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## Pretrial In Indonesian Criminal Law

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### Abstract.

*The law is a collection of rules that must be obeyed by all people in a society with the threat of having to compensate for losses or get criminal if they violate or ignore these rules, so that an orderly and fair life in that society can be achieved. The conception that embodies that Indonesia is a state of law basically has joints that are universal, such as the recognition and protection of human rights, the legality of the actions of the state or government in the sense of a legally accountable state apparatus, and the guarantee of Free Justice. The type of writing used by the author is juridical normative (legal research) juridical normative research is carried out by examining various rules of law that have a formal nature, namely laws, regulations and literature that contain theoretical concepts that are then connected to the problems that the author will discuss in this dissertation research. Pretrial as part of the criminal justice system in force in Indonesia is an effort to combat crimes that are penal by using criminal law as the main means of material criminal law and formal criminal law. Pretrial as part of law enforcement, as stated by Barda Nawawi Arief that the problem of law enforcement, both in abstracto and in concreto is an actual problem that has recently received a sharp spotlight from the public. As is the case with the implementation of pretrial which is part of a principle of the rule of law which is that a rule of law has various criteria and elements. Based on the foregoing, the philosophical basis of the pre-trial arrangement in Indonesian criminal law is based on the existence of human rights, namely because Indonesia is a state of law based on Pancasila and recognizes human rights. The idea of a pretrial institution was born from inspiration derived from Habeas Corpus in the Anglo Saxon judiciary, which provided a fundamental guarantee to the human being of the right to independence.*

**Keywords:** Pretrial, Criminal Law and Indonesian law.

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### I. INTRODUCTION

Human life cannot be separated from the problems that will be faced and humans cannot avoid them. Many problems that arise as a result of human behavior that wants to do something according to his wishes but violates the rules or norms that apply in social life, to overcome this, a rule is needed that can prevent and sanction people who do things that are not in accordance with the rules or norms that apply. These rules are called laws that have the power to force people to act in accordance with general provisions in social life in society. Every citizen is obliged to uphold the law in everyday reality, a citizen who negligently/deliberately does not carry out his obligations to the detriment of society, it is said that the citizen violates the law because the obligation has been determined by law. The law is a collection of rules that must be obeyed by all people in a society with the threat of having to compensate for losses or get criminal if they violate or ignore these rules, so that an orderly and fair life in that society can be achieved.

The conception that embodies that Indonesia is a state of law basically has joints that are universal, such as the recognition and protection of human rights, the legality of the actions of the state or government in the sense of a legally accountable state apparatus, and the guarantee of Free Justice. Indonesia is a country of law. According to Plato, the state of law in its concept which states that the state as a good organizer is based on good arrangements and is called the *nomoi* term, therefore the embryonic idea of the term state of law was put forward by Plato and this idea of Plato became more assertive after being supported by his disciple Aristotle who wrote in his book *politica*. Aristotle argued that the meaning of the rule of law arose from a policy that had a small state area, such as a city and had a small population and not like today's countries that have a large population and area. In the police system, all state affairs are carried out by deliberation, where all citizens participate in the affairs of State Administration.

## II. METHODS

Research is a scientific means for the development of science, then the applied research methods must be in accordance with the science that is the parent and in line with the object under study, in achieving the expected results and the truth of the writing can be accounted for. The type of writing used by the author is juridical normative (legal research) juridical normative research is carried out by examining various rules of law that have a formal nature, namely laws, regulations and literature that contain theoretical concepts that are then connected to the problems that the author will discuss in this dissertation research.

The approach used in this study is adapted to the problems to be investigated the method of approach used in this study is a normative juridical approach, where in this approach the concept of law will be viewed as the rules of law consistent in legislation, which is autonomous and convey factors outside the law. Ronny Hanitijo provides an understanding of the normative juridical approach as a normative juridical approach that is an approach that uses a positivist legistic conception.

## III. RESULT AND DISCUSSION

In pretrial setting, a good and effective strategy is needed in a policy taken by the policy maker. The policy is set out in the form of good legislation, it needs to be considered how to achieve a balance between legal certainty and justice, the interests of individuals and communities and can not be separated from the efforts of the government and society in order to protect human rights in the field of law, especially in terms of protection from forced efforts made by law enforcement officers.

1 Pretrial as part of the criminal justice system in force in Indonesia is an effort to combat crimes that are penal by using criminal law as the main means of material criminal law and formal criminal law. Pretrial as part of law enforcement, as stated by Barda Nawawi Arief that the problem of law enforcement, both in abstracto and in concreto is an actual problem that has recently received a sharp spotlight from the public. As is the case with the implementation of pretrial which is part of a principle of the rule of law which is that a rule of law has various criteria and elements.

According to Sri Soemantri, that a state of law must meet several elements:

1. The government in carrying out its duties and obligations must be based on laws and regulations;
2. The existence of guarantees of human rights (citizens);
3. There is a division of power in the state;
4. The presence of oversight of judicial bodies.

One of the principles derived from human rights is the suspect's human rights in the criminal justice process, namely the right to be considered innocent before his guilt is proven. This principle is commonly referred to as the presumption of innocence, which means that the enforcement of the law is in line with the principle of equality before the law as stipulated in the provisions of Article 27 paragraph (1) of the Constitution of the Republic of Indonesia year 1945.

Pretrial as part of the judicial process, the court has the authority to conduct an examination and decide on a case complained of before a court hearing. This is confirmed in the provisions of Article 1 Number 10 of Law Number 8 of 1981 that :

2 Pretrial is the authority of the District Court to examine and decide in the manner provided for in this law on :

- a. The validity or not of an arrest and or detention at the request of the suspect or his family or other parties or on the authority of the suspect;
- b. Whether or not the termination of the investigation or the termination of the prosecution upon request for the sake of law and Justice;
- c. Request for compensation or rehabilitation by the suspect or his family or other party in his power whose case has not been submitted to the court.

Juridically, the implementation of the above provisions concerning pretrial is regulated in Article 77 to Article 83 of Law Number 8 of 1981, then further elaborated into the provisions of subsequent articles. The provisions of Article 77 of the code of Criminal Procedure are in principle the same as the substance of the provisions of Article 1 Number 10. Article 77 of the code of Criminal Procedure states:

The District Court is authorized to examine and decide, in accordance with the provisions provided for in the law:

- a. Lawful or unlawful arrest, detention, termination of Investigation or termination of prosecution;
- b. Compensation and or rehabilitation for a person whose criminal case is terminated at the level of Investigation and prosecution.

The enactment of Law No. 8 of 1981, the authority to examine and decide claims for compensation is a new one for criminal law. Prior to the enactment of this law, requests for damages both individually and in the community were examined and decided by the civil courts. Obstacles faced in the pretrial process now is concerning the rehabilitation of suspects, provisions concerning rehabilitation in accordance with the provisions of Article 14 of the Constitution of 1945 is the authority of the President. Before the enactment of Law No. 8 of 1981 on Criminal Procedure Law (KUHAP), before the promulgation of Law No. 8 of 1981 on Criminal Procedure Law, Criminal Procedure Law enacted in the state of Indonesia using the rules in the system *Het Herziene Inlandsch Reglement* (hereinafter referred to as HIR) this rule is a product Dutch colonial law. HIR will certainly benefit the hawkers in this case the Netherlands, which in the rules still do not pay attention to human rights protection. the Criminal Procedure Law in force in Indonesia is regulated in H.I.R (*Het Herziene Inlandsch Reglement*) *Staatsblad* year 1941 No. 44, which is a product of Dutch colonial law, of course the rules in H.I.R is made for the benefit of the occupier, and not much attention has been paid to the fulfillment of human rights (HAM). The weaknesses of the provisions of the Code of Criminal Procedure set forth in H.I.R, among others, there is no provision that expressly limits the authority of officials who conduct preliminary examinations such as in the case of arrest, detention, search, seizure and so forth. Indonesia as a state of law that respects human rights, and ensures the equality of its citizens before the law and government, is required to have a criminal procedure law that reflects Indonesia's national policy, which regulates the rights and obligations for parties involved in criminal law enforcement processes, both for suspects and officials at every level of Investigation.

On December 31, 1981, Law No. 8 of 1981 on Criminal Procedure Law was officially promulgated, so that since then the Criminal Procedure Code has been valid throughout Indonesia, and given a transitional period of 2 (two) years and for Special Criminal Procedures regulated in a separate law, therefore, since December 31, 1983, the provisions of the Criminal Procedure Code are effective in handling general criminal cases. Some of the new things stipulated in the Criminal Procedure Code include the rights of suspects and defendants, legal assistance at all levels of examination, merging civil and criminal cases in terms of compensation, supervision of the implementation of Judge decisions, and pre-trial; The Criminal Procedure Code as a criminal justice system regulates the procedure for enforcing criminal law by giving authority to 4 (four) elements of law enforcement, namely elements of the power to investigate, elements of the power to prosecute, elements of the power to prosecute and elements of the power to execute decisions. In order to carry out the interests of criminal investigation, the law has given the authority to investigators and prosecutors to carry out acts of coercive efforts in the form of arrest, detention, seizure and search, these legal actions limit and even contradict the rights of suspects, therefore the granting of such authority must be regulated in detail to prevent abuse and arbitrary actions of investigators and or prosecutors. The regulation of coercive efforts in the Criminal Procedure Code is limited, it is expected to be able to provide guarantees and protection of human rights, protection of human dignity and dignity as naturally owned by a state of law. However, to better ensure the protection of human rights, on the possibility of abuse of authority of the forced effort, in addition to the regulation of forced efforts limitatively, the Criminal Procedure Code established pretrial institutions.

The idea of a pretrial institution was born from inspiration derived from Habeas Corpus in the Anglo Saxon judiciary, which provided a fundamental guarantee to the human being of the right to independence. Yanto further stated that, through the Habeas Corpus Act, a person with a court warrant can sue the official who made the detention to prove that the detention did not violate the law (illegal) or was completely legitimate in accordance with applicable legal provisions. Pretrial is a new institution in the Code of Criminal Procedure (KUHAP). Along with other innovations, such as the limitation of the process of arrest and

detention, making the Criminal Procedure Code referred to as Masterpiece (masterpiece). When viewed the process of formation of the Criminal Procedure Code, the intention of the formation of pretrial is as a translation of habeas corpus which is the substance of human rights. In fact, the preparation of the Criminal Procedure Code is much encouraged and references to international human rights law which has become International Customary Law.

#### IV. CONCLUSION

Pretrial in the Criminal Procedure Bill does not formulate the existence or validity of the determination of suspects but only formulates against the Commissioner Judge. The Commissioner judge according to the Criminal Procedure Code Bill of 2009 has broader authority than pretrial. According to Article 111 of the Criminal Procedure Code Bill of 2009, the Commissioner Judge has the duty and authority to determine whether or not the detention carried out by the investigator or public prosecutor is continued, determine whether or not the termination of the investigation or prosecution carried out by the investigator or public prosecutor is necessary, determine whether or not the revocation of, order the investigator or public prosecutor to release the suspect or accused from custody before the end of the detention period, if there is a strong suspicion of torture or violence at the level of Investigation or prosecution.

Based on the foregoing, the philosophical basis of the pre-trial arrangement in Indonesian criminal law is based on the existence of human rights, namely because Indonesia is a state of law based on Pancasila and recognizes human rights. The idea of a pretrial institution was born from inspiration derived from Habeas Corpus in the Anglo Saxon judiciary, which provided a fundamental guarantee to the human being of the right to independence. Indonesia itself regulates the pretrial in its Criminal Procedure Law in Article 77, which contains only 3 (three) things, namely; (a) the validity or not of arrest, (b) the validity or not of detention, and (c) the validity or not of termination of investigation/ prosecution, while the validity or not of determination of suspects is still not regulated in the Criminal Procedure Law.

#### V. ACKNOWLEDGMENTS

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