Conceptual Article

Presence of Pretrial in the Perspective of the Pancasila State of Law

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ABSTRACT

Pretrial is a process that precedes a trial in court or a preliminary examination before entering a trial. However, in its application, pretrial institutions both before and after the Constitutional Court Decision Number 21/PUU-XII/2014 are not in accordance with the Criminal Procedure Code and also have weaknesses or shortcomings. This paper aims to find out the presence of pretrial institutions in the perspective of the Pancasila state of law. In other hand, pretrial institution as an institution that oversees the protection of the human rights of suspects/defendants is regulated in Chapter X Articles 77 to Article 83 of the Criminal Procedure Code. The determination of the suspect must be carried out carefully by taking into account the principle of presumption of innocence as a general principle in criminal procedural law that must be enforced by law enforcers. In law enforcement, of course, there must be supervision both vertically and horizontally so as to minimize the occurrence of irregularities. Therefore, it is important to establish an Ad Hoc institution as a substitute for a Pretrial institution in which the judges consisting of career judges, legal practitioners and academics can act whether there is an application or not which is filed by the suspect/defendant or his family or proxies so that the decision is objective. Thus, it is important to reformulate the Criminal Procedure Code regarding the determination of suspects.

Keywords: Presence; Pretrial Institution; Pancasila State of Law

A. INTRODUCTION

The Indonesian state is a legal state based on Pancasila and the 1945 Constitution, therefore all problems must be resolved according to law (Situmeang, 2016). In realizing a rule of law, it cannot be separated from the concept of good governance, namely the concept of a clean, good and authoritative government (Börzel, & Risse, 2010). In this regard, Hans Kelsen said that the concept of human rights cannot be separated from the presence of a rule of law that prioritizes and protects human rights (Aswandi, & Roisah, 2019).

One manifestation of this concept is a pretrial institution as regulated in Article 1 number 10 of the Book of Law no. 8 of 1981 concerning the Criminal Procedure Code (KUHAP). The pretrial which is requested by the suspect or his family or proxies aims to protect the suspect's human rights against violations in the investigation, investigation, detention, search, confiscation, examination of letters, legal assistance and other rights of suspects as regulated in the Criminal Procedure Code. In addition, based on the Constitutional Court's Decision Number 21/PUU-XII/2014 dated April 28, 2015 regarding the Judicial Review of Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP) against the 1945 Constitution, it is stated that the authority of the Pretrial Institution includes

whether the determinations of suspects, searches and confiscations are legal or not (Anditya, 2018). Looking at the functions and authorities of the pretrial institution, it shows that there is a state responsibility in protecting the human rights of suspects as well as a form of supervision at the investigation level in order to avoid violations and/or deviations from the provisions stipulated in the Criminal Procedure Code as material law. On the other hand, there are limitations of the law in expressing needs in accordance with the laws that develop in society (Shah, 2015). However, the law creates rights that can be enforced (Eudy, 2018).

In this regard, the police as the front line in determining suspects should be able to distinguish the types of cases. If the case is a criminal case, then can a settlement through be applied restorative justice as a model for resolving cases that are included in the Police. This is intended to avoid an acquittal, where the act that has been charged against the defendant has been proven, but the act is not a criminal act as referred to in the Criminal Procedure Code and avoids wrongful arrests that result in losses to the suspect. Considering the principle of presumption of innocence in the criminal justice system and the rights of suspects as regulated in the Criminal Procedure Code. Although investigators in detaining suspects are based on evidence as regulated in Article 184 of the Criminal Procedure Code, but seeing the possibility of wrong application of the law, the author is of the opinion that 2 (two) pieces of evidence that determine the alleged occurrence of criminal acts are still subjective, so that other evidence or additional evidence is needed to be able to determine the suspect while still upholding the suspect's human rights in the investigation process. In addition, the professionalism and integrity of the Police as law enforcement officers can increase public perception of the legitimacy of the police (Stoughton, 2014).

Then, the detention of suspect has an impact on the suspect and his family (Wiseman, 2013), such as the difficulty to get a job (Suonpää, Aaltonen, & Geest, 2020). Thus, the determination of the suspect must be applied carefully. It is argued by J. Van. Kan who states that the purpose of law is to prevent arbitrary actions so that legal certainty can be realized (Kusumastuti, 2018). It is the purpose of Pretrial in the Criminal Procedure Code in the context of protecting human rights (Siar, 2019).

Based on this description, the conceptual idea is that there is a lack of pretrial institutions, namely only examining pretrial cases that are requested, besides that pretrial institutions are sometimes subjective in their decisions, in addition to the concept of the Preliminary Examining Judge as regulated in the Draft Criminal Code, so that the possibility of subjective the decision still exists, this is considering that the concept of the Preliminary Examining Judge is a single Judge and is a Career Judge. In addition, the concept of Judges Preliminary require the number of judges that much because when running the function judges preliminary examination it should be excused from the other, by the authors hold the view that the importance of reconstruction and reformulation of the Criminal Code related to the replacement of institutions Pretrial with the Ad Hoc agency. In the concept of justice, the Ad

Hoc Institution consists of career judges, legal practitioners and academics that can act when there is a request or there is no application, provide an objective decision on the determination of the suspect, and determine that the case is continued until a judge's decision is made or ordered to pay compensation. Based on this, in order to be able to describe the conceptual idea of the presence of pretrial institutions in the perspective of the State of Law of Pancasila, it is necessary to understand first, namely: first, what is the legal basis for pretrial institutions and second, how is the legal position of pretrial institutions at the theoretical level and its implementation in the Pancasila state of law. The previous researches related to or approaching the title and issues raised that support this writing are as follows: Ariesta Wibisono Anditya explained that the pretrial authority in determining the legitimacy of suspects can support, but at the same time can also be a tool for destroying Pancasila democracy (Anditya, 2018). In addition, Ely Kusumastuti said that the MKRI Decision No. 21/PUU-XII/2014 dated April 28, 2015 created legal uncertainty because it added the object of Pretrial with the determination of suspects, confiscation and searches (Kusumastuti, 2018). Meanwhile, Dita Aditya, Otto Yudianto and Erny Herlin Setyorini state that the fulfillment of justice in pretrial matters when there is an understanding that third parties could take action against the actions of investigators or public prosecutors (Aditya, Yudianto & Setyorini, 2020). Meanwhile, Rocky Marbun, Abdul Hakim, M. Adystia Sunggara explained that law enforcement officers (investigators, public prosecutors, judges) always ignore Pancasila as the philosophical basis of thought in carrying out the law by forgetting the institutional legal culture in the criminal justice system in the myth of modernity which is human objectivity (Marbun, Hakim & Sunggara, 2018). In addition, Johny Khoesoema Hioe, Anis Mashdurohatun, Gunarto and Irwan Jasa Tarigan state that pretrial institutions have a weakness; an unfair and ineffective complaint mechanism (Hioe, Gunarto, & Tarigan, 2020).

Based on this description, the conceptual idea in this paper is different from previous writings, where the writing carried out by the author is a response to various interpretations of the level of function and authority of the pretrial institution and problems in the field, so it is important– an Ad Hoc institution was formed in determining suspects by outlining the legal basis of the Pretrial institution from the historical, philosophical and juridical levels in the Pancasila State of Law and how the legal position of the institution in theory and practice so that this Ad Hoc institution does not cause multiple interpretations in its implementation for the realization of legal goals in the Pancasila state of law.

B. DISCUSSION

1. The Legal Basis of Pretrial Institutions

Based on Article 1 paragraph (3 of the 1945 Constitution, Indonesia is a state of law, therefore everything must be resolved through law, not by politics or economics, meaning that in a state of law the commander in chief is law (Asshiddiqie, 2011). The government is responsible for law enforcement can be based on justice. In the process, it is not only

the existing legal substance but also a legal structure and legal culture (Irsana, Ismail & Siregar, 2020).

Satjipto Raharjo said that the law has no function, if are not applied or enforced for lawbreakers, those who enforce the law in the field are law enforcement officers (Setiadi, & Kristian, 2017).Where in fact the law affects people's lives and social values that live in society (Dagan, 2015).This means pretrial institutions. As part of the judiciary in carrying out criminal procedural law It should be in accordance with the 1945 Constitution and Pancasila as the basis of the Indonesian state for the sake of upholding justice, certainty and benefit.

Historically the enforcement of procedural law in Indonesia began with HIR Staatsblad Number 44 of 1941 which is a codification containing provisions of criminal procedural law applicable in Indonesia (Article 6 paragraph (1) of Emergency Law No. 1 of 1951) where the Staatsblad has shortcomings namely the absence of restrictions on authority in conducting preliminary examinations, then Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP) which regulates the rights of suspects/defendants, legal assistance in supervising decision implementers, Pretrial and others is enacted (Yanto, 2013).

In line with this, there are several principles in the Miranda Rule that are accommodated in the Criminal Procedure Code which relate to respect for human rights, especially in protecting the rights of suspects.

In the Miranda Rule it is explained that if the suspect is not accompanied by an advocate in the event of an investigation, prosecution or examination at trial, the result of the investigation is null and void. This is related to the principle of presumption of innocence as the most important principle in criminal procedural law (Situmeang, 2019).

In this regard, philosophically the establishment of a pretrial institution is listed in the guidelines for implementing the Criminal Procedure Code for the purpose of monitoring the protection of the human rights of the suspect/defendant. Thus, it can be understood that the establishment of a pretrial institution acts as a supervisory agency for the results of investigations carried out by investigators and as a supervisor for the implementation of prosecutions, arrests, detentions, termination of investigations or termination of prosecutions carried out by public prosecutors (Plangiten, 2013). This is in accordance with the pre-trial arrangements as stated in Article 1 number 10, Article 77 to Article 83 of the Criminal Procedure Code (Yuliartha, 2009).

Juridically, the presence of a pretrial institution in the Criminal Procedure Code has experienced a dissenting opinion so that Law No. 8/1981 on the 1945 Constitution related to Article 80 of the Criminal Procedure Code regarding interested third parties has been decided through the Constitutional Court Decision No. 98/PUU-X/2012 which basically explains that there is an expansion of meaning in Article 80, especially regarding the understanding of third parties (Londah, 2017). Whereas based on this the author is of the view that with the decision of the Constitutional Court, it is important to follow up with reformulation of the provisions of the Criminal Procedure Code so that legal certainty can be achieved and does not cause multiple interpretations.

Furthermore, in the decision of the Constitutional Court Number 21/PUU-XII/2014 related to the review of Law Number 8 of 1981 concerning the Criminal Procedure Code against the 1945 Constitution, which basically states that there is additional authority given to the Pretrial, namely to examine whether or not the determination of a suspect is legal, check whether the search is legal or not, and check whether the confiscation is legal or not (Roberts, 2019). Based on this, it is of the view that with the expansion of authority, the judge should not examine what is the subject of the case seeking material truth, but in the preliminary examination at the pretrial institution the judge should examine the procedure and administratively whether or not it is in accordance with the criminal procedural law or other laws and regulations. In other words, judges in pretrial institutions examine formal and material truths.

Thus, the legal basis for pretrial institutions is clearly stated in the Criminal Procedure Code as the legal basis for criminal procedures in accordance with the Pancasila State of Law (Simamora, 2014).

This is in line with the balance theory of Otje Salman which explains that Pancasila is a unified whole that cannot be separated so that it is a system (Salman, & Susanto, 2005). Thus, justice in the perspective of Pancasila is in balance, harmony, and harmony (Erwinsyahbana, & Syahbana, 2018).

Based on this, it is important to reformulate the Criminal Procedure Code so that legal certainty, justice and legal benefits are achieved.

2. The Legal Position of Pretrial Institutions in The Theory and Its Implementation

Preliminary examination is an action taken against a pretrial investigation or prosecution process while a pretrial is a process carried out before a trial in court or before a preliminary examination (Rahim, 2012). The function and authority of the pretrial institution in examining, deciding whether or not a raid is valid in the investigation of a criminal act must sometimes be carried out by making the arrest of a suspect, which is an act of temporary restraint. In order to carry out the arrest, 2 (two) formal requirements must be met, namely: (1) by the police on the orders of the investigator, complete with a letter of assignment, (2) giving an investigator's order to the suspect and a copy to the family, (3) except in the case of being caught red-handed. , where the arrest is carried out by anyone with material conditions: (a) based on Article 17, namely the presence of sufficient preliminary evidence, (b) based on Article 19 paragraph (1) of the Criminal Procedure Code that the maximum arrest is one day 1 x 24 hours. Thus, the suspect can file a pretrial if the act of detention is contrary to the provisions (Article 21 of the Criminal Procedure Code) and if the detention is carried out past the time limit (Article 24 of the Criminal Procedure Code). In the event that an investigation is terminated, the Act provides an understanding that a third party may apply for a Pretrial regarding whether or not the termination of the investigation is correct. In addition, related to losses and rehabilitation, there are 2 (two) main definitions, namely claims for losses for those whose main cases have never reached the court and claims for compensation for cases that have been decided in court (Kusuma, & Karma, 2020).

At the implementation level, the function of the pretrial institution is not in accordance with the provisions stipulated in the Criminal Procedure Code, so that in practice there are still deficiencies such as the failure of the Pretrial application due to the commencement of the examination of the main case in the Court session or the Pretrial judge who rejects the Pretrial application. So that the pretrial object is not finished being examined and the pretrial object is not examined in accordance with the criminal procedure law. Therefore, pretrial judges should not be single judges but judges consisting of career judges, legal practitioners and academics who can act whether there is a request or there is no application and give an objective decision on the determination of the suspect.

Based on the provisions of Article 82 paragraph (1) letter c of the Criminal Procedure Code, it is emphasized that the pretrial examination is carried out quickly and no later than 7 (seven) days the judge must have made a decision (Sari, 2015). In addition, pretrial judges are passive, namely waiting for requests or demands so that they are not considered optimal because even though there are real deviations, but because there are no requests or no demands, the pretrial judges do not examine the case. The possibility of high subjectivity from pretrial judges can be seen in terms of pretrial demands or requests which have the same substance but differ in their considerations and decisions.

Although in criminal law the most important issue is whether the perpetrator intentionally or not wants certain consequences from his actions (Cook, 1917). However, that the stipulation of a criminal act is based on at least two pieces of evidence, as for what investigators must do in the process of examining a suspect, namely (Moningka, 2017): a. Be informed of the alleged act; b. It was stated that the suspect had the right to be accompanied by an advocate; c. Information from the suspect is recorded and included in the official report.

This is related to the provisions in the decision of the Constitutional Court no. 21/PUU-XII/2014 which explains that Article 1 number 14, Article 17 and Article 21 of the Criminal Procedure Code to determine the presence of a crime, the suspect must be met with sufficient initial evidence, namely at least two pieces of evidence. While Article 17 of the Criminal Procedure Code states that what is meant by sufficient initial evidence is preliminary evidence to suspect a criminal act in accordance with Article 1 point 14, where this preliminary evidence is not explained definitively (Barlyan, 2020). In this regard, it is of the view that with the unclear provisions regarding preliminary evidence to determine the suspect, it is necessary to add one more piece of evidence, such as expert judgment, so that certainty, justice and benefit in society can be achieved.

After the Constitutional Court Decision Number 21/PUU-XII/2014 which stipulates the determination of the suspect as a Pretrial jurisdiction. Where, the legal position of the pretrial single judge only has the authority to determine whether the initial evidence obtained is not authorized to examine the substance of the evidence (Afandi, 2016). In other words, the pretrial single judge has the authority to examine material truths, not only formal truths. Meanwhile, Article 111 paragraph (1) of the Draft Criminal

Procedure Code stipulates that commissioner judges have a broader authority, where the duties and authorities of the commissioner judge are carried out with an application by the suspect/defendant, his family or proxies to the commissioner judge. The commissioner judge has the authorities (Roringkon, 2019), i.e.: a. determining whether the arrest, detention, search, confiscation or wiretapping is carried out legally or not; b. determining the suspension of detention; c. determining that the information made by the suspect or defendant violates the right not to incriminate himself; d. determining that the evidence or statements obtained illegally cannot be used as evidence; e. determining the compensation and/or rehabilitation for someone who is illegally arrested or detained or compensation for any illegally confiscated property rights; f. determining that the suspect or defendant has the right to or is required to be accompanied by a lawyer; g. determining that an investigation or prosecution has been carried out for an illegal purpose; h. deciding the termination of investigation or termination of prosecution that is not based on the principle of opportunity; i. deciding that a case is appropriate for prosecution in court or not; and j. determining the violation of any other suspect's rights occurred during the investigation stage.

With the concept of commissioner judges, if the commissioner judges are still from career judges, the possibility of subjectivity still exists so that a judge consisting of career judges, legal practitioners and academics is needed who can act whether there is an application or no application and give a decision with objective of determining the suspect in order to achieve legal certainty, justice and benefit for the community.

Based on this description, it can be understood that it is necessary to reform the criminal law through the reformulation of the Criminal Procedure Code regarding the functions and authorities of the pretrial institution in determining suspects. Barda Nawawi Arief said that the meaning and nature of criminal law reform is closely related to the background and urgency of holding criminal law reform itself (Ravena, & Kristian, 2017).

C. CONCLUSION

Pretrial institutions have legal positions at the level of theory and implementation. At the theoretical level, the presence of these institutions is a form of state responsibility in protecting human rights. However, there are several problems in its implementation that harm the suspect's human rights. Therefore, it is important to establish an Ad Hoc institution to supervise the authority of investigators in determining suspects. In the future, the presence of pretrial institutions must be replaced with Ad Hoc institutions as the institutions that oversee the protection of human rights, so it needs to be emphasized in the Criminal Procedure Code by reformulation. It is important to establish an Ad Hoc institution to supervise the authority of investigators in terms of determining suspects. The ad hoc judges come from ad hoc institutions consisting of career judges, legal practitioners and academics who can act whether there is a request or not and give an objective decision on the determination of the suspect. Then, the case is continued until the judge

gives decision or orders to pay compensation. In addition, the judge determines whether the determination of a suspect is valid for the sake of realizing legal certainty, justice and legal benefits for the community or not, examines and decides whether an arrest and/or detention is legal or not at the request of the suspect and/or his family or proxies, determines whether the termination of an investigation or termination is legal or not, determines that the prosecution is at the request of the suspect/ investigator/ public prosecutor, request, and determines the compensation and/or rehabilitation by the suspect or his family or proxies in the event that the case is not submitted to the Court.

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