NOTES ON THE LAW WHICH QUALIFIES

"BARANG BUKTI" AS LEGAL EVIDENCE

INSTITUTE FOR CRIMINAL JUSTICE REFORM

Notes on the Law which Qualifies "Barang Bukti" as Legal Evidence[1]

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[1] "Barang Bukti" is the terminology used for objects confiscated during investigation process. In criminal procedure law, the confiscated objects do not necessarily qualify as legal evidence, as the law strictly limits what is considered as legal evidence.

PREFACE

Under the criminal justice system in Indonesia so far, the terms “legal evidence” and “confiscated objects” are distinguished. In terms of legal definition and theory of law of evidence, both have different roles and functions in the truth finding process. To put simply, confiscated objects usually refer to any objects related to a crime which are then confiscated by the law enforcement authorities. Meanwhile, the term “legal evidence” is limited in its forms as stated in the criminal procedural law (i.e. expert statement, witness statement, defendant statement, judges’ indication, letter, electronic evidence), which then will be used as a basis for proving a criminal conduct. In this context, both evidence and confiscated objects principally have a role that to some extent can determine a person's criminal conviction.

However, in certain cases, identifying object either as evidence or confiscated objects may be difficult, for example when the disputed object is in the form of a letter. To consider a confiscated object as legal evidence, it is still required witness/expert testimony that can 'explain' or ‘describe’ the object. That is also always a valid question when discussing the relationship between confiscated objects and legal evidence. Until recently, the discussion regarding confiscated objects and legal evidence has been developed after the enactment of the Law on Sexual Violence (TPKS) in May 2022 which qualifies confiscated objects as legal evidence.

This paper will enrich our understanding on how confiscated objects and legal evidence work in determining a person's guilt in the criminal justice process, both in terms of their use in criminal cases in general, and specifically in cases of sexual violence after the development of criminal procedural law regulated under the TPKS Law which sort of merges the two concepts.

Happy reading!

Jakarta, November 2022

Erasmus A. T. Napitupulu
Executive Director of ICJR

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A. Introduction

On May 9, 2022, the Sexual Violence Act (*Undang-Undang Tindak Pidana Kekerasan Seksual*/UU TPKS) was officially promulgated. One of the points that should be appreciated and recorded in the history of criminal justice reform in Indonesia is the qualification of confiscated objects as part of the legal evidence in the cases of sexual violence crimes.[2] This policy was enacted in response to tackle the obstacles that often occur in the handling of sexual violence crime cases and is expected to improve the performance of investigators and public prosecutors in investigating sexual violence crimes.

In the context of criminal procedural law in Indonesia, classifying confiscated objects as part of legal evidence indicates that investigators and public prosecutors may have additional sources of evidence. Presumably, these would help the prosecutors fulfilling the requirement to secure at least two types of legal evidence. However, does such an increased chance of fulfilling the minimum availability of two types of legal evidence correlate with an increased probability of the successful conviction of an alleged sexual violence?

Unlike investigators and public prosecutors, in examining cases and rendering verdicts, judges do not merely hold on to the availability of minimum two types of legal evidence. The minimum availability of two types of legal evidence is only the basis for judges to further determine whether they are convinced of a defendant's guilt. It means that in addition to the obligation to examine whether at least two types of legal evidence have been secured, the judges also must have convinced whether or not the alleged criminal act is proven and whether the defendant is the person responsible for the crime based on at least those two types of legal evidence.

Therefore, it is important to discuss further about how expanding sources of evidence – by qualifying confiscated objects as legal evidence may correlate with helping judges to obtain a conviction, including related matters that need to be pointed out. To further elaborate this issue, the author will first explain the legal framework of evidentiary standard in the Indonesia criminal justice system, especially regarding the evidentiary system adopted by the country, and the relationship between "the minimum standards of two types of evidence" and the judge's conviction. Then the author will discuss the concept of legal evidence and confiscated objects as a source of evidence under the Indonesian criminal justice system. At this point, the author will explain that legal evidence and confiscated objects can both be relevant sources of information in the process of proving a criminal case based on the

[2] Please note that in this paper, the term "confiscated objects" in Indonesian legal term refers to "barang bukti" and the term "legal evidence" in Indonesian legal term refers to "alat bukti".

negative theory of evidence (*negatief wettelijk bewijstheorie*).

After elucidating the evidentiary system and sources of evidence, in the subsequent section, the author will point out some relevant issues pertaining to the enactment of the new policy. These analyses are expected to be relevant for law enforcement not only on the context of sexual violence crimes but also other crimes, given the possibility of future changes regarding the policies on evidentiary system.

B. Examining the Negative Proof System and Minimum Standards of Evidence in Indonesia: Judges' Conviction Obtained from a Minimum of Two Valid Pieces of Legal Evidence

By tracing the minutes of the drafting of the Code of Criminal Procedure (KUHAP), it was found that the proof system adopted by the KUHAP is a negative proof system[3]. The negative proof or *negative wettelijk system*[4] is a system based on two main points. First, the guilt of the accused can only be proved in juridical sense based on the evidence which is recognized in the applicable rules and has met the minimum standards of evidence. Second, the defendant cannot be convicted unless the judge is internally convinced of the defendant's guilt[5]. The central role of the judge's conviction in this system is accompanied by a logical consequence in the form of freedom for the judge to evaluate the available evidence[6]. The freedom of the judge in assessing the evidence can be understood this way: If, with the available evidence, the judge does not obtain a conviction regarding the presence or absence of a criminal act and the presence or absence of guilt of the accused, then the judge should not impose a criminal conviction.

The concept of a negative proof system is a middle ground between a party who is of the view that a truth must be based solely on subjective beliefs and a party who views the opposite – that the truth is something objective which can be found based on a set of rules arranged as generally a priori[7]. As the midpoint of those two opposing concepts, the negative proof system holds to the existence of a set of proof rules and minimum standards of

[3] Minutes of Drafting of the Code of Criminal Procedure. The 10th Open Plenary Meeting on November 19, 1979. In its response, the government explained that " ... the method of criminal conviction adopted is the negative wettelijk theory, which is that in determining whether a person is wrong/not, the judge must base his conviction on the availability of legal evidence according to the law.".

[4] It is called a negative proof system because it lays out some rules which are negative in nature or the minimum standards that determine when or in what circumstances a sufficient proof cannot be met (Ronnie, p. 10). Mittermaier further explains that a set of rules regarding the proof system serves as a guideline for meeting the minimum standards of evidence (p. 149).

[5] Ronnie Gerrard Bloemberg. The Development of the Criminal Law of Evidence in the Netherlands, France and Germany between 1750 and 1870: From the System of Legal Proofs to the Free Evaluation of the Evidence. University of Groningen. 2018. Pp. 127 and 300.

[6] Ibid. P. 80.

[7] Ibid. P. 311.

evidence. The proof rules and the minimum standards of evidence serve as a benchmark in the process of seeking truth as well as a means to minimize the potential of judicial abuse as a consequence of granting freedom for judges to evaluate evidence and believe whether or not a defendant committed a crime[8].

In the Indonesian law, the negative proof system is manifested in Article 183 of the Code of Criminal Procedure[9]. In line with the concept of a negative proof system, the Code of Criminal Procedure stipulates that the determining factor for a judge in imposing a sentence on a person is the judge's conviction that a criminal act has or has not occurred and whether the defendant is a person guilty of committing the crime and that the judge's conviction is limited in its source of acquisition, namely from a minimum of two valid pieces of legal evidence, the type of which is restrictively regulated in Article 184 of the Code of Criminal Procedure. A minimum of two valid pieces of legal evidence in Article 183 of the Code of Criminal Procedure serves as the minimum standard. Meanwhile, Article 184 and other related articles serve as a set of proof rules that provide limitations as well as guidelines for obtaining such minimum standards[10].

Understanding the Minimum Standard of Two Types of Legal Evidence and the Judge's Conviction

The prior explanation regarding the negative proof system contains two elements. The first element is the provision of at least two types of evidence. Second, the judge's conviction shall be derived from the two types of evidence. As is common in the rules of the Code of Criminal Procedure and its derivative rules, until now there has been no substantial explanation or guideline that can assist authorized officials in making decisions. For example, in assessing whether or not detention is necessary, there are no clear standards or indicators as to under what conditions there is a concern that the suspect or defendant will flee, repeat a criminal act, or omit evidence. Furthermore, in the context of searches and seizures, there are also no clear standards or indicators for assessing what conditions can be considered necessary and urgent circumstances that may exclude the investigator's obligation to obtain permission

[8] Ibid. P. 144. “The judge should only have to convict when he was internally convinced of the guilt and when the minimum proof requirements were met. The minimum proof standards would create at least some guarantee that the judge did not follow a too easily acquired internal conviction”.

[9] Article 183 of the Code of Criminal Procedure: "A judge may not sentence a person unless from at least two valid pieces of legal evidence he has obtained a conviction that a criminal offence actually occurred and that it is the accused who is guilty of committing it".

[10] Jarcke and Mittermaier are of the view that a judge's conviction is the decisive basis for any conviction, whereas proof rules act as guidelines that negatively bind judges (providing limitations on what conditions judges cannot impose a sentence in). In Ronnie Bloemberg. The Development of the Criminal Law of Evidence in the Netherlands, France and Germany between 1750 and 1870: From the System of Legal Proofs to the Free Evaluation of the Evidence.

from the chief judge before conducting a search and/or a seizure.

The same case applies to the minimum standard of evidence. The Code of Criminal Procedure does not provide a clear explanation that can be used by judges as a guideline, especially regarding the relationship between the availability of at least two types of legal evidence and the judge's conviction obtained from the two types of legal evidence. The author's view can be challenged by the question of whether the minimum two types of legal evidence referred to in Article 183 of the Code of Criminal Procedure are qualitative or quantitative (the amount of evidence under Article 184 of the Code of Criminal Procedure or the quality of evidence, for example, based on the type of evidence)? Then, does the minimum standard of two types of legal evidence have to be met to prove each element of a criminal act or does it apply to all elements of a criminal act?

Those questions do not have a clear answer. Differing perspectives on this matter can be seen from, for example, the expert opinion of Eddy O.S Hiariej as well as the statement of the government and the House of Representatives in the judicial review number 21/PUU-XII/2014. Eddy explains that the two types of legal evidence are qualitative, except for legal evidence which is in the form of witness statements, which can also be interpreted quantitatively based on Article 185 paragraph (2) of the Code of Criminal Procedure[11]. Meanwhile, the Government and the House of Representatives understand the two legal evidences in Article 184 of the Code of Criminal Procedure in terms of their quality and quantity[12].

The requirement of a minimum of two types of legal evidence in the Code of Criminal Procedure can be understood as an attempt to raise the standard of criminal charges against the accused. However, without clarity of answers to the aforementioned questions, the minimum standard of two types of legal evidence and the judge's conviction can actually raise doubts to law enforcement in applying the negative proof system itself, which ultimately has an impact on the accuracy of the verdicts taken by the judge.

To answer the previous questions, the author is guided by the concept of a negative proof system adopted in the Netherlands, Germany, and France, where the negative proof system adopted in Indonesia is originated. The negative proof system is a product of the evolution of the law of evidence in those countries since the 17th century. In the process of evolution, one significant area of concern was the standard of obtaining the judge's conviction. Meanwhile, the minimum amount of evidence available is not explicitly stated. However, it is emphasized

[11] Eddy O.S. Hiariej, 2012, Theory and Law of Evidence, *Erlangga*.
[12] Constitutional Court Decision 21/PUU-XII/2014, pp. 76 and 84.

that the judge could not decide on the basis of one witness statement or the confession of the accused in the absence of other evidence[13].

The concept of judges' conviction embraced in the negative proof system is understood by some experts as a condition in which judges contend that there has been "a very high probability of guilt", which is more or less the same as the concept of *beyond reasonable doubt* embraced in the Anglo-American system[14]. Furthermore, to understand what is meant by "a high probability of guilt" or “beyond reasonable doubt”, it can be traced back to the thought process of the drafters of the negative proof system.

From a historical point of view, the negative proof system is an evolution of the legal proof system, which emphasizes the process of determining the guilt of the accused based on a set of rules that have been categorized and determined by the regulations[15]. For example, a person is presumed to have been found guilty to the extent that the criminal offence alleged to him is supported by the availability of witness testimony that has no flaws or confessions of the accused. Moreover, in the legal proof system, there is no room for the judge's conviction. That is, the system focuses on a certain quantity of evidence to determine a person's guilt[16].

The legal proof system has its roots in the late-medieval Aristotelian philosophy, which categorizes knowledge into two types, namely *scientia* and *opinio*. *Scientia* means “universally and necessarily true”. That is, knowledge results from a process of syllogism based on the basic principles, and it is through this process that the truth of a postulate can be proved. On the contrary, *opinio* is knowledge derived from arguments, statements from authority, and prevalence. Thus, *opinio* cannot be regarded as true knowledge[17].

The difference in the quality between *Scientia* and *Opinio* relates to the source of the acquisition of such knowledge. *Scientia* is sourced from direct evidence or inartificial evidence, such as testimony or confessions. Meanwhile, *opinio* is sourced from "artificial" evidence known as *indicia*[18]. At that time, the testimony of witnesses was seen as being able to produce *probatio perfecta*, which was considered to have directly proved the crime. In comparison, *indicia* is still in the realm of pre-assumption because it is only limited to the

[13] Bloemberg. Op. Cit. P. 10.
[14] Ibid.
[15] Ibid. P. 68.
[16] Ibid. P. 11. Bloomberg explains that “In general, only the confession of the defendant or the testimony of two reliable eyewitnesses could create a full proof sufficient to convict someone to a severe corporal or capital punishment.”
[17] Ibid. Pp. 65-66.
[18] Ibid. P. 66.

generation of suspicions or indications and still requires a thought process by the judge, which in those days was seen as unreliable to determine one's guilt[19].

Over time, the legal proof system began to be abandoned along with the introduction of the form of knowledge on the scale of probability levels. The quantity of evidence is no longer an important factor in determining a person's guilt. Contrary to the legal proof system, this new approach relies on the judge's ability to determine whether there is sufficient evidence to determine a defendant's guilt based on his or her convictions[20]. In the context of criminal convictions, the probability scale has two dimensions, namely the objective dimension – in which a fault can be proved to be highly probable– and the subjective dimension – in which the judge must be "morally certain"[21]. Filangieri explains that "morally certain" is nothing but the realm of the mind that contains a belief in a truth or a falsehood[22].

The same case applies to the concept of *Beyond Reasonable Doubt*[23]. In the United States' criminal justice system, for example, *beyond reasonable doubt* implies that the judges' convictions are not just possible doubts but must reach a moral point of certainty or jurors must be "firmly convinced of the guilt"[24]. In some states, reasonable doubt is negatively defined as "a doubt that would cause a reasonable person to hesitate to act in their most important affairs"[25]. In other words, if there is a reasonable doubt, then the standard of *beyond reasonable doubt* is not met.

The previous explanation regarding the concept of a negative proof system and the convictions of the judge points to several conclusions. First, the negative proof system emphasizes the quality of the evidence, rather than the quantity. The non-determination of the minimum amount of evidence[26] can be understood as a consequence of the emphasis on the judge's conviction and the assessment of the evidence in terms of its quality, not its quantity. Second, in the context of the Code of Criminal Procedure, the judge's conviction is

[19] Ibid. P. 69.
[20] Ibid. P. 67.
[21] Ibid. P. 74.
[22] Ibid. P. 75.
[23] One explanation of Beyond Reasonable Doubt in the Jury Instruction can be seen in State v Denise Frei. The judge explained the concept of beyond reasonable doubt to the Jury as follows, "if, after a full and fair consideration of all the evidence, you are firmly convinced of the defendant's guilt, then you have no reasonable doubt and you should find the defendant guilty. But if, after a full and fair consideration of all the evidence of lack of evidence produced by the state, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and you should find the defendant not guilty".
[24] "Firmly convinced" is a phrase introduced by The Federal Judicial Center and also endorsed by the Supreme Court through Justice Ginsburg's concurring opinion in Victor v Nebraska.
[25] Marc Miller and Ronald Wright. Criminal Procedures: Prosecution and Adjudication: Cases, Statutes, and Executive Materials. P. 536.
[26] Except for the rule regarding one witness and the testimony of the accused.

the decisive point in determining the guilt of a defendant. Such confidence must be obtained from a quality assessment of at least two available pieces of legal evidence.

It should be noted that the minimum standard of two types of legal evidence as a source for obtaining the judge's conviction has the potential to have a negative impact, specifically the possibility of a wrong understanding. For example, if two types of legal evidence have been secured, then the judge's conviction is considered appropriate to exist, such as the understanding embraced during the legal proof system which was precisely contrary to the essence of the negative proof system.

That concern was actually raised by Gratama in 1850. Gratama argues that the rules of evidence in the negative proof system do not make judges more cautious in passing judgments. In fact, it will be easier for judges to impose sentences when they think there is sufficient evidence available under the rules of evidence[27]. Gratama also maintains that it is impossible to determine in the first place (in the form of rules) under what conditions it can be judged whether or not there is evidence to convict a person because it must be solely the discretion of the judge in the assessment[28].

C. Legal Evidence and "Barang Bukti" (Confiscated Objects) as A Source of Evidence

As discussed earlier, the negative proof system outlines that the judge's conviction should be based on evidence, and the assessment of the strength of the evidence relies on the judge's authority. It has also been discussed that in the negative proof system, the rules of proof act as guidelines for judges in preventing decision-making based solely on conviction. After explaining the concept of a negative proof system, in this section, the author will discuss the sources of evidence in the Code of Criminal Procedure, which can be used as the basis for judges in obtaining convictions and imposing criminals.

Article 183 of the Code of Criminal Procedure provides that "a judge may not sentence a person unless from at least two valid pieces of legal evidence he has obtained a conviction...". Furthermore, Article 184 stipulates the categories of valid legal evidence, namely witness statements, expert statements, letters, instructions, and statements of the accused[29]. Thus, it can be understood that the source of evidence for the judge to be able to obtain a conviction refers to Article 184 of the Code of Criminal Procedure[30].

[27] Bloemberg. Op. Cit. P. 314.
[28] Ibid. P. 311.
[29] Article 184 of the Code of Criminal Procedure.
[30] Article 184 of the Code of Criminal Procedure stipulates that valid legal evidence includes the testimony of witnesses, letters, expert statements, instructions, and statements of the accused.

Furthermore, in addition to the terminology of Legal Evidence referred to in Article 183 of the Code of Criminal Procedure, there is the terminology of Confiscated objects mentioned in several articles in the Code of Criminal Procedure[31]. The term of confiscated objects is not defined in the Code of Criminal Procedure. However, referring to the literature, the term of confiscated objects can be understood by looking at the provisions in Article 39 of the Code of Criminal Procedure which regulates objects that can be subject to confiscation, including objects that are specifically made or intended to commit criminal acts[32].

Looking at the correlation between Article 39 and Article 184 of the Code of Criminal Procedure, it can be understood that the object subject to confiscation, which is commonly referred to as confiscated objects, cannot necessarily be the basis for imposing a criminal conviction. An exception is if the confiscated evidence is a letter, as stipulated in Article 185 of the Code of Criminal Procedure, the letter must also meet the qualifications of Article 187 of the Code of Criminal Procedure[33], and the letter cannot stand alone as a source of evidence for the judge.

Different matters are regulated in Law No. 12 of 2022 concerning the Crimes of Sexual Violence. In Article 24 paragraph (1) of this Law, it is stipulated that confiscated objects which is used to commit criminal acts or which results from criminal acts of sexual violence and/or objects or goods related to these criminal acts is part of legal evidence in proving cases of criminal acts of sexual violence. In other words, related to Article 184 of the Code of Criminal Procedure, confiscated objects may stand alone as a source of evidence for the judge. Previously, only letters could qualify as legal evidence and serve as the source of obtaining

[31] Some articles in the Code of Criminal Procedure that mention the terminology of material evidence include Article 5 paragraph (1), Article 8 paragraph (3) point b, Article 18 paragraph (2), Article 21 paragraph (1), Article 40.

[32] Based on Article 39 paragraph (1), objects which are subject to confiscation are: a. objects or bills of suspects or objects or bills of suspects or defendants that are all or partly suspected to have been obtained from criminal acts or as a result of criminal acts; b. objects that have been used directly to commit criminal acts or to prepare them; c. objects used to obstruct the investigation of criminal acts;
d. objects specifically made or intended to commit criminal acts; e. other objects that have a direct relationship with the criminal act committed.

[33] Article 187 of the Code of Criminal Procedure: The letter, as mentioned in Article 184 paragraph (1) point c, made under oath of office or corroborated by oath, is:
a. minutes and other official letters issued by an authorized general officer or made before him, containing a description of the events or circumstances heard, seen, or experienced by himself, accompanied by clear and unequivocal reasons for his particulars.
b. a letter made according to the provisions of laws and regulations or a letter made by an official regarding a matter that is included in the management for which he is responsible and which is intended for the proof of something or a situation;
c. a letter of statement from an expert containing an opinion based on his expertise regarding something or a circumstance formally requested from him;
d. other letters that can only be valid if they have something to do with the content of another evidentiary tool.

the judge's conviction, whereas now there is an open possibility for the judge to obtain a conviction from objects other than those in the form of a letter.

The adoption of confiscated objects as a source for judges to obtain convictions has a strong theoretical basis by tracing the development of the concept of a negative proof system. Back then, there was indeed a strict separation between inartificial evidence, such as witness statements and confessions, which were considered to contain possibilities, and "artificial evidence" or *indicia*, which was considered to contain presumptions[34].

Until the 19th century, confiscated objects in the form of testimony and confessions, sourced from people, was considered the most valuable evidence[35]. Meanwhile, *indicia*, which includes sources of evidence in the form of objects, is considered to be evidence whose value differs qualitatively and is not considered a reliable source of evidence[36]. Sources of evidence in the form of objects only gained importance in the late 19th and early 20th centuries when forensic studies began to surface and provide room for circumcisional evidence and expert testimony to explain a state of affairs[37].

From the above explanation, with regards to the types of evidence regulated in Article 184 of the Code of Criminal Procedure, it can be seen that the Code of Criminal Procedure also adopts evidence sourced from people in the form of witness statements and statements of the accused and in the form of objects, albeit limited to letters. However, the different arrangements between Article 184 and Article 39 of the Code of Criminal Procedure give the impression that the Code of Criminal Procedure still dichotomizes evidence that can be used as a source of evidence by drawing a line between legal evidence as stipulated in Article 184 and "other evidence" known as confiscated objects.

Andi Hamzah explains that that dichotomy persists because confiscated objects still require an identification from witnesses or defendants, and for confiscated objects to have evidentiary value, it is necessary to be identified (or examined) first[38]. In line with Andi Hamzah, Flora Dianti points out that the function of confiscated objects is limited to strengthening the position of valid legal evidence, seeking and finding material truths in the case being handled, and complementing valid legal evidence, so the confiscated objects can strengthen the judge's conviction in the guilt charged by the public prosecutor[39].

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[34] Bloemberg. Op. Cit. P. 69.
[35] Ibid. P. 81.
[36] Ibid. P. 72.
[37] Ibid. P. 81.
[38] Andi Hamzah. Indonesian Criminal Procedure Law. *Sinar Grafika*. 2008. P. 259.
[39] Flora Dianti. In the article https://www.hukumonline.com/klinik/a/apa-perbedaan-alat-bukti-dengan-barang-bukti--lt4e8ec99e4d2ae . Downloaded on May 17, 2022.

From those views, it can be seen that in the Code of Criminal Procedure, confiscated objects cannot stand alone as a source for judges to obtain convictions.

The dichotomy between "legal evidence" and "confiscated objects" as a source for obtaining the judge's conviction as stipulated in the current Code of Criminal Procedure is questionable with regards to its relevance. If the dichotomy between legal evidence and confiscated objects lies in their distinctive nature that cannot provide information directly or cannot stand alone, then the legal evidence 'Reference' (*alat bukti 'Petunjuk'*) pointed out in Article 188 of the Code of Criminal Procedure also does not meet the qualification. Referring to Bloemberg, one of the key points in the shift from the legal proof system to the negative proof system is that the dichotomy between direct and indirect evidence becomes irrelevant. This is because the determination of truth based on the concept of probability opens up the possibility of obtaining truth from various types of evidence. The various types of evidence are basically not different in quality because the judge will still consider the reliability of the evidence. What distinguishes them is only their evidentiary value, which depends on the circumstances that provide the evidence[40].

Obtaining Information Contained in Confiscated Objects to Obtain Sources of Evidence

Circumstances that provide evidence can be classified into two categories, namely the information contained in it and the way it is obtained. In this section, the author will focus on the information contained in an item of evidence.

As an illustration, imagine a situation related to the acquisition of information from evidence as follows: in a murder case, investigators found a knife stained with blood not far from the location where the body was found. The knife was later confiscated by investigators.

In the context of the Code of Criminal Procedure, the knife subject to confiscation can qualify as confiscated objects because it is suspected of being a tool for committing the crime of murder. However, to come to a conclusion as to whether the knife is a tool allegedly used to commit the criminal act, it is necessary to first conduct an examination. Without an examination, the knife cannot be used as a source of evidence to obtain a conviction for the judge. Apart from the fact that the object allegedly used as a tool to commit a criminal act is not legal evidence, as stipulated in Article 184 of the Code of Criminal Procedure, the object does not provide relevant information related to the case.

[40] Bloemberg. Op.Cit. P. 78. What is meant by the circumstances that provide the evidence are what information contained in it, which can be known after an examination. Other than the substance of the information contained in the evidence, the process of obtaining the evidence also needs to be considered.

It would be a different situation if the knife has been examined[41]. In the context of investigation, the investigator can carry out examination actions on the object through various means, ranging from making the confiscated objects as an object of examination by a person who has special skills – known as Criminalistic Technical Examination[42] – to making the object a means of examining witnesses or suspects[43]. Through the examination process, only information contained in the evidence can be obtained.

For example, from a forensic examination, information can be obtained about whether it is true that the knife was used as a tool to commit a criminal act by identifying whether the blood stained on the knife was the victim's blood. In fact, from the results of the examination, useful information can also be obtained to identify the perpetrator of the criminal act by examining the fingerprints contained on the handle of the knife.

In the event that the confiscated objects is used as the object of examination by a person who has special expertise, as illustrated earlier, then the results of the examination can be transformed into legal evidence in the form of a letter, as regulated in Article 185 of the Code of Criminal Procedure; otherwise, the expert who conducts the examination can explain the results of the examination and the information can serve as legal evidence in the form of expert testimony, as regulated in Article 187 of the Code of Criminal Procedure.

Apart from being an object of direct examination, the information contained in the confiscated objects can be obtained by making it a means for interviewing witnesses, suspects and/or defendants. Through the identification of these parties, the information contained therein can have evidentiary value through the testimony of witnesses or defendants.

From the two processes of examination of evidence above, either as an object of examination by experts or a means for investigating witnesses and or suspects/defendants, in the context

[41] In the Regulation of the Chief of Police Number 6 of 2019, material evidence is defined as a movable or immovable object, tangible or intangible, which has been confiscated by the Investigator for the purpose of examination at the level of investigation, prosecution, and examination at the court hearing. In the Appendix to the Decree of the Chief of Police Number Skep/1205/IX/2000 dated September 11, 2000, an examination is defined as an activity to obtain information, clarity, and identification of suspects and/or witnesses and/or material evidence as well as the elements of criminal acts that have occurred so that the position or role of a person or evidence in the criminal act can be clear and stated in the Minutes of Examination. The investigation and examination of material evidence are regulated further in the Decree of the Chief of Police Number Skep/1205/IX/2000 dated September 11, 2000 regarding the Field Manual on Examination.

[42] Appendix to the Decree of the Chief of Police No. Pol: Skep/1205/IX/2000 dated September 11, 2000. Implementation Manual on the Criminal Investigation Process. P. 26. The term of Criminalistic Technical Examination is further regulated in the Chief of Police Regulation Number 10 of 2009.

[43] Ibid. Field Manual on Examination.

of obtaining legal evidence, it can be seen that the information contained in it can ultimately have evidentiary value and can be submitted as legal evidence as regulated in Article 184 of the Code of Criminal Procedure. Therefore, with reference to the concept of a negative proof system, it can be understood that the dichotomy in the terminology between legal evidence and confiscated objects known in the law of proof in Indonesia is basically not very relevant anymore, especially when it comes to sources of evidence that can be used by judges to obtain a conviction. What is important to underline is the quality of information provided by an item of evidence so that it can be useful as a source for the judge to obtain a conviction, regardless of its qualification as legal evidence or confiscated objects.

D. Notes on Qualifying "Barang Bukti" (Confiscated Objects) as Legal Evidence in Proving Cases of Sexual Violence Crimes

The fundamental question concerning the breakthrough in the Sexual Violence Act, which is the adoption of confiscated objects as legal evidence, is whether the confiscated objects can stand alone as a basis for determining whether or not a minimum of two types of legal evidence are met and whether it can become a source for obtaining a judge's conviction. In this regard, the author argues that even if the confiscated objects have been adopted as legal evidence, it is still necessary to conduct an examination to obtain the information contained in it, so it can have evidentiary value and become a stand-alone source for the judge to obtain a conviction. This opinion is based on several reasons as follows:

First, the evidence from which the judge's conviction is obtained depends on its quality, not its quantity. Thus, what must be considered is whether the available evidence has been able to provide valuable information to be a source for the judge in obtaining a conviction, not merely whether the minimum standard of two types of legal evidence has been met.

Second, confiscated objects which is classified as legal evidence according to Article 24 of the Sexual Violence Act is the confiscated objects used to commit a criminal act or resulted from a criminal act of sexual violence and/or objects related to the criminal act. To be able to find out whether an item of evidence meets these qualifications, the item must first be inspected. In the absence of an examination, such items cannot provide reliable information to prove an occurrence. As a result, it is certainly difficult for the judges to obtain a conviction as to whether or not an item of evidence is truly an item used to commit a criminal act, resulted from a criminal act, or related to a criminal act.

Regarding the examination of evidence, as previously mentioned, the confiscated objects may be examined as a direct object of examination (i.e., Criminalistic Technical Examination) or as a means for assisting the examination. In order to obtain the judge's conviction in the

evidentiary process, what kind of examination would provide reliable information? In this regard, the author argues that the most preferable examination is the examination of confiscated objects as an object or Criminalistic Technical Examination as stipulated in the Regulation of the Chief of Police Number 10 of 2009. The advantage of examining confiscated objects as an object is that the results of the examination can be transformed into other types of legal evidence, namely letters or expert statements.

If the examination of confiscated objects as an object is not possible, then at least the evidence shall be examined as a means for interviewing witnesses and/or suspects. However, if the confiscated objects is only examined in its capacity as a means of an interview, then the information contained therein will only rely on the accounts of the witness and/or the suspect or the defendant. Thus, the information contained in the evidence will have evidentiary value as witness testimony or defendant's testimony.

However, that technique possesses weaknesses in the following situations: First, if the defendant denies the connection of the confiscated objects to the criminal offence alleged against him; and, secondly, if there is not more than one witness who can confirm the connection of the evidence to the said criminal offence.

In such a situation, there is a greater possibility of not obtaining the judge's conviction.

Referring back to the illustration of a knife in the murder case outlined in the previous section, without an examination of confiscated objects, the confiscated objects that could contain valuable information about a criminal offence loses its value in assisting the judge to obtain a conviction. Likewise, if the confiscated objects is only examined as a means for investigating witnesses and/or defendants, then the judge can certainly have reasonable doubts about the ability of the witness and/or the defendant to identify whether the item is really a tool used to commit a criminal act and whether the defendant is the perpetrator of the criminal act. Consequently, it would be more difficult to satisfy the "firmly convinced" standard.

Obligation to Undergo Criminalistic Technical Examination Procedures on Confiscated Objects

The author realizes that the assessment of the strength of the evidence in a case shall be done on a case-by-case basis. A similar approach must also be taken to assess the conditions surrounding a case, such as the time span between the reporting of a criminal act and the discovery of evidence, that may hinder the process of examining evidence. However, from the illustration of the knife in the aforementioned murder case, at least it can be inferred that the process of examining the evidence is closely related to the process of obtaining the

judge's conviction.

Until now, the examination of confiscated objects has been stipulated in various rules, including Law Number 2 of 2002 on the Police, Regulation of the Chief of Police Number 10 of 2009 on the Procedures and Requirements for Requests for Criminalistic Technical Examination of Crime Scenes and Criminalistic Laboratory Examination of Evidence to the Forensic Laboratory of the National Police of the Republic of Indonesia, Regulation of the Chief of Police of the Republic of Indonesia Number 12 of 2011 on Forensic Medicine and Regulation of the Chief of Police Number 10 of 2010 on Procedures for Managing Evidence within the National Police of the Republic of Indonesia, as well as Regulation of the Chief of Police Number 8 of 2014 on Amendments to Police Chief Regulation Number 10 of 2010.

From those sets of regulations, it can be understood that there have been rules governing the examination of confiscated objects as the object of examination in order to obtain the information contained from the evidence. The problem, however, is that the investigator's judgment is still relied on to determine whether or not an examination is necessary. There is no obligation for the investigator to carry out acts of examination. This will also apply to the implementation of the Sexual Violence Act as it is very likely that such an examination will not be carried out.

The absence of the obligation for the investigator to carry out an examination can be seen from the handling of case number 1273/Pid.B/2016/PN. Jkt.Sel jo 50/Pid/2014/PT. DKI. In the said case, the defendants were accused of murdering a person using a cleaver as a tool. The victim's body was found shortly after the murder occurred. The evidence of a cleaver allegedly used to commit the murder was discovered shortly after.

In the investigation stage, the investigator did not examine the cleaver as an object; in other words, no criminalistic technical examination was carried out on the cleaver. However, the cleaver was still examined as a means for investigating witnesses and defendants. During the investigation stage, the defendants admitted the cleaver to be the tool for committing the murder. During the course of the trial, the defendants denied having committed murder and also denied evidence in the form of the cleaver on the grounds that their testimony at the investigation stage was given under pressure. The District Court found the Defendants guilty. Nevertheless, on appeal, the Defendants were acquitted.

From the case, it can be seen that, by taking into account the time of discovery of the body and the evidence allegedly used to commit the criminal act, the investigator is allowed to have the option of examining the evidence of the knife as an object with the aim of obtaining information about whether it is true that the knife was used to kill the victim or whether it

was true that the defendant committed the criminal act of murder. However, from the facts of the trial, it was revealed that the investigator did not take such an action.

Regardless of the final outcome of the case, the Defendants' denial of the criminal acts charged against them and the evidence they had originally admitted at the investigation stage as a tool for committing the crime should be a situation that needs to be anticipated by the investigator and the public prosecutor. By simply holding on to the Defendants' confession and not promptly examining the confiscated objects scientifically, the investigator and the public prosecutor had essentially missed the opportunity to obtain accurate information from the cleaver, which might contain information as to whether it was true that the defendants were responsible for the criminal act. Not only that, given the crucial role of the cleaver and the information contained therein, the non-examination of the cleaver also technically opened up opportunities for doubts to arise on the part of the judge.

The above case is an illustration of the absence of the investigator's obligation to undergo a criminalistic technical examination although the evidence might contain important information about the perpetrator of the crime. As a result, not only did the investigator and the public prosecutor fail to uncover a criminal act, but the freedom of the actual innocent person was also deprived. If the investigator is required to carry out a criminalistic technical examination, of course the information that the cleaver was not a tool for committing the criminal act and that the defendants were not guilty of committing the crime could have been known from the beginning and can be taken into consideration in determining whether or not to continue the investigation of the suspects.

In the absence of an obligation to pursue a technical criminalistic technical examination, it is unlikely that the expansion of the source of evidence can have a positive impact on judges in obtaining convictions. Instead, the policy could even "force" judges to obtain convictions because the minimum standard of proof appears to have been met.

Understanding the Judge's Standard of Conviction

The Code of Criminal Procedure does not provide a definition of the judge's conviction, as referred to in Article 183 of the Code of Criminal Procedure. Likewise, there are no clear guidelines as to under what conditions the judge's standard of conviction has been met. Indeed, if the decision maker conducts a legal tracing, the judge's standard of conviction can be found in the context of a negative proof system. However, amidst the current conditions, in the absence of clear guidelines, of course, the legal tracing carried out by each decision maker can lead to different understandings from one another. As a result, the application of a judge's standard of conviction can also differ from one case to another. For this reason,

efforts are needed to define and provide standards for the terminology of “judges' conviction”.

The need for clear definitions and standards is justified in relation to the process of assessing evidence from the fact-finder. Christoph Engel refers to the "story model" theory with regard to the evidence assessment process. The theory explains that the party who is obliged to look for facts (fact-finders) in the evidentiary process will develop a story that he considers to be the most reasonable based on the evidence presented to him. Then, in making a decision, the fact-finder will choose the one which he considers to best fit the story that has been developed. In the meantime, there is a thought process that is automatic or outside the conscious, in which the fact-finder builds his confidence level[44].

The process of establishing such a level of conviction puts the fact-finder in a risky position where the fact-finder seeks to match the evidence with a story so that the fact-finder may overrepresent the evidence that he deems consistent with the story he believes in and undervalues the evidence that contradicts the story. The circumstances in which the fact-finder finds a correlation between the story he believes in and the evidence he has seen raises a level of confidence in him. However, the increase in the level of self-confidence also risks increasing the level of inaccuracy of decision-making[45]. It is in these conditions that the clarity of definitions and standards plays a role. Clarity of definitions and standards is necessary to counteract bias arising from the process of assessing evidence, while serving as a warning to the fact-finders regarding the potential of obtaining undesirable results in criminal justice proceedings, one of which is punishing innocent people[46].

The practice of defining and providing standards for what constitutes a judge's conviction can be seen in one of the judicial practices in the United States. In Victor v Nebraska, Ruth B. Ginsburg explicitly supports the definition of *beyond reasonable doubt* according to the Federal Pattern Criminal Jury Instruction as follows, “Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. … if, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty”[47].

[44] Kevin M. Clermont. Standards of Proof Revisited. Vermont Law Journal. Vol 33:469. P. 476.
[45] Ibid. In the branch of psychological science, there have been many studies showing that self-confidence is not directly proportional to accuracy. In his article, Kevin Clermont explains that the level of confidence can be improperly built upon not an assessment of the facts but the proficiency of each party in presenting the evidence it has. See Kevin Clermont. P. 478.
[46] Ibid.

In addition to those descriptive explanations, the academic community also puts forward a discourse on the quantitative explanation of *beyond reasonable doubt*. Although precisely quantifying the *beyond reasonable doubt* standard is believed to be difficult and impractical, some scholars, such as Werinstein[48] and Shapiro[49], quantify the *beyond reasonable doubt* standard as a standard of conviction at a level of 90% and above. Those experts are of the view that the explanation of the *beyond reasonable doubt* standard is reasonable, considering the aim of reminding jurors of the high standard of proof in criminal cases, encouraging investigators to conduct a more thorough investigation, and emphasizing efforts to avoid sentencing innocent people[50].

More technically, Shapiro offers a solution to explain the standard of *beyond reasonable doubt* using a terimonology that is easily understood by the jury in general with two questions, namely whether the jury believes that the public prosecutor has proved all elements of the criminal act and, subsequently, whether the jury's belief has achieved the level of "moral certainty" by considering the extraordinary injustices that may arise as a consequence of punishing innocent people[51].

Another approach is put forward by Cicchini, who emphasizes relatively structured definitions to make it easier for the juries to understand the standards. Cicchini takes as an example from an explanation adopted in several states, such as New York, Vermont, and Virginia, with the phrase "... if you have a reasonable doubt, you must find the defendant not guilty even if you think the charge is probably true". The use of the phrase "probably true" is deemed to draw the jury's attention to the question of whether the public prosecutor has successfully proved his indictment, instead of what the defendant has done (proved) to refute the public prosecutor's indictment[52].

The above explanation of the definition of *beyond reasonable doubt* indeed lies in the context of the judge's explanation to the jury as a layperson through the Jury Instruction[53]. Questions

[48] Jack B Werinstein and Ian Dewsbury. Comment on the Meaning of "Proof beyond a Reasonable Doubt". Law, Probability, and Risk (2006) 6, 172-173.
[49] James A Shapiro and Karl T Muth. Beyond a Reasonable Doubt: Juries Don't Get It.
[50] Jack B Werinstein and Ian Dewsbury. Comment on the Meaning of "Proof beyond a Reasonable Doubt". Law, Probability, and Risk (2006) 6, 172-173.
[51] Op. Cit. Shapiro. P. 16.
[52] Michael D. Cicchini. Instructing Jurors on Reasonable Doubt: It's all relative. California Law Review. Oct 2017.
[53] Jury Instructions are instructions given to the jury in criminal justice in the United States prepared by a judge at the time when the parties have finished presenting their respective evidence and have presented a concluding argument. The instructions act as guidelines for judges in assessing the facts, aimed at keeping the jury on track in accordance with applicable procedural and substantive laws. Legal Information Institute. Jury Instructions. Cornell Law School. Downloaded on Mei 18, 2022 https://www.law.cornell.edu/wex/jury_instructions.

may arise as to whether the same explanation is also needed for judges, given that judges are trained, experienced, and considered to be legally knowledgeable. In this regard, apart from the previously stated reasons, namely the potential differences in understanding, it is also necessary to pay attention to the findings from the field of cognitive science which show that judges or other professionals are basically ordinary humans who have cognitive limitations, specifically judges' tendency to make decisions based on intuition or preferences. In other words, their decisions are not entirely based on objective reasons[54].

Those findings essentially speak for human's underlying tendency to rely on mental shortcuts or heuristics in making complex decisions[55]. Heuristics itself can be understood as a state in which a person makes decisions in ways that make the decision-making process easier than it should be and put aside a rational and systematic thought process or, in other words, makes decisions based on intuition[56].

From the description above, it can be concluded that it is important to provide explanations or guidelines that can be understood by the judge regarding the standard of proof that is in accordance with the negative proof system adopted in Indonesia. This is especially important at present when the law of proof in Indonesia has been progressing with the qualification of confiscated objects as legal evidence that can act as a source for judges in obtaining conviction. With an explanation of the judge's standard of conviction, it is hoped that the judge will find it easier to translate whether or not the available evidence is sufficient to obtain a conviction regarding the presence or absence of a criminal act and whether or not the defendant is guilty.

E. Conclusion

The proof system adopted in Indonesia is a negative proof system. That is, the judge's

[54] Chris Guthrie, et al. Inside the Judicial Mind. 2001. Cornell Law Faculty Publications. In their research, the authors explain that "Psychologists suspect that even though judges are experienced, well-trained, highly motivated decision makers, they are vulnerable to cognitive illusions.24 The research on human judgment and choice indirectly supports this suspicion. Empirical studies show that cognitive illusions plague the assessments that many professionals make, including doctors, real estate appraisers, engineers, accountants, options traders, military leaders, and psychologists". Moreover, the authors identify five types of heuristics that often occur in the context of criminal justice administration, namely anchoring, framing, hindsight, representativeness, and egocentricity or overconfidence. See also Eyal Peer and Eyal Gamliel. Heuristics and Biases in Judicial Decisions. Court Review: The Journal of the American Judges Association. American Judges Association. 2013.

[55] Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Science 1124, 1124.1974.

[56] Intuitive processes are understood as a decision-making mechanism that takes place spontaneously and does not require high concentration. This process is automated and heuristic-based, as well as requiring no compute capacity. Daniel Kahneman & Shane Frederick. Representativeness Revisited: Attribute Substitution in Intuitive Judgment, in Heuristics and Biases: The Psychology of Intuitive Judgment. P. 49.

conviction plays an important role in determining the guilt of the accused. However, the judge's conviction is not solely subjective but has an objective aspect because it is based on valid evidence, which, referring to the Code of Criminal Procedure, requires a minimum of two valid pieces of legal evidence.

The idea of adopting confiscated objects as legal evidence has a strong theoretical foundation. Technically, the idea does provide hope for law enforcement in cases of sexual assault crimes because more various categories of legal evidence means a greater number of legitimate sources for judges to obtain convictions. However, in order to truly contribute positively to law enforcement, it is necessary to take further steps to follow up on the policy to serve its purpose and not cause any injustice, which is punishing innocent people.

One step to take is to require investigators to conduct a criminalistic technical examination of confiscated objects, as referred to in Article 24 paragraph (1) of the Sexual Violence Act, as soon as the confiscated objects is obtained. Moreover, on the part of the judges as the decision makers, it is also necessary to provide guidelines regarding the standard of conviction. With these guidelines, it is hoped that judges can gain a uniform understanding of the high standard of conviction among them. This uniformity of understanding has various purposes, including preventing the application of standards that are too high in one case or too low in another case, minimizing the potential of bias in assessing evidence, as well as reminding judges of the burden of proof that rests with the public prosecutor and of the high standards that must be met to declare a person guilty.

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ICJR PROFILE

Institute for Criminal Justice Reform, abbreviated as ICJR, is an independent research institution focusing on criminal law reform, criminal justice system reform, and legal reform in general in Indonesia.

One of the most crucial issues that is experienced by Indonesia during this transition period is reforming the legal system and criminal justice system into a more democratic direction. In the past, criminal law and criminal justice system were used as a tool to support the governing authoritarian power, in addition to being used as social engineering tools. Now is the time for the orientation and instrumentation of criminal law as a tool power to be shifted as a tool to support the work of democratic political system and respecting human rights. This is the challenge in the path to restoring criminal law and the criminal justice system during the transition period.

To answer the abovementioned challenge, it is necessary to make planned and systematic measures to resolve such a situation. A grand design for criminal justice system reform and legal reform must be initiated. The criminal justice system has been known to be placed in the strategic place for the framework to build the Rule of Law and respect towards human rights. Democracy can only function well with the concept that Rule of Law is institutionalized. Criminal justice system reform that is human rights-oriented is a “conditio sine qua non” with the process of democratization institutionalization during the transition period.

The measures in conducting legal transformation and criminal justice system to be more effective are currently ongoing right now. However, the measures must generate wider support. The Institute for Criminal Justice Reform is taking the initiative to support those measures, providing support in the context of building respect towards the Rule of Law and at the same time building human rights culture within the criminal justice system. This is the reason for ICJR’s existence.

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