

## STATUS OF PRETRIAL INSTITUTIONS IN INDONESIAN CRIMINAL LAW

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**Abstract:** *This study aims to describe the position of pretrial institutions in the study of criminal law in Indonesia and to analyze the implementation of pretrial institutions as legal remedies for suspects in obtaining justice at the level of investigation and prosecution. This is a normative legal research, which examines statutory regulations in a coherent legal system and unwritten legal values that live in society, which are related to the suspect's efforts to obtain justice through the Pretrial Institution. The results of the study state that pretrial is one of the new institutions introduced since the existence of Law Number 8 of 1981 concerning the Criminal Procedure Code in the midst of law enforcement life. Pretrial Institution arrangements in the Criminal Procedure Code are listed in Article 1 point 10, Chapter X Part One from Article 77 to Article 83. The position of the Judicial Institution in Indonesian positive law is part of the criminal justice system, as well as being part of law enforcement in abstracto or in concreto. In practice, pretrial is usually carried out in a rule of law country like Indonesia as long as the investigation process is carried out based on the provisions of the Criminal Procedure Code, although not all pretrial decisions are won by the suspect or the party submitting them. In the process of pretrial examination hearings, of course, the facts, both juridical and material facts, will be considered.*

**Keywords:** *Position, Pretrial Institution, Criminal Law.*

### 1. INTRODUCTION

Article 28D (1) of the 1945 Constitution of the Republic of Indonesia confirms that, "Every person has the right to recognition, guarantees and fair legal certainty and equal treatment before the law." (Darwis, 2013) This affirmation gives meaning to the recognition of human rights to receive equal treatment before the law.

Meanwhile the Declaration of the General Assembly of the United Nations (UN) on Human Rights on December 10, 1948 provided recognition of basic human rights that are natural as well as rights as citizens. The consideration of the declaration is the recognition of the equal and absolute dignity and rights of all human beings on the basis of human freedom, justice and peace (Sunarso, Filsafat Hukum Pidana, Konsep, Dimensi, dan Aplikasi, 2015). As for human rights relating to law enforcement, among others, is Article 9 which states, "No one may be arbitrarily arrested, detained or disposed of." (Sunarso, Filsafat Hukum Pidana, Konsep, Dimensi, dan Aplikasi, 2015).

The criminal law process does not guarantee and protect individual human rights because arbitrary actions often occur which affect law enforcement itself. Likewise, in a trial process that ignores the principle of fair trial, this will undermine the upholding of justice (Basri, 2021) And justice itself is one of the goals of law that most people talk about. Ulpianus describes justice as the will that continues and continues to give each one what is due, or *tribuere cuique suum*– to give everybody his own, justice gives to everyone who be his right (Notohamidjojo, 1971). This formulation expressly recognizes the rights of each person against the other, and what should be his part, and vice versa.

The rights and obligations that are equally expected by every human being have different meanings, thus influencing the conception of justice in determining one's rights and obligations. In the implementation of justice is very dependent on the structures of power in society. This means that building justice means creating structures that enable the implementation of justice. Without justice, there will be arbitrariness. Justice and truth are the most important virtues, so these values cannot be exchanged for any value. Thus if you have to choose, then legal justice is prioritized even though you have to reduce the side of legal certainty and legal benefits, even though prioritizing legal justice alone will have an impact on the lack of legal certainty and legal benefits, and vice versa.

In obtaining material truth or justice by honestly and accurately seeking the perpetrators of a crime and keeping innocent people from being sentenced, a "pretrial institution" is available which is an institution to realize a just law in accordance with the principles of justice and this is regulated in Law Number 8 of 1981 concerning Criminal Procedure Code. Therefore, in the realm of criminal law there is an adage that says "*Ubi jus ibi remedium*" which means where there are rights there is the possibility of demanding, the obligation of reparation when these rights are violated.

## 2. METHODS

This research is normative legal research, using a statutory regulation approach that focuses on primary legal material, namely Law Number 8 of 1981 concerning the

Criminal Procedure Code (KUHP). The nature of qualitative descriptive analysis. Collection of legal materials is carried out by means of document studies (library), processing of legal materials is carried out by means of checking (editing), marking (coding), reconstruction, and systematizing. Analysis of legal materials was carried out qualitatively and comprehensively.

### 3. RESULTS AND DISCUSSION

#### *3.1. Pretrial Institutions in Criminal Law Studies*

Basically humans have the same dignity and position. From birth, humans are endowed with a set of basic rights in life. These basic rights are owned regardless of differences in ethnicity, religion, race, class, nationality, age, or gender. These basic rights are essential in the life of every human being. That's why everyone has freedom of movement without any restrictions from other people. Restriction of a person's freedom of movement is a violation of human rights that must be respected and protected by the State (Hamzah, 2001). These basic rights have been recognized by the United Nations through the UN Charter (Universal Declaration of Human Rights,).

Pretrial institutions are the result of efforts to demand the protection of human rights, especially those involved in criminal cases. The purpose of forming a pretrial is for the sake of upholding the law and protecting the human rights of suspects at the level of investigative examination. In the KUHP, Article 1 point 10 states that pretrial is the authority of the District Court to examine and decide whether or not an arrest and or detention is legal at the request of the suspect or his family or other parties or the suspect's attorney.

The presence of the Pretrial Institution in the Indonesian justice system is a means of control by the Judge over legal actions during the investigation and prosecution process carried out by the Police and the Attorney General's Office. In the integrated criminal justice system adopted by the kuhap, it means that the relationship between the police, prosecutors, judiciary and correctional institutions must be a synchronous relationship so that there are no overlaps (Loqman, 1987).

Apart from that, the purpose and objective of establishing a pretrial institution, apart from what the author stated above, is to protect the rights of suspects at the level of preliminary examination carried out by investigators. This is regulated in article 1 point 10 of Law Number 8 of 1981 concerning Criminal Procedure Code, KUHP as follows:

Pretrial is the authority of the district court to examine and decide according to this regulated method regarding: First, whether an arrest and detention is legal or not at the request of the suspect. Second, whether or not the termination of the

investigation or the termination of the prosecution is valid at the request for the sake of upholding law and justice. Third, compensation for losses or rehabilitation by the suspect.

As it is known that the Criminal Procedure Code gives authority to investigators to be able to take coercive measures. Such as arrest, detention, search and seizure. The purpose of this forced effort is none other than for the public interest. Protecting public rights in the name of power/authority of state officials (investigators). Investigation by coercive action or effort against a person suspected of being the perpetrator of a crime is to seek evidence and a clear point as to whom the perpetrator (dader) or suspect.

In carrying out coercive measures, investigators are bound by the terms and conditions, reasons and procedures for coercive measures such as arrest, detention, search and confiscation. If the investigator commits an act that is not in accordance with the provisions of the applicable law/KUHAP (undue process of law) or takes an act of coercion such as arrest and wrong person in the arrest. So the person, family or attorney can take pretrial legal remedies through the District Court for the invalidity of forced measures (dwangs) (Loqman, 1987).

Provisions regarding pretrial authority are emphasized in Article 1 point 10 in conjunction with Article 77 of the Criminal Procedure Code. It can be said, it originates from these articles, but there is another authority, namely to examine and decide on compensation and rehabilitation as also emphasized in Articles 95 and Article 97. The powers granted by law to pretrial are as follows: (Harahap, 2002) examine and decide whether or not absence of forced efforts; examine whether or not the termination of the investigation or prosecution is legal; examine claims for compensation; examine rehabilitation requests; examine whether or not the confiscation action is legal.

Based on pretrial authority, provisions regarding who has the authority to file pretrial can be seen here. Parties who may submit a pretrial as defined in Article 79 and Article 80 of the Criminal Procedure Code Article 79: Requests for an examination of whether or not an arrest or detention is legal are submitted by the suspect, his family or his proxies to the Head of the District Court stating the reasons. Article 80: A request for an examination of whether or not a termination of an investigation or prosecution is legal can be submitted by an investigator or public prosecutor or a third party with an interest to the chairman of the district court by stating the reasons. Observing the provisions of Article 79, Article 80 of the Criminal Procedure Code it can be seen who is authorized to submit a pretrial, namely: the suspect, his family, or his attorney; investigator or public prosecutor; interested third parties

Mohamad Anwar said, from an etymological point of view, pretrial consists of two words, "pre" which means before. "Justice" itself is interpreted as the process of examining suspects, witnesses, evidence, public prosecutors who then the District Court assembly decides the case by imposing a financial penalty or acquitting the defendant from all lawsuits. The purpose of holding a pretrial institution in the world of law enforcement in Indonesia is to strengthen supervision or control over criminal examination practices, especially at the level of investigation and prosecution. Furthermore, namely in the context of respecting the human rights of someone who has been suspected of having committed an unlawful act.

Pretrial is not a separate judicial institution. However, it is only the granting of new powers and functions that the Criminal Procedure Code has delegated to each District Court, as an additional authority and function of the existing District Courts. If all this time, the authority and function of the District Court to hear and decide on criminal cases and civil cases is the main task, then the main task above is given an additional task to assess whether or not the arrest, detention, confiscation, termination of the investigation, or termination of the prosecution carried out by investigators or public prosecutor whose examination authority is given to Pretrial.

Article 1 point 10 of the Criminal Procedure Code states:

Pretrial is the authority of the district court to examine and decide according to the method stipulated in this law regarding:

- a) Whether or not an arrest and/or detention is legal at the request of the suspect or his family or other parties under the suspect's power of attorney;
- b) Whether or not it is legal to stop the investigation or stop the prosecution at the request of the suspect/investigator/public prosecutor for the sake of upholding law and justice;
- c) A request for compensation or rehabilitation by the suspect or his family or another party on his behalf, whose case was not brought to court.

In a pretrial limitative manner it is regulated in articles 77 to 83 of Law Number 8 of 1981 concerning the Criminal Procedure Code. Actually, pre-trial efforts are not limited to that, because legally the provisions governing pre-trial also concern claims for compensation, including compensation due to "other actions" which in the explanation of Article 95 paragraph (1) of the Criminal Procedure Code emphasizes losses arising from actions others namely, losses arising from entry into the house, searches and seizures that are not lawful according to law.

Indeed, pretrial based on the explanation above only tests and assesses the truth and correctness of coercive measures carried out by investigators and public

prosecutors in matters relating to the accuracy of arrest, detention, termination of investigations and prosecutions as well as compensation and rehabilitation. Pretrial is an imitation of the Rechter Commissariat in the Netherlands (hamzah, 2006).

The complete pretrial is regulated in article 1 point 10 of the Criminal Procedure Code jo. Articles 77 to 83 and articles 95 to 97 of the Criminal Procedure Code, article 1 point 16 jo. Articles 38 to 46, articles 47 to 49 and articles 128 to 132 of the Criminal Procedure Code. Thus, in this context, pretrial does not only concern whether an arrest or detention is legal, or whether an investigation or prosecution is legal or not, or regarding requests for compensation or rehabilitation, but pretrial efforts can also be carried out in cases of confiscation errors that are not including means of proof, or a person who is subject to other actions without reason based on law, due to a mistake regarding the person or the law applied, based on the Decree of the Minister of Justice of the Republic of Indonesia No.: M.01.PW.07.03 of 1982. In addition, pretrial is also can be carried out due to other actions that cause losses as a result of entry into the house, search and seizure that are not lawful according to law.

The Rechter Commissariat (judge who leads the preliminary examination) emerged as a manifestation of the active role of judges, who in Central Europe gave the role of "Rechter Commissariat" a position that has the authority to handle forced measures (dwang middelen), detention, confiscation, body searches , home, check papers (Adji, 1980).

Pretrial is an institution that was born from the thought of carrying out supervisory actions against law enforcement officials so that in carrying out their authority they do not abuse their authority, because it is not enough for internal supervision within the legal apparatus institutions themselves, but cross supervision is also needed between fellow law enforcement officers.

The pretrial institution was born for the sake of justice for society, which at this time is something very essential. However, as stated in the state constitution, the 1945 Constitution that everyone has the same position in law which is the constitutional right of every citizen, including the poor. Within the framework of justice, the state must provide equal services to all its citizens, including to obtain the right to fair treatment under the law. However, in reality when dealing with the law, people's rights are sometimes not fulfilled due to limited knowledge or access to use the services of lawyers to defend their legal interests, even though the law has provided space for the prosecution of justice to be treated fairly.

The basis for the birth of pretrial according to the Guidelines for the Implementation of the Criminal Procedure Code is as follows:

Bearing in mind that for the sake of examining a case, it is necessary to make reductions in the human rights of suspects, however, it should always be based on the provisions stipulated in the law, for the purpose of monitoring the protection of the human rights of suspects or defendants, a an institution where pretrial.

Pretrial is part of the authority of the district court which performs a supervisory function, especially in the case of coercive measures against suspects by investigators or public prosecutors. Supervision in question is supervision of how a law enforcement officer exercises the authority that is in accordance with the provisions of existing laws and regulations, so that law enforcement officers are not arbitrary in carrying out their duties. Meanwhile, for suspects or their families as a result of deviant acts committed by law enforcement officials in carrying out their duties, they are entitled to compensation and rehabilitation (Alfiah, 1986).

### ***3.2. Pretrial for Suspects to Obtain Justice at Investigation and Prosecution***

Pretrial is one of the new institutions introduced since the existence of Law Number 8 of 1981 concerning the Criminal Procedure Code, KUHAP in the midst of law enforcement life. Pretrial in Law Number 8 of 1981 is placed in Chapter X, Part One, as one part of the scope of authority to try for the District Court.

The KUHAP regulates the protection of suspects' rights so that the practice of arbitrary acts against suspects is a form of violation both of the Criminal Procedure Code itself and even of the principles of the rule of law such as: the principle of legality, protection of human rights, the government is bound by law, monopoly coercion government to guarantee law enforcement, and supervision by independent judges.

The suspect as defined in Article 1 point 14 of the KUHAP namely: a person who because of his actions or circumstances, based on preliminary evidence, should be suspected of being the perpetrator of a crime. Regarding the understanding formulated in the Criminal Procedure Code, it provides a gap between the suspect and the investigator. This means that in the investigation process the investigator must really ascertain whether a suspect should be suspected of being the perpetrator of a crime which of course is based on sufficient preliminary evidence to serve as evidence in determining who the perpetrator of the crime in this case is a suspect.

It is very different from the regulations contained when the HIR was in force, where the position of the suspect was greatly degraded and even seen as an object by carrying out arbitrary actions. Because he is only seen as an object, the position of the suspect is not that of an ordinary human being who is a subject in law. And this is a violation of the rule of law principle, as stated in the 1945 Constitution of the Republic of Indonesia is a rule of law country.

Switching the KUHAP into a replacement for the HIR is a significant step forward in the legal system in Indonesia as well as part of the renewal of national law, because the HIR needs to be repealed considering that it is no longer in accordance with the ideals of national law (Subekti, 1984). The human rights guarantee for the suspect's rights is by placing the suspect in a position that is not necessarily guilty, so that the examination process must uphold the law and human rights because the rights of a suspect cannot be revoked or contested.

For suspects who are already in the process of being detained by investigators, they have the following rights contained in the KUHAP: right to contact legal counsel; has the right to contact and receive private doctor visits for health purposes whether or not they are related to the case process; a suspect has the right to be notified of his detention to his family, to people who live with him, other people whose assistance is needed, and people who wish to provide legal assistance or guarantees for the suspension of his detention; while the suspect is in detention, he has the right to contact the family, receive visits from the family; has the right directly or through the mediation of a legal adviser to contact and receive relatives, both for the benefit of his family, the interests of his case and the interests of his work; the right to correspondence, namely, sending and receiving letters to their legal advisors, sending and receiving letters to relatives; rights to freedom of secret letters; may not be examined by investigators, public prosecutors or officials at the state detention center unless there is sufficient reason to suspect that the correspondence has been misused; have the right to contact and receive spiritual visits.

The suspect must be presumed innocent according to the legal principle of "presumption of innocence" until an appropriate legal decision is obtained. Where is the right control to avoid the occurrence of pressure or threats in the investigative examination is the presence of legal advisors or advocates following the course of the examination since the examination stage at the investigative level.

The forms of irregularities that are often carried out by investigators are: the suspect is detained without a warrant from the investigator; the investigator detains the suspect without sufficient preliminary evidence; the investigator commits acts of violence against the suspect during the examination to obtain instructions and uses coercion in the case of detention; and search warrants are not in accordance with the rules outlined in the KUHAP.

Pretrial arrangements in Law Number 8 of 1981 are listed in Article 1 point 10, Chapter X Part One from Article 77 to Article 83. Pretrial in criminal procedural law can be understood from the wording of article 1 point 10 of the Criminal Procedure Code which states that pretrial is the authority of the court to examine and decide and decide (Inassociates, n.d.): a. Whether or not an arrest and/or detention is legal, at the request of the suspect or his family or at the request of those with an interest in

upholding law and justice; b. Whether or not the termination of the investigation or the termination of the prosecution is valid at the request of those who have an interest in upholding law and justice; c. Whether or not the termination of the investigation or the termination of the prosecution is valid at the request of those who have an interest in upholding law and justice and; d. Requests for compensation or rehabilitation by the suspect or his family or other parties on his behalf whose case was not brought to court

What is formulated in Article 1 point 10 of the Criminal Procedure Code is emphasized in Article 77 of the KUHP which states: a. The District Court has the authority to examine and decide, in accordance with the provisions stipulated in this law concerning;; b. Whether or not the arrest, detention, termination of the investigation or termination of the prosecution are legal; c. compensation and or rehabilitation for a person whose criminal case is terminated at the level of investigation or prosecution.

Pretrial provisions fall if the main case has entered the District Court, intended to avoid imposing a different decision. It would be inappropriate if the pretrial was still being examined while the main case was also in the trial stage. If forced to hold a trial and there is a difference in decision making between the pre-trial and the main case, it will result in bad legal consequences. The dismissal of a pre-trial request can also be made by the applicant when the trial has not yet rendered a decision, provided that the respondent agrees with this.

Basically, pretrial decisions cannot be appealed. except for an illegal decision to terminate an investigation or prosecution. Article 83 paragraph (1) reads "Against the pre-trial decision as referred to in Article 79, Article 80 and Article 81 cannot be appealed", while Article 83 paragraph (2) reads: "against the decision which determines the "legitimacy" of terminating the investigation or prosecution "unable" to submit a request for appeal; against a decision stipulating "unlawful" termination of an investigation or prosecution "can" be filed for an appeal;

As emphasized above, pretrial is a common thing in building mutual control between the police, prosecutors and suspects through their attorneys or creating mutual control between fellow law enforcers. In a rule of law that seeks to uphold the rule of law, an independent control agency is urgently needed, one of whose duties is to observe/observe the lawfulness of an arrest, detention or whether the termination of an investigation is legal or whether the reason for stopping the prosecution of a criminal case is legal, whether it is carried out officially by issuing SP3 or SKPPP (Devonering), especially those that are done secretly (htt2).

In addition, it is hoped that the Police will be able to control the performance of the Attorney General's Office, whether the cases that have been delegated are actually forwarded to the Court. Likewise, the Prosecutor's Office is expected to be able to control the performance of the Police in the process of handling criminal cases whether cases that have been submitted to the SPDP (P.16) to the Prosecutor's Office are

ultimately transferred to the Prosecutor's Office or even quietly stopped. In this era of rule of law, it is time to build a culture of mutual control, between all components of law enforcement (Judges, Prosecutors, Police and Advocates) so that legal certainty can truly be given to those seeking justice.

#### 4. CONCLUSIONS

Pretrial is one of the new institutions introduced since Law Number 8 of 1981 concerning the Criminal Procedure Code, KUHAP in the midst of law enforcement life. Pretrial Institution arrangements in the KUHAP are listed in Article 1 point 10, Chapter X Part One from Article 77 to Article 83. The position of the Judicial Institution in Indonesian positive law is part of the criminal justice system, as well as being part of law enforcement in abstracto or in concreto.

In practice, pretrial is usually carried out in a rule-of-law state like Indonesia as long as the investigation process is carried out based on the provisions of the KUHAP. In the process of pretrial examination hearings, of course, the facts, both juridical and material facts, will be considered.

#### 5. SUGGESTION

Pretrial institutions as a means for suspects at the level of investigation and prosecution in an effort to obtain their rights in accordance with the law should be used by suspects and other parties justified by law if the suspect feels disadvantaged. In determining someone as a suspect, it is necessary to have fixed provisions and procedures as in the Criminal Procedure Code. Therefore for investigators, these provisions and procedures must be complied with so that demands for justice for suspects through pretrial can be avoided.

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