



Pre-Trial Authority after the Decisions of the Constitutional Court No.21-PUU-XII-2014

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Abstract

The pre-trial scope has actually been limited by Article 77 of the Criminal Procedure Code. However, the development of the law for the past 5 (five) years has broken through the boundary and preceded the discussion of the Draft Criminal Procedure Code. The expansion of the pre-trial scope, especially regarding the determination of suspects, was started before the Constitutional Court Decision No. 21/PUU-XII/2014 was issued. This research is normative legal research. It utilizes statute approach, conceptual approach and case approach. Based on the statement that the category of legal issues is a vague norm, the analytical instrument used is historical legal interpretation. The results of this study are to expand the pre-trial authority to examine and decide: 1) whether the determination of the suspect is valid; 2) whether the search is valid; dan 3) whether the seizure is valid. In addition, the pre-trial authority in judicial practice is extended to the inability of investigators to conduct investigations to the suspects (the legal subjects).

Keywords: Pre-Trial; After Decision; Constitutional Court

Introduction

Along with the population growth and social development, the development of law in Indonesia is now increasingly felt. Various kinds of community diseases demand and require that the law should always move forward as a social controller to become the front guard in creating an orderly, advanced and prosperous society. Law always develops and changes in accordance with the development of science and society in which the law is located, including criminal procedural law stipulated in Law No. 8 of 1981 concerning the Criminal Procedure Code. One of the focuses of the study in this paper is related to the pre-trial. Criminal Procedure Code accommodates the interests and rights of each person. It means that any act or forced actions against someone is an inappropriate action because it is ill-treatment.

Yahya Harahap affirms that every forced action in the form of arrest, detention, or seizure is:¹

¹ M. Yahya Harahap, 2002, *Pembahasan, Permasalahan dan Penerapan Kitab Undang-Undang Hukum Acara Pidana: Penyidikan dan Penuntutan (Discussion, Issues and Application of the Criminal Procedure Code: Investigation and Prosecution)*, Sinar Grafika, Jakarta. page 3

1. A forced action that is justified by the law for the purpose of examining criminal offenses alleged to the suspect.
2. A forced action that is justified by law and legislation, that is any forced action which includes the deprivation of liberty and freedom as well as the restrictions on the rights of suspects.

Pre-trial is a mechanism of criminal law that can be taken by someone to oppose the treatment or decision of another party. That treatment and decision is the object of pre-trial. There has been a thought that the object of pre-trial is limited which means that it is only limited to what is mentioned in Article 1 No.10 and Article 77 of the Criminal Procedure Code.

If we follow this idea, pre-trial is only limited to questioning the legality of arrest, detention, termination of investigation, and termination of prosecution. Similarly, it will also happen to the validity of compensation or rehabilitation for someone whose case is stopped at the level of investigation or prosecution. Today, pre-trial is an interesting issue to discuss, especially for the legal experts in Indonesia. It is inseparable from the existence of legal developments that occur in the context of pre-trial in several court decisions, namely the inclusion of valid testing of the determination of suspects as the object of pre-trial. This phenomenon provokes mixed reactions from various parties. Many parties support it since it is an advance in criminal procedural law that increasingly protects human rights. On the other hand, many people berate because it violates the principle of legality, where only the Criminal Procedure Code should be regulated as a pre-trial object that can be submitted to the pre-trial proceedings. The validity of the determination of the suspect is not included in the object that can be submitted to the pre-trial in the Criminal Procedure Code.

The Constitutional Court decision states that the determination of suspects is one of the objects that could be checked for validity in pre-trial. However, we should know that there has been a decision of the Constitutional Court No. 003/PUU-IV/2006 dated July 26, 2006 which basically states that the use of teachings against the material law stated in the explanation of Article 2 Paragraph (1) of Law 31/1999 jo. Law 20/2001 concerning the Eradication of Corruption Crimes is contrary to the 1945 Constitution of the Republic of Indonesia.

The purpose of pre-trial is stated in the explanation of Article 80 of the Criminal Procedure Code which confirms that "the purpose of pre-trial is to enforce law, justice and truth through a means of horizontal supervision." The essence of pre-trial is to supervise forced actions by investigators or prosecutors against suspects in order to make sure that the action is truly carried out in accordance with the provisions of the law, proportional to the provisions of the law, and not contrary to the law.

The purpose of pre-trial is to place the same rights and obligations between the examiner and the examinee. It places the suspect not as the object being examined. The application of the principle of *aquisitoir* in criminal procedure guarantees legal protection and basic interests. Law provides the means and space to demand rights taken through pre-trial. Yahya Harahap (2002: 4) argues that "the judiciary acts as a horizontal oversight of the forced actions imposed on suspects as long as they are in the examination of investigations into prosecution so that the action does not oppose the legal provisions."

The concept of pre-trial is formulated in Article 1 point 10 of the Criminal Procedure Code which determines that the pre-trial is the authority of the district court to examine and decide according to the method stipulated in this law, concerning:

1. whether or not an arrest or detention is valid at the request of the suspect or his family or other parties with the power of the suspect;
2. whether or not the termination of investigation or prosecution is valid at the request for the sake of law and justice;
3. request for compensation or rehabilitation by the suspect or his family or other parties for his power whose case is not brought before the court.

Furthermore, Article 77 of the Criminal Procedure Code formulates the scope of authority of the district court to examine and decide in accordance with the provisions stipulated in this law concerning:

1. the legitimacy of arrest, detention, termination of investigation or termination of prosecution;
2. compensation and/or rehabilitation for a person whose criminal case is stopped at the level of investigation or prosecution.

There is a different principle on the construction of norm formulation between Article 1 point 10 of the Criminal Procedure Code and Article 77 of the Criminal Procedure Code. However, in fact, the scope of the pre-trial authority is not stagnant.

The scope of pre-trial has been limited in the provisions of Article 77 of the Criminal Procedure Code, but the development of the law in the last 5 (five) years has broken through these boundaries and preceded the discussion of the draft Criminal Procedure Code. The legal development is a tangible manifestation of a responsive theory implementation that describes the law as a means of responding to social provisions and aspirations of the community. The expansion of the scope of pre-trial, especially regarding the determination of suspects, has begun before the Decision of the Constitutional Court No. 21/PUU-XII/2014. After the Constitutional Court Decision is issued, pre-trial requests for the determination of suspects have a legal basis to be brought to the court that has special characteristics of pre-trial submissions related to the determination of suspects, including:

1. the determination of the suspect is invalid because the examination of witnesses, experts, suspects, searches, and seizures is carried out after the determination of the suspect, so the provision of 2 (two) evidence is not fulfilled,
2. the second pre-trial request regarding the determination of a suspect cannot be categorized as *ne bis in idem* because it has not yet involved the subject matter,
3. the determination of suspects on the basis of the results of developing an investigation of other suspects in different files is invalid.

This decision provides a chance for the suspects to conduct pre-trial if they have not received a Notice of Commencement of Investigation when they are reported or the submission of the notice to the reported party more than 7 (seven) days. The reference is the principle of due process of law that must be fulfilled. Due Process of Law: The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private right, including notice and the right to a fair hearing before a tribunal with the power to decide the case (Black's law dictionary). The notification of the initiation of a legal process is a constitutional right guaranteed by the legal apparatus. It means that the implementation of the Notice of Commencement of Investigation as part of legal procedures needs to be ensured. The rejection of the pre-trial reason for late sending the notice in accordance with the Constitutional Court Decision can be known through Decision 71/Pid.Pra/2017/PN JKT.SEL on the grounds of "If it is not written into the application, the applicant considers the notice of investigation not a substantial matter. Therefore, the reason is rejected". This decision refers to the formulation of pre-trial requests that do not contain objections to the delay in the submission of the Notice of Commencement of Investigation, but it is submitted to the conclusion.

Formulation of the Problem

Based on the background above, the problem examined in this study is how the development of the scope of pre-trial authority arises in law enforcement in Indonesia is.

Objective of the Study

This study aims to examine the development of the pre-trial authority scope that arises in law enforcement practices after the Court Decision No. 21-PUU-XII-2014.

Research Method

This research is normative legal research that is research that examines legislation, legal principles, legal concepts and court decisions. The approach used in this study is (1) statute approach; the approach that reviews the laws and regulations that become the focus of this research; (2) conceptual approach; approach that examines various legal concepts related to legal issues from this study; and (3) case approach; approach that examines various court decisions that have obtained legal force related to the legal issues of this research from the aspect of criminal law. Legal material collection in this study utilizes documentation technique or document study.

Based on the category of legal issues from this study which is a vague norm, the analytical instrument used is legal interpretation. Moreover, since the legal issue of this research is to examine the development of the scope of pre-trial, the legal interpretation used is historical interpretation.

Results and Discussion

The scope of pre-trial authority has not evolved since the initial promulgation of Law No. 8 of 1981 concerning the Criminal Procedure Code until 1998 which was the beginning of the Reform Order. The scope of pre-trial authority is still based on the provisions of Article 77 of the Criminal Procedure Code which includes the legality or failure of arrest, detention, termination of investigation or termination of prosecution, compensation and / or rehabilitation for a person whose criminal case is stopped at the level of investigation or prosecution.

The starting point for the development of the scope of pre-court authority scope was at the beginning of the application for judicial review of Article 1 No.14, Article 17, and Article 21 paragraph (1) of Law No.8 of 1981 (Criminal Procedure Code) by the applicant Bachtiar Abdul Fatah on February 17, 2014.

The Criminal Procedure Code as a formal law in the criminal justice process in Indonesia has formulated a number of rights for suspects / defendants to protect against possible human rights violations. However, there are still several phrases that require an explanation to fulfill the principle of *lex certa* and the principle of *lex stricta* as a general principle in criminal law to protect someone from the arbitrary actions of investigators, especially the phrase “preliminary evidence”: “sufficient initial evidence” and “sufficient evidence” as specified in Article 1 No.14, Article 17, and Article 21 paragraph (1) of the Criminal Procedure Code. The provisions in the Criminal Procedure Code do not provide an explanation of the limits of the number of “preliminary evidence” phrases, “sufficient preliminary evidence”, and “sufficient evidence”. It is different from Law No.30 of 2002 concerning the Corruption Eradication Commission which clearly sets the limits on the number of evidences that is a minimum of two evidences. This is in accordance with the provisions in Article 44 paragraph (2) which states, “Sufficient initial evidence is considered to have existed if at least 2 (two) evidence have been found...”. The only article that determines the minimum limit of evidence is in Article 183 of the Criminal Procedure Code which states, “The judge may not impose a sentence on a person unless he has at least two pieces of evidence...”. It is the basis for Bachtiar Abdul Fatah submitting a request for material testing to the Constitutional Court.

The Court Decision No. 21_PUU-XII_2014 basically states that in addition to those stipulated in Article 77 letter a of the Criminal Procedure Code, the scope of the pre-trial authority includes examining and deciding suspects, searches and seizures. In addition, the decision also provides an interpretation of the phrase “preliminary evidence” (as determined in Article 1 No. 14 of the Criminal Procedure Code), “sufficient initial evidence” (as specified in Article 17 of the Criminal Procedure Code), and “sufficient evidence” (as determined in Article 21 paragraph (1) of the Criminal Procedure Code) that there should be a minimum of two evidences which is also stated in Article 184 of Law No. 8 of 1981 concerning the Criminal Procedure Code.² Thus, the scope of the pre-trial authority is not only those stated in Article 77 of the Criminal Procedure Code, but also extended to the determination of suspects, searches and seizures.

²Vide Decision of the Constitutional Court No. 21_PUU-XII_2014

1. Determination of the Suspect

Conceptually, a person can be categorized as a suspect if his/her actions or circumstances, based on preliminary evidence, can be suspected of being a criminal act.³ According to the Decision of the Constitutional Court No. 21-PUU-XII-2014, determining the suspect should be supported by at least two evidences as stated in Article 184 of the Criminal Procedure Code:

- a. witness testimony;
- b. information from experts;
- c. letter;
- d. clue;
- e. statement of the defendant

The question that arises is when the determination of the suspect begins if in the investigation process it has been found that if the event is a criminal event, then the next step is who is the perpetrator. To find the perpetrator of a criminal event, an investigation step is needed. It is a series of investigator's actions to search for and collect evidence to clarify the crime that occurred and to find the suspect.⁴ Thus, the determination of suspects is carried out at the stage of investigation. It must be supported by a minimum of two evidences. The evidence that can be collected during the investigation phase is witness testimony, expert information, and letters. Other evidence such as instructions and information from the defendant can only be obtained at the time of the hearing at the court.

Based on the above arguments, the determination of suspects must be carried out at the stage of investigation and supported by at least two evidences, which are witness statements, and / or expert statements, and/or letters.

2. Search Procedure

Conceptually, Article 1 point 17 and point 18 of the Criminal Procedure Code explains that what is meant by:

- a. Home search is the action of investigators to enter residential homes and other enclosed places to carry out inspection and/or seizure and/or arrest actions in the matter and according to the method stipulated in this law.
- b. Pat-down search is the act of the investigator to conduct a body check and/or suspect's clothes to look for objects that have been hard pressed on his body or carried to seize.

Furthermore, the Criminal Procedure Code does not have special procedures for each search (house and body). It has only a general search procedure. Therefore, the focus in reviewing search procedures is based on the provisions in the Criminal Procedure Code, as follows:

The first one is showing identification to the suspect or his family. Article 125 of the Criminal Procedure Code determines: Before conducting a house search, the investigator must show his identification to the suspect or his family, then the provisions referred to in Article 33 and Article 34 apply.

The second one is a permit from the chairman of the local district court. The Article 33 paragraph (1) of the Criminal Procedure Code determines: investigators in conducting investigations may conduct searches as needed with a permit from the head of the local district court.

Permission of the Head of the District Court except in **very necessary and urgent circumstances** as stipulated in Article 34 paragraph (1) of the Criminal Procedure Code that determines: *In a very*

³ Vide Article 1 No. 14 of the Criminal Procedure Code.

⁴ Vide Article 1 No. 1 of the Criminal Procedure Code.

necessary and urgent situation if the investigator must act immediately and it is impossible to obtain a permit in advance, without prejudice to the provisions of Article 33 paragraph (5), the investigator may conduct a search:

- a. *on the home yard of the suspect resides, stays or wherever the suspect is;*
- b. *at any other place the suspect resides, dwells or exists;*
- c. *at the place where the crime is committed or wherever there is a mark or sign;*
- d. *in lodging and other public places.*

The explanation of Article 34 paragraph (1) of the Criminal Procedure Code, mentions "*a very necessary and urgent situation*" which means *if you are in a dangerous place and need to escape immediately or where criminal acts can be repeated or the evidence can be easily destroyed or moved, where it is impossible to obtain a permit from the head of the district court in a proper manner and in a short time.*

The third one is written order from the investigator to enter the house. The Article 33 paragraph (2) of the Criminal Procedure Code determines: *police officers of the Republic of Indonesia can enter the house in the required event based on the written order of the investigator.*

The fourth one is that there should be two witnesses in which the suspects or residents approve it. Article 33 paragraph (3) of the Criminal Procedure Code determines: *every time entering a house must be witnessed by two witnesses where the suspect or occupant approves it.*

The fifth one is that it must be witnessed by the head of a village or ward chairman with two witnesses, if the suspect or resident refuses or is absent. Article 33 paragraph (4) of the Criminal Procedure Code determines: *if the suspect or resident refuses or is absent, entering the house must be witnessed by the head of the village or ward chairman with two witnesses.*

The sixth one is making an official report about the process and results of a house search signed by the suspect/ family, the head of the village or neighborhood, and 2 witnesses. Copies are delivered to the owner of the house.

Article 33 paragraph (5) of the Criminal Procedure Code states: *an official report and its derivative must be made within two days after entering and or searching the house that is submitted to the owner or occupant of the house concerned.*

Article 126 paragraph (1) and (2) of the Criminal Procedure Code determine:

- (1) *The investigator makes a report on the process and results of the search of the house as referred in Article 33 paragraph (5).*
- (2) *The investigator reads the report of the house search to the person concerned, then gives it a date and signed by the investigator or suspect or his family and or the village head or ward chairman with two witnesses.*

Therefore, the procedure specified in the Criminal Procedure Code must be fulfilled in conducting searches. If one of the procedures is not carried out, the search has a procedure defect.

3. Seizure Procedure

Conceptually, seizure is regulated in Article 1 point 16 of the Criminal Procedure Code. It is a series of actions by investigators, under their control, to take over and / or store movable or immovable objects, tangible or intangible for evidence in investigation, prosecution and justice.

To review the seizure procedure, the focus of the study is based on the provisions stipulated in the Criminal Procedure Code, as follows:

The first one is showing identification to the person whose object is seized. Article 128 of the Criminal Procedure Code states: *in the process of seizure, the investigator needs to show his identification to the person from which the object was seized.*

The second one is a permit from the head of the local district court. Article 38 paragraph (1) of the Criminal Procedure Code mentions: *the seizure can only be carried out by investigators with a permit from the head of the local district court.*

In very necessary and urgent circumstances, the permission of the head of the court is not necessary but the investigator must immediately report to the head of the local district court.

Article 38 paragraph (2) Criminal Procedure Code states: *in a very necessary and urgent situation where the investigator must act immediately and it is impossible to obtain a permit in advance, without prejudice to the provisions in paragraph (1), the investigator can seize only movable objects and therefore immediately report to the head of the local district court to obtain the approval.*

The third one is showing the object to the person from which the object was seized or his family witnessed by the head of the village or the ward chairman and two witnesses. Article 129 paragraph (1) Criminal Procedure Code states: *the investigator shows the object to the person from which the object will be seized or to his family and can ask for information about the object witnessed by the head of the village or ward chairman with two witnesses.*

The fourth one is making the reports of the seizure signed by the investigator, the person concerned / his family, the head of the village / ward chairman, and two witnesses. Article 129 paragraph (2) Criminal Procedure Code mentions: *the investigator makes an official seizure report that is firstly read to the person from which the object is seized or his family by being dated and signed by the investigator or person or his family and or the head of the village or ward chairman with two witnesses.*

Thus, the procedures specified in the Criminal Procedure Code must be fulfilled in carrying out seizures. If one of the procedures is not performed, the seizure has a procedure defect.

4. Investigators Authority

Besides the scope of the pre-trial authority as stipulated in Article 77 of the Criminal Procedure Code which is then extended to the determination of suspects, searches and seizures⁵, there are several Court Decisions related to the development of the scope of pre-trial authority in judicial practice, including:

South Jakarta District Court Decision No. 04/Pid.Prap/2015/PN.Jkt.Sel. (Pre-trial of Drs. BUDI GUNAWAN, SH. MSi, Phd)

The reason for the applicant filing a pre-trial is:⁶

1. The Respondent does not have the authority to carry out investigations and the investigation of corruption against the applicant;
2. Decision making by the respondent to determine the applicant as a suspect is invalid because it is not implemented under the law as stipulated in article 21 of the Corruption Eradication Commission Law. It violates the Principle of Legal Certainty which is the fundamental principle of implementing the duties and authority of the respondent;
3. The use of the respondent's authority to determine the suspect's status against the applicant is carried out for other purposes beyond the obligation and purpose of the authority of the respondent. This is a form of abuse of power;

⁵ Decision of the Constitutional Court No. 21_PUU-XII_2014

⁶ Decision of the South Jakarta District Court No. 04/Pid.Prap/2015/PN.Jkt.Sel, page 229.

4. The respondent's decision to determine the status of the applicant as a suspect without calling and / or formally requesting the statement of the applicant is an act that is contrary to the Principle of Legal Certainty which is the fundamental implementation of the authority of the respondent under the Corruption Eradication Commission Law.

The things that become the basis for judges' consideration are mentioned as follows:⁷

Article 11 letter a of Law No. 30 of 2002 provides a limitation regarding people as legal subjects of perpetrators of corruption under the authority of the Corruption Eradication Commission to conduct investigations and prosecutions, including:

- a. Law enforcement officers;
- b. State administrators;
- c. Other people related to the criminal acts of corruption committed by law enforcement officials or state administrators.

The law does not provide an explanation of the meaning of "law enforcement officers" and also does not explain who is included. The law enforcement officers can be interpreted literally as state officials who are authorized by law to carry out law enforcement duties. From the above understanding, it can be clearly known which parties are included or referred to as law enforcement officers. They are:

- a. investigator;
- b. prosecutor, public prosecutor;
- c. judge.

The "state administrators" is explained in article 1 No. 1 of Law No. 28 of 1999 concerning the Implementation of a State that is Clean and Free from Corruption, Collusion and Nepotism. This law states that the state administrators are: "State officials who carry out executive, legislative or judicial functions, and other officials whose functions and main tasks are related to the administration of the state in accordance with the provisions of the applicable legislation".

Moreover, Article 2 of Law No. 28 of 1999 concerning the state administration that is clean and free from Corruption, Collusion and Nepotism, states that "state administrators" consist of:

- a. State Officials at the Highest State Institution;
- b. State Officials at the State High Institution;
- c. Minister;
- d. Governor;
- e. Judge;
- f. Other state officials in accordance with the provisions of the applicable legislation; and
- g. Other officials who have a strategic function related to the administration of the country in accordance with the provisions of the applicable legislation.

The explanation of article 2 No. 6 describes "*other state officials*", in this case for instance, Head of Representative of the Republic of Indonesia abroad who is domiciled as an Extraordinary and Plenipotentiary Ambassador, Deputy Governor, and Regent/ Mayor.

"Other officials who have a strategic function" in the explanation of article 2 point 7 in the explanation of Law No. 28 of 1999 are officials who have the duty and authority in carrying out the administration which has a tendency towards the practices of corruption, collusion and nepotism, which includes:

⁷ *Ibid.* page 233 - 238.

- a. Directors, Commissioners, and other structural officials in State-Owned Enterprises and Regionally-Owned Business Entities;
- b. Head of Bank Indonesia and Chair of the National Bank Restructuring Agency;
- c. State University Leaders;
- d. Echelon I Officials and other Officials who are equated in the civil, military and National Police of the Republic of Indonesia;
- e. Prosecutor;
- f. Investigator;
- g. Court Registrar; and
- h. Project leader and treasurer.

The applicant is determined as a suspect for alleged Corruption Crime by the respondent when the applicant serves as Head of the Career Development Bureau. This is based on the Investigation Order No. Sprin.Dik-03/01/01/2015 dated 12 January 2015 stating that the alleged corruption was carried out in the period 2003 to 2006 since the applicant was appointed based on the Decree of the National Police Chief with Police No. Skep/217.IV.2003, April 24, 2003 concerning Position Termination and Appointment in the National Police Environment on behalf of Drs. BUDI GUNAWAN, SH. MSi, PhD, Police Commissioner Nrp. 59120980, from his old position, Middle Officer, Police Headquarters of the Republic of Indonesia (the Indonesian president's aide) to his new position, Head of the Bureau of Career Development of the Deputy of Human Resources of the Republic of Indonesia National Police starting April 24, 2003.

The question arises whether the applicant is included in the legal subject of the Corruption Crime perpetrator who becomes the authority of the Corruption Eradication Commission to conduct investigations and prosecution of Corruption Crimes.

The first thing that needs to be proven is regarding the position of the applicant as the Head of the Career Development Bureau whether the position in the Police organization of the Republic of Indonesia belongs to the law enforcement officials and or state administrators.

Based on the Appendix D of the Decree of the Indonesian National Police Chief with Police No. Kep/53/X/2002 dated October 17, 2002 concerning the organization and working procedures of organizational units at the level of the National Police Headquarters of the Republic of Indonesia, organization and working procedures of the Deputy Chief of Police for Human Resources (Assistant Deputy for Human Resources of the Republic of Indonesia Police), it is mentioned that Head of Career Development Bureau is one of the implementing elements of Human Resources. Furthermore, according to Article 4 of Presidential Decree No. 70 of 2002 concerning the organization and work procedures of the National Police of the Republic of Indonesia, Deputy Chief of Police for Human Resources (Deputy of Human Resources Police of the Republic of Indonesia) is a supporting element for leaders and staff in the field of human resource management.

Based on a Certificate No. Sket/2/I/2015 dated 30 January 2015 concerning the position of Head of Career Development Bureau Staff of the Deputy of National Police Human Resources supported by Certificate No. B/4/I/2015/SSDM dated 30 January 2015, along with the attachments, the Head of the Career Development Bureau is an administrative position of Echelon II A1. This position is not included as the state administrator since it is not included in the echelon I.

Moreover, it is also mentioned that the position of the Head of Career Development Bureau is a position under the Deputy Chief of Police for Human Resources. This position is an assistant to the leader and executor of staff and not law enforcement officers because it does not have the authority to carry out law enforcement duties.

Article 11 letter c of Law No. 30 of 2002 states that the legal subject of the perpetrators of Corruption Crimes under the authority of the Corruption Eradication Commission (the respondent) are those whose actions cause state losses of at least IDR 1,000,000,000 (one billion rupiah).

The Investigation Warrant No. Sprin.Dik-03/01/01/2015 dated 12 January 2015 which is accompanied by a register numbering investigation warrant at the Secretariat of the Investigation Directorate states that the applicant is suspected of committing a criminal act of corruption by jointly receiving a gift or promise.

Receiving gifts or promises in Law No. 31 of 1999 which has been amended by Law No. 20 of 2001 concerning Eradication of Corruption Crimes is not associated with the emergence of State losses. It is because these actions are related to abuse of power or authority. Therefore, what is alleged to be done by the applicant does not cause a loss of state finances. It means that the qualifications in article 11 letter c of the Corruption Eradication Commission Law are not fulfilled.

Based on these considerations, the applicant is not the legal subject of the perpetrators of corruption who are under the authority of the Corruption Eradication Commission (the defendant) to conduct investigations and prosecutions of corruption as written in article 11 of the Corruption Eradication Commission Law. Accordingly, the investigation process carried out by the Corruption Eradication Commission investigator regarding criminal events, as referred in the determination of the suspect against the applicant as stated in Article 12 letter a or b Article 5 paragraph (2), Article 11 or 12 B of Law 31 of 1999 concerning Eradicating Corruption Crime Jo. Law 20 of 2001 concerning Amendment to Law No. 31 of 1999 concerning Eradication of Corruption Crime Jo. Article 55 paragraph 1 1 of the Criminal Code, is illegal and not based on the law. Therefore, the determination of *aquo* does not have binding strength.

Since the investigation carried out by the respondent is invalid and the Investigation Order No.Sprin.Dik-03/01/01/2015 dated 12 January 2015 which stipulates the applicant as a suspect is the result of an investigation carried out by investigators from the Corruption Eradication Commission (the respondent), the Investigation Order No.Sprin.Dik-03/01/2015 dated 12 January 2015 which stipulates that the applicant as a suspect must be declared invalid and unlawful. Therefore, determination of *aquo* does not have binding strength.

Based on the above-mentioned reasons, all decisions and/or further stipulations issued by the respondent related to the results of the investigation and determination of the suspect against the applicant are invalid.

5. Decision of the South Jakarta District Court No.36/Pid.Prap/2015 / PN.JKT.Sel. (the Pre-trial of Hadi Poernomo).

The reasons of the applicant filing the pre-trial are as follows:⁸

- a. The investigation conducted by the respondent is invalid because it is not in accordance with the provisions of the law. The applicant instructs the respondent to stop the investigation based on the Order of Investigation No. S.prin.Dik.-17/01/04/2014. 21-4-2014.
- b. The action of the respondent to determine the applicant as a suspect is invalid and unlawful. The applicant states that all the decisions or further stipulations issued by the respondent related to the determination of the suspect on the applicant by the respondent are invalid.
- c. The seizure carried out by the respondent is not in accordance with the provisions of the law, so it is not valid and has no legal force.

The judges' basic considerations are as follows:⁹

⁸ Decision of the South Jakarta District Court No. 36/Pid.Prap/2015/PN.JKT.Sel. page 250.

⁹ *Ibid.* page 251 - 257.

Article 44 of Law No.30 of 2002 concerning the Corruption Eradication Commission (The Corruption Eradication Commission Act) confirms the following issues:

- (1) In conducting an investigation, if the investigator finds sufficient initial evidence of suspected corruption, he/she must report to the Corruption Eradication Commission within no later than 7 (seven) working days from the date that the evidence is found.
- (2) The sufficient preliminary evidence is considered to have existed if at least 2 (two) evidences are found, including and not limited to information or data that is spoken, sent, received, or stored in an ordinary or electronic or optical manner.
- (3) If the investigator does not find sufficient preliminary evidence as referred to in paragraph (1), he/she must report to the Corruption Eradication Commission and it will stop the investigation.
- (4) If the Corruption Eradication Commission believes that the case should be continued, it should carry out its own investigations or can delegate the case to police investigator or prosecutor' investigator.
- (5) If the investigation is delegated to the police or prosecutor's office as in paragraph (4), the police or prosecutor must coordinate and report the progress of the investigation to the Corruption Eradication Commission.

Thus, the Corruption Eradication Commission can conduct an investigation if it receives sufficient initial evidence by the investigators where the evidence is considered to have existed if at least 2 (two) evidence are found.

In fact, Article 44 of Law No. 30 of 2002 concerning the Criminal Eradication Commission emphasizes the meaning of the investigation mentioned in Article 1 point 5 of the Criminal Procedure Code, because it provides a condition that the alleged criminal act must have sufficient initial evidence; at least 2 (two) evidence. The Article 1 point 5 of the Criminal Procedure Code only provides an understanding that investigations are a series of investigative actions to find an event that is suspected as a criminal act in order to determine whether the investigation according to the method set in this law can be done.

There is a question arises that is whether the suspect can be determined by obtaining 2 (two) evidence as sufficient initial evidence at the investigation stage.

Because there is a different opinion between the experts submitted by the applicant and the expert submitted by the respondent, the District Court considers the following matters:

- a. Measuring instruments to assess a doctrine or expert statement are laws and regulations because the doctrine or opinion of the expert must be in in accordance with the law and regulation.
- b. Since the aquo case problematized is the determination of the suspect in the defendant (Corruption Eradication Commission), the District Court utilizes the third part of the investigation specifically Article 46 of Law No.30 of 2002 concerning the Corruption Eradication Commission which states the following statements;
 - 1) When a person is determined as a suspect by the Corruption Eradication Commission from the date of stipulation, special procedures applicable to examine the suspects regulated in other laws and regulations are not applicable under this Law.
 - 2) The examination of the suspect as referred in paragraph (1) shall be carried out without prejudice to the rights of the suspect.
- c. The word 'suspect' in Article 46 Chapter VI on the third part concerning the investigation of Law No. 30 of 2002 concerning the Corruption Eradication Commission makes a conclusion that the determination of the suspect in the Corruption Eradication Commission is in the process of investigation. It means that the determination is not in the inquisition process/preliminary investigation where the investigation process is the next process after the inquisition process (Vide Article 44 of Law No.30 of 2002).

Article 38 of Law No. 30 of 2002 concerning the Eradication Commission for Corruption confirms that all authorities related to the preliminary investigation, investigation and prosecution stipulated in Law No. 8 of 1981 concerning Criminal Procedure Law also apply to preliminary investigators, investigators and public prosecutor at the Corruption Eradication Commission.

Therefore, the provisions of Article 1 point 2 of Law No. 8 of 1981 concerning the Criminal Procedure Code must be followed. This Article states that an investigation is a series of investigator's actions in terms of and according to the method stipulated in this law to find and collect evidence to process a criminal offense and find the suspect.

It is in line with the Standard Operating Procedure of the Corruption Eradication Commission No. 01/23/2008 concerning the Standard Operating Procedure of Investigation activities on 1 December 2008 with the following steps:

- a. Examination preparation activities.
- b. Examination of witnesses, experts and evidence as well as potential suspects.
- c. Search Activities.
- d. Seizure Activities.
- e. Detention Activities.
- f. Case court activities.
- g. Case delegation activities to the prosecutor.

The determination of suspects is carried out after the examination of witnesses, experts and evidence. However, in fact, in the *in casu* case, the determination of the applicant as a suspect was carried out together with the order of the investigation on April 21, 2014, while the examination of witnesses, experts, suspects, searches and seizures was carried out after April 21, 2014.

Thus, the determination of the applicant as a suspect is contrary to the laws and Standard Operating Procedures of the Corruption Eradication Commission.

Article 43 paragraph (1) Law No. 30 of 2002 concerning the Corruption Eradication Commission states as follows: "Preliminary investigators are investigators on the Corruption Eradication Commission who are appointed and dismissed by the Corruption Eradication Commission".

Based on the above formula, what is a problem in the *in casu* case is whether the Corruption Eradication Commission can appoint an investigative preliminary even though it has not previously been an investigator.

In this regard, the District Court considers the following issues:

- a. Based on the Article 43 paragraph (1) of Law No. 30 of 2002 concerning the Corruption Eradication Commission, the opportunity for the Corruption Eradication Commission to appoint its own investigators known as independent investigators is closed. This is because if the legislators intend to give authority to the Corruption Eradication Commission to appoint its own preliminary investigators from people who have not previously been investigators, the formulation of Article 43 paragraph (1) of Law No. 30 of 2002 at least states that the Corruption Eradication Commission investigator is every person / every employee of the Corruption Eradication Commission who has expertise and fulfills certain conditions appointed and dismissed by the Corruption Eradication Commission.
- b. Since the Law does not provide an opportunity for the Corruption Eradication Commission to appoint its own investigators from people who are not previously investigators, the appointment of independent investigators by the Corruption Eradication Commission is against the Law. In other words, this action is null and void.

Because the appointment of independent investigators who did not come from investigators either from the Indonesian National Police or the Attorney General's Office was contrary to the Law and

canceled by law, the investigation process carried out by the independent investigators, Dady Mulyady (Witness of the Respondent), Marina Febriana and M.N. Huda D. Santoso, were null and void by law.

Based on Article 44 of Law No. 30 of 2002 concerning the Corruption Eradication Commission, the investigation process is a follow-up of the preliminary investigation process. Since the preliminary investigation process is null and void by law, the entire investigation process of the applicant including searches and seizures has also become null and void. Furthermore, Article 45 paragraph (1) of Law No. 30 of 2002 concerning the Corruption Eradication Commission confirms that investigators are investigators of the Corruption Eradication Commission who are appointed and dismissed by the Corruption Eradication Commission. It means that investigators appointed by the Corruption Eradication Commission as investigators in the Corruption Eradication Commission must previously have the status of investigators, both as police investigators, investigators at the Attorney General's Office or other investigators. This is in line with the provisions of Article 39 paragraph (4) of Law No. 30 of 2002 concerning the Corruption Eradication Commission which states "The preliminary investigators, investigators and public prosecutors who are employees of the Corruption Eradication Commission are temporarily dismissed from the Police and Prosecutors' institutions while serving as employees of the Corruption Eradication Commission."

The next question is whether the Indonesian National Police who have retired or stopped from the Indonesian National Police are still the preliminary investigators and investigator.

This issue is not regulated in the Law of the Corruption Eradication Commission, so it needs to pay attention to the provisions of Article 4 of the Criminal Procedure Code which states that investigators are each State Police officer of the Republic of Indonesia and Article 6 of the Criminal Procedure Code which states that investigators are State Police Officers and certain Public Officials given special authority by the law. Consequently, the members of the Police of the Republic of Indonesia who have retired or stopped from the Indonesian National Police and are working for the corruption Eradication Commission are not preliminary investigators and investigators.

If the members of the Indonesian National Police who have retired or quit from the National Police of the Republic of Indonesia want to be preliminary investigators or investigators of the Corruption Eradication Commission, they must be appointed first as Civil Servants at the Corruption Eradication Commission and then appointed as Civil Servants Officers after fulfilling certain conditions. It is in line with Article 3A of Government Regulation No. 58 of 2010 concerning changes to Government Regulation No. 27 of 1983 concerning the Implementation of the Criminal Procedure Code in which the authority to appoint investigators of the Civil Servants Official must be strictly regulated and stated in Corruption Eradication Commission Law.

Taking into account a copy of the Decree of the Chief of the Republic of Indonesia National Police and its attachment regarding a respectful dismissal from the Indonesian Police Service, it is known that 11 members of the Indonesian National Police in the Corruption Eradication Commission submitted a respected dismissal at their own request from the Indonesian National Police. The request to stop or resign was approved by the Head of the Republic of Indonesia National Police with a Decree dated 25 November 2014 and from 30 November 2014 was honorably dismissed from the Indonesian Police Service. Therefore, since that date, those people are also retired as a preliminary investigator and investigator. It is in line with the provisions of Article 43 paragraph (1) and Article 45 paragraph (1) of Law No. 30 of 2002 Jo Article 39 paragraph (4) of Law No.30 of 2002 above. Therefore, all preliminary investigations and investigations conducted by the members of the Republic of Indonesia Police who have retired or quit respectfully after November 30, 2014 are null and void.

Conclusions and Suggestions

Based on the description above, there are some conclusions:

1. Since the enactment of the Criminal Procedure Code on 31 December 1981, pre-trial authority is limited to determine:
 - a. Whether or not the arrest and detention are valid;
 - b. whether or not stopping the investigation and terminating the prosecution are valid; and
 - c. claim for compensation and rehabilitation.
2. Since the Constitutional Court Decision No. 21-PUU-XII-2014 dated 28 April 2015 at 10.57 West Indonesia Time read out, the pre-trial authority is extended to the authority to examine and decide on:
 - a. whether the determination of the suspect is legal;
 - b. whether the search is valid; and
 - c. whether the seizure is valid.
3. In the judicial practice, pre-trial authority is extended to the inability of investigators to conduct investigations of both suspects (the legal subjects).

Based on the Decision of the Constitutional Court No. 21/PUU-XIII/2014 dated 28 April 2015, the author suggests that the pre-trial provisions in the Criminal Procedure Code be amended and refined by noting that the determination of suspects, searches and seizures is the object of pre-trial through the applicable legislation process.

References

Law of the Republic of Indonesia No. 8 of 1981 concerning Criminal Procedure Law.

Decision of the South Jakarta District Court No. 04/Pid.Prap/2015/PN.Jkt.Sel.

Decision of the Constitutional Court No. 21_PUU-XII_2014 on April 28, 2015.

Decision of the Sumbawa District Court No. 2/Pid.Pra/2017/PN.Sbw (Pretrial of Ikhwan - Head of the Sumbawa People's Credit Bank).

Decision of the South Jakarta District Court No. 36/Pid.Prap/2015/PN.JKT.Sel. (Pretrial of Hadi Poernomo).

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