

# The Urgency of Regulating Witness Rights Accompanied by Legal Counsel in Pre-Adjudication Examination as a Form of Human Rights Fulfillment

Original Article

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## Abstract

The existing issue in the legal system is the lack of assurance and fairness in ensuring a witness's right to have legal representation during the pre-trial phase. The goal of this research is to evaluate the urgency of regulating the rights of witnesses accompanied by legal advisors during pre-trial examinations as a form of fulfilling human rights, as well as efforts to fulfill the rights of witnesses accompanied by legal advisors at the pre-adjudication stage as a form of fulfilling human rights. The benefits of writing provide a basic understanding regarding the urgency of regulating the rights of witnesses accompanied by legal advisors at the pre-trial stage as a form of fulfilling human rights. The emptiness of norms underlies this research with a type of normative legal research as well as a statutory and conceptual approach. The research results show that the urgency of regulating the rights of witnesses accompanied by legal advisors at the pre-trial stage is based on the principle of equality before the law which is fundamentally regulated in the constitution. In connection with efforts to fulfill the rights of witnesses accompanied by legal advisors at the pre-trial stage, extensive legal interpretation can be carried out by expanding the meaning of the definition of witness, so that the rights of witnesses described in the law can become a reference, in addition there is a role for law enforcers to assist in fulfilling the rights of witnesses.

**Keywords:** Witness Rights, Law Advisor, Pre-Judgment.

## 1. Introduction

The concept of human rights continues to develop and the law regarding the protection of human rights certainly experiences expansion or conceptual development in the fulfillment of human rights. This situation occurs because the dynamics of human life continue to develop and are faced with technological advances. The law should be able to provide preventive efforts in providing protection for one's rights, so that the law should undergo a continuous review process through progressive efforts for the truth that provides justice and happiness as conveyed by the initiator of the principle of progressive law, Satjipto Rahardjo. The presence of the concept of progressive law as a form of dissatisfaction with the teachings of positive law (analytical jurisprudence) which in its enforcement in Indonesia has not been maximized (Nuryadi, 2016). There are various legal complaints by the public regarding the procedures for investigations and investigations by law enforcers who deviate from the provisions of procedural law or the application of discretion that is carried out contrary to the principles of protection of human rights themselves (Siregar, 2016). The state is indeed charged with protecting the human rights of each citizen, one of which has an impact on the law



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enforcement process, which currently in the criminal justice system holds the principle of due process of law (Hutabarat et al., 2022).

The principle of due process of law provides the concept that every person is not allowed to be deprived or deprived of their right to life, including freedom, and property without the opportunity to defend themselves guaranteed by the constitution, so that due process of law is a constitutional guarantee that provides certainty of a fair legal process by providing an opportunity for a person to know and be heard in relation to why his right to life, freedom and property is deprived. Due process of law provides a constitutional guarantee that expressly ensures that the law will not be enforced irrationally, arbitrarily, or capriciously. The application of due process of law has the consequence that the government is responsible for respecting the law, respecting the rights of the people as stipulated in the constitution, and protecting the people from arbitrary actions. The philosophical basis contained in the concept of due process of law is related to natural law, which means that due process of law is justice that is naturally inherent in humans in defending their freedoms and rights (natural justice) (Latipulhayat, 2017).

The dedication of the Indonesian government to honoring and protecting human rights has grown thanks to the constitutional amendment known as the second amendment to the 1945 Constitution. This amendment includes ten new articles, specifically Articles 28A-28J, that focus on acknowledging and valuing human rights. The commitment to provide protection, fulfillment and respect for human rights does not stop at the rules that recognize human rights themselves, but continues to the justice system to uphold human rights with the enactment of Law No. 26 of 2000 concerning Human Rights Courts which does not rule out the establishment of ad hoc human rights courts so that they can provide justice for cases of gross human rights violations that have caused chaos before the enactment of the law (Sahyana, 2020). Problems with the fulfillment of human rights in the criminal justice system are always linked to problems of law enforcement. This is a problem that should receive attention from various parties (Supriyanto, 2016).

Injustice can occur in the fulfillment of equal rights for citizens, if there are rules that have norm conflicts, norm ambiguity, and norm vacuum. According to Adrian Bedneer's view, injustice is felt starting from the process of finding justice with an understanding based on the suffering of an injustice (Prawira & Yudha, 2021). Fulfillment of rights in a state of law can be in the form of the right to obtain legal aid. Legal aid providers must have the authority granted by law. The Criminal Procedure Code (KUHAP) specifies in Article 54 that suspects or defendants have the right to receive legal assistance from one or multiple legal advisors during all stages of examination, as outlined in the legislation, so that the fulfillment of the right to legal assistance only reaches suspects and defendants (Indah, 2014), while there is no regulation governing the right of witnesses to obtain legal assistance, namely accompanied by legal counsel at the pre-trial examination level. This situation creates legal uncertainty in the fulfillment of everyone's right to be treated equally before the law due to the vacuum of norms (Mokorimban, 2013).

Based on Pancasila and the 1945 Constitution, human rights are the main priority to guarantee equality in law, therefore the creation of a fair procedure is formulated in the KUHAP to overcome a criminal case (Hamaminata, 2023). Most witnesses do not understand their inherent rights that must be protected, such as the right to be treated equally before the law as the subject of law, not the object of law, and to avoid questions that could lead to legal traps for themselves in providing testimony (Kawuwung et al., 2023). There is no regulation regarding the right to equality before the law for witnesses to obtain legal counsel assistance resulting in law enforcers being able to nullify this right. Certainly, the concept of this

entitlement thrives within a legal framework, as evidenced by the content of Article 27, section (1) of the 1945 Constitution. This provision clearly asserts that all individuals enjoy equal treatment under the law and government, emphasizing the importance of adhering to legal principles without any discrimination. The phrase "*all citizens are equal before the law*" means that every citizen is constitutionally guaranteed the same position before the law, of course, they have the same right to obtain legal assistance without distinguishing their status as witnesses, suspects and defendants. The Legal Aid Law mentions in a passage that emphasizes the state's commitment to upholding the constitutional rights of individuals to access fair and equal legal protection, recognition, and certainty as a way to safeguard human rights.

This issue was tested by the Constitutional Court (MK) with the registration number 61/PUU-XX/2022, but in its decision the Constitutional Court rejected the material testing of Article 54 of Law No. 8 of 1981 concerning the Criminal Procedure Code against the 1945 Constitution. Quoting from the website of the Constitutional Court of the Republic of Indonesia or abbreviated as MK regarding its legal considerations, it gives the view that a witness to be accompanied by legal counsel is an important value to be regulated, but the intended norm content is not suitable if it must be formulated in Article 54 of the Criminal Procedure Code, this is because the norm is formulated specifically for suspects or defendants in obtaining legal assistance. The Constitutional Court considers that Article 54 of KUHAP still provides legal certainty and does not deviate from Article 28D paragraph (1) of the 1945 Constitution, in addition to being able to eliminate intimidation and improper treatment that can betray human rights, therefore it will affect the fulfillment of the purpose of criminal justice, namely obtaining material truth, so that the regulation of these issues must be set out in a separate chapter in the KUHAP.

According to a study published in a scientific journal by RR. Duni Nirbayati and Marcus Priyo Gunarto, it was found that legal representatives can help safeguard the rights of witnesses in uncovering the true facts of a criminal case. However, they face challenges due to the lack of regulations in the Criminal Procedure Code, resulting in examiners refusing to accompany witnesses. Therefore, there is a need for updated regulations in the Criminal Procedure Code, which is currently under revision in the Indonesian Parliament. The research, which was conducted using empirical legal research methods, found that there is often a rejection by the examiner (law enforcement) in the event that legal counsel wants to accompany witnesses in the process of examining criminal justice cases. Indeed, in the context of no rules governing can indeed refuse assistance, especially seeing the position of legal counsel as a legal aid provider, but if the witness wants to explore the values contained in the 1945 Constitution, the right is inherent to the witness and there is no law that regulates law enforcement can reduce the right, to be able to explore this issue must be seen to the witness who is part of the legal subject and equality before the law as an inherent right to the witness, not seeing the authority possessed by legal counsel in providing legal assistance that can be limited or reduced. This research has an element of novelty by using normative methods which are then reviewed based on the rules using legal theory as a scalpel which is arranged in a systematic descriptive manner (Efendi & Ibrahim, 2018).

Based on the description that has been described, there is a norm vacuum in Law No. 8 of 1981 concerning KUHAP, namely there are no provisions regarding the right of witnesses at the Pre-Adjudication stage to be accompanied by legal counsel (advocate) in the criminal justice system. Moreover, the urgency lies in the right of witnesses to equal standing before the law. This is certainly related to the criminal justice system in Indonesia which conceptually views the suspect and defendant as legal subjects, so that witnesses should be given the same

status as legal subjects who have legal interests and rights inherent in them that must be protected. In connection with this, the problem formulations that will be studied henceforth become the subject of discussion in this study are: 1) What is the urgency of regulating the right of witnesses to be accompanied by legal counsel at the pre-trial stage as a form of fulfillment of human rights? 2) How are efforts to fulfill the right of witnesses accompanied by legal counsel at the pre-trial examination stage?

## 2. Methods

This paper uses a normative legal research method, with a study that focuses on the vacuum of norms (Hamdi & Bahruddin, 2015), so that a systematic arrangement is needed in the legislation to regulate the right of witnesses to be accompanied by legal counsel at every level of examination. This study uses several approaches, including the legislative approach, namely the 1945 Constitution, Human Rights Law, and KUHAP. The concept approach, namely interpretation in law, the concept of human rights, the concept of law enforcement in the theory of law enforcement by Soerjono Soekanto and with qualitative analysis. The sources of legal materials used in this study consist of primary legal materials, namely the 1945 Constitution, Law. No. 8 of 1981, and Law No. 39 of 1999. There are secondary legal materials, namely articles, legal journals, and legal research results.

## 3. Results and Discussion

### 3.1. The Urgency of Regulating the Right of Witnesses to be Accompanied by Legal Counsel at the Pre-Adjudication Examination Stage as a Form of Fulfillment of Human Rights

Criminal justice system is a term that describes a working mechanism in order to overcome criminal acts with a system approach (Afrizal, 2020). Criminal justice in KUHAP can be classified into three stages. Luhut M.P. Pangaribuan believes that there are three stages of classification: pre-adjudication, adjudication, and post-adjudication. During the pre-adjudication stage, investigators play a crucial role in conducting investigations. The adjudication stage involves the judge commencing examination in the court process. Finally, the post-adjudication stage focuses on the correctional process for convicted individuals (Kamagi, 2019). The criminal justice system, hereinafter referred to as SPP, functions as a means of social supervision to conduct preventive efforts against the emergence of criminal acts which are often referred to as preventive functions, as well as a means of taking action and carrying out a trial on criminal offenders using criminal law instruments and criminal procedural law as well as other supporting legal instruments which actually carry out repressive functions. The process of criminal law appears from the holding of criminal justice with the aim of realizing justice according to common ideals. Believing that a well-functioning criminal justice system promotes the establishment of a just trial, it is essential to have a system that ensures that each person is treated fairly and not subject to arbitrary treatment. The real form of the criminal justice system is formulated in Law No. 8 of 1981 (Putri & Layang, 2022).

The Criminal Justice System provides a balance in seeking the fulfillment of human rights, whether from the victim, defendant, or suspect, and witnesses should get the same rights. The essence of talking about the criminal justice system also speaks from the examination stage and in the event that sufficient preliminary evidence has not been fulfilled, the status of a suspect cannot be given to someone who is being examined, so that he is still

examined as a witness. The initial examination of a witness is of course already dealing directly with law enforcement in exploring the material truth, so that everyone who is not yet a suspect or defendant is actually entitled to protection of their rights by being accompanied by legal counsel. Not everyone is aware and understands that the determination of suspect status must meet the minimum requirements of two sufficient preliminary evidences and directly deal with questions that create an offense, while the suspect still has the right to apply for pre-trial, namely "to determine the validity or invalidity of arrest, detention, termination of investigation, or termination of prosecution." The accompaniment of witnesses by legal counsel in the early stages of searching for sufficient preliminary evidence provides an effort to fulfill protection and respect for human rights. The right system to apply is Due process of law which prioritizes the principle of presumption of innocence. This stage must receive serious attention from law enforcers because it can be said that the pre-trial stage is the initial gate to the criminal justice system, and it should be noted that the authority used by investigators to determine suspects must not be arbitrary and impose an offense or find someone's fault (Setiyo et al., 2014).

The fulfillment of human rights through the criminal justice system will continue to evolve and change to meet the rights of every individual. The development of human rights fulfillment in the criminal justice system in Indonesia can be traced back to the period before the enactment of the Indonesian Criminal Procedure Code (KUHAP), when the criminal justice system was still based on *Het Herziene Inladsch Reglement*, better known as HIR. The foundation of the criminal procedure under HIR led to many unfair treatments, especially towards suspects, who were often subjected to pressure and even violence. This situation was influenced by the still-applied Inquisitorial principle, which viewed suspects as objects of examination. After the implementation of KUHAP in Indonesia, a noticeable shift occurred, moving away from the Inquisitorial principle to the Accusatorial principle, which treats suspects as subjects of examination. The enactment of KUHAP has had a significant impact on the fulfillment of human rights in Indonesia's criminal justice system. KUHAP is anticipated to act as the official standard in the Indonesian criminal justice system, addressing the calls for human rights adherence. Yet, guaranteeing human rights compliance in the criminal justice system is a more complicated matter than it appears. Despite this, KUHAP currently does not fully address the fulfillment of human rights for witnesses before they are designated as suspects, particularly in terms of witness accompaniment by legal counsel.

In the 1945 Constitution, there is a provision in Article 28D (1) that ensures equality under the law for all individuals. This provision guarantees that every person is entitled to fair treatment, protection, and assurance of justice and equality. When assessing the implementation of legal protection for individuals classified as legal entities, it is evident that legal counsel is mainly focused on the rights of the accused or the suspect. Article 54 of the Criminal Procedure Code guarantees the rights of suspects and defendants by allowing them to obtain legal assistance from one or more lawyers throughout the examination process, as outlined in the law. If we look back at the true nature of this right, we should also guarantee the fulfillment of the witness before the status of the suspect considering that the witness is also a legal subject who is suspected of being related to a criminal event, so that to protect the legal interests and rights of witnesses there must be a formulation of rules that explicitly accommodate the fulfillment of the witness's right to be accompanied by legal counsel in the pre-adjudication process.

### **3.2. Efforts to Fulfill the Right of Witnesses to be Accompanied by Legal Counsel at Pre-Adjudication Examination as a Form of Fulfillment of Human Rights**

#### **3.2.1. Expansion of Meaning through Extensive Interpretation**

Fulfillment of human rights in terms of the right of witnesses to be accompanied by legal counsel at the pre-adjudication stage can be achieved if there are provisions of articles or legal rules that can accommodate the rights and position of witnesses as legal subjects at the pre-adjudication stage. The method of legal interpretation becomes a temporary alternative, expanding the meaning of a regulation can be an effort that can be done in the event of a norm vacuum. The presence of the interpretation method also plays an important role in helping law enforcers to make legal discoveries. Legal discovery is an effort that is usually carried out by law enforcers in applying the law in the event of a concrete event, namely in this effort (legal discovery) a systematic step (method) is needed that can be used by law enforcers in seeking legal fulfillment both from the aspects of certainty, justice, and legal benefits. This situation can be understood as a situation that the rules (Law) do not provide clarity of regulation or even there is no formulated regulation. Legal discovery can provide an understanding or explanation of a legal event that can be done through interpretation. One method of interpretation that can be done in a situation where there are no rules governing is extensive interpretation (Hardinanto, 2016). Extensive interpretation is one of the interpretations that can be used by law enforcement in seeking the fulfillment of human rights in terms of the fulfillment of the right of witnesses to be accompanied by legal counsel at the pre-trial stage.

The essence of extensive interpretation is a method that can be done by expanding the meaning of a regulation, so that it can accommodate legal problems in the event of a norm vacuum. Fulfillment of the right of witnesses to be accompanied by legal counsel in the examination process at the pre-adjudication stage can be pursued by understanding who can be called a witness or who the witness actually is. If you look back at the provisions in the Criminal Procedure Code related to the definition of witnesses in Article 1 number 26, namely (Law of the Republic of Indonesia No. 8 of 1981):

*"a witness is a person who can provide information for the purpose of investigation, prosecution, and judiciary about a criminal case that he himself heard, he himself saw, and he himself experienced."*

The definition of witness in the Criminal Procedure Code cannot reach witnesses in a situation where the witness is still being examined at the investigation level. Of course, it cannot expand the meaning of the definition of witness in the article, because the article defines a witness after the existence of a suspect at the investigation level. In contrast to the investigation level, which is a situation where a suspect has not been named in the event that there is insufficient preliminary evidence, so that the presence of witnesses to find sufficient evidence to be able to determine a person who is strongly suspected of committing a criminal offense. To be able to accommodate the fulfillment of the witness's right to be accompanied by legal counsel at the pre-trial stage of examination, there must be rules governing the investigation stage. Referring to the definition of witnesses formulated in Article 1 number 1 of Law No. 31 of 2014 states that (Law of the Republic of Indonesia No. 31 of 2014):

*"A witness is a person who can provide information for the purpose of investigation, prosecution, and examination in court about a criminal offense that he/she hears, sees, and/or experiences."*

Based on the definition of witnesses stipulated in Law No. 31/2014, it defines witnesses starting from the investigation stage, so it is more relevant to expand the meaning with an extensive interpretation of the article, so that the protection of witness rights as stipulated in Article 5 of Law No. 31/2014, one of which is to get assistance and receive legal advice. The provisions of Article 5, in order to ensure legal certainty, can be interpreted by expanding the meaning of "the rights stipulated in Article 5 paragraph (1) letter n and letter p."

### 3.2.2. Law Enforcement Awareness

The awareness of law enforcers is certainly inseparable from the role and responsibilities of their duties being carried out. Soerjono Soekanto stated that there are five elements that can impact the implementation of laws, with law enforcement being one of them. He mentioned that the realm of enforcing laws is extensive, encompassing individuals who are directly or indirectly involved in law enforcement activities. From a sociological perspective, each law enforcer holds a specific position and plays a particular role. The position within society can range from high to low and serves as a framework for rights and duties, essentially defining their role. A role occupant is generally someone in a position. A right is actually an authority that can be used to do or not do, while an obligation is a duty or burden. According to Soekanto (2011), there are different aspects to a particular role, including the ideal aspect, the predicted aspect, the understood aspect, and the factual aspect.

Role performance as it is known, is the actual execution of a role. It is important to recognize that the expected and perceived roles are influenced by external factors, whereas self-perception plays a key role in understanding one's own role and carrying it out effectively. In reality, these roles function or begin to be seen when there is an interaction relationship with other people (role sector) or even related interactions with many parties (role set). As per Soerjono Soekanto, the issue of role holds great significance because discussions on law enforcement primarily revolve around discretion. Discretion involves making decisions not strictly governed by the law, allowing personal judgment to have a say. The presence of discretion in law enforcement is crucial due to the following reasons: (1) Legislation is never exhaustive enough to regulate all human behavior, (2) There are delays in adapting legislation to societal changes, leading to uncertainty, (3) Lack of resources to enforce legislation as intended by lawmakers, (4) Individual cases that demand special treatment also exist.

Discretion is needed as a complement to a rule of law which in general can be understood that the aspects that must be reached by law are too broad, so the presence of discretion will complement or perfect the rules of law. Soerjono Soekanto believes that discretion is essential to uphold the principle of legality, which requires all administrative acts to be law-based. Within the concept of "free discretion," the law sets boundaries that state administration must adhere to when making decisions. In "bound discretion" alternatives are given by law and the determination of alternative choices lies with the state administration." This means that a law enforcer can take the role of discerning the issue of the vacuum of norms related to witnesses who are examined can be accompanied by legal counsel at the pre-trial stage, especially since there is no law prohibiting such assistance considering respect for the inherent human rights of witnesses to be treated equally before the law and get the same protection.

In relation to the absence of rules governing the right of witnesses to be accompanied by legal counsel at the pre-adjudication stage, it cannot underlie the actions of law enforcers to prohibit the accompaniment of witnesses by legal counsel at the pre-adjudication stage. According to Article 73 of Law No. 39/1999 on Human Rights, the rights and freedoms outlined in the Law can only be restricted if it is necessary to uphold human rights, respect for others, decency, public order, and national interests. This means that Article 73 has emphasized that law enforcers cannot interfere with the rights of everyone, in this case

witnesses at the pre-trial examination, to not be allowed to be accompanied by legal counsel during the examination, because to limit someone's rights there must be rules at the level of the law to be the basis for limiting these rights.

## 4. Conclusion

The urgency of regulating the accompaniment of witnesses at the pre-adjudication stage by legal counsel must be pursued in providing legal certainty. The regulation of witness assistance by legal counsel at the pre-adjudication stage can be based on the principle of equality before the law and legal certainty stipulated in the provisions of Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia. The importance of regulating witness assistance by legal counsel at the pre-adjudication stage is based on the fact that there is still a vacuum of norms in the Criminal Procedure Code that cannot provide guarantees for the fulfillment of the rights of everyone in the criminal justice system, especially at the pre-adjudication stage, to be equal before the law and to obtain legal certainty for the fulfillment of these rights.

Efforts to fulfill the right of witnesses to obtain legal assistance at the pre-adjudication examination can be pursued by expanding the meaning using extensive interpretation of the definition of witnesses regulated in the Law on the Protection of Witnesses and Victims, besides that it can also expand the meaning of the rights of witnesses from the pre-adjudication stage as regulated in the Law. Of course, efforts to fulfill the rights of witnesses to legal counsel assistance at the pre-trial examination can be supported by the awareness of law enforcement in applying the law, which in the concept of law enforcement can complement a rule of law, especially in terms of discretion.

Awareness of law enforcers needs to be improved both those involved in law formation and direct law enforcement. The formation of laws related to the protection of witnesses' rights to be accompanied by legal counsel can be outlined in a separate sub-chapter in the KUHAP which specifically adds the rights granted at the pre-adjudication, adjudication and post-adjudication stages. Expand the definition of witness added in Article 1 of KUHAP. Law enforcers who directly enforce the law in protecting the legal interests of everyone can use the interpretation method in exercising discretion. The interpretation that can be used is extensive interpretation in expanding the definition of witness from the Law on Witness and Victim Protection, so that the rights of witnesses can be fully protected from pre-adjudication to post-adjudication stages.

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