

THE NECESSITY OF LAW COUNSEL ASSISTANCE IN A CRIMINAL PROCESS IN INDONESIA *

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Prejudice towards one another has become a Law of Nature. A very harmful prejudice will become clearer if some one gets involved in a criminal process although the person may not be guilty at all. Therefore, the absence of a legal counsel for someone in a criminal process can easily strengthen that bad prejudice to the person's disadvantage.

In this connection, some months ago, I received the honour to present a paper in this seminar on "Legal Aid and Law Students". The seminar will be attended by law students from several countries, especially from the South East Asia area, an area which is gradually drawing international interest. I would like to thank the sponsors of this seminar for this opportunity and on this occasion please allow me to present the case of the necessity of assistance in a criminal process in Indonesia to guarantee the basic Human Rights of any accused person. Lawyers, practitioners and government officials have endlessly deliberated about this in the seminar or discussions.

The rights and duties of enforcement officials in a criminal process in Indonesia are regulated by the "Code of Criminal Procedure in Indonesia." The Code of Criminal Procedure as defined by J.B. Bosch Kemper in "Het Boek van Strafvordering" are the whole principles and regulations adopted by the Government in executing its duties whenever the penal laws have been violated. Besides, there is another definition describing Code of Criminal Procedure as "Habeus Corpus" and "Magna Charta" because it has two functions. On the one hand, it has the public function of keeping order and security in society against acts of disturbance, if necessary by legally ignoring certain rights and basic freedom. On the other hand, it will function as a charter to realise rights and basic freedom as a positive law which must be respected and implemented by the authority. Between these two interests, conflicts often happen between public interest and individual interest. Unbalance practically, often happens between these two, because the authorities always tend to place more emphasis on the public interest, or what they consider as "public interest", so that individual interests are very often ignored. And at that moment, a law

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counsel assistance is absolutely necessary for the individual, where as we may conclude that the Code of Criminal Procedure is not being applied satisfactorily the law counsel is necessary for protection of the individual which becomes accused in criminal process. Nevertheless, I'll explain what's the reason why the law counsel has been given by attorney in Indonesia concerning the individual, sometimes do not get response or do not develop. Therefore, I would like divide our discussion about law counsel problem in criminal process in Indonesia as follows:

- 1) The Law counsel is necessary to the individual in a criminal process in Indonesia because:
 - a. The Penal Code and the Code of Criminal Procedure in Indonesia is obsolete;
 - b. Law enforcement apparatus in Indonesia is far from perfect;
 - c. The ignorance of an individual about his rights and duties as an accused in a criminal process.
- 2) Factors hampering the development of law counsel for individuals in a criminal process, that is:
 - a. Traditionalism
 - b. Culture
 - c. Socio- Political
 - d. Mental Altitude
 - e. Economy
 - f. Education

Penal Code and Code of Criminal Process

In the beginning the Penal Code of Indonesia consist of unwritten Code and .since the Dutch Government came to Indonesia, the written Penal Code was known, even though it was very simple and did not consist of the whole Penal Code arrangement but it consist of several regulations:

- a. "De Bataviasche Statuten" 1642 contains the special Penal code and valid only for the Dutch,
- b. "Interimair strafbepalingen" 1848, puts in order several Penal Codes.

These two regulations were for Europeans and was using the- principle of the old Dutch law and the Roman law. Even for the native population the unwritten Penal Code was still constantly used, as a traditional law.

Just in 1866 the codification has been known as the entry from all the Penal Code regulation introduced in February 10, 1866:

- a. “Het wetboek van strafrecht voor de Europeanen”. This Penal Code was only used for European group.
- b. “Het wetboek van strafrecht voor Inlanders en daarmede gelijkgestelden”, this Penal Code was only for Indonesians and for them who are equal with the Indonesian group in 1872.

With the execution of the Penal Code from 1866 and 1872, in fact there was a dualism in Penal Code applied to Indonesia. This condition went on till 1915. because in 1913 the Dutch Government started again their codification of those two regulations, which were finished in 1915.

In 1915, “Wetboek van strafrecht voor Nederlandsch Indie” was decided as a Penal Code applied for all people in the Netherlands East Indies without discrimination. This Penal Code was used since January 1, 1918 and was mainly the same as the Penal Code act in the Netherlands since 1866, because it was based on the principle of “CONCORDANSI” mentioned in that Penal Code which applied in the Netherland, with possible deviations if granted by the situation.

In 1942 began the Japanese occupation. Japan took “Army- Authority-regulation” which decided that old Penal Code was still used. After the Japanese surrendered, Indonesia proclaimed their independence and the Government made the transitional regulation in Penal Code, stating the existing regulations still valid, in order to avoid absenty of laws.

Throughout the years of Indonesian independence there have been several reviews of that Penal Code, the latest being in 1960, but those obsolete Penal Code in fact was not changed too significantly. For example, several articles restricting the freedom of expression which were frantically opposed by the Indonesian Movement. Leaders during colonialization period, known as “Haatzaai Artikelen” was and still being used. So is the case of the code of Criminal Procedure mentioned as “Revised of Indonesian Regulation (HIR)” had been made more than 100 years ago.

It had been created in 1848 when Indonesia was a Dutch Colony and had been renewed in 1941 with emergency regulations 1451 nr.1, a Revised Indonesian Regulation was made, followed as far as can be practiced as orientation. Nevertheless, the law in Indonesia at present still holds the universal principles, known as the principles of Penal Code, also admitted as the

Human Rights principles. These principles are, amongst them “Equality before the law” which means that everybody has the same rights before law and justice. “Presumption of Innocence” is the presumption that someone is not guilty, unless verdicted by the judge; “legality”, is that someone can only be verdicted based on the regulation act. These principles can avoid prejudice which can harm individuals accidentally accused in a criminal process. A law counsel is necessary for the individual which has been accused, guaranteeing these, principles and universal basis being used. Without a law counsel, there is not always a guarantee to the accused that these universal principles are used. It has always been a principle in Indonesia. that one has the right to get a law counsel, as soon as he has been arrested with the existence of Court act nr.14-1970. But in practice, some police, public prosecutor, or even judges did not do it, because these were not an act to regulate these procedures.

Why must I say that it is necessary to get a law counsel for an accused person in a criminal process in Indonesia? It is because the code of criminal procedure in Indonesia came from the authoritative regime as during the Dutch occupation, which primarily seeks confession than the truth. Moreover, the authoritative mentality still exist in some of our law enforcers in Indonesia, which on the whole was inherited from feudalism, colonialism, japaism and critical situations. Henceforth I shall explain about the procedure of the criminal law process from the time anybody was arrested to the Court meeting and finally to the execution where a law counsel is absolutely necessary in order not to harm the accused individual on his basic rights.

The Law Enforcement Apparatus in Indonesia

We can divide a criminal process in 4 stages, as follows : a preliminary investigation process, a process before the court and the act of sentence from the judge or verdict.

We can say it in a more clearly way :

1. The stage of preliminary investigation
2. The stage of prosecuting or judging
3. The stage before the court, and then follows the request for appeal, consideration and judicial (appeal), and ended with the verdict of the court which has the permanent power of the law.
4. The stage of execution

The authorities or organs who have to deal with the investigation process in criminal case are the police, the public prosecutor, court and the jail authorities. These four organs form the chain of processing in a criminal case, but often complexity/confusion arise among them, finally harming the accused. Of the four stages mentioned above, the investigation process is the most probable source of harm or damage to the accused, because in this stage of investigation two powers or authorities are operating — the police and the judge.

The authority of these two organs in this stage is noted in the “Revised Regulations of Indonesia”, in the basic act of the power of the police, and in the basic act of the judiciary.

In this investigation process the reactions of the people usually arise, because this is the first stage where the Human Rights will be pressed or deprived through the acts of a possibility of seizure and followed by an arrest

In the stage of investigation, where two organs work, some cases will arise and finally harm the suspect.

1. The seizure or temporary arrest which is not based on regulations of the formal law for instance, it is not according to article 62 sub 2 of the “Revised Regulations of Indonesia”.
2. Although in the regulation of the formal law we only know the phrase of seizure or temporary arrest it has later on been altered into police-arrest, prosecutor arrest and the judge arrest. This mean an ever changing responsibility and the future of the a accused will go from one to the other of the several organs that have to deal with this matter.
3. It always happens that an arrestation are not extended or delay prolonging arrestation are made as an excuse that, (for instance) because the investigation is not finished, although the case of the process is quite simple.

The arrest of the accused is only possible when there is a criminal act, this is exactly noted in the article 62 sub 2 of the “Revised Regulation of Indonesia” and this, will be carried out when it is really necessary for the good of the investigation itself vide article 75 and 85c sub I of the Revised Regulation of Indonesia.

And article 385 of the same regulation gives also a possibility to the accused for an arrest out-doors with guarantee.

I will give some possibilities for the accused who is not in arrest and for those who are in arrest, in executing preliminary investigation is to gather materials and to make an official report. This official report made by the investigator, is the product of his investigation and will form the basis of prosecutor's prosecution

a. An Investigation Against The Accused Who Is Not In Arrestation

With the use of the technology and skill or cunning in the way of investigation, the investigator will make a official report about the accused with some possibilities;

1. The accused will give smooth answers or admit without hesitation;
2. The accused will deny, but when there are a psychological and physical influences or technical investigation, he will, admit or confess at last;
3. The accused will not confess, but later on he had to admit falsely.

His confession is given only to avoid the physical and psychological pressures.

In this case the investigator has done something which is not necessary because this will be cleared in the process before the court.

4. The accused will always deny, but this seldom happened. Otherwise the accused will admit, but again, only to avoid pressures.

Who knows when the human rights of the accused is being violated by the investigator, with the practice of physical and psychological pressures? Because the preliminary investigation is not open to the public as the case in a court to avoid these pressures the aid of a lawyer is necessary is this process.

The lawyer of the accused can warn the investigator if he made use of pressures because this is against the article 422 of the Penal Code that goes as follows:

“Government official who is in charge of the criminal process, who uses force or forces a person to admit, or provokes someone for getting information, he is charged with 4 years prison.

b. An Examination Against The Accused Who Was In Arrest

With the use of skill or cunning techniques in investigation the investigator will meet 4 possibilities as mentioned above.

In the four cases we feel some psychological influence has been imposed towards the accused, that come together through his arrestation, but how far he can bear this psychological influence depends on the person.

For these who are used to jail or arrestation, they might not feel the influence but it is quite different for those who has never been arrested or for the first time get in touch with it. For them, the arrestation itself is too much to bear, and naturally will press them psychologically and mentally.

Any kind of pressure will possibly happen towards the accused who is arrest, but the events he had seen during this arrestation will also influence his inner feeling, that is:

1. There are for instance no beating or physical tortures the accused will stay in arrest for a few days.
2. They never acted roughly against the accused, but he is almost forced to see how other arrested persons are mistreated.

These kind of acts done towards a person under arrest are certainly against the Human Rights. Severe acts and physical made upon the accused through the preliminary investigation, could possibly because the investigators are not adequate in handling the investigation or are ignorant of the investigation technology.

The “Revised Regulation of Indonesia” do not give protection on the Human Rights of the accused, for the accused, can not get law assistance from lawyer. But as we have mentioned before, the act nr, 14/1970 has the competence to allow this, that the accused has the right of a law assistance or has the right to have a lawyer who can help him from the time he was arrested; but because of the absence of the execution regulation, there is a great uncertainty on the rights in this preliminary investigation. The same thing will happen again in the court law.

The other rights of the accused I can mention are among others the right to know whether he is called as an accused, or as a witness and in what case of process. This will also be noted in the order letter to the person. It is also the right of the accused to present a de charge witness. Actually it is the task of the investigator or law official to let the accused know about this right, as it is written in the article 82 sub 2 “Revised Regulations of Indonesia” as follows:

“When investigator begins, be so kind as to ask the accused if he wants witnesses to present, and if exists who those witnesses are.

That question will be noted in the official report, also in searching a house to seek for evidence, it is only possible when there is permission from the chairman of the court as noted in article 77 sub 2 “Revised Regulations of Indonesia” as follows:

“Except in the case mentioned in the next article in the search moment the public prosecution official or judge assistant cannot examine documents books and other documents, that do not included to the object that makes the act can punishable or used to do that act, if he absolutely do not get the authority from the chairman of the district court to do it.”

The authority like that is necessary too, if a search work of a house will be given to another criminal official who is looking after another. And so not all individual are aware of rights in a criminal process; therefore a law counsel/aid is absolutely necessary so that the accused will not be harmed. Further, I will present to you the rights of the accused in a examination process before the court, where a lawyers help is absolutely necessary. The reason of all this is that not all individual knows or understand how an investigation process should be held.

The Ignorance Of An Individual About His Rights And Duties As An Accused

The examination before the court is open to the public except session about sex criminals. The accused has also the freedom to present or give his rejections against the judge or prosecutor and witnesses.

The accused has also the freedom to present evidence or a de charge witnesses. During this phase the accused has the permission to get a lawyer to help him on technical juridical procedures so that the accused can use his rights as good as possible so that it will not harm him. This is in connection with the right of the accused to present an exception, a defense against the accusations of the Prosecutor, but not about the basic case, as for instance about the judge’s incompetence to judge his case or about the annulations of the accusation letter of the prosecutor. Besides that according to article 269 of the “Revised Regulations of Indonesia”, which says as:

“Question against the accused are limited with conditions that is trap questions are not allowed, whether they come from the prosecutor or from the judge”.

What is it meant by a trap question?

The above mentioned stated that a question against an act which has not been admitted by the accused or witness as being done, is directed to the accused and witnesses as if it has been admitted as true by both the accused and witnesses; the act has been denied, but the question directed has the assumption of being claimed as true. The judge, prosecutor or the lawyer are forbidden to direct suggestive questions which will produce a certain answer or which will push the accused to a certain direction. The prosecutor, the lawyer and the judge are forbidden to ask improper questions, and questions that hurt someone’s feelings. This sort of questions often come up in a trial in Indonesia. For this reason it is necessary that an accused should have lawyer so that he can protest against this or against forbidden questions directed towards accused, so he (the accused) could be protected, or can produce evidence or facts that can be used to protest against accusations given by witness. Not all person or individual who is accused is capable to produce a “pleidooi” (plea or argument) for himself and also “dupliek” (counter-plea) against the prosecutor’s accusation

I think in this case the role of a lawyer is extremely important. This role is also important for requesting an appeal, when the accused is not satisfied with the Judge’s verdict.

The district-court,

The High-court,

The Supreme-court,

In order to request for an appeal, in Indonesia, we have to follow a certain legal procedure.

This is my explanation about the necessity of an aid (legal aid) for someone in a criminal process in Indonesia. This is due to the Act of Penal code or code of criminal procedure which does not fit with the condition in Independent Indonesia, the inadequacy of the law apparatus and the ignorance of the individual on his rights and duties in a criminal process as such. Further, I am very eager to let you know about why or what factors made the code of criminal procedure are not used satisfactorily in Indonesia, where balance among the interests of the public does not always exist (or what we call public interest against individual interest), and resulted the violation of the human rights.

Although legal aid is an absolute must to the accused, this institution has not developed as we have wished, because of the following factors:

1. Traditionalism,
2. Culture,
3. Socio-Political,
4. Mental attitude,
5. Economy,
6. Education.

Traditionalism

The attitude toward traditionalism is very great. This is very obvious in an agrarian society, where authority is the symbol of truth, and thus, justified,

This attitude can be seen clearly in a rural society. The leader or the head of a village is worshipped as a person who has all the best qualities and skills. A change of attitude would not possibly take place in the near future, although communications factors in the villages will step by step leave the old pattern of thinking.

There is a notion that a protest attitude against the leader is a rebellious attitude and it means “rebellion”

This society is not exactly aware of own rights, they will always ask protection from their leader

The Code of Criminal Procedure, which gives protection to individual Human Rights is not known by them,

It is therefore that the application of the Code of Criminal Procedure and the Penal Code in some part of the Indonesian society, mostly in rural areas are not well done, because of this “take all for granted” — attitude they have.

They would keep silent, and often justify their leader’s behavior, which in a modern society would be considered wrong.

As we have said they take all for granted. On the other hand, the leaders or officials, because of the people’s attitude have difficulties in making distinctions between right and wrong according to the norms/values of a modern society.

“A leader can not do wrong”, they always say. Besides this, the Indonesians still hold the old family tradition. This tradition has given a separation line between those who are in the family and those who are outsiders.

As a family, the members are bound to live rightly and properly for the sake of the family’s honor.

The members of the family should be protected so that outsiders would not see his errors if he did one.

If this error is known by outsider, the family will have its reputation destroyed.

Punishment towards a family member who has committed an error is given indoors. I will give you some examples about the characteristics or traditionalism in a criminal process in Indonesia. For instance, physical cruellies done by a law official against a thief, is accepted by the social environment because the person who did it is an official of the Authority.

And if a law official did out of proportions physical cruelties and do not bother about the Human Rights at all and caused only a few reactions in society, it does not necessarily bring the official to be put on trial. At the most the case will be cleared internally, for instance the person will be removed to another place. I will not mention examples about these cases in daily life in Indonesia, cases in which an accused who has been deprived of his rights in a preliminary investigation process, is not capable to protest against the mistreatments he has gone through, any longer.

There are many cases like this one which were cleared internally without any trial, because if this comes out, the reputation of the family will be ruined .

A long process will be needed to break this kind of pattern of thoughts; a change from a “closed” society in dealing with problems, to an “open” society.

Culture

On the other hand, one not less important and very interesting factor in the application of the Penal Code or the Code of Criminal Procedure in Indonesia, is the surrounding culture of some societies — a factor that I think happens in some countries too. This deals with the feeling of justice of the members of this particular society whether they understand, the reason of sanctions imposed upon his wrong acts.

In some parts of Indonesia, mostly in rural areas, people still follow the legal tradition of their folks.

A very extreme example is the law of revenge, where a person's life should be paid with life. For instance humiliation will be revenged by killing, because they have ruined the prestige or the honour of the family.

To them, this act of revenge is not a criminal action, but a custom that has been going on for decades. In fact, they do not consider it as a fault. The remains of this kind of culture, can be seen clearly in rural areas, people who immigrate to live in a big city, where they consciously commit criminal acts which according to city people deserve punishment.

I think a legal aid counsel for them is necessary because they do not feel at fault at all as a result of ignorance of modern law which protects the rights of an individual.

No judge can punish, sentence (verdict) on an accused (suspect) who is ignorant of the law conduct, in the same manner towards someone who is not. The lawyer should warn the judge to be aware of the cultural environment factor where the accused comes from.

Socio-Political

Since the independence war, political crisis which also invited social crisis till 1966, intermittently occurred in Indonesia. These political crisis sometimes resulted in rebellion, disorder, even a coup'etat of the legal government.

A state of continuous emergency existed in Indonesia, resulting in the enforcement of emergency law.

Everybody with excuses, in the name of public disturbance or even for the sake of "Revolution"¹ in the years 1959-1966 can be imprisoned for an indefinite time without justice.

I do not relate, how the Sukarno regime can seize or arrest someone or one who is said to obstruct his revolution without paying attention to existing Penal Code of Criminal Procedure. Yet after the year of 1966 in a government which we call "orde baru" (new-order), the legal guarantee against the Human Rights were not fully satisfactory. I am not going to tell here about those who were directly or indirectly accused of "Gerakan Komunis/PKI" (coup d'etat by Indonesian Communist party) which failed in 1965.

Public security is more important than their individual interest. I think this happened in all countries and even more in those who employed the "people's democracy" system.

Yet gradually their individual rights were given back, living as a society. This depends on if they are truly a communist or only persuaded by the former communist. The state of continual emergency which existed in our country, had weakened the individual rights.

A law counsel institution is difficult to expand in this condition, because the enforcements of these emergency law.

Mental Attitude

The mental attitude of some law enforcers which have an authority complex, who feel that only they themselves are right, still exist in Indonesia. They are difficult to be criticized.

These mentalities are inherited from the crisis mentioned before, furthermore as inheritance of feudalism and colonialism. They feel themselves powerful to get full authority to guard against what they call public order.

Criticism is not fully accepted as a participation, but is mostly looked upon as an opponent for the authorities. In a criminal lawsuit, it is difficult or the law enforcers to watch the developments of the community around them, so that it sometimes happens that their action is felt in contradiction with the community justice. People have to obey the written law, without taking in consideration whether these rules are still suitable with the community of an independent nation. A legal assistance to an accused will be useless, if these assistance consists of new ideas, which cannot be accepted by the legal authorities.

I will not narrate, how a judge can refuse a request of dependant which will lighten the accused before the court, because the testimony of an expected witness is very important to the suspect. Though the right to refuse the request is in the hands of the judge, it is as least good to hear the testimony requested, for the benefit of the suspect.

Such a mental attitude, I think will also hinder the development of a law support Institution.

Economy

The economic development factor which is unsatisfactory to living or economic calculations, often hinders the development of a illegal aid given by a lawyer to a suspect. I shall divide these factors that is:

a) Unsatisfactory economic development.

Period to these last years, where the economic life is still unsatisfactory, the opinion of the community is still law and not balanced with the expenditure needed to fulfill one's life, greatly influencing the development of a legal aid institution.

The community concentrates its energy and mind more on the pursuit of living necessities, than to think of how to carry out the protection of basic rights. The disadvantaged party mostly do not wish to close their cases in court, but are of the opinion that it would be more useful to let it pass and then to concentrate their energy and mind on everyday's necessities. They are more attracted to material needs such as money, food and clothing than to immaterial things such basic rights and the rule of law.

b) Economic consideration factor.

On the other hand because of economic consideration, most of them who are evidently disadvantaged in a criminal lawsuit, will not demand a loss replacement through a lawsuit, because they are afraid of pressures or losses which they will suffer economically, if they bring it to court. On the other hand the attitude of some of the law enforcers can not be argued, whether they be a defendant, public prosecutor or even sometimes a Judge when they are more interested in economic "help" and rather than to pursue truth and justice in a criminal law process. This is made possible, because of the low income of those law enforcers, while their daily needs are more than their income.

I think I can give an example concerning the economic factor experienced by a certain lawyer in Djakarta, The lawyer complains, that he was disappointed because his client which strived through a law-suit in a crime (defendant), silently make an agreement with the attorney concerning the process. The accused is of the opinion, that the matter will be made easier and faster to bribe the attorney or Judge. Similar scandals like this happened, and not seldom found out and finally the parties were brought to court as the accused.

Education

Also a factor which helps in hampering the development of a legal aid institute. Education I meant here is the education on a wide scale, that is how much of Indonesian community received a middle class education, who knows exactly what their rights and duties

are. Besides education I also meant, the educational system received by the law students in Indonesia, which i think will also influence the development of a legal aid institute,

a) Community education.

I cannot mention how many of the Indonesian community clearly understand their rights and obligations.

A great part of the Indonesian community live in villages and only a handful of them are privileged to receive a middle class education in the cities. Due to economic factors, some of the village children have to leave school still on a low level, because they have to help their parents to earn a living agriculturally,

The community which received their education on the lowest level, mostly did not get knowledge and finally are not aware of the rights they possess in a legal process.

It sometime happens that they do not understand the existing law, whether they were on the injured side or on the insurer's side. It is not seldom in before the court that the accused gave his fate to the Judge, without giving correction. He has a right to get a legal aid

b). Legal Education.

A new idea is now taking place in Indonesia, in connection with the legal education for law students as lawyers to be, which will have an important role in a developing law building country. A legal education system which up until now is being accepted, as to produce lawyers which without fuss obey the law or ordinance. It does not stimulate the student to think critically, analyze, and develop logic thoughts against law which is ever growing in the community.

Up until now the student according to most lawyers receive their studies onside. A professor gives his lecture, the student accepts it without the opportunity to give his own opinion. An active lecture, where the student has a role in it is being pioneered in some law faculties in Indonesia. I say some law faculties, because not all law faculties in Indonesia is able or ready to employ this system. This is because a shortage of lectures, facilities such as good rooms and a complete library. It is now a fact, that not a kind of application on certain subjects were accepted by the law students.

A professor sometimes gives a great deal of theoretic law or lectures which were not to relevant anymore with the development with an ever changing community

This kind of education gives the student a much more passive attitude, resulting in a bad outcome, when the student becomes a lawyer. There thus becomes a passive lawyer, which protection of the basic rights of someone in the community.

In my opinion, the way of thinking of a lawyer which is followed since he was a student has an influence on the development of the law itself.