

Conference Paper

Shift in Procedural Law for Examining Pretrial Applications

Iskandar Muda Sipayung¹, Rocky Marbun^{2*}¹Faculty of Law Labuhanbatu University, Rantauprapat, North Sumatra, Indonesia²Faculty of Law, Pancasila University, Jagakarsa, Jakarta, Indonesia**ORCID**Iskandar Muda Sipayung: <https://orcid.org/0000-0002-4300-0436>Rocky Marbun: <https://orcid.org/0000-0003-2528-3740>**Abstract.**

The process of examining pretrial applications, through Supreme Court Regulation Number 4 of 2016, is determined to only seek formal truth. Therefore, the Pretrial Sole Judge is required to only examine the formal requirements of legal action as a coercive measure as stipulated in the pretrial object in Article 77 of the Criminal Procedure Code. However, prior to the emergence of the provisions of the Supreme Court, the Constitutional Court through Decision Number 21/PUU-XIII/2014 has expanded the object of pretrial not only those contained in the decision but through legal considerations. This study aims to find an extension of the paradigm in determining procedural law in examining pretrial applications. This study uses legal research methods through literature study. The results of this study indicate that there are two pretrial object models that shift the paradigm in the process of examining pretrial applications from a quasi-civil procedure law with the search for the formal truth, to a quasi-criminal procedure law with the search for material truth, through the establishment of the Prudential Principle and Subjective Action as the object of a pretrial application.

Keywords: pretrial, criminal procedure law, constitutional court

1. INTRODUCTION

Discourse on what procedural law is used for a judge in carrying out court authority [1] to examine pretrial requests, to this day it is still a legal issue that is always interesting to be discussed and studied scientifically. The pretrial authority, which was then a legal instrument of distinguishing with the arrangement before the Dutch colonial era, so that the Criminal Procedure Code often was seen as a great work [2][3][4][5]. However, at this time the existence of the Criminal Procedure Code began to be questioned the validity of its supervisory function which was only focused on matters that were postal only [6][7]. As a result, there is a neglect of the operational foundation specified in the Criminal Procedure Code, especially in the Considerant Considering letter c, where the Criminal Procedure Code has two main objectives, namely to make the general

Corresponding Author: Rocky Marbun; email: rocky_marbun@univpancasila.ac.id

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public understand their rights and obligations and provide guidance to the attitudes of law enforcers to act according to the functions and authority that has been set [1]. Understanding of the operational foundation which undergoes a reduction in the meaning of the formulation and design of legal norms contained in Article 1 number 10 Jo Article 77 of the Criminal Procedure Code, which focuses on the phrase “Lawful or Not” on the action of forced efforts from the investigator and the public prosecutor.

Referring to the phrase “Lawful or Not”, so that every form of supervision of legal actions in the form of forced efforts to someone, making the horizontal supervision model through pretrial only limited to the fulfillment of the formality of the investigation and prosecution administration system. In the end, as outlined in research conducted by the Criminal Justice Reform Institute (ICJR), the process of examining the pretrial application refers to the search for truth based on the principles of civil law [8]. Thus, the process of examining the pretrial application is no longer subject to the Criminal Procedure Code itself. As a result, pretrial becomes a legal instrument that deviates the purpose of the Criminal Procedure Code itself by referring to a positive proof system in the search for formal truth.

In fact, Nalom Kurniawan Barlyan [9] as a researcher from the Constitutional Court through his dissertation, has reduced the meaning of the concept of “attitude” by turning it into the concept of “mental” when explaining and describing the Celebration Considering Coup. That is, criminal law does not have enough concepts to examine, describe and describe the meaning of the ‘attitude’ concept, and its impact on the pattern of behavior of law enforcers.

Of course, as a form of criticism of the above research, we can say the existence of a view and assumption that morals become the main thing in the process of law enforcement through restrictions derived from its authority. In fact, the concept of “attitude” - through psychological studies, contains three aspects that greatly affect work patterns in a prexistic manner, namely cognitive aspects, affective aspects, and conative aspects [10][11]. As a result, every violation of authority in carrying out functions and authority - in relation to the procedure of investigation and prosecution, only stops at the application of ethical sanctions.

Criminal Procedure Code - especially pretrial authority, in the end, unable to carry out supervision and control of subjective actions seems to have the emergence of “threatening communication” in the examination process [12], which in the end, raises binary opposition in the examination process [13]. In fact, the Criminal Procedure Code is unable to neutralize the models of games from an interpretation model of legal norms that contain descriptive ethics, as stated in Article 72 jo Article 143 paragraph (4) of

the Criminal Procedure Code. Where, investigators and public prosecutors carry out the construction of games through interpretative-cognitive based on trinity of power (power-authority-discretion) to refuse to provide reports on the examination (BAP) of the suspect and case file [14].

There is also a study that takes a defense attitude towards the emergence of the phenomenon of expansion of objects from the examination. However, the focus of these studies is only limited to the defense of the meaning of the concept of “prospective suspects” [15], and academic recognition of testing the determination of embraced through pretrial as a form of protection of human rights [16]. However, there is an unconscious from within the two researchers regarding what procedural law will be used to examine pretrial requests.

The criticism mentioned above, refers to the existence of a form of resistance from the Supreme Court against the Constitutional Court Decision Number 21/PUUXII/2014 dated April 28, 2015 (MK Decision No. 21/2014) in the form of Supreme Court Regulation Number 4 of 2016 concerning Prohibition of Review Back the pretrial decision (Supreme Court No. 4/2016). In Article 2 paragraph (4) Supreme Court No. 4/2016, the Supreme Court has produced a knowledge that has been normalized through the pathway of domination - which is supported by supporting groups because of the equality of hegemony [17], by emphasizing the examination of pretrial requests only examining formal aspects.

Efforts to normalize the Constitutional Court’s decision No. 21/2014 Through dominance, it can be seen in the decision of the District Court Number 6/PID.PRA/2022/PN.JKT.Sel which is a form of truth (truth-games) through the production of knowledge based on Trinity of Power by hiding behind Supreme Court No. 4/2016 and Decision of the Constitutional Court Number 102/PUU-XIII/2015. Meanwhile, the dominance process, it turns out that hegemony goes through academics as an extension of power to form truths as resistance to the Constitutional Court’s decision No. 21/2014. As stated in the expert statement in the decision of the District Court Number 119/Pid.Pra/2015/PN.JKT.Sel, who rejects the concept of “Prospective Suspects” through the fulfillment of two pieces of evidence.

In the end, the purpose of criminal procedural law in the process of examination of criminal cases is to find material truth [18], only limited to the examination of the case. As for the examination of the problem in pretrial authority, it has placed a grand narrative, namely civil procedural law, there is even a scientific firmness that calls it the Civil Procedure Law Quasi [19]. Thus, pretrial no longer aims to find material truth, but stop only at formal truth.

However, it appears that there is a speck of hope in the realm of criminal justice practices in the pretrial examination process, namely the emergence of the disparity of pretrial decisions. As revealed by Rocky Marbun [20], there are several decisions that are a single narrative breakthrough as a myth of modernity in the pretrial process, including the following:

1. Decision of District Court Number 01/PID.PRAP/PN.BKY dated May 18, 2011 Jo Supreme Court Decision Number 88 PK/PID/2011 dated January 17, 2012 which stated the invalid confiscation;
2. Decision of District Court Number 38/PID.PRAP/PN.JKT.Sel dated 27 November 2012 with a pretrial applicant is Bachtiar Abdul Fatah who has a position as General Manager of Sumatra Light South (SLS) at PT. Chevron Pacific Indonesia. The verdict in the case is stating the determination of the suspect is invalid;
3. Decision of District Court Number 04/PID.PRAP/2015/PN.JKT.Sel dated February 16, 2015, with the Petal Petitioner is the Commissioner of General (Pol) Drs. Budi Gunawan, S.H., M.Sc with his decision (a) the investigation warrant is invalid; (b) the determination of the suspect is invalid; (c) invalid investigation; and (d) all decisions and provisions that have been issued are invalid;
4. Decision of District Court Number 36/PID.PRAP/2015/PN.JKT.Sel dated May 26, 2015, with a pretrial applicant is Hadi Poernomo (former Director General of Taxes). The phenomenal amar is (a) the determination of an invalid suspect; (b) invalid investigation; (c) invalid confiscation; and (d) all decisions and stipulation in the investigation are invalid;
5. Decision of District Court Number 11/Praper/2016/PN.SBY dated March 7, 2016, pretrial decision Number 19/Praper/2016/PN.SBY dated April 12, 2016, with the applicant is Ir. H. La Nyalla Mahmud Mataliti (Entrepreneur and Chairperson of PSSI-KPSI for the 2012/2016 period), with the verdict, among others (a) the determination of the suspect is invalid; and (b) an invalid investigation warrant;
6. Decision of District Court Number 67/PID.PRAP/2015/PN.JKT.Sel dated August 4, 2015, with Petitioner Dahlan Iskan (former Minister of BUMN). As for the ruling, among others: (a) an invalid investigation letter; (b) invalid investigation; (c) Determination of an invalid suspect; and all decisions and determination that have been issued is invalid;
7. Decision of District Court Number 97/PID.PRAP/PN.JKT.Sel dated 29 September 2017, with Petitioner Setya Novanto (Speaker of the Indonesian Parliament). The

verdict includes: (a) the determination of the suspect is invalid; and (b) rule the investigation to be stopped;

8. Decision of District Court Number 24/PID/PRA/2018/PN.JKT.Sel dated April 9, 2018, with the applicant for the Anti -Corruption Community Association (MAKI). As for the ruling, namely governing to continue the investigation;
9. Decision of District Court 18/Pid.Pra/2021/PN.JKT.Ssel dated January 10, 2022, a pretrial application for Investigatir from Financial Services Authority (FSA). The verdict from the single judge was based on the Constitutional Court's decision No. 21/2014 with legal considerations there is a violation of the principle of caution in determining the suspect and the quality of evidence that is not relevant to the alleged article, so that the single judge decides (a) the determination of the suspect is invalid; (b) an invalid criminal offense report; and (c) letters related to the determination of the suspect are invalid.

Referring to the dynamics of the development of objects from the pretrial authority, shows the development of anomalies that shake the ability to think in the study of procedural law for pretrial. However, the strength of Anomaly is still overshadowed by the Civil Procedure Law Quasi as "Normal Science" when it is proceeding in the examination of pretrial cases. This is interesting when the Constitutional Court granted a judicial review request for Article 1 number 10 of the Criminal Procedure Code Jo Article 77 of the Criminal Procedure Code to the 1945 Constitution. However, on the other hand, there was an internal intersection in the realm of judicial power between the Constitutional Court - as the result of the paradigm shift in State, with the Supreme Court - as a high institution of conventional state. This intersection will not be discussed further in this study.

The establishment of the Civil Procedure Law as a Grand Narrative in the pretrial examination process, to this day - even until this article was published, there has not been a single researcher or Non -Governmental Organization (NGO) that is able to formulate the right procedural law. In fact, including ICJR research when formulating the draft of the Supreme Court regulation on pretrial procedural law [8], as an imaginative study, it was still trapped in the vortex of maintaining the narrative grand.

Based on the descriptions above, in this study focused studies on a formulation of problems regarding how to find procedural law in carrying out pretrial authority in Indonesia after the Constitutional Court.

2. METHODOLOGY/ MATERIALS

This research focuses on the discovery of the procedural law model that should be used in the process of examining the pretrial application through a series of decisions of the Constitutional Court - especially in the Constitutional Court's decision No. 21/2014, which has several times changed the substance of several articles in the Criminal Procedure Code to search for the procedural law model, in addition to several decisions of the Constitutional Court, also used several decisions from the District Court that tried to undermine the Civil Procedure Law Quasi as the Grand Narrative in carrying out pretrial authority.

In order to achieve the research objectives mentioned above, researchers use legal research methods using a multidisciplinary approach, namely the approach in terms of law and the social science approach, through the search for secondary data in a literature study. In this study using the Trichotomy Relationship approach [11] [14], [21][22][23] which can only be used in the realm of law as a reality or realm of law enforcement, and the Critical Discourse Analysis approach (CDA) as a model of interpretation In line with the basic idea of the concept of Trichotomy Relationships, which is to dismantle the process of forming knowledge based on the power that margins other parties through normalization efforts, both hegemony and dominated, thus raising a truth-games decision using language and language skills in carrying out the Trinity of Power. Another approach used, because it is related to language and language, the researcher also uses the semiological (semiotics) approach from Ronald Barthes which focuses on changes in denotative meaning into a connotative meaning to provide justification for new concepts that are raised by the Constitutional Court.

Through efforts to demolish or criticize ideology of Article 1 number 10 of the Criminal Procedure Code Jo Article 77 of the Criminal Procedure Code Jo Perma No. 4/2016 by showing readers of the existence of veiled ideological (interests) aspects, which are operated as symbolic domination [24][25][26][27] by law enforcers, so that it becomes a myth of modernity [28], [29] through the grand narrative reading model [28]. The ideological criticism is a philosophical foundation, a sociological foundation and an operational foundation for determining the appropriate procedural law in carrying out pretrial authority by the District Court. Thus, this research is an effort to binary contamination [30],[31] from a state quo status that is maintained by the dominant group (law enforcement) as a binary opposition superior [20].

3. RESULTS AND DISCUSSIONS

Law Number 8 of 1981 concerning Criminal Procedure Law or known as the Criminal Procedure Code (KUHAP), has become a myth, through a hegemonic normalized jargon by academics as a great work. Thus, the Grand Narrative which is maintained is closed to the interpretation of the Criminal Procedure Code. The Criminal Procedure Code does not require an interpretation, other than grammatical with the Strict Law or Formalistic Thinking approach [32], which is carried out by judges. As a result, the Criminal Procedure Code is only seen as the Standard Operating Procedure (SOP).

The inability to conduct a complete reading of the Criminal Procedure Code, by ignoring the essence and existence of the Considerant considers, through a rigid understanding only of the body of the Criminal Procedure Code, has made law enforcers - even including criminal legal academics, as a “robot” with no life. Therefore, what is true is when the legal norm is fulfilled as the legitimacy of the implementation of its authority. Thus, law enforcers and criminal law academics, carry out a model of presupposition to the Criminal Procedure Code as something that is correct and without criticism. In the end, the Criminal Procedure Code is no longer able to provide guidance to the attitudes of law enforcers [11], but only limited to 'mental' development. So, every action and/or non-trial legal decision only leads to ethical sanctions. However, one of the Landmark Decision of the Constitutional Court, as stated in the Constitutional Court's decision No. 21/2014, emphasizing that the Criminal Procedure Code - in this case is a pretrial, is indeed a masterpiece of his day, but is unable to answer the times, because, the object of examination in pretrial is post factum [6]. So, in the logic of thinking from the Constitutional Court, it shows the existence of a recognition that the Criminal Procedure Code as a legal text is legalistic-positivistic. The Criminal Procedure Code is the result of a background knowledge (hintergrundwissen) of its applicable Het Herzeine Indonesia Reglement (HIR) until 1981.

The logic is constructed by a basic assumption regarding the existence of legal norms in the Criminal Procedure Code which gives rise to a dual meaning (ambiguity) or compulsion, thus giving rise to an interpretation model wrapped with Trinity of Power. The interesting thing is the view of Soerjono Soekanto [33] and J.A. Pointer [34], which confirms the work pattern of law enforcement towards legal norms and concrete facts will bring up an attitude that is based on discretion to interpret, where the results of the interpretation become a truth that can be forced with power and violence.

The meaning of procedural law for pretrial authority should be re-withdrawn to the philosophical foundation [35] from the formation and enactment of the Criminal

Procedure Code itself. Where, on the philosophical foundation of the Criminal Procedure Code wants the implementation of the authority and functions of law enforcers starting with a complete understanding of the values of Pancasila and the 1945 Constitution of the Republic of Indonesia and respect for human rights.

The view of the search for material truth in the criminal justice process, is a form of efforts to provide legal protection for the rights of everyone who is dealing with legal issues. Legal issues, according to Johari [18] are human problems, violations of law and law enforcement are work carried out by humans. Therefore, the law cannot be seen only from the provisions written in the articles of law and legislation. The application of a legal regulation is strongly influenced by many psychological variables related to the law itself.

The above view, of course, indeed leads to the application of the law at the level of the main examination of the case. However, the application of law through the implementation of the authority in the realm of investigation, gave rise to psychological conflicts for someone who was drawn into the realm of criminal law. As stipulated in the decision of the Constitutional Court Number 3/PUU-XI/2013 dated January 30, 2014 (Constitutional Court Decision No. 3/2013) [36], which shows the psychological impact of the family of the suspect who did not know the existence of the members of the arrested and detained members by the investigator. Thus, by the Constitutional Court it is determined that such an interpretation model raises constitutional losses. That is, the legal norms contained in Article 18 paragraph (3) of the Criminal Procedure Code, if interpreted symbolic dominated as truth-games, raises violations of human rights both protection of psychological impacts and against violations of the right to prepare defense.

The problem of forming truth-games is based on interpretation through the use of the Trinity of Power also emerged against Article 82 paragraph (1) of the Criminal Procedure Code, where the phrase "case began to be examined" has led to an uncertainty when a pretrial request can be declared void. Do you start from the delegation of cases? Or when the Chairman of the District Court set the composition of the panel of judges on the main examination of the case? Or is it during the first trial with the agenda of reading the indictment? [37]. The uncertainty will certainly have an influence on the community so as to bring up an unrest for the hope of a legal certainty [38]. Therefore, a form of truth-games is not permitted to be a language of power [39] which ignores the right to a legal certainty.

Indications of shift in procedural law in the inspection process at the pretrial are increasingly assertive with the emergence of the Constitutional Court's decision No.

21/2014 which, in addition to expanding pretrial objects by adding the determination of suspects, confiscation and search, it turns out that in the legal considerations of the Constitutional Court's decision No. 21/2014 gave rise to new anasirs in procedural law in pretrial, which is as follows:[6]

1. Subjective actions of law enforcement;
2. Relevance between evidence with the article accusation;
3. The application of the principle of caution in investigation;
4. Examination of prospective suspects before being named a suspect; and
5. Balance in examination.

The five Anasir, is an anomaly who questioned the establishment of the myth of modernity-in this case the Civil Procedure Law as a Grand Narrative, within the framework of pretrial procedural law. Procedure Law In the implementation of an examination of pretrial requests, after the Constitutional Court's decision No. 3/2013, MK Decision No. 21/2014 and MK Decision No. 102/2015, no longer showing traces of formalistic thinking. Thus, all circumstances that are post factum, are no longer the main focus in the process of examining pretrial requests. So, after the decision of the Constitutional Court, the purpose of the pretrial is no longer pursuing formal truth, but has shifted to the search for material truth as a form of respect for human rights.

4. CONCLUSION AND RECOMMENDATION

Starting from the development of anomalous knowledge that arose from the Constitutional Court's decision No. 3/2013, MK Decision No. 21/2014 and MK Decision No. 102/2015, there was a shift in procedural law in the process of examining the pretrial application. The focus of the examination of pretrial requests-all of which are the Civil Procedure Law Quasi by searching for formal truth, based on the protection of human rights from acts of arbitrariness from the holder of power-especially the investigators, not only examine the situation based on post factum evidence, however Binary contamination has occurred by accommodating the subjective conditions of the legal action of the investigator in carrying out its functions and authority in the realm of investigation. In other words, procedural law in pretrial can no longer use Quasi Civil Procedure Law, but follows the Original Intends from the promulgation of the Criminal Procedure Code, namely criminal procedural law, although not to the point of entering the problem of the principal of the criminal case.

Based on the conclusions above, the researcher submitted a recommendation to first, the Supreme Court revoked or at least revised Article 2 of Perma No. 4/2016, because it is not in accordance with the decisions of the Constitutional Court; Second, so that the law forming-in this case the President together with the House of Representatives-while waiting for the process of the Criminal Procedure Code, to immediately revise the Criminal Procedure Code by adding new legal norms that accommodate the anomaly knowledge above; And third, because, the existence of procedural law is to limit power from arbitrariness, so the President should immediately issue a Government Regulation in lieu of laws that improve the Criminal Procedure Code to be in line with the dynamics of thought about human rights.

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