

The Existence of Pretrial Institutions In The Enforcement Of Criminal Law

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Abstract

Milestone Born Based on the Constitutional Court Decision: 21/PUU-XII/2014 dated April 28, 2015, the authority of the Pretrial institution has increased by conducting an examination of the Investigator's actions in issuing a letter of determination of suspects, searches, and seizures coupled with the legality or absence of arrest and/or detention, termination of investigation or termination of prosecution upon request for the upholding of law and justice, and requests for compensation or rehabilitation. In legal practice, there are several Decisions that do not reflect the implementation of criminal procedure law in accordance with the scope of pretrial and create new authority in pretrial.

The norms of authority in the Criminal Procedure Code provide limitations/limitations that cannot be deviated by law enforcement, if law enforcement exercises its authority not based on laws and regulations, then law enforcement actions can be categorized as unlawful acts. Based on Article 24C paragraph 1 of the Constitution of the Republic of Indonesia of 1945 (third amendment), the Constitutional Court is a high state institution within the scope of judicial power (judicial) and the authority of the Constitutional Court is one of which is to test the Law against the 1945 Constitution. Suppose a decision that grants the application, has an impact on the invalidity of a norm and does not have binding legal force, then by itself, the decision cannot be separated from the Erga Omnes Principle which has legally binding force on all components of the nation, so all parties must submit and obey the decision (Syukri Asy'ari, 2013). In legal practice, there are several Decisions that do not reflect the implementation of criminal procedure law in accordance with the scope of pretrial and create new authority in pretrial so that how does pretrial exist in the enforcement of criminal law

I. Introduction

Law 8 of 1981 concerning the Criminal Procedure Law (Statute Book of the Republic of Indonesia No. 76 of 1981, Supplement to Statute Book of the Republic of Indonesia No. 3209 hereinafter referred to as the Criminal Procedure Code or KUHP) is a legislative law product that replaces H.I.R. (Het Herziene Inlandsch Reglement, Staatsblad of 1941 No. 44). One of the purposes of law is to protect certain interests (Peter Mahmud Marzuki, 2012) and aims to uphold the law, legal certainty, and protect the human rights of suspects. The enactment of the Criminal Procedure Code provides regulations that are not regulated beforehand, one of which is regarding the right of the suspect to request an examination of the legality or not of the actions of investigators who do not exercise their authority based on the Criminal Procedure Code, namely arrest, detention, termination of investigation or termination of prosecution. The philosophical foundation of the Criminal Procedure Code is based on Pancasila, especially which is closely related to the Precepts of God and Humanity (M. Yahya Harahap, 2009). The use of the Divine Precepts in the Criminal Code is to recognize that every law enforcement officer and suspect/defendant are both human beings who depend on the will of Allah SWT. Human beings are creatures created by Allah SWT whose birth is based on His Will and Grace, because humans are created by Allah SWT, this means that there are no fundamental differences between humans, every human being has human rights that must be protected without exception.

Since the enactment of the Criminal Procedure Code using the foundation of Divinity and Humanity, it will realize development in the field of criminal procedure law so that the community can appreciate their rights and obligations in order to achieve and improve the development of the attitude of law enforcement implementers in accordance with their respective functions and authorities towards the firm upholding of law, justice, and protection which is the protection of the nobility of human dignity and dignity. Order and legal certainty for the sake of upholding the Republic of Indonesia as a state of law in accordance with Pancasila and the 1945 Constitution.

The Criminal Procedure Code is a law that regulates judicial procedures in the general judicial environment at all levels of justice in Indonesia. The Criminal Code regulates the authority of investigators in the form of coercive efforts, namely arrest, detention, termination of investigation and termination of prosecution. Against this coercive effort, prospective suspects or suspects through pretrial institutions regulated in Articles 77 to 83 of the Criminal Code can submit a pretrial application, one of which is regarding the existence of legal action to detain the suspect if 2 pieces of evidence are obtained and if he is found to have been caught committing a criminal act.

The pretrial application was filed by Commissioner General Drs. Budi Gunawan, S.H., M.Si., on January 26, 2015 at the South Jakarta District Court on the determination of

the suspect by the Chairman of the Corruption Eradication Commission of the Republic of Indonesia (KPK R.I.) for the case of alleged corruption crimes jointly receiving gifts or promises made by Suspect Budi Gunawan. The single judge, Sarpin Rizaldi, S.H., M.H. in the South Jakarta District Court Decision 04/Pid.Prap/2015/PN. Jkt.Sel. accepted part of the applicant's application and declared that the KPK R.I. Letter on the Determination of the Suspect on behalf of the Suspect Budi Gunawan was invalid and all further decisions or determinations issued by the Respondent related to the Determination of the Suspect against the applicant were invalid. The pretrial decision is not based on the Criminal Procedure Code because it does not give authority to the pretrial to declare the validity or invalidity of a suspect determination and the pretrial decision makes law enforcement over the investigation process without legal certainty. The legal problem was answered by the Constitutional Court Decision: 21/PUU-XII/2014 dated April 28, 2015 which added the scope of the pretrial to an examination regarding the validity or not of the suspect determination letter, search, and confiscation.

On the other hand, Article 5 paragraph (1) of Law 48 of 2009 concerning Judicial Power (Statute Book of the Republic of Indonesia Number 157 of 2009, Supplement to Statute Book of the Republic of Indonesia Number 5076) explains that Judges and Constitutional Judges are obliged to explore, follow, and understand the values of law and the sense of justice that live in society. Furthermore, regarding the explanation of Article 5 paragraph (1), this provision is intended so that the decisions of Judges and Constitutional Judges are in accordance with the law and the sense of justice of the community. Based on such provisions, judges are required not only to affirm the law. In this case, the judge is obliged to interpret and/or explore the content of the norms contained in the law. If the judge is not given the authority to make legal discoveries, the legal vacuum that occurs due to the imperfection of the law will be able to turn into chaos (Luhut M.P. Pangaribuan, 2009). This provision must be interpreted as an obligation for judges because judges are the formulators and excavators of legal values that live among the people (Lilik Mulyadi, 2012). As is known, there is no law or legislation that is very complete. Unclear legal regulations must be explained, incomplete ones must be equipped with a way to find the law so that the legal rules can be applied to the event (Bambang Sutiyoso, 2012). In legal practice, there are several Decisions that do not reflect the implementation of criminal procedure law in accordance with the scope of pretrial and create new authority in pretrial, namely the Pretrial Decision of the Surabaya District Court on March 7, 2016 has added legal norms in the Pretrial Decision: 11/PRAPER/2016/PN. SBY by accepting the legal position of the pretrial applicant on behalf of Diar Kusuma Putra, S.E. as a witness in the case of corruption based on the Investigation Warrant of the Head of the East Java High Prosecutor's Office: Print-86/O.5/Fd.1/01/2016, dated January 27, 2016 concerning the Case of Corruption in the use of Grant Funds for the purchase of Initial Public Offering (IPO) Bank Jatim at the East Java Provincial Chamber of Commerce and Industry in 2012 and and the Investigation Warrant of the Head of the East Java High Prosecutor's

Office: 120/0.5/Fd.1/02/2016 dated February 15, 2016 related to the case of money laundering in the purchase of the Initial Public Offering (IPO) of Bank Jatim at the East Java Provincial Chamber of Commerce and Industry in 2012. That in essence, the Pretrial Decision of the Surabaya District Court: 11/PRAPER/2016/PN. SBY, namely acknowledging the legal position of the pretrial applicant (witness to the corruption case), and canceling the Investigation Warrant for the Corruption Case. In addition to this, there is a Pretrial Decision 38/Pra.Per/2015PN. Sby dated December 16, 2015 with a ruling declaring that the Termination of the Investigation of General Criminal Cases by the Surabaya Police on behalf of the Suspects Nora Maria Lidwina, Agus Suwanto, and Inyo Cancer Hetarie was invalid, ordering the continuation of the investigation and prosecution of the case, which the judge should only declare the legality and/or not of a termination of the investigation without having to include the mandatory prosecution to be continued, Furthermore, Decision 24/Pid/Pra/2018/PN. Jkt.Sel dated April 9, 2018 with Amar Decision stated that the investigation of the Century Bank Corruption case was continued by designating Suspects Boediono, Muliaman D Hadad, Raden Pardede et al or delegating to the Police and/or the Prosecutor's Office to continue with the Investigation, Investigation, and Prosecution in the trial process at the Central Jakarta Corruption Court which ordered the investigators to determine new suspects and continue the law enforcement process until with the prosecution stage. South Jakarta District Court Decision: 97/Pid.Prap/2017/PN. Jkt.Sel. dated September 29, 2017 with single judge Cepi Iskandar, S.H., M.H. on a pretrial application by Setya Novanto on the letter of the leadership of the KPK R.I. regarding the determination of the suspect Setya Novanto for alleged corruption in the procurement of the Package for the Implementation of Identity Cards Based on National Population Identification Number (Electronic KTP) from 2011 to 2012 at the Ministry of Home Affairs of the Republic of Indonesia which was carried out together with Andi Agustinus alias Andi Narogong, Irman as the Director General of Population and Civil Registration of the Ministry of Home Affairs of the Republic of Indonesia and Ir. Sugiharto, M.M., as the Commitment Making Officer (PPK) of the Directorate General of Population and Civil Registration of the Ministry of Home Affairs of the Republic of Indonesia with a verdict declaring that the determination of the suspect against Setya Novanto (the Applicant) issued by the Respondent based on Letter No. 310/23/07/2017 dated July 18, 2017 is declared invalid and ordered to The Respondent to stop the investigation against Setya Novanto (the Applicant) based on the Investigation Order No. Sprin.Dik-56/01/07/2017 dated July 17, 2017, so that the Pretrial Decision is not in accordance with the authority of the Criminal Procedure Code where the investigation is stopped where it should not be the pretrial authority in stopping the investigation in addition to this in the judge's consideration there are some of these evidences according to the Pretrial Judge cannot be used as evidence which is also not a pretrial authority, the pretrial decision creates uncertainty in law enforcement

2. Research Method

This legal research does not use any hypothesis or data terms, does not use qualitative and quantitative analysis, so that overall there is no legal research that the author makes in a descriptive nature. This legal research is a know-how activity in legal science, not just know-about. As a know-how activity, legal research is carried out to solve the legal issues faced (Peter Mahmud Marzuki, 2013).

The use of a legal expert's ability to identify a problem, namely the mastery of substantive legal knowledge or substantive legal knowledge is a must-have. In addition, in conducting legal research, a jurist must be guided by doctrines that cannot be set aside and diverged such as Freis Ermessen, the principle of "no crime without error", and others. As a legal doctrine, it should not be deviated from for any reason, if the deviation is carried out, the legal building that has been formed will collapse.

That the arguments by legal experts do not prohibit any of them, but these arguments should not deviate from something that is already standard in legal science, this is a foundation by legal experts in conducting legal research so that problem solving can be carried out in accordance with the rules of legal science.

This research is a legal research to discuss the problems in this legal research using a conceptual approach, a statute approach, and a case approach.

The approaches used in this legal research are conceptual approach, statute approach, and case study approach. The legal approach is carried out by examining all laws and regulations related to legal issues that are being carried out legal research, this legal approach will serve to study the consistency and conformity between one law and another law or between laws and the constitution or between regulations and laws. The legal approach also studies the legislative ratio and the ontological basis of a law, so that it is able to capture the content of the philosophy behind the law. The approach of laws and regulations in dealing with a legal fact, the relevant legal provisions are traced, the legal provisions are in the article that contains norms (Philipus M. Hadjon et al, 2005).

The case approach is an approach that the author does is associated with a certain case that has produced a legal product in the form of a court decision that has permanent legal force in Indonesia. The main study in this case study approach is ratio decidendi or reasoning, which is the legal consideration of the judge or panel of judges in giving court decisions. Ratio decidendi or reasoning is a reference for the preparation of arguments for solving legal issues. The cases studied are

The conceptual approach is an approach that the author uses to seek the meaning of a legal term from a legal issue that is not found from the legal rules that apply in Indonesia. The meaning of legal terms found is usually only in the form of a general meaning, of course, it is not appropriate in building legal arguments, therefore the author needs to study the views of legal scholars regarding the conceptual concept of legal terms. The conceptual approach is an approach that is carried out when the researcher does not depart from the existing legal rules. This is done because there

is no legal rule for the problem faced (Peter Mahmud Marzuki, 2012). That in compiling a concept, it is not only imagining and searching in imagination, but the first thing that must be carried out must be based on the views and doctrines that develop in the Science of Law, namely the concept of law enforcement, the concept of legality principles, and the concept of pretrial.

3. Results and Discussion

The definition of pretrial based on Article 1 number 10 of the Criminal Procedure Code is the authority of the district court to examine and decide in the manner regulated in this law, about: a. whether or not an arrest and/or detention is lawful at the request of the suspect or his family or other parties on the power of attorney of the suspect; b. whether or not the termination of the investigation or the termination of the prosecution upon request is lawful 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 or her behalf whose case is not submitted to court. Then based on Article 77 of the Criminal Procedure Code which is an elaboration of Article 1 number 10 of the Criminal Procedure Code, pretrial is an institution that is authorized to examine and decide:

Valid or invalid (Article 77 letter a of the Criminal Code)

Arrest and/or

Detention and/or

Termination of Investigation and/or

Termination of prosecution.

Compensation and rehabilitation (Article 77 letter b of the Criminal Procedure Code)

Claims for compensation by the suspect or his heirs for arrest or detention and other actions without reason based on the law or because of a mistake regarding a person for the law applied as intended in paragraph (1) where the case is not submitted to the court, shall be decided at the pretrial hearing as intended (Article 95 paragraph 2 of the Criminal Code).

Based on the explanation of article 95 paragraph (1) of the Criminal Procedure Code, it is stated that the meaning of losses due to being subjected to other actions is the loss caused by

Entering a house, which is not legal under the law

Unlawful searches under the law,
Unlawful confiscation under the law, and
Detention is longer than the sentence imposed.

A request for rehabilitation by the suspect for an arrest or detention that has not been accompanied by a reason based on laws and regulations or the existence of an error against a person or law applied as per Article 95 paragraph (1) of the Criminal Procedure Code whose case was not submitted to the district court and decided by a pretrial judge as in article 77 and article 97 paragraph (3) of the Criminal Procedure Code.

There is a Constitutional Court Decision that changes the scope of pretrial authority, namely:

Constitutional Court Decision : 65/PUU-IX/2011

The formulation of Article 83 paragraph (2) of the Criminal Procedure Code states that it is unconstitutional and no longer has binding legal force, while the content of Article 83 paragraph (2) of the Criminal Procedure Code states that it is exempt from the provisions of paragraph (1) is a pretrial decision that stipulates the invalidity of the termination of the investigation or prosecution, for which a final decision can be requested to the high court in the relevant jurisdiction.

Constitutional Court Decision : 21/PUU-XII/2014

In the Constitutional Court Decision, it was decided that the provisions of Article 77 letter a of the Criminal Procedure Code do not have binding legal force as long as they are not construed, including the determination of suspects, searches and seizures, special characteristics of pretrial submissions related to the determination of suspects, namely 1) the determination of suspects is invalid because the examination of witnesses, experts, suspects, searches, and seizures is carried out after the determination of the suspect so that 2 (two) pieces of evidence are not fulfilled, 2). The second pretrial application regarding the determination of the suspect cannot be categorized as *ne bis in idem* because it does not concern the subject matter of the case, 3). the determination of suspects on the basis of the results of the investigation of other suspects in different files is invalid.

Constitutional Court Decision : 109/PUU-XIII/2015

The Constitutional Court through Decision 109/PUU-XIII/2015 interpreted the

meaning of the KPK independent investigator which was used as a reason for submitting a pretrial application for the invalidity of the determination of the suspect. The Constitutional Court considers that when there is a difference between Law 30/2002 and the Criminal Procedure Code regarding the position of investigators, the KPK remains bound by Law 30/2002 in carrying out its duties and can override the Criminal Procedure Code as long as it is specifically regulated in Law 30/2002, in line with the principle of *lex specialis derogat legi generalis*. Furthermore, the Court is of the opinion that KPK investigators as regulated in Article 45 paragraph (1) of Law 30/2002 do not have to only come from the Police institution as stipulated in Article 6 paragraph (1) of the Criminal Procedure Code and according to the Court, the KPK has the authority to appoint its own investigators.

Constitutional Court Decision : 102/PUU-XIII/2015

Declaring that Article 82 paragraph (1) letter d of Law 8 of 1981 concerning the Criminal Procedure Law (Statute Book of the Republic of Indonesia No. 76 of 1981, Supplement to Statute Book of the Republic of Indonesia No. 3258), is contrary to the Constitution of the Republic of Indonesia of 1945 and does not have binding legal force as long as the phrase "a case has begun to be examined" is not interpreted as "the pretrial request is dropped when the subject matter of the case has been delegated and the first trial has begun. against the subject matter of the case on behalf of the defendant/pretrial applicant". Through this decision, the meaning of "the case has begun to be examined" in a pretrial case is at the time the subject matter is heard. This Constitutional Court decision will resolve the difference of views regarding the interpretation of the judges when aborting the pretrial application because previously there were some pretrial decisions that aborted the application after the file was sent as in Decision 02/Pid.Pra/2015/PN.Tdn, and the Cow Decision in PN SBY in 2018. As for the reason, the phrase "has begun to be examined" is not regulated grammatically (grammatically) by the Criminal Procedure Code so that the qualification "has begun to be examined" is systematically interpreted against the provisions of Chapter XVI "Examination at Court Sessions" Part Three "Ordinary Examination Procedures" in Article 152 of the Criminal Procedure Code which regulates "In the event that the district court receives a letter of assignment of the case and is of the opinion that the case is within its authority, The Chief Justice appoints the Judge who will hear the case and the appointed Judge sets the date of the hearing." The process of appointing judges and the process of determining the

date of the hearing is carried out by the judge through the process of examining the case file first.

Constitutional Court Decision : 130/PUU-XIII/2015

The Constitutional Court stated that the submission of the Investigation Commencement Warrant (SPDP) is not only required to the public prosecutor but also to the reported person and the victim/complainant with a minimum time of 7 (seven) days, considered sufficient for the investigator to prepare/resolve the matter. aforementioned. The Constitutional Court's reason is based on the consideration that for the reported party who has received the SPDP, the person concerned can prepare defense materials and can also appoint a legal advisor who will accompany him, while for the victim/complainant it can be used as a momentum to prepare the information or evidence needed in the development of the investigation of his report. This decision provides space for the suspect to conduct a pretrial if at the time of his status as a reported person has not received the SPDP or the time has passed.

Constitutional Court Decision : 130/PUU-XIII/2015, dated November 9, 2016

The Constitutional Court's decision that provides legal certainty against the disqualification of pretrial, based on Article 82 paragraph (1) of the Criminal Procedure Code, the pretrial examination procedure for matters as referred to in Article 79, Article 80 and Article 81 is determined in the event that a case has begun. examined by the District Court, while the examination regarding the request to the pretrial has not been completed, then the request is dropped.

Law enforcement has theories that can explain its use, including grand theory, namely the Systemic Approach or Legal System theory proposed by Lawrence M. Friedman, middle theory, namely Law as a Tool of Social Engineering and Applied Theory, namely the Penal Policy theory. Law enforcement is a process that involves many things. Therefore, the success of law enforcement will be affected by these things. In general, as stated by Soerjono Soekanto, there are five factors that meet law enforcement, namely:

The legal factor itself;

Law enforcement factors, namely parties that form and apply the law;

Factors of facilities or facilities that support law enforcement;

Community factors, namely the environment in which the law applies or is applied;

Cultural factors, namely as the result of works, creations and tastes that are based on human karsa in life associations.

The five factors mentioned above are closely related because they are the essence of law enforcement and are also a benchmark of the effectiveness of law enforcement. In another article, Soerjono Soekanto said that in order for the law to function properly, harmony is needed in the relationship between four factors, namely:

The law or regulation itself. The possibility is that there is a discrepancy in the laws and regulations regarding certain areas of life. Another possibility is the incompatibility between laws and regulations with unwritten law or customary law. Sometimes there is a discrepancy between the recorded law and the customary law and so on.

The mentality of officers who enforce law enforcement law enforcement includes judges, police, prosecutors, defenders, correctional officers, and so on. If the laws and regulations are good, but the law enforcement mentality is not good, then there will be a disruption in the law enforcement system.

Facilities that are expected to support the implementation of the law if the legislation is good and also the enforcement mentality is good, but the facilities are inadequate (in a certain measure), then the pawn of the law will not run properly.

Legal awareness, legal compliance and citizen behavior.

The four factors mentioned above are closely related and are the core of the law enforcement system. If these four factors are carefully examined, it will be possible to reveal things that affect the law enforcement system. In this regard, Satjipto Rahardjo stated that in order for the law to run or can play a good role in people's lives, the following things must be considered:

Get to know the problems faced as well as possible. This includes carefully recognizing the community who wants to be the target of the cultivation;

Understand the values that exist in the community. This is important in terms of social engineering to be applied to society with multiple life sectors such as; traditional, modern, and planning at this stage determines the values of which sector is chosen;

Make hypotheses and choose which ones are most feasible to be implemented;

Follow the course of the application of the law and measure its effects.

Through the South Jakarta District Court Pretrial Decision: 04/Pid.Prap/2015/PN. Jkt.Sel. dated February 16, 2015 at the South Jakarta District Court opened the opportunity for the Suspects to submit a pretrial application for the determination of the suspect issued by the investigator, so that it will increase the scope of pretrial authority with the consideration of the judge that the determination of the Suspect is the result of the investigation and the Determination of the Suspect has great legal consequences for the Applicant, then the District Court must consider the Determination of the suspect. Then the pretrial judge's consideration of carrying out an assessment of the suspect's actions is linked to the legal facts of the investigation of the suspect's act of receiving gifts or promises in Law No. 31 of 1999 which has been amended by Law No. 20 of 2001 concerning the Eradication of Corruption, is not associated with the occurrence of state losses, because the act is related to the abuse of power or authority, so that what is alleged to have been done by the Petitioner does not cause financial losses to the state, so that the qualifications in article 11 letter c of the KPK Law are not fulfilled so that the pretrial has entered into the proof of the subject matter of the case regarding the suspect's unlawful acts, it is not a legal procedure for a person to be determined by the suspect by the investigator based on any evidence.

Pretrial Decision of the South Jakarta District Court: 97/Pid.Prap/2017/PN. Jkt.Sel. dated September 29, 2017 in its ruling gave additional authority to the Corruption Eradication Commission (KPK) based on Law 30 of 2002 concerning the Corruption Eradication Commission Article 40, namely the Corruption Eradication Commission is not authorized to issue a warrant to stop the investigation and prosecution in corruption cases, but the judge in his ruling stated that he ordered the Respondent to stopping the investigation of SETYA NOVANTO (Applicant) based on the Investigation Warrant: Sprin.Dik-56/01/07/2017 dated July 17, 2017, resulting in the issuance of a new authority of the KPK to issue an Investigation Termination Warrant on the other hand based on article 40 of Law 30 of 2002, the KPK does not have the authority to issue an Investigation Warrant. However, in 2019 Law was issued: 19 of 2019 concerning the Second Amendment to Law 30 of 2002 concerning the Corruption Eradication Commission Article 40 of Law 30 of 2002, the KPK was amended to Article 40

(1) The Corruption Eradication Commission may stop the investigation and prosecution of Corruption cases whose investigation and prosecution have not been completed within a maximum period of 2 (two) years.

(2) The termination of investigation and prosecution as intended in paragraph (1) must be reported to the Supervisory Board no later than 1 (one) week from the issuance of the order to stop the investigation and prosecution.

(3) The termination of investigation and prosecution as intended in paragraph (1) must be announced by the Corruption Eradication Commission to the public.

(4) The termination of investigation and prosecution as intended in paragraph (2) may be revoked by the Chairman of the Corruption Eradication Commission if new evidence is found that can cancel the reason for the termination of investigation and prosecution, or based on a pretrial decision as intended in laws and regulations

That the limitation of the scope of pretrial has been limited by Article 70 of Law 8 of 1981 concerning the Criminal Procedure Law (Statute Book of the Republic of Indonesia of 1981, Number 76, Supplement to Statute Book of the Republic of Indonesia 3209 and the Decision of the Constitutional Court: 21/PUU-XII/2014 dated April 28, 2015 which has been announced in the State Gazette, regarding the scope of pretrial to be as follows:

Article 77 letter a of Law 8 of 1981 concerning the Criminal Procedure Law (Statute Book of the Republic of Indonesia of 1981, Number 76, Supplement to Statute Book of the Republic of Indonesia Number 3209) is contrary to the Constitution of the Republic of Indonesia of 1945 as long as it is not interpreted to include the determination of suspects, searches, and confiscations;

Article 77 letter a of Law 8 of 1981 concerning the Criminal Procedure Law (Statute Book of the Republic of Indonesia of 1981, Number 76, Supplement to Statute Book of the Republic of Indonesia Number 3209) does not have binding legal force as long as it is not interpreted including the determination of suspects, searches, and confiscations;

Then to the scope of preliminary evidence as per the Criminal Code, namely:

Article 1 number 14 of the Criminal Code, A suspect is a person who, because of his actions or circumstances based on preliminary evidence, should be suspected of being the perpetrator of a criminal act.

Article 17 of the Criminal Code, an arrest warrant is issued against a person who is suspected of committing a criminal act based on sufficient preliminary evidence

Explanation of Article 17 of the Criminal Procedure Code, What is meant by

"sufficient preliminary evidence" is preliminary evidence to suspect the existence of a criminal act in accordance with the sound of Article 1 point 14. This article stipulates that an arrest warrant cannot be carried out arbitrarily, but is addressed to those who actually commit a criminal act.

Based on the Constitutional Court Decision: 21/PUU-XII/2014 in terms of preliminary evidence, sufficient preliminary evidence for the determination of the suspect is

The phrases "preliminary evidence", "sufficient preliminary evidence", and "sufficient evidence" as specified in Article 1 number 14, Article 17, and Article 21 paragraph (1) of Law 8 of 1981 concerning the Criminal Procedure Code (Statute Book of the Republic of Indonesia of 1981, Number 76, Supplement to Statute Book of the Republic of Indonesia Number 3209) are contrary to the Constitution of the Republic of Indonesia of 1945 as long as it is not interpreted as "preliminary evidence", "sufficient preliminary evidence", and "sufficient evidence" are at least two pieces of evidence contained in Article 184 of Law 8 of 1981 concerning the Criminal Procedure Law;

The phrases "preliminary evidence", "sufficient preliminary evidence", and "sufficient evidence" as specified in Article 1 number 14, Article 17, and Article 21 paragraph (1) of Law 8 of 1981 concerning the Criminal Procedure Law (Statute Book of the Republic of Indonesia of 1981, Number 76, Supplement to Statute Book of the Republic of Indonesia Number 3209) do not have binding legal force as long as it is not interpreted as "preliminary evidence", "sufficient preliminary evidence", and "sufficient evidence" are at least two pieces of evidence contained in Article 184 of Law 8 of 1981 concerning the Criminal Procedure Law;

So that the principle of legality has been implemented by the two things mentioned above and in order to create legal certainty and legal justice from arbitrary acts, the scope of pretrial has been strictly limited.

Ontology is one of the main branches of legal philosophy that discusses the fundamental nature of the existence of something (Abd. Shomad , 2013). The scope of ontology is the basic things studied in legal science which include legal values, such as justice, order, and legal certainty. The next scope is legal rules such as written or unwritten and legal behavior, which can be said to be a reality or legal event.

Pretrial aims to carry out horizontal supervision of all acts of coercion carried out

by law enforcement officials for the purpose of examining criminal cases so that these actions do not really contradict laws and regulations, in addition to the existence of internal supervision in the apparatus itself.

Axiological is a part of philosophy that specifically discusses the essence of values related to something. Axiological discussions can be in the form of problems arising from complex cases that include questions about legitimate norms, norms to choose, which norms are likely to be used with their consequences.

The authority of the District Court to examine and decide based on the Criminal Procedure Code on the disputed pretrial legal object, the examination and pretrial decision are still based on the provisions stipulated in the Criminal Procedure Code and other related and binding provisions, meaning that it is not allowed to examine and decide on a pretrial application outside of these provisions (Abd. Shomad , 2013). Based on the Criminal Procedure Code, arrest, detention, termination of investigation and termination of prosecution enter as an action before or "pre" the main examination whose facets/parts are in the investigation and prosecution. Therefore, the pretrial scope of time when a case is still under investigation at the level of investigation or prosecution, to the prosecution stage, the thing that can be disputed is the invalidity of further detention by the public prosecutor, i.e. a continued detention that does not meet formal and material requirements and/or termination of prosecution, i.e. a case that should be prosecuted by the public prosecutor but the prosecution is stopped.

Epistemology is an effort to adjust the relationship between something in the human mentality and the real world, where to find the right justice a way or method is needed. Epistemology in the philosophy of law is the knowledge that humans have acquired, regarding the origin or source of the knowledge, the measure of knowledge that has been obtained. Legal science is a science that aims to seek the truth or seek a true justice. Truth is defined as the correspondence between knowledge and its object, it shows a relationship between knowledge and object, if knowledge is in human mentality, then the object is in the real world.

Pretrial has the function of Vertical control and horizontal control. Vertical control is divided into two, namely Extern and Internal. External Vertical Control means that it is an external vertical control function, namely the community, in this case the suspect and/or 3rd party, can control the performance of the

investigator and the prosecutor's office. While Intra vertical control is a control function carried out by superiors, in this case carried out by the National Police Chief or Police Chief or Police Chief, can control the performance of subordinate investigators, the Attorney General or the Head of the High Prosecutor's Office controls the performance of the prosecutor's apparatus under him. The Horizontal Control function is that the investigating officer and the public prosecutor can submit pretrial applications to each other

Pretrial as an institution that supervises the investigation stages of handling cases of alleged criminal acts is an institution that needs to be maintained, according to Luigi D.A. Corrias and Geoffrey M. Gordon, as a juice constitutum, namely Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings), the Roman law proverb *hominum causa omne jus constitutum est* Every law is made for the man and it must serve mankind, every law is made for man and must serve mankind while according to Soerjono Soekanto and Pumadi Purbacaraka regarding the provisions of the law that apply now and the ideals of the law that will apply in the future. In general, the law that applies today is called *ius constitutum* and the law that aspires to be called *ius constituendum*, Soerjono Soekanto and Purnadi Purbacaraka explained that:

Ius constitutum is a law that is formed and applies in a state society at a certain time. *Ius constitutum* is a positive law.

Ius constituendum is a law that is aspired to in the life of the state, but has not been formed into other laws or provisions."

Soerjono Soekanto and Purnadi Purbacaraka also explained that *ius constituendum* changed to *ius constitutum* by:

Replace a law with a new law (the new law was originally a draft *ius constituendum*).

Amendments to existing laws by incorporating new elements (new elements were initially in the form of *ius constituendum*).

Interpretation of laws and regulations. The interpretation that exists today may not be the same as the interpretation of the past. The interpretation in the present day used to be *ius constituendum*.

The development of the doctrine or opinion of a leading legal scholar in the field of legal theory.

Based on the Draft Criminal Procedure Law, there are regulations regarding the definition of Preliminary Examination Judges replacing the pretrial legal position regulated in Law 8 of 1981 concerning the Criminal Procedure Law. Article 1 number 7 of the Draft Criminal Procedure Law provides the definition of a preliminary examining judge (single judge) to assess the stages of investigation and prosecution and other authorities:

The Preliminary Examining Judge is an official who is authorized to assess the course of investigation and prosecution, and other authorities specified in this Law.

The authority of the Preliminary Examining Judge based on Article 111 of the Draft Criminal Procedure Code is:

The Preliminary Examining Judge is authorized to determine or decide:

whether or not the arrest, detention, search, seizure or wiretapping is lawful;

cancellation or suspension of detention;

that the information made by the suspect or defendant violates the right not to incriminate oneself;

evidence or statements obtained illegally cannot be used as evidence;

compensation and/or rehabilitation for a person unlawfully arrested or detained or compensation for any property unlawfully confiscated;

the suspect or defendant has the right to or be accompanied by a lawyer;

that the investigation or prosecution has been carried out for an unlawful purpose;

Termination of investigation or termination of prosecution

whether or not a case is suitable for prosecution to the court.

any other violation of the suspect's rights that occurred during the investigation stage.

An application regarding the matter referred to in paragraph (1) is submitted by the suspect or his legal counsel or by the public prosecutor, except for the provisions in paragraph (1) letter i can only be submitted by the public prosecutor.

The Preliminary Examining Judge may decide on matters as intended in paragraph (1) on his own initiative, except for the provisions as intended in

paragraph (1) letter i.

The authority of the Preliminary Examining Judge is further explained regarding the procedures for the implementation of the authority of the Preliminary Examining Judge, especially in Article 112, namely:

Article 112

The Preliminary Examining Judge shall give a decision within 2 (two) days at the latest from the receipt of the application as referred to in Article 111 paragraph (2).

The Preliminary Examining Judge shall make a decision on the application based on the results of the study of copies of warrants for arrest, detention, search, confiscation, wiretapping, or other relevant records.

The Preliminary Examining Judge may hear testimony from the suspect or his legal counsel, investigators, or the public prosecutor.

If necessary, the Preliminary Examining Judge may request information under oath from the relevant witnesses and relevant documentary evidence.

The application as referred to in Article 111 paragraph (2) does not delay the investigation process.

Article 113

The decision and determination of the Preliminary Examining Judge must clearly contain the legal basis and reasons.

In the event that the Preliminary Examining Judge establishes or decides on unlawful detention, the investigator or public prosecutor at the respective level of examination must remove the suspect from custody.

In the event that the Preliminary Examining Judge determines or decides on illegal confiscation, within 1 (one) day after it is determined or decided, the confiscated object must be returned to the most entitled except for the prohibited object.

In the event that the Preliminary Examining Judge determines or decides that the termination of the investigation or the termination of the prosecution is invalid, the investigator or public prosecutor must immediately resume the investigation or prosecution.

In the event that the Preliminary Examining Judge determines or decides that the

detention is unlawful, the Preliminary Examining Judge determines the amount of compensation and/or rehabilitation.

Further provisions regarding the amount of compensation and/or rehabilitation are regulated by Government Regulations.

Article 114

The Preliminary Examining Judge shall examine the application for compensation or rehabilitation with the following provisions:

within a maximum period of 5 (five) working days after receiving the application, the application must begin to be heard;

Before examining, and deciding, it is mandatory to hear the applicant, investigator, or public prosecutor;

Within 7 (seven) working days after the hearing, a verdict must be given.

In the event that the case has been examined by the district court, an application for compensation or rehabilitation cannot be submitted to the Preliminary Examining Judge.

Article 121

The Preliminary Examining Judge has an office at or near the State Prison.

The Preliminary Examining Judge is a single judge, examining, appointing, or deciding because of his position alone.

In carrying out his duties, the Preliminary Examining Judge is assisted by a clerk and several secretariat staff.

Article 122

The determination or decision of the Preliminary Examining Judge cannot be appealed or appealed.

The scope of claims for compensation by the suspect, defendant, or convict and the authority of the preliminary examining judge are

Article 128

A suspect, defendant, or convicted person has the right to seek damages for being arrested, detained, prosecuted, tried, or subjected to any other action without a valid reason under the law or because of a mistake regarding the person or the applicable law.

Claims for compensation by the suspect or his heirs for arrest or detention and other actions without reason based on the law or due to mistakes regarding persons or laws applied as referred to in paragraph (1) to the Preliminary Examining Judge.

A claim for compensation by the defendant, convict or his heirs because they are sued or tried as referred to in paragraph (1), shall be submitted to the district court.

When an act of arrest, detention, or other action at the stage of investigation, prosecution, or trial is declared invalid, it is the state that inflicts the loss.

In the event that the defendant has been arrested, detained, taken other actions, prosecuted, or tried in accordance with the laws and regulations and is ruled free or free from all lawsuits by the court, the defendant cannot claim compensation.

Article 129

The amount of compensation as referred to in Article 128 is determined in the court decision.

The court decision as referred to in paragraph (1) contains all the things that are considered as reasons for the decision.

Article 130

The Preliminary Examining Judge shall conduct an examination of the application for compensation or rehabilitation as referred to in Article 128, with the following provisions:

within a maximum period of 5 (five) working days after receiving the application, the application must begin to be heard;

Before examining and deciding, it is mandatory to hear the applicant, investigator, or public prosecutor;

Within 7 (seven) working days after the hearing, a verdict must be given.

In the event that the case has been examined by the district court, the application for compensation or rehabilitation as referred to in Article 130 cannot be submitted to the Preliminary Examining Judge.

The scope of the rehabilitation request and the authority of the preliminary examining judge are

Article 131

In the event that there is an error in the application of the law, everyone must be given rehabilitation if the court decides to be free or free from all lawsuits whose decision has permanent legal force.

Rehabilitation as referred to in paragraph (1) is given and included at the same time in the court decision.

A request for rehabilitation by a suspect or defendant for arrest or detention without reason based on the law or a mistake regarding the person or the error in the application of the law as referred to in paragraph (1) where the case is not submitted to the district court shall be decided by the Preliminary Examining Judge.

The formal aspect examination is to prove a limited pretrial application regarding letters issued by law enforcement officials that can explain the authority, legal consequences, and legal procedures based on applicable laws and regulations.

That the concept of the scope of authority of the preliminary examining judge until now there is no regulation that expressly regulates the disqualification of the examination stage because so that if the respondent delegates the case file to the competent District Court, there will be a difference between the decision of the preliminary examining judge and the act of receiving the case file to carry out the prosecution stage, so it is necessary to regulate the limit on the disqualification of the examination stage by the examining judge Introduction to the lawfulness of arrest, detention, search, confiscation, or wiretapping, that information made by a suspect or defendant in violation of the right not to incriminate oneself, evidence or statements obtained illegally cannot be used as evidence, that an investigation or prosecution has been carried out for an unlawful purpose, a violation of any other suspect's rights that occurs during the investigation stage, So that the concept of dropping the examination by the preliminary examining judge can be when the subject matter of the case has been handed over.

Concept The scope of authority of the preliminary examining judge does not provide an obligation to the suspect to be present so that he can be represented to a legal advisor, this is if the suspect is not detained by the investigator or included in the list of people searched, then it becomes an obstacle in law enforcement.

The concept The scope of authority of the preliminary examining judge in assessing the process of examining witnesses, suspects and experts at the

investigation stage by investigators in the context of the process of obtaining at least 2 (two) pieces of evidence to determine the suspect, needs to be emphasized with the concept of also assessing the process of examining witnesses, experts, and suspects so that it can create a sense of justice in the law enforcement process. The concept of evidence within the scope of the preliminary examining judge needs to be added witnesses, letters and experts so that they can provide a clear explanation to the suspect or applicant. Concept The scope of authority of the preliminary examining judge in assessing the pre-prosecution process, both the provision of instructions by the Public Prosecutor and/or the fulfillment of instructions by the investigator, to provide legal certainty in the investigation process submitted by the suspect.

Concept The scope of authority of the preliminary examining judge in assessing the validity or not of the determination of the suspect in determining the concept is so that legal certainty is carried out if the preliminary examining judge grants the suspect's application, so that it does not result in the discontinuation of the investigation process but only the determination of the suspect.

4. Conclusion

Based on the description in the previous chapters, it can be concluded:

The essence of pretrial in criminal law enforcement

From the Ontological Aspect Pretrial aims to carry out horizontal supervision of all acts of coercion carried out by law enforcement officials for the purpose of examining criminal cases so that these actions do not really contradict laws and regulations, in addition to the existence of internal supervision in the apparatus itself.

From the Axiological aspect

Based on its nature, pretrial is interpreted as an institution that has the authority to examine, test, and determine whether or not legal actions are legal, the validity of legal procedures carried out by investigators or public prosecutors in exercising their authority

From the epistemological aspect Pretrial has the function of Vertical control and horizontal control. Vertical control is divided into two, namely Extern and Internal. External Vertical Control means that it is an external vertical control function, namely the community, in this case the suspect and/or 3rd party, can control the performance of the investigator and the prosecutor's office. While Intra vertical control is a control function carried out by superiors, in this case carried out by the National Police Chief or Police Chief or Police Chief, can control the performance of subordinate investigators, the Attorney General or the Head of the High Prosecutor's Office controls the performance of the prosecutor's

apparatus under him. The Horizontal Control function is that the investigating officer and the public prosecutor can submit pretrial applications to each other. Ius Constituendum in pretrial has been perfected with the concept of preliminary examination judges, but there is still a concept of the scope of authority of preliminary examination judges that needs to be added.

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