

ANALYSIS OF THE EXISTENCE OF THE RIGHT TO REMAIN SILENT PRINCIPLE FOR THE SUSPECT AND THE DEFENDANT BASED ON THE BOOK OF CRIMINAL PROCEDURE AND PROJECTIONS IN CRIMINAL PROCESS

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Keywords

Existence
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Abstract. This legal research aims to determine: (1) the existence of the guarantee of the right to remain silent for suspects and defendants in the criminal case process according to the Criminal Procedure Code, and (2) to find out the importance of the right to remain silent principle and future projections in the criminal case process. . The research method used in writing this law is a prescriptive normative research. The type of data used is secondary data. The secondary data sources used include primary legal materials, secondary legal materials, and tertiary legal materials. The data collection technique used is a literature study in the form of secondary data collection, by searching for data from books, documents, archives and legislation related to the object of research. The presiding judge of the trial recommended to answer and after that the examination was continued. And projections according to positive law in Indonesia, the principle of the right to remain silent KUHAP does not recognize the existence of the right to remain silent principle, the Criminal Procedure Code only mentions the issue of the right to remain silent principle in the examination stage at the trial, while in the pre-trial stage there are no arrangements .

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1. INTRODUCTION

Law enforcement is an effort to enforce real legal norms as behavioral guidelines in the traffic of legal relations in the life of society, nation and state. basis that is inherently inherent in human beings, is universal[1]. Therefore, it must be protected, respected, and maintained and must not be ignored, reduced, or taken away by anyone. Law in Indonesia guarantees Human Rights (HAM). This can be proven in the 1945 Constitution of the Republic of Indonesia through several articles that regulate human rights, one of which is Article 27 paragraph (1) which reads: "All citizens are equal before the law and government and are obliged to uphold the law and government with no exceptions." This article contains the principle of equality of position in the law. Protection of human rights is closely related to the justice system in Indonesia[2].

Realizing a just and correct criminal justice system as well as enforcing the law through an appropriate criminal court process, automatically the rights of suspects and defendants are guaranteed and protected. The enforcement of law, justice and protection of human dignity in criminal acts, especially for the protection of human rights for suspects or defendants in the criminal justice process, is evidenced by the existence of a process of investigation, investigation, detention, prosecution, pre-trial, trial examination, evidence, and then a decision. court conducted by judges as state judicial officials who are authorized by law to adjudicate. All these processes are carried out by upholding justice for the sake of upholding the law[3].

The protection of the human rights and dignity of a suspect or defendant is regulated in Article 17 of the Criminal Procedure Code which reads: "An order to arrest a person who is strongly suspected of committing a crime must be based on sufficient preliminary evidence." [4]. Elucidation of Article 17 of the Criminal Procedure Code, among other things, emphasizes that arrest orders cannot be carried out arbitrarily but are aimed at those who actually commit criminal acts. This shows that investigators

must collect facts that are truly able to support the mistakes made by the suspect through investigation (investigation), before issuing an arrest order.[4], [5]. So it is clear that law enforcement in Indonesia according to the Criminal Procedure Code must be oriented to the principle of balance. On the one hand, law enforcement officers are obliged to protect and defend the interests of public order and justice, while on the other hand they must also continue to uphold the dignity and human rights of a suspect or defendant, in accordance with the principle of presumption of innocence.[6].

The principle of presumption of innocence has been formulated in Article 8 of the Basic Law on Judicial Powers Number 48 of 2009 which reads: "Everyone who has been suspected, arrested, detained, prosecuted and or brought before a court hearing, must be presumed innocent until a court decision is made. who declares his guilt and obtains permanent legal force. "The principle of presumption of innocence owned by the Criminal Procedure Code provides guidelines that the suspect or defendant has the right given by law not to give an answer, both in the investigation process and in the trial process the right to remain silent. If this is the case, then the principle provides both positive and negative potential in the criminal case process. Positive potential with the principle of the right to remain silent, which can protect the human rights of suspects or defendants in the process of investigation, examination, or proceedings at trial, in addition to preventing violence against suspects or defendants in the investigation process. The negative potential of the right to remain silent principle is that it can make it difficult for investigators to uncover a criminal case[7].

2. METHOD

2.1 Types of research

Judging from the type of legal research that the author does, it is a type of normative legal research. Normative legal research is legal research conducted by examining library materials or secondary data materials, consisting of primary legal materials, secondary legal materials, and tertiary legal materials. These materials are systematically arranged, studied and conclusions are drawn in relation to the issue of the existence of the right to remain silent principle for suspects and defendants in criminal case proceedings according to the Criminal Procedure Code and the projection of the principle of remaining silent in criminal proceedings.

2.2 Nature of Research

The research conducted by the author is prescriptive. As a prescriptive research, this research studies the purpose of law, values of justice, validity of the rule of law, legal concepts and legal norms.

2.3 Research Approach

The research approach carried out by this author is a qualitative approach which is intended to understand the phenomenon of what is experienced by the research subjects. In legal research, there are several approaches. With this approach, the author will get information from various aspects regarding the issue that is being tried to answer. The approaches used in legal research are the statute approach, the case approach, the historical approach, the comparative approach, and the conceptual approach. Of the four approaches, the approach that is relevant to legal writing that the author adopts is the statute approach.

2.4 Data Type

The data obtained in this study are basic data in the form of secondary data. Secondary data is data obtained from library books, the scope of which is very broad including data or information, document review, previous research results, and library materials such as literature books, newspapers, magazines, and archives related to the issues discussed.

2.5 Data source

Sources of data used in the form of secondary data sources are library materials which can be in the form of documents, books, reports, archives and literature related to the problem under study:

a. Primary Legal Material

Primary legal materials are legal materials or library materials that have juridical binding power, as for what the authors use are:

- 1) 1945 Constitution Amendment IV.

- 2) Law Number 8 of 1981 concerning Criminal Procedure Law.
- 3) Law Number 48 of 2009 concerning Judicial Power.

b. Secondary Legal Material

Secondary legal materials are materials that provide primary legal explanations, such as:

- 1) The results of scientific work of relevant or related scholars in this research.
- 2) Research results that are relevant to this study.
- 3) Draft Criminal Procedure Code

4) Other supporting books.

c. Tertiary Law Material

Tertiary legal materials, namely legal materials that provide instructions and explanations of primary legal materials and secondary legal materials, including materials from the internet media that are relevant to this research.

2.6 Data collection technique

Data collection techniques used by the author in this study are: literature study, namely data collection techniques by collecting materials in the form of books and other library materials that have to do with the problem being studied which is classified according to cataloging. This data collection method is useful for obtaining a theoretical basis in the form of expert opinions regarding the object of research, such as applicable laws and regulations and relating to matters that need to be researched.

2.7 Data analysis technique

Analysis of data in a study is to describe or solve the problem under study based on the data obtained and then processed the subject matter proposed for normative research. In this study, the author uses a qualitative analysis technique. According to Abdul Kadir Muhammad, what is meant by qualitative analysis is analysis by describing quality data in the form of regular, coherent, logical, non-overlapping and effective sentences so as to facilitate understanding and interpretation of data.

3. RELUST AND DISCUSSION

3.1 The Existence of The Right To Remain Silent Principle in Criminal Case Processes according to the Criminal Procedure Code

The existence of the principle of The Right To Remain Silent is a reflection of the principle of presumption of innocence because based on the principle of presumption of innocence, the rights of a suspect or defendant will be guaranteed. For that the author will describe, namely:

1. The Right To Remain Silent Principle as a Reflection of the Presumption of Innocence

One of the most important principles in criminal procedural law is the principle of presumption of innocence. This principle is stated in Article 8 of Law Number 48 of 2009 concerning the Basic Provisions of Judicial Power as it is based on the principle of presumption of innocence, so it is only natural that the suspect or defendant in the criminal justice process is obliged to get his rights. Based on the criminal procedure law in Indonesia, although universally the principle of presumption of innocence is recognized and upheld, but legally formally the Criminal Procedure Code (KUHP) also adheres to the principle of presumption of guilt. That attitude can at least be inferred from the provisions of Article 17 of the Criminal Procedure Code which states, "An order for an arrest is made against a person who is strongly suspected of committing a crime based on sufficient preliminary evidence" meaning, In order to carry out criminal proceedings against a person based on factual descriptive and sufficient preliminary evidence, there must be a presumption that that person has committed a criminal act in question. The principle of presumption of innocence is a direction for law enforcement officers on how they should act further and override the principle of presumption of innocence in their behavior towards suspects. In essence, the presumption of innocence is legal normative and not end result-oriented The principle of presumption of innocence is a direction for law enforcement officers on how they should act further and override the principle of presumption of innocence in their behavior towards suspects. In essence, the presumption of innocence is legal normative and not end result-oriented The principle of presumption of innocence is a direction for law enforcement officers on how they should act further and override the principle

of presumption of innocence in their behavior towards suspects. In essence, the presumption of innocence is legal normative and not end result-oriented[8]. The principle of presumption of guilt is factual descriptive, meaning that based on the facts, the suspect will eventually be found guilty. Therefore, a legal process must be carried out against him starting from the stage of investigation, investigation, prosecution, to the judicial stage. Can't stop halfway. As someone who has not been found guilty, he/she has rights such as the right to immediately get an examination in the investigation phase, the right to immediately get an examination by the court and get a fair decision, the right to be notified of what is suspected or charged to him in the following language. which he understands, the right to prepare a defense of the right to an interpreter, the right to obtain legal assistance and the right to have his family visit. No less important as a manifestation of the principle of the presumption of innocence is that a defendant cannot be burdened with the obligation of proof. The public prosecutor is the party who filed charges against the defendant, then the public prosecutor is burdened with the task of proving the defendant's guilt by means of proof permitted by law. In judicial practice, the manifestation of this principle can be interpreted further as long as the judicial process is still running (District Court, High Court and Supreme Court) and has not yet obtained permanent legal power (inkracht van gewijsde). The defendant cannot be categorized as guilty as a perpetrator of a crime so that during the criminal justice process he must obtain his rights as regulated by law, namely: the right to immediately get an examination in the investigation stage,[2]. The logical consequence of this presumption of innocence is that the suspect or defendant is given the right by law not to give an answer either in the investigation process or in the trial process (the right to remain silent).

2. Reflecting The Right To Remain Silent Principle in the Criminal Procedure Code

In principle, the Criminal Procedure Code does not regulate "the right to remain silent". KUHAP does not adhere to the principle of the right to remain silent. (M. Yahya Harahap, 1988: 725). This can be shown by the formulation of provisions in Article 175 of the Criminal Procedure Code. The formulation of Article 175 states that "If the defendant does not want to answer or refuses to answer the questions put to him, the judge at the trial chair recommends answering and after that the examination will continue". To create a balance and harmony of interests as well as the protection of the legal interests of judges and defendants as well as legal advisors. So each party must realize that the implementation of the right to remain silent principle must be carried out with the principle of balance.

- a. Protection of human dignity by,
- b. Protection of the interests and public order.

Law enforcement officials in carrying out the functions and authorities of law enforcement must not be oriented to power alone. Before the Criminal Procedure Code came into effect, it was influenced by the mindset that law enforcement officers were classified as a group of "tools of power" or instruments of power which focused on every orientation to power alone in the functions and powers that existed at it. However, after the Criminal Procedure Code comes into force, law enforcement officers are based on a harmonious balance between the orientation of the enforcement and protection of public order with the interests and protection of public order with the interests and protection of human rights. Law and order enforcement officers who can cause violations of human rights and inhumane treatment methods[8]. Law enforcement officers must at all times be aware and able to serve, and are obliged to maintain social interest (public interest) which coincides with the duty and obligation to uphold human dignity and individual protection, namely upholding human dignity and protecting individual interests. Thus, law enforcement officers must change their mental attitude and view towards the horizon of law enforcement which places their position no longer solely as an instrument of power (tools of power), but must be able to understand and see as an agency of service. It is time for law enforcement officers, able to "become slaves or servants of their slaves", or a master is a slave of his slaves[10].

The principle of balance in the Criminal Procedure Code which is in accordance with Article 175 of the Criminal Procedure Code provides the understanding that the examination of the defendant in a

court hearing must protect the interests of the defendant as a human being who has human rights and the interests of public order on the other hand without sacrificing human rights in order to pursue the public interest. The application of Article 175 of the Criminal Procedure Code as a balance, the defendant should answer the questions put to him. The defendant in his position as a person suspected of committing a crime is a member of the community who is responsible for upholding the law in public life[11]. This is intended so that a guilty person gets a punishment in accordance with existing regulations. On the other hand, it also wants an innocent person not to receive a punishment that is not deservedly given to him. The judge also cannot force the defendant to answer if the defendant does not want to answer the questions put to him. All he can do is "advise" the defendant to answer. In addition, the judge or the public prosecutor may not interpret the silence of the defendant as behavior and actions that hinder and disturb the order of the trial. Moreover, to consider and draw the conclusion that the reluctance to answer as a condition that aggravating the guilt and punishment of the defendant.

The silence of the accused must be assessed in a casuistic and realistic manner, with mature arguments and sufficient considerations so that the examination of the accused is focused on the principle of balance between the interests of the accused on the one hand and the public interest on the other, to reveal the real truth. The existence of Article 175 of the Criminal Procedure Code to legalize the defendant does not answer the questions asked during the examination, it is not merely used because the defendant can easily escape the responsibility for the crime committed.

3.2 Projection of The Right to Remain Silent Principle for Suspects and Defendants in Criminal Case Processes

Based on the existence of the principle of the right to remain silent according to the Criminal Procedure Code which the author has described above, the principle of the right to remain silent is expressly not applicable in positive law in Indonesia. criminal proceedings, especially in the protection of the rights of suspects and defendants.

3.3 The projection of the principle of The right to remain silent is associated with the RUU KUHAP

The principle of presumption of innocence adopted by the Criminal Procedure Code provides guidelines for law enforcement officers to use the principle of accusatur at every level of examination. Law enforcement officials keep away from "inquisitorial" or "inquisitorial" methods of examination that place suspects or defendants in examination as objects that can be treated arbitrarily. This principle of inquisitiveness used to be used as the basis for examinations during the HIR period, which did not at all give a suspect or defendant reasonable rights and opportunities to defend themselves and defend their rights and truth because, from the beginning, law enforcement officers had the assumption, namely:

- a. already a priori consider the suspect or defendant guilty. It was as if the suspect had been convicted from the first time he was examined before the investigators.
- b. suspects or defendants are considered and used as objects of examination without regard to their human rights and rights to defend and defend their dignity and truth. As a result, it is often the case in practice that a truly innocent person is forced to accept bad luck, being in prison (M. Yahya Harahap, 2002: 41).

To support the principle of presumption of innocence and the principle of accountability in law enforcement, the Criminal Procedure Code has provided a shield to suspects or defendants in the form of a set of human rights that must be respected and protected by law enforcement officials. With a shield of rights recognized by law theoretically from the beginning of the examination stage, the suspect or defendant already has a position commensurate with the examining official in legal standing, has the right to demand treatment outlined by the Criminal Procedure Code. However, with the draft of the Criminal Procedure Code, it provides regulations regarding the application of the principle of The right to remain silent in regulating the rights of suspects and defendants. In Article 167 of the Draft Criminal Procedure Code which states that "If the defendant does not answer or refuses to answer questions put to him, the presiding judge of the trial recommended to answer and after that the examination was continued" so that the defendant was not given the obligation to answer the questions asked but the

judge only recommended it. Basically, if the enactment of the Draft Criminal Procedure Code becomes a positive law in Indonesia, the principle of The right to remain silent is recognized for its existence because it is regulated in the rights of suspects and defendants. In the RUU KUHAP the rights of suspects and defendants who acknowledge the existence of the right to remain silent, namely in Article 90 of the RUU KUHAP which states Basically, if the enactment of the Draft Criminal Procedure Code becomes a positive law in Indonesia, the principle of The right to remain silent is recognized for its existence because it is regulated in the rights of suspects and defendants. In the RUU KUHAP the rights of suspects and defendants who acknowledge the existence of the right to remain silent, namely in Article 90 of the RUU KUHAP which states Basically, if the enactment of the Draft Criminal Procedure Code becomes a positive law in Indonesia, the principle of The right to remain silent is recognized for its existence because it is regulated in the rights of suspects and defendants. In the RUU KUHAP the rights of suspects and defendants who acknowledge the existence of the right to remain silent, namely in Article 90 of the RUU KUHAP which states

- (1) In examination at the level of investigation and examination in court, a suspect or defendant has the right to give or refuse to provide information relating to the allegation or indictment imposed on him.
- (2) In the event that a suspect or defendant exercises his right not to provide information, the attitude of not providing information cannot be used as an excuse to incriminate the suspect or defendant.
- (3) In the event that the suspect or defendant agrees to provide a statement, the suspect or defendant is reminded that his/her statement is evidence, even though the suspect or defendant later withdraws the statement.

So according to the provisions of Article 90 of the Draft Criminal Procedure Code in relation to the protection of the rights of suspects and defendants, it regulates the principle of The right to remain silent. And, the information of the suspect and the defendant can be used as legal evidence. According to the Draft Indonesian Criminal Procedure Code (RUUKUHAP) in Article 176 "Judges are prohibited from imposing a sentence on a defendant, unless the judge obtains conviction with at least 2 (two) valid evidence that a criminal act has actually occurred and the defendant is guilty of doing it." From the explanation of the article, it is clear that in passing the judge's decision it is necessary to have at least two valid pieces of evidence that can prove that the defendant is guilty of committing a crime.

- a. evidence
- b. letters
- c. electronic proof
- d. an expert's statement
- e. testimony of a witness
- f. defendant's statement
- g. judge observation

The defendant's statement is only one of five types of evidence and does not always have to be present or necessary to prove the defendant's guilt. In practice, in the investigation of a criminal case or the trial process in court, the defendant's confession is not used as important evidence because it can change at any time in the trial according to the defendant's wishes. In fact, if the defendant remains silent from the time of the investigation to the trial in court, it will not be able to influence the judge to convict the defendant if other evidences have been legally and convincingly fulfilled.

The silence of the suspect in the investigation or in court will be able to bring the potential for both positive and negative things, it may be detrimental to the suspect or defendant because he cannot bring up things that can alleviate or explain understandable reasons why the suspect or defendant commits an act. the crime. The silence of the suspect or defendant may be beneficial if the investigator is unable to find or find other evidence in the criminal case. So with the principle of the right to remain silent, it can provide potential for suspects or defendants, both positive and negative. The positive potential is that it can protect the rights of suspects or defendants from torture in the process of investigation and examination in the process of criminal cases. However, On the other hand, it also provides negative potential, namely it can make it difficult for investigators to reveal a criminal case

and can harm the suspect or defendant because with this silence the suspect or defendant cannot bring up things that lighten or explain the causes of the crime. With the development of the principle of the right to remain silent in the Draft Law on the Criminal Procedure Code

- a. Prohibit investigators from practicing cruel coercion to obtain confessions
- b. Prohibit investigators from doing psychological intimidation. (M. Yahya Harahap, 2002: 96).

The existence of the principle of the right to remain silent is solely an effort to prevent deviant actions such as the use of torture in the investigation process. This has actually been tolerated and has come to the attention of the drafters of the law as part of the rights of suspects or defendants in the RUU KUHAP.

4. CONCLUSION

In this study there are two main problems studied by the author, namely: (1) regarding the existence of the principle of the right to remain silent for suspects and defendants in criminal proceedings according to the Criminal Procedure Code, and (2) regarding the projection of the principle of the right to silence. (The right to remain silent) for suspects and defendants in the criminal case process. that principle. This can be seen in the provisions of Article 175 of the Criminal Procedure Code which states that if the defendant does not want to answer or refuses to answer questions put to him, The presiding judge of the trial recommended to answer and after that the examination was continued. Thus, the Criminal Procedure Code does not recognize the existence of the principle to remain silent. The Criminal Procedure Code only mentions the issue of the principle of remaining silent during the examination stage at the trial, while in the pre-trial stage there is no regulation. The projection of the right to remain silent principle is associated with the existence of the RUU KUHAP that the existence of the right to remain silent principle is recognized, namely in Article 90 of the RUU KUHAP which regulates the rights of suspects and defendants. With the principle of the right to remain silent, efforts are made to prevent deviant actions such as the use of torture in the investigation process. while in the pre-trial stage there are no arrangements. The projection of the right to remain silent principle is associated with the existence of the RUU KUHAP that the existence of the right to remain silent principle is recognized, namely in Article 90 of the RUU KUHAP which regulates the rights of suspects and defendants. With the principle of the right to remain silent, efforts are made to prevent deviant actions such as the use of torture in the investigation process. while in the pre-trial stage there are no arrangements. The projection of the right to remain silent principle is associated with the existence of the RUU KUHAP that the existence of the right to remain silent principle is recognized, namely in Article 90 of the RUU KUHAP which regulates the rights of suspects and defendants. With the principle of the right to remain silent, efforts are made to prevent deviant actions such as the use of torture in the investigation process.

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