

Legal Protection of Witness Accompaniment by Advocates During the Investigation Stage

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Abstract. *This study aims to describe and analyze the problems regarding legal protection for advocates in assisting witnesses at the investigation stage; the position of advocates in assisting witnesses at the investigation stage. The research conducted by the researcher is a qualitative study with a normative legal approach. The research specifications used by the researcher are descriptive analytical. The types and sources of data in this study are secondary data using primary legal materials, in the form of: Criminal Procedure Code, Law Number 8 of 2003 concerning Advocates, PerKap 8 of 2009 concerning the Implementation of Human Rights Principles and Standards in the Implementation of Duties of the Republic of Indonesia National Police. Secondary legal materials in the form of books, online journals, and articles. As well as tertiary legal materials in the form of the Great Dictionary of the Indonesian Language and the Legal Dictionary to support primary legal materials. The data collection method used is library research. The data analysis method in this study uses qualitative analysis techniques. Based on the research that has been done, it can be concluded that: 1). There are no regulations in the Criminal Procedure Code that clearly and in detail regulate the assistance of witnesses by advocates at the investigation stage. Becoming a witness is an obligation for all citizens as regulated by law, but not all citizens understand the law. 2). The position of advocates in accompanying witnesses at the investigation stage is that legal assistance by advocates is intended to avoid the non-neutrality of investigators and avoid threats and intimidation that may be carried out by investigators. Advocates provide legal assistance to witnesses limited to advocates who can only see and may not influence witnesses in providing information and uphold the integrity and code of ethics of advocates as part of law enforcement.*

Keywords: Advocate; Investigation; Legal; Protection.

1. Introduction

In resolving criminal cases, the investigation stage is an important stage that aims to collect evidence related to events suspected of being criminal acts in order to find the suspect. Witness testimony in the Criminal Procedure Code is recognized as the main evidence, so that witnesses are very important in the criminal handling process. Even Muhammad Yusuf, a legal practitioner, said that without the presence and role of witnesses, it is certain that a case will become a "dark number" (a crime committed but never reported or detected by the police) considering that in the legal system in Indonesia, the reference for law enforcement is "testimony" which comes from witnesses or experts.¹

Bambang Waluyo in his book expressed the opinion that there are criticisms of the settlement of criminal justice cases based on several facts which are detrimental to the parties involved in legal problems. Such as the settlement of criminal cases that take a long time, are complicated, expensive, and do not fulfill the sense of justice for the community.²The urgency of the presence of witnesses in the investigation process is not accompanied by regulations that clearly regulate the rights of witnesses in the Criminal Procedure Code. The right of witnesses that should be highlighted is the right to receive legal assistance from a legal advisor or advocate. At the investigation stage, a person who has the status of being examined as a witness when facing the investigator cannot be accompanied by an advocate. Investigators argue that in the Criminal Procedure Code there is no regulation that requires witnesses to be accompanied by an advocate when being examined. The Criminal Procedure Code only regulates the rights of suspects or defendants to obtain legal assistance. This is contrary to the principle of equality before the law. Given that witnesses can potentially become suspects, legal assistance by advocates aims to maintain the neutrality of the examination process and prevent arbitrary actions by investigators so that the examination process can run relatively smoothly.

On the other hand, advocates also feel constitutionally disadvantaged because it hinders their professional duties and functions in providing legal assistance when asked to accompany their clients who have the status of witnesses being examined in the investigation process. As happened to advocates such as Petrus Bala Pattayona accompanying witnesses, namely Police Brigadier General Prasetijo Utomo in the Djoko Tjandra case in 2020, Bagia Nugraha accompanying witnesses in the Corruption case, and Yudi Wibowo Sukinto when accompanying Jessica

¹ Asmilawati Jafar, 'Legal Protection for Witnesses in the Criminal Case Examination Process at the Makassar District Court' (UIN Alauddin Makassar, 2014) <<http://repositori.uin-alauddin.ac.id/id/eprint/6418>>. Accessed on 01 September 2024

² Bambang Waluyo, *Settlement of Criminal Cases Using the Application of Restorative and Transformative Justice* (Jakarta: Sinar Grafika, 2020). Page 2

Wongso when she was a witness in the cyanide coffee case.³They argued with investigators when they wanted to accompany their clients by saying that there were no regulations governing legal assistance from advocates to witnesses which resulted in their expulsion by investigators. To fight for the rights of witnesses and obtain legal certainty regarding this matter, representatives of Peradi South Jakarta filed a judicial review to the Constitutional Court against the Criminal Procedure Code. In their petition, the applicants asked the Constitutional Court to declare Article 54 of the Criminal Procedure Code constitutionally conditional based on the extent interpreted including witnesses and those examined.

As described above, this study aims to examine legal protection for advocates in assisting witnesses at the investigation stage. So that there is legal certainty for witnesses to receive legal assistance from advocates, and for advocates to be able to carry out their professional duties and functions in providing legal assistance when requested by their clients who have the status of witnesses at the investigation stage.

2. Research methods

a. Approach Method

The approach method used is the normative legal approach.

b. Research Specifications

The research specifications used are analytical descriptive.

c. Method of collecting data

The data collection method used is library research.

d. Data Analysis Methods

The data analysis method in this study uses qualitative analysis techniques.

3. Results and Discussion

3.1. Legal Protection for Witness Assistance by Advocates at the Investigation Stage

The Criminal Procedure Code is a positive law that applies in the criminal justice system and also as a basis for law enforcement officers in carrying out their duties. The existence of the Criminal Procedure Code aims to be a rule of procedure for the provisions of the criminal handling process while defending its interests in order to achieve a fair legal process (due process of law). Adhering to the

³ 'Tribun News' <<https://www.tribunnews.com/metropolitan/2016/01/19/kombes-krishna-murti-usir-pengacara-yang-dampingi-jessica>>. Accessed on 03 September 2024

provisions of criminal procedure law, the final part of the investigation process is the determination of the suspect. At this stage, investigators try to find and collect sufficient evidence, including finding someone who is suspected of being the perpetrator of a criminal act in a case suspected of being a criminal act. To reach the belief that someone can be determined as a suspect, investigators should examine the available evidence such as witness statements, expert statements, letters, and other evidence.⁴ Article 183 of the Criminal Procedure Code stipulates that a judge may not sentence a person to a crime unless, with at least 2 (two) valid pieces of evidence, they are convinced that the crime actually occurred and the defendant is guilty of committing it.

In the investigation process, investigators are required to be able to dig up information or evidence that will later be able to explain events that are suspected of being criminal acts. To reach the conviction that someone can be named a suspect, investigators must conduct a thorough examination of the evidence, starting from witness statements, expert statements, letters, and other evidence. In carrying out their duties, investigators must comply with the procedures for examining witnesses in the investigation process. Like the procedure for summoning witnesses for examination, before carrying out the witness examination stage, investigators must issue a summons stating the reasons for the summons clearly while paying attention to a reasonable time limit. If the witness is absent from the first summons without a valid reason, the investigator then makes a second summons. Referring to Article 112 paragraph (2) of the Criminal Procedure Code, it states that if the witness does not comply with the investigator's third summons for a valid reason, the investigator will summon him again with an order to the officer to bring him to him. However, investigators can also come to the witness's residence as stated in Article 113 of the Criminal Procedure Code.⁵

The existence of witnesses in the process of disclosing criminal cases occupies a key position as stated in Article 184 of the Criminal Procedure Code. As the main evidence, of course the existence of witnesses is very crucial and the impact is very pronounced if there are no witnesses in the process of disclosing criminal cases. Starting from the initial stage of the case resolution process, namely the investigation to the trial process in court, the contribution of witnesses is very much needed as a reference and consideration for the judge in deciding whether or not the suspect is guilty. From here it is clear the position of witnesses in efforts to uphold law and justice. The importance of the role of witnesses seems to be inconsistent with the attitude of lawmakers who do not pay great attention to legal

⁴ Reza Maruffi, 'Aspects of Legal Certainty Regarding Legal Counsel Assistance to Witnesses in Investigation Stage Examination', *Banua Law Review*, 3.1 (2021), 10–29 <<https://balrev.ulm.ac.id/index.php/balrev/article/view/16>>.P. 13

⁵ Republic of Indonesia, Law Number 8 of 1981 concerning Criminal Procedure Law (Indonesia, 1981) <<https://peraturan.bpk.go.id/Details/47041/uu-no-8-tahun-1981>>.

protection for witnesses. Provisions regarding the rights of suspects or defendants have been regulated quite completely and in detail in the Criminal Procedure Code Chapter VI starting from Article 50 to Article 68. Article 54 of the Criminal Procedure Code mentions legal assistance received by suspects at the examination level. The presence of an advocate or Legal Advisor during the investigation stage is essentially intended to be able to carry out control, so that the examination process takes place fairly and humanely by upholding the principle of the presumption of innocence.

However, the presence of witnesses who participate in the investigation process does not receive the same rights as suspects or defendants. In the context of positive law in Indonesia, there are no regulations that specifically cover legal assistance by advocates for witnesses. Even the Criminal Procedure Code does not clearly regulate the obligation of a witness to be accompanied by an advocate when undergoing the investigation process. The articles stated in the Criminal Procedure Code are only addressed to suspects or defendants, while for witnesses the rights granted are still vague. As a reference for criminal procedural law in Indonesia, the Criminal Procedure Code does not specifically and in detail regulate the rights obtained by witnesses as regulated for suspects or defendants. In the Criminal Procedure Code itself, there are articles that touch on the rights of witnesses, but the provision is still associated with suspects or defendants so that it can be said that witnesses do not have their own chapters or sub-chapters that specifically regulate them. So that many rights are obtained by suspects or defendants but not by witnesses.

By arguing Article 112 of the Criminal Procedure Code that being a witness is an obligation for every citizen, however not all citizens understand the law. The general public sometimes feels afraid when they are called to be a witness. Fear of the consequences of the information they provide. Not to mention arbitrary actions or threats that may be received by the witness. Therefore, with legal assistance assistance from an advocate will help the community who are being examined as witnesses. However, advocates must be constrained by legislation that does not clearly regulate legal assistance for witnesses. Protection for witnesses is still very minimal, and what is often demanded of witnesses is only obligations. So it can be said that the position of witnesses is vulnerable to being faced with criminal acts in the form of making statements against themselves. To avoid this from happening, it is time for the criminal justice system to accommodate adequate legal protection for witnesses. So that the criminal justice system does not only focus on the perpetrators of the crime but every unit involved must also be considered and given the same protection.

The procedures and processes that have been built in the Criminal Procedure Law (formal criminal law) are based on the principle of legality, the same as in material criminal law. The affirmation of the principle of legality in criminal procedure law

is contained in Article 3 of the Criminal Procedure Code which states that "trials are carried out in accordance with the methods regulated in this law". This has the consequence that regulations of a criminal procedure nature cannot be delegated to regulations below the law. With this, the Criminal Procedure Code should contain operational provisions in such a way that they can later be implemented without being further regulated in regulations below the law.

This legal uncertainty can cause problems that impact justice seekers (witnesses) and advocates as a profession that provides legal aid services in providing legal assistance during the investigation process. In addition, this also becomes an obstacle for advocates to carry out their professional duties. Equality before the law and the right to be defended by an advocate or legal advisor is a form of protection for the human rights of every human being that must be protected to achieve social justice without exception as mandated in the 1945 Constitution. One of the main duties of an advocate is to provide legal assistance to justice seekers. Advocates are often asked to accompany people as witnesses during the examination process. The absence of regulations that clearly accommodate the assistance of witnesses by advocates during the examination process has hampered the performance of advocates in carrying out their duties. Debates between investigators and advocates who want to accompany their clients often occur and even end with the advocate being expelled by investigators. Justice seekers are not only people who hold the status of suspects or defendants, but also include witnesses and/or victims, or other subjects of examination. Awareness of the importance of access to justice which is a basic principle of the rule of law to ensure a balanced implementation of assistance, protection, and defense for all parties through defense or assistance by advocates not only to suspects or defendants but to all parties who are facing or in conflict with the law. The obstacles experienced by legal advisors (advocates) when accompanying their clients who have the status of witnesses during the investigation process are in the form of rejection by investigators, as exemplified in the previous discussion. Investigators argue that in the Criminal Procedure Code there is no obligation for witnesses to be accompanied by an advocate. Therefore, investigators do not allow advocates to accompany their clients as witnesses.

The emergence of problems regarding legal certainty related to legal assistance to witnesses has led the South Jakarta Peradi Branch Board to file a judicial review to the Constitutional Court. In the contents of the application, the Applicant for the judicial review assessed that Article 54 of the Criminal Procedure Code which is the object of the judicial review interprets it in a limited manner only for suspects or defendants and does not accommodate witnesses. So that the involvement of advocates is often limited in the process of examining witnesses by investigators, both the police and the Corruption Eradication Commission (KPK). The review of the provisions of Article 54 of the Criminal Procedure Code aims to provide legal certainty for the authority of advocates to be involved in the investigation process.

The applicants argued that in the investigation/examination stage as part of the pre-judicial stage, witnesses can play a role in determining whether a criminal case has actually occurred or not. The core of the investigation activity is the collection of evidence to ensure several things, including determining whether the act being examined is a criminal act or not, determining who the perpetrator of the crime is, determining whether the elements of the crime suspected of the suspect have been fulfilled and others. However, in practice, the applicants said, investigators or investigators often prohibit legal counsel from accompanying their clients, only to the extent of listening to the course of the examination or in a passive sense. If the legal counsel provides many comments or suggestions regarding the examination of their clients as witnesses, the investigator will immediately reprimand and even invite the legal counsel to leave the examination room. For this reason, in their Petition, the Applicant asked the Constitutional Court to declare Article 54 of the Criminal Procedure Code constitutionally conditional based on the extent interpreted to include witnesses and those examined.

Regarding the judicial review of the article, the Constitutional Court judge issued decision No. 61/PUU-XX/2022 which in essence contains the following:⁶

1. Rejecting the application on the grounds that including witness rights in Article 54 of the Criminal Procedure Code would make the format, substance and systematics of the Criminal Procedure Code unclear and give rise to the potential for legal uncertainty.
2. Allowing legal advisors (advocates) to provide legal assistance in the form of legal assistance to witnesses at the witness examination stage.
3. The legal aid is only in the form of assistance to witnesses. The assistance referred to is limited to advocates who can only see and may not influence witnesses in providing information and uphold the integrity and code of ethics of advocates as part of law enforcement. This aims to prevent witnesses from acts of intimidation and arbitrariness that may be carried out by related parties.
4. Legal assistance for witnesses included in the revision of the Criminal Procedure Code has been included in the list of the 2020-2024 National Legislation Program (Prolegnas), Serial Number 294, so in order to provide guaranteed protection and legal certainty for witnesses, it is important for lawmakers in the revision of the Criminal Procedure Code to include material regarding the procedures for examining witnesses and legal assistance or assistance for witnesses in a separate chapter or sub-chapter.

⁶ Constitutional Court, Constitutional Court Decision Number 61/PUU-XX/2022 Concerning the Judicial Review of Law Number 8 of 1981 Concerning Criminal Procedure Law Against the 1945 Constitution, 2022, pp. 1–7 <<https://www.mkri.id/index.php?page=download.Putusan&id=3966>>.

3.2. Position of Advocate When Accompanying Witnesses at the Investigation Stage

Since the enactment of Law Number 18 of 2003 concerning Advocates, the position of advocates has become clearer and stronger, on par with other law enforcers.⁷ Like other law enforcers, the existence of advocates in the Indonesian legal system has an important position and function. Holding the title of a noble profession or *officium nobile*, an advocate in addition to mastering knowledge as the main capital must also have honesty values based on the calling of his conscience. With that, it is hoped that the existence of advocates as law enforcers in the Indonesian legal system is equal to other law enforcers can be recognized and no longer looked down upon so that in carrying out their professional duties advocates can work well, without pressure, and can fight for justice based on legal principles in accordance with procedural procedures both inside and outside the court.⁸

Before the Advocates Law, there was no standard term for the profession. Some called it a lawyer, legal advisor, defender, and so on. Each of these terms has its own meaning. However, after the Advocates Law was enacted, it was clearly stated in Article 1 point 1 that an Advocate is a person who provides legal services, both inside and outside the court who meets the requirements based on the provisions of this law.⁹ The advocate profession has been recognized and agreed upon by the world community that advocate is a noble profession. This is inseparable from the history that states that the advocate profession is not only as a law enforcer in court, but more broadly as a defender of society oppressed by the authorities, a protector of society, and as a fighter for human rights.

Advocates act as elements of law enforcement, one of which is to ensure that procedural legal procedures are carried out correctly and appropriately by other law enforcement officers, which on the one hand is intended so that law enforcement runs properly, and on the other hand so that clients avoid arbitrary actions. In the context of an integrated criminal justice system, advocates as one component of the criminal justice system act to supervise and ensure that the entire examination process of clients at all stages runs correctly (in accordance with procedural law), ensure that the examination of their clients is in due process of law, and the last is to encourage the smoothness of the legal process in order to

⁷ Republic of Indonesia, Law Number 18 of 2003 Concerning Advocates (Indonesia, 2003) <<https://peraturan.bpk.go.id/Details/43018/uu-no-18-tahun-2003>>.

⁸ Setyo Langgeng, 'The Role of Advocates in SPP', *Journal of Legal Sovereignty*, 1.1 (2018), 138–56 <<https://doi.org/http://dx.doi.org/10.30659/jdh.v1i1.2628>>.p. 144. Accessed September 02, 2024.

⁹ Sunarno Edy Wibowo, *Professional Ethics: Code of Ethics for Indonesian Advocates* (Surabaya: Narotama University Press, 2016).P. 146

realize a fast, cheap and simple trial. The presence of advocates is greatly needed by the wider community in providing legal understanding and enlightenment to all levels of society. In law enforcement, advocates are an integral part (subsystem) in an integrated justice system. As one of the pillars of the subsystem, their presence is very much needed in order to realize an honest, fair, clean trial, guarantee legal certainty and guarantee HAM (Human Rights) to make the Judicial Power independent.

In the context of legal assistance to witnesses when being questioned in the investigation process, an advocate acts as a mediator, defender and protector of the witness's rights during the examination stage. The presence of an advocate will be able to prevent arbitrary actions by investigators against witnesses in the form of physical or psychological violence. Witnesses during examination also feel safer and more comfortable in providing information because they are accompanied by someone who understands the legal process. Advocates can also help witnesses understand the questions asked by investigators, because often the investigator's questions are vague, sometimes very technical and difficult for witnesses to understand. In Islam itself, as emphasized in the Qur'an, the existence of a witness has a very important role in revealing the truth. Even in the Qur'an it is clearly regulated that a witness is expected to be fair in providing information and is prohibited from providing false information. In Islam it is emphasized that it is not lawful for someone to testify unless he knows. Which knowledge is obtained through sight or hearing or fame (istifaadhah), the meaning of fame is fame that results in suspicion or knowledge in cases that are generally difficult to know except through it.¹⁰

Furthermore, the services provided by advocates, one of which is legal assistance for witnesses during the investigation process, can encourage witnesses to be braver and cooperate in revealing matters related to the crime that occurred (Justice collaborator). In addition, it can also be a form of implementing Article 5 of Law Number 39 of 1999 concerning Human Rights, which states: "Every child whose freedom is deprived has the right to receive humane treatment and with attention to the needs of personal development according to his age and must be separated from adults, except in his interests", by preventing pressure on witnesses, the possibility of torture, and preventing engineering cases by trapping witnesses.

Advocate assistance during the examination stage aims to maintain neutrality in the examination process so that it is free from pressure so that law enforcement

¹⁰ Muhammad Shafwan and M Zayin Chudlori, 'Review of Islamic Law Concerning Witness Protection in the 2006 Witness and Victim Protection Law Introduction Every Human Being on This Earth Has No Human Rights. According to Jan Materson – Which Eggi Quotes in Full.' 1 With Defi', *Al-Qanun: Journal of Islamic Legal Thought and Reform*, 22.2 (2019) <<https://doi.org/https://doi.org/10.15642/alqanun.2019.22.2.302-324>>.Pg. 306. Accessed September 03, 2024.

can run neutrally. It is very unfortunate that advocates with their capacity as providers of legal assistance to every citizen in accordance with the mandate of the law but are not accompanied by clear legal certainty of regulations. Considering that sometimes advocates are asked to accompany clients who have the status of being examined, be it suspects, victims, or witnesses. In fact, the code of ethics of the advocate profession has regulated not to reject clients, whether they have the status of suspects or witnesses.

Like a house, witnesses are the key to entering a case. Witness testimony is important in legal evidence, not only for investigators, prosecutors, and judges, but also for suspects and defendants. The role of witnesses is not only to reveal facts and reconstruct events, but also to reveal new facts. With their testimony, they can weaken the charges or even strengthen the charges, including the severity of the verdict in a case. For this reason, witnesses have the right to protection from the start of the case until the end of the criminal process. They have the right to protection for personal security, family, property, and freedom from threats regarding their testimony. Often investigators, both the police and other authorized investigators, put forward 'legal' arguments that the Criminal Procedure Code does not regulate witness assistance by advocates. If the Criminal Procedure Code is read partially between articles, this argument is indeed justified. However, on the other hand, if it is read with clear logic, then the understanding of procedural law and the criminal justice system as a whole, as well as the correct paradigm related to the existence of witnesses, of course this argument is not justified.

The position of an advocate in accompanying witnesses at the investigation stage as described above is contrary to the argument that the presence of an advocate often has an influence that can influence or even mislead witnesses in giving their statements. Perhaps in the field there are advocates who act like that, but this cannot be used as a justification for prohibiting advocates from being present in the investigation process. Therefore, clear regulations are needed for advocates to be able to accompany their clients who are witnesses at the investigation stage, considering the position of advocates as described above.

The efforts of advocates in realizing the principles of the rule of law in social and state life through their roles and functions as a free, independent, and responsible profession are expected to be able to uphold justice based on law. Through legal services provided for the benefit of the community in raising awareness of their fundamental rights before the law. As one element in the justice system, advocates certainly need cooperation with other judicial institutions as law enforcement officers such as the police and prosecutors.

4. Conclusion

Until now, the regulation regarding legal assistance in the form of assistance by advocates to witnesses as examined in the investigation process has not been regulated in the Criminal Procedure Code. Advocates feel disadvantaged in terms of constitutional rights because they cannot accompany witnesses professionally as providers of legal aid services feel disadvantaged. Because as mandated by Article 18 paragraph (4) of Law Number 39 of 1999 concerning Human Rights, every person who is examined in the examination process until the trial process has the right to receive legal assistance. In addition, advocates in carrying out their professional duties in providing legal assistance must deal with clients, whether they are suspects or defendants, witnesses, or victims. Article 54 of the Criminal Procedure Code as a reference for advocates in providing assistance in the investigation process is only intended for suspects or defendants, and does not accommodate witnesses. So when advocates are asked to accompany witnesses, advocates are rejected by investigators because there are no regulations governing witness assistance by advocates when examined by investigators. The position of advocates when accompanying witnesses at the investigation stage is that the role of witnesses in the investigation examination process is very important. Even witness statements occupy a primary position as evidence that will later be able to reveal the actual criminal event. Being a witness is an obligation for all citizens as regulated by law, but not all citizens understand the law. Coupled with threats or intimidation that may be carried out by investigators. The position of advocates in the Indonesian justice system is equal to other law enforcement officers. More firmly, advocates are law enforcement officers in protecting the human rights of all citizens. In the context of the position of advocates in accompanying witnesses at the investigation stage is in order to maintain the neutrality of the examination so that there is no pressure by investigators during the investigation process.

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