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Urgency of the Function of Testimonium de Auditu Witnesses as Restoration of Indonesian Criminal Procedure Law

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Abstract: *the purpose of this study is to study, understand and analyze the urgency of witness testimony de auditu as a restoration of criminal procedural law in Indonesia. In this writing, the author uses a normative legal method with research specifications in the form of descriptive analysis.* in law, there is a term Testimonium De Auditu which means witness testimony where the witness did not see, hear, or experience a criminal event himself but he knew and heard the incident from someone else. Testimonium De Auditu testimony is generally not acceptable as valid evidence because it is not in accordance with the Criminal Procedure Code. Testimonium de auditu witness testimony (indirect testimony) has legal standing after the Constitutional Court decision Number: 65/PUU-VIII/2010 concerning the expansion of the meaning of witnesses acting as valid evidence of witness testimony in criminal cases and is included in the term of criminal procedure law in Indonesia. The urgency of the need for testimonium de auditu witness testimony is regulated in the Criminal Procedure Code because testimony from testimonium de auditu witnesses is important to show that the criminal event actually occurred.

1. Introduction

Indonesia is a country based on law. Article 1 paragraph (3) of the Indonesian Constitution states that, "The State of Indonesia is a country based on law."[1]This underlies that Indonesia needs legislation. However, legislation will always lag behind the development of society that is running faster. Therefor there is a term stating, her recht hink acter de feiten aan, meaning the law is helter-skelter following the events from behind.[2]

[1]Andi Pradikta Alvat. (2019), Politics of Law Human Rights Protection in Indonesia, Jurnal Daulat Hukum, 2 (4), p 513.
[2]Janedjri M. Gaffar, (2013), Election Law in the Jurisprudence of the Constitutional Court, Jakarta: Konstitusi Press, p.5.

Law enforcement is a process that arises from a violation of the law. One of the efforts in the law enforcement process is the drafting of a regulation that we can now call Criminal Procedure Law.[3]Criminal Procedure Law is a collection of provisions on how to investigate, prosecute, prosecute, and try someone who is considered guilty and has committed a violation of criminal law. Criminal Procedure Law has a narrower scope, namely starting from seeking the truth, investigation, inquiry and ending in the process of implementing the court decision (execution) by the prosecutor. With the establishment of the Criminal Procedure Code, a complete codification and unification have been carried out in the sense that it covers the entire criminal process from the beginning (seeking the truth) to the cassation level at the Supreme Court, even to the judicial review (herziening). In addition, there are also things that need to be adjusted to the times, for example in terms of evidence.[4]

The nature of proof in criminal procedure law is very urgent, when described with a proof which is a process to determine and state someone's guilt. The conclusion of this proof is done through the trial process, so that it will determine whether someone can be sentenced or can be acquitted of the charges because they are not proven to have committed a crime, or released from legal charges because what was charged was proven, but did not constitute a crime. The most important thing in proof is the existence of valid evidence. While one of the important things in valid evidence is witnesses.

Not all witness statements have value as evidence. Witness statements that have value as evidence are statements that are in accordance with what is explained in Article 1 number 27 of the Criminal Procedure Code, connected with the explanatory text of Article 185 paragraph (1), it can be concluded: first, every witness statement outside of what he himself heard in the criminal event that occurred or outside of what he saw or experienced in the criminal event that occurred, statements given outside of hearing, seeing, or his own experience regarding a criminal event that occurred, "cannot be used and assessed as evidence". Such statements do not have the power of evidentiary value; second, "testimonium de auditu" or witness statements obtained as a result of hearing from other people "have no value as evidence". Witness statements in court in the form of repeated statements from what he heard from other people, cannot be considered as evidence.

[3]Sekar Tresna Raras Tywi, Ira Alia Maerani, and Arpangi. (2021), Law Enforcement against Entrepreneurs who Conduct Criminal Acts to Pay Wages Below the Minimum Wage. Journal of Legal Sovereignty, 4 (1), p 26.

[4]Indonesian Attorney General's Office Training and Education Agency Module Compilation Team, (2019), Criminal Procedure Law Module, Jakarta: Attorney General's Office Education and Training Agency of the Republic of Indonesia, p 1.

In law, there is a term Testimonium De Auditu which means witness testimony where the witness did not see, hear, or experience a criminal event himself but he knew and heard the incident from someone else. Testimonium De Auditu testimony is generally not acceptable as valid evidence because it is not in accordance with the Criminal Procedure Code. According to Andi Hamzah, de Auditu testimony cannot be accepted as evidence in accordance with the purpose of the Criminal Procedure Code, namely to uphold material truth and protect Human Rights. If the witness's testimony is only heard by someone else, then its truth cannot be guaranteed so it cannot be used in Indonesian courts.[5]

The Constitutional Court in Decision Number 65/PUU-VIII/2010 is of the opinion that witness testimony is information that is relevant to the criminal case being prosecuted. The judge is of the opinion that the definition of a favorable witness in Article 65 of the Criminal Procedure Code cannot be interpreted narrowly by referring to Article 1 number 26 and number 27 of the Criminal Procedure Code alone. The definition of a witness as stated in Article 1 number 26 and number 27 of the Criminal Procedure Code imposes restrictions and even eliminates the opportunity for suspects or defendants to present witnesses that are favorable to them because the phrase "he heard it himself, he saw it himself and he experienced it himself" requires that only witnesses who heard it themselves, saw it themselves, and experienced an act/criminal act themselves can be presented as favorable witnesses. After the Constitutional Court issued its decision number 65/PUU-VIII/2010 in 2011, the decision confirmed that the testimony of a de auditu witness was recognized and became valid as evidence, then what about the position of the de auditu witness itself, whether the de auditu witness is still evidence of an indicative or not. The evidentiary power of a de auditu witness has also changed due to the expansion of the meaning of witness by the Constitutional Court, which was initially focused on the phrase he heard himself, he saw himself, and he experienced himself, changed to testimony that is not always he heard himself, he saw himself, and he experienced himself as long as the witness's statement is relevant to the case and can clarify the case at hand. The evidentiary power of a de auditu witness has changed to be the same as a witness in general because the de auditu witness has been acknowledged after the issuance of this Constitutional Court decision.

Based on this, the author is interested in researching and writing about it in legal writing.the purpose of this research is to study, understand and analyze the urgency of witness testimony de auditu as a restoration of criminal procedural law in Indonesia.

2. Research Methods

[5]Andi Hamzah, (2009), Indonesian Criminal Procedure Law, Sinar Grafika, Jakarta, p. 262

The approach used in this study is normative juridical or written legal approach (statute approach). The normative juridical approach is an approach carried out based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to this study. This approach is also known as the literature approach, namely by studying books, laws and other documents related to this study.

3. Results and Discussion

3.1. Audit Testimony

The term Testimonium de Auditu or Hearsay Evidence. Hearsay comes from the word Hear which means to hear and Say means to say. Therefore, literally the term hearsay means to hear from the words (of others). So, not hearing the facts themselves from the person who said it so it is also called indirect evidence (second hand evidence) as opposed to direct evidence (original evidence), because hearing from the words of others, then the witness de auditu or hearsay is similar to the term "report", "gossip" or "rumor". Thus, the definition of testimony de auditu or hearsay evidence is testimony or information because of hearing from others. Also called indirect testimony or not an eyewitness who experienced it. There are also those who define testimony obtained indirectly by seeing, hearing and experiencing it themselves but from others. While Subekti calls it auditory testimony.

Meanwhile, a fairly complete definition was put forward by Munir Fuady, namely that what is meant by indirect testimony or de auditu or hearsay is testimony from a person in court to prove the truth of a fact, but the witness did not experience/hear/see the fact himself.[6]He only hears about it from other people's statements or words, where the other person claims to have heard, experienced or seen the fact so that the value of the evidence really depends on the other party who is actually outside the court. So, in principle there is a lot of doubt about the truth of this testimony so it is difficult to accept it as full evidentiary value.

*From the audit*According to Sudikno Mertokusumo, it is a witness's statement obtained from a third party. In the Common Law system, it is known as hearsay evidence which has the same meaning, namely information given by someone containing statements from other people either verbally, in writing or in other ways.

Constitutional Court Decision No. 65/PUU-VIII/2010, stated that Article 1 numbers 26 and 27, Article 65, Article 116 paragraph (3), (4), Article 184 paragraph (1) letter a of the Criminal Procedure Code are contrary to the 1945 Constitution insofar as the definition of a witness in these articles is not

[6]Munir Fuady, (2012), Theory of Criminal and Civil Evidence Law, Bandung: Citra AdityaBakti, 2nd Edition, p. 132.

interpreted as a person who can provide information in the context of investigation, prosecution, and trial that he/she does not always hear himself/herself, he/she sees himself/herself, and he/she experiences himself/herself, seen from the decision, that witness information does not only have to be information that he/she sees, hears, and experiences himself/herself. The expansion of the definition in the Constitutional Court decision essentially states that the definition of a witness as evidence is information from a witness regarding a criminal event that he/she heard himself/herself, he/she saw himself/herself, and he/she experiences himself/herself by stating the reasons for his/her knowledge, including information in the context of investigation, prosecution, and trial that he/she does not always hear himself/herself, he/she sees himself/herself, and he/she experiences himself/herself.[7]

The Constitutional Court in its ruling stated that the definition of a favorable witness in Article 65 of the Criminal Procedure Code cannot be interpreted narrowly by only referring to Article 1 number 26 and number 27 of the Criminal Procedure Code. The definition of a witness in the Article limits or even eliminates the opportunity for a suspect or defendant to present a favorable witness for him/her, because the phrase "he/she heard it himself/herself, he/she saw it himself/herself and he/she experienced it himself/herself" requires that only a witness who heard it himself/herself, saw it himself/herself, and experienced an act himself/herself can be presented as a favorable witness for the suspect/defendant.

3.2. Urgency of Witness Statements Testimonium de Auditu as Restoration of Criminal Procedure Law in Indonesia

The main focus of the use of de auditu witnesses as evidence is to emphasize the extent to which the testimony of the witness who is not in court can be trusted. If it turns out that the testimony of the third party witness is reasonable enough or has reasonable grounds to be trusted, then such testimony is exempted. This means that such testimony can be recognized as evidence even indirectly, namely through indicative evidence in criminal proceedings or through presumptive evidence.

In addition to reflecting on the history of the formation of the Criminal Procedure Code and the legal policy that underlies and inspires the Criminal Procedure Code, the renewal of the Criminal Procedure Code needs to be carried out based on a study of various developments during the implementation of the Criminal Procedure Code.[8]Criminal law reform in general and criminal procedure law in particular is a problem that always arises everywhere, especially in developing countries such as Indonesia. The purpose of this reform is so that

[7]Eddy OS Hiariej, (2012). Theory and Law of Proof. Erlangga, p 102-103

[8]Al. Wisnubroto and G. Widiartna, (2005), Reform of Criminal Procedure Law, PT. Citra Aditya Bakti, Bandung, p 13

criminal procedure law develops in line with the process of modernization in all aspects of life. In addition, the reform of criminal procedure law is not only to improve criminal procedure law but also to replace it with something better.

Several phenomena of criminal justice practices that imply the weak side of the provisions in the Criminal Procedure Code and especially the main focus of the author related to the problem of the absence of regulations in the use of de auditu witnesses so that there is a need for regulations in the use of testimonium de auditu witnesses in the new RUU-KUHAP. The problems that arise are expected to be the basis for the renewal of the Criminal Procedure Code in Indonesia towards a better direction and so that in the future the Criminal Procedure Code systematically has a more complete, precise, and firm (definite) formulation of provisions, so that it is not open to interpretation at will by law enforcement officers.

Updates to the Criminal Procedure Code considering Law Number 8 of 1981 concerning Criminal Procedure Code (KUHAP) which has been in effect for more than 30 (thirty) years require comprehensive improvements, so if we look at the historical interpretation, the Criminal Procedure Code was formed to replace the Herzine Indische Reglement which was colonial in nature and tended to apply the principles of the crime control model, namely efficiency, prioritizing quantity using the principle of presumption of guilt. Therefore, the Criminal Procedure Code which was formed in the era of independence, although it did not completely abandon the principles of the crime control model, but was more directed towards due process of law as a procedural model in the universally applicable criminal justice system.

Amendments to the 1945 Constitution, various International Conventions related to criminal procedure law, and modernization of techniques and systems of evidence in criminal procedure law are some of the main reasons for the need for comprehensive improvements to the Criminal Procedure Code. In addition, with the submission of the Draft Law on the Criminal Code by the President to the DPR-RI, it is necessary to adjust formal criminal law (RUU KUHAP) in order to implement material criminal law regulated in the Draft Law on the Criminal Code.[9]

The need for testimony of a testimonium de auditu witness is regulated in the Criminal Procedure Code because testimony from a testimonium de auditu witness is important to show that the criminal event really happened. As we know in Article 1 number 26 and Article 1 number 27 states in its phrase that those who meet the criteria for a witness are people who see, hear, and

[9]Erwin Ubwarin, (2014), Validity of Expert Statements in Corruption Crimes, Sasi Journal, 20 (1), p 31

experience the incident themselves and they convey their statements according to what they saw, heard, and experienced themselves, not hearing from others.

Several judicial practices in Indonesia, especially criminal trials, have cases where in the evidence they use testimonium de auditu witnesses to prove that a crime has indeed occurred, such as in the case of Supreme Court Decision Number 430K/Pid/2006 involving suspect Safrin Adon Gafur alias Afin in a case of indecent acts committed against a minor, Constitutional Court Decision Number 65/PUU-VIII/2010 filed by Yusril Ihza Mahendra regarding the corruption case of access fees for the Legal Entity Administration System (Sisminbakum), a case of criminal acts against morality in decision number 375/Pid.Sus/2013/PN.PTK dated December 19, 2013 with a suspect named Irfan Aftari alias Irfan Bin Izhar, and the case of Yusman Telaumbanua in the Sitoli District Court Decision Number 8/Pid.B/2013/PN-GS.

Based on several decisions and several theories put forward by scholars regarding the use of Testimonium de Auditu in criminal procedure law in Indonesia, clear regulations are needed regarding statements from de auditu witnesses in the renewal of criminal procedure law. Researchers also see that the 2010 Draft Criminal Procedure Code only regulates the prohibition on the use of testimonium de auditu or hearsay evidence and testimonium de auditu cannot be categorized as witness statements. This can be seen in the Explanation of Article 185 paragraph (1) of Law Number 8 of 1981 concerning the Criminal Procedure Code and the Explanation of Article 180 paragraph (1) of the Draft Criminal Procedure Code.[10]

It is necessary to provide protection to witnesses whose testimony is testimonium de auditu, because testimonium de auditu witnesses have the right to give their testimony which they clearly heard from witnesses who saw the crime directly. This also provides legal certainty for testimonium de auditu witnesses that they can give their testimony in court accompanied by reasons that are indeed reasonable, namely one of which is that the first witness cannot be present in court because the first witness has died, so the testimony of the testimonium de auditu witness who heard directly from the first witness who really saw, heard and experienced the incident or crime is heard. The testimony of a testimonium de auditu witness is not necessarily said to be a valuable statement, if the statement given by the testimonium de auditu witness has relevance to the crime that occurred. The testimony of the testimonium de

[10]DH Latif, (2016), The Role of Indicative Evidence in General Criminal Acts According to the Criminal Procedure Code. Lex Administratum, IV (3), p.177

auditu witness is worthy of being accepted and worthy of being considered as one of the evidence in criminal procedure law, namely indicative evidence.[11]

This is also emphasized in the Constitutional Court decision Number 65/PUU-VIII/2010 which in its decision stated that testimonium de auditu witnesses are not prohibited by looking at the information provided whether it has "relevance" to other evidence that can support the testimony of the testimonium de auditu witness and its conformity with the criminal event that occurred. Based on the doctrinal interpretation submitted by Prof. Edy OS Hiariej that the word "evidence" or "evidence" or "bewijs" is information that provides the basis for supporting a belief that some part or all of the facts are true. In the concept of proof there are four fundamental things that need to be considered, namely:

1. Evidence must be relevant to the dispute or case being processed. That is, the evidence relates to facts that point to the truth of an event;
2. Evidence must be admissible. On the other hand, evidence that is not relevant will not be admissible. However, it is possible that relevant evidence cannot be accepted;
3. The existence of exclusionary rules or exclusionary discretion, namely regulations that require that evidence obtained illegally cannot be accepted in court. Especially in the context of criminal law, even though evidence is relevant and acceptable from the perspective of the public prosecutor, the evidence can be set aside by the judge if the acquisition of the evidence is not in accordance with the rules; and.
4. In the context of a trial, every relevant and acceptable evidence must be able to be evaluated by a judge. This is included in the context of the strength of evidence or bewijskracht. The judge will assess every piece of evidence submitted to the court, the suitability between one piece of evidence and another, and will then use the evidence as a basis for consideration in making a decision.[12]

The urgency of making testimony de auditu witness statements as evidence from the perspective of renewing criminal procedural law for the development of Indonesian evidentiary law, is because it is in accordance with the Constitutional Court Decision Number 65/PUU-VIII/2010, which in its decision expanded the meaning of witnesses in Article 1 number 26 and Article 1 number 27 of Law Number 8 of 1981 concerning the Criminal Procedure Code.[13]The text of the

[11] Prisco Jeheskiel Umboh. (2013), Functions and Benefits of Expert Witnesses Providing Information in Criminal Case Processes. Lex Crimen. 2 (2), p 112

[12] Steven Suprantio, (2014), Binding Power of the Constitutional Court Decision on "Testimonium De Auditu" in Criminal Justice (Study of Constitutional Court Decision Number 65/PUUVIII/2010), Judicial Journal, Judicial Commission, Jakarta, 7, p 69

[13] Asprianti Wangke, (2017), Position of Witness de Auditu in Judicial Practice according to Criminal Procedure Law, Lex Crimen, VI (6), p 312

Constitutional Court Decision Number 65/PUU-VIII/2010 which acknowledges the testimony of witnesses in the testimonium de auditu is as follows:

1. "Declaring that Article 1 numbers 26 and 27; Article 65; Article 116 paragraph (3) and paragraph (4); and Article 184 paragraph (1) letter a of Law Number 8 of 1981 concerning Criminal Procedure Law (State Gazette of the Republic of Indonesia 1981 Number 76 and Supplement to the State Gazette of the Republic of Indonesia Number 3209) are contrary to the 1945 Constitution of the Republic of Indonesia insofar as the definition of witness in Article 1 numbers 26 and 27; Article 65; Article 116 paragraph (3) and paragraph (4); Article 184 paragraph (1) letter a of Law Number 8 of 1981 concerning Criminal Procedure Law (State Gazette of the Republic of Indonesia 1981 Number 76 and Supplement to the State Gazette of the Republic of Indonesia Number 3209), is not interpreted to include "a person who can provide information in the context of the investigation, prosecution and trial of a criminal act which he has not always heard himself, seen himself and experienced himself.
2. "Declares that Article 1 number 26 and number 27; Article 65; Article 116 paragraph (3) and paragraph (4); and Article 184 paragraph (1) letter a of Law Number 8 of 1981 concerning Criminal Procedure Law (State Gazette of the Republic of Indonesia of 1981 Number 76 and Supplement to the State Gazette of the Republic of Indonesia Number 3209) do not have binding legal force insofar as the definition of witness in Article 1 number 26 and number 27; Article 65; Article 116 paragraph (3) and paragraph (4); Article 184 paragraph (1) letter a of Law Number 8 of 1981 concerning Criminal Procedure Law (State Gazette of the Republic of Indonesia of 1981 Number 76 and Supplement to the State Gazette of the Republic of Indonesia Number 3209), is not interpreted to include "a person who can provide information in the context of the investigation, prosecution and trial of a criminal act which he does not always hear himself, see himself and experience himself".
3. Ordering the publication of this decision in the State Gazette of the Republic of Indonesia as appropriate;
4. Reject the Petitioner's application for other than that.

In accordance with the verdict, the witness's statement is expanded and it is acknowledged that the witness's testimony de auditu must be seen as relevant to the criminal event that occurred. In addition, in the practice of criminal justice, it was also found that the use of witness testimony de auditu could be included as a basis for the judge's consideration to issue Supreme Court Decision Number 430K/Pid/2006 which stated that the suspect was proven to have committed an indecent act. The defendant's attorney in this case stated that the witness's statement heard in the trial was included in the category of testimony de auditu, but the judge was of the opinion that the witness's statement had relevance to

other evidence, namely visum et repertum. So in this case, the Supreme Court judge stated that he rejected the cassation from the defendant's attorney.

Testimonial de auditu statements are not simply ignored just because they provide statements in court but the statements are heard from other people. The Criminal Procedure Code and the 2010 Draft Criminal Procedure Code do not provide exceptions for testimonial de auditu witness statements. The Explanation of Article 185 paragraph (1) of the Criminal Procedure Code and the Explanation of Article 180 paragraph (1) of the 2010 Draft Criminal Procedure Code reject statements that are testimonial de auditu.

But looking at the practice of criminal justice there are several decisions that in their evidence use testimonium de auditu statements and see the opinions of writers who agree with the use of testimonium de auditu witness statements, for example Munir Fuady. Therefore, it is necessary to regulate testimonium de auditu statements so that they are included as one of the evidence in criminal procedure law as additional evidence (indications), which indeed the testimony of a testimonium de auditu nature has relevance or is interconnected with the criminal event being prosecuted in court. In addition, testimonium de auditu witness statements can also have relevance to other evidence in Article 184 paragraph (1) of Law Number 8 of 1981 concerning the Criminal Procedure Code.

4. Conclusion

The urgency of the need for testimony of a testimonium de auditu witness is regulated in the Criminal Procedure Code because testimony from a testimonium de auditu witness is important to show that the criminal event actually occurred. As we know in Article 1 number 26 and Article 1 number 27 states in its phrase that those who meet the criteria for a witness are people who see, hear, and experience the incident themselves and they convey their statements according to what they see, hear, and experience themselves, not hearing from others. Constitutional Court Decision Number 65/PUU-VIII/2010 which in its decision states that testimonium de auditu witnesses are not prohibited by looking at the information provided whether it has "relevance" to other evidence that can support the testimony of the testimonium de auditu witness and its conformity with the criminal event that occurred. Based on the doctrinal interpretation conveyed by Prof. Edy OS Hiariej that the word "evidence" or "evidence" or "bewijs" is information that provides the basis for supporting a belief that some part or all of the facts are true.

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