
***Amicus Curiae* In The Criminal Evidence System In Indonesia**

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Abstract

The Criminal Procedure Code in Indonesia is not known to other parties, other than to law enforcement officers who represent victims (Investigators or Public Prosecutors), suspects (Legal advisors) and Judges. However, in civil law, there are known other parties who are interested in entering into a dispute known as *intervient*. The idea of a third party that has an interest in the realm of civil law is made into the forerunner of a third party in criminal procedural law in Indonesia. Against such conditions in criminal law known as the term "*Amicus Curiae*" or often referred to as "Friends of Court" or in Indonesian is known as "Friends of the Court". Regarding how the existence and opportunities for the implementation of "*Amicus Curiae*" in the Criminal Procedure Code in Indonesia in the future that will come will be assessed by normative methods with conceptual, historical, and legislative approaches.

Keywords: *Amicus Curiae*; Criminal Procedure Code; Criminal Proof System

I. INTRODUCTION

Society is composed of various individuals who have different wills, in fulfilling the will of the individual sometimes there is friction between individual interests with one another which often gives birth to a dispute (*pedata*) and crime. Against crimes that occur in the community, the criminal law functions. Criminal Law according to Eddy O.S. Hiarij is as follows:

“The rule of law of a sovereign country, which contains actions that are prohibited or ordered, is raided by criminal sanctions for those who violate or who do not comply, when and in what cases the criminal sanctions are imposed and how the implementation of the criminal sanction is imposed by the state” (Eddy, 2016).

Criminal Law is divided into 2 (two) in terms of the form of material criminal law (substantial) and formal criminal law (procedural) or better known as the Criminal Procedure Code. Whereas in criminal procedure law we are known to have several stages, namely starting from the stage of investigation (including in the investigation), Prosecution, Trial until the execution of the verdict.

Whereas in a crime that occurs the victim is represented by the state through its law enforcement officers (related to the Social Contract Theory) dealing with the perpetrators (can be through their legal counsel). In the trial, the law enforcement officers are divided into their respective duties and functions, where the Prosecutor as the Public Prosecutor while the Judge is tasked with examining and adjudicating. So that in the trial there were 3 (three) parties, namely: 1) Public Prosecutor (representing the victim), 2) Defendant (or through his Legal Counsel) and 3) Judges who tried and decided.

Whereas in the Criminal Procedure Code in Indonesia there is no known other party, other than to law enforcement officers who represent victims (Investigators or Public Prosecutors), suspects (Legal advisors) and Judges. However, in civil law, there are known other parties who are interested in entering into a dispute known as *intervient*.

In legal developments it became known "*Amicus Curiae*" or often called "*Friends of Court*" or in Indonesian is known as "*Friend of the Court*". *Amicus Curiae* is a legal concept derived from the Roman legal tradition, which later developed and practiced in tradition *Common Law System*. Through mechanism *Amicus Curiae*, the court is given permission to invite third parties to provide legal information or facts relating to issues that are not yet familiar ("*Delik Kesusilaan dan Kemerdekaan Pers dalam Perkara Majalah Playboy di Indonesia (Amicus Brief)*," 2011). *Amicus Curiae* interpreted as "someone who is not a party to the litigation, but who believes that the court's decision may affect its interest". Freely, *Amicus Curiae* is translated as a party that feels an interest in a case giving its legal opinion to the court ("*Delik Kesusilaan dan Kemerdekaan Pers dalam Perkara Majalah Playboy di Indonesia (Amicus Brief)*," 2011). Applicant *Amicus Curiae* called amici(s) whereas if the applicant is more than one person / organization it is called "*Amici Curiae*" (Aminah, 2014).

That *Amicus Curiae* Practice has been carried out by several institutions such as Indonesia Media Defense Litigation Network (IMDLN), Institute for Criminal Justice Reform (ICJR), Institute for Community Research and Advocacy (ELSAM) and Indonesian LBH Foundation (YLBHI) (Aminah, 2014).

The research about *Amicus Curiae* has been done by Jonas (2015), he state in Botswana, *Amicus Curiae* participation is still at a nascent stage. This is due primarily to inflexible rules of standing and the general lack of knowledge of the potential usefulness of the institution by the judiciary. This article argues that to enhance amicus participation in litigation, thereby strengthening the epistemological quality of its public law jurisprudence, Botswana must pay close attention to the practices and experiences of South Africa where amicus participation has resulted in the phenomenal growth of constitutional jurisprudence (Jonas, 2015). Vijoen and Adebe (2014) in their research state thus far, the use of *Amicus Curiae* interventions before the African regional human rights bodies has been negligible. In order to ensure greater participation by amici, this article suggests that the possibility of amicus intervention should be unequivocally provided for under each of the applicable legal regimes, that the grounds for accepting or rejecting interventions should be clearly articulated, and that access to information about pending cases should be provided routinely (Viljoen & Abebe, 2014). Marin and friends (2018) findings reveal the wide-range of extra-legal sources used in amicus briefs, and that the type of extra-legal sources incorporated may be associated with who the amici are and which party they support. Ultimately, we discuss potential reasons for the differences observed in the use of extra-legal sources and offer recommendations to more effectively engage in the policy briefing process (Marin, Garces, Miksch, Yun, & Horn, 2018).

Based on the background above, the author is interested in discussing the issue, namely how the position of *Amicus Curiae* in the Criminal Procedure Code in Indonesia that this paper examines the General Review of *Amicus Curiae* and also its position in the Criminal Procedure Code both at the level of investigation, prosecution and the Court.

II. DISCUSSION

Amicus Curiae in the Criminal Procedure Code in Indonesia

Black's Law Dictionary define that *Amicus Curiae* as a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter someone who has no relationship and interests with the parties in a case, but submits his opinion to the court or is asked for his opinion by the court to provide written information about the substance of a case that has a strong connection with that person or the public interest) (Januardy & Prayogy, 2016). While Hukumpedia provides a fairly short definition, namely "*parties who feel an interest in a case, give their legal opinion to the court. 'The involvement of interested parties in a case is only limited to giving an opinion, rather than making resistance such as derden verzet'*". Whereas Siti Aminah gave the definition of *Amicus Curiae* as:

- 1) Someone, a group of people or organizations that have no relationship and interests with the parties in one case,
- 2) have interest and have an interest in the results of court decisions,
- 3) by giving opinions / information based on their competence regarding legal or legal facts or other

- matters related to the case to the court,
- 4) to assist the court in examining and deciding cases (being friends),
- 5) voluntarily and own initiative, or because the court requested it,
- 6) in the form of giving a "legal opinion", or giving information at the trial, or through scientific work.
- 7) intended for cases relating to the public interest,
- 8) the judge has no obligation to consider it in deciding the case (Januardy & Prayogy, 2016).

That from the above understanding *Amicus Curiae* is limited to the efforts of third parties (not including parties to litigation) to provide information to the court. That the aim is to provide information (or legal opinion) to the court as additional material. Here it is not stated that *Amicus Curiae* can be given at a stage other than the trial, for example at the stage of investigation and prosecution. In the common law tradition, the mechanism of *Amicus Curiae* was first introduced in the 14th century. Later in the 17th and 18th centuries, participation in *Amicus Curiae* was widely noted in the All England Report. From this report, we can see several images related to *Amicus Curiae*, as follows:

- 1) The main function of *Amicus Curiae* is to clarify factual issues, explain legal issues and represent certain groups;
- 2) *Amicus Curiae*, relating to facts and legal issues, does not have to be made by a lawyer;
- 3) *Amicus Curiae*, is not related to the plaintiff or defendant, but has an interest in a case;
- 4) permission to participate as *Amicus Curiae* ("Institute for Criminal Justice Reform-ICRJ, *Amicus Curiae* Dalam Kasus Florence Sihombing Pada Perkara Nomor 382/Pid.Sus/2014/PN.Yyk Di Pengadilan Negeri Yogyakarta," 2011).

Initially, people proposed *Amicus Curiae* to support arguments or show new arguments in a case so that the court could obtain new information (in the context of providing general information), but in its development, *Amicus Curiae* could act for 3 (three) types of interests namely:

- 1) For its own interests or the interests of the groups it represents that might be affected by a court ruling, regardless of the interests of the parties, so that the court does not decide only on the reasons stated by the parties;
- 2) For the benefit of one of the parties in the case and help strengthen his argument, so that the court has the confidence to "win" the party or grant his request;
- 3) For public purposes. In this case, court friends provide information on behalf of the interests of the wider community who will receive the impact of the decision (Aminah, 2014).

That from the above explanation, *Amicus Curiae* was originally only to strengthen the existing argument, but in its development, *Amicus Curiae* developed for the benefit of the proponent himself, in favour of either party or in the public interest.

In the United States, *Amicus Curiae* plays an important role in landmark cases, such as civil rights cases and abortion. In fact, in a study conducted in 1998, *Amicus Curiae* participated in more than 90 (ninety) percent of cases that entered the Supreme Court (US Supreme Court) ("Institute for Criminal Justice Reform-ICRJ, *Amicus Curiae* Dalam Kasus Florence Sihombing Pada Perkara Nomor 382/Pid.Sus/2014/PN.Yyk Di Pengadilan Negeri Yogyakarta," 2011). Whereas in Indonesia, *Amicus Curiae*, although not yet well known and used by academics and practitioners, but in practice began to be used in various cases. *Amicus Curiae* began to be used in court cases such as the case of Time versus Soeharto, Prita Mulyasari, Blasphemy Case Bro. Basuki Tjahaja Purnama Alias Ahok ("Amicus Curiae (Amicus Brief) Perkara Penodaan Agama Sdr. Basuki Tjahaja Purnama Alias Ahok," 2017), Murder Cases Salin Kancil and Tosan (Januardy & Prayogy, 2016).

That the enactment of *Amicus Curiae* in the Indonesian legal system is not explicitly regulated, basically the application of *Amicus Curiae* is based on the provisions of Article 5 paragraph (1) of the Republic of Indonesia Law Number 48 of 2009 concerning Judicial Power, which states: "Judges and Constitutional Judges must explore, follow, and understand the legal values and sense of justice that

lives in society.” the word "must dig" shows that the judge in making his decision must explore the values that exist in society, with the existence of a "new information" submitted by Amicis (the applicant) then there is a new value or information that becomes the basis of the judge's consideration. Here the excavation of these values is carried out / assisted by *Amicis*.

In addition, Article 180 paragraph (1) of Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHP) states “*In the event that it is necessary to clarify the seat of the issue that arises in a court session, the presiding judge may request expert information and may also request that new material is submitted by interested parties..*”. Phrase words “*may also request that new material be submitted by interested parties*” indirectly shows the concept of *Amicus Curiae* but this is not specifically "institutionalised" in the Criminal Procedure Code in Indonesia.

That if we compare with the provisions of Article 14 of the Constitutional Court Regulation Number 06 / PMK / 2005 defines “*The Related Party who has an indirect interest is "the party whose position, duties and functions need to be heard" or "the party that needs to be heard as ad informandum, that is the party whose rights or authority is not directly affected by the subject matter high concern for the intended application"*”. That from word phrases “*parties who need to be heard as ad informandum, namely parties whose rights and / or authority are not directly affected by the subject matter of the request but because of their high concern for the said application*” shows that the Constitutional Court recognizes the existence of "third parties" who have dedication to a case which incidentally is an embodiment of *Amicus Curiae*.

Therefore, it is not excessive if this mechanism can be used as one strategy that can be used to clarify legal principles, especially cases involving various laws or controversial articles.

Amicus Curiae in the Criminal Proof System in Indonesia

That after passing the stages of reading the indictments and the answers to the Public Prosecutor's Indictment (after that the Interlocutory Decision) then proceed with the examination phase. At this stage, the Public Prosecutor proves the charges he made. This stage is the stage of proof of whether or not the defendant has committed an act that was indicted against him. There are 4 (four) proof theories, namely:

Convictio-in Time

Verification in determining the wrongdoing of the defendant is solely determined by the assessment of "Judge's belief". That the judge is given the freedom to gather his beliefs. That this belief can be obtained from the evidence examined in the trial, can also be drawn directly from the conviction of the statement or confession of the defendant. This proof system has weaknesses, namely the subjectivity of judges in shaping their beliefs.

Conviction-Raisonee

This proof emphasizes the judge's conviction but with consideration of "clear reasons". Here the judge outlines and explains the reasons underlying his belief in the defendant's mistake. Here the reason given by the judge must be based on "reasonable" reasons or reasonable reasons.

Positif Wettelijk Stelsel (Positive Verification by Law)

This proof is based on the evidence specified in the laws and regulations. That the judge determines the wrongdoing of the defendant's actions based on the evidence presented by the Public Prosecutor. That in this theory there is no need for a judge's conviction, to the extent that he has fulfilled the evidence, it is sufficient to determine the defendant's fault.

Negative Wettelijk Stelsel (Negative Verification by Law)

This proof is a combination of Positive *Intelligence Stelsel* (Proof According to the Act Positive) and *Convictio-in Time* (based on the judge's belief). That this theory requires the incorporation of the evidence determined by the laws and regulations with a judge's conviction formed from the evidence.

That Indonesia adheres to *Negative Wettelijk Stelsel* (Verifying According to the Law Negatively) as described in Article 183 of the Criminal Procedure Code which reads “*The judge may not impose a sentence on a person except if with at least two legitimate evidences he obtains the conviction that a criminal act has actually occurred and that the accused is guilty*”. That Article 183 of the Criminal

Procedure Code provides a limitation that the Judge in deciding the defendant is guilty must be based on legal evidence and from the evidences formed his belief that the accused is guilty.

The legal evidence has been "limitatively" valid evidence according to the law, namely Article 184 paragraph (1) of the Criminal Procedure Code. The evidence of Article 184 paragraph (1) KUHAP are: 1) Witness Information; 2) Expert Information; 3) Letter; 4) Instructions and 5) Descriptions of Defendants.

That looking at the evidentiary provisions contained in the laws and regulations which "required" the existence of 2 (two) valid evidence to form the judge's conviction, the judge is bound to the evidence in Article 184 paragraph (1) of the Criminal Procedure Code. Therefore "closed" the possibility for judges in seeking consideration in preparing a decision.

That existence *Amicus Curiae* get a legal breakthrough in terms of finding additional material / information for the judge in his legal considerations. *Amicus Curiae* can be used as "new material" material for judges in shaping their beliefs. *Amicus Curiae* help the judge in carrying out his obligation to "explore" the values of justice that exist in society, here pengaju (amicus) provide new information material for the judge.

That *Amicus Curiae* can not only be applied at the trial stage but can also help investigators in the investigation phase. That at the stage of investigation here the investigator proved based on evidence (linked to Article 184 paragraph (1) of the Criminal Procedure Code) that a criminal act had occurred and determined the suspect. That the role of *Amicus Curiae* is to help in considering whether there is a legal event that is a crime. Here *Amicus* helps provide legal considerations for investigators about a crime. Here the role of *Amicus Curiae* can be in the form of expert information based on theoretical studies of science.

Besides that, *Amicus Curiae* can also be submitted to the Public Prosecutor whether the case is a crime. Because the Public Prosecutor is also in the pre-prosecution stage conducting a study of a case file, whether the case is a criminal event or not, and whether the case file has fulfilled the material requirements (the fact that the action is related to the alleged criminal act). Here the public prosecutor can make *Amicus Curiae* a legal consideration in conducting pre-prosecution if it is not fulfilled, *Amicus Curiae* can be taken into consideration in preparing instructions (P-19) for investigators. It can also be a matter of consideration for the Public Prosecutor in closing the case if the case includes the category of civil law or not enough evidence, or it could also be an ingredient that reinforces that the case is worthy to be delegated to the trial.

That *Amicus Curiae* can also be used at the legal endeavour stage, both at the stage of appeal, cassation and reconsideration. That at this stage *Amicus Curiae* can be considered for judges of Appeal, Cassation or Judgment. So that with these considerations a decision can be made that substantially realizes justice.

That *Amicus Curiae* is free in the sense that it is not binding for law enforcement officials (both investigators, prosecutors and judges), *Amicus Curiae* is only "new material" or "additional information material" in making a legal policy (both strengthening support in the contents of case files), or in terms of decisions). Because the benefits provided by *Amicus Curiae* support a process of enforcing criminal law in Indonesia.

III.CONCLUSION

That the Indonesian Criminal Procedure Code has not yet regulated the existence of third parties who provide additional information for law enforcement officials. Here *Amicus Curiae* is only implied in the provisions of Article 5 paragraph (1) of the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power and Article 180 paragraph (1) of the Criminal Procedure Code. That in practice *Amicus Curiae* has been used in several criminal cases in Indonesia, both at the stage of investigation and trial. In the process of proving *Amicus Curiae* to be free, it is not binding on law enforcement officials whether it is obligatory to use the information / copy material. But it is an appreciation because it can help law enforcement officials (investigators, prosecutors and judges) in their legal considerations.

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