OPEN ACCESS
Scholars International Journal of Law, Crime and Justice
Abbreviated Key Title: Sch Int J Law Crime Justice
ISSN 2616-7956 (Print) |ISSN 2617-3484 (Online)
Scholars Middle East Publishers, Dubai, United Arab Emirates
Journal homepage: https://saudijournals.com

Original Research Article

Due Process of Law: Pre-trial and Preliminary Examination Judge on Indonesian Criminal Procedure Law

Fitriah Faisal[1*]

[1]Faculty of Law, Halu Oleo University, Kampus Hijau Bumi Tridharma, Anduonohu, Kec. Kambu, Kota Kendari, Sulawesi Tenggara 93232, Indonesia

DOI: 10.36348/sijlcj.2023.v06i03.003 | **Received:** 12.02.2023 | **Accepted:** 09.03.2023 | **Published:** 11.03.2023

***Corresponding author:** Fitriah Faisal
Faculty of Law, Halu Oleo University, Kampus Hijau Bumi Tridharma, Anduonohu, Kec. Kambu, Kota Kendari, Sulawesi Tenggara 93232, Indonesia

Abstract

The purpose of this research is to find out whether the pretrial institution has realized the due process of law as aspired by the criminal procedural law and what about the pretrial reform institution in the RKUHAP, namely the Preliminary Examination Judge, whether it has been able to reflect the due process of law. The type of research in this study is normative. The data source used is secondary data which contains primary, secondary and tertiary legal materials. The data was collected by using library techniques and analyzed by qualitative methods and will be described systematically or prescriptively. From the Research It was found that the current pretrial does not reflect the due process of law, so it is necessary to immediately approve the reform of the pre-trial institution. Then the pretrial substitute institution, namely the Preliminary Examination Judge has greater authority than pretrial regarding the rights of the suspect, so that the establishment of this pretrial substitute institution is expected to have the purpose of criminal procedural law: due process of law or behoorlijk procesrecht in order to seek material truth or objective truth and the purpose to protecting the human rights of suspects and defendants can be achieved.

Keywords: Due Process of Law, Pre-Trial, Preliminary Examination Judge.

INTRODUCTION

Due process of law is a popular term used to encapsulate the ideals of criminal law. due process of law has minimal elements as Tobias and Petersen said in Mardjono Reksodiputro's third book: hearing, counsel, defense, evidence and a fair and impartial court [1]. It apply for whole citizen and place where the enforce rules of law is exist and means: no one is above the law. This requires us to support and fight for the implementation of a fair legal process in our justice system [2].

However, a fair or due trial process of law is often misinterpreted by law enforcement and courts. Sometimes due process of law is only associated with the application of the rules of criminal procedural law and often only associated with literal application. Even though the meaning of a fair trial is far more than just the formal application of law. Actually, it should be including an intend of respect for the rights of citizens [3].

When the enforcement law is happening: from investigation until trial, no one could deny that sometimes still occur act that are not fulfill the principle of due process of law. For something like that, The Criminal Procedure Code 1981 provides a law that the suspect can use. The Pretrial are held by the request from the suspect or defendant or his family or also at his lawyer [4]. Pretrial is an open forum, led by a judge to summon the investigators or public prosecutors who have made forced efforts to explained their actions, whether there are truly reasons and they did based on law.

[1] Marjono Reksodiputro . *Human Rights in the Criminal Justice System.* Jakarta: University of Indonesia. 2007. Pg. 27

[2] Marjono Reksodiputro . *Anthology of Problems in the Criminal Justice System.* Jakarta: University of Indonesia. 2007. Pg. 9

[3] Marjono Reksodiputro . *Reading Materials: Swakarsa Security Management.* Jakarta: University of Indonesia. 2013. Pg. 14

[4] Law No. 8 of 1981: Criminal Procedure Law.

With this way through open courts, suspects or defendants are guaranteed their human rights in the form of legal rights and against arbitrary deprivation or restriction of independence by investigators or public prosecutors, because in this forum the investigator or public prosecutor is obliged to prove that his actions are legal and do not violate the law.[5] However, the Pre-Trial Mechanism is not working as it should because in its implementation it is considered to be detrimental to justice seekers such as complicated procedures, a lot of wasted time, high costs, and the possibility of intimidation from law enforcement officials. Lots of pros and cons about pretrial, made the drafters renewal the law in the RKUHAP (draft of the criminal procedure act), and will replace pretrial with the Preliminary Examination Judge. Based on that, the problem in this research is:

1. Is pretrial on criminal procedure act reach the due process of law?
2. Is renewal pretrial institution to preliminary examining judge in the future to be can be better and can give due process of law?

This reasearch use a normative method which is used books and used data source from secondary data. The secondary data consists from book text, from another result research, and from journal as well. This research used primary data, like legislation or any other supporting regulations study about this [6]. Data was carried out with method studies library, that is the method used with collected, studied and processed the secondary data, primary, and tertiary. Then the data got analyzed with method qualitative and described with sentence in a systematic way or prescriptive for make it easy to make a conclusion.

Due Process of Law in Pretrial on Indonesian Criminal Procedure Act

Fair trial reflecting a appreciation to the right of independence of the citizen. Respect for it is very important because when a person becomes a suspect, his legal status is changes. It marked by various changes to his independence: there are various restrictions on his freedom and often comes with a moral degradation [7]. The possibility of arbitrariness by law enforcement officers when making someone become a suspect of a violation of the law cannot be excluded, where the determination of this suspect will be followed by various restrictions on one's independence as an individual.

Before the KUHAP (Criminal Code Act) was used as a guideline for criminal justice processes. In the past it used the HIR *(Het Indische Reglement)* but this HIR paid little attention to the rights of citizens and indonesia used it for 36 years Indonesia, then the Criminal Procedure Code was enacted for criminal justice practices, which contained obligations to uphold the rights of suspects and the defendant who is still part of the citizen of course and with hope this new code uses the understanding of due process of law properly and not only formally [8].

In the Criminal Procedure Code the Court is given special authority to guarantee the interests of a person in terms of himself as a suspect or defendant in an alleged crime, namely: pretrial. Pretrial is an innovation in the Criminal Procedure Code that comes together with other innovations such as limitations or the process of arrest or detention, making the Criminal Procedure Code also known as a masterpiece. According to Dr. A. Hamzah: pretrial is a place to complain about human rights violations because the intention is to establish pretrial as a translation of habeas corpus which is the substance of human rights, because the preparation of the Criminal Procedure Code is also heavily supported by International Human Rights which has become an International Customary Law [9].

As a new legal institution at the time therefore pretrial is reminiscent of the term Pre-Trial Procedure, which was called by the Congress of the International Commission Of Jurists in New Delhi in a comparative study: on their paper on "*Criminal law in relation to rule of law "* that in the implementation of criminal procedural law includes cooperation between the Executive and the Judiciary (Prosecutor and Police) and that Pre-Trial Procedure is a general provision that lies in the hands of the executive and in some cases is supervised by the Judiciary. In the Pre-Trial, this procedure is the control of the court, and is part of the court itself [10].

In Indonesia, pretrial is regulated in Article 77 of the Criminal Procedure Code regarding pretrial which reads: "*The district court has the authority to examine and decide in accordance with the provisions stipulated in this law concerning:* a. *Whether or not the arrest, detention, termination is legal investigation or termination of prosecution; b.Compensation and/or rehabilitation for a person whose criminal case is terminated at the level of investigation or prosecution"* [11].

[5] Fitriah Faisal, "Analysis of Pretrial decision on the validity of determination status of the suspect " Thesis, UI, 2016.

[6] Soerjono Soekanto and Sri Mamudji , *Normative Legal Research: A Brief Overview. Ed. 1.* ct . 16. (Jakarta: Rajawali Press, 2014), 13.

[7] Marjono Reksodiputro . Op. *Cit* . p. 28

[8] Marjono Reksodiputro . *Ibid.* p.31

[9] Luhut Pangaribuan, *Criminal Procedure Code*, Jakarta: Djambatan, 2005. p. 22

[10] Oemar Seno Adji, *Criminal Procedure Code Now*, Jakarta: Erlangga, 1985, p. 101

[11] M. Karjadi and R. Soesilo , *The Book of Criminal Procedure Code* , Bogor: Politea , 1997, p. 70.

From the contents of the article we could concluded that the pretrial regulates the protection of a person's rights in his status as a suspect or defendant in forced efforts made by law enforcement officials. According to Maqdil Ismail in his writings on Media Indonesia, that regarding Pretrial: the Criminal Procedure Code has a limits, it only whether or not arrest, detention, termination of investigation or termination of prosecution are legal; Compensation and/or rehabilitation for a person whose criminal case is terminated at the level of investigation or prosecution but does not include issues regarding the determination of a suspect given to someone. In fact, the determination of the suspect is the mother of all coercive measures which are the pretrial area because by being a suspect, a person can be arrested, detained and prosecuted [12].

Problem in KUHAP its only talks about the rights of the suspect, the rights of the accused and the rights of the convict, while the discussion regarding a person's right to obtain disclosure about why he becomes a suspect does not have much literature explaining this matter. According to Luhut Pangaribuan that intention to introduce the *Habeas corpus concept* in the Criminal Procedure Code is not successful. That because the pretrial in the formulation of the Criminal Procedure Code is more directed just a mere administrative oversight, pretrial cannot be used to test whether the juridical principle of coercion is valid in a material sense, and whether preliminary evidence serves as a basis for determining status as a suspect and becoming a suspect. Is the basis for determining that coercive measures are materially valid [13].

Although in the end the Constitutional Court expand the authority of the Criminal Procedure Code including authority to check the legitimate of the determination of suspect status [14]. However this still indicate that pretrial now it does not realize the ideal purpose and idea of the criminal procedural law itself: its mean there is no Due Process of Law. it can be seen from various weaknesses of pretrial itself. These various weaknesses have implications for the inability of pretrial to fulfill a sense of justice and legal certainty and will harm justice seekers. Several issues that arise related to pretrial are as follows:

1. Not all forced efforts can be applied for pretrial. So far it only determines whether the arrest or detention is legal, while confiscation and search which are also forced efforts are not the object of pretrial.
2. In practice it often happens that the pretrial institution is unable to examine the legality of the arrest and detention materially.
3. The pretrial does not have the authority to see whether the initial evidence serves as the basis for determining the status as a suspect and becomes the basis for determining that coercive measures are materially valid.
4. In the event that a case has begun to be examined in a district court, while the pretrial against coercive measures related to the case has not been completed, the pretrial petition shall be declared invalid.
5. If there is no pretrial request, even if the forced effort deviates from the provisions, the pretrial cannot happen, because pretrial is more passive, even though if you want to create a *due process of law*, it should be related to forced efforts where the action is sure to harm other people there should be supervision carried out by justice enforcers.

The Due Process of Law in Preliminary Examination Judge as a Pre-Trial Reform Institution on the Draft of Indonesian Criminal Procedure Act

One of the criticisms of the pretrial institution is the failure of the pretrial institution to reach a *due process of law.* The Pre-Trial Mechanism is considered not working as it should because in its implementation it is considered to be detrimental to justice seekers, such as complicated procedures, wasted time, high costs, and there is also the possibility of intimidation from law enforcement officials. The pre-trial in the current Criminal Procedure Code has actually departed from the initial concept when the Criminal Procedure Code got formed, because the Pre-trial does not accommodate a preventive authority in an illegal forced attempt to be carried out. This is because the pre-trial examination is carried out after the forced effort has been completed. The government through the Criminal Procedure Code which aims to overcome problems that occur in terms of monitoring the use of force and provide justice and legal certainty will replace the Pre-trial system and be replaced with a new system, namely the Preliminary Examining Judge [15].

If we discuss about Pre-Trial which we can find in the Criminal Procedure Code, namely Law no. 8 of 1981, we must see that the process of forming the pre- trial was not only from the last draft of the RKUHAP (The Draft of Criminal Procedure Act) which was enacted into the Criminal Procedure Code, but also the RKUHAP which was submitted to the legislative in 1974 and looked further again it turns out that in the

[12] Maqdir ismail , *Meaning of Budi Gunawan's Pretrial Decision,* Accessed from Mediaindonesia.com written on 18 February 2015, accessed on 01 March 2023, 17:06 WITA .

[13]Luhut Pangaribuan, *Op. Cit*, p.24

[14] The Constitutional Court Decision Number 21/PUU-XII/2014.

[15] Fitriah Faisal, "Analysis of Pretrial decision on the validity of determination status of the suspect "Thesis, UI, 2016.

1974 RKUHAP there was already a preliminary examination stage or a Commissioner Judge, where his duties were not only to act as a supervisory judge in the preliminary examination stage but also to act actively in the implementation of coercive measures [16]. Seeing the various problems that arise and the shortcomings of this Pretrial raises discourse in the RKUHAP or the Draft Criminal Procedure Code. commissioner and then in the RKUHAP 2015 which has filed to the legislative, the concept of Commissioner Judge changed to be the Preliminary Examining Judge [17].

This institution is basically an institution that exist between investigators and public prosecutors on the one hand and judges on the other. The authority of the commissioner judge or the next will We call with the Preliminary Examining Judge, authority broader and more complete than pre- prosecution (pretrial institutions). Preliminary Examining Judge is a court official who is authorized to evaluate the course of investigation, prosecution, and other powers stipulated in this Law. His authority among others determine or decide to:

a. Whether or not the arrest, detention, search, confiscation or wiretapping is legal;
b. Cancellation or suspension of detention;
c. That the statement made by the suspect or defendant violates the right not to incriminate oneself;
d. Evidence or statements obtained illegally cannot be used as evidence;
e. Compensation and/or rehabilitation for someone who has been illegally arrested or detained or compensation for any property rights that have been illegally confiscated;
f. The suspect or defendant has the right to or is required to be represented by a lawyer;
g. That the investigation or prosecution has been carried out for an illegal purpose;
h. Termination of investigation or termination of prosecution which is not based on the principle of opportunity;
i. Whether or not a case is appropriate for prosecution in court;
j. Violation of any other rights of the suspect that occurred during the investigation stage.

This Preliminary Examining Judge is expected to be the goal of criminal procedural law, namely *due process of law* or *behoorlijk procesrecht* in order to seek material truth (objective truth) and the purpose to protecting the human rights of suspects and defendants can be achieved.[18] If we look at Article 111 of the Draft of Criminal Procedure Code regarding the Preliminary Examining Judge, it appears that the Institution It has wider authority compared to the Pretrial Institution.

If we compare the Pretrial Authority and the Preliminary Examining Judge then we can see that this Pretrial Institution is limited and narrow in terms of authority as stated in Article 77 of the Criminal Procedure Code. From the description on, we could seen that the examining judge preliminary have more authority and wider from pretrial. The policy of reforming the criminal procedural law, especially regarding pretrial is the right step to guarantee *due process of law* in law enforcement, because with the authority of the Preliminary Examining Judge are expected to create justice for all parties, both suspects and victims, which is expected to minimize the occurrence of *errors in person* or the arbitrary actions of law enforcement officers against suspects, this is also a reflection that we respect the principle *of innocence of presumption* .

Preliminary Examining Judge in the Criminal Procedure Code will emphasizes that our criminal justice system is a justice system that refers to *due process of law*. Its existence prolongs the legal process that must be passed, which on the other hand means it is inefficient. Even so, this is a consequence which of course must be balanced with the increased quality of the preliminary examination as the entry point for a case into a fair criminal justice process. So that the 'complexity' that arose in the preliminary examination with the change of the Pretrial name to Judge examiner It is hoped that this Preliminary Examining Judge will result in higher quality law enforcement so that the trial process is expected to be able to run according to the general principles in procedural law which adheres to the principles of fast, simple and low-cost and not the other way around examiner This Preliminary Examining Judge slows down the action and efficiency of the single-case trial process but if supported by quality improvement, it certainly guarantees *due process of law* and ensure fairness for all parties.

With the renewal of the Criminal Procedure Code and the establishment of the Preliminary Examining Judge which has broad duties and authorities is a refinement of the Pretrial institution. So with the Preliminary Examining Judge make the future KUHAP able to meet the expectations of realizing *due process of law* while at the same time providing legal certainty, justice, and benefits to society. It is hoped that with the renewal of this institution, which is more active than just waiting for pretrial requests, it is hoped that there will be no more reports of violence or torture of suspects and acts of coercion beyond the limit to obtain

[16] Loebby loqman. *Pretrial in Indonesia,* Jakarta: Ghalia Indonesia, 1987, p. 45.

[17] Ministry of Law and Human Rights, "Draft of Criminal Procedure Law", http://ditjenpp.kemenkumham.go.id/files/doc/1008_RUU%20KUHAP.doc .

[18] Indriyanto Seno Adji, *Criminal Procedure Code in Prospect*, Jakarta: Sinar Grafika, 2011, p. 26.

information, both from suspects and witnesses, because with the upcoming KUHAP it will be through the Preliminary Examining Judge, functions to supervise and control law enforcement officers in carrying out their duties so that there is no abuse of authority by law enforcement officials.

Expected with legal and judicial reforms and the application and implementation of the duties and authorities of professional law enforcers, it is possible that they will be able to provide justice, legal certainty, and benefits for the community and the achievement of *due. process of law.*

CONCLUSION

1. The current Pretrial Institution does not reach the purpose of criminal procedure act itself and does not reach the *Due Process Of Law*, it can be seen from the various weaknesses of the pretrial itself. These various weaknesses have implications for the inability of pretrial to fulfill a sense of justice and legal certainty which will certainly harm justice seekers.
2. The shortcomings of pretrial to realizing a *due process of law*, the government issues a policy through the draft Criminal Procedure Code which in the future will change the pretrial into a Preliminary Examining Judge is considered to have broader authority than pretrial. With the renewal of the Criminal Procedure Code and the establishment of the Preliminary Examining Judge which has broad duties and authorities is a refinement of the Pretrial institution. So with the Preliminary Examining Judge make the future KUHAP (criminal procedure act) able to meet the expectations of realizing *due process of law* while at the same time providing legal certainty, justice, and benefits to society. It is hoped that with the renewal of pre-trial, which is the Preliminary Examining Judge more active than just waiting for pretrial requests, it is hoped that there will be no more reports of violence or torture of suspects and acts of coercion beyond the limit to obtain information, both from suspects and witnesses. And th Preliminary Examining Judge has functions to supervise and control law enforcement officers in carrying out their duties so that there is no abuse of authority by law enforcement officials anymore.

REFERENCES

- Faisal, F. (2016). Analysis of Pretrial Decision on the Validity of Determination Status of The Suspect. Thesis, University of Indonesia.
- Harahap, M. Y. (2007). *Discussion of Problems and Application of KUHAP (Investigation and Prosecution)*. Jakarta: Sinar Grafika, Second Edition.
- Husein, H. M. (1999). *Investigation and Prosecution in Criminal Processes*. Jakarta: Rineka Cipta.
- Ismail, M. (2015). "The Meaning of Budi Gunawan's Pretrial Decision." Last Modified February 18, 2015. https://mediaindonesia.com/opini/612/makna-decision-praperadilan-budi-gunawan
- Karjadi, M., & Soesilo, R. (1997). *Book of Criminal Procedure Code*, Bogor: Politea.
- Loeqman, L. (1987). *Pretrial in Indonesia*, Jakarta: Ghalia Indonesia.
- The Constitutional Court. https://www.mkri.id/public/content/persidangan/decisan/21_PUU-XII_2014.pdf
- Pangaribuan, L. (2005). *Criminal Procedure Code*, Jakarta: Djbatan.
- Reksodiputro, M. (2007). *Human Rights in the Criminal Justice System*. Jakarta: University of Indonesia.
- Reksodiputro, M. (2007). *Anthology of Problems in the Criminal Justice System*. Jakarta: University of Indonesia.
- Reksodiputro, M. (2013). *Reading Materials – Swakarsa Security Management.* Jakarta: University of Indonesia.
- Seno Adji, I. (2011). *Criminal Procedure Code in Prospective*, Jakarta: Sinar Grafika.
- Seno Adji, O. (1985). *Criminal Procedure Code Now*, Jakarta: Erlangga.
- Law No. 8 of 1981 of Criminal Procedure Law. LN RI No. 76/1981, TLN RI No. 3209.