Implementation of the Constitutional Court Decision No: 21/PUU-XII/2015 of 28 April 2015 Concerning Suspect Identification as a Pretrial Object

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ABSTRACT
As a negative legislator, the Constitutional Court has issued Decision Number: 21/PUU-XII/2015 of 28 April 2015 that expands pretrial objects as referred to in Article 77 of the Criminal Procedure Code. This study aims to discover the problems arising from the inclusion of suspect identification as a pretrial object through Decision Number: 21/PUU-XII/2015 of 28 April 2015, including changes in the authority, rights, and obligations of law enforcers that often creates legal vacuums. In implementing this regulation, law enforcement is often exposed to legal uncertainty in filling these vacuums. This is normative juridical research using vertical and horizontal legal synchronization approaches on Constitutional Court Decision Number: 21/PUU-XII/2015 of 28 April 2015. The results show that the Criminal Procedure Code or other regulations do not regulate Constitutional Court Decision Number: 21/PUU-XII/2015 of 28 April 2015 concerning Suspect Identification as a Pretrial Object. The differing interpretations of pretrial judges in filling this legal vacuum may create legal uncertainty.

Keywords: *Implementation of the Constitutional Court Decision, Pretrial Object, Suspect Identification.*

1. INTRODUCTION

Habeas Corpus, part of the Anglo-Saxon justice system, provides fundamental guarantees for human rights, especially the right to independence. This act inspired the creation of pretrials. The Habeas Corpus Act gives an arrested person the right to challenge their arrestor through a court order. This right exists to ensure that the deprivation or restriction of the independence of a suspect or defendant has complied with the applicable legal provisions and human rights guarantees [1].

In civil law systems, pretrial institutions are a means to guarantee the rights of suspects. The Indonesian legal system has protected these rights since the promulgation of Law Number 8 of 1981 concerning the Criminal Procedure Code that provides additional authority to the district court to conduct examinations against criminal cases handled with force. This law requires pretrial judges to guarantee the human rights of suspects, specifically regarding the abuse of power by law enforcement.

The development of law based on demands and changes in the value system is the influence of common law. Common law courts refer to case law or precedent to help interpret the law, while civil law courts do not. Several recent studies (see McCormik and Summers, 1991) reveal the following:[2]

> "in modern times, almost all systems, except France, have used precedent, especially when interpreting the legislation in question. Even in France, although the Cour de Cassation does not apply case citations, many articles in the Criminal Code have been interpreted using cases that occurred in the 19th century, whose interpretations still survive and are accepted to this day. The sharp separation between the executive and the judiciary, namely the separation of the philosophy of power, has maintained the *de jure* position of the judge that in which they cannot or does not need to look further than the law to apply it".

In common law jurisdictions such as the UK and the United States, using precedent and observing its binding nature is always a must. On the other hand, civil law countries such as Indonesia do not have such strict *stare decisis*, causing legal characteristics to be static and limited.

After approximately forty years of enforcing the Criminal Procedure Code, it became increasingly apparent that there were limitations. The regulated norms do not meet the expectations of justice seekers due to the democratization of various existing countries. In addition, institutional transplantation is more common and often forced by origin countries during western decolonization. [3] *Presumption of innocence* is a legal principle that declares an individual guilty only after a court decision with permanent legal force. While this principle protects an individual from legal repercussions, it cannot protect from moral punishment in everyday life. There are even laws that reduce the rights of a suspect. These conditions are contrary to human rights.

Pretrial institutions examine case processing up to proceedings in the district court. Indonesia has only recently introduced pretrials in its legal system. Every element in the system has its specific purpose, including pretrial institutionalization. Pretrials aim to uphold the law and protect the rights of suspects during investigation and prosecution. [4]

Identifying a person as a suspect for an indefinite amount of time without the ability to take legal action to challenge the legality and purity of the identification can expose them to legal consequences. The suspect may be temporary dismissed from their workplace, which results in loss of rights.

The authority of pretrial institutions to examine and determine the legality of suspect identifications fulfills due process of law and respects human rights. To accommodate the dynamic value system, the judge will attempt to make legal discoveries that will be outlined in their decisions, although the law does not yet regulate this process. However, the rule of law does not apply to these decisions. Furthermore, most observers who adhere to positivism see this as a violation of the law. On the one hand, a different legal model may be adopted in forced legal transplants during colonization or a condition to engage in trade, receive aid, establish cooperation, or receive diplomatic recognition. On the other, national elites can propose this transplant to modernize their society to be on par with developed countries. [5]

As a country that adheres to a civil law system, Indonesia can override certain higher court decisions. In addition, lower courts can deviate from higher court decisions by utilizing differentiating and overriding techniques or the rule of construction to override previous court decisions. Furthermore, legal positivism, which remains the dominant western legal ideology, states that all law is positive as expressions of the will of the highest authority. [6]

2. RESEARCH METHOD

This is normative juridical and sociological research. This research is juridical as the research target is the law or rules contained in the Criminal Procedure Code and the Constitutional Court Decision Number: 21/PUU-XII/2015 of 28 April 2015. This research uses a sociological approach based on studies on the pretrial decisions of district courts within the jurisdiction of the North Sumatra Police and investigations conducted by investigators within the jurisdiction of the North Sumatra Police.

3. DISCUSSION

3.1 Suspect Identification as a Pretrial Object

The first case handling the validity of suspect identification can be seen in decision Number: 38/Pid.Prap/2012/PN.Jkt.Sel involving the applicant, Bachtiar Abdul Fatah, and the respondent, the Attorney General of the Republic of Indonesia casu quo Deputy Attorney General for Special Crimes casu quo Investigating Director of the Deputy Attorney General for Special Crimes with the judicial verdict being: [7]

a. Declaring to accept and grant the pretrial application of the applicant in part;
b. Declaring the respondent's actions to identify the applicant as a suspect as illegal and violates Article 2 Paragraph (1) or Article 3 of Law Number 31 of 1999 jo. Law Number 20 of 2001 concerning Eradication of Corruption;
c. Declaring the applicant's detention as the Suspect according to the detention order Number: Print30/F.2/Fd.1/09/2012 of 26 September 2012 as illegal, considering that it has violated Article 2 Paragraph (1) or Article 3 of Law Number 31 the Year 1999 jo. Law Number 20 of 2001 concerning Eradication of Corruption jo. Article 55 Paragraph (1) of the Criminal Code;
d. Ordering the respondent to release the suspect BACHTIAR ABDUL FATAH (the applicant in this case) from detention immediately after the announcement of this verdict;
e. etc.

On 16 February 2015, another case involving Sarpin Rizaldi, pretrial judge at the South Jakarta District Court with applicant Budi Gunawan and respondent the Corruption Eradication Commission (KPK) casu quo The KPK leaders produced decision Number: 04/Pid.Prap/2015/PN.Jkt.Sel of 16 February 2015 with the judicial verdict being: [8]

a. Granting the pretrial application of the applicant in part;
b. Declaring Investigation Order Number: Sprin.Dik03/01/01/2015 of 12 January 2015, in which respondent identifies the applicant as a suspect regarding criminal incidents as referred to in Article 12 letter a or b, Article 5 Paragraph (2), Article 11 or 12 B of Law

Number 31 of 1999 concerning Eradication of Corruption in conjunction with Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption jo. Article 55 Paragraph (1) of the Criminal Code as invalid and has no legal basis, nullifying the binding force of the a quo declaration;

c. Declaring the investigation carried out by the respondent, regarding criminal incidents as referred to in suspect identification against the applicant as referred to in Article 12 letter a or b, Article 5 Paragraph (2), Article 11 or 12 B of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999, resulting in South Jakarta District Court Decision Number: 38/Pid.Prap/2012/PN.Jkt.Sel., p. 79 – 80.6 1999 concerning Eradication of Corruption jo. Article 55 Paragraph (1) 1 of the Criminal Code as invalid and has no legal basis, nullifying the binding force of the a quo declaration;
d. Declaring the suspect identification made by the respondent against the applicant as invalid;
e. Declaring any further decisions or judgments issued by the respondent regarding the suspect identification made by the respondent against the applicant as invalid;
f. etc.

The issuance of these pretrial decisions cannot be categorized as a change in norms, considering that these decisions are not required to be followed by other pretrial judges.

Suspect identification as a pretrial object has started to become a norm since the submission of a lawsuit by Bactiar Abdul Fatah, an employee of PT Chevron Pacific Indonesia, through his attorney, Dr. Maqdir Ismail, S.H. and his partner, with application Number: 56/PAN.MK/2014 of 17 February 2014 to the Constitutional Court, which produced Decision Number: 21/PUU-XII of April 28, 2015. The judicial verdict is as follows. [9]

1. Granting the application of the applicant in part;
   a. The phrases "preliminary evidence", "sufficient preliminary evidence", and "sufficient evidence" as specified in Article 1 point 14, Article 17, and Article 21 Paragraph (1) of Law Number 8 of 1981 concerning Criminal Procedure Code (State Gazette of the Republic of Indonesia of 1981 Number 76, Supplement to the State Gazette of the Republic of Indonesia Number 3209) contradicts the 1945 Constitution of the Republic of Indonesia if "preliminary evidence", "sufficient preliminary evidence", and "sufficient evidence" do not consist of at least two pieces of evidence as contained in Article 184 of Law Number 8 of 1981 concerning the Criminal Procedure Code;
   b. The phrases "preliminary evidence", "sufficient preliminary evidence", and "sufficient evidence" as specified in Article 1 point 14, Article 17, and Article 21 Paragraph (1) of Law Number 8 of 1981 concerning Criminal Procedure Code (State Gazette of the Republic of Indonesia of 1981 Number 76, Supplement to the State Gazette of the Republic of Indonesia Number 3209) is not binding if "preliminary evidence", "sufficient preliminary evidence", and "sufficient evidence" do not consist of at least two pieces of evidence as contained in Article 184 of Law Number 8 of 1981 concerning the Criminal Procedure Code;
   c. Article 77 letter a of Law Number 8 of 1981 concerning the Criminal Procedure Code (State Gazette of the Republic of Indonesia of 1981 Number 76, Supplement to the State Gazette of the Republic of Indonesia Number 3209) contradicts the 1945 Constitution of the Republic of Indonesia if suspect identification, search, and confiscation are not taken into consideration;
   d. Article 77 letter a of Law Number 8 of 1981 concerning the Criminal Procedure Code (State Gazette of The Republic of Indonesia of 1981 Number 76, Supplement to the State Gazette of the Republic of Indonesia Number 3209) is not binding if suspect identification, search, and confiscation are not taken into consideration;
2. etc.

3.2 Changes in the Obligations of Investigators in Suspect Identification

The Constitutional Court Decision Number: 21/PUU-XII/2015 of 28 April 2015 classifies suspect identification as a violent act conducted by investigators. This action is considered a pretrial object in addition to other objects stipulated in Article 77 of the Criminal Procedure Code.

The Constitutional Court considers "at least two pieces of evidence" a manifestation of due process of law to protect human rights in the criminal justice process. As

a formal law in the Indonesian criminal justice process, the Criminal Procedure Code has several phrases that require further explanation to fulfill the *lex certa* and *lex stricta* principles. Fulfillment of these principles will ensure that a person is protected from investigators that abuse their power. "Thus, investigators can prevent the abuse of power in determining "preliminary evidence," "sufficient preliminary evidence," and "sufficient evidence" as referred to in Article 1 number 14, Article 17, and Article 21 Paragraph (1) of the Criminal Procedure Code," said Constitutional Judge Wahiduddin Adams. [10]

As investigators with authority to identify suspects, the National Police must change its investigation method to accommodate changes in the meaning of "**initial evidence**," "**sufficient preliminary evidence**," and "**sufficient evidence**" as formulated by the Constitutional Court Decision Number: 21/PUU-XII/2015 of 28 April 2015. Previously, the police referred to the Supreme Court, the Minister of Justice, the Attorney General's Office, and the National Police Chief Joint Decree No. 08/KMA/1984, No. M.02-KP.10.06 of 1984, No. KEP-076/J.A/3/1984, and No. Pol KEP/04/III/1984 concerning Improved Coordination in Handling Criminal Cases (Mahkejapol) and the National Police Chief Regulation No. Pol. Skep/1205/IX/2000 concerning Guidelines for the Administration of Criminal Investigations defines sufficient preliminary evidence as to at least one police report plus one valid evidence as regulated in Article 184 of the Criminal Procedure Code.

The Criminal Procedure Code does not recognize "suspect identification" and administrative investigation products that identify suspects. Therefore, a suspect is considered identified when investigators explicitly use the word "suspect" in administrative investigations to: [11]

- Order suspects to stop and check their identification.
- Conduct arrests, detentions, searches, and confiscations.
- Conduct document inspection and confiscation.
- Take fingerprints and photographs.
- Summon a person to be examined as suspects or witnesses.

In exercising their authority, investigators must refer to Article 184 of the Criminal Procedure Code that regulates valid evidence, namely witness statements, expert testimonies, documents, instructions, and defendant statements. In addition, investigators must also refer to Article 183 of the Criminal Procedure Code. This article states that judges may not impose a sentence on a person without at least two valid pieces of evidence proving that a criminal act has occurred and that the defendant is guilty of committing it.

The Constitutional Court Decision Number: 21/PUU-XII/2015 of 28 April 2015 does not only apply during the initial investigation process for suspect identification but also in carrying out the decision of the pretrial judge regarding the validity of the suspect identification.

Both investigators and judges are affected by the inclusion of suspect identification as a pretrial object, altering the investigation process. Previously, the absence of regulations governing suspect identification in the Criminal Procedure Code has caused pretrial judges to issue judicial verdicts based on legal discoveries (*rechtsfinding*) that are very dilemmatic for investigators to follow up. In contrast, the Criminal Procedure Code regulates the decision of judges. For example, the Criminal Procedure Code and the National Police Chief Regulation regulate the termination of an investigation or arrest.

The legal vacuum on suspect identification has resulted in varying legal interpretations, affecting judges' judgment and judicial verdict. There are cases of judges acting as criminal judges where they also examine the subject matter. These cases have caused judges to also assess facts or substances in addition to the suspect identification process.

3.3 Authority Shift of Judges after the Issuance of the Constitutional Court Decision No. 21/PUU-XII/2015 of 28 April 2015

In common law countries, the stare decisis doctrine enables lower courts to deviate from the decisions of higher courts by using differentiating and overriding techniques or the rule of construction to override previous decisions. The Indonesian civil law system transplanted this doctrine through Constitutional Court Decision No. 21/PUU-XII/2015 of 28 April 2015 Concerning Suspect Identification as a Pretrial Object. Previously, suspect identification was not regulated in the Criminal Procedure Code or other regulations, causing judges to try to make legal discoveries and investigators to make interpretations. As a result, the judicial verdict of pretrial judges is not consistent. In addition, investigators may interpret these decisions in different ways, thus creating legal uncertainty.

Several decisions of pretrial judges at North Sumatra district courts which declared the suspect identification invalid include:

1. Tarutung District Court Pretrial Judge Decision Number: 01/Pid.Pra/2017/PN. Trt of 6 December 2017. Applicant KUMINSER SITUMORANG was identified as a suspect by a Humbahas Police Investigator for allegedly committing obscene acts against minors as regulated in Article 82 of Law No. 23 of 2002 concerning child protection. The judicial verdict is as follows: [12]

a. Declaring the application of the pretrial applicant as partially granted;
b. Declaring any further decisions issued by the respondent regarding suspect identification of the applicant as invalid;
c. Ordering the respondent to release the applicant from detention immediately;
d. Ordering the respondent to stop the investigation on the applicant;
e. etc.

2. Stabat District Court Pretrial Judge Decision Number: 7/Pid.Pra/2017/PN. Stb. Applicant David Fernando, also known as Ahau, and ten other persons were allegedly committing gambling as referred to in Article 303 Paragraph (1) 1e and 2e subs Article 303 Bis the Criminal Code. The judicial verdict is as follows: [13]
   a. Declaring the pretrial application as partially granted;
   b. Declaring the arrest warrants against applicants II to XI as invalid;
   c. Declaring the detention warrants against applicants II to XI as invalid;
   d. Declaring further decisions/orders issued by the pretrial respondent regarding suspect identification against applicants II to XI as invalid;
   e. Declaring all legal proceedings against pretrial applicants II to XI, along with all the legal consequences based on the Police Report: LP/1115/IX/2017/SPKT-III of 11 September 2017 as invalid;
   f. Declaring search warrant Number: SP-Dah/110/IX/2017/Ditreskrimum of 11 September 2017 as invalid;
   g. Declaring all confiscation warrants based on Police report Number: LP/1115/IX/2017/SPKT-III of 11 September 2017 as invalid;
   h. Ordering the pretrial respondent to return confiscated goods brought in good condition;
   i. Ordering the pretrial respondent to release applicants II to XI from the State Detention Center as soon as this decision is announced;
   j. etc.
3. Medan District Court Pretrial Judge Decision Number: 53 / Pid. Pra / 2017 / PN. Mdn. Applicant SIWAJIRAJA, SIWAJIRAJA was suspected of murdering as regulated in Article 340 in conjunction with Article 338 of the Criminal Code in conjunction with Article 55 of the Criminal Code. The judicial verdict is as follows: [14]
   a. Granting the pretrial application of the applicant in part;
   b. Declaring suspect identification based on the investigation warrants Number: Sp.sidik/190/I/2017/Reksrim of 18 January 2017 and Sp.Sidik/199/I/2017/Reskrim of 21 January 2017, arrest warrants number: SP. Kap / 192/ III / 2017 / Reskrim of 14 March 2017 and SP. Han / 115 / III / 2017 / Reskrim of 15 March 2017 as invalid and not based on the law and therefore the aquo identification, arrest, and detention have no binding force;
   c. Declaring suspect identification based on the investigation warrants Number: Sp.sidik/190/I/2017/Reksrim of 18 January 2017 and Sp.Sidik/199/I/2017/Reskrim of 21 January 2017, arrest warrants Number: SP. Kap / 192/ III / 2017 / Reskrim of 14 MARCH 2017 and SP. Han / 115 / III / 2017 / Reskrim of 15 March 2017 as null or void, and therefore, the aquo identification, arrest, and detention have no binding force;
   d. Declaring detention warrant Number: print-527-rt.3/ep.1/OHARDA/06/2017 of 7 June 2017, including further detention is null and void and has no legal basis and therefore the aquo detention has no binding force;
   e. etc.

The decisions above show different judicial verdicts even though all these cases handle suspect identification. This variation creates differences in the handling of each case and implies that:

1. In invalidating the suspect identification, the decisions of judges differ. The cancellation of an investigation warrant results in the invalidity of suspect identification and all products of investigative action based on the canceled investigation warrant, such as Visum et repertum, confiscation of evidence, and the arrest and detention of other suspects.
2. The order issued by the judge for investigators to cancel an investigation will create a dilemma, as the basis for canceling an investigation is regulated in Article 109 of the Criminal Code, which is as follows:
   a. Insufficient evidence;
   b. The incident is not a criminal act;
   c. The suspect died (Article 77 of the Criminal Code), the actions of the suspect have expired (Article 78 of the Criminal Code), the case is *nebis in idem* (Article 76 of the Criminal Code), and the complaint offense is revocated

(Article 75 and Article 284 Paragraph 4 of the Criminal Code).

3. The termination of a case due to invalid suspect identification, which results in the cancelation of an investigation due to insufficient evidence based on Article 109 of the Criminal Code, will cause problems, including:

   a. The phrase ”insufficient evidence,” as stated in Article 109, is different from ”not supported by two pieces of evidence,” as regulated in Article 184 of the Criminal Procedure Code under the Constitutional Court Decision No. 21 of 2015. Insufficient evidence is defined as *vrijpracht*, namely the failure to fulfill an element.

   b. Cases where the crime allegedly committed by a suspect does not present sufficient evidence, and the investigator, prosecutor, or the judge has provided assessment can only be reopened if there is new evidence. Suspect identification is invalid if the investigator does not follow the procedure or present two pieces of evidence as regulated in Article 184 of the Criminal Procedure Code. These conditions are within the scope of formal law and do not assess the material truth of a case.

   c. Cancellation of a warrant will also result in the cancellation of the related criminal incident.

Future revisions of the Criminal Procedure Code need to regulate several problems, including:

a. Examination of the main case by pretrial judges.

   Article 2 of Supreme Court Regulation No. 4/2016 states that a single judge leads pretrial hearings concerning the validity of suspect identifications, seizures, and searches due to the relatively short nature of the examination and the proofing that only examines formal aspects.

   The Supreme Court Regulation implies that pretrial judges are obliged to examine the procedures of an investigative process. In practice, pretrial judges also examine the material truth of the evidence presented by investigators and is no longer a formal procedure. The examination procedure is the same as the main case.

   Pretrial judges often examine the subject matter, which is the authority of criminal judges. Decisions of pretrial judges have also led to the closure of a case. This situation can alter the purpose of the pretrial institution.

   Yahya Harahap, the former chief justice, argued that pretrial judges do not have the authority to verify the legitimacy of the evidence. Pretrials cannot verify evidence as it is related to substance. *”Verifying the legitimacy of evidence requires substance examination. According to the Criminal Procedure Code, suspect identification requires two legitimate pieces of evidence as defined in Article 1 number 14, Article 17, and explanation of Article 17,”* said Yahya in a trial at the South Jakarta District Court, Jl Ampera Raya, South Jakarta, Friday (24/4/2015).

   Yahya argues that pretrial judges should only examine the formal and material requirements of evidence.

b. Pretrial judges issuing decisions outside their authority

   Practically, pretrial judges only have the right to determine the validity of the termination of an investigation. In practice, pretrial judges issue decisions that exceed their authority, namely declaring suspect identifications as invalid by canceling the investigation warrant issued due to insufficient evidence presented by the investigator.

c. The judge invalidates all evidence obtained by the investigator during an investigation if a person is no longer considered a suspect. This situation causes conflicts with two out of five pieces of evidence obtained by investigators as regulated in Article 184 of the Criminal Procedure Code.

4. CONCLUSION

Suspect identification, which did not exist in the Criminal Procedure Code, has become a pretrial object. The identification process begins with the pretrial court granting the request of the pretrial applicant that was identified as a suspect without being supported by evidence as regulated in Article 184 of the Criminal Procedure Code. Since the issuance of Constitutional

Court Decision Number: 21/PUU-XII/2015 of 28 April 2015, suspect identification must be supported by two valid pieces of evidence and has become a pretrial object.

The requirements in the suspect identification process have changed due to the issuance of Constitutional Court Decision Number: 21/PUU-XII/2015 of 28 April 2015, which has expanded pretrial objects. The definition of "preliminary evidence," "sufficient preliminary evidence," and "sufficient evidence" was altered to include two valid pieces of evidence as regulated in Article 184 of the Criminal Procedure Code.

The authority of judges in pretrial cases has shifted and may create legal uncertainty due to the issuance of Constitutional Court Decision Number: 21/PUU-XII/2015 of 28 April 2015. The upcoming pretrial institution regulations (*ius constitutum*), which are currently being drafted and are part of the Criminal Procedure Code Draft, are expected to accommodate changes in the value system.

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