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RESEARCH ARTICLE

Design of Pre-Trial Institution with the Concept of Preliminary Examining Judge in the Reform of Indonesian Criminal Procedure Law

Dwi Nurahman[1*], Maroni[2], A. Irzal Fardiansyah[3]

[1,2] Faculty of Law, University of Lampung, Indonesia

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***Corresponding Author:**

dwinurahman@umitra.ac.id

ABSTRACT

Pretrial which has been regulated in the Indonesian Criminal Procedure Code has drawn much criticism from legal practitioners. In practice, it turns out that Pretrial does not provide a sense of justice for those seeking justice, especially suspects in the criminal justice process. The Indonesian government has prepared a Draft Revision of the Indonesian Criminal Procedure Code, one of the contents of which is replacing Pretrial with a Preliminary Examining Judge. The social problems that occur are how to design the Pretrial institution with the concept of a preliminary examining judge in the renewal of Indonesian criminal procedure law. This scientific writing uses the Sociological Legal Research method (socio legal research).

INTRODUCTION

The Indonesian Criminal Procedure Code replaces Het Herziene Inlandsch Reglement (HIR) as the legal umbrella for procedure in Indonesia (Panjaitan, 2022). The presence of the Criminal Procedure Code is intended by lawmakers to "correct" past experiences of judicial practice that are not in line with the enforcement of human rights under HIR rules, while also providing legalization of human rights for suspects or defendants to defend their interests in the legal process (Pattiruhu et al., 2020). One manifestation of the protection of human rights as stated in the Criminal Procedure Code is the existence of a Pre-Trial institution for every citizen who is arrested, detained and prosecuted without a legitimate (sufficient) reason based on the provisions of the law (Moeliono and Wulandari, 2015).

In practice, it turns out that pre-trial proceedings do not provide a sense of justice for those seeking justice, especially suspects in the criminal justice process (Abdullah, 2017). The government and the House of Representatives have created a Draft Law to Revise the Criminal Procedure Code, one of the contents of which is to replace the Preliminary Trial institution with a Preliminary Examining Judge (Boyne, 2016). The background underlying the emergence of the Preliminary Examining Judge is to better protect human rights guarantees in the criminal procedural legal process (Dandurand, 2014). The policy for formulating the regulation of Preliminary Examining Judges as contained in the Draft Law on the Revision of the Criminal Procedure Code does have executive authority (Faisal, 2023).

The main reason for replacing the Pre-trial institution with the Preliminary Examining Judge is to better protect human rights guarantees, especially for defendants or suspects in the criminal process against arbitrary actions by law enforcement officers and to avoid congestion due to differences between investigators from different agencies, while the specific reason for the emergence of the Preliminary Examining Judge formulation policy is based on (Rettob, 2021):

Pretrial hearings are conducted if there are demands from the entitled parties. So, there is no pretrial hearing without demands from the entitled parties requesting a pretrial hearing;

The authority of the Preliminary Examining Judge as stated in the Draft Law on the Revised Criminal Procedure Code is clearly broader than the authority of the Preliminary Examining Judge. Not only regarding the legality or otherwise of arrests, detentions, searches, confiscations, wiretapping, but also the cancellation or suspension of detention, as well as the termination of investigations or termination of prosecutions that are not based on the principle of opportunity;

The Preliminary Examining Judge also decides or determines compensation and rehabilitation;

It is regulated regarding the limitation of the examination time by the Preliminary Examining Judge in accordance with the principle of a speedy trial as stated in Article 112 of the Draft Law on the Revised Criminal Procedure Code that the Preliminary Examining Judge makes a decision within a maximum of 2 (two) days from receiving the application;

It is also emphasized in Article 122 of the Draft Law on the Revision of the Criminal Procedure Code, that no appeal or cassation can be filed against the decision or determination of the Preliminary Examining Judge. This is different from the current practice where the Preliminary Trial decision cannot actually be appealed, but the Supreme Court accepts;

The Preliminary Examining Judge has an office in or near the State Detention Center in Article 121 of the Draft Law on the Revision of the Criminal Procedure Code, unlike the Preliminary Trial Judge who has an office in the District Court. This means that every State Detention Center has or has a Preliminary Examining Judge who makes decisions alone and;

The Preliminary Examining Judge can issue a determination or decision regarding any other violation of the suspect's rights that occurs during the investigation stage. This shows that the Preliminary Examining Judge has the aim of providing protection for human rights, especially for the accused or suspect.

RESEARCH METHODS

This scientific writing uses the Sociological Legal Research method (Banakar and Travers, 2005). Legal Research is research that focuses on law as a norm or rule (Noor, 2023), thus it is a research of a positive legal nature (Abdulkadir, 2004).

DISCUSSION ANALYSIS

The pre-trial process that has been regulated in the Criminal Procedure Code still has weaknesses, which really need to be changed in accordance with current developments (Sumitro, 2018). The existence of this Pretrial has drawn a lot of criticism from legal practitioners because there are things that should be regulated by the Pretrial but are not accommodated by the Criminal Procedure Code (Foudray and Lowder).

In addition, although the Pretrial institution was formed to carry out the function of court supervision of the preliminary examination process to make it more just and humane (Akbar et al., 2023), However, in its implementation, there are several provisions in the Criminal Procedure Code which give rise to problems which encourage the government to create a policy on the formulation of Preliminary Examining Judges in the Draft Law on the Revision of the Criminal Procedure Code

(Sosiawan, 2018), Regarding the issue of the Pretrial Institution in the Criminal Procedure Code, among others (Kharis, 2023):

Legal Subject Issues in Pre-Trial

Legal subjects are individuals and legal entities. Legal subjects in pretrial consist of investigators, public prosecutors, suspects or their heirs and interested third parties, while the parties that can be pretrial are investigators and public prosecutors (Qurniawan et al., 2022). The question that may arise is whether a Non-Governmental Organization that represents the interests of the general public and victims of certain crimes can file a Pre-Trial Claim.

Pre-trial Authority Issues

The scope of pre-trial proceedings in the Criminal Procedure Code is considered too narrow because it does not cover the illegality of other coercive measures carried out by investigators or public prosecutors (Dobbie et al, 2018), for example, the invalidity of document inspections, house entry and searches.

Passive Pretrial Judge

The procedure for examining a pretrial motion is more like the process of examining a civil case. This can be seen from the terminology used in the pretrial motion process, the applicant and the respondent of the pretrial motion, the stages of the motion, and so on (Himawati, 2020). Another consequence is that the judge in the Pretrial is passive so that even though he knows that there is a procedural error during the preliminary examination, if there is a party that files a request for a Pretrial examination, the judge cannot summon the party that made the procedural error to be examined if no one files a pretrial. It is said that the judge is passive because the Pretrial judge tends to only assess the formal requirements of a case. The Pretrial judge does not have the authority to assess the material requirements even though the actions of the official concerned are not legally valid.

Pretrial Examination Period

The maximum period for a pretrial hearing of seven (7) days is often considered too short in practice. A pretrial hearing in progress is dropped if the main case has been examined by the district court. The applicant who has the status of suspect or his family who is facing the judicial official as the respondent (Irawati, 2022). In such cases, the applicant generally needs a lot of time to look for evidence which is certainly difficult to use to confront the respondent who, due to his position, has a lot of access to refute the applicant's pre-trial motion.

Legal Remedies Issues against Court Decision

Pretrial decisions cannot be appealed. However, in practice, it turns out that pretrial decisions that cannot be appealed can be appealed through cassation (Fani, 2021). One example is Ginanjar Kartasasmita's Praperadilan, which in its cassation decision, the Supreme Court even granted the cassation request. The Attorney General's Office, which filed the cassation, argued that the Criminal Procedure Code does not prohibit filing a cassation against a Praperadilan decision, while Muchtar Yara, one of the legal advisors for suspect Ginandjar Kartasasmita, argued that according to the workbook of the Supreme Court of the Republic of Indonesia, the Praperadilan decision cannot be appealed.

The design of a pre-trial institution with the concept of a preliminary examining judge in the renewal of Indonesian criminal procedure law where the court is passive in the sense that it only acts upon a request from the suspect (Panjaitan, 2024), The Preliminary Examining Judge can act passively or actively, namely (Ariska, 2019):

At the request of the suspect or victim (passive judge), with a legal product in the form of a decision (Reksodiputro, 2010).

On their own initiative after receiving a copy of the arrest warrant, detention, confiscation, termination of investigation or termination of prosecution which is not based on the principle of opportunity (active judge). In such cases the legal product produced is a Determination (Noor, 2023).

One of the unique things about the difference between the Preliminary Examining Judge and the Pre-Trial Judge, apart from their authority, is the judge (Felisiano and Paripurna, 2023). The judge in a pre-trial hearing is a judge who is still attached to the district court, whereas the judge in the preliminary examination judge is a judge who is independent of the district court and is permanent (Afaandi, 2016). This means that the district court judge who is appointed as a Preliminary Examining Judge will release his gavel while serving as a Preliminary Examining Judge for a period of 2 (two) years. After passing the period of two years (Wijaya, 2022), will return to the district court from which he came and become a gavel judge again (Huda et al., 2024).

This difference in judges is a new breakthrough in the framework of law enforcement. The existence of differences in the regulation of judges between the Preliminary Trial and the Preliminary Examining Judge is expected to minimize the judicial mafia which is now increasingly rampant. In terms of judicial mafia, it is very possible to occur in the practice of Preliminary Trial. This can happen by appointing judges who can be invited to cooperate by interested parties to influence their decisions (Supriyono et al., 2023).

The concept of the Preliminary Examining Judge, this can be minimized, because in the Preliminary Examining Judge, a judge has been appointed who specifically handles the Preliminary Trial, the judge in the Preliminary Trial is free. However, in the Preliminary Examining Judge, a judge has been determined who will decide the case submitted (Cantigi, 2022). The existence of differences in the arrangement of judges between the Pre-Trial and Preliminary Examining Judges can more or less prevent the practice of judicial mafia.

CONCLUSION

The design of the Pretrial institution with the concept of a preliminary examining judge in the renewal of Indonesian criminal procedure law, namely the Pretrial judge is only authorized to examine and issue a decision on the validity or otherwise of an arrest, detention, termination of investigation or termination of prosecution, compensation and/or rehabilitation for a person whose criminal case has been terminated at the investigation or prosecution stage. The pretrial judge is passive in the sense that he only acts upon a request from the suspect. A pretrial hearing is conducted if there is a demand from the entitled parties. Meanwhile, the Preliminary Examining Judge is authorized to determine or issue a decision on the validity or otherwise of an arrest, detention, search, seizure, or wiretapping, cancellation or suspension of detention; statements made by the suspect or defendant in violation of the right not to incriminate oneself; compensation and/or rehabilitation; investigation or prosecution has been conducted for an unlawful purpose; termination of investigation or termination of prosecution that is not based on the principle of opportunity; violation of any other rights of the suspect that occurs during the investigation stage. The Preliminary Examining Judge can act passively or actively, namely at the request of the suspect or victim (passive judge), on his own initiative after receiving a copy of the arrest warrant, detention, confiscation, termination of investigation or termination of prosecution that is not based on the principle of opportunity (active judge).

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