

The State's Obligation To Provide Legal Counsel For Rape Suspects Or Defendants (A Study In The Jurisdiction Of The Sharia Courts Of Aceh)

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Abstract:

Introduction: This study aimed to explain the State's obligation to provide legal counsel to the Suspect or Defendant, which in this study is specifically for the rape suspects or defendants in Aceh. According to Article 56 Paragraph (1) of Indonesian Code of Criminal Procedure No. 8 of 1981, Article 62 Paragraph (1) of Islamic Criminal Bylaw No. 7 of 2013, and other mandatory rules, legal counsel must be provided.

Research Methods: This study used empirical juridical research by conducting a comprehensive study by carrying out a direct observation of the research location and conducting an interview. Normative methods were also used to support the results of interviews conducted by examining various sources of applicable law.

Discussion: The obligation of the State in providing legal counsel has been regulated in Article 56 Paragraph (1) of the Indonesian Code of Criminal Procedure No. Article 62 Paragraph (1) of Islamic Criminal Bylaw No. 7 of 2013 and other mandatory rules, which clearly states that the State through its officials is obliged to provide legal counsel to the rape suspects or defendants at every stage of the judicial process.

Conclusion: It can be concluded that the suspect or defendant, must be given legal counsel if the criteria specified by the law have been met. Moreover, the obligation is strengthened by the jurisprudence of the Supreme Court of the Republic of Indonesia No. 1565 K/Pid/1991 on September 16, 1993, the Supreme Court of the Republic of Indonesia No. 367 K/Pid /1998 on May 29, 1998, and MA No. 545 K/Pid.Sus/2011. It is recommended to the Public Prosecutor, Judge, Police and other institutions to coordinate together so that one understanding related to the issue of legal counseling provision for suspects or defendants undergoing legal proceedings at the investigation/inquiry level until the examination stage of the court hearing.

Keywords: Legal Counsel; The Crime of Rape; Suspect; Defendant

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I. INTRODUCTION

The provision of legal counsel is a supporting tool for law enforcement in general and efforts to protect human rights. Law enforcement officers (criminal) are a component of the criminal law system, so no matter how perfect the criminal law substance without law enforcement, there is no benefit in realizing the objectives of the criminal justice system, and important instruments in the criminal justice system because it is part of the protection of human rights, especially against the right to freedom and the right to the body and soul of the suspect / defendant.¹

Aceh Province has special rules at the same level as Regional Regulations, which are called Qanun, namely Qanun No. 7 of 2013 concerning Jinayat Procedural Law Article 62 Paragraph (1), which in the Qanun explains that in the case of a Suspect or Defendant is suspected or charged with committing fingers that are threatened with Uqubat Hudud or threatening 60 (sixty) lashes or 1200 (one thousand two hundred) grams of pure gold as a fine or 60 (sixty) months in prison or more or for those who cannot afford to have their own legal counsel who are threatened with 20 (twenty) lashes or 400 (four hundred) grams of pure gold as a fine or 20 (

¹Abdussalam, *Tanggapan Atas Rancangan Undang-Undang Tentang Hukum Acara Pidana*, Jakarta: Restu Agung, 2008, p. 25.

(twenty) months of imprisonment, the official concerned with the examination in the trial process must appoint an advisor to them".²

Law No. 8 of 1981 concerning the Criminal Procedure Code, hereinafter abbreviated as KUHAP, article 56 Paragraph (1) also regulates similar matters as the contents of Article 62 Paragraph (1) of Qanun No. 7 of 2013 namely in Article 56 Paragraph (1) of the Criminal Procedure Code also explains in the event that a suspect or defendant is suspected or charged with a criminal offense threatened with capital punishment or fines of fifteen years or more or for those who cannot afford those who are threatened with a five Twelve years or more who do not have their own legal counsel, officials concerned at all levels of examination in the judicial process are required to appoint legal counsel for them.³

At the end of the sentence from the clarification of the two rules mentioned above, the word is obligatory to appoint legal counsel for them, it is clear that the appointment of legal counsel to accompany the suspect is a normative necessity. The constitutional guarantee is then manifested either through national laws that have been ratified or ratified by Indonesia as stated in Article 18 paragraph (4) of Law No. 39 of 1999 concerning Human Rights, Article 14 paragraph (3) letter d, Law No. 12 of 2005 concerning the ratification of the International Convention on Civil and Political Rights, and Aceh Qanun No. 07 of 2013, Article 62 Paragraph (1), which also states that each person examined is entitled to obtain legal assistance from the time of the investigation until a court decision has obtained permanent legal force.⁴

Based on the above explanations, it is clear that legal aid is the right of every person guaranteed by the constitution and legislation. However, in practice there are some cases of rape of the Suspect or Defendant who are not accompanied by legal counsel, and there are those who are accompanied by legal counsel. Which is the criteria for how a case must be accompanied by a legal advisor in Qanun No. 07 of 2013. Article 62 Paragraph (1) and other regulations are more than enough, but this is not fulfilled by judicial officials, the highest punishment in the qanun jinayat is punishment against rape perpetrators, which can be up to a maximum of 200 lashes. Then in the case of someone being raped or equally wanting to have sex it is very difficult to prove. Therefore, legal counsel is needed in this rape case, because the arrest or detention is based on sufficient preliminary evidence, the right to prepare a defense early.⁵The researcher is interested in further researching related to this issue, with the title of research "The State Obligation in Providing Legal Investigators for Suspects or Accused of Rape Actors (Study of Legal Areas in Aceh Syar'iyah Court)."

II. RESEARCH METHODOLOGY

In this study, researchers used empirical juridical research by conducting a comprehensive study by conducting observations or direct interviews and research locations, while to support the results of interviews conducted by normative methods, namely by examining various sources of applicable law. Data collection in this study was carried out by means of a review of interview material or primary data, which included primary legal materials, secondary legal materials, and tertiary legal materials.⁶

- 1) Primary legal material; Primary legal material in the form of laws and regulations, official documentation, Judges' decisions, who have authority relating to the problem, legal counsel not given in rape cases.
- 2) Secondary legal material. Secondary legal material is all legal material publication of unofficial documents which includes books and scientific works concerning legal issues that are not obtained by perpetrators of rape.
- 3) Tertiary legal material. Tertiary legal materials are legal materials that provide an explanation of primary and secondary legal materials, such as public dictionaries, legal dictionaries, magazines, and newspapers that are useful for this research.
- 4) To support this primary data, interviews were conducted with respondents and specified informants, namely: Respondents included PPNS investigators from Wilayahulhisba or Polri investigators, prosecutors and judges. For information, there are experts in the field of Jinayat Qanun as well as 2 people from Jinayat Procedural Law, 2 practitioners from the Legal Aid Institute.

²O.C. Kaligis, *Perlindungan Hukum Atas Hak Asasi Tersangka, Terdakwa dan Terpidana*, Bandung: PT Alumni, 2006, p. 237.

³Islamic Criminal Procedur Bylaw No. 7 of 2013, Article 26 Paragraph I.

⁴Republic Indonesia, Indonesian Code of Criminal Procedure No. 8 of 1981

⁵*I b i d.*

⁶Mohd Din, *et all, Procedure to Writing a Thesis*, Darussalam, Universitas Syiah Kuala, Faculty of Law University Syiah Kuala, p. 8.

III. DISCUSSION

A. STATE OBLIGATIONS IN PROVIDING LEGAL ADVISORS IN RAPE CASE

A legal advisor or lawyer is an advocate who is a person who is engaged in providing legal services, both inside and outside the court of law, which meets the requirements set out in the law. In conclusion, it is stated that people who work as legal professionals are called legal counsel / lawyers. ⁷This definition is taken from Article 1 number 1 of Law Number 18 of 2003 concerning Advocates with the original formulation, namely: "Advocates are people who work in providing legal services, both inside and outside the court that fulfill the requirements based on the provisions of this Law" . Legal aid itself in the Winarta record is interpreted as a concept to realize equality before the law (equality before the law) and the provision of legal services and advocacy (access to legal counsel) for all people within the framework of justice for all (justice for all). The 1945 Constitution of the Republic of Indonesia also expressly regulates the provision of legal counsel, that is, precisely in Article 28 D Paragraph (1), which contains "every person upon recognition, guarantee, protection, and fair legal certainty. The purpose of being fair here is that the Law refers to a rule of life that is in accordance with the ideals of living together."⁸

Basically the granting of legal counsel to the Defendant or Defendant both in rape cases or in other criminal cases, must fulfill several conditions that already exist in the existing rules, as in Article 56 Paragraph (1) Undang- Undang No. 08 of 1981, namely the Book of Shrimp Criminal Procedure Law which in its contents explains the criteria for what must be given legal counsel, including:⁹

- a) Threatened with capital punishment.
- b) Threatened fifteen years or more.
- c) Not able, with threats of a five-year prison sentence or more.
- d) Don't have your own legal advisor.

From the above criteria, if we refer back to Article 56 Paragraph (1) of Law No. 08 of 1981, concerning the Criminal Procedure Code, the official concerned, must appoint both the suspect and defendant legal counsel in each court process. but in practice, if we look at the decisions of judges that have reached the above criteria, they are not accompanied by legal counsel. Then in the Aceh regional regulation namely the Qanun, the Jinayat Program also regulates similar things as regulated by Law No. 08 of 1981, namely the criteria for what must be given a legal advisor, namely in Article 62 Paragraph (1) Qanun Acar Jinayat No. 07 of 2013, namely:¹⁰

- 1) Suspect or Defendant, who is suspected or charged, who is threatened with 60 lashes.
- 2) Suspect or Defendant, who is suspected or charged, who was fined 1200 grams of pure gold.
- 3) Suspect or Defendant, who is presumed or charged, who is threatened with 60 months imprisonment or more.
- 4) Suspect or Defendant, who is suspected or indicted, who is unable to have legal counsel, who is threatened with 20 lashes, or 400 grams of pure gold, or 20 months in prison.

From the two explanations of the rules that must be given legal counsel above, it should be in the Rape case that occurred in Aceh, which was transferred to the Syar'iyah Kutacane Court and the Syar'iyah Lhokseumawe Court had met the criteria for a legal advisor to be given, as in the rape case with the Syar Court's Decision 'iyah Kutacane No. Case register I / JN.B / 2018 / Ms.Kc, the suspect or the Laughter has fulfilled the criteria that must be given a legal advisor in which the Defendant or Defendant is sent to him is uqubat Ta'zir with Uqubat imprisonment for 175 (one hundred seventy-five months imprisonment / 14, 5 years).¹¹

Gustav Radbruch's Theory, it is explained that there are 3 (three) basic legal values, namely justice, expediency and certainty. In every dispute, justice is a relative and subjective value. Even justice is clearly stated in terms of a sense of justice. The sense of justice is said to be relative because there are no absolute and

⁷Andi Sofyan dan Abd. Asis, *Hukum Acara Pidana: Suatu Pengantar*, (Jakarta: Kencana Prenada Media Group, 2015), p. 110.

⁸Advocates' requirements as regulated in Law Number 18 of 2003 concerning Advocates are (1) Citizens of the Republic of Indonesia; (2) Residing in Indonesia; (3) No status as a civil servant or state official; (4) At least 25 (twenty-five) years old; (5) Graduated bachelor degree with a legal higher education as referred to in Article 2 paragraph (1); (6) Pass the exam conducted by the Advocate Organization; (7) Internship for at least 2 (two) years continuously at the Advocate's office; (8) Have never been convicted of a criminal offense threatened with imprisonment of 5 (five) years or more; (10) Behave well, be honest, be responsible, be fair and have high integrity. These ten conditions are mentioned in Article 3 paragraph (1) of the Advocate Law.

⁹*Ibid.*

¹⁰*Ibid.*

¹¹Nur Agus Susanto, *Jurnal Yudisial*, Vol. 7, No. 3, p. 218.

universal benchmarks. It is said to be subjective because someone's sense of justice is always different from others' sense of justice because everyone has their own sense of justice which is not necessarily the same as someone else's sense of justice. In this case justice according to Gustav Radbruch will only be achieved or will only be said to be fair if there is equality before the law, does not side with one party, does not harm others, if all three points have been fulfilled, then something can be said to be fair.¹²

Rape cases in Kutacane (Aceh Tenggara) and Lhokseumawe, the suspect or defendant in both cases of rape were not accompanied by legal counsel, which according to the rules, and according to the criteria was more than enough for the suspect or defendant to obtain legal counsel. According to the data that researchers got from the Aceh Syar'iyah Court, there were 11 rape cases that occurred in 2016, 7 rape cases that occurred in 2017, 19 rape cases that occurred in 2018, and 20 rape cases that occurred in 2019, which from year to year according to data obtained by researchers, there are cases of rape accompanied by legal counsel and some are not accompanied by legal counsel, if viewed from the perspective of justice stated by Gustav Radbruch, then in the case there is no justice, namely officials concerned does not evenly provide legal counsel to Suspects or Defendants who have met the criteria required to be given legal counsel, then the official concerned has harmed the Suspect or Defendant due to not giving the right of the Defendant or Defendant who according to the rules is obliged to provide legal counsel. Basically, every rape perpetrator must be accompanied by a legal advisor, because it tends to be the sentence imposed on the perpetrators of rape that is definitely a heavy sentence, in addition to a heavy sentence. However, if guided by the editors contained in the rules governing the obligation to provide legal counsel, such as article 56 Paragraph (1) of the Criminal Procedure Code, and Article 62 Paragraph (1) of the Qanun on the Jinayat Event, the officials concerned in the rape case occurred in Kutacane and Lhokseumawe has fulfilled the appeal of the regulation, that is, has appointed legal counsel for the suspect or defendant, but that is apart from the mandatory words in the regulation, so that if it has been appointed but the suspect or defendant refuses to be given legal counsel, the relevant officials feel they have fulfilled their obligations, whereas if the mandatory words contained in these rules are something that must exist, something that must not be absent, which the suspect or defendant has met the mandatory criteria to be accompanied by legal counsel in accordance with the jurisprudence of the Indonesian Supreme Court No. 1565 K / Pid / 1991 dated September 16, 1993, the Supreme Court of the Republic of Indonesia with No 367 K / Pid / 1998 dated May 29, 1998, and MA No. 545 K / Pid. Sus / 2011.

IV. CONCLUSION

1. **Conclusion:** The conclusion of this research, the suspect or defendant, must be given legal counsel if the criteria specified by the Law have been reached, even the obligation is strengthened by the jurisprudence of the Supreme Court of the Republic of Indonesia No. 1565 K / Pid / 1991 dated September 16, 1993, the Supreme Court of the Republic of Indonesia with No 367 K / Pid / 1998 dated May 29, 1998, and MA No. 545 K / Pid. Sus / 2011.

2. **Suggestions:** It is recommended to the Public Prosecutor, Judge, Police and other agencies to coordinate together so that one understanding is related to the problem of legal counseling for suspects or defendants undergoing legal proceedings at the level of investigation, investigation and examination at the court hearing.

REFERENCE

- [1]. Qanun No. 7 tahun 2013, pasal 26 ayat I, tentang Hukum Acara Jinayat.
- [2]. Undang-undang No. 8 tahun 1981, Pasal 56 ayat I, Tentang Hukum Acara Pidana.
- [3]. Abdussalam, *Tanggapan Atas Rancangan Undang-Undang Tentang Hukum Acara Pidana*, Jakarta: Restu Agung, 2008.
- [4]. O.C. Kaligis, *Perlindungan Hukum Atas Hak Asasi Tersangka, Terdakwa dan Terpidana*, Bandung: PT Alumni, 2006.
- [5]. Andi Sofyan dan Abd. Asis, *Hukum Acara Pidana: Suatu Pengantar*, (Jakarta: Kencana Prenada Media Group, 2015).
- [6]. Frans Hendra Winarta, *Bantuan Hukum di Indonesia: Hak untuk Didampingi Penasihat Hukum bagi Semua Warga Negara*, (Jakarta: Elex Media Komputindo, 2011).
- [7]. Arto, A. Mukti, *Redefinisi Fungsi Pengadilan sebagai Penegak Hukum dan Keadilan: Kajian Teoritis dan Pragmatis Penyelenggaraan Peradilan Guna Membangun Paradigma Baru. Varia Peradilan. IKAHI Mahkamah Agung Republik Indonesia*, Jakarta: 2011.
- [8]. Nur Agus Susanto, *Jurnal Yudisial*, Vol. 7, No. 3.

¹²Arto, A. Mukti, *Redefinisi Fungsi Pengadilan sebagai Penegak Hukum dan Keadilan: Kajian Teoritis dan Pragmatis Penyelenggaraan Peradilan Guna Membangun Paradigma Baru. Varia Peradilan. IKAHI Mahkamah Agung Republik Indonesia*, Jakarta: 2011, p. 78.

- [9]. Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana (Perkembangan Penyusunan Konsep Baru KUHP Baru)*, Jakarta, Kencana, 2008.
- [10]. Barda Nawawi Arief, *Kapita Selekta Hukum Pidana*, Bandung, Citra Aditya Bakti, 2010.

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