

# THE PETRIAL INSTITUTIONS IN THE PERSPECTIVE OF JUDGE'S INDEPENDENCE, CORRUPTION ERADICATION COMMISSION AND HUMAN RIGHTS: A Juridical-Empirical Study According to Indonesian Legal System

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# THE PETRIAL INSTITUTIONS IN THE PERSPECTIVE OF JUDGE'S INDEPENDENCE, CORRUPTION ERADICATION COMMISSION AND HUMAN RIGHTS: A Juridical-Empirical Study According to Indonesian Legal System

<sup>1</sup>Kamri Ahmad, <sup>2</sup>Andi Arjuni K. Petta Lolo, <sup>3</sup>Andi Maulana K

<sup>1</sup>Faculty of Law, Universitas Muslim Indonesia, Makassar

<sup>2</sup>Faculty of Economy, Universitas Hasanuddin, Makassar

<sup>3</sup>Faculty of Pharmacy, Universitas Muslim Indonesia, Makassar

\*Corresponding Author Email: kamri.ahmad@umi.ac.id

## ABSTRACT

This research based on the reform era where the problem of the criminal justice system has an extraordinary development, especially with pretrial institutions. The most urgent thing in the development of pretrial is the independence of judges and human rights. On the other hand, it is also about emphasizing the eradication of corruption. Before reforms in 1998, pretrial institutions, were not so hard in their ripples. However, after the formation of the Corruption Eradication Commission (CEC) in 2002, then this pretrial institution became a problem intended to fulfill the protection of human rights to encouraging the eradication of corruption.

The independence of the judge in the process of pretrial with the judge single models, does not create the possibility of *un-independence of judiciary*? In terms of results in the form of a decision, the pretrial judge's decision has similarities with the verdict of Constitutional Court (MK), which is *final and finding*. The difference between Constitutional Court's decision and the pretrial decision where the *decision of the Constitutional Court is based on the results of plenary session with 9 assemblies*, while the pretrial decision is led by one a single judge. Another difference lies in its executorial strength. This is what the researcher tried to study how the essence of pretrial, then as much as possible new concept for the Criminal Code draft will be found later.

*Keywords: Pretrial, Independence of Judges, CEC, and Human Rights*

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## INTRODUCTION

Since the enactment of Law Number 8 of 1981 on December 31<sup>st</sup>, 1981, the Indonesian criminal justice system has gradually changed. From a form that is still colonial leads to more national nationality based on the spirit and philosophy of Indonesia nation, i.e. Pancasila and the Constitution of the Republic of Indonesia 1945s.

Changes that occur in the criminal justice system of Indonesia in reality cause problems among law enforcement officials who are quite serious, because there is a demand that requires an immediate change from the old methods/ procedures in which someone dealing with the law is seen as an object of law (*inquasatoir principles*). In other words human exist for law. "Accused" just like that without being seen as having legal rights and then in new methods/ procedures, the suspect or accused person is seen as subject law or it could said laws to humans (*principle accusatoir*). The position between investigator, public prosecutor and suspect or defendant is considered same. Usually the audit system with *accusatoir* is used when in front of the court hearing. So, both in thinking or acting it can remain balanced 'equality' with the

provisions of the applicable law. Remembering old pattern of H.I.R or R.B.G which is long enough applied in Indonesia is approximately 130 years old.

A change from the old norm to new norm usually is not easy. Changing habits that have been ingrained, it is not an easy job. It means, it is very difficult to change a behavior if it has become a habit, including a change in the criminal justice system from *inquisitoir* to *accusatoir*. This is often the beginning of conflict in the pretrial system at the level of procedure between the applicant and the pretrial respondent.

In a criminal case, pretrial is one aspect of the Criminal Procedure Code which aims to guarantee the human rights of suspects at the investigation and prosecution stage. However, the existence of pretrial institutions for law enforcement officials, especially investigators and public prosecutors, in reality faces a dilemma. The dilemma is when investigator and public prosecutor are given the authority to carry out repressive actions such as arrest, detention including determining someone to be a suspect and so on. However, if in his action based on its authority is considered to have a procedural error so his act of exercising its authority will be sued through pretrial. This context implies that the Criminal Procedure Code contains respect for human rights.

Even though in the provisions of positive legislation related to pretrial, the only limit that can be submitted by pretrial is the wrong procedure of investigation and prosecution before someone becomes a suspect. In the latest developments, starting from the pretrial case, the Judge Sarpin's judicial pretrial decision was the most uproar in the State Court. At South Jakarta in the case of Kombespol Budigunawan as the petitioner against the CEC which led by Abraham Samad. Judge Sarpin granted Budigunawan's request which was determined as a suspect. Judge Sarpin through his judgment and conviction broke through the provisions of criminal procedural law, even though the suspect's status at that time was still not included as an object that could be applied for a pretrial suit.

After the decision of Sarpin Judge granted petitioner's petition, then no doubt, various responses emerged in the media about the independence of judges, and also deals with the concept of legal positivism in Indonesia, as adopted by the Criminal Procedure Code. It turned out that the decision was strengthened by the Constitutional Court through one of the decisions that expanded the pretrial object which also included the status of a suspect who had not previously been. But beyond that, pretrial institutions are not impossible to contain weaknesses, especially with the judicial system through a single judge which weaknesses can affect the internal independence of judges as lately doubted by the criminal law expert community.

Another *Dassein* pretrial interesting is in cases of alleged corruption Grant Funds from the Head of East Java Province in 2016. In this case, the suspect was La Nyalla Mattalitti. The Head of the East Java High Prosecutor's Office, Maruli Hutagalung has issued several times the Investigation Orders (Sprindik) even though he has been defeated by La Nyalla Mattalitti in pretrial cases up to four times. Finally, the Head of the East Java Prosecutor's Office at that time had said that "He will issue sprindik up to a thousand times if there is a pretrial verdict a thousand times." Then the Petitioner said that "Is there a suspect living in worry forever without legal certainty?" According to the author, in such conditions of law enforcement (*due process of law*), this condition is completely contrary to human rights. There are two principles relating to such conditions, namely the *presumption of innocence* and *Litis Finiri Oportet*.<sup>1</sup>

According to the Court, the provisions regarding the Investigation Order (Sprindik) were not explicitly mentioned in the Criminal Procedure Code, so that it could cause three major

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<sup>1</sup> Mk Decision Number: 42/PPU/-XV/2017 in the case of Anthony Chandra Kartawiria, p. 25

problems namely: 1) There is no clarity for a reported/suspect regarding about matters are the basis for the Investigator's consideration when he will issue Sprindik; 2) There is no their strict interpretation related to how many times Sprindik can be issued; and 3) Criteria for new evidence such as what can be reused in the second Sprindik publication and so on. Thus, the issuance of Sprindik, which is more than once or even repeatedly without time limit, has finally claimed the right to legal certainty of citizens (who deal with criminal law, pen) which is contrary to Article 28D of the Indonesian Constitution.

Another rationale in this research is that "Pretrial as an investigative and prosecuting control body", based on a number of very basic considerations as follows: 1) It stipulated in the 1945 Constitution of the Republic of Indonesia that the Republic of Indonesia is not a state of power (*machtstaat*), but Indonesia is a state of law (*rechtstaat*). According to Eddy Damian, in 1974 at the Symposium of Law Faculty of Indonesia University which was held on May 8<sup>th</sup>, 1966, stated:

*"The characteristics of a rule of law consist of (i) recognition and protection of human rights that contain equality in the political, legal, social, economic, cultural and educational fields. (ii) Free and impartial justice is not influenced by any other power or power. In the popular language now that is "Independence of judiciary" (pen.) As regulated by Law Number: 48 of 2009 concerning Judicial Power. (iii) Legality in the sense of law in all its forms"*

Based on the statement above, it can be said that pre-trial is a more concrete manifestation of the 1945 Constitution, namely the *protection of human dignity*. In sociological language, Satjipto Rahardjo states that "Law is for humans, not humans for law".

2) With the presence of a pretrial institution in Law Number: 8 of 1981 (the Criminal Procedure Code), the respect for human rights is increasingly given top priority in the Indonesian criminal justice system, which was previously in force at the time of the HIR and RBG, It appears that the human rights of suspects or defendants at all stages of the examination in the criminal justice system are often sidelined by law enforcement officials, particularly investigators and public prosecutors in the search for material truth. Andi Hamzah (1984) that the Department of Justice describes how meant by material truth is. Material truth is the complete truth of a criminal case by applying the provisions of the criminal procedure law honestly and precisely in order to find out who the perpetrators can be accused of violating the law and then request an examination and decision from the court to find whether a crime is proven has been done and whether the accused can be blamed. In connection with this, the pretrial institution has a function as a control mechanism for law enforcement officers in carrying out their duties.

3) Pretrial institution is an institution controls that can be used by people/communities to sue the government in violation of the law (*onrechtmatige overheidsdaad*) by way of filing perm o Honan through the district court in accordance with the principle of rule of law based on Pancasila democracy. 4). The pretrial institution has recently become an actual problem, attracting the attention of many people, especially law enforcement officials, (criminal) legal scientists and justice seekers.

Based on that basic thoughts then issues that would be discussed in this study are what extent is the independence of pretrial judges using the single judge system model to realize the principle of "For Justice based on the Almighty God is and how the role of pretrial institutions function to balance the interests of human rights enforcement does and the interests of law enforcement to achieve legal certainty in the sense of *due process of law* based on investigation and prosecution function by the KPK.



## RESEARCH METHOD

Type of this study is *doctrinal* research besides as a normative (doctrinal) it also used juridical normative approach as a paradigm. The normative approach is intended to see the tendency of judges to consider in making pretrial decisions, whether the respondent violates the procedures of his authority according to the *rules of the game* or how vice versa. While the juridical approach intended to examine from the legal aspect, how high the development of legal knowledge of judges, lawyers, as well as public prosecutors and investigators related to the case in which pretrial is requested especially regarding the law governing the provisions which are justified or not subjected to the submission, examination of pretrial cases. This study used three locations to collected data, such as the Constitutional Court, CEC's (Corruption Eradication Commission) Office in Jakarta and decision of South Jakarta and Makassar District Court.

The population of this study was the overall results of the investigation and prosecution of the Commission, ruling right impretial, as well as the decision of Mahkamah associated or can be associated with a glue bag a pretrial. Sample was attempted from three documents, namely Investigation Report and the Prosecution Document for CEC corruption cases. The following documents are the decisions of the South Jakarta District Court and the Constitutional Court's Decision. The sampling method is used by *purposive sampling* because it believe that the validity level was quite high due analysis to be performed. Thus, the results were made as objective as possible. After that, this study will also be directed to case studies to see factual and argumentative views.

## DISCUSSION

### Definition of Pretrial Institutions

Pretrial institution is an institution of control over state administrators in the field of criminal law. As an institution of control over investigators and public prosecutors the CEC is no exception in the criminal justice system, operationally described under the law as follows:

1. Pretrial according to article 1 point 10 of the Criminal Procedure Code is the authority of a district court to examine and decide in the manner stipulated in this law concerning:
  - i) Whether an arrest and/or detention are valid or not at the request of the suspect or his family or other party on the suspect's power.
  - ii) The validity of the investigation or the prosecution at the request is valid or not for the sake of upholding the law and justice.
  - iii) Requests for compensation, or rehabilitation by the suspect or his family or other parties for their attorneys whose cases have not been submitted to the court.
2. As a control institution it is intended that the existence of pre-trial has a role as a body that seeks to supervise and examine the actions of law enforcement officials that are repressive in order to realize their duties.
3. Investigators according to Article 1 point 1 of the Criminal Procedure Code are police officers of the Republic of Indonesia or certain civil servants who are authorized by law to conduct investigations.
4. The public prosecutor according to Article 1 point 6 sub b of the Criminal Procedure Code is a prosecutor who has been authorized by this law to prosecute and implement the determination of judges.

Based on the juridical description, the meaning of "Pretrial as a control institution for investigators and public prosecutors" is an institution that seeks to supervise and examine the actions of law enforcement officers that are repressive, but that repressive actions are wrong procedures, especially actions legal procedures for investigators and public prosecutors in carrying out their duties and functions.

In relation to understanding of human rights, Andi Zainal Abidin once explained that the term of "human rights" is more appropriately replaced with term "human social rights" as a translation of *social rights*, because according to the meaning and purpose of the humanitarian principle which is just and civilized from Pancasila and also the Preamble to the 1945 Constitution of the Republic of Indonesia (author's view).

The opinion expressed by Andi Zainal Abidin Farid is a very logical thing. Because indeed the word of human rights also has an abstract understanding so that it does not show certainty of meaning, such as the meaning contained in other legal terms like ownership rights, customary rights in customary ownership and so on. Apart from that, it illustrates information to the general public that the government has tried to carry out *legal development* so that it can be in line with development in other fields, which is the realization of TAP MPR No. IV MPR/1973<sup>2</sup>. Furthermore it is also mentioned that "Improvement and refinement of legal development by, among others, reforming, modification, and legal unification in certain fields by paying attention to legal awareness in the community. Of course, in author's opinion including reforms and improvements in criminal procedural law, especially the pretrial process."

As the definition of pretrial before, it should also be known about formal criminal law. This is essential because pretrial is one of aspect of formal criminal law itself. According to Simons<sup>3</sup> in Andi Hamzah, said that "Formal criminal law regulates how the state through its tools exercises its right to convict and impose criminal charges, so it contains a criminal procedure". Thus the criminal procedure law is legal regulations that contain procedures for state staff such as police, prosecutors and judges, including advocates in applying material criminal law. While Van Bemmelen<sup>4</sup> in Andi Hamzah, explains that:

Criminal procedural law studies the regulations created by the State due to allegations of violations of criminal law:

- 1) The state through its tools investigates the truth;
- 2) As far as possible to investigate the perpetrators of the act;
- 3) Take the necessary actions to catch the perpetrator and if necessary arrest him;
- 4) Collecting evidence material (*bewijs material*) that has been obtained in the investigation of the truth to be delegated to the judge and bring the defendant before the judge;
- 5) The judge makes a decision on whether the accused has been convicted or not and for that purpose convicted of criminal or disciplinary action;
- 6) Legal efforts to fight the decision;
- 7) Finally carry out decisions about criminal and disciplinary action.

We agree with Van Bemmelen but there is a note as a writer that actually the criminal procedural law functions not only against allegations of criminal acts that can be accounted for, but also functions on how to declare there is no violation of criminal law. However, we disagree with Simons, because in the process of criminal proceedings the State's instruments do not always

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<sup>2</sup> Kansil, CST, 1984: 139

<sup>3</sup> Andi Hamzah, 1984 (new edition, 2014), Criminal Procedure Law, p.7-8

<sup>4</sup> Ibid, 17-18

impose penalties or penalties for perpetrators of criminal events, for example *Juvenile Delinquency*, where judges in their decisions tend not to *straf* but *maatregel*. In another example in Article 45 of the Criminal Code<sup>5</sup> mentioned that if an immature person is prosecuted for an act he did when he was not sixteen years old yet, the Judge may order that the offended person be returned to his parents, guardians or caretakers without being subject to any punishment, or order that the offended person be handed over to the government without being charged a punishment.

Based on Article 45 of the Criminal Code of the above, it is clear the judge in his ruling is not absolutely convict, is an alternative to selecting the decision should be to educate the child based on confidence and legal considerations taken.

Back to the definition of pretrial, according to Article 1 point 10 of the Criminal Procedure Code that Pretrial is the authority of a district court to examine and decide in the manner provided for in this law concerning the possibility of an application being accepted or rejected. Therefore pretrial is one of the authorities granted by law to a district court in a criminal justice environment, to examine, and decide on the validity of an arrest, detention, termination of investigation, and/or termination of prosecution. Furthermore, determine compensation and or rehabilitation at the request of the suspect or his family, and or other parties on the suspect's power.

According to the language, Pretrial comes from two syllables "*pra*" and "*fair*". So, the meaning of the word "*pra*", in the Lembaran Komunikasi, June-July 1986 (Center for Language Development and Development of the Ministry of Education and Culture) namely "*pra*" has various meanings, it depends on the words combined; "*pra*" can mean (in) advance, before, overtake, preparation.

According to the Fourth Edition of Big Indonesian Dictionary (KBBI) (2015) the word "*pra*" means "*bound form before ...*". Whereas Poerwadarminta (1976: 17), the word "*fair*" means impartial. Meanwhile, according to KBBI (2015: 10), the word "*fair*" means equal, not biased; not take sides; the judge's decision (2) is on the right side; hold on to the truth; (3) rightly; not arbitrary.

In the view of Islam, Rasulullah once advised a friend "*O Abuhurairah, justice one hour is more important than your decades of worship (prayer, alms, and fasting). O Abuhurairah, perversion of the law one hour is more poignant and greater in the sight of Allah than committing sixty years' immorality*".<sup>6</sup>

The history shows the meaning of justice in quantity, as well as the meaning in quality. The meaning of quantity for example the Prophet compares justice with a matter of time while showing the meaning of the quality of justice. Likewise, the law is misused. If the law is perverted in a matter of time, it is more horrifying than people committing acts of immorality for sixty years. What if the law was misused for many years, or a certain period of a freezing regime? Of course this is even more terrible. What is meant by legal fraud? Are they the same as illegal acts? These questions will be illustrated later on the research results.

Therefore, the existence of a pretrial institution is to safeguard legal institutions that form the judicial sub-system such as investigators and public prosecutors so that the legal process against suspects or defendants does not deviate from the applicable legal provisions. Such

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<sup>5</sup> R. Susilo, 1985, Book of Criminal Law, Politeia, Bogor, p.61

<sup>6</sup> Bismar Siregar, 1995, God's Judge and Justice Law: Collection of Legal Records and Courts in Indonesia, Gema Insani Press, Jakarta, p.19-20



existence also means protection of the legal rights and human rights of the accused for the sake of the state's legal authority.

The essence is to guarantee the authority of the implementation of *the rules of law* in this case *due process of law* (fair legal process) as the inheritance of Article (2) of Law Number: 48/2009 concerning Judicial Power states that "Judgment is carried out 'for the sake of justice based on Almighty God'". Paragraph (2) states "The State Courts applies and enforces law and justice based on Pancasila". Then who actually do implements and enforces the law and justice referred to? In Article 1 to 1 General Provisions states that "judicial power is independent of state power for the judiciary to enforce law organizes and equity based on Pancasila and the Constitution of the Republic of Indonesia 1945s, for the implementation of State laws of the Republic of Indonesia".

If we pay close attention, both Article 1 and Article 2 above use the term "justice" and the one who organizes the court is an institution called "Judicial Power". Its purpose is to uphold law and justice. The enforcement of law and justice should be referred to base on the Lordship of the Almighty. So as a State of Law, then law which is held is a Fair Law not an unfair law. The question is how to assess the fair law and what the criteria are, and what the consequences if the law is implemented unfairly? We will discuss in this part below.

At the level of investigation or prosecution, criteria which are required by institutions to become a basic procedure that can least pretrial filing.

In the case of BG as the petitioner, for example, some of the legal reasons that were used as the basis were Article 28D of the 1945 Constitution, next, Article 14 number 3 letter a of the ICCPR regarding violations of a person's rights.

Article 28D paragraph (1) of 1945 the Constitution states "Every person has the right to recognition, guarantees, protection and certainty of law that is fair and equal treatment before the law". Further more in Article 14 number 3 letter (a) states " *In the determination of any criminal charge against him, every shell entitled to the following minimum guarantees, in full equality:*

- a) *To be informed promptly and in detail in a language which understand the nature and causes of the charge against*

Translation:

In the determination of a crime, everyone is entitled to minimum guarantees in full below, namely a) to inform promptly and in detail in a language understood about the nature and because allegations in wear against him". Based on this doctrine, the question is did the respondent not do this? Or according to Indonesian positive law, is this just a requirement before someone becomes a suspect?

Article 2 number 3 letters (a) and (b) (regarding the promise of the State to guarantee the restoration of rights that have been violated), "Each State Party to the present Covenant undertakes:

- a) To ensure that any person whose rights or freedoms as here in the recognized are violated shell have and effective remedy, not whit standing that the violation has been committed by persons acting in an official capacity;
- b) To ensure that any person claiming such a remedy should have his rights there to determined by competent judicial, administrative or legislative authorities, or by



any others competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

Translations:

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Each State party to the present Covenant promises:

- a) Ensure that any person whose rights or entitlements are recognized in this Covenant are violated will have an effective remedy, even if the violation has been committed by persons acting in an official capacity;
- b) Ensure that every person who demands the remedy must have their rights determined by a judicial institution (pretrial according to the Petitioner's translation), administration, or an authorized legislative body, or other competent authority governed by the country's legal system, and to develop all possible remedies for judicial settlement.

Thus referring to the spirit or fundamental principles of the Criminal Procedure Code (*human rights protection*) jo. The provisions of Article 7 of the Law on Human Rights jo, Article 2 number 3 letters a and b of the ICCPR which have been ratified through the International Covenant Law, therefore the legitimacy of the use of the authority of the State Apparatus in implementing the Criminal Procedure Code through the Pretrial Institution **has legally undergone an expansion of interpretation** (*de systematische interpretatie*) including covers the authority of the investigator which is to reduce or limit someone's rights such as determining someone as a "suspect" illegally or without legal basis, so that it is not only limited to testing the authority as stipulated in Article 77 of the Criminal Procedure Code... However, if the State apparatus has legally carried out and in accordance with the correct legal procedures (*due process of law*) then of course too is justification.

Apart from that, the applicant also bases on jurisprudential reasons. The reason for the jurisprudence is in judicial practice, the judge has made several legal discoveries related to other actions of the investigator/ public prosecutor who can be the object of pretrial. For example, confiscation and determination of a person's suspect as in the Decision's Pretrial of Bengkayang District Court No. 01/ Pid.Prap/ PN.Bky, May 15<sup>th</sup>, 2011 Jo. Decision of the Supreme Court Number: 88 PK/ Pid/ 2011 on January 17<sup>th</sup>, 2012, which in essence states that the invalidation of confiscation that has been invalid.

Regarding the invalidity of determination of the suspect, the South Jakarta District Court Number: 38/ Pid.Prap/ 2012/ PN.Jk-Sel has accepted and granted the pretrial request by stating, among other things, "It's illegal according to the law that the Respondent's actions to designate the Petitioner as a suspect ..."

The issue is whether the context of the case according to the Bengkayang District Court Decision Number: 01/ Pid.Prap/ PN.Bky, May 15<sup>th</sup>, 2011 Jo. Decision of the Supreme Court Number: 88 PK/ Pid/ 2011 on January 17<sup>th</sup>, 2012 is same as the context of the South Jakarta District Court case Number: 38/ Pid.Prap/ 2012/ PN. Jkt-Sel. If the context is same, then the Judge Sarpin's decision can be said to be a decision based on jurisprudence. If they are not same, the possibility is included in the category of legal discovery by the Judge. Meanwhile if it is not included in both of them, then the Judge Sarpin's decision can be said to be out of the positive legal path.

To find this out, it is better to return to the *judex facie* case Number: 38/ Pid.Prap/ 2012/ PN/ Jk-Sel. In the trial, severe contradictory points were revealed between Petitioner's reasons and Respondent's reasons, among other things said "The applicant named as a suspect firstly by

Respondent then look for evidence by calling witnesses and the foreclosure... while the Respondent said that "Petitioner is set as suspect for their suspicious transactions/ unnatural and or alleged acceptance of gift or promises".

### Criteria for Fair and Unfair Legal Decisions

First of all, before deciding a legal decision, a judge must first live up the phrase "For the sake of justice based on the Almighty God". This is important, because there is no human being without weaknesses. There is no human (as long as it is an ordinary person) who does not have weaknesses. That is the meaning of the Word of Allah (QS. Al-An'am: 162) "That indeed my prayer, my worship, my life and my death are for the sake of the Lord of the worlds, and there is no partner for him; That is what I was commanded to do and I was the first to surrender (to Allah SWT). After that, then we (read: the Judge) refer to what is called *due process of law* as a judicial mechanism.

According to the author's analysis, to assess the fairness of judge's decision, there are two important variables as a benchmark for a judge who will decide a case related to the *due process of law* model in the justice system which describes *rechtsvoordingheid* (fair law) and *rechtszekerheid* (legal certainty). These three things namely *due process of law*, *rechtsvoordingheid* and *rechtszekerheid* are very important things to achieve what is called *ex aquo et bono* (the fairest decision). Of course, the decision referred to not only the decision of the court judge, but also regarding the decision of the court of a person becomes a suspect by investigators. To achieve that, we need two things. *First*, professional ethics, *secondly*, legal reasoning (argumentation legal reasoning in the verdict).

#### 1) Professional Ethics

What and how professional ethics is? Judges in carrying out their profession must comply with the Joint Regulations of the Supreme Court of the Republic of Indonesia and the Judicial Commission of the Republic of Indonesia Number: 02/ PB/ MA/ IX/ 2012 and Number: 02/ PB.P.KY/ 09/2012 concerning Guidelines for Enforcement of the Code of Ethics and Judge's Code of Conduct.

In the General Provisions of this Joint Regulation, what meant by "Code of Ethics and the Code of Conduct for Judges" is a guide to moral virtues for each judge, both inside and outside the service as regulated in the Joint Decree of the Chairperson of the MA-RI and the Chairperson of KY-RI Number: 047/ KMA/ SKB/ IV/ 2009- 02/ SKB/ P.KY/ RI/ IV/ 2009 on 8<sup>th</sup> April 2009 concerning Code of Ethics for Judges and Judges' Code of Conduct.

In Article 3 of the Joint Decree, there are 10 (ten) principles which must be guided by a judge in deciding a case, namely 1) Independence of the judge and the courts. This is in accordance with the content of Article 1 of the Law Number: 48/2009. 2) Presumption of innocence, taken from the essence of Article 8 paragraph (1); every person who is suspected, arrested, detained or confronted before a court hearing must be presumed innocent before a court decision declares his guilt before *inkracht*. 3) Appreciation of the profession of judges and courts. 4) Transparency. 5) Accountability. 6) Prudence and Confidentiality. 7) Objectivity, referring to Article 6 paragraph (2) of the law of the judiciary power, then Article 8 paragraph (2). 8) Effectiveness and Efficiency. 9) Equal Treatment and 10) Partnership. In addition to these articles, Article 5 of Law Number 48/2009 concerning Judicial Power can also be read.

Whereas for the judge's behavior guidelines according to the provisions of Article 4, there are also 10 (ten) principles, namely: (1) behaving fairly, (2) behaving honestly, (3) behaving wisely and wisely, (4) being independent, (5) having integrity high, (6)

responsible, (7) uphold self-esteem, (8) highly disciplined (9) behave modestly, (1) be professional. These provisions, if examined properly, then the SKB MA and KY are only referred to as "violations" of the code of ethics. This is called "Independence of Judges".

There is one of the provisions which is tougher than just being called a violation as regulated by Law Number: 48/2009 concerning Judicial Power. Article 3 paragraph (2), that "Every person who intentionally violates the provisions referred to in paragraph (2) is convicted in accordance with the provisions of the legislation". According to the author's analysis in response to this provision, the Judge's position here if a criminal act was involved and involved him, then he could be convicted because of his involvement after such outside interference. And the verdict could be annulled alias defective in law. Apart from that, the judge concerned indirectly violated the provisions of Article 1, adopting Law 1. Number: 48/2009. Following Article 3 paragraph (2) and (3). An explanation of this can be seen in the next sheet.

According to the author, when a judge hears and decides a case by adhering to the code of ethics and the code of conduct of the judge as SKB MA-KY, the decision is believed to be a very objective decision. Because according to Bismar Siregar, if a decision is not objective, then the decision can be called a crime.<sup>7</sup>

The judge upheld the law. Changing from the direction of the concept of positive law which says that "Law is determined by the legislature in the form of an absolute formulation". Then ignore the *stufenweise concretisierung* process 'tiered concretisation', Hans Kelsen.<sup>8i</sup> In the end, this is what sometimes makes it difficult for the independence of pure positivist judges (*pure positivism*) when examining and deciding cases.

## 2) Legal Reasoning

Aristotle in what he called the categorical traditional logic, then developed by Leibniz, Mill, and Russel (Neong Muhadjir, 1996) said "The truth has two forms. Namely argumentative and factual truth..." Therefore, the Judge in the examination of a case also needs to refer not only to belief, but the description in the considerations given is truly argumentative and factual. The question then is where should we start holding on?

As in Muhadjir's writings, Aristotle introduced five formal logic models, namely deductive mathematical logic, inductive mathematical logic, mathematical logic probabilistic, and reflective logic. The five logic models use different methods of verifying the truth. From a logical model formal such as compiled structure relationships between a number of propositions in building a generalization, but it remains on the principles of formal relations between propositions.

The question of where to start to find the truth does seem simple. But, when examined properly, then it may not be as simple as one might imagine. Because the Judge's considerations in deciding cases where someone is guilty or innocent, need to be careful because it involves a person's right to life. It can be imagined if someone who is dealing with criminal law or concerning civil rights for example, at that time the judge gives the wrong legal judgment/wrong. Then the decision can harm that person who is already

<sup>7</sup> Siregar, Bismar, 1995, Op.Cit, p.59: "As Allah's creatures are imperfect (*da'eef, weak*), humans, are very easily tempted. At first, he might not want to break the law, but because of the influence of the situation and conditions he forgets the meaning and nature of life in this mortal realm. There are many different types of evil that are not seen by the human eye, but clearly visible to God. Crimes like that take a variety of forms. One of them is not objective attitude towards a problem ...."

<sup>8</sup> Susanto, A.F, 2005, Semiotika Hukum, Refika Aditama, Bandung, p.3



under the hammer knock of a judge. That is why in Article 5 of the Law. Number: 48/2009 in advance gives a warning, that a judge or constitutional judge "must explore the legal values that live in the midst of the community". The phrase "required to explore legal values" is part of the *legal reasoning* that must be done by a Judge.

What is meant by living legal values? According to the author, the living law is not only based on notions such as the common law, customary law and the like as long as these are understood by most people, including the scientific community (*special legal scholar*). However, in my opinion, living legal values are also included when a law is passed and enacted by the DPR with the Government, then recorded and given a Number on the State Gazette in the State Secretariat through the Minister of State Secretary. That's when the legal values contained in the law come into life by themselves. And this is what is called the "*asas fictie*". About where the Judge should begin his legal reasoning, will be discussed in the section regarding this research data.

### **The Consequences if the Law Running in Unfair Way**

Even though a judge's ruling is also a form of law, it still has legal consequences. The consequences in question are, that the judge's legal decision can be null and void by law so that it cannot be implemented. What is the measure to judge that a judge's decision is null or void so that it can be declared unfair?

*First*, as the doctrine put forward by **Hart** in his book *The Concept of Law* (1997), states that "If a so-called law but not fair, then it is not law". Judges' decisions are a form of law. But if the ruling is unfair, it cannot be called a law.<sup>9</sup> Meanwhile, according to **Marcu Tilius Cicero** in his treatise entitled "*Treatise on The Law*" it is said that *the magistrate is a speaking law, and the law a silent magistrate*.<sup>10</sup> (The judge is the law that speaks, while the law is the judge who is silent).

As for **Socrates** on one occasion when defending himself said "*For his duty is, do not make a present of justice, but to give judgment: and he has sworn that he will also according to the laws, not to according to his own good pleasure*".<sup>11</sup> The Judge's duty is not just to bring justice, but also to give consideration by remembering his oath that he will judge according to law, not according to his own will.

*Second*, if a legal ruling is not objective it can also be called unfair. In fact, according to the former Supreme Court Judge, Bismar Siregar considered that if a legal ruling was born from an objective legal process, then the act of making a ruling on such a legal matter was a crime (1995). Regarding the objectivity of the examination of suspects or defendants (including applicants and/or defendants in pretrial), it can also be seen in the provisions of Article 153 paragraph (2) b of the Criminal Procedure Code. This provision states "He is obliged to ensure that no action is taken or questions are asked which result in witnesses or witnesses giving answers freely".

*Third*, another thing that can lead to logical consequences of the law that is called unfair is if the examination process or the decision making process violates the principles that do not have exceptions. For example the judge must listen to both parties (*audi et alteram partem*). Or when the witnesses submitted are only one person then according to the principle of justice, "One witness

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<sup>9</sup> Kamri, A, 2013, Harmonization of Unwritten Laws as The Cornerstone for Justice Court Judgment's Decision Based on One Supreme Divinity, STTSS Proceedings, Social Transformation Toward Sustainable Society, UUM, Malaysia, p.73

<sup>10</sup> Maqdir Ismail, in Uncovering the Truth: Examination of Irman Gusman's Case Verdict, 2018, Pitan Daslani, Bumi Aksara, Jakarta, p.48

<sup>11</sup> Ibid, p.49



is not a witness". If a judge only listens unilaterally among the parties to the trial, or hears only one witness, then the verdict can be seen as unfair. This is where a judge's legal reasoning can begin and be judged related to his independence authority.

Are there any principles that have exceptions? The answer is there. For example, the principle of justice is open to the public. The exception to this principle is if the case is a child and/or moral case. This principle can be seen in Article 153 paragraph (3, 4) of the Criminal Procedure Code.

## CONCLUSION

Based on discuss above, we can conclude that the Criminal Procedure Code (read: Pretrial) not only functions to demand accountability for alleged criminal acts, but also serves to state that no criminal acts have occurred as a form of law. Pretrial is on form of law to protect human rights, as well as to uphold the legal authority of the State. This is because the enforcement of the authority of the state's law is as important as the enforcement of the authority of the social rights of disturbed citizens as part of the balance between the state's right to punish and the restoration of human rights. This is the essence of the *due process of law*.

In order to revise the Criminal Procedure Code which will come, especially on pre-trial, should be set on the determination of the suspect limitative enough just once, unless there are new developments in the case .. Because the determination of the suspect repeatedly in the case of the same after the decision of the judge who allow pretrial petition, in addition to not provide legal certainty, also proved to be a potentially violate human rights. Single judge in the pretrial system was time to be reviewed and replaced by Court Judge. This is important to ensure a more objective and balanced court decision.

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