

AMICUS CURIAE AS THE DEVELOPMENT OF EVIDENCE IN CRIMINAL PROCEDURE CODE

Dwi Herman Sucipta^a, I Made Wirya Darma^b

ABSTRACT

Article 184 paragraph (1) of the Criminal Procedure Code has limitedly determined legal evidence according to the law, however, in the last few years, the Indonesian Court of Justice has emerged Amicus Curiae. In this study, it will be discussed the legal basis for judges to apply the Amicus Curiae as evidence of a crime in positive law in Indonesia today (*ius constitutum*) then the second issue will discuss the Amicus Curiae as evidence development in the KUHAP in the future come (*ius constituendum*). The research method used is normative juridical or library research related to normative legal substances, to find the truth based on scientific logic from the normative side by examining library materials or secondary data consisting of primary and secondary legal materials. Amicus Curiae is a legal concept that is not well known in Indonesia which adheres to the Civil Law legal system. The legal concept of Amicus Curiae is indeed only practiced in the traditions of countries that adhere to the common law legal system. The proof using the Amicus Curiae concept has been found in many cases in Indonesia. However, legally the Amicus Curiae has not been regulated in positive law in Indonesia.

Keywords: amicus curiae; criminal procedure code; evidence.

INTRODUCTION

One of the most important principles contained in the Criminal Procedure Code is the principle of legality as reflected in Article 3 of the Criminal Procedure Code which has the formulation "Trials are carried out according to the method stipulated in this law". The phrase "this law" in the provisions refers to the Criminal Procedure Code; therefore, the principle of legality must be interpreted, that the trial is carried out according to the method stipulated in the Criminal Procedure Code. The principle of legality is one of the oldest legal principles in the history of human civilization. The existence of this principle is not difficult to find in various national legal provisions of various countries. The principle of legality is maintained as a protection against potential arbitrariness in the administration of criminal law.¹

Citizens in this way are protected from possible abuse of state power. Not at any time the ruler can declare an act as a crime and then decide to take action against the citizens for violating the provisions of the authorities. The freedom of citizens to do/not do something can only be limited by and through certain methods and certain forms: the making of laws and regulations democratically in which criminal provisions must be formulated appropriately (*lex certa*). Even this democratic process needs to be held in an open (transparent/transparency) and accountable manner.² In

^a Master of Law, Universitas Pendidikan Nasional, Jl. Bedugul No. 39 Denpasar 80224, email: dwihermans90@gmail.com

^b Faculty of Law, Universitas Pendidikan Nasional, Jl. Bedugul No. 39 Denpasar 80224, email: wiryadarma@undiknas.ac.id

¹ Danel Aditia Situngkir, "Asas Legalitas dalam Hukum Pidana Nasional dan Hukum Pidana Internasional," *Soumaterra Law Review*, Vol. 1, No. 1, 2018, p. 23.

² Tristam P. Moeliono, "Asas Legalitas dalam Hukum Acara Pidana: Kritik terhadap Putusan MK tentang Praperadilan," *Jurnal Hukum Ius Quia Iustum*, Vol. 22, No. 4, 2015, p. 598.

accordance with the legality principle, the evidence that can be used to prove a crime in court is the one clearly specified in Article 184 of the Criminal Procedure Code.

The protection of individual rights obtained through the due process of law has consequences where evidence can only be considered by a judge in deciding a case, if it fulfills the principles of proof which are elaborated into the rule of law with requirements that must be met. To fulfill the due process of law, the evidentiary system in Indonesian criminal procedural law recognizes the minimum principle of proof. The principle or minimum principle of proof is a principle that must be guided in assessing whether or not evidence is sufficient to prove whether or not a defendant is wrong or not.³

The provisions of special legislation only bind the proof of the specific criminal acts they regulate; therefore, it is only a kind of shortcut in an emergency to accommodate that does not only material law developments, but also formal law. The limitations of the Criminal Procedure Code in the regulation of evidence in Article 184 will limit the development of evidence. The developments that are still not clearly regulated in the Criminal Procedure Code will cause continuous controversy and its implementation is only based on customary court practice, jurisprudence, and legal instruments issued by the Supreme Court.⁴ According to the Decision of the Constitutional Court (MK) Number 21/PUU-XII/2014 dated 28 April 2015, the determination of a suspect must be based on (1) a minimum of 2 (two) pieces of evidence as contained in Article 184 of the Criminal Procedure Code and (2) accompanied by an examination of potential suspects.

In recent years, the Indonesian Court of Justice has emerged *Amicus Curiae*. *Amicus Curiae* is a legal concept that is not well known in Indonesia that adheres to the Civil Law legal system. The legal concept of *Amicus Curiae* is indeed only practiced in the traditions of countries that adhere to the common law system.

Amicus Curiae, which is not known in the legal system in Indonesia, especially in criminal procedural law, has recently been widely used by institutions engaged in social and humanitarian fields to defend and provide explanations of the legal facts in a case. The explanation given by the *Amicus Curiae* is in practice given in the form of a letter or in writing or commonly called the *Amicus Brief* or it can also be orally in court, but in practice it has been mostly given in the form of a letter/written (*Amicus Brief*).⁵

The existence of the *Amicus Curiae* may provide additional arguments for the court to consider.⁶ Judges in applying the *Amicus Curiae* in the process of proving criminal acts in court are

³ Niken Savitri, "Pembuktian dalam Tindak Pidana Kekerasan Seksual terhadap Anak," *Jurnal Bina Mulia Hukum* Vol 4, No. 2, 2020, p. 276-293.

⁴ Ramiyanto, "Bukti elektronik sebagai alat bukti yang sah dalam hukum acara pidana," *Jurnal Hukum dan Peradilan*, Vol. 6, No. 3, 2017, p. 463.

⁵ Siti Aminah, *Menjadi Sahabat Keadilan (Panduan Menyusun Amicus Brief)*, The Indonesian Legal Resource Centre (ILRC), Jakarta: 2014, p. 11.

⁶ Patricia Marin, et al., "Use of extra-legal sources in amicus curiae briefs submitted in Fisher v. University of Texas at Austin." *education policy analysis archives*, Vol. 26, 2018, p. 40.

based on Article 5 paragraph (1) of the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power which states "Judges and Constitutional Justices are obliged to explore, follow, and understand legal values and a sense of justice that lives in society.

The practice of Amicus Curiae is actually commonly used in countries that use a common law legal system, not civil law as adopted by Indonesia. However, this does not mean that this practice has never been implemented in Indonesia. One of which is the case of journalist Upi Asmaradhana. In addition, other cases involving the Amicus Curiae include the review of the Time Magazine case versus Suharto, and the case of a pretrial review of the Decree on the Termination of Prosecution (SKPP) Bibit-Chandra, the case of the eviction of Papanggo, North Jakarta, even the party acting as the Amicus Curiae is a non-governmental organization (NGO) from abroad.⁷

However, the Amicus Curiae existed for so long in criminal justice in Indonesia to provide an explanation of the legal facts against a criminal act committed by a person and there are even judges who use it as letter evidence in their consideration to make a decision, basically it has not had the clear rules in its implementation. Whether it is regarding when the Amicus Curiae may be submitted, what are the criteria for a person or institution that may apply for the Amicus Curiae, what is the position of the Amicus Curiae, what is the legal force in proving a criminal act, what are the benefits and what is the legal basis of the judge in using it as a consideration and so on. This of course makes it unclear how, when and in what way the judge uses the Amicus Curiae. On what basis does the judge use it as evidence and what is the legal force of the Amicus Curiae in the evidentiary system according to Indonesian criminal procedure law. This happened none other than because basically the Amicus Curiae is not a legal concept known in the Indonesian legal system, especially in the Indonesian evidence system and does not yet have a clear legal basis in its application or there is a legal vacuum in the regulation of the Amicus Curiae in proving criminal acts in Indonesia.

Based on the background of the study, there are 2 (two) problem formulations discussed in this study. The first problem is what the legal basis for judges to apply the Amicus Curiae as evidence of a crime in positive law in Indonesia today (*ius constitutum*) is. And the second problem is how the Amicus Curiae as the evidence development in the KUHAP is in the future (*ius constituendum*).

METHODS

Normative legal research is applied in this study as a research method on the legal aspects of a problem by analyzing various legal materials. The statute approach is chosen as the approach applied in this study by reviewing all legal products ranging from laws to regulations that are relevant to the legal issues discussed. This study focuses on the legal arguments built in reviewing and analyzing clear arrangements regarding the Amicus Curiae arrangement as a type of evidence

⁷ Ali Salmande, "Dasar Hukum Sahabat Pengadilan (*Amicus Curiae*) di Indonesia", (2011), <<https://www.hukumonline.com/klinik/detail/ulasan/lt4d42718991ad6/dasar-hukum-sahabat-pengadilan-amicus-curiae-di-indonesia/>>, [accessed July 5, 2021]

development in the Criminal Procedure Code. The document study technique applied in this research as a technique for tracing legal materials with qualitative analysis as a study analysis

DISCUSSION

Legal Basis for Judges to Apply Amicus Curiae as Evidence of a Criminal Acts in Positive Law in Indonesia Today (*Ius Constitutum*)

The Criminal Procedure Code which is perceived as static because it must maintain legal certainty, however still has a dynamic side that continues to look for its form. This dynamic side is manifested in the behavior of law enforcers in understanding the Criminal Procedure Code which is not only a set of norms, but goes further than that targeting its value content. A good understanding of the Criminal Procedure Code which is supported by legal education that is not limited to carrying out business as usual, but dipping deep to reach prophetic intelligence, will greatly determine the quality of law enforcement and the protection of human rights.⁸ The implementation of humanistic law enforcement and protecting human rights can only be carried out by wise law enforcers.

Judge is one of law enforcers. In solving a problem, the judiciary has free authority, meaning that no other institution can interfere or influence Law Number 48 of 2009 concerning Judicial Power, which is stated in article 1 that "judicial power is the power of an independent state to administer justice to uphold law and justice based on Pancasila and the 1945 Constitution of the Republic of Indonesia, for the sake of the implementation of the constitutional state of the Republic of Indonesia".

The independence of judicial power has been widely discussed on various occasions, along with the strengthening of the guarantee of the 1945 Constitution of the Republic of Indonesia concerning the independence of judges in exercising their authority. Some put their hope in a more reliable future for courts, far from the intervention of external powers as happened in the New Order era. However, there are also few party who are worried that the intervention will come from the judiciary itself, or from the litigants or the mode of transaction. Independence is as the meaning of being free or independent.⁹

Judges have the freedom to resolve any problems in a case in court. Judges must be given freedom in carrying out their judicial functions.¹⁰ The judges are required by law that they cannot be subjective. The judge's freedom in adjudicating a case must reflect a sense of community justice not for his own sense of justice as a judge. To obtain a truth about an event occurred requires a

⁸ Muhammad Rustamaji, "Pembaruan Hukum Acara Pidana Melalui Telaah Sisi Kemanusiaan Aparat Penegak Hukum." *Kanun Jurnal Ilmu Hukum*, Vol. 19, No. 1, 2017, p. 15

⁹ Suparman Marzuki, *Kekuasaan Kehakiman; Independensi, Akuntabilitas, dan Pengawasan Hakim, dalam Dialekta Pembaruan Sistem Hukum Indonesia*, Sekretariat Jenderal Komisi Yudisial Republik Indonesia, Jakarta: 2012, p. 285.

¹⁰ Andi Suherman, "Implementasi Independensi Hakim dalam Pelaksanaan Kekuasaan Kehakiman," *SIGn Jurnal Hukum*, Vol. 1, No.1, 2019, p. 42-51.

systematic process of activity using appropriate and rational measures and thoughts. Evidence activities in criminal procedural law are basically expected to obtain the truth within juridical limits. In criminal procedural law, there is a proof mechanism, which can be interpreted as an effort to obtain information through the evidences in order to obtain a belief on whether or not the criminal act that is being charged is true and can find out whether there is an error in the defendant.

When a judge is faced with the situation of having to adjudicate a case that has no legal basis or the legal arrangement is unclear, In this situation the judge may not refuse to try the case on the pretext that there is no law that regulates it. This is in accordance with Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, and Article 5 paragraph (1) states that "Judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society". When a case is unclear, it is the duty of the judge to clarify it by creating a new law that is as fair as possible. It is adapted to the needs of the community through a decision. In the development of existing evidence mechanisms and evidence, one of which is the Amicus Curiae.

Law is as the bearer of the value of justice. Justice is the moral foundation of law and at the same time the benchmark for a positive legal system. It is to justice that positive law originates. Justice must be an absolute element for law as law. Without justice, a rule does not deserve to be law. If law enforcement tends to value legal certainty or from the point of view of its regulations, then as a value it has shifted the values of justice and usefulness. It is because, in legal certainty, the most important thing is the regulation itself in accordance with what is formulated. Likewise, when the value of utility is prioritized, then the value of utility will shift the value of legal certainty and the value of justice because what is important for the value of utility is the fact that the law is useful to society.

In the Indonesian judiciary, the Amicus Curiae has not been clearly regulated, but the legal basis for the acceptance of the Amicus Curiae concept in Indonesia is Article 5 paragraph (1) of Law Number 4 of 2009 concerning Judicial Power. This article becomes a reason for the judge to know the strength of evidence. Judges in deciding a case must explore various arrangements, opinions and various references to make a case clear. This is an indicator in determining the judge's conviction.

The Constitutional Court is a judicial institution that strictly regulates the existence of the Amicus Curiae in Indonesia. One of the real forms of integrity is the realization of the constitutional court as a state institution that serves as the guardian of the constitution. Basically, at the time of change, the situation and condition of the debate over the issue of constitutionalism of the 1945 Constitution of the Republic of Indonesia was at stake and the results would have an impact on all dimensions of constitutional life, including in the context of the protection of human rights as the

main fundamental characteristic of the rule of law.¹¹ In protecting these human rights, the Constitutional Court can form regulations that are oriented towards efforts to seek material truth, one of which is to legitimize the existence of Amicus Curiae in the judiciary in Indonesia.

In Article 14 paragraph (4) of the Regulation of the Constitutional Court Number 06/PMK/2005 it is stated that the related parties with indirect interests are:¹²

- a. Parties whose statements, due to their position, main duties, and functions need to be heard
- b. Parties who need to be heard as ad informandum, namely parties whose rights and/or authorities are not directly affected by the subject of the application but because of their high concern for the application in question

In addition to being recognized in Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, the Criminal Procedure Code (KUHAP) is narrowly interpreted to provide limited recognition of community participation or involvement in Article 180 paragraph (1) stated: "In the event that it is necessary to clarify the position of the problems that arise in the court session, the presiding judge at the trial may ask for expert testimony and may also request that new materials be submitted by the interested parties". So this Amicus Curiae is a new material in the judiciary in Indonesia which does not yet have a standard form, because there are no clear and specific regulations in the legislation. The legal standing of the document written by Amicus Curiae is still unclear. There are no regulations that explicitly regulate the legal standing of documents written by Amicus Curiae.¹³ The position of Amicus Curiae is not also the testimony of witnesses or expert witnesses, because Amicus Curiae is more about community participation.¹⁴

Thus, the concept of Amicus Curiae has been partially adopted by the Constitutional Court in its regulations. In Article 183 paragraph (1) of the Criminal Procedure Code it is stated that "Evidence provided by the government, person, or other state company is considered as valid evidence if it is obtained legally based on the laws and regulations of the other country." This article is about valid evidence, which is used in the criminal evidence system in Indonesia.

Evidence in criminal procedural law is very important in the process of examining criminal cases in court. Evidence is seen as very important in criminal procedural law because what is sought in the examination of criminal cases is material truth, which is the goal of the criminal procedural law itself. Evidence in criminal procedural law is looking for material truth so that various kinds of evidence are needed to strengthen the argument regarding the guilt or innocence of a person accused of committing a crime.

¹¹Ahmad, and Novendri M. Nggilu. "Denyut Nadi Amandemen Kelima UUD 1945 melalui Pelibatan Mahkamah Konstitusi sebagai Prinsip the Guardian of the Constitution," *Jurnal Konstitusi*, Vol. 16, No. 4, 2020, p. 788.

¹²Article 14 paragraph (4) Constitutional Court Regulation Number 06/PMK/2005.

¹³Fadil Aulia, and Muchlas Rastra Samara Muksin, "The Position of Amicus Curiae under the Indonesian Law of Evidence," *Jurnal Media Hukum*, Vol. 27, No. 2, 2020, p. 225.

¹⁴Linda Ayu Pralampita, "Kedudukan Amicus Curiae dalam Sistem Peradilan di Indonesia," *Lex Renaissance*, Vol. 5, No. 3, 2020, p. 571.

The information given by Amicus Curiae is not stated as evidence as regulated in Article 184 of the Criminal Procedure Code. In Article 184 of the Criminal Procedure Code stated as evidence are witnesses, expert statements, letters, instructions, and statements of the defendant. This is very reasonable considering the existence of Amicus Curiae is a new thing in procedural law in Indonesia.

Amicus Curiae as a Concept for the Development of Criminal Law Evidence in Combating Limitative Formalism of Evidence in the Criminal Procedure Code in the Future (*Ius Constituendum*)

Amicus Curiae, which literally means "Friends of the Court", is a legal concept that allows third parties, namely those who have an interest in a case, to give their legal opinion to the court. The 'involvement' of interested parties in this case is only limited to giving opinions, not fighting back.¹⁵ *Amicus Curiae* is a practice that originates from the Roman legal tradition, which later developed and was practiced in the common law tradition. Through the *Amicus Curiae* mechanism, courts are given permission to accept and invite third parties to provide information or legal facts relating to unfamiliar issues. A person who becomes "Friends of the Court" is not presented by the court to explain a case.

The involvement of a third party in a case for the purpose of revealing a factual and concrete legal event but not being revealed in court is part of the legal protection of a defendant in court. Everyone has the right to the same protection and recognition before the law even if they are accused of committing an unlawful act. One of the purposes of evidence is to seek legal certainty in order to make a decision whether the perpetrator is found guilty or otherwise. The involvement of *Amicus Curiae* is expected to be able to realize the objectives of the law, namely justice, benefit and legal certainty, so that there is no misguided trial.

The importance of legal certainty to the position of *amicus curiae* in criminal procedural law is in accordance with Article 28D paragraph (1) of the third amendment of the 1945 Constitution that "everyone has the right to recognition, guarantees of protection and fair legal certainty and equal treatment before the law." *Ubi jus incertum, ibi jus nullum* (where there is no legal certainty, there is no law). Legal certainty is very important, especially in countries that adhere to a civil law system such as Indonesia, where the main source of law is legislation.

The law should provide legal certainty, because if it does not provide legal certainty then the law will lose its meaning and no longer serve as a guide, which according to Fence M. Wantu, "law without the value of legal certainty will lose its meaning because it can no longer be used as a behavioral guide for everyone. Thus, legal certainty in a regulation becomes absolute because the

¹⁵ Sukinta, "Konsep dan Praktik Pelaksanaan Amicus Curiae dalam Sistem Peradilan Pidana Indonesia," *Administrative Law and Governance Journal*, Vol. 4, No. 1, 2021, p. 89-98.

law functions as a regulation that must be obeyed as stated by Radbruch, namely legal certainty is interpreted as a condition in which the law can function as a regulation that must be obeyed.¹⁶

The Amicus Curiae is delivered by someone who is interested in influencing the outcome of the action, but is not a party to a dispute; or it can be an adviser requested by the court for some legal matters, because the person in question has sufficient capacity for legal matters that are being litigated in court, and that person is not a party to the case concerned, meaning that the person has no desire to influence the outcome of the case involving the wider community.

In countries that have recognized and accommodated the Amicus Curiae or international courts related to human rights violations, judges usually consider and evaluate the Amicus Curiae in their decisions. Especially with regard to the question of whether the opinions on the law and the case from the Amicus Curiae are acceptable or not. And the Amicus Curiae is usually brought to appeal cases and issues of public interest such as social issues or civil liberties that are being debated, the judge's decision will have a broad impact on people's rights.

This Amicus Curiae is to provide an overview of the law and the case, especially its impact on other parties other than the parties who are not involved in litigation in court, and also to assess the law and the case independently. At the domestic level, there is a need to accommodate and acknowledge the existence of Amicus Curiae. It must be admitted that the Amicus Curiae has not been accommodated in our legal system, especially in cases related to the public interest, such as human rights violations and corruption. Perhaps, in the future our law or court precedents need to recognize and accommodate the Amicus Curiae which aims to help the court explain the legal substance and the case that is being tried independently. Because the development of the law itself is dynamic depending on space and time, it is necessary to look at the opinions of other parties other than the litigants in court regarding the law and the case.

The nature of evidence in criminal procedural law is very urgent, if it is explained, with a proof which is a process to determine and state someone's guilt. The conclusion of this evidence is carried out through the judicial process.

In the criminal procedural law that applies in Indonesia, there is a system of evidence. The proof system is based on the Criminal Procedure Code (KUHAP), namely the defendant's guilt must be based on his guilt which is proven by at least two valid pieces of evidence, the judge has the belief that the crime actually occurred and the defendant did it. Included in the evidence in the criminal procedure law is Article 184 of the Criminal Procedure Code, namely: witness statements, expert statements, letters, instructions, and statements from the defendant. When it comes to the Amicus Curiae, of course, it is not evidence that exists in criminal procedural law, but in Indonesia it has been

¹⁶ Tony Prayogo, "Penerapan Asas Kepastian Hukum dalam Peraturan Mahkamah Agung Nomor 1 Tahun 2011 tentang Hak Uji Materiil dan dalam Peraturan Mahkamah Konstitusi Nomor 06/Pmk/2005 tentang Pedoman Beracara dalam Pengujian Undang-Undang." *Jurnal Legislasi Indonesia*, Vol. 13, No. 2, 2018, p. 191-201.

practiced, in various cases.¹⁷ When an organization proposes Amicus Curiae in a trial and the judge agrees, Amicus Curiae is allowed to express its opinion but not to oppose it. The presence of Amicus Curiae can lighten the burden of proof carried by prosecutors and legal advisors and become a consideration for judges to decide cases, namely criminal cases.

When referring to the meaning of Amicus Curiae as discussed earlier, there are three categories of Amicus Curiae, namely:¹⁸

1. Apply for a permit/application to become an interested party in the trial;
2. Give an opinion at the request of the Judge, or
Provide information or opinions on their own initiative.

This Amicus Curiae does not have to be a lawyer but a person who has knowledge of a case that makes his testimony valuable to the court. Amicus Curiae has an independent position, in contrast to lawyers who have a position to represent the interests of the person giving the power of attorney (the defendant). This information from the Amicus Curiae can be in the form of writing or given orally in court, the written file is usually referred to as the Amicus Brief. In the statement it can be an explanation of facts or legal, scientific opinions. This Amicus Curiae can give information at trial because of a request or requested by the court and can even submit it himself, but must have permission from the chairman of the court. When it is received, it is allowed to give information, because its purpose is to assist the examination, and as a form of participation. Looking at the use of Amicus Curie in terms of the theory of the judge's decision, it can actually be justified, because in the theory of making a decision, the judge must consider the balance between the conditions that have been determined in the applicable law and the interests of the parties involved related to a case. For example, there is a balance that is directly related to the community, or the interests of the defendant and others. Therefore, with the consideration in the interests of the community, it has become a space for the inclusion of this Amicus Curiae practice in criminal justice in Indonesia. Because usually the reason for submitting the Amicus Curiae is in the interest of the wider community. However, in contrast to the theory of decision-making through a scientific approach, usually judges in trial practice often ask expert witnesses to express their opinions. Judges can consider or determine decisions that should be in accordance with a sense of justice.

In the United States, the Amicus Curiae plays an important role in important cases, such as civil rights and abortion cases.¹⁹ Amicus Curiae can convey that information, usually abroad there are rules to require permission from the court or it can be approval from one or both parties. However, in Indonesia, namely the Supreme Court, there are no regulations regarding this matter and the Amicus Brief can be submitted directly to the court, although there is no guarantee that the

¹⁷ Syaiful Bakhri, *Sistem Peradilan Pidana di Indonesia*, Pustaka Pelajar, Yogyakarta: 2014, p. 109.

¹⁸ Siti Aminah, *Op. Cit.*, p. 14.

¹⁹ Soares, Cesaltina Angela, and I. Made Agus Mahendra Iswara, "Amicus Curiae in The Criminal Evidence System in Indonesia." *Sociological Jurisprudence Journal*, Vol. 2, No. 1, 2019, p. 69.

Amicus Brief will be considered. When the Constitutional Court has regulation number 06/PMK/2005 it is stated that related parties must apply for a permit so that their statements can be heard, if granted, the Constitutional Court will issue an opinion, a copy of which will be given to the party submitting the application. However, the Constitutional Court does not have regulations for indirectly related parties, such as the Amicus Brief who submits written statements without being present in person at the trial.

The position of Amicus Curiae cannot be categorized as evidence as stated in the Criminal Procedure Code. The Amicus Curiae is a new piece of evidence that does not have a standard form, because it has not been clearly or formally regulated in the existing laws and regulations. In terms of the evidentiary strength, the Amicus Curiae lies in the conviction of the judge himself in assessing the content and relevance of the proposed Amicus Curiae to the case. Amicus Curiae cannot be said to be a witness statement or an expert witness, because it is something new in criminal justice, although there are no specific regulations yet, its practice has been applied in several cases in Indonesian courts.

Amicus Curiae cannot be said to be a witness statement. This can be seen from Article 1 point 26 of the Criminal Procedure Code 26 which states that a witness is a person who can provide information for the purposes of investigation, prosecution and trial regarding a criminal case which he has heard, seen, and experienced himself. The requirements to be a witness are being healthy (not having a mental disorder), being mature, having the courage to take an oath according to their respective religions, and seeing, hearing, experiencing for themselves, and the witness's obligation is to give honest information.

The Constitutional Court Decision Number 65/PUU-VIII/2010 further expands the definition of a witness, namely "Article 1 points 26 and 27, Article 65, Article 116 paragraph (3) and paragraph (4) of Law Number 8 of 1981 concerning Criminal Procedure Code is contrary to the 1945 Constitution of the Republic of Indonesia (*UUD 1945*).

As long as the definition of a witness in those articles is not interpreted as a person who always hears, sees, and experiences an event. These decisions include declaratory and constitutive decisions. Thus, since the reading of the Constitutional Court's decision which has binding legal force. Amicus Curiae is someone who has an interest in clarifying factual issues, explaining existing legal issues and representing certain groups, it is not explained that Amicus Curiae must be someone who has seen, heard or experienced it himself.

Amicus Curiae cannot be said to be an expert witness, because expert witnesses cannot be just anyone, but information given by someone who has special expertise, such as medical experts, procedural law experts, and others. Amicus Curiae does not have to be a person with special expertise such as an expert witness, ordinary people can become Amicus Curiae as long as someone follows the existing case. Amicus Curiae is not an intervention that affects a court's decision, it is

nothing but an expression of the right to an opinion on the law and the case that is being heard in court from a person or institution.

Although Amicus Curiae is not included in the evidence, his opinion is accepted and can be considered by the judge, this is in accordance with the judge's obligation to explore the values of justice that live in society. Amicus Curiae can be used as material to make light of a matter. The concept of Amicus Curiae is in line with the provisions of national law, juridically judges are required to open the widest possible range of information and opinions from various groups as a form of legal discovery by exploring existing laws in society as well as concrete new facts related to the case that is being handled.²⁰

The discovery of law by judges is prioritized because the main task of judges is to find the law in judging and deciding a case, and to establish law through its decision (jurisprudence) which is one of the sources of law. In addition, legal scientists also make legal discoveries, the results are in the form of legal science or doctrine which can also be used as sources of law. If the doctrine is followed and taken over by the judge in his decision, then it becomes law.²¹ In this regard, the legitimacy of the Amicus Curiae as evidence needs to be encouraged to be included in future legislative policies.

CLOSING

The Amicus Curiae is not concretely regulated in any legislation in Indonesia's current positive law. However, there are several provisions in the laws and regulations that provide space for the *Amicus Curiae* to be used as evidence of a crime in court. The following are some of the rules:

- a. Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, as well as in Article 5 paragraph (1) it is stated that "judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society. "
- b. Article 14 paragraph (4) of the Regulation of the Constitutional Court Number 06/PMK/2005 states that the related parties with indirect interests are:
 1. Parties whose statements, due to their position, main tasks, and functions need to be heard
 2. Parties who need to be heard as ad informandum, namely parties whose rights and/or authorities are not directly affected by the principal of the application but because of their high concern for the application in question.
- c. Article 180 paragraph (1) states: "In the event that it is necessary to clarify the position of the problems that arise in a court session, the presiding judge at the trial may request expert testimony and may also request that new materials be submitted by those concerned."

²⁰Ni Putu Wdyaningsih, "Amicus Curiae dalam Proses Peradilan Pidana Anak sebagai Pengguna Narkotika." *Jurnal Kertha Semaya*, Vol. 8, No. 7, 2020, 1098.

²¹Efa Laela Fakhriah, "Penemuan Hukum oleh Hakim Melalui Pembuktian dengan Menggunakan Bukti Elektronik dalam Mengadili dan Memutus Sengketa Perdata," *Jurnal Bina Mulia Hukum*, Vol. 5, No.1, 2020, p. 90.

- d. Article 183 paragraph (1) of the Criminal Procedure Code states that "Evidence provided by the government, person, or other state company is considered as valid evidence if it is obtained legally based on the laws and regulations of the other country."

Amicus Curiae as a Concept for the Development of Criminal Law Evidence in Combating Limitative Formalism Evidence in Future Laws (*Ius Constituendum*), are: our law or court precedents need to recognize and accommodate the *Amicus Curiae* aiming to help courts explain the legal substance and the case is being heard independently. Because the development of the law itself is dynamic depending on space and time, it is necessary to look at the opinions of other parties other than the litigants in court regarding the law and the case. The limited scope of evidence in the Criminal Procedure Code makes the position of *Amicus Curiae* illegal, however in its development, the *Amicus Curiae* has been widely used to decide cases that are of lack evidence. This *Amicus Curiae* is delivered by someone who is interested in influencing the outcome of the action, but is not a party to a dispute; an adviser to the court on some legal matters who is not a party to a case usually someone who wants to influence the outcome of a case involving the wider community.

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