

# Termination of Pretrial Process upon Commencement of the Subject Matter in the Indonesian Criminal Justice System Perspective

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**Abstract.** The instruments of pretrial arrangements prescribed in the Criminal Procedure Code are insufficient to regulate pretrial mechanisms in practice. The problems in question are related to the pretrial examination period. Pretrial shall be carried out speedily within seven days at the latest or pretrial examination should be stopped if the first examination of the subject matter commenced. In conjunction with a criminal justice system, the pretrial and subject matter examination system are different and separate sub-systems, although integrated in a series of criminal justice systems. The purpose of this paper is to examine whether the pretrial termination due to the examination of the subject matter is appropriate according to criminal justice system perspective. This research is a doctrinal research with the statute approach and conceptual approach, by reviewing the pretrial arrangement relating to the concept of criminal justice system. Examination at the pretrial and the subject matter are two different and separate sub-systems. They should not exclude each other, the examination of subject matter should not the pretrial process, or the subject matter examination cannot be started before pretrial verdict have passed.

## 1. Introduction and Literature Review

Pretrial is a new organ in Indonesia Code of Criminal Procedure (here after called KUHAP). The usage of term “institution” does not refer to institution or certain structure in law enforcement but it refer to organ or certain form with determined objective [1]. Pretrial hold the balancer role among individual interest (suspect or defendant) and investigator or prosecutor’s authority. Pretrial is a voluntary investigation conducted before examination of subject matter started by Court of first instance (District Court) [2]. The purpose described clearly in Article 1 (10) to Article 77 KUHAP that stated,

“Pretrial is the competence of the court of justice to conduct an investigation and decide in ways which are regulated by this law, on : whether or not an arrest and/ or detention is legal at the motion of the suspect or his family or other party on behalf of the suspect; whether or not the termination of investigation or prosecution upon motion is valid for the sake of upholding law and justice; a motion for indemnity or rehabilitation from a

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suspect or his family or another party on his behalf whose case has not been brought before the court”

Meanwhile, Article 77 KUHAP stated:

“A court of first instance has the authority to examine and decide, in line with the provisions contained in this law:

- a. whether or not an arrest, detention, termination of an examination or prosecution is valid
- b. on compensation and/or rehabilitation for a person whose criminal case is dropped at the level of investigation or prosecution” [3].

The meaning stated above assert jurisdiction of pretrial. According to the KUHAP. Pretrial only examine: 1) whether or not an arrest and/or detention is legal at the motion of the suspect or his family or other party on behalf of the suspect; 2) whether or not the termination of investigation or prosecution upon motion is valid for the sake of upholding law and justice; and 3) a motion for indemnity or rehabilitation from a suspect or his family or another party on his behalf whose case has not been brought before the court. The jurisdiction stated in KUHAP has amended by Constitutional Court through pretrial cases brought before them.

### **1.1. Pretrial after Decision of Constitutional Court**

Constitutional Court has conducted four judicial review on Act No 8/1981 of The Republic of Indonesia on The Code of Criminal Procedure for one single topic: pretrial. The four judgments are Decision Number 21/PUU-XII/2014 regarding pretrial’s competence on determination of suspect [4]; Decision Number 109/PUU-XIII/2015 regarding status of Corruption Eradication Commission (KPK) investigator as part of pretrial motion [5]; Decision Number 102/PUU-XIII/2015 regarding period of dropped pretrial motion [6]; and Decision Number 130/PUU-XIII/2015 regarding notification letter of investigation commencement as one of the reasons for pretrial motion [7].

Based on the decisions above, there are significant amendments in Indonesian pretrial. The amendments are:

1. Decision Number 21/PUU-XII/2014 expand pretrial jurisdiction that previously regulated by Article 77 (a) KUHAP. According to the decision the article is not binding if the significance other than suspect determination, search, and confiscation. Based on this decision, pretrial’s jurisdiction are 1) whether or not an arrest and/or detention is legal 2) whether or not the termination of investigation or prosecution upon motion is valid 3) whether or not determination of suspect is legal 4) whether or not the search and confiscation is valid; and 5) a motion for indemnity or rehabilitation for cases that were not brought to court.
2. Decision Number 109/PUU-XIII/2015 deliver interpretation that we cannot use validity of KPK investigator become basis to file pretrial motion [8].
3. Decision Number 102/PUU-XIII/2015 stated that Article 82 verse 1 (d) KUHAP conflict with constitutionally established rights in the Constitution of Indonesia (Undang-Undang Dasar 1945). The article is not binding if the significance of “the trial of a case has already been started by the court” other than motion for a pretrial hearing shall be dropped if the first hearing on behalf suspect of the case already been started by the Court.
4. Decision Number 130/PUU-XIII/2015 has stated SPDP notification is mandatory not only for prosecutor but also for reported party/person and person reporting/victim

within seven days. That period of time (seven days) are considered sufficient for investigator to prepare/finish SPDP.

The consequence of the decision above is pretrial motion based on invalid determination of suspect has increased significantly. An increase shown at Surabaya District Court. Since 2016, there are 160 pretrial cases has been filled until July 2018. 134 out of 160 have been decided by. Some of the 160 cases has been declared dropped due to commencement of subject matter trial by Court [9].

## **1.2. Pretrial Hearing and Subject Matter Case Trial**

Pretrial regulated in Chapter X KUHAP regarding court's authority to judge. Chapter X contained of parts. They are pretrial, court of first instance, high court and the last part is Supreme Court. There are seven articles in first part regarding Pretrial. Starts with Article 77 until 83 ruled about pretrial scope and pretrial examination. In Article 82 verse (1) point d KUHAP stated "in the event the trial of a case has already been started by the court of first instance (district court), while the examination of the motion for a pretrial hearing has not yet been completed, the motion shall be dropped". Constitutional court through decision number 102/PUU-XIII/2015 has emphasized meaning of "trial of a case has already been started" is the subject matter has been delegated to Court and the first trial already conducted.

Court's trial arranged in Chapter XVI KUHAP. Contained of seven parts, 87 articles, starts with Article 145 to Article 232. Chapter XVI elaborate in detail about Court's examination process comprise summons to the defendant to trial's attribute. Those two chapters, in principle, arranged two different issues and two different systems although in Criminal Justice system perspective they included in one integral system. Chapter X encompasses pretrial examination system, in other hand Chapter XVI encompass court trial system. Individually, each system is different. Should they exclude one each other? In term of this research, should pretrial examination dropped in conjunction to court's trial commencement?

The objective of pretrial in Criminal Justice system is to enforce the law, justice and truth using horizontal supervision means. In Criminal Justice system, horizontal supervision involves inter-body act to supervise whose component own the authority to supervise the function of each of them. The supervision aims to avoid abuse of power by the authority [1]. If system exclude each other then it would be difficult to conduct a proper supervision mechanism.

## **2. Objective of the Study**

The objective of the study is to analyze termination of pretrial examination in relation of commencement of subject matter case's trial in Criminal Justice System.

## **3. Methodology**

This research is a doctrinal research with the statute approach and conceptual approach, by reviewing the pretrial arrangement relating to the concept of criminal justice system. Using primary and secondary sources [10]. Primary sources are Act Number 8/1981 on Code of

Criminal Procedure, Criminal Court Decision, and related regulation. Secondary sources are textbook, paper, law journal regarding pretrial and Criminal Justice System

## 4. Discussion

Pretrial is a quick trial who do not examine the subject matter. Pretrial only examines be presumed reasonably as improper investigation and prosecution process. Pretrial held by single Judge with assistance from a clerk (Article 78 verse 2 KUHAP) and within seven days at the latest the judge must have passed his decision (Article 82 verse 1 (c) KUHAP) or the case should be dropped if the trial of a case has already been started by the court of first instance (Article 82 verse (1) point d to Constitution Court Decision Number 102/PUU-XIII/2015)

The usage of term “pretrial” because it is conducted before the case examined by Court. In Criminal Justice System framework, pretrial is one of sub-system among interconnected other sub-systems. Criminal Justice System is a long and connected process, start with preliminary (interrogation and investigation), prosecution, court’s trial, decision, legal endeavor to final and binding decision [11]. Each of them sustain each other sub-system in one integrated Criminal Justice System.

### 4.1. Characteristics of Criminal Justice System

Hans Kelsen (a prominent positivistic legal scholar) propounded the Pure Theory of Law. First page of his well-known book stated that law is human order. Order is a norm system. Law is not merely regulation but also law is an integrated system [12]. This doctrine underlies the development of Adolf Merkl-Stratum Theory (Stufen Theory) who understand law as a system comprise of pyramid shape of norms [13].

Criminal Justice System is the subsystem of legal system, as the pretrial system to Criminal Justice system. As a system, criminal justice system and pretrial have the system characteristic. The characteristics are:

1. Open as there are interaction to surrounded environment, in contrary, system is considered closed as it is isolated from any influence;
2. Comprise of two or more sub-systems and each subsystem comprise of smaller sub-system and so on;
3. Sub-system dependent to each other;
4. System has the ability to self-arranged;
5. System has the aim and objective [14].

As a system, criminal justice fulfilled all the above mentioned the characteristics. Criminal Justice systems are closed since its components are restricted and binding. Criminal Justice System comprise of dependent subsystem as applied on interrogation related to investigation. Prosecution cannot be conducted without proper output of investigation. So on and so forth. In other hand, criminal justice system also independent, every sub-system has each authority based on regulation and, of course, has the same aim and objective, the law enforcement.

According to Kenneth J. Peak, the functions of Criminal Justice System are:

1. a true system of justice;
2. a criminal justice process;
3. a criminal justice network;
4. a criminal justice non-system.

Each function has different characteristic. The characteristics of a true system of justice are procedural legal basis; component’s function differentiation; proper coordinated body,

specific expertise between components; and firm control mechanism. A criminal justice process prioritizing achievement pursuant to specific field; different goal between components; tends to operational performance rather than ideal one is the characteristics of Criminal Justice process. Meanwhile, Criminal justice Network's characteristics are each component work limited to their network; a broad authority for discretion without clear and firm limitation; absence of punishment for dysfunctional component. Criminal justice non-system's characteristics are the opposite of true system which are absence of coordination between component; less of specific expertise; and there is no control mechanism [15].

#### **4.2. Termination of Pretrial Process upon Commencement of the Subject Matter**

The character of Indonesia Criminal Justice System tends to criminal justice network since all the characteristics of criminal justice network are found [16]. As the subsystem of Criminal Justice System, pretrial and court trial only shows limited coordination that seems sequential but excludes one another. In term of discretion competency, each subsystem owns a broad one without punishment for dysfunctional component. For instance, some pretrial motions in Surabaya District Court more than seven days. Respondent, in general, absence in the pretrial examination and delivered subject matter to Court, therefore the pretrial motion should be dropped.

Authority of each component will determine sustain of the system. Criminal Justice, along with the component (subsystem) is an integrated system whose aim to transform input becomes output, and the output is the objective of Criminal Justice System. For that purpose, synchronization between subsystems is urgently required [16] Synchronization can be done both vertically and horizontally. Vertical synchronization can be understood by harmonize regulation regarding pretrial and court trial, whereas horizontal synchronization through supervision or mechanism of authority implementation inter-component in Criminal Justice System.

Pretrial and Court trial regulated in different and separate chapter in KUHAP as well as the other regulation. Article 82 verse (1) point d KUHAP come up with the dropped pretrial motion due to commencement of Court Trial. Those two different and separate system should not exclude each other because if it so, the monitoring of component's authority implementation would not be achieved. Pretrial made to examine reasonably presumed as abuse of power by investigator or prosecutor. If the examination terminated due to court trial, then we will never conclude the supervision inter-component.

### **5. Conclusion**

Termination of pretrial examination due to commencement of court trial not in accordance with Integrated Criminal Justice System since the termination cause improper monitoring on Criminal Justice System component. That failure will lead to un-fulfillment of Criminal Justice System objective, the law enforcement and society protection.

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