



Legal Standing of Testimonium De Auditio on Child Sex Crime

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Abstract

This study discussed the legal standing of testimonium de auditio / hearsay evidence on child sex crime; a case study in the Decision of High Court Number: 45.PID.SUS/2018/PT.PDG. This study was analyzed through criminal law evidentiary theory and legal certainty theory. Then, it employed a normative juridical method which is supported by interviews with law enforcement officials relating to the cases raised in this paper. The results and analysis of this paper found that the Decision of the Constitutional Court Number: 65/PUU-VIII/2010 does not set limits on the receipt of testimonium de auditio. The Decision of the Constitutional Court does not specifically address testimonium de auditio witness, but it is one of the types of witnesses being debated. Based on the Decision of the Constitutional Court, testimonium de auditio witness can be accepted as evidence as long as it has relevance to the case being tried and other evidences. This “relevance” phrase is debated because there is no limit for the judge in determining the relevance. Thus, determining its relevance requires the judge’s shrewdness and intelligence in analyzing the case. However, based on the Decision of the Constitutional Court Number: 45.PID.SUS/2018/PT.PDG, the legal standing of testimonium de auditio / hearsay evidence is not recognized. Thus, the decision overturned the decision of the court of first instance. According to the author, the High Court judge was wrong in applying the evidentiary theory. In this case, the the High Court judge made the decision only based on the Positive Law (Positif Wettelijk Bewijs Theorie). This is contrary to the Indonesian criminal law evidentiary theory which adheres to the principle of Negatief Wettelijk Bewijs Theorie. In addition, the Decision of the Constitutional Court Number: 65/PUU-VIII/2010 has not provided legal certainty in determining whether or not testimonium de auditio witness can be used as evidence.

Keywords: *Testimonium De Auditio; Child Sex Crime*

Introduction

The Constitutional Court is one of the actors of judicial power as referred to in the 1945 Constitution of the Republic of Indonesia. In 2010, the Constitutional Court has created a new norm that is recognizing the existence of *testimonium de auditio* as evidence; as stated in the Decision of the Constitutional Court Number 65/PUU-VIII/2010 in 2010 concerning the case for the petition to review Law No. 8 of 1981 concerning the Criminal Procedure Code to the 1945 Constitution of the Republic of

Indonesia which has broadened the definition of witnesses and witness statements in Article 1 number 26 and number 27 of the Criminal Procedure Code to: “a person who can provide information in the course of an investigation, prosecution and trial for a crime that he/she does not always hear, see, and experience him/herself” (Asshiddiqie & Tarmizi, 2010).

Decision of the Constitutional Court Number 65/PUU-VIII/2010 makes an update by granting the petition for the examination of Article 1 number 26 and 27 of Law No. 8 of 1981 concerning the Criminal Procedure Code. In the decision read out on August 8, 2011, the Constitutional Court stated that “Article 1 numbers 26 and 27, Article 65, Article 116 paragraph (3) and paragraph (4) of Law No. 8 of 1981 concerning Criminal Procedure Law is contrary to the 1945 Constitution of the Republic of Indonesia (1945 Constitution) as long as the witness understanding in these articles is not interpreted as a person who always hears, sees, and experiences an event (Sayogie, 2017).

The Decision of the Constitutional Court seems to nullify a legal situation or form a new law. That certainly brings consequences in criminal procedure law in Indonesia which so far, in the provisions of the legislation, literature and doctrine by experts, explains that witnesses must be people who see, hear and experience a crime. The Decision of the Constitutional Court also has several impacts on criminal procedural law in Indonesia. If it turns out that a witness is not necessarily a person who sees, hears and experiences a criminal event, how can the criteria of the person be made as a witness? Then, what are the criteria for witness testimonies that can be used as evidence at trial? Do people who do not see, hear or experience a criminal event can be witnesses in a criminal trial. This needs to be studied further because the Constitutional Court also does not provide clear conditions on how the criteria of witnesses who can provide information at trial as valid evidence according to the Criminal Procedure Code (Andi & Asis, 2014).

The impact is seen in child sex crime cases that were tried at Solok District Court Number 78/Pid.Sus/2017/PN.Slk up to the Padang High Court. In this case, the prosecutor charged the defendant with the charge that he had deliberately committed violence and forced the child to have sexual intercourse or was charged under Article 81 paragraph (1) jo. Article 76D of Law No. 23 of 2013 concerning Child Protection jo. Law No. 17 of 2016 concerning the Second Amendment to the Child Protection Law.

In terms of the value and strength of the evidence (the degree of evidence), so that a witness's statement has the value and strength of proof, it is necessary to pay attention to some basic provisions that must be fulfilled. It means that the testimony of a witness can be considered valid as evidence that has the strength of evidence, it must meet the requirements according to the provisions of the Law.

Based on the case, in both decisions at the District Court and the High Court level, the judge is only guided by evidence as stipulated in the Criminal Procedure Code. Judges do not refer to the Decision of the Constitutional Court Number 65/PUU-VIII/2010. Basically, the Decision of the Constitutional Court does not specifically regulate *testimonium de auditu* witness but it does regulate the expansion of the definition of witness. Decision of the Constitutional Court explains that witness statements can be accepted as long as it has relevance to the case. It means that the judge must be careful in linking the case being examined, the evidence, and witness testimony to the trial in order to find the relevance and linkage of witness testimony and other evidences (Feriansyah, 2016).

Based on the Decision of the Judge of the Solok District Court in case Number 78/Pid.Sus/2017/PN.Slk, the judge took consideration based on the testimony of the victim witness SR (ayu) which was strengthened with evidence in the form of a letter of *visum et repertum* results. In addition, the judge considered that the testimony of the *a de charge* witnesses was in line with the testimony of victim witness SR (ayu). The judge did not refer to the Decision of the Constitutional Court

Number 65/PUU-VIII/2010, but the judge practiced the Decision of the Constitutional Court by looking for relevance between the *testimonium de auditu* witness and the case. Thus, the judge of the District Court found the defendant guilty (Handika, 2016).

Based on the considerations of a judge of the High Court, the decision of a District Court judge was deemed wrong in applying the provisions of Article 183 of the Criminal Procedure Code regarding the determination of the decision based on a minimum of 2 (two) interrelated pieces of evidence. According to the judge of the High Court, the judge at the first instance only considers the testimony of the victim witness, in which the victim witness testifies that she had been intimidated by the defendant. Meanwhile, the other witnesses presented at the trial were the *testimonium de auditu* witnesses (Wulandari, 2013). Thus, the consideration of the Judge of the Padang High Court Number 45/PID.SUS/2018/PT.PDG explained that the *testimonium de auditu* witness was not evidence and the High Court overturned the judge's decision.

The problem is that in the two decisions, each judge at a different court level does not refer to the Decision of the Constitutional Court Number 65/PUU-VIII/2010 regarding the expansion of the definition of witnesses. This raises the issue of whether the Decision of the Constitutional Court provides legal certainty from the aspect of the definition of expanded witnesses in court so that whether or not witnesses such as *testimonium de auditu* witness can be accepted as evidence. Thus, a rule of law can be considered to function properly and guarantee the enforcement of the law.

Based on that, an interesting question in this paper is how to consider *testimonium de auditu* / hearsay evidence witnesses after the stipulation of Decision of the Constitutional Court Number 65/PUU-VIII/2010 in child sex crime cases?

Research Method

Legal research is a scientific activity that is based on certain methods, systematics and ideas aimed at studying one or several specific legal phenomena by analyzing it and conducting an in-depth examination of the legal facts to then seek a solution to the problems that arise in the symptoms concerned (Soekanto, 2008).

The main approach method used in this study is the normative legal research approach which is carried out by analyzing the Decision of the High Court Number 45.PID.SUS/2018/PT.PDG by using primary legal material in the form of laws and theories that are available. In addition, this research is also supported by interviews with several law enforcement officers related to the case discussed in this paper.

The characteristics of normative juridical legal approaches are based on secondary data. Secondary data that will be used in this study comes from library research. It is a study of books, laws and other related regulations relating to the problem.

After primary data and secondary data are obtained, they are then analyzed qualitatively in a juridical manner by not using numbers but using sentences which are the views of experts, statutory regulations. It also includes data obtained in the field which gives a detailed description of the problem so that conclusions can be drawn in accordance with the objectives of the study (Soekanto, 2008).

Results and Discussion

Judge's Consideration on the Decision of the High Court Number 45.PID.SUS/2018/PT.PDG

Before discussing more about the legal standing of *testimonium de auditu* / hearsay evidence in child sex crime cases in the case study of the Decision of the High Court Number 45.PID.SUS/2018/PT.PDG which originated from the decision number 78/Pid.Sus/2017 /PN.Slk, it is necessary to first explain again the core of this case. As explained briefly in the background of the study, there has been violence or threats of coercion, trickery, commit a series of lies, or persuade children to engage in sexual intercourse/ commit or allow obscene acts. This event occurred to SR (Ayu), a 15-year-old woman, having the address at Jorong Rawang, Sulit Air Village, X Koto District in December 2016. At that time, the victim was feeding a dog and then the defendant FA (Meri) called her. Defendant FA (Meri) is a 28-year-old man. The defendant FA is a girlfriend of SR and lives in FJ's house, which is located near the victim's sister's house. The victim was invited into the bedroom by the defendant FA and sexual intercourse between them occurred. Before engaging in sexual intercourse with the victim, the defendant lured and persuaded the victim on the pretext that he would take responsibility and marry the victim. In addition, the defendant threatened the victim not to inform others of his actions. A few days later, the defendant invited the victim to have sexual intercourse again, which meant that the victim had been intimidated twice.

The act resulted in SR victims becoming pregnant. The victim's pregnancy is known by ER (Ena) who is the victim's mother. The pregnancy was proven by a letter *visum et repertum* No.181/65/Visum/2017 from Solok Hospital which was approved by dr. Berri Rahmadoni, Sp.OG. Based on the conclusion of the post mortem, the hymen of the victim suffered a long-torn wound so that the victim was pregnant with 33-34 weeks' gestation. Then, the victim's family reported the incident to the police.

During the trial process at the Solok District Court, there were witnesses to a charge for the defendant's action. Based on the victim's testimony, the victim stated that FJ was the one who first had sexual intercourse with her and then FA. Second is the witness ER (Ena) who is the parent (mother) of the victim, which ER confirms the statement from SR. The third was witness AF (Al) who knew that the defendant had sexual intercourse with SR victims from SR parent's report. AF also participated in the victim's family meeting with the defendant. Based on AF's statement, FA defendant did not admit his actions. However, after talking with the victim, the defendant was willing to marry the victim. However, on the wedding date set by the two families, the defendant ran away.

The fourth is witness AR (Ar). AR knew that the defendant had sexual intercourse with SR victims from SR parent's report. AR also participated in the victim's family meeting with the defendant. Based on AR's statement, the defendant FA did not admit his actions, but after talking with the victim, the defendant was willing to marry the victim. But on the wedding date set by the two families, the defendant ran away. The fifth is a witness DM (Darmansyah). DM is the defendant's brother. Based on DM's information, the defendant had known the victim for 1 year ago and was dating at the end of 2016. Then the victim's family told the victim's father (Mr) NR (Nasrullah) that the victim was impregnated by the defendant. DM's statement is different from other witnesses' statements, that the defendant did not escape when he was married to the victim. However, the defendant only went to buy a new dog to Lampung. In addition, there were several other witnesses who corroborated the statements of the victims which consisted of SY (Anto), NR (Nasrullah) with a total of 7 a de charge witnesses. Based on the overall testimony of a de charge witnesses, none of the witnesses heard, saw and experienced themselves except the victim witness (*testimonium de auditu*).

Besides that, there is a *de charge* witness which witness testimony alleviates the defendant's actions. The witnesses included KM (Kasmiati), AN (Asni), and RJ (Rijal). Based on the testimony of the mitigating witnesses, the defendant never dated the victim, never disturbed women, and had good behavior. However, all witnesses presented at the trial did not see, hear and experience the process of the crime themselves. So, they can be categorized as *testimonium de auditu* witnesses because witnesses only hear from the victim's testimony.

The plea notes (*pledooi*) of the defendant's legal counsel stated that the witness testimony presented at the trial could not be used as evidence based on the provisions of Article 1 point 27 of the Criminal Procedure Code concerning witness statements that were limited in nature. This article explains about "information from witnesses regarding a criminal event which he/she heard him/herself, he/she saw him/herself and he/she experienced him/herself by mentioning reasons and knowledge". If this is related to the victim witness, the victim witness testimony that is still under age is not bound by an oath. Thus, the statement cannot be used as evidence but only used as evidence. In addition, all witnesses gave information that was heard from others (*testimonium de auditu*).

The basis of the judgment of the Solok District Court judge lies in the testimony of the victim witness SR (Ayu) and the evidence of the letter in the form of the results of *visum et repertum*. The debate on the judges' consideration in the Solok District Court Decision was to make *testimonium de auditu* witness as evidence.

Referring to Article 1 number 27 of the Criminal Procedure Code and Article 185 paragraph (1) of the Indonesian criminal justice system "issues" the *testimonium de auditu* as evidence because in Indonesian law the *testimonium de auditu* witness' statements in principle do not have power as witness evidence. However, in fact, the Decision of the Solok District Court Judge Number 78/Pid.Sus/2017/PN.Slk decided on the case as described above by making the *testimonium de auditu* witness as evidence. However, it was not as a witness evidence but it was connected with the evidence of *visum* letter which later found correspondence with the victim's statement and the instructions obtained.

As the writer explained above, Andi Hamzah concluded that the *de auditu* testimony needed to be heard by the judge. Although it does not have value as evidence of testimony, it can strengthen the value as evidence of testimony and can strengthen the convictions of judges from two other evidences (Hamzah, 2014). The *de auditu* testimony can be used as a source of evidence for the assessment and consideration submitted to the judge. It means that the Decision of the Solok District Court Judge Number 78/Pid.Sus/2017/PN.Slk is in accordance with expert opinion.

There is a question that arises from the Solok District Court Judge's Decision Number 78/Pid.Sus/2017/PN.Slk namely what is actually the reason for the judge in concluding and considering the contents of the decision? Based on a copy of Solok District Court Judge Decision Number 78/Pid.Sus/2017/PN.Slk, the basis for the judge's consideration is that the judge considers that the *a de charge* witness testimonies are in accordance with the testimony of witnesses of SR victims (ayu). In addition, before the trial the defendant did not submit evidence to strengthen the argument/ denial of his actions. Therefore, according to the panel of judges, this is an indication of the defendant's mistakes. Such instructions are in accordance with the Jurisprudence of the Supreme Court of the Republic of Indonesia No. 1043/K/Pid/1982 dated August 19, 1982 which explained that the defendant's unwarranted admission was evidence of a guideline for the accused's guilt.

However, the principal consideration of the judge is the testimony of *a de charge* witnesses in accordance with the testimony of victim witnesses. Basically, the testimony of *testimonium de auditu* is indeed very weak when compared to the evidence of witness testimony in general. So, in searching for material truth, the judge positions the testimony of *testimonium de auditu* as a guidance evidence. As

discussed above, related to the assessment of evidence in the Criminal Procedure Code regarding hierarchy, the first evidence mentioned has the strongest evidentiary power. It means that the testimony of the *testimonium de auditu* cannot be compared to the testimony of witnesses in general because of their weak nature. Thus, the judge took into consideration the inclusion of testimony from the *testimonium de auditu* in the guidance evidence. The guidance evidence has the smallest evidence strength compared to other evidence.

The author agrees with Munir Fuadi's statement as quoted in the discussion section of this paper that the *testimonium de auditu* witness is on guidance evidence and one form of application of progressive law. In other words, the limitative restrictions in the Criminal Procedure Code regarding evidence, especially against the weak legal standing of *testimonium de auditu* witnesses, can be set aside through the interpretation of judges. This is of course supported by the requirements and strong reasons to believe it and use it as guidance evidence to build the confidence of judges in deciding a case in court. Yet, the judge did not necessarily make the *testimonium de auditu* witness the main reason for deciding the case. Therefore, it requires the judge's intelligence and accuracy to judge the truth of the *testimonium de auditu* witnesses.

In case Number 78/Pid.Sus/2017/PN.Skl, the author considers that the judge hearing the case considers that the testimony of victim witnesses and other witnesses is reasonable enough to be trusted; hence, witness statements like that were excluded from *testimonium de auditu*. In other words, such witness statements can be recognized as evidence even though indirectly through guidance evidence.

The author analyzes the Decision of Judge of the Solok District Court Number 78/Pid.Sus/2017/PN.Slk with the Decision of the Constitutional Court No. 65/PUU-VIII/2010. Based on the Decision of the Constitutional Court, *testimonium de auditu* that cannot be accepted is testimony heard from other parties where other parties need to be presented to court but cannot be present in the court. Based on this decision, the Constitutional Court accepted witnesses who did not hear themselves, did not see for themselves, and did not personally experience a criminal event that occurred. Therefore, the Court allowed the presence of *testimonium de auditu* witness in a trial. Thus, the judge did not know whether or not the other party was lying. However, in case Number 78/Pid.Sus/2017/PN.Slk, all witnesses could be presented at the hearing. Based on the Decision of the Constitutional Court, the *testimonium de auditu* witness in this case is valid and can be accepted as guidance evidence.

Meanwhile, based on the consideration of the High Court judges, the decision of the district court judge was considered wrong in applying the provisions of Article 183 of the Criminal Procedure Code regarding the minimum limit of judges in setting decisions based on two interrelated pieces of evidence. According to the Judge of the High Court, the judge at the first instance only considered the testimony of the victim witness, in which the victim witness testified that he had been intimidated by the defendant. Meanwhile, the other witnesses presented at the hearing were *testimonium de auditu* witnesses.

In addition, the weakness of the first instance judge's decision is not presenting experts to listen to opinions regarding the legal standing of *testimonium de auditu* witnesses. It means that there is no other evidence presented at the hearing as referred to in Article 184 paragraph (1) of the Criminal Procedure Code which includes expert statements, affidavits and instructions which are not displayed in the case of this trial. Meanwhile, from the examination at the investigation level to the hearing, the defendant continued with his statement refuting the public prosecutor's accusation that the defendant had never had sexual intercourse with the victim witness. Thus, the Judge of the High Court considers that in accordance with the principle of the evidentiary law which states that *unus testis nulus testis*, a witness is not a witness but one witness can be accepted if there is other supporting evidence.

The author will first try to analyze the legal standing of witness victims in the trial; whether or not witness statements of victims who are still 15 years old can be heard or are part of *unus testis nulus testis*. According to the writer, the Judge of the High Court refers to the strength of the evidence or (the degree of evidence) attached to the *testimonium de auditu* witness in this case. Moreover, all the witnesses presented at this case were *testimonium de auditu* witnesses but those who could be accepted as witnesses were victim witnesses. The legal standing of the victim witness in this case, if related to article 145 *Het Herziene Inlandsche Reglement* (HIR) as a witness, cannot be heard. In addition, SR (ayu) as a witness of a 15-year-old victim, a child whose age is under 15 years cannot be heard as a witness. In the HIR explanation, it was stated that the children under the age of 15 years may also be heard without swearing. However, their statement was not evidence of testimony but only as information. This is reinforced in article 171 of the Criminal Procedure Code, that children who are not yet 15 years old and have never been married may be examined to provide information without oaths. So, a child under the age of 15 can be examined to take information from him/her. However, the statement was not taken by oath and was not treated as evidence of witness testimony in court. Referring to this provision, the author justifies the Decision of the Solok District Court Judge who made the victim witness testimony as evidence because there is compatibility with other evidence.

For the *testimonium de auditu* witnesses, it refers to the Decision of the Constitutional Court No. 65/PUU-VIII/2010. However, the problem is still the same as what has been discussed in section A in this chapter where the Constitutional Court does not provide clear enough limits on the extent to which the value of a person's statement can be used as a witness. Judge's consideration given by the panel of judges who decided the case only explained that the value of the witness's testimony did not lie in whether a person saw, heard and experienced an event. However, it lies in the relevance of the testimony given to the ongoing case.

Then the defendant submitted an appeal by using Appeal Request Deed Number 3/Deed.Pid/2018/PN.Slk on March 7, 2018. Decision of the Padang High Court Number 45/PID.SUS/2018/PT.PDG canceled the Decision of the District Court Judge Solok Number 78/Pid.Sus/2017/PN.Slk.

The Judge of the High Court stated that it refers to the non-implementation of Article 183 of the Criminal Procedure Code which states that there is a "minimum of two interrelated evidence". Accordingly, the Judge of the High Court did not recognize the testimony of the *testimonium de auditu* witness as guidance evidence. According to the writer, the High Court Judge actually examined the Defendant's Note (Pleodoi) from the defendant's legal counsel who stated that the witness testimony presented at the trial could not be used as evidence, based on the provisions of Article 1 number 27 of the Criminal Procedure Code regarding witness statements that were limited in nature. Thus, it influenced the Judge of the High Court by not recognizing the *testimonium de auditu* witness as evidence.

Legal Standing of Testimonium de Auditum in the Decision of the High Court Number 45.PID.SUS/2018/PT.PDG

The theory that the writers apply to analyze the findings above is the criminal evidentiary theory. This evidentiary theory is closely related to the evidentiary system in criminal law. Evidentiary system contains mainly about what evidences may be used to prove, the ways in which evidence can be used, the strength of the evidence, and the standards/criteria used as measurements in drawing conclusions about the evidentiary of something (object) that is proven. Evidentiary system is a roundness or overall of various provisions regarding the activities of evidence that are interrelated and related to one another that are inseparable and become a unified whole (Chazawi, 2006).

If the findings above are related to the theory of *onviction intime* or the evidentiary theory based solely on the judge's conviction (Muhammad, 2007), this theory relies on the judge's conviction in making decisions. The weakness of this theory is the lack of clarity of benchmarks and the size of a judge's conviction. However, in the case of Solok District Court Number 78/Pid.Sus/2017/PN.Slk and the Decision of the Padang High Court Number 45/PID.SUS/2018/PT.PDG, it was clearly not using this theory. It means that the judge is not wrong in applying the evidentiary theory in which Indonesian criminal law uses the negative theory of *Wettelijk* or the evidentiary theory based on the judge's conviction arising from the evidence in the Law negatively.

The case in Solok District Court Number 78/Pid.Sus/2017/PN.Slk and the Decision of the Padang High Court Number 45/PID.SUS/2018/PT.PDG also did not use *conviction rasionnee* or evidentiary theory based on the judge's conviction within the boundaries for logical reasons. This theory still uses the judge's conviction but it is limited by rational reasons (Muhammad, 2007). Basically, the judge's conviction is based on the grounds of proof by creating a conclusion based on certain evidentiary provisions (Soetarna, 2017) because judges at both levels do not decide on cases solely using conviction alone.

The *Positief Wettelijk* evidentiary theory is only based on the evidentiary tools mentioned in the law positively. This theory is evidence based on evidence according to the Law in a positive manner or evidentiary using evidence that has previously been determined in the Law. If the evidence has been fulfilled, the judge has enough reason to pass the decision without having to be sure in advance of the truth of the evidence available. In other words, the judge's conviction is not given the opportunity to determine whether or not someone is guilty. Judge's conviction must be avoided and cannot be taken into consideration in determining someone's mistakes (Soetarna, 2017). In this case, according to the author, the Judge's Decision at the High Court level is affected by this theory where the high court judge is only fixated on Article 1 number 27 of the Criminal Procedure Code and Article 183 of the Criminal Procedure Code so that it ignores the facts found in the investigation process until the trial.

Meanwhile, the decision of the District Court tried to combine facts, evidence and witnesses starting from the investigation process to the trial. It means that District Court judges have applied *negatief wettelijk* theory or evidentiary theory based on judge's conviction arising from the evidence in the Law negatively. In proving a case, in addition to using the evidence contained in the law, the judge can also use conviction. This conviction is only limited to the assessment of the evidence established in accordance with the Law earlier. This evidentiary system combines the evidentiary system according to the law positively and the proving system according to the conviction of the judge so that this proving system is called multiple evidentiary (*doubelen grondslag*) (Soetarna, 2017). There are two elements of evidentiary which consist of evidence based on the Law and elements of the judge's conviction, both of which become an inseparable element. Judge's conviction is deemed to be absent if they are not obtained from at least two valid evidences. In addition, two valid pieces of evidence are seen as nil if they cannot make up judge's conviction.

Then what about the *testimonium de auditu* witness in this case if it is associated with *Negatief Wettelijk* theory? In accordance with the authors' analysis above, it is based on the Decision of the Constitutional Court Number 65/PUU-VIII/2010 for the petition for review of Law No. 8 of 1981 concerning the Criminal Procedure Code, especially article 1 number 26 and article 1 number 27. According to the Court, article 1 number 26 and number 27 provides restrictions and even eliminates the opportunity for a suspect or defendant to bring witnesses that are favorable to him/her. It is in accordance with Article 65 of the Constitutional Court Criminal Procedure Code which states that the understanding of witnesses in Article 1 number 26 and number 27 of the Criminal Procedure Code is not interpreted as including "a person who can provide information in the context of investigation, prosecution and trial of a criminal act which he/she does not always hear him/herself, he/she saw it him/herself, and he/she

experienced it him/herself.” Based on this decision, the Constitutional Court accepted witnesses who did not hear themselves, did not see for themselves, and did not personally experience a criminal event that occurred. Therefore, the Court allowed *testimonium de auditu* witness to be presented in the trial.

In this provision, it has clearly been explained that the Constitutional Court allowed the presence of *testimonium de auditu* witness in a trial. However, it is still the same as before that the Constitutional Court did not provide clear enough limits on the extent to which the value of a person’s statement can be used as a witness. The judge’s consideration given by the panel of judges who decided the case only explained that the value of the witness’s testimony did not lie in whether he/she saw, heard and experienced an incident him/herself. However, it lies in the relevance of the testimony given to the ongoing case. Judge’s decisions regarding the *testimonium de auditu* is that it cannot be clearly formulated whether or not the *testimonium de auditu* can be accepted as evidence. However, it depends on the facts of the case. The objection to the *testimonium de auditu* was based on the principle that the entire process of proof was directly before the judge and the defendant followed the whole process, which was the best evidence.

The second theory is the theory of legal certainty whether or not the Decision of the Constitutional Court Number 65/PUU-VIII/2010 has provided legal certainty to the legal standing of *testimonium de auditu* witness in court. As explained earlier, the Constitutional Court does not provide clear enough limits on the extent to which the value of a person’s statement can be used as a witness. Judge’s consideration given by the panel of judges who decided the case only explained that the value of the witness’s testimony did not lie in whether he/she saw, heard and experienced an incident him/herself. However, it lies in the relevance of the testimony given to the ongoing case. It means the validity of the *testimonium de auditu* lies in the consideration of the judge. Therefore, it requires carefulness and understanding of the judge.

Conclusion

Based on the findings and analysis in the discussion, the following conclusions can be drawn:

1. The limitation in accepting *testimonium de auditu* is related to the Decision of the Constitutional Court Number 65/PUU-VIII/2010. The Constitutional Court ruled that the definition of witnesses in article 1 number 26 and number 27 of the Criminal Procedure Code, was not included as “someone who can provide information in the context of investigation, prosecution and trial of a criminal act which he/she did not always hear him/herself, he/she saw for him/herself, and he/she experienced him/herself”. Based on this decision, the Constitutional Court accepted witnesses who did not hear themselves, did not see for themselves, and did not personally experience a criminal event that occurred. Therefore, the Court allowed *testimonium de auditu* witness to be presented in a trial. The Constitutional Court does not provide clear enough limits on the extent to which the value of a person’s testimony can be used as a witness. Judge’s consideration given by the panel of judges who decided the case only explained that the value of the witness’s testimony did not lie in whether he/she saw, heard and experienced an incident him/herself. However, it lies in the relevance of the testimony given to the ongoing case. It means the validity of the *testimonium de auditu* lies in the judge’s judgment. Therefore, it demands the accuracy and understanding of a judge.

2. Regarding the consideration of *testimonium de auditu* / hearsay evidence as evidence in child sex crime cases in the High Court Decision case number 45.PID.SUS/2018/PT.PDG, in case Number 78/Pid.Sus/2017/P, the author considers that the judge hearing this case considered that the testimony of victim witnesses and other witnesses was reasonable enough to be trusted. Thus, witness statements like that are excluded from *testimonium de auditu*. In other words, such witness statements can be indirectly recognized as evidence; namely through guidance evidence. The Judge of the High Court considers that the weakness in the decision of the first instance judge is the absence of an expert to hear the opinion in terms of the legal standing of *testimonium de auditu* witness. It means that there is no other evidence presented at trial as referred to in Article 184 paragraph (1) of the Criminal Procedure Code which includes expert statements, letters and instructions that are not displayed in the case of this trial. Meanwhile, from the examination level at the investigation level to the hearing, the defendant continued with his statement refuting the public prosecutor's accusation that the defendant had never had sexual intercourse with the victim witness. Thus, the Judge of the High Court considers that in accordance with the principle of the evidentiary law which states *unus testis nulus testis*, a witness is not a witness but one witness can be accepted if there is other supporting evidence. Yet, judges at the high court level only see and pay attention to the strength of proof or (the degree of evidence) so that they are trapped in the evidentiary of *Positif Wettelijk Bewijstheorie*. Meanwhile, the decision of the district court tried to combine facts, evidence and witnesses from the investigation to the trial. In other words, the district court judge has applied *negatief wettelijk bewijstheorie* or evidentiary theory based on the judge's beliefs arising from the evidence in the law negatively.

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