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RESEARCH ARTICLE

REFORMULATION OF THE ARRANGEMENT OF LEGAL AID FOR UNABLE SUSPECTS/DEFENDANTS (PRABONO) IN A FAIR CRIMINAL JUSTICE SYSTEM

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ABSTRACT

The obligation of assistance to citizens provided by the state is only for citizens with a 15-year criminal sanction or the death penalty for people who are less capable and a threat of 5 years or more for other communities as indicated in Article 56 of Law No. 8 of 1981. Restrictions on access to legal assistance as meant in Article 56 of the Criminal Procedure Code will place the state in a discriminatory position against the right of legal assistance to citizens and the state's obligation to provide legal assistance. This study aims to identify, understand and analyze the philosophical basis of the state's obligation to provide legal assistance for those who are unable (prabono) and ratio of legal aid obligations from the state only for those accused of being sentenced to death or 15 (fifteen) years of imprisonment or defendants incapable of being threatened with 5 (five) years or more as Article 56 of Law No. 8 of 1981. This type of research is normative by carrying out several approaches, namely the legal approach, case approach and historical approach. The results of this study reveal that the philosophical basis of the state's obligation to provide legal assistance to inadequate defendants is that the Indonesian nation is increasingly clear in the economic position of the marginal community, namely the poor. Therefore, there is a right to legal assistance for people who are not economically capable so that they get justice. These rights are stated in national law, then the ratio of legal aid obligations from the state only to the defendant who is threatened with death penalty or 15 (fifteen years) in prison or incapacitated defendants who face a sentence of 5 (five) years or more as Article 56 of the Law No. 8 of 1981, in this case the process of criminal law, the state must not limit legal assistance with certain qualifications but must provide freedom and broad access to law and legal assistance.

INTRODUCTION

Substance of Law No. 39 of 1999 concerning Human Rights blends the basic principles of provisions concerning human rights itself, if further examined, the articles containing basic principles only regulate human rights, the right of every person to be recognized as a person in the field of law and entitled to receive assistance and fair protection from an objective and impartial court (article 5 paragraph (1) and (2), article 5 paragraph (3) which requires the protection of human rights more towards vulnerable groups. Provisions regarding article 54 of the Criminal Procedure Code determine that for the sake of defense, suspects are entitled to legal assistance from legal counsel according to their own choice (article 55 of the Criminal Procedure Code). Based on this matter the investigator at the beginning of the examination in accordance with the provisions contained in article 114 of the Criminal Procedure Code must be believed to have informed the suspect's legal rights to be accompanied by a legal advisor or advocate. But the suspect when he answered there was no legal counsel, which was clearly the right of the suspect if replaced with a statement to refuse legal counsel could not be justified.

The obligation of investigators arises when a suspect is suspected of committing a crime that is threatened with a high sentence. Article 56 paragraph (1) states that "In the event that a suspect or defendant is suspected or charged with a crime that is threatened with capital punishment or threatened with fifteen years or more for those who are not capable of being punished with fifteen years or more imprisonment do not have their own legal counsel, the official concerned at all levels of examination in the judicial process must appoint a legal counsel for them." When viewed from the context of legal aid itself, legal assistance is a right and part of human rights that must be accepted and accessed by all levels of society with no exception. Access referred to here does not look at the case as well as the limitation of the threat of punishment, but this refers to the obligation of the state to provide legal assistance to all levels of society, especially people who are unable and not restrictive to obligations related to time issues or the threat of punishment. Access and obtain legal assistance which is the right of every citizen and is a form of state obligation to provide this. Understandable for people who are financially able to get access and legal assistance more easily, especially with the number of individual and co-operative law offices (law firms) that professionally carry out their profession to

provide legal assistance to the community, but on the contrary to the community groups less able then access and to obtain legal assistance will be more difficult especially with one's financial ability to take the services of an advocate. This is of course realized by the legislators, for those who cannot afford to be able to obtain access to legal assistance the same as the able groups so that the provisions of the Law and the rules below provide protection for this group in order to obtain legal assistance the maximum is that this legal aid is accommodated in Law No. 16 of 2011 concerning Legal Aid. It's just that the limitation of the obligation of assistance to citizens provided by the state is only for citizens with a 15-year criminal threat or death penalty for people who are underprivileged and the threat of 5 years or more for other communities as stipulated in article 56 of Law No. 8 of 1981 concerning the Pidana Procedure Law and the Supporting Regulations below it are things that are discriminatory and unfair when viewed from the rights of all citizens to obtain access to this legal assistance. Without the restrictions and criteria used, the state as a manifestation reflecting the will of the people to give space and protection to all citizens who are not excluded, including the color of the country that has problems with the law. Restrictions on access to legal assistance as provided in Article 56 of the Criminal Procedure Code will put the state in a discriminatory position against the right of legal assistance to citizens and the state's obligation to provide legal assistance.

MATERIALS AND METHODS

This research is juridical normative, namely research focused on identifying the rules or norms in positive law. The basis of normative research here is the vacuum of norms, where regulations regarding legal aid arrangements for suspects / defendants who are not able (prabono) in the justice system are fair. The approach used in this study is the Legislative Approach and Conceptual Approach. This study uses primary legal materials, secondary legal materials, and tertiary legal materials. Material Primary law consists of legislation and court decisions in a hierarchical manner. Secondary legal materials, are all publications about the law. Tertiary Legal Materials include legal dictionaries and encyclopedias. The facts in the field are legal relevant data (*ratione decidendi*) and irrelevant (indirect) data with the law but do not complement (*obiter dicta*). Analysis of legal material is carried out in an analytical perspective, which aims to produce perspectives on what should be the essence of legal research that adheres to the character of law as applied science. The results of the study and analysis using legal logic, legal interpretation, legal arguments and legal principles which in turn produce conclusions in response to legal issues that must be answered.

RESULTS AND DISCUSSION

Basic Philosophy of the State's Obligation to Provide Legal Assistance to Suspects/Defendants who Are Not Able: The scope of legal services for the incapable of the courts as stipulated in the Republic of Indonesia Supreme Court Regulation No. 1 of 2014 (PERMA) consists of court fee waiver services, holding hearings outside the court building and providing court legal aid posts. This is no different from the scope of legal aid services in court according to the Circular of the Supreme Court of the Republic of Indonesia Number 10 of 2010. In the Circular Letter of the Supreme Court of the Republic of Indonesia Number 10 of 2010 which was stipulated on 30 August 2010, legal assistance covers case

services prodeo, organizing circuit courts and providing legal aid posts. The binding power of the Supreme Court Circular letter is basically more to the internal Supreme Court itself, different from the Supreme Court Circular Letter Number 1 of 2014 which binds other parties relating to the Supreme Court of the Republic of Indonesia and the judicial bodies below it, which are administrative in nature.¹

There are three scope of legal services in the Supreme Court Regulation Number 1 of 2014, namely:

- Case fee waiver service;
- Organizing a trial outside the court building;
- Provision of Legal Aid Posts (*posbakum*).

So for people unable to afford litigation or lawsuits, they can get assistance in providing legal aid services by organizations of legal counsel/advocates. With the issuance of the Republic of Indonesia's Supreme Court Regulation Number 1 of 2014, the Circular Letter of the Supreme Court of the Republic of Indonesia Number 10 of 2010 concerning Guidelines for the Granting of Legal Aid in court has been declared invalid. This Republic of Indonesia Supreme Court Regulation Number 1 Year 2014 will bind out especially for the world of legal counsel/advocate. In addition, it does not close the possibility that there will be a memorandum of understanding between the court and the organization of legal counsel advocate or Legal Aid Institute.

The responsibility for protection and fulfillment of human rights is above the state that needs to be realized by the government, it needs to be given adequate attention to the conditions and constraints of the state in carrying out its obligations.² When this Human Rights is an issue that is not only within the sectoral scope but an international scope that has become a serious demand for a country to respect, protect, and defend and guarantee the human rights of its citizens and residents without discrimination. When Human Rights is a translation of Human Rights, actually translating a Human Right with Human Rights is very excessive. In the writings of A. Hamid S. Attamiri stated that in terms of human rights it has been misguided by including human rights in it, actually enough with istilah "human rights" as embraced from "human right" or "mensen rechten".³ According to the flow of natural law, it states that the law comes from God which is universal and eternal, and between law and morals must not be separated. The adherents of this school view that law and morals are reflections and rules internally and externally of human life which are realized through law and morals.⁴ Legal protection must see the stages of legal protection born from a legal provision and all legal regulations given by the community which basically constitute a community agreement that regulates the relationship of behavior between members of the community and between individuals and the government which is considered to represent the interests of the community.⁵ Protection for the people globally includes 2 (two) things, namely:

¹www. Hukum online. Com : *Peraturan Mahkamah Agung Nomor 1 Tahun 2014 tentang Prosedur Bantuan Hukum.*

² <http://alfian374.blogspot.com/2015/03/hak-asasi-manusia-dalam-presfektip.html?m=1>

³ *Ibid.*

⁴ Satjipto Rahardjo. *Ilmu Hukum.* (Bandung : PT. Citra Aditya Bakti, 2000), p. 53.

⁵ *Ibid.*, p.54.

- Preventive Legal Protection is a form of legal protection whereby the people are given the objection to submit an objection or opinion before a government decision gets a definitive form.
- Refresive legal protection, which is a form of legal protection which is more aimed at resolving disputes.⁶
- The meaning of the nature stored in this legal aid is not spared from the existence of the Indonesian nation that we love, namely the existence that is increasingly clear in the economic position of the marginal community, namely the economically weak / inadequate society. Therefore, there is a right to legal assistance for people who are not economically capable so that they get justice. These rights are listed in national law as a form of government in realizing Human Rights and protection for the state.

Ratio Legis of the Obligation of Legal Aid from the State Only for Suspects / Defendants Threatened with Death Sentences or 15 (Fifteen) Years of Prison or Suspect / Defendant Not Able to be Threatened with 5 (Five) Year or More Sentences as Article 56 of Law No. 8 of 1981 concerning the Criminal Code: One important principle in a series of efforts to protect human rights, is the right of a suspect to get legal assistance since he was processed at the stage of investigation. Provision of legal assistance at this stage was previously unknown in H.I.R For this reason, for someone who is unable to seek justice if he is threatened with five years and above, legal assistance must be provided free of charge, taking into account the availability of legal counsel. Apart from that, the law also requires the provision of legal assistance to suspects or defendants if they are threatened with fifteen years or more.⁷

Legal assistance that is not regulated in the HIR, in the draft law this is very well regulated, without distinguishing the rich and the poor and without distinguishing one's social status, regarding this legal assistance that we wish to present here, is that the suspect and defendant during in the examination and at each level of examination, is entitled to legal assistance from someone or more legal counsel. This Kara has the right to show that even if the person is unable, if he asks for legal counsel, the government must provide for him at the government's expense, then legal counsel according to the level of examination, the suspect's relationship is supervised by investigators, public prosecutors, or correctional institutions, but not the contents of the speech may be heard, except for crimes against state security.⁸ Legal assistance that is not regulated in the HIR, in the draft law this is very well regulated, without distinguishing the rich and the poor and without distinguishing one's social status, regarding this legal assistance that we wish to present here, is that the suspect and defendant during in the examination and at each level of examination, is entitled to legal assistance from someone or more legal counsel. This Kara has the right to show that even if the person is unable, if he asks for legal counsel, the government must provide for him at the government's expense, then legal counsel according to the level of examination, the suspect's relationship is supervised by investigators, public prosecutors, or correctional institutions, but not the contents of the speech may be heard, except for crimes against state

security.⁹ This principle aims to ensure the implementation of justice and enhance moral quality. Freedom as the substance of human rights, is that freedom is a very important side of the law in general and for human rights in particular. Human rights and basic human freedoms cannot be separated from personal human beings, because without freedom, humans will lose their dignity and humanity.¹⁰ In this case with regard to legal protection by the State / government as the government organizer or as a ruler, Philipus M. Hadjon distinguishes in two types of legal protection, namely¹¹ : (1) Preventive legal protection is a legal protection whereby the people are given the opportunity to submit objections (inspraak) or their opinions before a government decree gets a definitive form. Thus preventive legal protection aims to prevent disputes. Preventive legal protection is very meaningful for government actions that are based on freedom of action because with this legal protection, the government is encouraged to be careful in making decisions. (2) Repressive legal protection, is legal protection carried out through a judicial body, both public and state administrative courts. Repressive legal protection aims to resolve disputes. Legal protection by the state / government is more emphasized in the state / government element as the holder of sovereignty. For that legal protection provided by the state / government to citizens can be seen in legal instruments and policies issued by the government.¹²

Formulation of Legal Assistance for Suspects / Defendants (Probono) that Are Not Easier in the Future in a Fair Criminal Justice System: Regarding the implementation of legal assistance in the criminal justice system, the implementation is still not consistent with applicable regulations. Legal assistance that has been provided by law enforcers is still in favor of the public who are able to pay for legal counsel, this matter can be examined from the principle of equality before the law, related to the rights of suspects or defendants to be accompanied by legal counsel and equal treatment of themselves suspect or defendant¹³. In Article 50-68 of the Criminal Procedure Code which has granted rights to suspects or defendants, it aims to guarantee the human rights of the accused or the defendant in addition to upholding the equality of a suspect or defendant before the law. at the time of investigation, prosecution and before the trial. In principle, this legal assistance, especially for suspects / defendants who are not able to act as perpetrators of this crime, legal advisors or advocates and legal aid agencies that have been verified by the Indonesian Republican law and human rights ministries must be brave enough to commit to releasing professional elitism because in general in fact the shackles of professional elitism greatly hinder the process of structural change. And in essence the profession network is a new layer of structure and is more pro-elite. Therefore, to be more vigilant, do not get trapped in a circle of professional networks that will further alienate us from society. Legal aid activities must be independent, meaning that they do not take sides with the government. So that they are able to appear themselves more clearly and brilliantly and be sensitive to the problems of the interests of

⁹ *Ibid.*

¹⁰ *Op. Cit. p. 220.*

¹¹ *Ibid.. p. 1.*

¹² Umayyah, disertation " *Pengaturan Prinsip Kesetaraan Antara Advokat, Polisi, Jaksa dan Hakim Dalam Proses Peradilan Pidana Di Indonesia*, Program Doktor Universitas Brawijaya, (Malang : Universitas Brawijaya, 2011) p. 54.

¹³ Yesmil Anwar and Adang, *Sistem Peradilan Pidana : Konsep, Komponen, & Pelaksananya Dalam Penegakan Hukum Di Indonesia*, (Bandung : Widya Pajadjaran, 2011), p. 274.

⁶ *Ibid..p. 41.*

⁷ *Ibid.*

⁸ *Ibid.*

the lower class. In accordance with Law No. 39 of 1999 concerning Human Rights, that humans are endowed by God Almighty with reason and conscience that gives him the ability to distinguish between good and bad things that will guide and direct attitudes in living their lives. With reason and conscience, humans have the freedom to decide their own behavior and actions. Besides that, he is responsible for everything he does.¹⁴ Basic freedom and basic rights are what are called human rights that are inherent in humans naturally as the gift of God Almighty. These rights cannot be denied. This denial of rights means denying the dignity of humanity. Therefore, countries, governments or organizations that carry out the obligation to recognize and protect human rights for every human being without exception. This means that human rights have always been the starting point and goal in carrying out the lives of the people, nation and state.¹⁵ Human rights are a set of rights that are inherent in the nature and existence of human beings as God's creatures and are a gift that is obliged to be respected, upheld and protected by the state, law, government and everyone for the honor and protection of human dignity. This Law Material also adapts to the legal needs of the community and the development of national laws based on Pancasila and the 1945 Constitution, then the Law on Human Rights is used as a legal umbrella of all laws and regulations concerning human rights.¹⁶

When citizens face the state it is not uncommon for citizens to be threatened because of the great power of the state to enforce applicable laws including their powers to take other actions. Citizens are threatened as a result of misuse of state power which often takes the form of torture, enforced disappearance, express murder, arbitrary arrest, and detention indefinitely. Besides that there are also many citizens who are either affected by their political beliefs, religion, sexual orientation or social status who are treated discriminatively both socially and before the law. Therefore, the equality before the law is contained in article 27 paragraph (1) in the form of recognition, guarantee, protection, fair legal certainty (article 28 (D) paragraph (1)) is very important. This right actually includes the right to a free and impartial judicial process (the Amendment to the 1945 Constitution in conjunction with Article 17 of the Human Rights Law), the right to presumption of innocence (Article 18), the right not to be subject to retroactive penalties (Article 28 (1) Paragraph (1) Amendments to the 1945 Constitution and Article 18 of the Human Rights Law It should be noted that legal practices at this time indicate that the right not to retroact is excluded for international crimes such as crimes of genocide and crimes against humanity. In addition, to be free from torture and treatment that undermines human dignity (article 28 (G) (2) jo 28 (1) (1)) and other rights guaranteed in article 18 of the Human Rights Law, such as enforcement the most favorable provisions for suspects and the right to legal assistance. Within this framework, rights also include the right to a fair hearing or fair trial, including the right to test witnesses, the right to defend themselves, seek legal assistance and so on. The right to legal assistance for those who are poor and marginalized is based on article 28 (H) (2) Amendments to the 1945 Constitution saying that "everyone has the right to receive special facilities and treatment to obtain the same opportunities and benefits to achieve equality and justice". Special measures

to ensure equality / justice. When investigating Law No. 8 of 1981 concerning Criminal Procedure Law has been in effect for more than a quarter of a century, in that period many changes occurred in general conditions both outside and inside the country that brought about changes in the conditions and perspectives of the Indonesian people. Many of these changes are influenced by the development of science in the fields of democracy, human rights and in this case also the development of information technology and communication. Along with these changes, it is necessary to perfect some related provisions. For these reasons, adjustments must be made to the provisions in the Criminal Procedure Law later, where some things are about new developments (both those directly related to legislation, and those that are not directly related to those that have been accommodated in a academic texts on criminal procedural law which are fed by the National Legal Development Agency or BPHN, except that in the future there is still a need for a re-enrichment of the contents of the provisions of adjusted articles between the development of society and a real condition and also the possibility of implementation in an order practice.

Provisions for suspects / defendants to be entitled to legal assistance where this is a universal provision in democratic and civilized countries, as in The International Convenant on Civil and Political Rights article 14 sub 3d has provided guarantees to suspects / defendants. Article 69 and 74 of the Criminal Procedure Code also regulate legal assistance against suspects / defendants, restrictions are only imposed if legal counsel misuses their rights so that freedom and concession are provided in terms of jurisdiction solely and not from a political, social and economic perspective. In the provisions of article 56 of Law No. 8 of 1981 concerning the Criminal Procedure Law paragraph (1) the obligation of investigators to arise when a suspect is suspected of violating a criminal offense that is threatened with high penalties, so that this article is imperative in which article 56 paragraph (1) of the Criminal Procedure Code states that "in the case of a suspect or defendant suspected or charged with a criminal offense threatened with capital punishment or a threat of fifteen years imprisonment or more or for those who are incapable of being threatened with fifteen years or more who do not have their own legal counsel, the official concerned at all levels of examination in the judicial process must appoint legal counsel for them." Because of this matter in the Criminal Procedure Law, in the future it is necessary to renew legal aid not as a limitation or limitation but it is an obligation for the state that must be provided to all Indonesians without exception with sentences. "in the event that a suspect or defendant is suspected or charged with committing a criminal act that does not have his own legal counsel, the official concerned at all levels of examination in the judicial process shall appoint a legal counsel for them."

Conclusion

The philosophical basis of the state's obligation to provide legal assistance to incompetent suspects / defendants is the existence of our beloved Indonesian nation, which is an increasingly clear existence in the economic position of the marginal community, namely economically weak / inadequate people. Therefore, there is a right to legal assistance for people who are not economically capable so that they get justice. These rights are listed in national law as a form of government in realizing Human Rights and protection for the state.

¹⁴ Jandi Mukinto. *Op. cit.*, p. 87.

¹⁵ *Ibid.*, p. 88.

¹⁶ *Ibid.*

Ratio Legis the obligation of legal assistance from the state only for suspects / defendants who are threatened with a death sentence or 15 (fifteen years) in prison or an incapable suspect / defendant who is threatened with a sentence of 5 (five) years or more as Article 56 of Law No. 8 of 1981 concerning the Criminal Code is in undergoing a legal process, in this case the criminal law process, then there must be a guarantee that all processes are carried out in accordance with the correct procedural law, and there must be no violence, torture or abuse. The state may not limit legal assistance with certain qualifications as stated in the provisions of Law No. 8 of 1981, but must provide freedom and broad access to the law and legal assistance in accordance with the objectives of the Criminal Code. Formulation of Legal Aid for suspects / defendants (prabono) who are not capable in the future in a just criminal justice system is that in the future the provisions contained in the formulation of Law No. 8 of 1981 concerning Criminal Procedure Law has been in effect for more than a quarter of a century, in that period many changes occurred in general conditions both outside and inside the country that brought about changes in the conditions and perspectives of the Indonesian people. Many of these changes are influenced by the development of science in the fields of democracy, human rights and in this case also the development of information technology and communication. Along with these changes, it is necessary to perfect some related provisions. For these reasons, adjustments must be made to the provisions contained in the Criminal Procedure Law later, where some things about new developments.

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