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Measuring pre-trial consistency as a means of legal protection for suspects

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Abstract
Pre-trial was inspired by the habeas corpus institution, whose purpose is to provide legal protection for suspects against coercive measures against the law. This study aims to review whether pre-trial norms and practices are still consistent with the purpose of their establishment, namely, to provide legal protection for suspects. The method used in this study is normative juridical with statutory, case, historical and conceptual approaches. Based on the discussion and analysis, the results show that the pre-trial has not optimally provided legal protection for suspects from illegitimate coercive measures because there are pre-trial objects regarding the legitimacy of coercive measures, there are pre-trial objects regarding whether or not the termination of the investigation or prosecution is legal, third parties are allowed to submit a pre-trial, the determination of a suspect is not a coercive measure, the concept of compensation and rehabilitation contradicts the theory of state responsibility, and there is a time limit for filing compensation and rehabilitation.

Keywords: pre-trial, suspect, coercive measure, legal protection

Introduction

Prior to the entry into force of the Criminal Procedure Code (The term Criminal Procedure Code (KUHAP) refers to General Explanation point 4 of the Law of the Republic of Indonesia Number 8 of 1981 concerning Criminal Procedure Code), the Inlands Regulations (IR) Staatsblad Number 16 of 1848 was used as Indonesian criminal procedural law. It was later changed to Het Herziene Indonesisch Regulation (HIR) based on Staatsblad Number 44 of 1941, while the Op de Strafvordering (Rv) regulation was applied to the European group. Post-independence HIR will remain in force until a new criminal procedural law is confirmed through Article 1 of the Transitional Rules of the 1945 Constitution.

IR In both IR and HIR, there are no provisions governing trials of coercive measures, while in Rv, there is an institution of Judge Commissioners (Rechter Commissaris). The commissioner judge at the preliminary examination stage supervises acts of coercive measures, including arrest, detention, search, confiscation, and examination of letters. In this function, the commissioner judge determines whether or not the coercive measures that have been carried out are valid (Atonius Benari Simbolon, 2020). Such a function is referred to as examining judge, which is contained in the second title of Rv in the van de regtercommissaris section (Anang Shopan, 2019) [2]. The commissioner judge has executive authority as an investigating judge. In this case, the executive authority includes summoning witnesses or suspects, visiting the witness or suspect's house, and temporarily detaining the suspect.

After the Criminal Procedure Code was passed, it contained an innovation, namely pre-trial, inspired by habeas corpus in the Anglo-Saxon legal system. Habeas corpus guarantees human freedom so that it is not violated arbitrarily (Yanto, 2013) [16]. According to Adnan Buyung Nasution, the essence of habeas corpus is to give the right to a person detained through a court order to sue the detaining official to prove that the detention is legal (Anang Shopan, 2020).

M. Yahya Harahap believes that pre-trial is a means of protecting the human rights of suspects at the level of investigation and prosecution (M. Yahya Harahap, 2016). Furthermore, according to M. Yahya Harahap, coercion limits or reduces the suspect's human rights. Therefore, this action must be carried out legally according to the applicable law. The purpose of establishing the Criminal Procedure Code is to protect human rights, and this is expressly stated in the preamble to letter *a* of the Criminal Procedure Code. Based on this description, it can be understood that establishing a pre-trial institution is a means of legal protection for suspects against coercion. The definition of pre-trial is contained in the provisions of Article 1 point 10 of the Criminal Procedure Code, which reads:

Pre-trial is the authority of the district court to examine and decide according to the method stipulated in this law regarding:

a. Whether or not an arrest and/or detention is legal at the request of the suspect or his family or another party under the authority of the suspect;
b. Whether or not the termination of investigation or prosecution is legal at the request for the sake of upholding law and justice;
c. A request for compensation or rehabilitation by the suspect, his family, or another party on his behalf whose case was not brought to court.

Pre-trial objects are regulated by Article 77 of the Criminal Procedure Code and based on Constitutional Court Decision Number 21/PUU-XII/2014 on April 28, 2015, where pre-trial objects are expanded so that the current pre-trial objects are as follows:

a. Investigation or termination, prosecution, determination of suspects, searches, and confiscations;
b. Compensation and/or rehabilitation for a person whose criminal case is terminated at the level of investigation or prosecution.

Observing the scope and purpose of establishing a pre-trial institution to protect suspects from coercive measures that are against the law, in this case, it will be discussed and analyzed whether the current pre-trial is still consistent with the background it was formed.

Research Method

The type of research used is normative juridical. In normative juridical research, the law is identified as positive, guiding humans to act as they should (Amiruddin & Zainal, 2012) [1]. This study uses statutory, case, historical, and conceptual approaches.

Results and Discussion

The law functions as a means of protecting human interests. For this protection to materialize, there must be law enforcement. The law must be adequately implemented; if there is a violation during the implementation of the law, then law enforcement must be carried out (Sudikno Mertokusumo, 1999) [14]. In order to protect human interests, the law contains coercive regulations so that there are no disputes between interests (J Van and J.H, Beekhuis, 1987).

Legal protection is tasked with protecting human dignity. In addition, through legal protection, human rights are recognized and protected from arbitrary actions. Human interests are the goal of rights, so these rights must be recognized and protected by law (Satjipto Rahardjo, 2014) [13]. The meaning of legal protection is the efforts made by the government to secure, control and fulfill human rights (Tedi Sudrajat & Endra Wijaya, 2020) [15].

Philipus M. Hadjon, there are two forms of legal protection, namely preventive legal protection and repressive legal protection. In preventive legal protection, the people are given space to express their opinions or objections before the government issues its decision. In contrast, in repressive legal protection, the people have the means to resolve disputes, or in short, this repressive legal protection only functions if a conflict has occurred (Philipus M. Hadjon, 2020).

Based on the definition, the intent and purpose of legal protection are primarily to protect rights. Then the relevance of this paper is that the rights protected are the rights of the suspect. The Criminal Procedure Code contains the rights of suspects and defendants, but this discussion will only outline the rights of suspects. This is because the violation of the suspect's rights is relevant to the pre-trial. In general, the suspect's rights can be concreted from the general explanation of the Criminal Procedure Code relating to the enforcement of the Criminal Procedure Code principles, including: "The right to be treated equally before the law (equality before the law), the right of a suspect to be presumed innocent until a court decision states him guilty (presumption of innocence), the right not to be arrested, detained, searched and confiscated without a written order by an authorized official by law and in ways stipulated by law, the right of a person to receive compensation and rehabilitation for coercive measures that are not lawful according to law and the right to obtain a quick, simple and low-cost trial process."

The form of legal protection for suspects against coercion (dwang middelen) is by including a pre-trial. Then for the illegal coercion, the suspect can demand compensation and rehabilitation. This paper will discuss and analyze several issues regarding pre-trial consistency as a forum for legal protection for suspects, with the following explanation:

First, the object of pre-trial contained in Article 77 letter a of the Criminal Procedure Code uses the word valid or not. It means that pre-trial includes two models: pre-trial regarding the legality of coercive measures and pre-trial regarding the invalidity of coercive measures. If what is proposed by the pre-trial is about the legitimacy of coercive measures, then this has no essence for the suspect. Therefore, if the coercive measure is legalized through pre-trial, the coercive measure against the suspect will continue.

Second, when a case is terminated at the level of investigation or prosecution, the status of *mutatis mutandis* is no longer a suspect, and this demands the right of law enforcement officials to use force efforts. The Criminal Procedure Code contains pre-trial objects regarding whether or not the termination of an investigation or prosecution is legal. Consequently, when the termination of an investigation or prosecution is declared invalid by a pre-trial judge based on Article 82 paragraph (3) letter b of the Criminal Procedure Code, the investigation or prosecution of the suspect must be continued. Therefore, there is an open space for law enforcers to make further efforts to force the suspect. In addition, parties who can file a pre-trial regarding whether or not the termination of an investigation or prosecution is legal according to the provisions of Article 80 of the Criminal Procedure Code, namely investigators, public prosecutors, or interested third parties. Then based on the Decision of the Constitutional Court Number 98/PUU-X/2012 dated May 22, 2013, the interpretation of interested third parties is "victim witnesses or reporters, non-governmental organizations or community organizations."

Third, whether the determination of the suspect is legal becomes the object of pre-trial after the Constitutional Court Decision Number 21/PUU-XII/2014, on April 28, 2015. In essence, this determination of a suspect is not a coercive measure because the meaning of a coercive measure is an act of coercion to curb freedom or restrain someone not to own or control the goods (Syifa Fachrunisa, 2021). Luhut M.P Pangaribuan believes that coercion is an act of coercive investigators, public prosecutors, and judges to collect evidence. In the KUHAP systematics, this coercive measure is contained in Chapter V of the Criminal Procedure Code, which consists of actions in the form of "arrest, detention, house or body search, entry into the house, confiscation, and inspection of documents (Luhut M.P Pangaribuan, 2013)."

The Panel of Judges of the Constitutional Court also did not have a unanimous opinion regarding the qualifications for determining the suspect as a coercive measure. This different opinion is contained in the legal considerations of Judge I Dewa Palguna:

"That the action of setting the suspect *an sich* is not a coercive measure and therefore does not fall within the scope of pre-trial (Constitutional Court decision No 21/PUU-XII/2014 on April 28, 2015)."

Fourth, compensation and rehabilitation in the Criminal Procedure Code must be requested. This can be seen from Article 1 point 10, Article 1 point 22, Article 30, Article 68, Article 81, Article 82 paragraph (1) letter b, Article 82 paragraph (4), Article 95 and Article 97 paragraph (3) of the Criminal Procedure Code. This is also supported by Article 9 paragraph (1) of Law Number 48 of 2009 Concerning Judicial Powers (The Judicial Powers Law), which reads:

"Everyone who is arrested, detained, prosecuted, or tried without reason based on law or because of confusion about the person or the law that is applied, has the right to demand compensation and rehabilitation."

Then the submission of compensation and rehabilitation has a time limit as stipulated in Government Regulation of the Republic of Indonesia Number 92 of 2015 concerning the Second Amendment to Government Regulation Number 27 of 1983 concerning the Implementation of the Criminal Procedure Code. This arrangement is contrary to the General Explanation number 3 letter d of the Criminal Procedure Code, which reads:

"Anyone who has been arrested, detained, prosecuted, or tried without reason based on law and/or because of a mistake regarding the person or the law that was applied must be compensated and rehabilitated starting from the investigation stage. Law enforcement officials, who intentionally or because of their negligence cause the legal principle to be violated, are prosecuted, sentenced and/or subject to administrative penalties."

The essence of the General Explanation of number 3 letter d of the Criminal Procedure Code is that the State must provide compensation and rehabilitation to a person subject to coercive measures illegally or wrongly. Compensation and rehabilitation for such coercive measures should be the state's obligation. According to Nalom Kurniawan Barlyan, the provision of compensation and rehabilitation for coercive measures against the law is in accordance with the principle of remedy and rehabilitation (Nalom Kurniawan Barlyan, 2020) [10].

Legal protection through compensation mechanisms is also contained in the International Covenant on Civil and Political Rights, which was later ratified through the Law of the Republic of Indonesia Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights. Article 9, paragraph 5 of Law Number 12 of 2005 states that "everyone who has been the victim of illegal arrest or detention has the right to receive compensation which must be enforced." Article 9, paragraph 5 stipulates that everyone has the right to compensation because if there are rights, there are obligations. In this case, the state must compensate everyone detained or arrested illegally. Furthermore, the state's obligation to provide compensation is also contained in Article 14, paragraph (6) of Law Number 12 of 2005:

"If a person has been sentenced by a legal decision that has permanent legal force, and if later it turns out that it was decided otherwise, or pardoned based on a new fact, or a fact that has just been discovered shows conclusively that an error has occurred in upholding justice, then the person who has suffered punishment as a result of the decision "should be compensated" according to law. Unless it is proven that the non-disclosure of the unknown fact was wholly or partly caused by himself."

The phrase used in Article 14 paragraph (6) of Law Number 12 of 2005 is "must." Literally, "must" is interpreted as an obligation that must be carried out. In this case, with or without a request/demand for compensation, the state is obliged to provide compensation if it has been wrong in applying the law. The state's obligation to provide compensation is in line with the concept of state responsibility. According to F. Sugeng Istanto, the definition of state responsibility is "the obligation of the state to provide an answer which is a calculation of something that happened and the obligation to provide recovery for losses that may be incurred (F. Sugeng Istanto, 1994) [6]."

A contradiction of the articles in the Criminal Procedure Code with general explanations results in the law being inconsistent and uncertain. Legal certainty is one of the pillars of a rule of law nation, and moving from legal certainty, the principles of legality and the rule of law can be upheld. This uncertain formulation is contrary to the nature of procedural law, which is guided by the principles of lex scripta, lex stricta, and lex certa.

Regarding pre-trial procedural law, there are 3 (three) opinions, namely using civil procedural law, criminal procedural law, or quasi-civil and criminal procedural law. Hari Sasangka believes that pre-trial uses civil procedural law because the Criminal Procedure Code is not clearly regulated, and the use of civil procedural law in pre-trial cases also exists in practice (Hari Sasangka, 2007) [7].

Unlike Sasangka Day, D.Y. Witanto argues that pre-trial procedural law uses criminal procedural law. Such idealism can be understood because pre-trial is integrated into the Criminal Procedure Code, and other procedural laws cannot be used. D.Y Witanto believes there are several reasons why the pre-trial should use criminal procedural law. First, Article 82 paragraph (1) letter b of the Criminal Procedure Code stipulates that the testimony of the suspect and the authorized official be heard. Hearing the testimony of the suspect only exists in criminal cases. Second, the disproportionate timeframe for completing pre-trial cases is only seven days, while in civil cases, the settlement can be three to five months. Therefore it is not appropriate to use civil procedural law (D.Y. Witanto, 2019) [4].

Then the opinions of quasi-civil and criminal pre-trial can be found in a book entitled "Permasalahan Praperadilan, Ganti Kerugian, Rehabilitasi, Ditinjau dari Segi Teori, Norma dan Praktik (Pretrial Issues, Compensation, Rehabilitation, in Terms of Theory, Norms, and Practice)" written by Erwin Susilo. Quasi-civil pre-trial basis: first, Article 1, point 10, letters *a* and *c*, while Article 79 of the Criminal Procedure Code uses the word "proxy of the suspect or his attorney," which is known in civil procedural law while the term in criminal cases is "legal adviser." Second, the parties in a pre-trial case are called "applicant" and "respondent." This term is known in civil cases, for example, the request for an EGMS. Third, a coercive measure claim can be filed together with a claim for compensation, in which Article 101 of the Criminal Procedure Code formulates a civil procedural law that applies to claims for compensation (Erwin Susilo, 2020) [5].

Then on the quasi-criminal pre-trial basis, Erwin Susilo has the same view as D.Y. Witanto, principally because of the hearing of the statements of the applicant and the respondent and the disproportionate time limit when using civil procedural law. As Erwin Susilo's opinion, the procedural law model is also contained in Decision Number: 3/Pid.Prap/2017/PN.Cbn, in its legal considerations, reads "...that pre-trial cases filed based on the Criminal Procedure Code but in the pre-trial examination are semi-civil cases, where in addition to the application of the Criminal Procedure Code, civil procedural law also applies to the examination procedure". The absence of clear and definite clarification of pre-trial, compensation and rehabilitation procedural law can have implications for the failure of the suspect's right to obtain a quick, simple, low-cost trial.

Pre-trial arrangements currently do not provide preventive legal protection to suspects because pre-trial requests can only be filed after there has been a violation of the law in the form of coercive measures against the law. From the perspective of repressive legal protection, it turns out that pre-trial does not optimally provide repressive legal protection for suspects because some subjects and objects are not of legal interest to the suspect. Thus, the pre-trial procedural law does not yet have legal certainty.

Conclusion

The pre-trial institution was inspired by habeas corpus, which aims to protect suspects from coercive measures against the law. Pre-trial arrangements currently do not provide preventive legal protection to suspects because pre-trial requests can only be filed after there has been a violation of the law in the form of coercive measures against the law. Pre-trial also has not optimally provided repressive legal protection for suspects with the considerations: there is a pre-trial object that turns out to be not in the interest of the suspect, parties other than the suspect can submit a pre-trial regulated in Article 80 of the Criminal Procedure Code, there is a pre-trial about whether or not the determination of a suspect who is not qualified as a coercive measure exists, there is a concept of compensation and rehabilitation that is contrary to the theory of state responsibility, and uncertain pre-trial procedural law, compensation, and rehabilitation.

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