

The Implementation of Pretrial Object Extension on Suspect Determination After the Constitutional Court Ruling No.21/PUU-XII/2014 Viewed from the Perspectives of Justice and Legal Certainty

Andhi Subangun, Prof. Dr. Supanto, S.H., M.Hum, Dr. Widodo Tresno Novianto, S.H., M.Hum

Sebelas Maret University, Indonesia

Abstract: - This study investigated the implementation of pretrial object extension on suspect determination after the Constitutional Court Ruling No. 21/PUU-XII/2014 viewed from the perspectives of justice and legal certainty through pretrial decision.

This study is categorized as normative study which analyzes various kind of pretrial decisions after Constitutional Court (also known as MK) Ruling No 21/PUU-XII/2014, whether the implementation of pretrial decision making has considered the principal of justice and the legal certainty.

This current study used cases approach, in which it was done by specifically examining and analyzing the cases that have become pretrial decision.

The results of the study informed that the implementation of pretrial judge's decision after the emergence of Constitutional Court Ruling No.21/PUU-XII/2014, in the implementation of the pretrial judge's decision after the Constitutional Court Ruling No. 21/PUU-XII/2014, there were some decisions referred to the Constitutional Court (MK No. 21/PUU-XII/2014) and some were not. Pretrial decisions referred to the Constitutional Court Ruling tended to provide a sense of justice and legal certainty since the pretrial judges had examined evidence possessed by law enforcement officers before deciding someone as a suspect regardless whether the results were granted or rejected. Meanwhile, pretrial decisions that did not refer to MK No. 21/PUU-XII/2014 tended not to give a sense of justice and legal certainty because judges questioned the matters outside of the evidence possessed by investigators so that this can lead to misuse of authority by pretrial judges. In the implementation of pretrial decisions, one another is sometimes contradictory, so it created legal uncertainty.

Given the above conditions, pretrial judges should consequently implement the Supreme Court Regulation (PERMA) No. 2 Year 2016 to create the same procedure and fair decision in pretrial case handling.

Keywords: pretrial, suspect, constitutional court, justice and legal certainty

I. INTRODUCTION

At the beginning of the issue of the Criminal Procedure Code (also called KUHAP), the Indonesian people were very proud of the creation of the conditional and unification of

the national criminal procedure law. The presence of the Criminal Procedure Code has given great hope for the realization of more effective law enforcement, fair, and upholds the human dignity, so it is not surprising that at the beginning of its enactment, the Criminal Procedure Code was called as the "Great Work of the Indonesian".¹ In the Criminal Procedure Code there are some new things that are fundamental when compared to "*Het Herziene Inlands Reglement (HIR)*" also known as *Reglement Indonesia (RIB)*², one of which is pretrial matters.

Pretrial is a new institution introduced in the Criminal Procedure Code in the midst of law enforcement trials. Pretrial in the Criminal Procedure Code is placed in Chapter X of the First Section as one part of the scopes of the authority of the district court to judge.³ Pretrial is not an independent institution, but it is a delegation of new authority and functions from the Criminal Procedure Code to each district court as supplementary authority and functions of the district courts. If all this time the authority and function of the district court are to adjudicate and decide on criminal and civil offenses as main duty, then now the supplementary tasks are attached⁴ as regulated in Article 1 number 10 jo Article 77 of the Criminal Procedure Code: Pretrial is the authority of the district court to examine and decide cases according to the procedure regulated in this law, regarding:

- a. The legality of the arrest and detention of a suspect as the request of suspect, his family, or other parties by the power of suspect;
- b. The legality of the termination of investigation and prosecution for the sake of law enforcement and justice;

¹ Wisnu Subroto dan G. Widiartana, 2005, *Pembaharuan Hukum Acara Pidana*, PT. Citra Aditya Bakti, Bandung, 2005 page 3.

² Loebeby Loqman, *Praperadilan di Indonesia*, Ghalia Indonesia, Jakarta, page 7.

³ M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP Pemeriksaan Sidang Pengadilan, Banding, Kasasi, dan Peninjauan Kembali*, Sinar Grafika, Jakarta, Edisi Kedua, Ctk. Ketiga Belas, page 1.

⁴ *Ibid*, page 1-2

- c. Request for the compensation or rehabilitation by suspect, his family, or other party with the power of suspect whose case is not submitted to the court.⁵

The district court has the right to examine and decide cases in accordance with the provisions regulated in the law, related to:

- 1) The legality of the arrest, detention, termination of investigation, or termination of prosecution;
- 2) Compensation and rehabilitation for person whose case is stopped at the level of investigation or prosecution.⁶

The inception of the pretrial institution was appeared by the absence of supervision and assessment of the forced efforts to guarantee human rights protection within the HIR which was formed with power-oriented during the Dutch colonial era. Pretrial, in its principle, aims to carry out horizontal supervision of all forced-acts effort by law enforcement officers for the purpose of criminal case examination so that the action is not contradictory to legal and statutory regulation. So, it is clear that pretrial institutions are intended to supervise the use of forced efforts by law enforcement officers, in this case the police and prosecutors.

After the implementation of the Criminal Procedure Code for more than 37 years, it turned out that there were increasingly limitations. The expectations addressed to the Criminal Procedure Code turned into questions after there were still human rights violations in the criminal process. On the other hand, Criminal Procedure Code apparently still showed opportunities to be interpreted differently by the interested party, so that it lost its law certainty aspect. The vacuum in the Criminal Procedure Code often causes problems in its implementation, a phenomenon that often appears in real cases. In addition, in the law enforcement practice, it does not rule out the possibility of discrimination or irregularities in its implementation.

Along this time, the issue of decisions concerning matters related to pretrial material whether it is in the form of investigation, detention, prosecution or anything else when linked to a fast, simple, and low-cost judicial principle is also associated with the authority possessed by law enforcement officials to perform their authority in the judicial process often become a public spotlight that can lead to negative perceptions about the seriousness of the performance of law enforcement officers in resolving a criminal case. This is because it is common for the law enforcement officers to deliberately stall time in the process of handling cases or look for excuses not to precede the case, on the other hand justice seekers expect that through pretrial institutions they get legal certainty regarding the judicial process they are undergoing.

Various responses from justice seekers that pretrial institutions is not effective as a means of control of various actions for law enforcement officers where they sometimes don't do it professionally during the investigation to carry out arrests, detention, confiscations, searches and terminations of investigations included actions by public prosecutors to stop prosecution.

The essence of the existence of pretrial institutions is as a form of supervision and the objection to the law enforcement process that is closely related to guarantee the protection of human rights, so that at its time, the rules on pretrial are considered as part of the Criminal Procedure Code masterpiece. However, in its journey, pretrial institutions are unable to function optimally since they are unable to answer the problems in the pretrial process. The oversight function played by the pretrial institution is only *post facto* so that it does not arrive at the investigation, and the review is performed in formal way, with the focus on objective elements while the subjective element cannot be monitored by the court. This causes pretrial to be trapped only on formal matters and limited to administrative matters so that its existence was far from the nature of the pretrial institution.

When the Criminal Procedure Code came into effect in 1981, the determination of suspects has not been a crucial and problematic issue in Indonesia. Forced attempts at that time were conventionally interpreted as limited to arrest, detention, investigation and prosecution, but at present the form of forced effort has undergone various developments or modifications, one of which is the determination of suspects by investigators in the form of labeling or status of the suspect without an unclear time limit so that someone is forced by the state to accept the status of the suspect without the availability of an opportunity for him to make legal efforts to review the legality and purity of the purpose of the suspect's determination. In fact, law must consider the purpose of justice and benefit simultaneously so that the law must be scientifically concretized in a better and proper language. In other words, the principle of prudence must be held firmly by law enforcement officer in determining one's status as a suspect.

The long history of Indonesian law enforcement records several important legal events related to the efforts of the parties to obtain justice. The first event was when Commissioner General Budi Gunawan was named a suspect by the Indonesian Corruption Eradication Commission (KPK), at the same time Budi Gunawan was determined by the House of Representatives (DPR) as the sole candidate for the National Police Chief. For the determination as the suspect, then Budi Gunawan filed a pretrial lawsuit. Furthermore, as we had already known, the pretrial decision read off by Sarpin, the judge, was won by Budi Gunawan where Sarpin in his decision stated that the determination of the suspect on Budi Gunawan was invalid. Sarpin's decision was a legal break through because at that time the Pretrial Judge Authority was limited to those regulated in article 77 of the Criminal

⁵Undang-Undang Nomor 8 tahun 1981 tentang Hukum Acara Pidana (*Seri Hukum dan Perundang-Undangan KUHP DAN KUHP*), SL Media, page 210.

⁶*Ibid.*

Procedure Code, which was limited to regulating the legality of the arrest, detention, termination of investigation, or termination of prosecution and compensation and or rehabilitation for one whose criminal case is stopped at the stage of investigation or prosecution. Sarpin's decision at that time became a long debate between legal experts, where many legal experts refused but many of them also supported it.

The Constitutional Court issued a decision related to the lawsuit filed against article 77 of the Criminal Procedure Code proposed by Bahtiar Abdul Fatah on February 17, 2014. Bahtiar Abdul Fatah, as the party who felt aggrieved with the decision, one of them was as a suspect asking for examination of the article 77 letter (a) of the Criminal Procedure Code concerning the pretrial object by registering an application to the Registrar's Constitutional Court because article 77 letter (a) of the Criminal Procedure Code is considered contradictory to Article 1 paragraph (3), Article 28D paragraph (1), Article 28I paragraph (5) 1945 National Constitution of the Republic Indonesia. The application is recorded in register No 21 / PUU / XII / 2014 on February 26, 2014.

Subsequently, on April 28, 2015, the Constitutional Court granted a part of the lawsuits against Law No. 8 of 1981 concerning the Criminal Procedure Code which was filed by the convicted fictional Bioremediation corruption case of PT. Chevron Indonesia, namely Bachtiar Abdul Fatah, in its decision No. 21 / PUU- XII / 2014 the Constitutional Court decided to grant the claim of the applicant on the object of pretrial. In its decision, the Constitutional Court declared conditional unconstitutional on the initial evidence phrase, sufficient initial evidence, and sufficient evidence in Article 1 number 14, Article 17 and Article 21 paragraph (1) of the Criminal Procedure Code as long it is interpreted as minimum two evidence in accordance with article 184 of the Criminal Procedure Code. Article 77 is declared conditional unconstitutional as long as it is interpreted including the determination of suspects, searches and seizures. With those Constitutional Court Ruling, the determination of the suspect has become the object of pretrial and sufficient evidence is interpreted as two evidence, are considered valid. So that, the long debate over the Sarpin's decision was disappeared as the Constitutional Court expanded the object of pretrial by including the determination of the suspect. In its decision, the constitutional court stated that to be named as a suspect, the investigator must have minimum two evidence.

The consideration of the Constitutional Court in including the determination of the suspect in the pretrial object is solely to protect a person from arbitrary acts by the investigator which may occur when a person is determined as a suspect, while there is mistake in its process.

The decision of the Constitutional Court in the case No. 21/PUU-XII/2014 dated April 28, 2015, basically informed the criminal law applied in Indonesia explicitly regulates the existence of corrective institution on the determination of a

person as a suspect, in other words according to the Constitutional Court it is the right of a person to review the legality of the decision.

The inclusion of a suspect determination as the pretrial object by the Constitutional Court has caused many claims made by the suspects regarding the determination of him as a suspect by law enforcement officers. Among these cases, there are some of them that took attention regarding cases of pretrial claims submitted to law enforcement officers in relation to the Constitutional Court Ruling No. 21/PUU-XII/2014.

Among the interesting cases related to the pretrial lawsuit is the submission of a pretrial lawsuit on behalf of the suspect Hadi Purnomo towards the Corruption Eradication Commission in the case No. 36/Pid.Prap/2015 PN Jak.Sel in that pretrial decision, the pretrial judge granted a claim submitted by Hadi Purnomo. One of the considerations of pretrial judges was that Corruption Eradication Commission was not authorized to appoint the investigators and initial investigators themselves. In his consideration, the judges considered that Corruption Eradication Commission has no authority to appoint initial investigators, investigators, and public prosecutors other than police and prosecutor, this is based on Article 39 paragraph (3) Law No. 30 years 2002 which stated that initial investigators, investigators and public prosecutors who are employees of the Corruption Eradication Commission, are temporarily dismissed from the police and prosecutors while they are at the Corruption Eradication Commission. Thus, it is clear that the Corruption Eradication Commission only recognizes initial investigators, investigators and public prosecutors from the police agencies and prosecutors while serving as Corruption Eradication Commission employees. That is why the initial investigation and investigation carried out by the Corruption Eradication Commission is declared invalid.

Another case was a pretrial ruling on behalf of Setya Novanto, the Chairperson of the Indonesian House of Representatives who was also General Chair of the Golkar, which was named a suspect by the Corruption Eradication Commission. In his decision, the pretrial judge granted a pretrial claim filed by the suspect, Setya Novanto. As the result, the determination of the suspect by the Corruption Eradication Commission became invalid. One of the judges' considerations was that they believed that in the determination of the suspect it required two valid evidence and determination of potential suspect should be done at the end of the investigation, not in the beginning or during the investigation stage. The granting of Novanto's pretrial decision attracted public attention since it involved important figure in this country and it led society to think that the law was blunt when dealing with person who got power.

II. RESEARCH QUESTIONS

Based on the above background, the research questions are formulated as follows:

1. What is the basis of judges' consideration in determining the legality of the suspect determination in the pretrial object after the Constitutional Court decision No. 21/PUU-XII/2014?
2. Does the practice of pretrial decisions by extending the object of pretrial through the decision of the Constitutional Court No. 21/PUU-XII/2014 already provide justice and legal certainty?

III. METHOD

The type of research used in this study is normative legal research by examining library resources and regulatory regulations related to the problems being discussed, especially the regulations related to criminal procedural law.

Soerjono Soekanto and Sri Mamuji present the notion of normative legal research. Normative legal research is: "legal research conducted by studying library resources or secondary data".⁷

Mukti Fajar ND and Yulianto Ahmad defined normative legal research as:

"Legal research that places the law as the norm system. The norm system in this case related to principles, norms, rules of law, court decisions, agreements and doctrines".⁸

The definition of legal research proposed by Mukti Fajar and Yulianto Ahmad is focused on the object of the study. The object of normative legal research is the law which is conceptualized as a norm or rule. The norms as the object of the study include laws, government regulations, and others.⁹

The data collection technique used in this research was literature study related to regulations on pretrial. Literature study was done by collecting secondary data. In this research, the researchers collected the secondary data which were related to the problems being studied.

After the process of data collection was completed, then they were systematically grouped according to the problems examined. The next, the data were analyzed by using qualitative analysis method. Qualitative analysis method is a method that is based on the relationship between variables being studied. The purpose is to enable researchers to get the meaning of the relationship between variables so that it can answer the existing problems.

IV. DISCUSSION

- A. The basic consideration of pretrial judges in determining the legality of the determination of suspects as the pretrial

objects is the Constitutional Court Ruling No. 21/PUU/2014 itself, this according to some jurisprudence of the Constitutional Court is a new norm. The Constitutional Court Ruling contains two things:

1. Adjudicating at the first and final level, has ruled decision in the petition of Law Review Number 8 Year 1981 concerning the Criminal Procedure Code to the 1945 Constitution of the Republic of Indonesia proposed by Bahtiar Abdul Fatah. Namely Article 77a of Law Number 8 Year 1981 concerning Criminal Procedure Law (State Gazette of the Republic of Indonesia in 1981, Number 76, Supplement to the State Gazette of the Republic of Indonesia Number 3209) is contrary to the 1945 Constitution of the Republic of Indonesia as long as it is not interpreted including determination of suspects, searches and seizures. Article 77 letter (a) of Law Number 8 Year 1981 concerning Criminal Procedure Law (Additional State Gazette of the Republic of Indonesia Number 3209) does not have binding legal force as long as it is not interpreted including the determination of suspects, searches and seizures. Considering, that based on the aforementioned considerations, the District Court has the authority to examine and decide the case of whether or not the Determination of a Suspect is legal.
2. In its decision, the Constitutional Court also states conditional constitutionality to the initial evident phrase, sufficient initial evidence, and sufficient evidence in article 1 number 14, article 17 and article 21 paragraph (1) of the Criminal Procedure Code as long as it is interpreted as at least two evidence in accordance with article 184 the Criminal Procedure Code.¹⁰

After the Constitutional Court Ruling is issued, there were many pretrial claims related to the determination of suspects submitted by justice seekers. In its legal considerations, almost all pretrial judges agreed to make the Constitutional Court Ruling No. 21/PUU/2014 as the basis for the authority to decide cases.

One example of a pretrial judge's judgment related to the determination of the suspect is the consideration of pretrial judge towards RJ.Lino, who is in the pretrial judgment on behalf of the RJ.Lino suspect, pretrial judge states that towards the object claim in the form of the determination of the suspect submitted by the applicant, the panel of judges argued that the Constitutional Court in Decision Case Number 21/PUU-XII/2014, on April 28, 2015 stated that:

⁷Salim HS, Erlies Septiana Nurbani. (2016). *Penerapan Teori Hukum pada Penelitian Tesis dan Disertasi*. Jakarta: Ed. Kesatu. Cet. Keempat. Rajawali Pers. Page 12.

⁸*Ibid*. page 13.

⁹*Ibid*

¹⁰www.MahkamahKonstitusi.go.id retrieved on 1 September 2017

“Determination of suspects is a pretrial object with the consideration that, because the determination of suspects is part of the investigation process which constitutes deprivation of human rights, so the determination of suspects by investigators is an object that can be sought for protection through the Pre-Judicial Institution’s legal efforts.”

To determine whether the determination of suspects is legal or not made by the investigator, the pretrial judge will assess the evidence and evidence possessed by the investigator, whether the investigator has fulfilled two evidences before determining someone as a suspect. Besides the pretrial ruling RJ. Lino, we can also consider the pretrial judge consideration, Ilham Arif Siajudin, related to the determination of suspects as pretrial objects with the following considerations:

“That towards the object of the claim in the form of determination of suspect by the applicant, the panel of judges argued that the Constitutional Court Ruling Number 21/PUU-XII/2014, on 28 April 2015 is an additional authority besides the authority of the District Court to examine and decide in accordance with article 77 of the Criminal Procedure Code concerning the legitimacy of arrest, detention, termination of investigation or termination of prosecution and compensation and/or rehabilitation for someone whose criminal case is terminated at the level of investigation or prosecution conducted in pretrial court, the authority has been expanded based on the Constitutional Court Number 21/PUU-XII/2014 on April 28, 2015.”

Legal instruments as the basis of judges’ judgments including determining the legitimacy of the determination of suspects are:

1. Law Number 8 Year 1981 concerning Criminal Procedure Code

The Criminal Procedure Code regulates verification in Article 183 which says “The judge may not impose a sentence on a person except if with at least two legitimate evidences he obtains the conviction that a criminal act actually occurred and that the guilty person committed it”.

The evidence referred to in Article 184 paragraph (1) includes:

- a. witness testimony,
- b. expert testimony,
- c. letter,
- d. evidences,

e. defendant testimony.

2. Law Number 30 Year 2002 concerning the Corruption Eradication Commission

The Corruption Eradication Commission laws regulating the initial evidence for determining suspects are in Article 44 paragraph (1), (2), and (3). Article 44 paragraph (1) states:

“If the investigator in conducting an investigation finds sufficient initial evidence for suspicion of criminal acts of corruption, within 7 (seven) working days at the latest from the date that sufficient initial evidence is found, the investigator reports to the Corruption Eradication Commission.”

Article 44 paragraph (2) states:

“Sufficient initial evidence is deemed to have been found of at least 2 (two) evidence, including and not limited to information or data that is said, sent, and received, or stored either normally or electronically or optically.”

Article 44 paragraph (3) states:

“In the event that the investigation carried out its duties did not find sufficient preliminary evidence as referred to in paragraph (1), the investigator reported to the Corruption Eradication Commission and the Corruption Eradication Commission to stop the investigation.”

3. The Constitutional Court Ruling

The Constitutional Court Ruling in its decision states that acceding phrase “initial evidence”, “sufficient initial evidence”, and “sufficient evidence” as regulated in the Criminal Procedure Code are contrary to the 1945 Constitution as long as they are not interpreted and have no legal force that “initial evidence”, “sufficient initial evidence”, and “sufficient evidence” are at least two evidences contained in Article 184 of the Criminal Procedure Code.

The Constitutional Court Ruling above is also intended to end the confusion and inconsistency in the use of the terms contained in the Criminal Procedure Code. In Article 1 number 14 of the Criminal Procedure Code, the suspect is defined through the term “initial evidence” as a basis for

declaring someone to be suspected of being “a criminal offender”, in which the use of such terms is not in line with the definition of investigation contained in Article 1 number 2, that is the search and collection of “evidence” with which “makes clear the crime that occurred and found the suspect”, so with the Constitutional Court Ruling No. 21/PUU-XII/2014 inaccuracies in the use of the terms no longer need to be debated. All of these terms can actually be similarly interpreted (*evidence*), so distinguishing between *evidence* and *initial evidence*, or even *with evidence* is no longer valuable.

Likewise, the inconsistency of the terms used when regulating the authority of investigators to arrest, as determined in Article 17 of the Criminal Procedure Code, can only be carried out towards someone who is suspected of committing a crime based on “sufficient initial evidence”, while a detention order carried out towards a suspect or the defendant who was allegedly committing a crime is based on “sufficient evidence”, as determined in Article 21 paragraph (1) of the Criminal Procedure Code, because there was a concern that the person would escape, damage or eliminate evidence and repeat his criminal offense, it should not principally be different in meaning. Those two cases are now with Constitutional Court Ruling No. 21/PUU-XII/2014 must be equalized.

The identical meaning of various terms is intended with aim that the function of state law can be implemented, that is the state capability through the legislators to make or interpret the law through court decisions, so that it can be implemented neutrally, uniformly, and predictably.

The decision of the investigator in determination of a suspect, arrest and detention with the existence of Constitutional Court Ruling Number 21/PUU-XII/2014 becomes “linear” with decision making by judges, through its decision stating that a criminal offense has been proven and the defendant is guilty of it. In this case, the determination of the suspect, arrest and detention must be based on at least:

- a. The existence of witness testimony and letter;
- b. The existence of witness testimony and expert testimony;
- c. The existence of letter and expert testimony.

In this case, evidence or initial evidence or evidence tool that can be used in the determination of the suspect, arrest and detention, must be obtained in

the case and according to the method specified in the law. Information material from a witness obtained during the investigation phase “must be taken back” in the context of investigation. Thus, the Clarification Minutes made in the investigation must be changed in the form of a *pro justis* in the form of Investigation and Interrogation Report from the witnesses. Likewise, the opinions of experts obtained during the investigation phase are contained in the Investigation and Investigation Report from the expert. Both witness testimony and expert testimony obtained from other cases which are related (*splittzing*), even if they have been included in a court judgement with permanent legal force, must be taken back for the purpose of examination in the investigation of that case.

As the evidence, initial evidence or letter evidence tool which is categorized as evidence must be obtained formally through seizure in accordance with applicable regulations. The letter obtained as evidence without going through such process only functions as evidence material in the investigation, and does not become evidence, initial evidence or evidence tool in the investigation. It is different from the letters issued by the competent agency which are indeed requested by the investigation to make clear a litigation of a criminal case being investigated, such as *visum et repertum* or for example a land certificate becoming the object of the National Land Agency, which can directly be evidence, initial evidence or evidence tool without going through confiscation.

Meanwhile, material evidence which could initially be “evidence” or “initial evidence”, for the determination of suspects, arrest and detention, with the Constitutional Court Ruling No. 21/PUU-XII/2014 must be changed into a letter or expert testimony. The evidence can no longer be seen as “evidence” or “initial evidence” directly, given that in the Constitutional Court Ruling No. 21/PUU-XII/2014, the conditional constitutionality of the articles reviewed as long as it is interpreted by the arrangement of evidence as determined in Article 184 of the Criminal Procedure Code. While the evidence of “instructions” and “suspect testimony” only become the domain of the judge or have just presented in the examination of court session, so it is impossible of being used to investigate.

Accordingly, the statement of the suspect or potential suspect (the statement of reported or suspect who is temporarily examined as a witness) is not a evidence, initial evidence or evidence tool at all. The Constitutional Court Ruling No. 21/PUU-XII/2014 requires the examination of suspects is only as an additional requirement for the validity of the determination of suspects. The examination of

suspects is only a condition for completing case files and surely in the context of fulfilling the suspects' rights to be heard by others about their case being alleged against them according to their version. In other words, the examination of potential suspects (statements of the reported or suspects who are temporarily examined as witnesses) or statements of suspects cannot be used as evidence, because actually they do not have evidence to prove the suspect's guilt towards the alleged crime.

This is an embodiment of *non-self-incrimination* principle, which is universally applicable, which is held to realize *due process* on one side and *fair procedure* on the other side. This investigating means a person cannot be supposed to have fulfilled the elements of a crime only because of his own statement as a suspect.

The three existing arrangements require at least two available evidence in order to have legal force and a person can be determined as a suspect in a criminal act. If there are no two evidences, the criminal act cannot be continued by the court and someone suspected of being a criminal offender cannot be arrested or detained but must be released.

In the pretrial justice regarding the submission of a petition for the determination of a suspect in a corruption case or any criminal case, all regulations require minimum two initial evidence that can be said to be legal evidence tool. If in the re-examination of a petition for the determination of a suspect examines for evidence and there is no compulsion in this determination, so determination of the suspects towards a criminal offender is lawful. But if in the pretrial justice in examining evidence both witnesses and letters from both parties is less than two and there is a forced attempt by determining a person as a suspect, so the stipulation was illegal and not lawful. Law enforcers are expected to be careful in examining the official initial evidence to determine a suspect so that there is no forced and arbitrary attempts that harm human rights for criminal offenders and law enforcers must be strong for the law so that there is no doubt.

- B. The author analyzes the pretrial decision related to pretrial judges' consideration relating to the conditions for being determined as a suspect, accordingly, there must be at least two evidence tools as determined in article 184 of the Criminal Procedure Code and accompanied by an examination to potential suspects, "what evidence that Corruption Eradication Commission have before it determine the suspects in pretrial justice of RJ.Lino or Ilham Arif Sirajudin.

The process of finding the sufficient initial evidence of suspicion of corruption with at least 2 (two) evidence is not carried out at the investigation stage but must be in the initial investigation stage. This cause in raising the initial investigation stage to the investigation stage, the applicant must obtain at least 2 (two) pieces of evidence that indicate the existence of a criminal event and the potential suspect, so when the case is raised at the investigation stage, the suspect has been determined. This is a logical consequence of not being granted the authority for Corruption Eradication Commission to issue an order to terminate investigations and prosecutions in corruption cases. (vide Article 44 jo Article 40 of the Corruption Eradication Commission Law). Therefore, it is as the basis in the final stage of the initial investigation in which Corruption Eradication Commission has been able to determine the potential suspects because it has found a criminal incident and found 2 (two) or more types of evidence, this is in accordance with the provisions of Article 1 number 14 of the Criminal Procedure Code and the Supreme Court Regulation Number 4 Year 2016.

The author argues that the panel's considerations are not true because according to the Corruption Eradication Commission law, initial evidence and also two evidence found in the initial investigation phase because the Corruption Eradication Commission did not recognize the termination of the investigation so that investigators in the initial investigation stage have found evidence and evidence tool as well as examine potential suspects so that when the investigation warrant is issued, there is already a potential suspect and at that time immediately issued a suspect's determination letter.

The consideration of the pretrial judge above, according to the author, that the pretrial decision on the suspect Setya Novanto did not refer to the Constitutional Court Ruling No. 21/PUU/XII/2014. While, related to pretrial decision on Setya Novanto, it was based on Retributive or Punitive Justice principle that demand the existence of healthy legal system and consistent law enforcement efforts so that the offenders get a sentence that is worth the amount of crime they committed. Without a healthy legal system and consistent law enforcement efforts, retributive or punitive justice will not provide welfare to the community.¹¹

¹¹Yochim Agus Tridianto, *Keadilan Restoraktif*, Cahaya Atma Pustaka, Ctk.01, Yogyakarta, 2015, page10-16

On the contrary, the disappointment of the society will come in exchange, so pretrial decision of Setya Novanto did not fulfill the principle of social justice because from the initial investigation carried out by the Corruption Eradication Commission found the active role of Setya Novanto in the *E-KTP* corruption case in which he had actively conditioned the company owned by Andi Naronggong to be the winner. In addition, the fee was arranged for the parties, including Setya Novanto. In the trial court of defendant Andi Naronggong, it had been proven that there was Setya Novanto's role in designing the scenario so that the company owned by Andi Naronggong became the winner, so the facts in trial court could become legal facts. Therefore, with the existence of the pretrial decision, the initial investigation and investigation carried out by the Corruption Eradication Commission were hampered because the suspicion on related person could not be proven in court while other parties involved had already been put on trial to account for their actions.

Pretrial decision of Setya Novanto's if linked to Gustav Radbruch's theory of justice, it is clearly contradictory. Gustav Radbruch states that ideally in a decision must contain the idea *idee des recht*, which includes three elements, namely justice (*Gerechtigkeit*), legal certainty (*Rechtsicherheit*) and expediency (*Zweckmassigkeit*). These three elements should be judged and accommodated proportionally by the Judge so that in turn a quality decision can be produced and meet the expectations of justice seekers.¹²

The pretrial decision that did not fulfill the justice principle could lead to controversy among the society which in turn caused public distrust on legal institutions, especially court institutions that tried corruption cases that attracted public attention.

If it is associated with the principle of legal certainty from the theory of legal certainty proposed by Peter Mahmud Marzuki, the contents of Setya Novanto's pretrial legal considerations relating to the initial investigation and investigation of the Corruption Eradication Commission are contradictory with the pretrial legal consideration of RJ.Lino and Ilham Arif Sirajudin.

The difference of pretrial legal considerations of Setya Novanto and the pretrial decision of RJ.Lino and Ilham Arif Sirajudin caused the legal uncertainty. This is contrary to the theory of legal certainty which states that certainty is a characteristic that cannot be separated from law, especially for written legal norms. Law without the

value of certainty will lose meaning because it can no longer be used as a behavioral code for everyone. In addition, the existence of legal uncertainties is contrary to the theory of legal certainty stated by Jan Michiel Otto.

According to Jan Michiel Otto, the real legal certainty is indeed more juridical. For this reason, he defines legal certainty as the possibility that in certain situations:

- a. There are clear, consistent and easily accessible rules, issued and recognized by the state;
- b. Government institutions apply these legal rules consistently and also obey and adhere to the rules;
- c. Citizens in principle adjust their behavior to the rules;
- d. Independent and impartial judges apply these legal rules consistently when they resolve legal disputes, and;
- e. Judicial decision are applied in concrete.¹³

V. CONCLUSION

1. Basic considerations of pretrial judges to determine the legitimacy of the determination of suspects as objects of pretrial session after the Constitutional Court Ruling No. 21/PUU-2014 is evidence possessed by investigators based on Article 184 of the Criminal Procedure Code before the investigator determines someone to be a suspect based on the Constitutional Court Ruling No. 21/PUU-XII/2014 where the determination of suspects is a new pretrial object and the Constitutional Court declares conditional constitutional on the initial evidence phrase, sufficient initial evidence and sufficient evidence in Article 1 number 14, Article 17 and Article 21 paragraph (1) of the Criminal Procedure Code is interpreted as at least two evidence tools.
2. In its application based on the Constitutional Court Ruling No. 21/PUU-XII/2014 associated with the principles of justice and legal certainty, the authors concluded that pretrial decision referring to the Constitutional Court Ruling No. 21/PUU-XII/2014 could fulfill a sense of justice and legal certainty over the pretrial decision that is not referring to the Constitutional Court Ruling No. 21/PUU-XII/2014 because of the existence of the Constitutional Court Ruling, the pretrial judge can review the evidence tools possessed by initial police investigator and investigator before determining someone to be a suspect.

SARAN

¹²Peter Mahmud Marzuki, *Op.Cit.* 74

¹³Shidarta, *Op.Cit.* page 85

1. It is necessary to revise the Criminal Procedure Code by including the expansion of pretrial objects into the draft of Criminal Procedure Code, because the changes can only be carried out by the official institutions of the President and Parliament so that in the pretrial session, pretrial judges can carry out the Constitutional Court Ruling consistently.
2. The Supreme Court needs to provide a circular letter regarding the pretrial decision that has been decided so that can be a guide for judge on other pretrial decisionsto result in legal certainty. In addition, with the Supreme Court Regulation Number 4 Year 2016 Article 2 paragraph (2), the article also explained that everything must be proven in the examination is legitimacy of the determination of the suspect, only to the extent of the formal aspect whether there are 2 (two) legal evidence tools, it is expected that pretrial judges can carry out the Supreme Court Regulation so that uniformity in the pretrial examination pattern is created.

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