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RESEARCH ARTICLE

EXCLUSIONARY RULE PRINCIPLE AND CONSTITUTIONAL RIGHTS PROTECTION IN EVIDENCE SEEKING

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Abstract

The process of evidence seeking is often violations of constitutional rights. At this stage, the state authorizes law enforcers to carry out various coercive measures to obtain evidence. In many cases, the practice of violating constitutional rights in the evidence seeking raises the falses punishment. In Indonesia, coercive efforts to find evidence can be tested through pretrial institutions. Unfortunately, the existence of pretrial in Indonesia only test the formal truth of coercive measures and it is not yet authorized to examine the material truth. This article intends to explain the urgency and application of the exclusionary rule in various countries as well as the idea to push the regulation of exclusionary rules that allow judges to be not only examining judges but also investigating judges. Through this regulation, judges are expected to be able to examine formal and material actions as a control mechanism for the constitutional rights protection.

Introduction:-

Violation cases of Miranda which occurred in Arizona 1966 (Miranda v. Arizona, 384 US 436 (1966) and violation against Sengkon and Karta which occurred in Bekasi 1977 (Decision No: 2/KTS/Bks/1977), became valuable lessons how the practice of constitutional rights violation in the evidence seeking raises false punishment (error in persona). That two classic cases was clearly illustrate the act of neglecting constitutional rights by investigators to pursue the confession of a suspect. It is contrary to the law enforcement goals, namely upholding the law, justice and protection of human dignity, order, peace, and legal certainty (Barda Nawawi Arief, 1998) and proceed according to principles due proces of law (Reksodiputro, 2007).

Even though the Miranda cases and the Sengon Karta cases have been decades ago, but until this day the practice as that cases are still mostly happend in the investigation process, ironically it is by normal method (I. S. Adji, 1998). For example in the murder cases of M Asrori that occurred in 2007. The violations is in the evidence seeking but it was raises subjective errors with defendant's guilt and false punishment (Judgment for Judicial Review No: 89 PK/PID/2008). As a result, Imam Chambali was sentenced to 17 (seventeen) prison terms (Decision No. 48/Pid.B/2008/-PN.JMB, n.d.). Only in 2008 based on a novum from the confession by Very ldham Heryansyah a.k.a Ryan who claimed as the killer of M Asrori, so Imam Chambali was finally released based on the Judicial Review Decision Number: 89 PK/PID/2008.

The irregularities practice in the evidence seeking also can be seen in the case of the former chief Indonesian legislative, Setya Novanto. He proposed a lawsuit to the Constitutional Court. The lawsuit based on the

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constitutional rights violation because Setya Novanto talks have been illegally recorded and then used as evidence. The Constitutional Court Decision Number: No.20/PUU-XIV/2016 stated that interception carried out without through legal procedures cannot be justified. The Constitutional Court's decision was based on preventing human rights violations as guaranteed by the 1945 Constitution (Constitutional Court Decision No.20/PUU-XIV/2016, n.d.)

The cases as described above shows that the phenomena and consequences resulting from deviant or even illegal evidence seeking are dangerous. So, it is time for Indonesia as a state of law to establish the rules which prohibit collecting evidence by violating fundamental rights as stated in the Indonesian constitution, or known as the excusionary rule (Alkostar, 2011).

Various problems in Indonesia also can be reflected in the practice of the excusionary rule from various legal systems in the world which are slowly recognizing exclusive rules (exclusion of evidence) as a reaction of constitutional rights violations. The application of the exclusionary rule is seen as a necessity in the Indonesian legal system to provide normative instruments for law enforcers in the process of evidence seeking. Besides, it provides factual justification for the evidence value, as well as an effort to prevent law enforcement's improper behavior and in the long term it becomes a moral and educational force to encourage greater legal compliance (OakS, 1970). Today the principle of the exclusionary rule comes from the common law system, but this principle has also begun to be adopted by several countries that adhere to the civil law system. The example of the use mixed legal system has also been demonstrated by China (Gless & Macula, 2018).

Strengthening the protection of citizens' constitutional rights through the application of exclusionary rules are expected to become a control mechanism in the process of evidence seeking which is a necessity in a rule of law. Moving on from the explanation above in the context of Indonesian criminal law, Indonesia experiences a legal vacuum regarding how to obtain evidence and the legal consequences (exclusionary rules). This article seeks to explain the urgency of implementing the executionary rule and its practice in various countries as an effort to protect citizens constitutional rights who are undergoing legal processes.

Methods:-

This paper is a doctrinal research by examines laws with conceptualized and developed on the basis of the doctrines adopted by the drafters and/or developers (Irianto & Shidarta, 2011) to provide a systematic exposition between the variables of the process evidence seeking and the excusionary rule. Then it is analyze the causal relationship between the two variables with rules and explain difficulty areas that may be encountered by using statute approach, historical approach, and comparative approach.

Based on the causal relationship between the premise of the evidence seeking process and the execution rule, it turns out that in practice the evidence seeking process is very vulnerable to the abuse practice of authority against suspects. So that in order to protect constitutional rights, an exclusionary rule is needed as a basis for judges in Indonesia to act as examining judges as well as investigating judges in testing the validity of evidence and as a form of constitutional rights protection in the criminal justice process. The objectivity and rationality of the conclusions above are based on deductive interpretation to ensure that conclusions are drawn logically and because they are valid to test the truth of the conclusions that have been traced consistently and logically (coherently) so that they are scientifically justified.

Result and Discussion:-

A. Evidence Seeking

In criminal procedural law the evidence seeking is part of the evidentiary process that aims to seek material truth. The evidentiary process itself cannot be separated from the provisions of evidence which include evidence, how to obtain evidence, submission of evidence in court as well as the strength of evidence and the burden of evidence (Hiariej, 2012). Self-evidence in criminal law is a process to determine whether or not a defendant is guilty (Hamzah, 2008), based on conclusions drawn from the evaluation of evidence (Dennis, 2007).

Essentially, evidence is a means of reconstructing a past criminal event (Crijns & Meij, 2005), to seek and determine the material truth. The urgency of evidence as an important means of seeking material truth has juridical consequences which evidence also must be legal according to law. The meaning of legal here is not only formally

according to law (Article 184 paragraph (1) of the Criminal Procedure Code) but materially how to obtain evidence must also be legal according to law.

According to Eddy O.S. Hiariej, as a means of proving evidence must at least fulfill four fundamental principles of evidence, namely: evidence must be relevant, acceptable, in accordance with the principles of exclusionary rules and evaluation of evidence (Hiariej, 2012). Based on that fundamental principles, formally valid evidence must have relevance to the case, can be accepted by the parties and evaluatively the evidence is mutually compatible and mutually reinforcing. However, these three conditions can be excluded if they can be proven materially if the search for evidence is carried out contrary to the exclusionary rules. Thus, every action in the evidence seeking using coercive measures in the form of arrest, detention, search and confiscation, seizure (Harahap, 2000) only can be justified and accepted, if it does not conflict with the exclusionary rules.

The use of coercive efforts in the evidence seeking itself has a causal relationship with the legal process as the principle of the fruit of the poisonous tree. This principle is simply interpreted that if your actions violate the law, you will not find evidence, because you do not follow a legal investigation path then whatever evidence obtained has been tainted by poison (Lemley, 2017). Based on causal relationship, so that the evidence is not toxic, the search for evidence must be guided by strict and firm conditions and the existence of a control mechanism in its implementation. This is in accordance with the principle of a rule of law where the state's actions against its citizens are limited by law so that the state cannot act arbitrarily (Gautama, 1983). Thus, in the context of a state of law, the use of force as a coercive effort to obtain evidence can only be justified if it is carried out based on the law.

The absence of a single, universally agreed definition of the violence meaning in law enforcement is a crucial problem faced to date. As a result, it is difficult to assess and control the use of force in coercion. The International Police Association itself states that the use of force as a necessary measure by the police to compel compliance is only justified against subjects who put up a fight (Police, 2001). However, it is still quite difficult to determine how much force is needed in the coercive effort because the definition of excessive use of force, both in number and frequency by the police as justified or excessive action is difficult to estimate (Alpert et al., 2004).

Therefore, in the process of evidence seeking, the use of force in coercion should be avoided as much as possible. Even if it requires violence to ensure the emergence of legal certainty and the maintenance of public order, the application of coercive measures must still respect the constitutional rights of citizens.

B. Constitutional Rights Protection in the Investigation Process

The use of constitutional rights term shows the scope of rights that apply in positive law (constitution) in a country. It is simply described that not all human rights are contained in the constitution and vice versa every constitutional right must be a human right (Bisariyadi, 2017). Thus the human rights listed in the constitution are referred to as constitutional rights. Another reason for using the term constitutional rights is to open up opportunities for juridical interpretation so that the protection of the constitutional rights of suspects, victims and witnesses regarding the evidence seeking can be regulated firmly in law (Gardbaum, 2008).

Constitutional rights protection in the judicial process aims to maintain the dignity and privacy of a person so that they are free from coercion, physical torture, self-blame and manipulation because in the process of obtaining information about crimes suspects, victims and witnesses as sources of information are very vulnerable to being treated unfairly so that it is contradictory. with the main objective of law enforcement (Gless & Richter, 2018).

In the Indonesian legal system, the constitution is the basic rule (Staatsgrundsetz) as the basis for the formation of laws (Formell gesetz) and other lower regulations (Attamimi, 1981). Constitutional rights protection from investigative actions in Indonesia can be implicitly seen in several articles in the 1945 Constitution. Article 28D paragraph (1) stipulates the right to obtain fair legal protection and certainty and to obtain equal treatment before the law. Furthermore, Article 28 G paragraph (1) regulates the right to personal protection (privacy rights) and property as well as the right to feel safe and protect from the threat of fear. Furthermore, Article 28G paragraph (2) regulates the right to be free from torture or treatment that degrades human dignity. However, until now, Indonesia does not have strict rules regarding the prohibition of the use of evidence obtained by violating constitutional rights through torture, intimidation, illegal searches and seizures so that special rules are needed at the level of the law to regulate them.

The practice of protecting constitutional rights related to investigative actions also can be seen from the practice of several countries. Germany as a country that also adheres to a civil law system guarantees the protection of constitutional rights related to the investigation process based on two constitutional doctrines, namely the rule of law (the rechtsstaatsprinzip) and proportionality (the verhdltnismdissigkeit). Although unlike America, which adheres to the common law and focuses on prevention (Bradley, 1983), but the German constitution (Grundgesetz) has also provided a solid basis for the individual freedom protection with the basic principle that human dignity is inviolable so that its respect and protection is the duty of all state authorities (Grundgesetz art. i(i) W. Ger. 1949). Thus, evidence obtained by force or fraud will be viewed on a case-by-case basis based on the balance of the constitutionally protected interests of the defendant's privacy with the importance of the evidence and the seriousness of the offense charged.

Meanwhile, in the Netherlands, although the constitutional rights protection in investigative stage is clearly explain in Article 10 (1) states that everyone has the right to respect privacy, with limitations that will be determined by or in accordance with law. Furthermore, in Article 12 regulates about the right to obtain identification and notification before walk into the some place, and regarding the right to privacy in the house, it is explicitly regulated in Article 12 (1) which states the right to be inviolable in the house (Stevens, 2010). It shows that carrying out investigations in the Netherlands, constitutional rights violators only can be justified based on the provisions of a special law that regulates the conditions which the power can be exercised.

In contrast to the tradition in civil law countries. In common law countries such as the United States, constitutional rights are divided into levels, namely rights as directly stated in the constitution (express), rights as contained in constitutional amendments (implied) and rights not stated in the constitution (unnumerated) (Lamparello, 2015). In the United States, the constitutional rights protection in investigative stages and developed from case law so that any method of evidence seeking that violates the due process clause stated in the constitution (express). to not self-criminalize that stems from the Miranda Case' (Miranda Vs Arizona state tahun 1966).

Constitutional rights protection related to the evidence seeking in America itself has been regulated in the fourth and fifth constitutional amendments. The fourth amendment to the constitution relates to the right to obtain protection from evidence obtained from unauthorized searches or confiscations. Besides that the fifth constitutional amendment relates to the right to protection from coercion to be self witness in every criminal case, or life snatch, freedom or property, without due process of law, also prohibits private property from being taken in the public interest, without fair compensation contained in the fifth amendment to the constitution.

Meanwhile in China the constitutional rights protection was began as reflected when China amended constitution in 1999 which stated that the China is a socialist state based on law. Furthermore, in 2004 the Chinese constitution was again amended to include the phrase, "The state respects and guarantees human rights". (Lewis, 2011). In 2010 China has also enacted the 2010 Evidence Rule which stipulates detailed and concrete procedures for handling evidence allegedly obtained through illegal means. It is a form of constitutional right protection to stem violations in the criminal justice system against the methods used by investigators in obtaining evidence (Lewis, 2011).

One of the constitution functions is as a guardian of the fundamental right (Manan & Harijanti, 2016). In the context of Indonesian law, the 1945 Constitution implicitly contains constitutional rights relating to protection from investigative actions. Thus, in order for constitutional rights related to the evidence seeking guaranteed and protected, it should also be regulated in law as applied in Germany, Netherlands and China. Through regulation, the purpose of the constitution to create a balance between the state power administration and the constitutional rights protection of citizens will be realized.

C. The Practice of Exclusionary Rules in Various Countries as a Control Instrument of Evidence Seeking

Exclusionary rules or exclusionary discretion is one of the fundamental principles in evidence which states that evidence obtained illegally cannot be used, especially in the context of criminal law. This means that even though the evidence is relevant, the court can ignore it if the method of evidence seeking is not in accordance with the regulations (Dennis, 2007).

Conceptually, the rules derived from the common law system are used as a control mechanism for police actions that are integrated with the adversary system (Turner & Weigend, 2018). It is based on the basic assumption that the exclusion of evidence will prevent illegal behavior, and exclusion is a viable alternative to controlling law

enforcement behavior. Through the application of exclusionary rules, so it is hoped that it will encourage law enforcement compliance with the rules on how the search is carried out and when the search can be carried out. In a country that adheres to a civil law system, efforts to introduce exclusionary rules are aimed at ensuring the integrity of the judiciary, increasing the standard of police behavior, and protecting civil liberties from investigative actions carried out by the police in order to find evidence by sharing a variety regulations (Pakter, 1985).

In the United States, The United States Supreme Court also enforces exclusionary rules for four types of main proceedings, namely arrest and confiscation offenses, confessions obtained in violation, evidence identification which obtained by violation, and evidence obtained by violating the due process clause. (OakS, 1970). Meanwhile, in England, the Supreme Court created judge's rules which contain rules regarding how a suspect's condition can be examined by the police, accompanied by notification of all rights of the suspect in the investigation process and the legal consequences of violating these rights (I. S. Adji, 1996). Thus, evidence obtained illegally (illegally secured evidence) should not be used as evidence in court.

In the civil law system which relies on the idea that evidence is considered the domain of the court, the exclusion of this evidence can be justified. The background is from the concerns related to systemic interests (justice) or the interests of individuals affected by the violation when these interests exceed the procedural interests of presenting relevant evidence in court. As an illustration in Germany, the practice of setting aside evidence obtained illegally to maintain the integrity of the judicial system so that tainted evidence cannot be used in court can be seen in the German Code of Criminal Procedure (Strafprozeßordnung – StPO) (Turner & Weigend, 2018). Article 136a of the German Code of Criminal Procedure (Strafprozeßordnung – StPO) expressly prohibits evidence obtained through violation of due process during interrogation. Thus the confessions obtained through illegal interception, forced confessions and through fraud cannot be accepted even though the Court rejects interception without a warrant (Pakter, 1985).

While in the Netherlands courts can deal with violations of existing procedural rules that occur during the investigation process by considering violated of the relevance provisions, the violation seriousness and the damage caused by the violation (Tak, 2008). As explained P J P, there is no consequence of the evidence obtained illegally as regulated in the Dutch Code of Criminal Procedure sect. 359a CCP (Dutch Criminal Procedure Code, n.d.).

In China since 2010 the Supreme Court (SPC), Supreme People's Procuratorate (SPP), Ministry of Public Security (MOPS), Ministry of State Security (MOSS) and Ministry of Justice (MOJ) have specific rules for ignoring evidence which obtained illegally. The rule stipulates that evidence obtained illegally cannot be used in criminal justice. However, this regulation has not succeeded in preventing the use of tainted evidence. In 2012, the Criminal Procedure Code adopted (2012 CPL) as the rules formally and as an important step for China towards the rule of law and the protection of human rights (Jiang, 2018).

In the context of Indonesian law, how to obtain new evidence is implicitly regulated in Article 183 of the Criminal Procedure Code which regulates about legal evidence, but no further explanation. As a result, the consequences of the evidence obtained and confiscated not in accordance with the procedures are not yet clear. This is different from Article 36 of Law No. 23 of 2004 concerning the Constitutional Court which regulates that evidence must be legally accountable for its acquisition and in the event that the acquisition of evidence cannot be legally accounted for, it cannot be used as legal evidence.

D. Testing the Legality of Authority in Evidence Seeking

The initial understanding to determine the meaning of legality testing, of course must be distinguished between the meaning of legality testing (judicial review) which is the competence of the Supreme Court. According to Article 24A Paragraph (1) of the 1945 Constitution by actions legally testing in enforcement of the supervision form and objection mechanisms related law enforcement processes which closely related with the guarantee of the protection of constitutional rights as the competence of pretrial institutions. The Supreme Court's authority is to examine statutory regulations under the law while testing the legality of actions which are the competence of pretrial institutions serves as a form of pre-assessment, a process of gathering and screening information which prosecution and defense claims will be examined as part of a judicial investigation (or judicially supervised) (Qamar, 2012). Thus, the pretrial trial is not the main focus of determining the facts and credibility of the evidence, but rather serves as a confirmation of the previous series of data collection (Duff et al., 2006).

The idea to make the method of obtaining tools as an object of pre-trial in this paper is based from the idea that the function of pretrial institutions is to protect the human rights suspects from the use of coercive measures in the investigation and prosecution process (Kusumastuti, 2018). It is also a guarantee for the suspect/defendant not to get excessive action before the trial process to balance individual rights and community protection, maintain the integrity of the judicial process, and ensure the authority of the court (M. Van Nostrand & G Keebler, 2007). This idea was inspired by the habeas corpus in the Anglo Saxon court, which is fundamentally a protection for someone who has been suspected of committing a crime from unauthorized examination (Hamzah, 2009). Although continental european countries (civil law) do not fully implement the habeas corpus concept, they still emphasize the importance of monitoring actions that have implications for the deprivation of constitutional rights. For example, in the Netherlands, which introduced the rechter commissaris which functions as a supervisor (Reform, 2014).

The pretrial institution in Indonesia is actually closer to the model of the commissioner judge institution (rechter commissaris) in the Netherlands and the Juge d' Instruction in France. Although the authority of pretrial judges in Indonesia is not as extensive as that of commissioner judges in the Netherlands (Hamzah, 1985). The pretrial authority in Indonesia is substantially still limited to examine the legality of an arrest, detention, termination of investigation or termination of prosecution, as well as requests for compensation or rehabilitation (Articles 1 to 10 in conjunction with Article 77 of the Criminal Procedure Code), as well as whether or not the determination of a suspect is legal (Decision of the Court of Justice). Constitution of the Republic of Indonesia Number 21/PUU-XII/2014)

This model of authority makes the pretrial only has the authority as an examining judge which is limited to test administrative requirements. Due to the limited authority of pretrial institutions, the existence of pretrial institutions is still quite rarely used. This can be seen from the ratio of the number of pretrial applications filed at the Central Jakarta Special Class IA District Court in 2019 which only examined 20 pretrial applications (Http://Sipp.Pn-Jakartapusat.Go.Id/, n.d.), the 2019 South Jakarta Special Class IA District Court examined 162 pretrial applications (sipp.pn-jakartaselatan.go.id), Tanjung Karang Class IA District Court in 2019 examined 7 pretrial applications, (Http://Sipp.Pn-Tanjungkarang.Go.Id/, n.d.) Muaro Class II District Court in 2019 no pretrial applications (Http://Sipp.Pn-Muaro.Go.Id/, n.d.) and the Sangeti Class II District Court in 2019 examined 1 pretrial case (Http://Sipp.Pn-Sengeti.Go.Id/, n.d.).

Based on the purpose of establishing a pretrial as a means of supervising the actions of law enforcement in investigations or prosecutions, so that the evidence seeking in a procedural and substantive manner fulfills the principle of constitutionalism (Griffin, 1990). Thus, pretrial authority should ideally not only be limited by examining judge, but also serves by investigating judge as a check and balance system mechanism to test the validity of obtaining evidence whether it is in accordance with the principle of exclusionary rules.

As in the United States, preliminary examination judges have been involved in pre-trial since the criminal investigation process was carried out or since someone complained about a crime. So that the pre-trial process in the context of habeas corpus is carried out in three processes, namely: (1) Preliminary hearing, (2) Arraignment, and (3) Pre-trial conference (Stephan Landsman, 1983). Whereas in the Netherlands the Rechter Commisaris Institution (the judge who leads the preliminary examination), appears as a manifestation of the active participation of judges, which in Central Europe gives the role of the "Rechter Commisaris" a position that has the authority to handle coercive measures (dwang middelen), detention, confiscation, body search, home, examination of documents (O. S. Adji, 1980).

Thus, conceptually in order to test the constitutionalism of evidence seeking, of course, an exclusionary rule is needed as the basis for judges to act as examining judges as well as investigating judges in testing the validity of evidence as a form of constitutional rights protection in the criminal justice process.

Conclusion:-

The process of evidence seeking is a crucial process and it is very vulnerable causing the practice of law enforcement authority abuse against suspects. Strict conditions are needed as a control mechanism for the use of law enforcement authorities so it is accordance with the principles of the rule of law. The constitutional rights protection certainly has consequences for the presence of protection from investigative actions through torture and intimidation or searches and confiscations. The strengthening of constitutional rights is possible if regulated in the constitution which is then implemented in law.

In various countries, the exclusionary rule functions as a normative instrument becomes a control for investigators to stipulate that evidence obtained by violating the provisions is not evidence or its value is reduced. The application of exclusionary rules is expected to prevent deviations or arbitrariness from law enforcement and subsequently become a moral and educational force to encourage greater compliance. Furthermore, in order to test the legality of actions in the evidence seeking, an exclusionary rule is needed as a basis for judges in Indonesia to act as examining judges as well as investigating judges in testing the validity of evidence as a form of protection of constitutional rights in the criminal justice process.

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