



Adversary System in Common Law Countries and Possibility for Implementation in Indonesian Court

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ARTICLE INFO

Keywords:

Justice, Adversary System, Criminal Justice System.

How to cite:

Nirmala, Puspita. (2020). Adversary System in Common Law Countries and Possibility for Implementation in Indonesian Court. *Amsir Law Journal*, 2(1), 12-20.

DOI:

10.36746/alj.v2i1.28

ABSTRACT

This research tries to open the possibility of implementing an adversary system which is very closely related to the common law system in Indonesia, especially concerning the “The Rights of the Accused” in the criminal justice process. This research is carried out normatively by conducting legal studies through literature and legislation. The result of this research is that if the accused declared himself guilty of the crime he committed, this means that the accused will lose his right to be tried and processed fairly trial in the common law system. If a defendant is declared guilty, then the next process is the conviction without trial, in which case there are weaknesses in the rights of the accused that should have been carried out through a jury trial. Is it possible to apply in Indonesian courts? Is it not contrary to the norms contained in the Code of Criminal Procedure (KUHAP), especially regarding the rights of suspects relating to human rights (HAM), such as equal treatment before the law; put forward the presumption of innocence; the right to compensation; right to legal assistance; the defendant's rights before the court; a free, fast and simple trial; and a court that is open to the public. However, if possible in Indonesia to switch to the adversary system, the judge's role can be limited only as a referee to allow the creation of a fair trial. The party in charge of deciding whether or not the defendant is right is the jury.

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1. Introduction

Law enforcement is one of the efforts to create security and order in the community, whether in the form of prevention or eradication or prosecution after a law violation occurs. If the laws which are the legal basis for determining the actions of law enforcers are

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not by following per under the Pancasila view, which is the way of life of our nation, then, of course, law enforcement will not achieve its goals.

The Law of Criminal procedural has the objective of seeking and obtaining material truth, namely the most detailed truth as possible from a criminal case by applying the provisions of the criminal procedure law honestly and accurately. The provision in question is to find an offender who can be charged with a violation of the law, to conduct an examination, and to give a decision from the court to determine whether a criminal case has been committed and whether the person accused can be stated guilty.

After the court ruling was released and all legal efforts have been made, finally the verdict has permanent strength. Therefore, the criminal procedure law assists in the implementation and supervision of the decision (Department of Justice the Republic Indonesia). Judge Decisions are a more powerful tool for the functioning of statutory regulations. The decision that is released from the judge is more real and clear by the existing facts, it will even enliven a sense of justice to the community compared to abstract regulations and still needs to be verified.² The hopes and ideals of law enforcement if law enforcement officers can function the law properly to realize these legal objectives. Judges have a role in law enforcement, through judicial procedures. It is hoped that the appropriate decisions will be made sense of justice for the community.³

Judicial institutions will still be a concern for society to see whether justice can be obtained in real life in the state. Through the courts, it will be tested and seen how the state protects the interests of its people, the way the state resolves legal problems faced by the people, the way the state treats and imposes legal sanctions on violators of the law, and the independence and freedom of judges in giving decisions to provide a sense of justice. The Indonesian people currently lack or do not trust law enforcement officers due to the abuse of power which is known as the popular term judicial corruption that has occurred in the lowest court to the highest court.

In principle, although the decision of the district court has been tested through an appeal process by the High Court, then at the level of Cassation by the Supreme Court, the public sometimes does not fully trust a court decision that is quality, true, honest and fair.⁴ The decisions issued by the Court, both at the first and final levels, are deemed unable to reflect a sense of justice for justice seekers, because the quality of the decisions does not reflect the values of truth and justice. How is the process of the justice system, especially the criminal justice in Indonesia, able to answer this?

In a developing legal system, there is a system to assess the quality and objectivity of decisions issued by judicial institutions. The system in question is the relationship with the defendant as the accused, where the judge decides a criminal case according to the demands presented at trial. In the UK, the criminal justice system recognizes the existence of the Adversary System that is, a negotiation between the accused and the public prosecutor and his defense. The purpose of these negotiations is to speed up the process of solving criminal cases. The nature of the negotiations must be based on the willingness of the accused to admit his mistakes and the willingness of the public prosecutor to threaten the punishment desired by the accused or his defense, and the participation of the judge as deciding the case.

² Musakkir. (2013). *Putusan Hakim yang Diskriminatif dalam Perkara Pidana; Suatu Tinjauan Sosiologi Hukum dan Psikologi Hukum*. Yogyakarta: Rangkang Education & Republik Institute, p. 24.

³ *Ibid.*, p. 23.

⁴ Aristeus, Syprianus. (2008). *Eksaminasi Terhadap Putusan Hakim sebagai Partisipasi Publik*. Jakarta: Badan Pembinaan Hukum Nasional Departemen Hukum dan Hak Asasi Manusia RI, p. 6.

In the Adversary System we can see that if the accused finds himself guilty of the crime he committed, this means that the accused will lose his right to be tried and processed fairly. If a defendant admits that he is guilty, the next process is to directly impose a criminal sentence. If we look at the Indonesian law, this system has weaknesses in the rights of the accused which should be carried out through a jury trial. Thus the Adversary system conflicts with the legal system in Indonesia. Even if a person is accused of being the perpetrator of a criminal act, within the scope of human rights, as well as the rights of the suspect in the Criminal Procedure Code in Indonesia, especially regarding equal treatment before the law without any discrimination, the presumption of innocence, right to compensation, right to obtain legal aid, the right to attend the defendant before the court, a free, fast and simple trial; the judiciary remains open to the public.

From this legal issue then the problem is formulated, that is about how to protect the accused in criminal justice using the Adversary System, especially in countries that adhere to the Common Law system? And, is it possible for legal protection to use the implementation of the Adversary System in Indonesian courts?

2. Method

This research uses a normative juridical approach, which is a method or procedure used to solve problems by examining secondary⁵ data by promoting analytical prescriptive descriptions.

3. The Protection of the Accused in the Common Law Criminal Justice System with the Use of the *Adversary System*

In the criminal law (procedure) system in the United States, the Adversary System is an integral part of the entire applicable law enforcement system, so that this method is included in one of the formal and legal procedures. This practice is known as the “plea bargaining system.” In the adversary system, in handling criminal cases, the party who is the plaintiff is the state representing the victim and the interests of the community, and the defendant is the accused. The defendant is usually represented by the defense (defense attorney), while the state is represented by the prosecuting attorney.

The party who in charge of finding the truth of the facts and being impartial is usually represented by the jury. If an accused refuses to be tried by a jury, the judge can serve as a discoverer of the truth of the facts presented in the trial.⁶ In the adversary system, the principles used in the criminal justice system are as follows:

- 1) The criminal justice procedure must be a “Dispute” between the accused and the prosecutor in the same position before the court.
- 2) The main objective of the procedure is to resolve disputes which arise by the result of crime.
- 3) The use of methods for filing objections or statements (pleadings) and the existence of a guarantee and negotiation agency is not only a necessity, it is very important. This is to strengthen the existence of contests between parties and accurately define the boundaries of the rules of the game in the criminal justice system.
- 4) The parties have a clear and autonomous function, that is, the prosecutor carries out the prosecution, the accused rejects or refutes the accusation. The prosecutor

⁵ Soemitro, R.H. (1998). *Metodologi Penelitian Hukum dan Jurimetri*. Jakarta: Ghalia Indonesia, p. 10.

⁶ Atmasasmita, Romli. (2003). *Bunga Rampai Hukum Acara Pidana*. Bandung: Bina Cipta, p. 71.

determines which facts must be proven accompanied by supporting evidence, the accused determines which facts presented in court are favorable to his position.

- 5) The role of the judge as a neutral referee in disputes is to comply with the rules of the trial. Judges are only active when one of the parties objects to the arguments presented.
- 6) More oriented someone's protection the innocent.
- 7) Relating to this principle, the role of the judge is to observe the contestants who are in litigation that is the public prosecutor, the accused, and the judge as an impartial referee. The truth can only be obtained through or disclosed by giving equal opportunities to each party (contestant) to submit arguments accompanied by supporting evidence, for which the judge is expected to determine his decision.
- 8) When exactly the Adversary System was born, it is not known. This system has developed throughout the history of the "common law system" ruling mainland America.⁷ Professor Albert Alschuler in Romli has carefully revealed the history of the "plea bargaining system" in part f of his article. "Plea Bargaining and Its History (1979), highlighted the differences between the practices described above common law and the era of development in the current version of plea bargaining." During the "common law" period, an accused was given non-cruel treatment, because he had assisted the public prosecutor in prosecuting another person in a particular case, but not because he (the accused) had made prosecution easier, or because he (The accused) have done well to the victim, against whom he committed the crime. During the "Common law" period, the practice of negotiating in the interest of obtaining information (bargaining for information), as well as the practice of negotiating for the benefit of restitution (Bargaining for restitution), did not place an accused (involved in the negotiation) in the same position. with an accused who is involved in negotiation practice with the public prosecutor in which he (the accused) confesses his guilt (Bargaining for his plea of guilty).⁸

According to Romli, the description of "plea bargaining" is as follows:

- 1) "Plea bargaining" is essentially a negotiation between the public prosecutor and the accused or his defense.
- 2) The main motivation for the negotiation is to accelerate the criminal case handling process.
- 3) The characteristic of negotiation must be based on the accused's "volunteerism" to admit his mistake and the public prosecutor's willingness to threaten the punishment desired by the accused or his defense.
- 4) The judge's participation as a referee is not allowed.⁹

Observe the description related to the plea bargaining system above, if the accused finds him guilty of the crime committed, this means that the accused will lose his right to be tried and processed in a fair trial. In the criminal justice system in America in general, it is clear that this plea bargaining occurred during the "arraignment" and "preliminary hearing" periods. If a defendant pleads guilty, the next process is the imposition of a punishment without going through the trial. Conversely, if the accused states not guilty, the case will be tried through trial stages with the jury.

⁷ Atmasasmita, Romli. (2006). *Sistem Peradilan Pidana (Eksistensialisme dan Abolisionisme)*. Bandung: Bina Cipta, p.106.

⁸ *Ibid.*, p. 107.

⁹ Soeharto. (2007). *Perlindungan Hak Tersangka, Terdakwa, Korban dan Tindak Pidana Terorisme dalam Sistem Peradilan Pidana Indonesia*. Bandung: Refika Aditama, p. 73.

Generally, it can be said that the function of a criminal procedure law is to limit the power of the state in protecting every citizen who is involved in the criminal justice process so that it is expected to be guaranteed protection of suspects and defendants from the actions of law enforcement officials. Thus, the same law also provides limitations on the human rights of its citizens. According to E. Utrecht, the law is the limitation of a set of rules in the form of orders and prohibitions that govern the order of a society and therefore must be obeyed by the community. Law cannot be separated from power (force).

Authorization itself often comes from the formal authority which gives authority or power to a person or party in a particular field. Without authorization, the law will be nothing but a contained social rule mere recommendation. The law recognizes forms of coercion, in that the authority to force itself is regulated, both in terms of means and space or its implementation by law. Thus the relationship between law and authorization in society can be concluded that the law requires power for its implementation, and vice versa, authorization itself is limited by law.

The Adversary System of criminal justice in the United States, it contradicts the paradigm of the original purpose of the criminal justice system which further protects the accused. Because of this system, the rights of the accused cannot be implemented according to the stages of the trial, the right of the accused to meet with witnesses, the right to refuse to admit guilt voluntarily, get witnesses who relieve the accused, the right to be tried by a jury, The right to file a defense is a human right of the accused violated by plea bargaining with this system. In the practice of handling criminal cases in America with a plea bargaining system, it still raises pros and cons. Which is the case between the accused's statements of guilt with the ultimate goal of punishing someone who is truly guilty, because the accused will lose his right to be tried by a jury? The accused lost the opportunity to meet with witnesses who were mitigated.

4. Regarding the Possibility of Adversary System Implementation Schemes in Indonesian Court

In Indonesia, the criminal justice system is known to have police investigators, the prosecutor, in this case PU, court and Correctional Institution as law enforcers of their respective countries determined the limits of its authority. In the framework of law enforcement by following per under the Criminal Justice System, The National Police is in charge of investigating criminal acts, which in essence are a form of law enforcement regulated in legislation considering that many criminal investigations have to do with human rights matters.

Article 1 No. (1) of Law No. 39/1999 concerning Human Rights formulates the definition of Human Rights as a set of rights inherent in the nature and existence of humans as God which must be respected, held in the highest esteem, and protected by the state, law, Government, and all people to protect human dignity and worth. So human rights are natural rights that come from Allah, so that no person or any power in this world may take away the basic rights inherent in humans from birth. Only by respecting and upholding these natural rights can humans live by following per under their human dignity.

Human rights are characterized by two characteristics. First, the balance between rights and obligations; second, the balance between individual interests and the interests of society. So it includes individual human rights and community rights. Rights and obligations are inherent and integral to the law. Individual rights and obligations always connote the rights and obligations of other members of society. Human rights, in essence, contain two faces; these are Human rights in the meaning of human rights, and human

rights in the meaning of human rights. These are two aspects that are both characteristic and legal identity, namely the human aspect and the social aspect. About concerning human rights, the rights of suspects in the Criminal Procedure Code in Indonesia, namely:

- 1) Equal treatment before the law without any discrimination,
- 2) Presumption of innocence;
- 3) The right to obtain compensation;
- 4) Right to get legal assistance;
- 5) The right to attend the defendant before the court;
- 6) Free, fast, and simple trial;
- 7) Judiciary that is open to the public.

Considering that the Criminal Procedure Code in Indonesia is more than a quarter-century, it is necessary to renew it so that it is in line with the development of science and technology as well as the development of society and the development of international regulations. Therefore Indonesia has ratified several international conventions concerning human rights, especially those directly related to criminal procedural law, these are International Covenant on Civil and Political Rights. One of the articles in the ICCPR regulates requires that if a person is arrested, he must immediately be brought to the judge for detention. In the Criminal Procedure Code, the detention period for suspects is considered too long and contradicts the ICCPR which has been ratified by Indonesia. The provisions in ICCPR which become a consideration in reforming criminal procedural law in Indonesia to prioritize the rights of suspects.

The purpose of criminal procedural law is to obtain the essence of truth or substantive truth; whereas the method of seeking the truth is carried out before a court session presided over by a judge. Procedurally states that there are two types of ways to find the truth in criminal proceedings, those are non-adversarial type (inquisitorial) and adversarial type (accusatorial). The inquisitor type is adopted by countries that adhere to the civil law system, while the accusatory type is adopted by countries that adhere to the common law system.

The adversarial (accusatorial) type comes from the word adversary which in English means face to face. Therefore starting from a doctrine that a defendant is a subject who has the same position as the state (in this case represented by the public prosecutor. In the criminal justice system that faces to face, to achieve justice, then both prosecutors and perpetrators were allowed to collect evidence and look for witnesses. Starting with a non-neutral police investigation, and direction on gathering evidence that can prove the guilt of the accused. However, the judge between two parties fighting for the truth, compete in front of impartial decision-makers, that is judge or jury who doesn't know the case at all, because without the provision of BAP (Documents of Examination).

Both parties must argue based on the oral testimony of witnesses that can be tested by opponents, the proceedings are based on jurisprudence (case law) rather than based on the procedural law. In jury-system countries, legal laymen are included as jurors (members of the jury), participate in the trial, and determine whether the defendant is guilty or not. Otherwise, the suspect type inquisitor is considered an object to be examined. This examination is attempted to obtain the confession of a suspect or defendant in various ways, including torture,¹⁰ while investigations at the pre-trial stage of the court are more

¹⁰ Michibeby 11/2012, *Asas-Asas dalam Hukum Acara Pidana*. Available from: <<https://michibeby.wordpress.com/2012/11/20/asas-asas-dalam-hukum-acara-pidana/>>. [Accessed: March 2018].

neutral because those who reveal all the means of evidence to obtain the truth are led by the investigating judge.

Judges are professional because the judge's position is filled with a bachelor of law. And judges play a more active role in leading the course of the process, call the witnesses and questioning him with lawyers and prosecutors and judging by adhering to case examination files. BAP position in adhering countries the common law system does not exist to form the basis for the prosecution of prosecutors and judges. The file is only an unofficial document whose evidentiary value is insignificant. It is different from countries that adhere to a civil law system. BAP made by the police indeed prepared as an official report from the results of a complete and formally correct police investigation. However, in Indonesia, which adheres to the civil law system, the BAP is documentary evidence (including written documents), but it must also not be forgotten that valid witness testimony is that which was given at trial.

Likewise, with the Netherlands, the BAP is only used as a guideline by the judge, because what is considered valid witness testimony is that which was spoken before the trial. In civil law (Including Indonesia) the criminal process is written so it is called paper justice. Process type cases that are non-adversarial (inquisitorial) and adversarial (accusatorial) in the present reality, there is no longer any pure type. The continental European model of the criminal process is inquisitorial but has been influenced by the accusatory system. Otherwise, the American-British model of criminal proceedings and all jurisdictions who adhere to the common law, the backrest is an accusatory but some passages are similar to the type of the inquisitor. The combination of the two types is known as a hybrid model or mixed type model.¹¹

Criminal courts in Indonesia have used HIR as their legal basis. It should be understood, HIR itself adopts a mixed system or the mixed type which is characterized by being given a big role to the public prosecutor, either as the investigator or as the public prosecutor. The next characteristic is an open trial attended by the defendant and the public prosecutor. The defendant and his legal adviser are still allowed to study the case files before the trial begins. Some of the views that state that HIR adheres to the inquisitor system because he still recognizes it as a valid proof of evidence so that he uses coercion to obtain a confession, this is one of the characteristics of the inquisitor system, but that does not mean that HIR is an inquisitor.¹²

The enactment of the Criminal Procedure Code (KUHAP) replacing HIR brought several changes to the criminal system in Indonesia. One of the most fundamental changes is that normatively the Criminal Procedure Code pays more attention to and respects the rights of suspects, which previously during the HIR period, was solely aimed at achieving legal order and certainty, without pay attention to the issue of whether the existing system has taken into account the protection of the dignity of the suspect.¹³ KUHAP changes the evidence of a suspect or defendant's confession to the statement of the defendant. By changing the confession of a suspect or defendant to the statement of the suspect or defendant, it is hoped that it can eliminate the mindset of law enforcement officials to

¹¹ Belajar Memahami Hukum 04/2012, *Pertumbuhan dan Perkembangan Sistem Peradilan Pidana*. Available from: <<https://ianbachruddin.blogspot.co.id/2012/04/pertumbuhan-dan-perkembangan-sistem.html>>. [Accessed: February 2018].

¹² Atmasmita, Romli. (1996). *Sistem Peradilan Pidana; Perspektif Eksistensialisme dan Abolitionisme*. Bandung: Binacipta, p. 50.

¹³ *Ibid*.

extort confessions, and also give implication on protecting the freedom of the suspect or the accused in giving testimony.¹⁴

Besides thoughts want to make reforms regarding human rights, then wishes to make corrections to law enforcement action such as police, prosecutors, and others in the form of curbing fraud, abuse of authority, and other acts must be done maximally so that law enforcement takes place properly and therefore directed into the form of vertical surveillance and horizontal surveillance. There were more human rights violations because of the arbitrary authority which is in the form of improper detention or illegal arrest.¹⁵

Required certain actions where the action will violate someone's human rights is an act of coercion necessary for an investigation so that it can bring someone before a court because they are accused of having committed a criminal act. However, after all the forced efforts that are carried out must comply with the rules which have been stipulated in the law. So that someone who is suspected or accused of having committed a criminal act, know their rights and the extent of the authority of the law enforcement officers to carry out such coercive measures, where the action will reduce their human rights.¹⁶ Law enforcement officers in carrying out their obligations as law enforcers can not be separated from the possibility to act not by the provisions of the applicable law so that actions are carried out for examination for the sake of creating justice and public order sometimes it results in losses for the suspect, the suspect's family or other interested third parties. Therefore, it is necessary to guarantee the protection of human rights from the state apparatus.

5. Conclusion

If the accused states him guilty of the crime committed, this means that the accused will lose his right to be tried and processed in a fair trial. When the accused states guilty, then the next process is the imposition of a punishment without going through the trial, in which case there are weaknesses in the rights of the accused which should have been carried out through a jury trial. Especially in Indonesia, the Criminal Procedure Code contains human rights values or the rights of suspects, such as equal treatment before the law without any discrimination; presumption of innocence; the right to compensation; the right to legal assistance; the right to attend the defendant before the court; a free, fast and simple trial; a court that is open to the public. If Indonesia switches to an adversary system, the judge's role is limited to being the referee which allows the creation of a fair trial. The party in charge of making decisions whether or not the defendant is the jury. "Living justice, who knows the public, who in this case is represented by the jury."

Although the adversary system is commonly used in countries based on the common law system, this does not mean that Indonesia has to switch to common law to implement the adversary system. There is no need to take the whole. Gradually, as a country that is loyal to the Napoleonic Code, the French legal system has succeeded in implementing the adversary system without bothering to move to common law. It is time for the pretrial system to be improved and strengthened disagrees with the idea of abolishing pretrial also wants the suspect's rights during the examination stage to be protected. The information on the results of the examination should have been obtained through violent means considered invalid.

¹⁴ Pangaribuan, Aristo M. A., dan Arsa Mufti. (2017). *Pengantar Hukum Acara Pidana Indonesia*. Jakarta: Raja Grafindo Persada, p. 31.

¹⁵ Harahap, Yahya. (2003). *Pembahasan Permasalahan dan Penerapan KUHAP; Penyidikan dan Penuntutan*. Jakarta: Sinar Grafika, p. 68.

¹⁶ *Ibid.*, p. 82.

Acknowledgments

I thank the editorial team of Amsir Law Jurnal for publishing my writing in volume 2 (1), October 2020.

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Conflict of Interest Statement:

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