in court because the defendant felt that he was under pressure during the examination can be avoided if the suspect is given legal assistance as mandated in Article 54 and Article 56 paragraph (1) of the Criminal Procedure Code in the pre-trial stage. Institute for Criminal Justice Reform (ICJR) in its research,¹⁵explains that the judge's authority as horizontal supervision with a new concept called "Preliminary Examining Judge", needs to be further regulated to avoid conflict with other legal principles. Active control can be carried out by monitoring the handling of the pre-trial process or actively conducting examinations, for example, substantial examinations related to the need to take coercive measures. Furthermore, it is necessary to regulate the model for fulfilling each suspect/defendant's rights and the legal consequences if the rights guaranteed in the RKUHAP are not fulfilled. It is also important to provide full opportunity to suspects/defendants to test each right in the RKUHAP,¹⁶including the right to legal aid. Human rights guarantees for suspects or defendants should be included in a complaint so that their fulfillment can be tested. This testing is carried out through horizontal oversight of every action of investigators and prosecutors, not only on formal-procedural matters but also on substantive matters such as the provision of legal assistance during the pre-trial phase. Horizontal oversight carried out by pre-trial judges, or in the future through the concept of Preliminary Examining Judges, should be present, providing a balance between the extensive power of investigators and prosecutors and the human rights of suspects, because legal assistance is a universal right that is solely necessary to defend the suspect's legal interests. Thus, due process of law can always be achieved in the criminal justice system.

CONCLUSION

The right to legal aid is a fundamental right and an integral part of the principle of due process of law and equality before the law. In the context of the Indonesian criminal justice system, the existence of legal aid from the pre-trial stage is not only a formal guarantee regulated in the Criminal Procedure Code, but also a concrete manifestation of human rights protection (HAM) that must be respected, protected, and fulfilled by the state. Horizontal supervision in the current pre-trial concept does not include legal aid as an object of the judge's authority, so that for suspects who are not accompanied by legal counsel as required by Article 56 of the Criminal Procedure Code, the assessment must be submitted to the trial examination. One of the principles in the Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment) is that every person who is detained or their defense can take action in accordance with applicable law to test the legality of their detention in order to obtain release without delay. The body of principles provides an a contrario implication that every unlawful detention means that every person detained can obtain release, including suspects who are not accompanied by legal counsel during the investigation. Horizontal oversight through the pretrial mechanism or the concept of a Preliminary Examining Judge, as proposed in the Criminal Procedure Code Draft Bill (RKUHAP), is crucial to ensure that every action by law enforcement officers, including the provision of legal aid, is monitored substantively, not merely administratively. This oversight serves not merely as a procedural correction, but also as a protective mechanism against potential abuse of power during the investigation and prosecution process. Therefore, legal aid must be viewed as a universal and absolute right inherent in every person facing the law, to ensure due process of law.

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¹⁴Puteri Hikmawati, The Existence of Commissioner Judges in the Criminal Justice System (Analysis of the Draft Law on Criminal Procedure), Jurnal Kajian Vol 18, No 1 (2013), Center for Research, Data Management, and Information, Secretariat General of the Indonesian House of Representatives, Jakarta, March 2013.

¹⁵Lovina and Sustira Dirga, "Judicial Scrutiny Through Preliminary Examining Judges in the Criminal Procedure Code", Jakarta: Institute for Criminal Justice Reform (ICJR).

¹⁶Ibid. pp. 26-29.

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