

Exclusionary Rule As The Defendant's Rights In Criminal Jurisdiction

Rizka Fakhry Alfiananda¹, Devy K. G. Sondakh², dan Ralfie Pinasang³

¹Pengadilan Negeri Airmadidi dan ^{2,3}Universitas Sam Ratulangi

Email: fakhryrizka@gmail.com

Abstract

The *exclusionary rule* is basically one of the principles that developed along with the development of criminal evidence law, especially in countries with anglo-Saxon legal traditions. The principle that emphasizes the exclusion or exclusion of evidence obtained unlawfully in the criminal justice process has over time become a procedural element that supports the creation of a fair trial for the Defendant. The right to a fair trial is a right that must be guaranteed by the State and does not only concern the right to be tried by an independent and impartial court. Indonesia as a state of law that tries to balance the public interest in law enforcement with the interests of the suspect or defendant in a fair judicial process unfortunately has not regulated *exclusionary rule* in its criminal procedural law. In fact *exclusionary rule* is one of the instruments for recovery in the event of a violation by law enforcement officials, especially in the process of obtaining evidence. Through research conducted using this normative legal research method, the author wants to place the *exclusionary rule* not only as a principle but also as a defendant's right in the criminal justice process as an inseparable part of the right to a fair trial so that it is urgent to be accommodated in the agenda of procedural law reform. Indonesian crime.

Keywords: Exclusionary Rule; The Right to a Fair Trial; Criminal Justice

INTRODUCTION

Protection of human rights is one of the consequences of the adoption of the democracy or rule of law by Indonesia as confirmed in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Human rights are a set of rights inherent in the nature of and the existence of humans as creatures of God Almighty and is His gift that must be respected, upheld and protected by the state, law, government, and everyone for the sake of honor and protection of human dignity.¹ The state must guarantee the equality of every individual, including the independence of the individual to exercise their human rights. However, this does not mean that human rights that must be respected, protected, and fulfilled by a state of law are not at all possible with restrictions.

Criminal law is one of the legal aspects that cannot be separated from the discourse on the protection and limitation of human rights. As a means to maintain order and

¹ Pasal 1 angka 1 Undang-Undang Republik Indonesia Nomor 39 Tahun 1999 tentang Hak Asasi Manusia.

security in society, criminal law provides a legitimacy for the state to punish someone who has committed an act that is included in the category of criminal act (*ius puniendi*). All criminal justice systems are in principle *coercive in nature* because in their implementation there must be rights or individual freedoms that are sacrificed in order to protect the interests of the greater citizen.² Under these conditions, the criminal justice system has placed the interests of the state and the interests of the suspect or defendant in a *vis--vis*.³

In order to ensure a balance between law enforcement and the protection of human rights, the criminal justice system must work by prioritizing the principle of *due process of law* as constructed in a criminal procedure law (*criminal procedure law / criminal procedure act / criminal procedure code*). The presence of criminal procedural law seeks to ensure that the implementation of *ius puniendi* from the state is carried out in ways that are in accordance with the law and minimizes arbitrariness from the state considering the current global trend showing trust in the means of penal as an effective control strategy against the community given the characteristics of criminal law which are coercion and the various coercive elements it has.

In addition, the presence of criminal procedural law also aims to ensure that the suspect or defendant gets a fair trial, considering that the *right to a fair trial* is part of human rights. The right to a fair trial does not only include the right to be tried by an independent and impartial judiciary, but more than that the right to a fair trial includes all rights, both fundamental and procedural in nature, contained in criminal procedural law, namely since the investigation process (investigation) and investigation) until the execution of the decision. Therefore, the state must be present to provide protection and at the same time provide remedies (*remedies*) if there is a violation in the implementation of the criminal justice process carried out by law enforcement officers.⁴

exclusionary rule is present as a form of redress provided by the state for violations of human rights, especially in the aspect of the process of obtaining evidence. The principle that emphasizes the exclusion or waiver of evidence obtained in an unlawful or unlawful manner *has* developed along with the development of the law of evidence (*rules of evidence*) in criminal procedural law, particularly with regard to the *admissibility of evidence*.⁵ The validity of the evidence in its development does not only

² PHPHMC van Kempen, *ed.*, *Criminal Law and Human Rights*, (Burlington: Ashgate Publishing Company, 2014), hlm. xi.

³ Muntolib, Ahmad, and Sri Endah Wahyuningsih. "Peran Bantuan Hukum dalam Proses Peradilan Pidana di Kabupaten Blora." *Jurnal Hukum Khaira Ummah* 12.3 (2017), hlm. 637-642.

⁴ Mekanisme pemulihan menjadi penting mengingat baik *Article 18* dari *Universal Declaration of Human Rights* maupun *Article 2* dari *International Covenant on Civil and Political Rights* sudah menempatkan hak untuk mendapatkan pemulihan (*right to a remedy*) sebagai salah satu hak asasi manusia yang diakui sekaligus dijamin. Negara harus memberikan pemulihan jika Negara melanggar hak-hak atau kebebasan warga negara yang dijamin oleh konstitusi.

⁵ Basri, Hasan. "Perlindungan Hukum terhadap Pelaku Tindak Pidana berdasarkan Sistem Peradilan Pidana Indonesia." *SIGn Jurnal Hukum* 2.2 (2021), hlm. 104-121.

involve aspects of the relevance of the evidence to the case being examined but also includes the process of obtaining the evidence (*bewijsvoering*) so that evidence obtained against the law cannot be used to prove the guilt of the Defendant at trial.

Genealogically, the *exclusionary rule* was born and developed in the Anglo-Saxon legal tradition, especially England and the United States, which tend to have a *due process model* with the characteristics of an adversarial system. Apart from being a representation of respect for the *due process of law* in providing protection for human rights, especially suspects or defendants, the birth of the *exclusionary rule* is also inseparable from efforts to protect the jury and *lay* from failing to examine the evidence presented at trial. In contrast to judges who are considered professional, judges and *lay* considered ordinary people who have minimal experience in the decision-making process so they are very vulnerable to errors in evaluating the evidence submitted by the litigants. Thus, the law of evidence must be constructed rigidly which includes some exceptions to the *evidence*.

However, the existence of legal convergence as a consequence of international relations makes the differentiation between the two no longer relevant. In practice, countries with inquisitorial systems are starting to recognize exceptions against evidence obtained against the law in the law of proof.⁶ The exclusion of evidence obtained against the law is basically a consequence of the procedural aspects that are inseparable from a criminal justice process, namely the acquisition of evidence. Indeed, almost all criminal justice regimes strictly regulate the acquisition of evidence, but not all of them strictly regulate the exclusion or exclusion of evidence obtained illegally. Whereas strict rules regarding the acquisition of such evidence should be balanced with a consequence if the evidence is obtained against the law.

Indonesia through the Criminal Procedure Code as the main guide in the implementation of the criminal justice process and other laws outside the Criminal Procedure Code only regulates the acquisition of evidence but does not regulate the exclusion or exclusion of evidence obtained unlawfully through the *exclusionary rule*. This is understandable because Indonesia is a country that inherits the legal tradition of continental Europe which from the beginning has a tendency to *crime control models* with a strong inquisitorial system characteristic and conceptually requires efficiency in law enforcement so as to try to minimize the emergence of obstacles that can affect on the efficiency of law enforcement. In the evidentiary process, judges who prioritize the principle of *free proof* will only accept relevant evidence and will only exclude or rule out evidence that they think is irrelevant. The validity of the evidence presented at the trial is only seen from its relevance to the case being examined. Because the examination of the evidence presented at the trial is the domain of the judge, the existing evidentiary

⁶ Jacqueline Ross dan Stephen C. Thaman, *Comparative Criminal Procedure*, (Massachusetts: Edward Elgar Publishing, 2016), hlm. 44.

law is not rigidly constructed and only serves as a *guideline* for judges in their efforts to find facts and draw conclusions from the facts obtained.

This is a dilemma, considering that based on several studies, it is found that there have been violations of human rights in the process of obtaining evidence.⁷ For example, the use of *non-scientific investigation* form of torture to obtain information and even confessions from both the Witness and the Defendant. In the context of evidence, this practice has the potential to lead to misjudgments of evidence leading to the possibility of a *miscarriage of justice* or *failure of justice* if it is not balanced with provisions concerning the *exclusionary rule* in criminal procedural law. Thus, the absence of regulation regarding the *exclusionary rule* will also reduce the defendant's right to receive a fair trial. Therefore, in this paper, the author wants to place the *exclusionary rule* not only as a principle but also as the defendant's right in the criminal justice process as an inseparable part of the right to a fair trial.

RESEARCH METHODS

This research was conducted using normative law research methods that focus on an inventory of positive law, legal principles and doctrines, legal discovery in cases *in concreto*, legal systematics at the level of legal synchronization, legal comparisons, and legal history. In addition, this research also uses several approaches, namely: the *statute approach*, the *historical approach*, and the *conceptual approach*. The data used in this paper is secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials obtained from *library research*. The data that has been collected is analyzed using qualitative methods which then produce descriptive-analytical writing.

RESULTS AND DISCUSSION

Procedural Aspects As A Basis Of The Right To A Fair Judicial Process

Criminal justice is a representation of the *ius puniendi* or the state's right to punish someone who has committed an act that is categorized as a criminal act. In the criminal justice process, charges against the Defendant will be submitted in a trial which is open to the public unless the law provides otherwise. The Prosecutor will try to prove the indictment by submitting evidence and against that evidence the Defendant can refute. The court then renders a decision based on an assessment of the evidence presented at

⁷ Lihat Nurkholis Hidayat dan Restaria F. Hutabarat, *ed.*, *Mengukur Realitas dan Persepsi Penyiksaan di Indonesia*, (Jakarta: The Partnership for Governance Reform, 2012), hlm. 95., Working Group on the Advocacy against Torture, *Indonesia Pro Penyiksaan: 16 Tahun Pasca Ratifikasi Konvensi Anti Penyiksaan di Indonesia - Catatan Untuk Peringatan Hari Anti Penyiksaan Internasional 2014*, (Jakarta: Working Group on the Advocacy against Torture, 2014), hlm. 6-7., dan Ayu Eza Tiara, Arif Maulana, dan Muhammad Retza Billiansya, *Kepolisian Dalam Bayang-Bayang Penyiksaan (Catatan Kasus Penyiksaan Sepanjang Tahun 2013 sd 2016)*, (Jakarta: Lembaga Bantuan Hukum (LBH) Jakarta, 2016), hlm. 38- 42.

trial. This implies that the factual basis for making a decision must be based on a careful examination of the evidence against and against the Defendant.

Considering the interests of the Defendant is an important matter so that the Defendant can participate effectively in the trial process. To ensure this, the Defendant is granted all kinds of procedural rights that allow him to participate during the trial process. These rights are categorized properly according to the notion of *a fair trial*, which is the basic understanding that the criminal process against a defendant must be carried out in a fair and proper manner.⁸

The right to a fair trial is one of the fundamental rights as well as the most complex because it includes the main principles in the implementation of the judicial process so that the right to a fair trial cannot only be interpreted as the right to be tried in a fair and open examination by an independent court. and impartial. This complexity can even be seen from the different approaches used to define it. (*right to a fair trial*) is very difficult to define in a standard way considering that each expert has his own idea of how a fair trial should be. Indeed, many experts have agreed on the basic features of a fair trial, but it must be understood that there are still many controversial aspects so that no agreement can be found.

The originality and universality of the right to a fair trial is critical to the diversity and extreme complexity of the elements of this right making the unique concept of this right difficult to define.⁹ *A fair trial* may be simple enough to look at from a linguistic point of view. However, at the practical level, it is very difficult to define a fair trial and identify the limits of *a fair trial* and *an unfair trial*. This difficulty occurs because the limits of *fair trial* and *unfair trial* may be very thin, considering that in many cases the concept of *fair trial* is closely related to the traditions and legal systems of each country, thus allowing for different levels of guarantees to guarantee rights. Therefore, the concept of "*fairness*" would allow it to be used to find criteria that separate *fair trials* from *unfair trials* as well as establish rules and criteria to identify them. Judicial institutions must have the necessary standards to distinguish *fairness* from *unfairness* because this is an important element in the implementation of the right to a fair trial.

The discourse of the criminal justice system cannot be separated from the concept of *fairness*, which is basically one of the most important principles in formulating constitutional agreements which become *the basic structure of society*. *Fairness* is an integral part of the goals of the criminal justice system. According to Matthew Robinson and Marian Williams, the goal of the criminal justice system, apart from reducing crime, is to create justice.¹⁰ Creating justice has 2 (two) interrelated meanings, as reflected by

⁸ Koen Vriend, *Avoiding a Full Criminal Trial: Fair Trial Rights, Diversions, and Shortcut in Dutch and International Criminal Proceedings*, (Berlin: Springer dan Asser Press, 2016), hlm. 2.

⁹ Mindaugas Simonis, "Effective Court Administration and Professionalism of Judge as Necessary Factors Safeguarding the Mother of Justice - The Right to a Fair Trial", *International Journal for Court Administration Volume 10 Issue 1*, (2019), hlm. 50.

¹⁰ Matthew Robinson dan Marian Williams, "The Myth of Fair Criminal Justice System", *Justice Policy Journal Volume 6 Nomor 1*, (2009), hlm. 4-5.

Justitia, a Goddess of Justice in Roman mythology who carries a sword and scales. The sword is considered to represent the first meaning of justice which aims to hold the guilty person accountable for the harm he has caused. If a criminal is not punished for his guilt, then justice has not been achieved. This justice is referred to *ascorrective justice* or justice as a result. Then the scales and blindfolds are considered to represent *fairness* as the second meaning of justice which assumes that everyone will be treated equally in the eyes of the law or justice is blind. Justice thus will not be present when there is a person or group who is treated differently by law. This justice is referred to *asprocedural justice*.

Justice can not only be seen from the aspect of the results, but also the process to achieve the results.¹¹ In this discourse, there is a difference in the meaning of justice from the outcome aspect and justice from the process aspect. In this regard, George P. Fletcher distinguishes between *justice* and *fairness*. *Justice* is about what someone deserves, while *fairness* is about how someone is treated compared to others.¹² In the context of criminal justice, *justice* is associated with the interests of the victim, while *fairness* is associated with the interests of the defendant. Nevertheless, *fairness* is a relative matter as stated by Justice Benjamin Nathan Cardozo in his consideration in the case of *Snyder v. Massachusetts* in 1934 that "*due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute, concept. It is fairness with reference to particular conditions or particular results*".¹³

In the criminal justice process, criminals in principle deserve to be punished for their actions, but they are subject to conviction and punishment if the state has given them *afair trial* and proved their guilt *beyond reasonable doubt*. *Fairness* is conceptualized as something that is felt by the Defendant in relation to the process and how the Defendant is treated in the process. In this context, the *fairness* or *fairnessreasonableness*.¹⁴

¹¹ Shiddiq, Farhan Ridhwan, and Sholahuddin Harahap. "Perlindungan Hukum Atas Hak Terdakwa untuk Didampingi Penasehat Hukum dalam Memenuhi Hak Hak Terdakwa." *Prosiding Ilmu Hukum* (2018): hlm. 696-702.

¹² George P. Fletcher, "Justice and Fairness in the Protection of Crime Victims", *Lewis & Clark Law Review Volume 9 Nomor 3*, (2005), hlm. 548.

¹³ *Snyder v. Massachusetts*, 291 US 97 (1934). The case stems from an armed robbery and murder that occurred at a gas station in Somerville, Massachusetts. At the trial, the Public Prosecutor submitted a motion for the jury to be directed to look at the scene of the case. The court later granted the motion under Massachusetts law. Snyder's attorney then filed a motion so that his client could attend the scene with the jury, but the motion was rejected so the review was carried out only by the absence of the defendant. Snyder was later tried and sentenced to death for the murder. Snyder's attorneys argued that the Judge's refusal of his motion to appear at the crime scene was a violation of due process under the Fourteenth Amendment to the United States Constitution. However, Justice Benjamin Nathan Cardozo, who represented the majority of the Judges, stated that there was no violation of the due process in the process. Meanwhile, Owen Josephus Roberts, who represented the minority judges, expressed his dissenting opinion against the majority opinion of the judges.

¹⁴ Alexandre Chitov, "The Concept of Truth And Fairness In Thai Criminal Procedure", *New Criminal Law Review Volume 24 Nomor 1*, (2021), hlm. 62.

Eligibility or fairness is represented by a series of procedures that regulate how a person is treated in the criminal justice process. If referring to the concept of human rights presented by Roy Gregory and Philip Giddings which divides human rights into 2 (two) categories, namely substantive rights (*substantive rights*) and procedural rights (*procedural rights*),¹⁵ then it is actually appropriate or reasonable. These are in the category of procedural rights which are an important element in realizing a substantially fair trial. However, the right to a fair trial is substantially not only supported by procedural rights in its realization. Other substantive rights also play an important role in supporting the creation of a fair trial as well as giving a person the right to a fair trial. Therefore, the right to a fair trial must not only be understood partially as translated as the right to be tried by a court that is open to the public as well as independent and impartial, but must be understood in its entirety considering that there are many other rights that are important to build a conception of rights. on a fair trial.

Exclusionary Rule As An Important Element Of Fair Judgment

One of the inseparable components of the right to a fair trial is the *exclusionary rule* or the exclusion of evidence obtained against the law. The exclusion of evidence obtained against the law is basically a consequence of the procedural aspects which are an integral part of a criminal justice process, namely the acquisition of evidence. Almost all criminal justice regimes strictly regulate the acquisition of evidence but not all of them strictly regulate the exclusion of evidence obtained against the law. Whereas strict rules regarding the acquisition of such evidence should be balanced with the consequences if the evidence is obtained against the law.

As a consequence of obtaining evidence, basically the exclusion of evidence obtained unlawfully is the right of the Suspect or the Defendant. M. Cherif Bassiouni discusses it as inadmissibility of *certain evidence*.¹⁶ The formula given by M. Cherif Bassiouni is not clear because certain evidence is not received because it was obtained against the law. The right to the exclusion of evidence obtained illegally would be more concrete to describe the rights that arise as a consequence of violating the procedural aspects of obtaining evidence in the criminal justice process.

The discourse on the exclusion of evidence obtained illegally as a right is still quite controversial considering that not all criminal justice regimes regulate this matter in a

¹⁵ Menurut Roy Gregory dan Philip Giddings, hak-hak substantif (*substantive rights*) terdiri dari hak asasi manusia generasi pertama, kedua, dan ketiga. Sedangkan hak-hak prosedural (*procedural rights*) terdiri dari 2 (dua) bagian, yaitu: hak untuk menerima perlakuan-perlakuan yang *fair*, adil, dan tidak memihak dari para pejabat yang melaksanakan kewenangan publik dalam kaitan dengan hak-hak substantif; dan hak untuk mengajukan keluhan atau keberatan (*the right to complain*), hak untuk didengar (*the right to be heard*), dan hak untuk mendapatkan tindakan pemulihan apabila menderita kerugian akibat tindakan pemerintah (*the right to have corrective action taken if one has suffered harm from government*). Lihat Roy Gregory dan Philip Giddings dalam Richard Bellamy and Alex Warleigh (eds.), *Citizenship and Governance in the European Union*, (London dan New York: Continuum, 2001), hlm. 73.

¹⁶ M. Cherif Bassiouni. *International Criminal Law. Second Revised Edition*, (Leiden: Martinus Nijhoff Publishers, 2014), hlm. 809-810.

concrete way. If you look at international human rights legal instruments such as the *Universal Declaration of Human Rights* (UDHR) and *International Covenant on Civil and Political Rights* (ICCPR), indeed there is no single provision that is directly related to the exception of evidence obtained against the law. In fact, the two instruments do not explicitly regulate the acquisition of evidence.

However, the provisions of *Article 14*¹⁷ from the ICCPR which is referred to as a representation of an arrangement regarding the right to a fair trial, based on *General Comment No. 32* often plays an important role in providing guarantees for other substantive rights in the covenant and must be taken into account in determining criminal

¹⁷ *Article 14* dari ICCPR menyebutkan sebagai berikut:

1. *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*
2. *Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*
3. *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
 - (a) *To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
 - (b) *To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
 - (c) *To be tried without undue delay;*
 - (d) *To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*
 - (e) *To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
 - (f) *To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*
 - (g) *Not to be compelled to testify against himself or to confess guilt.*
4. *In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.*
5. *Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*
6. *When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*
7. *No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*

charges and the rights and obligations of a person in a criminal justice process.¹⁸ In the context of obtaining evidence and the exclusion of evidence, *Article 14* has a close relationship with *Article 7* which basically states that no one can be subjected to torture or cruel, inhuman or degrading treatment or punishment.¹⁹ *general comment* states that domestic law must ensure that statements or confessions obtained in violation *Article 7* of the ICCPR are excluded from evidence unless such statements or confessions are used as evidence that torture or other treatment prohibited by that provision has occurred.²⁰ The State has the burden of proving that the statements made by the Defendant have been given of their own free will accompanied by information about the circumstances under which the evidence was obtained to enable an assessment of the claim.²¹

European Convention on Human Rights (ECHR), as emphasized in the *Guide on Article 6 of the European Convention on Human Rights*, *Article 6*²² does guarantee the right to a fair trial but this provision does not establish any rules regarding the validity of evidence.²³ However, if it is concluded from the explanation in the *guide*, the *European Court of Human Rights* has raised a lot of jurisprudence that can be used as a guide to assess the validity of evidence, especially from the aspect of its acquisition. In some of

¹⁸ Human Rights Committee, General Comment No. 32 - Article 14: Rights to Equality Before Courts and Tribunals and to a Fair Trial, (Geneva: United Nation Human Rights Committee, 2007), hlm. 17.

¹⁹ *Article 7* dari ICCPR menyebutkan bahwa “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”

²⁰ Human Rights Committee, *Op.cit.*, hlm. 2

²¹ Human Rights Committee, *Op.cit.*, hlm. 10 dan hlm. 13

²² *Article 6* dari ECHR menyebutkan sebagai berikut:

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
3. *Everyone charged with a criminal offence has the following minimum rights:*
 - (a) *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
 - (b) *to have adequate time and facilities for the preparation of his defence;*
 - (c) *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
 - (d) *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
 - (e) *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

²³ European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights - Rights to a Fair Trial*, (Strasbourg: Council of Europe, 2021), hlm. 43.

these jurisprudence, *Article 3* concerning *Prohibition of Torture*²⁴ and *Article 8* concerning *Right to Respect for Private and Family Life*²⁵ have relevance to *Article 6* in terms of obtaining evidence. The use of evidence obtained by violating these two provisions will result in an unfair trial under *Article 6*.²⁶

However, the *European Court of Human Rights* maintains that it is not the role of the courts to determine whether certain types of evidence such as evidence obtained illegally under domestic law are admissible. The question that must be answered is whether the trial process as a whole, including the way in which evidence is obtained, is fair. This involves examining the alleged violations of the law in question, particularly violations of other rights under the convention. So in this context, the right to defend the defendant must be respected. The defendant was given the opportunity to challenge the validity of the evidence as well as oppose its use.

Similar to the ECHR, *The American Convention on Human Rights (Pact of San José)* through *Article 8*²⁷ Indeed, it has guaranteed the right to a fair trial, but this

²⁴ *Article 3* dari ECHR menyebutkan bahwa “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

²⁵ *Article 8* dari ECHR menyebutkan sebagai berikut:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

²⁶ Human Rights Committee, *Op.cit.*, hlm. 43-46.

²⁷ *Article 8* dari *Pact of San José* menyebutkan sebagai berikut:

1. *Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the sub stantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.*
2. *Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:*
 - a. *The right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;*
 - b. *Prior notification in detail to the accused of the charges against him;*
 - c. *Adequate time and means for the preparation of his defense;*
 - d. *The right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;*
 - e. *The inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;*
 - f. *The right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;*
 - g. *The right not to be compelled to be a witness against himself or to plead guilty; and*
 - h. *The right to appeal the judgment to a higher court.*
3. *A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.*
4. *An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.*
5. *Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.*

provision does not stipulate any rules regarding the validity of evidence. Even the vacancy in this provision was never answered with other documents outside the main document, as was the case with the *European Court of Human Rights* against the ECHR. Some argue that *The Inter-American Court of Human Rights* evaluates evidence in a flexible and informal way. However, the flexibility of accepting the evidence has exceptions in 2 (two) matters, namely: First, *Article 57 of the Rules of Procedure of the Inter-American Court of Human Rights* which states "*Items of evidence tendered before the Commission will be incorporated into the case file, as long as they have been received in adversarial proceedings, unless the Court considers it indispensable to duplicate them*". Therefore, evidence produced by the Commission in non-adversarial proceedings should be excluded from the evidence pool of a particular case. However, the Court appears to be of the opinion that the evidence presented by the Commission was obtained in an adversarial process.²⁸

Second, the exclusion of evidence obtained through coercion. The evidence referred to initially was only a confession by referring to *Article 8 (3)*, namely "*A confession of guilt by the accused shall be valid only if it is made without coercion of any kind*". In its development, there has been a debate as to whether the exception to this evidence can be made on evidence other than confessions obtained through coercion or not. However, based on existing jurisprudence, the exception to this evidence is still limited to confessions obtained through coercion. In fact, this provision is different from the *United Nation Human Rights Committee* under *Article 7* of the ICCPR which excludes statements or confessions obtained through torture or other cruel, inhuman or degrading treatment.²⁹

The African Charter on Human and Peoples Rights (Banjul Charter) not much different from the ECHR and the *Pact of San José. Banjul Charter* seems silent about how to handle evidence obtained through human rights violations.³⁰ Nonetheless, *The African Commission on Human and Peoples' Rights* has been involved in developing a framework for obtaining unlawful evidence for example through *The Resolution on the Right to Recourse and a Fair Trial (Tunis Resolution)*, *The Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa (Dakar Declaration)*, *The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman*

²⁸ Meskipun aturan eksklusivitas ini ditetapkan hanya dalam *the rules of procedure*, namun kebebasan Pengadilan untuk mengubahnya terbatas, karena persyaratan ini mengalir dari *asas audi et alteram partem* yang merupakan asas dasar keadilan. Selanjutnya, Pengadilan harus mempertimbangkan tidak dapat diterimanya semua bukti yang dihasilkan tanpa mengikuti prinsip ini, kecuali ada keadaan langka yang membenarkan pengecualian, seperti kematian seorang saksi yang diusulkan yang dapat memberikan pernyataan tertulis. Namun demikian, bahkan dalam kasus seperti ini, pihak lawan harus diberikan kemungkinan untuk menolak atau mengomentari bukti ini. Álvaro Paúl, "Admissibility of Evidence Before the Inter-American Court of Human Rights", *Revista Direito GV Volume 13 Nomor 2*, (2017), hlm. 663.

²⁹ *Ibid.*, hlm. 663-671.

³⁰ Robert Doya Nanima, "Evaluating the jurisprudence of the African Commission on evidence obtained through human rights violations", *De Jure Law Journal*, (2020), hlm. 307-308.

or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), and *The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*. Although indeed among the four instruments, only *Robben Island Guidelines* and *the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* provide arrangements regarding the exclusion of evidence obtained unlawfully.

Robben Island Guidelines provide limited standards regarding the exclusion of evidence, i.e. only evidence obtained through torture, cruel, inhuman or degrading treatment. Then, through *The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 4 (four) concepts were introduced, namely: the right to an effective remedy, the role of the Prosecutor, prohibition of obtaining evidence through violations of the rights of detained persons, and regulations regarding how to handle evidence obtained through force or coercion.³¹ The prohibition of obtaining evidence through violation of the rights of a detained person is regulated in letter M numbers 7 d to f, respectively as follows:

- d) *It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him or her to confess, to incriminate himself or herself or to testify against any other person.*
- e) *No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his or her capacity of decision or his or her judgment.*
- f) *No detained person shall, even with his or her consent, be subjected to any medical or scientific experimentation which could be detrimental to his or her health.*

While the rules on how to handle evidence obtained through violence or coercion are regulated in letter N number 6 d (i), namely:

- d) *The accused has the right not to be compelled to testify against him or himself or to confess guilt.*
- (i) *Any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing. Any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion.*

Although based on these provisions implicitly it is only limited to the exception of evidence in the form of confessions, but if you refer to the provisions of letter N number 6 g, then actually the exception of evidence is not only limited to evidence in the form of confessions but also includes other evidence. The provisions of letter N number 6 g state that:

³¹ *Ibid.*, hlm. 311.

Evidence obtained by illegal means constituting a serious violation of internationally protected human rights shall not be used as evidence against the accused or against any other person in any proceedings, except in the prosecution of the perpetrators of the violations.

When the Prosecutor obtains evidence against a Suspect that they know or believe with reasonable grounds to obtain through other means by unlawful methods, which constitute a grave violation of the Suspect's human rights, particularly involving torture or other cruel, inhuman or degrading treatment or punishment, degrading, or other violations of human rights, they must refuse to use such evidence against anyone other than those who used the method, or notify the appropriate judicial body, and must take all necessary steps to ensure that those responsible for using this method is brought to court.³²

Based on several international and regional legal instruments, it can be concluded that the *exclusionary rule* is an integral part of the right to a fair trial which in the criminal justice process must be given to the suspect or defendant. The next question that arises is how to regulate the *exclusionary rule* in the legal regime of each country.³³ This question is certainly very difficult to explain in its entirety considering the complexity of the research that must be done. However, as an illustration, a comparison of the substance of the constitution can be used to see whether the constitution of a country regulates the acquisition of evidence and the exclusion of evidence in the criminal justice process as a constitutional guarantee or not. The comparison is carried out using purposive sampling or judgmental sampling, which is a sample selection method used for certain situations with certain predetermined objectives. The selection of the sample of the country's constitution being compared is based on its participation in the ratification of the ICCPR considering that the ICCPR has a significant influence on the development of human rights arrangements in the state constitution.³⁴

Based on this research, it was concluded that of the 173 (one hundred and seventy three) countries that ratified the ICCPR, there were 42 (forty two) countries that regulate the acquisition and exclusion of evidence in the constitution,³⁵ there are 83 (eighty three) countries that only regulate the acquisition of evidence. In the

³² Lihat *the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* huruf F 1).

³³ Rohman, Arif. "Perlindungan hukum terhadap terdakwa salah tangkap dalam sistem peradilan pidana." *Jurnal Komunikasi Hukum (JKH)* 3.1 (2017). Hlm. 26-39.

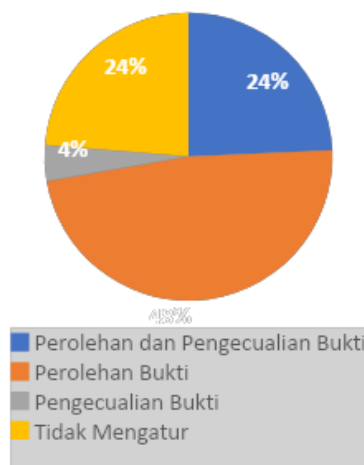
³⁴ Seluruh konstitusi negara-negara tersebut dapat dilihat di <https://www.constituteproject.org/>. diakses pada tanggal 3 Mei 2022

³⁵ Negara-negara tersebut antara lain: Afganistan, Albania, Bahrain, Bolivia, Brazil, Cambodian, Cape Verde, Colombia, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, Georgia, Guatemala, Guinea-Bissau, Honduras, Iraq, Italy, Kazakhstan, Kenya, Kyrgystan, Liberia, Maldives, Marshall Islands, Mexico, Namibia, Paraguay, Philippines, Portugal, Republic of Kora, Republic of Moldova, Russian Federation, Sao Tome and Principe, South Africa, Atate of Palestine, Timor-Leste, Turkey, Turkmenistan, Ukraine, Venezuela, dan Zimbabwe.

constitution,³⁶ there are 7 (seven) countries that only regulate the exclusion of evidence in the constitution³⁷ and there are 43 (forty three) countries that do not regulate the acquisition of evidence or the exclusion of evidence in the constitution..³⁸ The following is the data when depicted in a diagram presentation.

Diagram 1. Arrangements for the Acquisition and Exclusion of Evidence in the Constitutions of Countries that Ratified the ICCPR

Jenis Pengaturan



In total, there are 49 (forty) nine countries that regulate the exclusion of evidence in their country's constitution. Then the majority of the constitution puts arrangements regarding the exclusion of evidence under the setting of the chapter on human rights in its constitution. Only a few country constitutions such as Belarus, Italy, Kazakhstan, and Turkey include provisions for exclusion of evidence outside of the provisions in the

³⁶ Negara-negara tersebut antara lain: Algeria, Angola, Argentina, Bahamas, Bangladesh, Barbados, Belgium, Balize, Benin, Botswana, Bulgaria, Burkina Faso, Burundi, Cameroon, Canada, Chad, Chile, Congo, Costa Rica, Democratic People's Republic of Korea, Democratic Republic of the Congo, Dominica, Eritrea, Estonia, Eswatini, Finland, Gabon, Gambia, Grenada, Guyana, Iceland, Israel, Jamaica, Japan, Jordan, Kuwait, Lao People's Democratic Republic, Lesotho, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malta, Mauritius, Mongolia, Montenegro, Morocco, Netherlands, New Zealand, Nicaragua, Niger, North Macedonia, Norway, Pakistan, Panama, Papua New Guinea, Poland, Republic of Moldova, Rwanda, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, Spain, Saint Vincent and the Grenadines, Sweden, Syrian Arab Republic, Thailand, Trinidad and Tobago, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Uzbekistan, Vietnam, Yemen, dan Zambia.

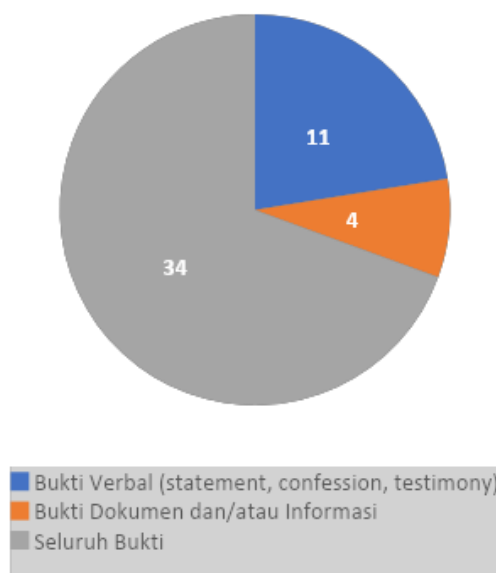
³⁷ Negara-negara tersebut antara lain: Armenia, Azerbaijan, Belarus, Croatia, Greece, Mozambique, dan Peru.

³⁸ Negara-negara tersebut antara lain: Andorra, Antigua and Barbuda, Australia, Austria, Bosnia and Herzegovina, Central African Republic, Côte d'Ivoire, Cyprus, Czech Republic, Djibouti, Equatorial Guinea, France, Germany, Ghana, Guinea, Haiti, Hungary, India, Indonesia, Iran, Ireland, Latvia, Lebanon, Mali, Mauritania, Monaco, Nepal, Nigeria, Qatar, Romania, Samoa, San Marino, Sri Lanka, Sudan, Suriname, Switzerland, Tajikistan, Togo, Tunisia, United Republic of Tanzania, dan Vanuatu.

chapter on human rights. The composition of the types of evidence that are excluded in each of the aforementioned constitutions are as follows:

Diagram 2. Types of Evidence Excluded in State Constitutions

Jenis Bukti Yang Dikecualian



Based on the diagram, as many as 34 (thirty four) state constitutions regulate the exclusion of evidence for all types of evidence,³⁹ as many as 11 (eleven) state constitutions regulate the exclusion of evidence only for verbal evidence such as statements, confessions, and testimony,⁴⁰ and as many as 4 (four)) the state constitution regulates the exclusion of evidence only for evidence in the form of documents or information.⁴¹

The overall description of the data above can at least show that the exclusionary rule has become an inseparable part of the protection of human rights in the modern constitution. It does not mean that countries that do not regulate the exclusion of evidence in their constitutions do not also regulate the exclusion of evidence in laws and regulations or implement it in their criminal justice practice. For example, in the United States, which in its constitution only regulates the acquisition of evidence, in practice, there is a lot of jurisprudence regarding the implementation of the exclusionary rule. Another example is Australia, which in its constitution does not regulate the acquisition

³⁹ Negara-negara tersebut antara lain: Armenia, Azerbaijan, Belarus, Brazil, Cape Verde, Colombia, Croatia, Dominican Republic, Ecuador, Ethiopia, Fiji, Georgia, Greece, Guinea-Bissau, Honduras, Italy, Kazakhstan, Kenya, Kyrgyzstan, Maldives, Marshall Islands, Mexico, Mozambique, Philippines, Portugal, Russian Federation, Sao Tome and Principe, South Africa, Timor-Leste, Turkey, Turkmenistan, Ukraine, Venezuela, dan Zimbabwe.

⁴⁰ Negara-negara tersebut antara lain: Afganistan, Albania, Bahrain, Cambodia, Egypt, Iraq, Liberia, Namibia, Peru, Republic of Korea, dan State of Palestine.

⁴¹ Negara-negara tersebut antara lain: Bolivia, El Salvador, Guetamala, dan Paraguay.

of evidence or the exclusionary rule, but instead regulates it rigidly in the Evidence Act 1995. Therefore, the exclusionary rule cannot only be understood as a principle in criminal procedural law, especially the law of evidence, but more than Therefore, the exclusionary rule must be understood as one of the procedural aspects as well as an important element that supports the realization of a fair trial process for the Defendant.

CONCLUSION

The exclusionary rule which is an exception to evidence obtained unlawfully in its development is not only part of a principle that develops in the law of evidence. Moreover, the exclusionary rule has developed into a procedural aspect that supports the creation of a fair trial for the Defendant. As a procedural aspect, the exclusionary rule has also developed into the defendant's right in the criminal justice process which of course cannot be separated from the right to a fair trial. Therefore, Indonesia, which from the beginning has placed the protection of human rights as a manifestation in the operationalization of its legal state, must accommodate arrangements regarding the exclusionary rule in the renewal of the criminal procedural law, namely the Draft Criminal Procedure Code which will replace the Law of the Republic of Indonesia Number 8 of 1981 concerning the current Criminal Procedure Code. Indeed, the Draft Law on Procedural Law has attempted to accommodate the exclusionary rule setting through Article 175 paragraph (2), the operation of which is through the examination of evidence acquisition conducted by the Preliminary Examining Judge as stipulated in Article 111 paragraph (1) letter d. However, the complexity of the exclusionary rule at the practical level must be seriously considered by legislators so that the exclusionary rule arrangement really has an impact on the realization of a fair trial for the Defendant but does not have a counterproductive impact on the law enforcement process considering that in essence criminal procedural law tries to balance the public interest against law enforcement with the interests of the Suspect or the Defendant in a fair trial.

REFERENCES

Journal

Alexandre Chitov, "The Concept of Truth And Fairness In Thai Criminal Procedure", *New Criminal Law Review Volume 24 Nomor 1*, (2021).

Álvaro Paúl, "Admissibility of Evidence Before the Inter-American Court of Human Rights", *Revista Direito GV Volume 13 Nomor 2*, (2017).

Basri, Hasan. "Perlindungan Hukum terhadap Pelaku Tindak Pidana berdasarkan Sistem Peradilan Pidana Indonesia." *SIGn Jurnal Hukum 2.2* (2021):

- George P. Fletcher, "Justice and Fairness in the Protection of Crime Victims", *Lewis & Clark Law Review Volume 9 Nomor 3*, (2005).
- Malau, Agustina. *Eksistensi Peradilan In Absentia dalam Sistem Hukum Acara Pidana dan Relevansinya dengan Hak Terdakwa untuk Melakukan Pembelaan*. Diss. Universitas Islam Riau, 2017.
- Matthew Robinson dan Marian Williams, "The Myth of Fair Criminal Justice System", *Justice Policy Journal Volume 6 Nomor 1*, (2009).
- Mindaugas Simonis, "Effective Court Administration and Profesionalism of Judge as Necessary Factors Safeguarding the Mother of Justice - The Right to a Fair Trial", *International Journal for Court Administration Volume 10 Issue 1*, (2019).
- Muntolib, Ahmad, and Sri Endah Wahyuningsih. "Peran Bantuan Hukum dalam Proses Peradilan Pidana di Kabupaten Blora." *Jurnal Hukum Khaira Ummah* 12.3 (2017).
- Rohman, Arif. "Perlindungan hukum terhadap terdakwa salah tangkap dalam sistem peradilan pidana." *Jurnal Komunikasi Hukum (JKH)* 3.1 (2017).
- Robert Doya Nanima, "Evaluating the jurisprudence of the African Commission on evidence obtained through human rights violations", *De Jure Law Journal*, (2020).
- Shiddiq, Farhan Ridhwan, and Sholahuddin Harahap. "Perlindungan Hukum Atas Hak Terdakwa untuk Didampingi Penasehat Hukum dalam Memenuhi Hak Hak Terdakwa." *Prosiding Ilmu Hukum* (2018).

Book

- Bassiouni, M. Cherif, *International Criminal Law. Second Revised Edition*, Leiden: Martinus Nijhoff Publishers, 2014.
- European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights - Rights to a Fair Trial*, Strasbourg: Council of Europe, 2021.
- Gregory, Roy, dan Philip Giddings dalam Richard Bellamy and Alex Warleigh (eds.), *Citizenship and Governance in the European Union*, London dan New York: Continuum, 2001.
- Hidayat, Nurkholis, dan Restaria F. Hutabarat, ed., *Mengukur Realitas dan Persepsi Penyiksaan di Indonesia*, Jakarta: The Partnership for Governance Reform, 2012.
- Human Rights Committee, General Comment No. 32 - Article 14: Rights to Equality Before Courts and Tribunals and to a Fair Trial, Geneva: United Nation Human Rights Committee, 2007.
- Ross, Jacqueline, dan Stephen C. Thaman, *Comparative Criminal Procedure*, Massachusetts: Edward Elgar Publishing, 2016.
- Tiara, Ayu Eza, Arif Maulana, dan Muhammad Retza Billiansya, *Kepolisian Dalam Bayang-Bayang Penyiksaan (Catatan Kasus Penyiksaan Sepanjang Tahun 2013 sd 2016)*, Jakarta: Lembaga Bantuan Hukum (LBH) Jakarta, 2016.
- van Kempen, PHPHMC, ed., *Criminal Law and Human Rights*, Burlington: Ashgate Publishing Company, 2014.

Vriend, Koen, *Avoiding a Full Criminal Trial: Fair Trial Rights, Diversions, and Shortcut in Dutch and International Criminal Proceedings*, Berlin: Springer dan Asser Press, 2016.

Working Group on the Advocacy against Torture, *Indonesia Pro Penyiksaan: 16 Tahun Pasca Ratifikasi Konvensi Anti Penyiksaan di Indonesia - Catatan Untuk Peringatan Hari Anti Penyiksaan Internasional 2014*, Jakarta: Working Group on the Advocacy against Torture, 2014.

Regulations

Universal Declaration of Human Rights.

International Covenant on Civil and Political Rights.

Universal Declaration of Human Rights.

International Covenant on Civil and Political Rights.

European Convention on Human Rights.

The American Convention on Human Rights (Pact of San José).

The African Charter on Human and Peoples Rights (Banjul Charter).

The Resolution on the Right to Recourse and a Fair Trial (Tunis Resolution).

The Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa (Dakar Declaration).

The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines).

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

Undang-Undang Republik Indonesia Nomor 39 Tahun 1999 tentang Hak Asasi Manusia.
Evidence Act 1995.

Rancangan Kitab Undang-Undang Hukum Acara Pidana.