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**Pretrial Reform in Indonesia:
A Study of Pretrial Hearings at the Sharia Court of Aceh Province**

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Abstract

This study aims to examine pretrial as stated in the Code of Criminal Procedure. This study is a normative legal study using a statutory approach and examines dozens of court decisions related to pretrial. Based on the results of this study, it is concluded that the current pretrial institution still has weaknesses, namely unclear procedural law, passive and post factum testing, the application is dropped after the main case is delegated, there is no legal remedy, the examination is only formal-administrative. The main cause of these weaknesses is because the Criminal Procedure Code adheres to the principle of functional differentiation, which strictly divides authority between the criminal justice subsystems. The next conclusion is that the ideal court supervision of criminal justice is a concept of supervision that is in the middle between the interests of the state to enforce the law and the interests of the community whose rights must be guaranteed so that they cannot be arbitrarily taken away. This supervision is carried out by the Commissioner Judge who has the authority to materially test all actions of other criminal justice subsystems from the pre-adjudication stage to the post-adjudication stage. From this research, it is suggested that in the upcoming update of the Criminal Procedure Code, it is necessary to change the design of the criminal justice system from functional differentiation to court centric or centered on the court.

Keywords: Pretrial, supervision, commissioner judge, legal justice

Abstrak

Penelitian ini bertujuan untuk mengkaji praperadilan sebagaimana tercantum pada Kitab Undang-undang Hukum Acara. Kajian ini merupakan studi hukum normatif dengan menggunakan pendekatan perundang-undangan dan mengkaji puluhan putusan pengadilan yang berkaitan dengan praperadilan. Berdasarkan hasil penelitian ini disimpulkan bahwa pranata praperadilan yang berlaku saat ini masih terdapat kelemahan-kelemahan yaitu tidak jelasnya hukum acara, pengujiannya bersifat pasif dan post factum, gugurnya permohonan setelah perkara pokoknya dilimpahkan, tidak terdapat upaya hukum, pemeriksaannya hanya bersifat formil-administratif. Penyebab utama dari kelemahan tersebut adalah karena KUHAP menganut asas diferensiasi fungsional, yang membagi secara tegas wewenang diantara sub sistem peradilan pidana. Kesimpulan berikutnya adalah pengawasan pengadilan terhadap peradilan pidana yang ideal adalah konsep pengawasan yang berada di tengah-tengah antara kepentingan negara untuk menegakkan hukum dengan kepentingan masyarakat yang hak-haknya mesti dijamin untuk tidak dapat dirampas secara sewenang-wenang. Pengawasan tersebut dilakukan oleh Hakim Komisaris yang berwenang menguji secara materil segala tindakan dari sub sistem peradilan pidana lainnya dari tahap praadjudikasi sampai kepada tahap post adjudikasi. Dari penelitian ini disarankan agar pada pembaruan KUHAP mendatang perlu dilakukan perubahan desain sistem peradilan pidana dari diferensiasi fungsional menjadi court centris atau berporos kepada pengadilan.

Kata Kunci: *Praperadilan, pengawasan, hakim komisaris, keadilan hukum*

Introduction

The design of Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP) adopts functional differentiation, which means that the institutions or apparatus involved in the criminal justice system are autonomous with their respective functions and duties.¹ The KUHAP stipulates that the police carry out the investigative function, the prosecutor's office carries out the prosecution function, and the court as the party that tries.² This design is the antithesis of the Herzien Inlandsch Reglement (HIR) which gives the authority to investigate and prosecute to the public prosecutor, while the police are only subordinate to the public prosecutor.³

¹ Ali Rezky and Oheo Kaimuddin Haris, "Broadening of the Concept of Obscenity in the Draft of Indonesian Penal Code," *Hasanuddin law Review* 4, No. 2 (2018). M. Yahya Harahap, *Pembahasan Permasalahan Dan Penerapan KUHAP (Penyidikan dan Penuntutan*, Jakarta: Sinar Grafika, 2006, p. 47-49.

² Article 7 of the Criminal Procedure Code concerns the authority of investigators, Article 14 of the Criminal Procedure Code concerns the authority of public prosecutors, and Article 1 number 9 of the Criminal Procedure Code concerns the authority to prosecute.

³ Article 38 paragraph (1) and Article HIR, Article 12 of Law Number 19 of 1948 concerning the Composition and Powers of Judicial Bodies; Article 2 paragraph (2) of Law Number 15 of 1961

The purpose of this functional differentiation concept is to limit the power of each institution, so that power does not accumulate in one hand. This is to avoid the dominance of one institution over another. The investigative and prosecution powers that used to be the dominus litis of the prosecutor's office are separated by giving them to the police.⁴ The hypothesis is that power that accumulates in one hand is very susceptible to misuse.⁵ From this separation and division of authority, it is hoped that there will be a mechanism for mutual control and mutual supervision (check and balances) between these institutions. In the context of the relationship between power holders, this functional differentiation is interpreted as differentiating the function of the court to ensure the implementation of regulations so that they do not deviate or go outside their corridor.⁶

The Criminal Procedure Code is claimed as a masterpiece of the Indonesian nation.⁷ Not only because it has accommodated the protection of human rights, but more than that, the Criminal Procedure Code has overhauled the paradigm of procedural law which originally placed the suspect/defendant as the object of examination (inquisitor) to the subject of examination (acquisitor). The paradigm overhaul is evident from the provisions of the Criminal Procedure Code which require sufficient preliminary evidence in using coercive authority, limitations on the period of detention, notification to the family of the person being detained, permission or approval for confiscation and searches from the court, and the change of evidence of the defendant's confession to the Defendant's statement.⁸ The existence of these regulations is expected to prevent investigators from freely using their coercive authority arbitrarily, create legal certainty for people being detained, and is expected to change the mindset of "extorting confessions from suspects/defendants" to a mindset of exploring and exploring the information

concerning the Main Provisions of the Attorney General's Office of the Republic of Indonesia; Article 5 of Presidential Decree Number 11 of 1963 concerning the Eradication of Subversive Activities; Law Number 7 of 1955 concerning the Investigation, Prosecution and Trial of Economic Crimes

⁴ Luhut MP Pangaribuan, "Hakim Pemeriksa Pendahuluan Dalam Rancangan Sistem Peradilan Pidana, dalam Teropong Media Hukum dan Keadilan", *Pembaruan Hukum Acara Pidana, MAPPI FHUI 1* (2014), p. 3-4.

⁵ Lord Acton state "*Power tends to corrupt, absolute power corrupt absolutely*". Crane Brinton, "Lord Acton's Philosophy of History Author (s)", *The Harvard Theological Review, Januari, 1919, Volume 12, Number 1, January, 1919*, Cambridge University Press on Behalf of the Harvard Divinity School Stable 12, 1919, p. 84-112.

⁶ Eddy Purnama, et.al., *Independensi Hakim Konstitusi dan Sistem Pengawasannya*, Banda Aceh: Bandar Publishing, 2022, p. 58-59.

⁷ Anugerah Rizki Akbari, et.al., *Audit KUHAP: Studi Evaluasi Terhadap Keberlakuan Hukum Acara Pidana Indonesia*, Jakarta: Institute Criminal Justice Reform, 2022, p. 7, 62 and 89.

⁸ Regarding the requirement for "sufficient preliminary evidence" as stated in Article 1 number 14, number 20, Article 17, 21 paragraph (1) of the Criminal Procedure Code. Based on the Constitutional Court Decision Number 21/PUU-XII/2014, the phrase "preliminary evidence", "sufficient evidence" "sufficient preliminary evidence" are 2 (two) pieces of evidence contained in Article 183 of the Criminal Procedure Code. The limitation of the detention period is stated in Article 24 to Article 29 of the Criminal Procedure Code.

provided by suspects/defendants, especially their statements in court.⁹ This is in line with the principle of the presumption of innocence as a universal principle of criminal justice which prohibits treating suspects/defendants as defendants.¹⁰

One of the pieces of evidence of the Criminal Procedure Code adopting acquisitor is the establishment of pretrial as a horizontal control of the implementation of coercive measures carried out by investigators and public prosecutors. Article 1 number 10 in conjunction with Article 77 of the Criminal Procedure Code in a limited manner determines that pretrial is only authorized to examine and decide on the legality or otherwise of an arrest, detention, termination of investigation or termination of prosecution, as well as compensation and/or rehabilitation for a person whose criminal case is terminated at the investigation or prosecution level. The initial idea of this pretrial institution was to provide guarantees of human rights protection for people who are confronted with the state, and to prevent people from becoming victims of criminal justice. However, pretrial is considered unable to meet the expectations of its establishment as a complaint institution aimed at preventing and overcoming arbitrariness carried out by investigators and public prosecutors.¹¹ Pretrial is less effective in carrying out its function as a means of controlling the use of coercive authority held by investigators and public prosecutors.

According to Luhut Pangaribuan, the pre-trial concept is not effective in supervising investigators and public prosecutors in the use of coercive measures, because in terms of determining someone as a suspect based on "sufficient preliminary evidence" and "sufficient evidence" it is only done internally and discretionarily without any transparency and accountability.¹² The Institute Criminal for Justice Reform stated that there are weaknesses in pretrial, namely that it is post factum, only examines case administration, the Judge is passive, the case is dropped after the main case is submitted to the Court, the unclear criminal or civil procedural law, and poor case management in resolving cases.¹³

⁹ It is undeniable that the development of global human rights as stated in Article 9, Article 11, and Article 14 of the International Covenant on Civil and Political Rights as ratified through Law of the Republic of Indonesia Number 12 of 2005

¹⁰ The principle of the presumption of innocence is a universally applicable principle, stated in the general explanation number 3 letter c of the Criminal Procedure Code, Article 18 paragraph (1) of Law Number 39 of 1999 concerning Human Rights.

¹¹ Luhut MP Pangaribuan, "Hakim Pemeriksa Pendahuluan Dalam Rancangan Sistem Peradilan Pidana, p. 7-10. Khudzaifah Dimiyati and Angkasa Angkasa, "Victimological Approaches to Crime of Rape in Indonesian Criminal Justice System," *Hasanuddin Law Review* 4, No. 3 (2019), p. 366-376.

¹² Luhut M.P Pangaribuan, *Lay Judges dan Hakim Ad Hoc: Suatu Studi Teoritis Mengenai Sistem Peradilan Pidana Indonesia*, Fakultas Hukum Universitas Indonesia, Jakarta 2009, p. 11.

¹³ Supriyadi Widodo Eddyono. et.al., *Praperadilan di Indonesia: Teori, Sejarah dan Praktiknya*, Jakarta: Institute Criminal For Justice Reform, dan Open Society Foundations, 2014, p 84-95

Another pretrial issue is that there is no legal remedy against the pretrial decision. Article 83 of the Criminal Procedure Code and the Constitutional Court Decision Number 65/PUU-IX/2011 close off efforts to resist or appeal against the pretrial decision.¹⁴ Likewise, Law Number 5 of 2004 as last amended by Law Number 3 of 2009 concerning the Supreme Court, which expressly excludes pretrial decisions from being cassated.¹⁵ The Supreme Court Circular (SEMA) Number 4 of 2014 paved the way for pretrial decisions to be reviewed (PK) on the condition that there is legal smuggling, but by the Supreme Court Regulation (Perma) Number 4 of 2016 the exception to legal smuggling is eliminated, so that no legal remedy can be taken against pretrial decisions at all.¹⁶

Based on these weaknesses, the idea of a Commissioner Judge that was once in effect during the *Strafvordering* period re-emerged, such as the proposal of Oemar Seno Adji in the 1974 RKUHAP (Criminal Code Draft).¹⁷ The idea of a commissioner judge emerged in the 2004 RKUHAP.¹⁸ The idea of its formation is no different from the idea of the formation of a pretrial, namely to guarantee and protect human rights for people who are facing the state in the criminal justice process. It's just that the authority it has is much greater than the pretrial institution.¹⁹

The concept of the Commissioner Judge in the 2004 RKUHAP was maintained in the April 2007 RKUHAP, December 2007 RKUHAP, 2008 RKUHAP, 2009 RKUHAP, 2010 RKUHAP and 2011 RKUHAP which placed the Commissioner Judge as the supervisor of investigations and prosecutions as well as other duties determined by law.²⁰ The term Commissioner Judge was then replaced with Preliminary Examining Judge in the 2012 RKUHAP.²¹ However, ironically in the latest RKUHAP, namely the 2025 RKUHAP, the idea of the Commissioner Judge and the Preliminary Examining Judge was removed. The 2025 RKUHAP still

¹⁴Constitutional Court Decision Number 65/PUU-IX/2011 “Article 83 paragraph (2) of Law Number 8 of 1981 concerning Criminal Procedure Law (State Gazette of the Republic of Indonesia 1981 Number 76, Supplement to the State Gazette of the Republic of Indonesia Number 3209) does not have binding legal force.”

¹⁵ Article 45A concerning Amendments to Law Number 14 of 1985 concerning the Supreme Court.

¹⁶ Attachment to SEMA Number 4 of 2014 stipulates that “A judicial review of a pretrial motion is not permitted except in cases where indications of legal smuggling are found”.

¹⁷ Indriyanto Seno Adji, “Hakim Komisaris Solusi Ke Arah Prinsip Keadilan”, *Majalah Hukum dan Pembangunan*, Universitas Indonesia, Nomor XXXII, Juli-September (2002), p. 253-254.

¹⁸ Supriyadi Widodo Eddyono. et.al., *Praperadilan di Indonesia*, p. 31-35. Erwin Susilo, et.al., “Reverse Evidence: A Beacon of Hope for Pretrial Reform,” *Sriwijaya Law Review* 9, No. 2 (2025).

¹⁹ Article 72 paragraph (1) of the 2004 RKUHAP stipulates that the authority of the Commissioner Judge includes all pre-trial authority, plus the authority to test whether or not detention is necessary, whether the time limit for investigation and prosecution has been exceeded, and whether or not an examination can be carried out without being accompanied by a legal advisor.

²⁰ Article 1 number 7 of the 2007 April Criminal Procedure Code.

²¹ The use of the nomenclature of Preliminary Examining Judge can be equated with the term *Giudice per le indagini preliminari* in Italy or Magistrate in the United States.

maintains the concept of pretrial with broader authority and improvements to the weaknesses of previous pretrials. However, has this idea been able to answer the ineffectiveness of pretrial as a means of control (judicial scrutiny) of criminal justice. This is interesting to study in more depth in order to obtain the right formula for the concept of court supervision in an ideal criminal justice system.

This study is a normative legal study using a statutory approach and examines dozens of court decisions related to pretrial motions.²² The statutory approach is a legal research method that examines all laws and regulations, such as statutes, government regulations, court decisions, and regulations related to legal rules. The data analyzed are court decisions with permanent legal force related to pretrial motions, as stipulated in the Indonesian Code of Procedural Law.

Pretrial Philosophy

The philosophical aspect of the existence of pretrial institutions or similar institutions cannot be separated from the dialectic between the ruler and the people they rule for centuries. This dialectic revolves around the limitation of power from the ruling party so that it does not use its power excessively, and ensures that the rights of the people it rules are fulfilled.²³ The ruler is not only required to guarantee the "stomach" needs of his citizens, but is also required to guarantee the fundamental rights of his citizens who are indeed born as free human beings by nature.

Magna Charta 1215 which was then continued with Magna Charta 1225 limited the power of the King over his subjects, without distinguishing whether his subjects were nobles, clergy or commoners.²⁴ The Magna Charta Charter made a huge contribution to the world of law enforcement, because it emphasized the rights of the people to receive a fair legal process.²⁵ Forms of a fair legal process include the prohibition of seizing someone's property or freedom without a court decision, delaying the legal process, and the obligation for the ruler to obtain proper evidence in order to bring someone to court.²⁶

The Magna Charta Charter inspired the British Parliament to issue the Habeas Corpus Act in 1679, which emphasized that a person's freedom may not be arbitrarily taken away.²⁷ According to this habeas corpus, a person's freedom may only be taken away based on valid law by showing a court order and within 3 (three)

²²Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Prenada Media, 2021. Munir Fuady, *Metode Riset Hukum: Pendekatan Teori dan Konsep*, Depok: Rajawali press, 2018.

²³ Lucinda Maer and Oonagh Gay, "The Bill of Rights 1689," *Political Studies*, House of Commons Library, 2009, p. 2-3. This notwithstanding dispensation is permission for the kingdom not to be considered to have violated any provisions for any action it takes.

²⁴ Magna Charta, Runnymede, 15 Juni 1215.

²⁵ Nicholas Vincent, "Magna Carta and the English Historical Review: A Review Article," *The English Historical Review* 130, No. 544, (2015), p. 646-684.

²⁶ Article 1, Article 38, Article 39 and Article 40 of the Magna Charta.

²⁷ John Crace, "1215 and All That: A Digested Magna Carta," *Index on Censorship* 43, Nomor 4, 2014, p. 18.

days must be brought to court to determine whether the deprivation is valid or not.²⁸ Robert Walker interpreted it as meaning that to place someone in power must go through a court process and obtain approval from him. In other words, every action of the ruler that takes away freedom must be tested in court to prove that it is not contrary to the law. The contents of the court summons addressed to law enforcement are "The detainee is under your control, so you are obliged to bring that person to court and state the reasons why you are detaining him".²⁹

In short, the right of habeas corpus is a person's right to test the legality of the deprivation or restriction of rights carried out by state officials through the Court.³⁰ The Court here asks the state officials to prove that the deprivation of rights they have carried out is indeed necessary and does not violate applicable laws. The right of habeas corpus is based on the principle of the Presumption of Innocence, namely that a person is considered innocent until there is a final and binding decision declaring the person guilty.³¹ In this case, the Court asks the party carrying out the deprivation to prove that the deprivation they have carried out is indeed very necessary and does not violate applicable laws. The United States Constitution prohibits the suspension of the implementation of the 'writ of habeas corpus' except in relation to issues of rebellion, invasion and public security.³²

The values contained in habeas corpus then colored the constitutions of countries in the world including international treaty charters. Which values became the standard of criminal procedure law universally, as a law that limits the authorities against people suspected of committing crimes. The authorities through their apparatus are required to obtain approval from the court to seize someone's property or freedom, and such actions must be authorized and can be tested by the court.

Pretrial Authority

Based on Article 1 number 10, Article 77 and Article 82 paragraph (1) letter b of the Criminal Procedure Code that pretrial is authorized to examine and decide cases:

1. The validity of the arrest and detention filed by the suspect, his family or a party given power of attorney;
2. The validity of the termination of the investigation, prosecution filed by the investigator, public prosecutor, or interested third party;

²⁸ Habeas Corpus Act 1679.

²⁹ Adnan Buyung Nasution, "Praperadilan Versus Hakim Komisaris (Beberapa Pemikiran mengenai Keberadaan Keduanya)", Sosialisasi RUU KUHAP, Departemen Kehakiman tanggal 27 November, 2001, p. 2-8.

³⁰ The deprivation or restriction of rights carried out by the State against its citizens can take the form of arrest, detention, confiscation of property and searches.

³¹ Law Number 39 of 1999 concerning Human Rights.

³² Article 1, Section 9, Paragraph 2 The Constitution of the United States of America. The most important thing about the constitution of the United States is the first ten amendments or known as the Bill of Rights, which was initiated by James Madison.

3. Claims for compensation and rehabilitation for cases not filed in court by the suspect, his family or a party given power of attorney;
4. The validity of the confiscation of confiscated objects filed by the person who has the right or authority over the confiscated objects.

Expansion of Pretrial Authority

Along with judicial practice, the minimal authority of pretrial has developed, extending to objects that are not stated in the Criminal Procedure Code. Below, the researcher presents various pretrial decisions, which expand the scope of authority of pretrial. Both decisions were then confirmed constitutionally and applied to technical regulations of procedural law, including the following:

1. The pretrial decision of the South Jakarta District Court Number 38/Pid.Prap/2012/PN.Jkt.Sel, dated 27 November 2012, p. 3., and the pretrial decision of the South Jakarta District Court Number 40/Pid.Prap/2012/PN.Jkt.Sel, dated 27 November 2012, determine that the pretrial has the authority to examine and decide whether or not the determination of a suspect is valid;
2. The pretrial decision of the South Jakarta District Court Number 04/Pid.Prap/2015/PN.Jkt.Sel “Komjen Budi Gunawan VS KPK Case” determine that the pretrial has the authority to examine and decide whether or not the determination of a suspect is valid;
3. The Constitutional Court Decision Number 21/PUU-XII/2014 determine the pre-trial has the authority to examine and decide on the validity of the determination of a suspect, the validity of a search and the validity of a confiscation;
4. The pretrial decision of the South Jakarta District Court Number 24/Pid/Pra/2018/PN.Jkt.Sel ordered the Corruption Eradication Committee (KPK) to name Boediono and his friends as suspects and then prosecute them in court;
5. The pretrial decision of the South Jakarta District Court 32/Pid.Pra/2015/PN.Jkt.Sel determining the pre-trial authority to examine and decide whether or not the blocking of a bank account is valid.

Pretrial at the Sharia Court in Aceh Province

In the discussion of the criminal justice subsystem, it has been explained that there is a subsystem of the Sharia Court in Aceh Province. This subsystem was born from the specificity and uniqueness of the Acehnese people who enforce Islamic sharia.³³ In the context of criminal justice, as the researcher has previously

³³ Abdul Manan and Cut Intan Salasiyah, “Evaluating the Implementation of Sharia in Aceh, Indonesia (Examining the Qanun Jinayat in Bireuen Regency),” *Jurnal Ilmiah Peuradeun* 9, No. 3 (2021). Mursyid Djawas, et.al., “Harmonization of State, Custom, and Islamic Law in Aceh: Perspective of Legal Pluralism,” *Hasanuddin Law Review* 10, No. 1 (2024).

stated, the Sharia Court has the authority to try criminal cases committed by Muslims in Aceh, as well as people who are not Muslims but submit themselves to Islamic law because they commit criminal acts together with Muslims or the criminal acts they commit are not regulated in the Criminal Code (KUHP) and other laws.³⁴ The components of criminal justice in Aceh Qanun Number 7 of 2013 concerning Criminal Procedure Law (Qanun Criminal Procedure Law) are almost the same as the Criminal Procedure Code.³⁵ Similar to the Criminal Procedure Code, the Criminal Procedure Law also determines that investigators are authorized police officers and Civil Servant Investigators (PPNS), public prosecutors are prosecutors who are authorized to prosecute, and guidance for convicts who are sentenced to prison is also carried out by correctional institutions. In relation to pretrial, the norms governing it in the Qanun Criminal Procedure Law (*Qanun Hukum Acara Jinayat/QHAJ*) are broadly the same as pretrial in the Criminal Procedure Code. If there are differences, they are only to adjust to current pretrial developments.

According to Article 82 QHAJ, the District/City Sharia Court in pretrial cases has the authority to examine and decide on the validity or otherwise of an arrest, detention, search, confiscation, examination of documents, termination of investigation or termination of prosecution, and compensation and/or rehabilitation for any person whose criminal case is terminated at the investigation or prosecution level. This provision is different from the Criminal Procedure Code which does not expressly include confiscation, and does not include searches and examination of documents as objects of pretrial.

If we examine further the provisions of this Qanun, especially regarding the authority to test the validity of searches, confiscations and examination of documents, it has preceded the Constitutional Court Decision Number 21/PUU-XII/2014, which only included searches and confiscations as objects of pretrial. However, this Qanun does not include the determination of a suspect as an object of pretrial. The exclusion of suspect determination as an object of pretrial motion is not only because at the time the Qanun was enacted in 2013 there was no Constitutional Court ruling, but also because at that time including suspect determination as an object of pretrial motion was not a populist idea. Moreover, the pretrial motion judge “Bachtiar Abdul Fatah VS Chevron” was sanctioned for including suspect determination as an object of pretrial motion.

If the Criminal Procedure Code determines that pretrial hearings are led by a single judge, this is different from the QHAJ. Article 83 paragraph (2) of the Jinayat Law Qanun states that pretrial hearings can be led by a single judge. This provision is different from the Criminal Procedure Code, which only determines a single judge to lead the hearing, while the QHAJ places the hearing being led by a single judge

³⁴Mursyid Djawas, et.al., “The Position of Non-Muslims in the Implementation of Islamic Law in Aceh, Indonesia, *Ahkam: Jurnal Ilmiah Syariah* 23, No. 1 (2023).

³⁵ The Qanun enforcers in Aceh are called Wilayatul Hisbah, which is the same as the Civil Service Police in other areas.

as the discretion of the Chief Justice of the Regency/City Sharia Court. This is because Article 83 paragraph (2) of the Qanun uses the phrase "can be led by a single judge", which means that pretrial hearings are led by a panel of judges unless the Chief Justice of the Sharia Court determines that it will be led by a single judge. There is a difference between the Criminal Procedure Code and the QHAJ regarding the legal standing of the applicant. In the request for the validity of the arrest and detention, the Criminal Procedure Code determines that it is submitted by the suspect, his family or attorney, while the QHAJ adds it to the other party who is harmed. From here, it appears that the QHAJ places the issue of arrest and detention, which is more personal in nature, into a public issue, so that anyone who feels aggrieved by the arrest and detention can file a pretrial hearing.

In the request for the validity of the termination of investigation or prosecution, QHAJ uses a different term from the Criminal Procedure Code to refer to other parties outside the request submitted by the investigator or public prosecutor. The Criminal Procedure Code uses the term 'interested third party' while QHAJ uses the term "other aggrieved party". The difference between the two terms lies in their scope, in this case the third party with an interest is broader than the other aggrieved party. In the context of the Criminal Procedure Code, as long as the third party can prove their interest in the termination of investigation or prosecution, then the party is considered to have legal standing without having to prove that there is a loss for them. In the context of QHAJ, the party must prove that there is a real loss for them due to the issuance of the termination of investigation or prosecution. If it cannot be proven, then the pretrial request can be declared unacceptable, because it does not have legal standing.

Another difference between pretrial motions in the Criminal Procedure Code and QHAJ is in terms of examination. QHAJ determines the trial date sooner than the Criminal Procedure Code, according to Article 87 paragraph (1) letter a QHAJ that the examining Judge determines the trial date within 2 (two) working days from the receipt of the request. This is different from the Criminal Procedure Code which determines it within 3 (three) days. Both QHAJ and the Criminal Procedure Code do not clearly determine the meaning of the acceptance of the request, whether since the pretrial motion was registered or since the relevant Judge received the case to be tried.

Regarding the examination time and when the examination begins. QHAJ determines that the verdict is rendered within 7 (seven) working days from the trial, while the Criminal Procedure Code only states that the Judge must have rendered the verdict within 7 (seven) days. Of course, this has a significant difference, not only does QHAJ determine a period of 7 (seven) days as a working day but more importantly regarding the commencement of the examination. QHAJ clearly states that the case has been tried since, while the Criminal Procedure Code only states that the examination must be carried out quickly and the judge must have made a decision

within seven days at the latest, but it is not clear when the examination is stated to have started.

Another provision in the QHAJ that is considered progressive in order to accommodate the interests of justice seekers in their cases in order to obtain legal certainty is the prohibition on conducting an examination of the main case, when the examination of the pretrial case is taking place. This norm is the antithesis of the provisions of Article 82 paragraph (1) letter d of the Criminal Procedure Code, which requires the pretrial case to be dropped. Article 82 paragraph (1) letter d of the Criminal Procedure Code is considered less accommodating to justice seekers, because it does not provide legal certainty for the applicant for the pretrial case that he has filed, and is susceptible to being misused by the Respondent by immediately submitting the main case to the court so that the pretrial case is dropped.

Another norm, which can also be considered a progressive step from the QHAJ when compared to the Criminal Procedure Code, is regarding the amount or size of compensation that must be fulfilled by the Judge. Article 89 QHAJ determines compensation for mistaken arrest or detention, namely 0.3 grams of pure gold or its equivalent, and compensation for mistaken search or seizure, namely the amount of damage to goods due to the search or seizure. This provision makes compensation in the case of mistaken arrest or prosecution can be measured with certainty, and compensation for mistaken search or seizure can be estimated. This is not found in the Criminal Procedure Code, even the Implementing Regulation of the Criminal Procedure Code only determines the maximum limit of the amount of compensation, so that it can cause disparities between one decision and another in the same case.

The Weaknesses of Pretrial

Criticism of the pretrial institution has emerged since the first discourse on the renewal of the Criminal Procedure Code. In the context of the renewal of the Criminal Procedure Code, the existence of the pretrial institution is always faced with the broad discretionary authority possessed by law enforcement officers such as assessing "sufficient evidence" to then be able to make arrests and detentions.³⁶ In this regard, the National Legal Counseling Agency (BPHN) is of the opinion that the renewal of the Criminal Procedure Code is necessary because there are still many legal loopholes that provide opportunities for law enforcement officers to transact their authority.

BPHN further stated the need for a renewal of the Criminal Procedure Code to accommodate new norms as a consequence of the ratification of international agreements such as the International Covenant on Civil and Political Rights, and the development of world law related to the eradication of crime and the protection of human rights as stated in the International Criminal Court, United Nations Against

³⁶ Supriyadi Widodo Eddyono, et.al, p. 83-90.

Corruption, and the International Convention Against Torture.³⁷ In this context, the existence of the pretrial institution is one of the materials for the amendment to the Criminal Procedure Code. As previously stated, pretrial institutions are considered less effective in providing guarantees of protection for a person's rights from being carried out arbitrarily by law enforcement officers in accordance with the intent of their establishment.³⁸

The pretrial institution has been in effect since the enactment of the Criminal Procedure Code, but it is very unfortunate that the duties and authorities of the pretrial are very limited. This is not only due to the limited insight that was possessed at that time, considering that pretrial was a completely new thing, but also because of the very repressive political situation and conditions, so that it was not possible to grant broader human rights guarantees. The pretrial formulated at that time must be seen as the optimal result that can be achieved, among other things, considering the constellation of political forces, both the police and the prosecutor's office at that time, which were generally still strongly oriented towards power.

After 30 (thirty) years of the enactment of the Criminal Procedure Code, namely from 1981 to 2011, the pretrial institution was felt to be less effective in carrying out its function as a control institution at the pre-adjudication stage. The pretrial was considered not to meet the expectations of its formation as a complaint institution aimed at preventing and overcoming arbitrariness carried out by investigators and public prosecutors.³⁹ Not only because of the unclear procedural law used along with the formal issues that cover it, but also because of the limited authority of pretrial which only tries the legality of arrest, detention, search, confiscation, termination of investigation and termination of prosecution, whether accompanied by a request for compensation and/or rehabilitation or not. Below the researcher explains the weaknesses contained in pretrial.

1. Lack of Court Arrangements

Pretrial Procedural Law does not get a large portion in the Criminal Procedure Code. Even the examination is only regulated in one Article, namely Article 82 of the Criminal Procedure Code. The limitations of the regulations on pretrial make the trial process very dependent on the "wisdom" of the Judge leading the trial. As long as it is regulated by the Criminal Procedure Code, the Judge is free to provide an interpretation to then apply it to a concrete case, but what if the Criminal Procedure Code does not provide any regulations about it at all.

³⁷ Badan Pembinaan Hukum Nasional, *Hakim Komisaris dalam Sistem Peradilan di Indonesia*, Jakarta, Oktober 2011, p. 13-14. The provisions of the ICCPR relating to the provisions of criminal procedure law include Articles 9 to 16.

³⁸ Supriyadi Widodo Eddyono and Erasmus AT Napitupulu, *Prospek Hakim Pemeriksa Pendahuluan dalam Pengawasan Penahanan Dalam Rancangan KUHAP*, Jakarta: Institute For Criminal Justice Reform, 2014, p. 29 s.d. 42.

³⁹ Luhut Pangaribuan, "Hakim Pemeriksa Pendahuluan (HPP) dalam Rancangan Sistem Peradilan Pidana di Indonesia", p. 7-10.

Theoretically, the Judge can indeed find the law (*rechtvinding*), or in the extreme, the Judge can create a new norm to then be applied (*jude made law*). This is where the problem lies, because the lack of regulation has given rise to various variants of pre-trial practices which ultimately give rise to legal uncertainty.

Judges often apply the principles applicable to civil procedural law in examining pretrial motions. The use of the principles of Civil Procedural Law is because the nature of a pretrial motion is the same as a civil lawsuit, namely a dispute between parties (*contentiosa*), and the party being sued is not positioned as an object of examination like the Defendant. However, are only the principles of civil procedural law that can be used, what about the principles of state administrative procedural law, which have the same object of examination, namely testing the actions of officials or government agencies.

2. Depends on the Application and Post Factum

In fact, the Criminal Procedure Code has provided an ideal mechanism for the use of coercive measures, but only limited to search and seizure efforts that must obtain permission from the Head of the District Court. This permission from the Head of the District Court, if utilized optimally, can at least minimize abuse of authority and excessive actions in conducting searches and seizures. However, in reality, investigators often take refuge in "urgent circumstances" to replace permission from the Head of the Court with approval from the Head of the Court. On the other hand, the Head of the Court responds pragmatically by granting approval on the grounds that the status of the confiscated evidence will be determined by the Judge during the examination of the main case.

Returning to the issue of pretrial which is intended as a means of control by the court over pre-trial actions, a mechanism such as "Obtaining permission from the Head of the District Court" should be applied to pretrial. In addition to maximizing the function and role of pretrial which is currently only waiting for requests, it is also to avoid dualism of court products regarding the issue of searches and seizures. With this mechanism, investigators or public prosecutors are required to request justification from the pretrial for the coercive measures they intend to take. In relation to the issue of searches and seizures, there are no longer any pretrial decisions that appear to cancel the permission or approval of the chief justice regarding searches and seizures carried out by investigators.

Unfortunately, the "permission" mechanism is not given to pretrial hearings at all, so that pretrial hearings can only carry out their functions after a request has been made. This is a criticism of pretrial hearings, which are considered unable to reach violations committed by investigators or public prosecutors, even though this has become a widespread issue in society. This issue is confronted with the concept of a closed pretrial hearing, in which investigators and public prosecutors have absolute authority to determine a person's fate. Moreover, if the person who is violated is in a weak and helpless position when facing state officials, who work in

the name of the law. Regarding this issue, Indriyanto Seno Adji stated that the function of pretrial hearings cannot reach torture and violence committed when someone is detained. This is because the person being detained is under the control of the party detaining him, and his every action is under the supervision of his detainee. So it is almost impossible in such a situation and condition for him to put up resistance. Moreover, the arresting party does not necessarily provide legal counsel to fight for his fate.

The consequence of the pretrial authority based on this request is that the examination is carried out after the action, aka *post factum*, so that the pretrial is not appropriate to be called a "control tool" but rather a "recovery institution". The pretrial is positioned as an institution that assesses the legality or otherwise of the coercive measures that have been taken, not assessing whether or not the coercive measures are appropriate to be taken. In relation to the pretrial authority based on a request, the pretrial can only restore the damage that has been requested, without being able to prevent it.

Pretrial control of coercive measures will be more effective if it exists before the coercive measures are taken. Every coercive measure must receive pretrial justification before being carried out. This is a preventive effort to reduce violations committed by investigators or public prosecutors. This is different from the current concept which can only test after the action has been taken, and even then after a request. This kind of pretrial concept makes the pretrial ineffective in carrying out its function as a means of control over coercive measures taken at the pretrial stage.

3. Formal Administrative Examination

There is no provision in the Criminal Procedure Code that states that pretrial hearings are formal administrative in nature. Pretrial hearings are considered to be formal administrative in nature because they are related to the maximum examination time of only 7 (seven) days. The 7 (seven) day period is considered to only allow for conducting formal administrative examinations, without touching on material aspects. Such an assumption arises not only because of the lack of procedural law regulations, but also because the examination is only led by a single judge, and the material examination is part of the examination of the main case.

The paradigm that places pretrial examination as merely administrative formality delegitimizes pretrial. The institution that was formed with the aim of controlling the actions and behavior of Investigators and Public Prosecutors in law enforcement, has turned into a formalistic administrative institution. If using such a paradigm, then whatever is argued, whatever quality and quantity of evidence presented by the Applicant will be useless when faced with the documents and files presented by the Respondent. However, ironically, the assumption that pretrial evidence is administrative formality is justified by Supreme Court Regulation Number 4 of 2016 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2016 as a Guideline for

the Implementation of Duties for the Court (Perma Number 4 of 2016), which in essence states that evidence in pretrial hearings regarding the application for the validity of suspect determination, confiscation and searches, the evidence only examines formal aspects.

If the Judge uses formal administrative evidence in trying the motion, the truth that appears is only the formal truth based on the results of the suspect's examination which is used as evidence by the investigator, so that the suspect's statement is no longer needed to be heard. The pretrial motion simply passes over the administrative arbitrariness, while whether or not the suspect's statement is true is the domain of the main case examination. By referring to the concept of evidence, it is impossible for the pretrial hearing to uncover the truth about what the suspect actually experienced. Whether or not the suspect was pressured and tortured cannot be proven legally. In fact, the Criminal Procedure Code itself requires the pretrial judge to hear the suspect's statement.

The concept of pretrial evidence that is formal administrative in nature has essentially denied the purpose and function of the establishment of pretrial as a control over the implementation of the authority of investigators and public prosecutors. The institution whose establishment is aimed at upholding justice as early as possible seems to be like an administrative institution, which only deals with files and places justice in those files. So there is no difference at all with non-judicial government administration institutions, namely simply examining formal administrative documents to decide whether the application is granted or rejected, so if so, it is appropriate that the word justice contained in the pretrial be removed and replaced with another term.

4. Dismissed if the Main Case is Transferred to Court

Article 82 paragraph (1) letter d of the Criminal Procedure Code essentially states that if the main case has begun to be examined, the pretrial case will be dropped. This norm is a loophole for the Respondent who is reluctant to have his actions tested to nullify the pretrial hearing. This is done by the Respondent by not being present at the first hearing, causing the Judge to postpone the hearing, and during the postponement period the Respondent immediately completes the investigation or prosecution files to then submit the case to the court. Trial practice provides various interpretations of the norm of Article 82 paragraph (1) letter d of the Criminal Procedure Code, especially regarding the phrase 'a case has begun to be examined'. Is it since the Public Prosecutor submitted the case to the court, or since the first hearing was conducted, or when the indictment was read. The multiple interpretations were then ended by the Constitutional Court through its decision Number 102/PUU-XIII/2015, which stated that the phrase 'a case has begun to be examined' is constitutional if interpreted as when the main case has been delegated and the first trial has begun on the main case on behalf of the defendant/applicant for pretrial motion.

The Constitutional Court's decision was not immediately accepted by the judicial institution as the party implementing it. The Supreme Court has a different interpretation of the provisions of Article 82 paragraph 1 letter d of the Criminal Procedure Code. Through SEMA Number 5 of 2021 in the 2021 Criminal Chamber Meeting, in essence, the Supreme Court's judicial case has been dropped since the case file was transferred and received by the Court. According to the Supreme Court, this was because the status of the Suspect had changed to that of the Defendant and the status had changed to that of a judge's detainee. However, the Supreme Court later stated that if the Judge still issued a decision and granted it, this would not stop the main case.⁴⁰

The dualism originating from these 2 (two) judicial institutions at first glance provides judges with the option to choose it on a case-by-case basis for the sake of law enforcement and justice. Judges can follow the interpretation of the Constitutional Court and can also follow the interpretation of the Supreme Court. However, if viewed more deeply, this is very detrimental to those seeking justice, because the legal certainty of Article 82 paragraph (1) letter d of the Criminal Procedure Code is increasingly uncertain.⁴¹ In fact, this dualism has claimed the victim of a Judge at the Teluk Kuantan District Court who was given a warning sanction by the Judge Supervisory Body because he followed the interpretation of the Constitutional Court, not the interpretation of the Supreme Court.⁴²

5. No Legal Remedies

The fast nature of pretrial hearings means that the legislators in principle do not want any legal action. Moreover, for pretrial objects submitted at the investigation phase, it is possible that they can be tested again at the prosecution phase. However, the legislators exclude certain decisions from being able to request legal action.

Article 83 paragraph (1) of the Criminal Procedure Code stipulates that pretrial decisions, both regarding testing the validity of arrests, detention, termination of investigations and termination of prosecutions, as well as compensation for cases that are not submitted to court, cannot be appealed. However, according to paragraph (2) of the Article, if the termination of the investigation or prosecution is invalid, a final decision can be requested to the high court. This decision is an exception, but can only be tested to the high court as a final decision. This means that the decision of the high court is final and binding, which cannot be brought to the Supreme Court.

⁴⁰ SEMA Number 5 of 2021 in the 2021 Criminal Chamber Meeting stated "In criminal cases, since the case files are transferred and received by the Court.

⁴¹ Supreme Court Supervisory Body of the Republic of Indonesia, Disciplinary Sanctions March 2022.

⁴² The consideration of the Teluk Kuantan District Court decision Number 2/Pid.Pra/2021/PN Tlk. The Constitutional Court Decision Number 102/PUU-XIII/2015.

The fast nature of pretrial hearings means that the legislators in principle do not want any legal action. Moreover, for pretrial objects submitted at the investigation phase, it is possible that they can be tested again at the prosecution phase. However, the legislators exclude certain decisions from being able to request legal action. Article 83 paragraph (1) of the Criminal Procedure Code stipulates that pretrial decisions, both regarding testing the validity of arrests, detention, termination of investigations and termination of prosecutions, as well as compensation for cases that are not submitted to court, cannot be appealed. However, according to paragraph (2) of the Article, if the termination of the investigation or prosecution is invalid, a final decision can be requested to the high court. This decision is an exception, but can only be tested to the high court as a final decision. This means that the decision of the high court is final and binding, which cannot be brought to the Supreme Court.

The inconsistency and discrimination were addressed by the Constitutional Court through its decision Number 65/PUU-IX/2011. According to the Constitutional Court, the norm of Article 82 paragraph (2) of the Criminal Procedure Code which excludes Article 82 paragraph (1) of the Criminal Procedure Code is not in line with the expedited pretrial examination procedure. The Constitutional Court then opined that the existence of Article 82 paragraph (2) of the Criminal Procedure Code creates an imbalance of rights for the parties involved in the pretrial. This is because the article allows the party issuing the termination to take legal action, whereas if the termination is considered valid then there is no legal action. Of course this is very detrimental to the party questioning the termination, both the investigator or public prosecutor concerned and the third party concerned, who is usually the victim. Based on this, the Constitutional Court opined that Article 82 paragraph (2) of the Criminal Procedure Code is unconstitutional and contradicts Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution, namely that it does not equalize legal standing and there is no certainty of fair law.⁴³

According to Article 45 paragraph (1) and paragraph (2) letter a of Law Number 5 of 2004 expressly excludes pretrial decisions from being examined at the cassation stage, and Supreme Court Regulation Number 4 of 2016 expressly prohibits pretrial decisions from being subject to judicial review. Thus, the pretrial decisions with any pretrial object become final decisions and bind the parties (final and binding). Like it or not, even if there is a glaring error in the decision, the parties

⁴³ Decision Number 65/PUU-IX/2011 states “Article 83 paragraph (2) of Law Number 8 of 1981 concerning Criminal Procedure Law (State Gazette of the Republic of Indonesia of 1981 Number 76, Supplement to the State Gazette of the Republic of Indonesia Number 3209) is contrary to the 1945 Constitution of the Republic of Indonesia; Article 83 paragraph (2) of Law Number 8 of 1981 concerning Criminal Procedure Law (State Gazette of the Republic of Indonesia of 1981 Number 76, Supplement to the State Gazette of the Republic of Indonesia Number 3209) does not have binding legal force.”

must still implement it without any opportunity to challenge the decision in a higher court.

6. Implementation of the Decision Depends on the Respondent

In the context of pretrial, especially if the Judge grants a request to test the actions of investigators or public prosecutors in the form of the validity of arrests, detentions, confiscations, searches, determination of suspect status and the validity of termination of investigation or prosecution, the Judge issues a decision whose ruling states that the action is invalid. The ruling is then accompanied by a ruling ordering the Respondent to take certain actions in connection with the granting of the request. It is not a problem if the Respondent, in this case the investigator or public prosecutor, voluntarily agrees to comply with the ruling. However, it becomes a serious problem if the investigator or public prosecutor is unwilling to carry it out. The court cannot do anything other than witness the disobedience to its ruling.

There are at least several real examples of the reluctance of investigators or public prosecutors to comply with pretrial rulings for various reasons. First, in the case of Bahctiar Abdul Fatah VS Attorney General's Office as in ruling Number 38/Pid.Prap/2012/PN.Jkt.Sel, which the researcher has previously described at length. In this case, the Judge granted the pretrial motion with a ruling stating that the Attorney General's Office's determination of Bachtiar Abdul Fatah as a suspect was invalid, and then ordered the Attorney General's Office to release him from detention. However, on the pretext that the Judge had issued a verdict beyond his authority, the Attorney General's Office refused to implement the verdict and then referred the case to the court.

The second example is the case of termination of investigation of a blasphemy case with suspect Ade Armando. The plaintiff filed a pretrial motion to the South Jakarta District Court against the termination of investigation conducted by the Metro Jaya Regional Police. In response to the petition, the South Jakarta District Court through its decision Number 84/Pid.Pra/2017/PN Jkt.Sel stated that the letter of termination of investigation issued by the Metro Jaya Regional Police was invalid.⁴⁴ However, the Metro Jaya Regional Police investigators who should have continued the investigation and then transferred the case to the Public Prosecutor did not do so, but instead only left the case without a clear status.⁴⁵

⁴⁴ The complete verdict of the pretrial decision of the South Jakarta District Court Number 84/Pid.Pra/2017/PN jkt.Sel is: 1. Granting the applicant's request in part; 2. Declaring invalid: Letter of Termination of Investigation Number: SPPP/ 22/ II/ 2017/ Dit Reskrimsus, dated February 1, 2017, Directorate of Special Criminal Investigation, Metro Jaya Regional Police; and Decree Number: S.Tap/ 22/ II/ 2017/ Dit Reskrimsus Regarding the Decree of Termination of Investigation, dated February 1, 2017, Directorate of Special Criminal Investigation, Metro Jaya Regional Police; 3. Charging the defendant with court costs in the amount of nil;

⁴⁵ CNN Indonesia, *Polisi Masih Bungkam soal Nasib Kasus Penistaan Agama Ade Armando*, Senin, 18 April 2022. <https://www.cnnindonesia.com/nasional/20220418202652-12-786323/polisi-masih-bungkam-soal-nasib-kasus-penistaan-agama-ade-armando>. Republika.co.id, *Kasus Penistaan*

The third is the Boedi Mulya VS KPK decision as in decision Number 24/Pid/Pra/2018/PN.Jkt.Sel. In this decision, the pretrial judge issued a decision by ordering the KPK investigators to determine Boediono et al as Suspects and then ordered the KPK Public Prosecutor to submit the case to the Court. Similar to the 2 (two) previous decisions, in this decision the Corruption Eradication Committee is reluctant to comply with the pretrial decision, so that up to now Boediono et al still have the status of free people without being burdened with suspect status.

Another pretrial case that attracted attention was the pretrial case of 'La Nyala Mattaliti VS Attorney General's Office CQ. East Java High Prosecutor's Office'. In this case, La Nyala Mattaliti had been declared victorious at least 2 (two) times against the Attorney General's Office regarding his determination as a suspect for alleged corruption related to the use of Grant Funds at the East Java Provincial Chamber of Commerce and Industry in 2012 for the purchase of Bank Jatim's Initial Public Offering (IPO). Not accepting the determination of a suspect against La Nyala Mattaliti, he filed a pretrial case with the Surabaya District Court against the Attorney General's Office CQ the East Java High Prosecutor's Office. The Surabaya District Court through its decision 11/PRAPER/2016/PN.SBY won La Nyala Mattaliti by declaring that the determination of a suspect against him was invalid. The reason the pretrial judge granted it was because the case had previously been investigated, so the second investigation was invalid.

Not accepting the pretrial decision, the East Java High Prosecutor's Office named La Nyala Mattaliti a suspect again for a similar case. The suspect determination was then challenged again by La Nyalla Mattaliti through his son Muhammad Ali Affandi by filing a pretrial motion to the Surabaya District Court. Similar to the previous pretrial decision, the Surabaya District Court through decision Number 19/PRA.PER/2016/PN.SBY stated that the suspect determination of La Nyala Mattaliti was invalid for the same reason, namely repeated investigation.⁴⁶ However, instead of trying to collect new evidence to clarify the case, the East Java High Prosecutor's Office instead re-named La Nyala Mattaliti as a suspect just one day after the decision. This case truly ended after the Corruption Court through its decision 76/Pid.Sus/TPK/2016/PN.Jkt.Pst acquitted La Nyala Mattaliti from the Public Prosecutor's charges. Which was then strengthened by the Supreme Court's cassation decision Number 765 K/PID.SUS/2017.

Agama Ade Armando tidak Jalan, Begini Dalih Polda Metro Jaya, Selasa, 12 Apr 2022, 19:00 WIB, Selasa, 12 Apr 2022, 19:00 WIB Selasa, 12 Apr 2022, 19:00 WIB, <https://news.republika.co.id/berita/ra86on485/kasus-penistaan-agama-ade-armando-tidak-jalan-begini-dalih-polda-metro-jaya>.

⁴⁶ The verdict of case Number 19/PRA.PER/2016/PN.SBY stated: 1. Granting the applicant's request in part. 2. Stating according to law that the determination of the applicant as a suspect by the respondent is invalid. 3. Declare that the Investigation Order Letter from the Respondent Number: Print-256/O.5/Fd.1/03/2016, dated March 10, 2016, and the Investigation Order Letter from the Respondent Number: Print-291/O.5/Fd.1/03/2016, dated March 16, 2016.

The Idea of a Commissioner Judge as a Substitute for Pretrial

The concept of the Commissioner Judge in the 2004 RKUHAP is intended as an improvement on pretrial proceedings which are considered to still have many weaknesses, especially related to the limitations of their authority to more effectively control the investigation and prosecution process. The principal difference between the Commissioner Judge in the 2004 RKUHAP and pretrial is his active role. The Commissioner Judge can determine the validity of arrests, detentions, confiscations, termination of investigations and prosecutions that are not based on the principle of opportunity, without having to have a request from the suspect, his family or his attorney.⁴⁷

The authority of the Commissioner Judge in the 2004 RKUHAP was then expanded again in the 2007 RKUHAP. In the 2007 RKUHAP, the Commissioner Judge has the authority to visit suspects or witnesses in order to find out their condition. This authority is not found in the 2004 RKUHAP. Without this authority, the Commissioner Judge in the 2004 RKUHAP only acts as an institution that monitors investigations and prosecutions, while the 2007 RKUHAP places the Commissioner Judge as a "master" of the case like an investigator, who can visit suspects or witnesses at their residence.

In the April 2007 RKUHAP, the authority of the Commissioner Judge was further expanded to assess whether or not the Public Prosecutor was fit to carry out a prosecution.⁴⁸ According to the explanation, the Commissioner Judge was created to replace the pretrial institution which has not been running properly, and is located between investigators and public prosecutors on the one hand and judges on the other hand with broader and more complete authority than pretrial.⁴⁹

The April 2007 RKUHAP was then refined by the December 2007 RKUHAP. The concept of the Commissioner Judge in the December 2007 RKUHAP is no different from the 2004 RKUHAP and the April 2007 RKUHAP. The authority of the Commissioner Judge in Article 111 paragraph (1) of the December 2007 RKUHAP includes the authority of the Commissioner Judge contained in the 2004 RKUHAP and the April 2007 RKUHAP. The interesting thing about the December 2007 Criminal Procedure Code is that the commissioning judge can order investigators to carry out an autopsy if the family objects to the autopsy.⁵⁰

The idea of the Commissioner Judge in the 2007 RKUHAP is maintained in the 2008 RKUHAP. There is no difference in the authority held by the Commissioner Judge as stated in the 2007 RKUHAP and the 2008 RKUHAP. The 2008 RKUHAP drafting team stated that the Commissioner Judge is maintained in the 2008 RKUHAP after the drafting team compared it with similar concepts in France, Italy, the Netherlands, Germany, America and Australia, and after the

⁴⁷ Article 72 paragraph (2) of the 2004 Criminal Procedure Code.

⁴⁸ Article 73 paragraph (1) letter f. In the April 2007 RKUHAP.

⁴⁹ General explanation of the April 2007 RKUHAP, p. 3.

⁵⁰ Article 38 paragraph (4) of the December 2007 RKUHAP.

drafting team studied the Criminal Procedure Codes of various countries such as the Dutch, Belgian, French, Italian, German, Russian Federation, Georgia, Thailand, Malaysia, the People's Republic of China (PRC), Japan and the United States.⁵¹ However, in the 2012 RKUHAP, the term Commissioner Judge was replaced with Preliminary Examining Judge. The use of the nomenclature of the Preliminary Examining Judge can be equated with the term *Giudice per le indagini preliminari* in Italy or Magistrate in the United States.

The authority of the Preliminary Examining Judge is both active and passive. Active means that the Preliminary Examining Judge in exercising his authority does not have to wait for the submission of an application from the parties as is the case in the pretrial institution. On his own initiative, the Preliminary Examining Judge can exercise his authority, except regarding the issue of whether or not a prosecution can be carried out, which requires an application from the Public Prosecutor.⁵² Regarding this, Fachrizal Affandi stated that this Preliminary Examining Judge is conceptually more able to provide human rights guarantees for suspects/defendants compared to the pretrial that is currently in effect.⁵³

Pretrial proceedings that have been in effect since 1981 have not been able to accommodate the needs of justice seekers to obtain justice as early as possible. This is because its nature is very concerned with the formal administrative aspect rather than the substantive aspect of justice. With its limited authority, pretrial proceedings are even powerless when faced with the actions of investigators or public prosecutors who are reluctant (unwilling), stalling for time (buying time) or selective in handling cases.

Even though pretrial exists as horizontal supervision of the actions of investigators and public prosecutors, this institution has not been able to play its role optimally. Only on the basis of discretion regarding the sufficiency of evidence, a person can be dragged all the way to the criminal court to be tried. Starting from being named a suspect, being arrested, detained, to blocking accounts including the accounts of his children and wife can be done by investigators without having to go through prior testing. This is further exacerbated by the testing mechanism by the Head of the District Court against permits or approvals for seizures and searches which are purely administrative in nature, without the need for material testing whether the seizure and search are really needed or not.

From the weaknesses of pretrial, there is a discourse to fix it. Some have proposed that the pretrial authority be demanded like pretrial in the United States and

⁵¹ Academic Manuscript of RKUHAP 2008, pages 1 to 7. Regarding the study of the Commissioner Judge in the Academic Manuscript of RKUHAP 2008.

⁵² Article 111 paragraphs (2) and (3) RKUHAP 2012.

⁵³ Fachrizal Afandi, "Perbandingan Praktik Praperadilan Dan Pembentukan Hakim Pemeriksa Pendahuluan Dalam Peradilan Pidana Indonesia", *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* 28, No. 1, (2016), p. 103.

extend to every coercive effort carried out by investigators.⁵⁴ There is also a discourse to revive the Commissioner Judge like in the colonial era, who not only supervises the legal process at the pre-adjudication stage but can also conduct investigations, examine and summon witnesses and suspects like investigators.

Not only limited to these two discourses, there is also a discourse that wants the formation of a Preliminary Examining Judge inspired by *juge d' instruction* in France,⁵⁵ Examining Judge in the Netherlands and *Giudice per le indagini preliminari* in Italy.⁵⁶ This Preliminary Examining Judge is positioned as a mediator between the interests of law enforcement represented by investigators and public prosecutors with the interests of the community that are in contact with the legal process. The goal is clear, namely to answer whether the reported crime actually occurred or not, and to ensure that the legal process carried out by investigators and public prosecutors has been carried out in accordance with applicable provisions.

The ineffectiveness of pretrial proceedings in carrying out its functions is due to the design of the Criminal Procedure Code which adheres to the principle of functional differentiation. This causes pretrial control over the implementation of authority carried out by investigators and public prosecutors to be limited to formal administrative aspects, because based on the principle of functional differentiation, the authority to investigate and prosecute is the autonomous authority of investigators and public prosecutors. Moving from the ineffectiveness of pretrial proceedings, there must be court control that is not only carried out in the pre-adjudication phase but also includes the post-adjudication phase. If court control in the pre-adjudication phase is aimed at providing justice as early as possible to the community that comes into contact with the initial criminal justice process, while court control in the post-adjudication phase is aimed at ensuring that the decision handed down by the Judge is actually implemented as it should be.

The court should be involved from the beginning to the end of the criminal justice process. From the upstream since the alleged crime was discovered or reported to the downstream, namely related to the implementation of the sentence. Thus, all actions of the criminal justice apparatus can be tested or must pass the test in court. The element of the court here plays a role in balancing the position of the powerless community with the position of law enforcement officers as the party authorized to take action, so that law enforcement can be carried out objectively.

This idea automatically changes the concept of functional differentiation from the Criminal Procedure Code to the concept of court centric, aka the court as

⁵⁴ James Inciardi, *Criminal Justice*, Harcourt Brace Jovanovich, Florida, 1990, p. 171.

⁵⁵ Jacqueline Hodgson, "Constructing the pre-trial role of the defence in French criminal procedure: An adversarial outsider in an inquisitorial process?", *International Journal of Evidence and Proof*, University of Warwick, November 2009.

⁵⁶ Edward Johnston. et.al., *A Comparative Analysis of Pre-Trial Procedure in Europe: The Search for an Ideal Model*, *A Comparative Analysis of Pre-Trial Procedure in Europe: The Search for an Ideal Model*, Istanbul University Press, Istanbul-Turkey, 2020, hlm. 41-66, p. 109-132.

the axis of criminal justice. If the concept of functional differentiation divides the roles of the components of criminal justice based on their respective functions, the concept of court centric places the court as the center of criminal justice. In functional differentiation, the position of each component of criminal justice is equal, while in court centric the court is the ruler. Every action taken by the components of criminal justice can be canceled by the court, and these components must carry out every court order.

The role of the court as a court control over the criminal trial is more appropriately carried out by the Commissioner Judge rather than maintaining the pretrial or Preliminary Examining Judge, which in terms is only intended as court supervision in the pre-adjudication phase. The term Commissioner Judge can also replace the current Judge Wasmat. However, the Commissioner Judge that the researcher means here is not like the Commissioner Judge as stated in the SV or juge d'instruction in France who also performs executive duties, but rather the Commissioner Judge who purely carries out his duties as a judiciary by conducting tests on the actions taken by investigators, public prosecutors and correctional institutions.

The Supervisory and Observer Judge Institution that has been in effect so far is not at all experimental or can conduct tests. Its function is only to monitor and provide advice to the Correctional Institution. However, it cannot test regarding the reduction of sentences carried out by the Prison, such as granting remissions, conditional releases, conditional leave and so on. In fact, the reduction is a correction to the Judge's decision which is not carried out by a higher court. In addition, the Supervising and Observer Judges are also powerless when faced with the failure to execute death row convicts, even though all available legal efforts and means have been taken.

Conclusion

Pretrial has not been able to meet the expectations of its formation as a means of control in the pretrial phase to uphold the law, truth and justice. There are still many weaknesses in pretrial that make it ineffective in supervising the implementation of the use of authority by investigators and public prosecutors. The first weakness is the lack of procedural regulations. Article 82 of the Criminal Procedure Code as a guideline for Judges in examining pretrial applications does not comprehensively regulate the procedures for its proceedings. The second weakness is that pretrial depends on the existence of an application and is post factum. The third weakness is that pretrial examination is of a formal administrative nature. The fourth weakness is that the case is dropped after the main case is transferred to the court. The fifth weakness is that there is no legal remedy against the pretrial decision. The sixth weakness is that the pretrial decision does not have executorial power, because the pretrial decision depends on the respondent to carry it out or not. In addition, pretrial cannot reach the actions of investigators or public prosecutors

outside of those specified including their authority even though the actions are clearly violations. The concept of court supervision in the ideal criminal justice system is supervision that can balance the position of society with the position of the 'State'. The court must ensure that the power held by the state is not carried out excessively and arbitrarily against its people. The court is in the middle between the interests of the state to enforce the law and the interests of the people whose rights must be guaranteed and cannot be arbitrarily taken away. As a judicial institution, the court must become the center of criminal justice (court centric), which has the authority to supervise the actions of law enforcement officers from the investigation to the execution stage, both the implementation of coercive and non-coercive authority. The concept of court supervision is technically more appropriate to be carried out by the Commissioner Judge who is between the interests of investigators, public prosecutors, correctional institutions and the interests of the community as suspects, victims, or as interested parties.

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