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Juridical Analysis of the Normative Gap in the Summoning of *A Charge* and *A De Charge* Witnesses in Indonesia

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ABSTRACT

The Public Prosecutor, as the representative of the State, holds dominant authority in regulating the course of criminal trials (*dominus litis*). The role of the Prosecutor inevitably places them in direct opposition to the interests of the Defendant. This clearly demonstrates a disparity in how the law treats the summoning of witnesses: while the Prosecutor's witnesses are compelled by law, those of the Defendant are not equally supported or guaranteed by the legal framework. As a result, the Defendant's right to present mitigating witnesses remains a theoretical entitlement (*lex scripta*) without enforceability. This research conducts a normative juridical analysis of relevant legal texts, scholarly literature, and journal sources. A significant imbalance is evident in the process of summoning witnesses those summoned by the Prosecutor aim to incriminate (*a charge*), while those proposed by the Defendant seek to mitigate or exculpate (*a de charge*). Incriminating witnesses are bound by legal obligations and face sanctions under Article 224 in conjunction with Article 552 of the Indonesian Penal Code if they fail to appear, and their testimony is considered valid evidence in court. The findings indicate that this legal imbalance significantly affects the objectivity of criminal proceedings, often leading to a tendency to disadvantage the defendant. In contrast, exculpatory witnesses are treated merely as a "right" of the Defendant, without any enforceable obligation to appear, as no legal consequences exist for their absence.

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INTRODUCTION

One of the fundamental principles in criminal procedural law is the principle of *equality before the law*, which requires equal standing between the Public Prosecutor and the Defendant before the law (Saputra, 2015). This principle is not merely a moral ideal in enforcing justice but has obtained constitutional legitimacy through Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, as well as the principle of *due process of law* as reflected in Article 28D paragraph (1) of the same Constitution (Putra et al., 2023). In this context, summoning witnesses both incriminating (a charge) and exculpatory (a de charge) is critical to ensuring a fair and balanced trial.

However, empirical realities reveal a systemic imbalance in the procedural mechanism for summoning both types of witnesses. The Indonesian Code of Criminal Procedure (KUHAP) provides a legal basis for presenting witnesses from both parties. Article 65 of KUHAP affirms the right of the Suspect or Defendant to present exculpatory witnesses, whereas Article 160 paragraph (1) letter a mandates the Public Prosecutor to present witnesses in court (Haptasi et al., 2015). Herein lies a normative disparity: while *the state actively summons charge witnesses through the Public Prosecutor, the responsibility to summon de-charge* witnesses rests entirely with the Defendant and/or their legal counsel without any clear, firm, and adequate procedural mechanism by the state to ensure their presence (Interview with Agus Manurung).

This situation raises a legal question regarding the consistency between the applicable legal norms and the principles of justice they are intended to uphold. Such unequal treatment not only contravenes the *audi et alteram partem* principle that each party must be given an equal opportunity to present and prove their arguments (Prasetyo, 2020), but it also poses a potential threat to procedural justice. Law must not merely confer rights in the normative sense but also guarantee their accessibility and practical enforceability.

The normative gap is further exacerbated by the absence of derivative regulations that detail the technical procedures for summoning *a de charge* witness. In judicial practice, judges often delegate the responsibility entirely to defense counsel without sufficient administrative or legal support from the court. In a democratic rule of law state, the judiciary should not remain passive but proactively guarantee equal access to evidentiary mechanisms for all parties.

Based on the foregoing, this study is compelled to undertake a juridical analysis of the normative disparity in the summoning of *a charge* and *a de charge* witnesses, in order to identify weaknesses within the criminal procedural system, particularly concerning the procedural rights and guarantees in the summoning of *de charge* witnesses.

LITERATURE REVIEW

Witness

The definition of a witness according to Law No. 13 of 2006 Article 1 paragraph (1) is a person who can provide information for the purposes of investigation, prosecution, and examination in Court about a criminal act that he himself hears, sees himself, and/or experiences himself. In general, witness testimony evidence is the most important evidence in criminal cases. It can be said that there is no criminal case that can be separated from the evidence of witness testimony. Almost all proof of criminal cases, always based on the examination of witness statements, at least in addition to proving with other evidence, it is still always necessary to prove with witness testimony evidence. Being a witness in a trial is an obligation for every citizen. The awareness of a person to be a witness is a sign that the person has obeyed and is aware of the law. On the other hand, a person who becomes a witness after being summoned to a court to give evidence but refuses the obligation, then he can be criminally charged under the provisions of the applicable law. The provision of the law that threatens with criminal punishment against a person who deliberately does not fulfill his obligation to appear as a witness when he has been legally summoned according to the law is Article 224 of the Criminal Code.

Witnesses are parties who have been involved in criminal cases. He occupies an important role and function in an examination of a case in a court hearing. Without witnesses, a criminal act will be difficult to uncover the truth. The purpose of questioning witnesses is to provide an opportunity to declare that the suspect is innocent, or if guilty admits his guilt. Given its very important role and function, the Government guarantees the rights and obligations of a witness and provides special protection for the witness which is regulated, guaranteed and outlined in the Law of the Republic of Indonesia No. 13 of 2006 concerning the Protection of Witnesses and Victims. The essential things for legal protection of witnesses are so that they are free from outside pressure that tries to intimidate them with regard to their testimony in a criminal case. Thus, they have consciously and willingly willing to be a witness in a case and at the same time dare to tell the truth without being overwhelmed by fear, so they have complied and carried out their obligations as good and law-abiding citizens.

Witness A Charge

The witness submitted by the public prosecutor is called Witness A Charge, namely a witness whose testimony incriminates the defendant. A charge witness or incriminating witness in this case, including victim witnesses, is one of the main evidence in proving criminal justice. The process of examining the criminal case of evidence that was first examined was witness A Charge. Given its very important role and function, the government guarantees the rights and obligations of an a charge witness and provides protection as regulated in the Law of the Republic of Indonesia No. 13 of 2006 concerning the Protection of Witnesses and Victims. Witnesses who are favorable or incriminating to the defendant who are listed in the letter of transfer of the case and/or who are requested by the defendant or legal counsel or the public prosecutor during the trial or before the verdict is handed down, the presiding judge of the trial is obliged to hear the testimony of the witness

According to the nature and existence of a witness statement a charge is the testimony of a witness with incriminating evidence against the defendant and is contained in the case file and is commonly submitted by the prosecutor/public prosecutor. The regulation of the use of witness A Charge is regulated in article 160 paragraph (1) of the Criminal Procedure Code: a. Witnesses are called into the courtroom one by one in the order best considered by the presiding judge after hearing the opinion of the public prosecutor, defendant or legal counsel; b. The first to hear his testimony was the victim who was a witness; c. In the event that there are witnesses, both favorable and incriminating to the defendant listed in the case transfer letter and/or requested by the defendant or legal counsel or the public prosecutor during the trial or before the verdict is rendered, the presiding judge of the trial is obliged to hear the testimony of the witness (Ninorey, 2022).

The use of witness testimony in order to be said to be valid must meet the following formal and material requirements: a. Formal requirements: 1) A witness must take an oath and promise both before and after giving evidence (Article 160 paragraphs (3) and (4) of the Criminal Code) 2) A witness has reached the age of adulthood who has reached the age of 15 years or more or is married. Meanwhile, people who have not reached the age of 15 years or are not married can give information without being sworn and are considered ordinary information (article 171 point a of the Criminal Code). b. Material requirements 1) Seeing, hearing, or experiencing a criminal event (article 1 point 26 or 27 of the Criminal Code). 2) A witness must be able to state the reason for his testimony (article 1 point 27 of the Criminal Code). 3) The testimony of a witness alone is not enough to prove the guilt of the defendant/this principle is known as unus testis nullus tertis (article 185 paragraph (2) of the Criminal Code)

Witness A de Charge

A de charge witness is a right given to the defendant, the defendant can present a de charge witness in the trial. If the defendant feels that the a de charge witness can benefit the defendant. A de charge witness is one of the important parts of the evidentiary process in the Court, because the witness ade charge can balance the evidence that has been presented by the prosecutor who has indicted the defendant, The position between a charge and a de charge witnesses is the same in the trial, the testimony between a charge and a de charge witnesses can help the judge in passing a verdict on the defendant.

The evidentiary strength of a witness a charge is the same as that of a witness a de charge, because in essence the Criminal Code has stipulated that witness testimony is one of the strongest evidence, both witness a charge and witness a de charge. (Charimansyah, 2016). A witness submitted by a suspect or a defendant, who is expected to give information favorable to him or her in French, is also called Witness A De Charge. Witness A De Charge in giving testimony at the trial aimed at mitigating the defendant, and can change the prosecutor's demands in filing a lawsuit

The position of mitigating witness testimony compared to incriminating witnesses is the same as long as the conditions as valid evidence are met. Second, the results of this study show that the presence of *a de charge* witness or mitigating witness to the judge in sentencing a verdict for the Defendant who submitted this witness in a trial with a case that is proven to have incriminated the Defendant based on Article 363 Paragraph (1) point 5 of the Criminal Code is a de *charge* witness or mitigating witness is considered by the judge in making a decision. (Narsyanto, 2024).

METHODOLOGY

The research method employed in this article is a normative juridical approach. This method is utilized to conduct legal analysis based on library research, which involves reading, recording, citing, summarizing, and critically examining information derived from statutory regulations and legal literature relevant to the issue under study (Maulida & Nurhaqi, 2023). This approach is undertaken to assess the alignment between the Public Prosecutor's authority and the defendant's rights within the framework of existing laws and regulations, based on relevant legal principles, particularly in the context of witness summoning during trial proceedings.

RESEARCH RESULT AND DISCUSION

The summoning of witnesses proposed by the Defendant (*a de charge witness*) in Indonesian criminal court practice continues to face serious structural and normative challenges. Although the right to present exculpatory witnesses is explicitly guaranteed under Article 65 of the Indonesian Code of Criminal Procedure (KUHAP), (Kristanto & Puspitasari, 2024) which states:

> *"The Suspect or Defendant shall have the right to present witnesses and/or experts who may relieve them of guilt."*

Procedural barriers often impede its implementation. One such barrier is the requirement that defense counsel first provide "sufficient preliminary evidence" to convince the panel of judges that the proposed witness's presence is essential for uncovering the material truth.

From the perspective of the presumption of innocence and the principle of equality of arms in a fair trial, this requirement contradicts the notion that the Defendant should not be unduly burdened in presenting exculpatory evidence, including favorable witnesses. Article 116 paragraph (3) of KUHAP further reinforces this principle by stating:

> *"In the event that the suspect so requests, the investigator shall be obliged to examine the witness presented by the suspect, and such examination shall be recorded in the investigation report."*

This provision underscores that the right to defense during the investigative phase is inherently proactive and imposes a corresponding duty on investigators to ensure its fulfillment. However, implementing this provision is frequently disregarded or executed merely as a formality. When investigators reject or delay the examination of *a de charge without* lawful justification, such conduct violates the Defendant's rights at the very outset of the judicial process. The lack of clear implementing norms and the weak oversight of the investigative function render Article 116 paragraph (3) a provision with limited enforceability.

This issue becomes even more complex when considered in light of Constitutional Court Decisions No. 65/PUU VII/2010 and No. 170/PUU XXII/2024, which affirm that the object of examination in trial proceedings is not limited solely to the investigation report, but also includes the Prosecutor's indictment. This doctrine implies that the court is not obliged to examine testimony or witnesses included in the investigation report if they are not cited in the indictment (Interview with Agus Manurung).

As a result, even if *de-charge* witnesses were examined during the investigation phase, their testimonies may be excluded from trial proceedings if not referenced in the indictment. This condition illustrates the significant influence of the Public Prosecutor, as dominus litis, in shaping the evidentiary narrative, often to the detriment of the Defendant's right to a fair defense (Artadinata & Lasmadi, 2023).

Moreover, Article 143 paragraph (2) of KUHAP merely requires the Prosecutor to describe the alleged offense in a "precise, clear, and complete" manner within the indictment (Arif, 2021), without the obligation to reproduce the full contents of the investigation report. Consequently, in practice, the Prosecutor typically includes only those portions of the investigation report that support the charges or the legal elements of the offense. Exculpatory statements or witnesses are often disregarded and omitted from the indictment's narrative framework. This represents a structural imbalance in the criminal justice process, whereby the defense apparatus lacks equal leverage or procedural force compared to the evidentiary instruments of the Prosecution.

Another significant disparity lies in the legal consequences for witnesses who fail to comply with court summonses. Article 224 of the Indonesian Penal Code (KUHP) stipulates:

> *"Any person who, under legal obligation, is summoned to appear as a witness... and intentionally fails to comply with such summons, shall be subject to imprisonment for up to nine months."*

This provision is reinforced by Article 522 of the Penal Code, which applies specifically to criminal cases. However, these sanctions are enforceable only against witnesses officially summoned by law enforcement authorities, namely, the Prosecutor or the court. Conversely, no equivalent coercive mechanism exists for witnesses summoned by the Defendant's legal counsel. As a result, *a de charge* witness may freely refuse to appear without legal consequence, ultimately weakening the effectiveness of the Defendant's right to a defense.

This limitation was encountered by the legal team representing the Defendant in the high-profile corruption case concerning tin trading regulations, which resulted in state losses estimated at IDR 300 trillion. Despite efforts by defense counsel to summon exculpatory witnesses, their absence during the trial undermined the defense's strength, creating an evidentiary imbalance in favor of the Prosecutor's indictment (Nurhakim, 2023). This circumstance amounted to a violation of the Defendant's rights, which, though normatively guaranteed, were rendered inoperative in practice. Moreover, the absence of exculpatory witnesses in this case also obstructed deeper investigative efforts that could have revealed the full extent of the corruption scheme.

While the Defendant in this case was ultimately found guilty of a grave offense, equality before the law and the need for evidentiary balance remain crucial elements in protecting individual liberty and minimizing the risk of arbitrary or unjust prosecution.

A similar issue arose in the Corruption Case Reg. No. PDS 03/M.2.29/FT.2/11/2023, where the Defendant's legal counsel struggled to summon favorable witnesses. Despite having relevant knowledge of the events, many of these witnesses declined to appear due to fear of being implicated as suspects. This refusal, though in violation of Article 168 of KUHAP, prohibits the Defendant from calling witnesses directly related by lineage, including a spouse, children, or other immediate family members (Marsita et al., 2024). Compelled defense counsel after seeking leniency from the Public Prosecutor to present the Defendant's family members as witnesses. However, these testimonies could not be treated as valid legal evidence due to the absence of an oath.

This testimony was a last-ditch tactical effort by the defense to mitigate the Defendant's sentence, appealing to the court's empathy by highlighting the financial and familial hardships that imprisonment would impose. In stark contrast, the five witnesses summoned by the Public Prosecutor protected by the legal framework under Articles 224 and 522 of KUHP complied with the summons, took the oath, and testified against the Defendant.

Even though, as stated in the ruling of Case Reg. No. PDS 03/M.2.29/FT.2/11/2023, the court acknowledged that all five witnesses were themselves implicated as potential suspects and thus ordered the return of all evidence for further investigation, but the trial still failed to uphold its objectivity. The court's partial judgment did not holistically evaluate the entirety of the testimonies presented, particularly those attempted by the Defendant or their counsel (Nurhaqi, 2022).

The root of all these challenges lies in the absence of implementing regulations that govern the technical execution of the Defendant's right to summon exculpatory witnesses. As stipulated in the International Covenant on Civil and Political Rights (ICCPR), ratified by Indonesia through Law No. 12 of 2005, Article 14 paragraph (3) letter (e) of the ICCPR unequivocally states:

> *"To obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."*

Although this ratification has incorporated the norm into national law, without implementing provisions, this international legal standard remains inoperative in domestic judicial practice (Setiawan et al, 2024). Therefore, it can be concluded that the normative gap in summoning *a de-charge witnesses is not merely a matter of procedural interpretation* but also reflects deeper institutional deficiencies in the design of the criminal justice system itself.

A state governed by the rule of law must possess written norms and demonstrate institutional commitment to ensuring substantive justice for all parties in a legal proceeding. Accordingly, the revision of the KUHAP or the drafting of implementing regulations for international human rights norms is an urgent necessity to rectify the disparity in treatment between exculpatory and incriminating witnesses. Without such reforms, the principle of equality of arms in the evidentiary criminal justice system will remain a constitutional ideal without meaningful realization in the courtroom.

CONCLUSION AND RECOMMENDATIONS

The constitutional right to the principle of equality before the law, as enshrined in Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which states "All citizens shall be equal before the law and the government and shall be required to respect the law and the government, with no exceptions", must be upheld and enforced equally, including in the fulfillment of obligations related to the summoning, attendance, and examination of witnesses. If incriminating witnesses are obligated to appear, then exculpatory witnesses should also be subject to the same treatment in order to ensure justice both for the Public Prosecutor, who acts as the representative of the State, and for the Defendant, who is a citizen and has not yet been lawfully declared guilty in the absence of a judge's verdict (presumption of innocence principle).

ADVANCED RESEARCH

Future research should be focus toward a deeper theoretical and empirical investigation into institutional responsibilities and procedural equity within Indonesia's criminal justice system. While the current study has illuminated the asymmetrical treatment of witness summoning wherein exculpatory witnesses lack enforceable guarantees comparable to their incriminating counterparts subsequent inquiries must examine the systemic roots and broader implications of this procedural gap. A comparative legal analysis of witness protection and equality mechanisms in other jurisdictions, particularly those operating under adversarial and inquisitorial models, is essential to identify best practices that may be adapted into the Indonesian legal framework. Furthermore, empirical research is needed to evaluate the discretionary practices of judges and prosecutors in accepting or obstructing the presence of exculpatory witnesses. Such studies should incorporate qualitative methods, including structured interviews with legal practitioners and content analysis of trial records, to determine whether procedural imbalances arise from legislative insufficiency or institutional inertia. These future directions aim not merely to critique but to constructively inform potential revisions to the Code of Criminal Procedure (KUHAP) and to advocate for derivative regulations that actualize the principle of equality of arms as enshrined in both constitutional and international legal standards.

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