

The Role Of The Indonesian Constitutional Court In Providing The Protection Of The Constitutional Rights For Its Citizens' Through Changes In Indonesian Criminal Procedure Law And Enlarging The Authority Of Pretrial Institutions

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Abstract

One of the material content arranged in the Criminal Procedure Code which is considered to provide an improvement in the context of providing protection for the rights of citizens is a pretrial mechanism. The pretrial concept in the Criminal Procedure Code, apart formulated from the culture and customary law in Indonesia, was also inspired by the Habeas Corpus Act in the Anglo Saxon justice system. Although the birth of this concept was considered ideal to provide the protection of human rights for a suspect or defendant in the event that an act of force is imposed, yet seeing the limitative nature of pretrial jurisdiction as regulated in Article 77 of the Criminal Procedure Code above, not all acts of forced can be tested for its validity in a pretrial hearings. Pretrial judges generally only submit detention assessments as subjective rights/discretion of investigators who have the authority to do so. Therefore, it become difficult for a suspect to have justice through the pretrial efforts that he through, if the above matters are still practice in pretrial hearings.

I. Introduction

In the context of criminal law, the Criminal Procedure Code (KUHAP) promulgated through Law Number 8 year 1981, by various group in his time, has been considered as a children of nation's master piece in order to renewing court law process in Indonesia. One of the material content arranged in the Criminal Procedure Code which is considered to provide an improvement in the context of providing protection for the rights of citizens is a pretrial mechanism.

The pretrial concept in the Criminal Procedure Code, in essence is a mechanism for a person to demand the legality of deprivation of his independence right, as a result of a detention process by law enforcement officials (police or prosecutors), for the alleged crime accused to him. The pretrial concept in the Criminal Procedure Code, apart formulated from the culture and customary law in Indonesia, was also inspired by the Habeas Corpus Act in the Anglo Saxon

justice system.¹Habeas Corpus Act itself is a statute born in 1679 during the reign of King Charles II, historically inspired by Magna Carta 1215.²

The arrangement in the Magna Carta expressly requires the existence of fundamental rational law and fair process as a condition to curb the human rights (deprived of human rights). Therefore, the reduction of a human rights must be included in the procedural law as part of due process of law. The pretrial as part of due process of law, limitatively regulated in Article 77 of the Criminal Procedure Code which reads:

The district court has the authority to examine and decide, in accordance with the provisions stipulated in this law concerning:

- a. the legitimacy of arrest, detention, cessation of investigation or cessation of prosecution;
- b. compensation and or rehabilitation for someone whose criminal case has been terminated at the level of investigation or prosecution.

Although the birth of this concept was considered ideal to provide the protection of human rights for a suspect or defendant in the event that an act of force is imposed (dwang meddelen), yet seeing the limitative nature of pretrial jurisdiction as regulated in Article 77 of the Criminal Procedure Code above, not all acts of forced can be tested for its validity in a pretrial hearings. The act of forced refer to included confiscation, search and inspection of documents.

Whereas in these forced actions, there might be violations of human rights. For instance, during the search house, if it is done arbitrarily, then the house search can be categorized as a violation of the peace of residence of a person as part of his private rights. Another example is in a body search. If it is done in a harassing manner, then the action can be categorized as a violation of someone's honor, values, and dignity. Same things applies to confiscations. If this is done arbitrarily, the confiscation may be categorized as a serious violation of ownership rights.

The three examples above regarding the possibility of violations in taking legal actions in the form of confiscation, search and inspection of documents, can be categorized as a form of violation of the citizens' constitutional rights as guaranteed in Article 28G paragraph (1) of the 1945 Constitution (UUD 1945), which reads, "Every person has the right to protect themselves, family, honor, dignity, and property under his authority, and is entitled to a sense of security and protection from the threat of fear to do something that is consider as a human right". By unregulated the three objects of forced action above mentioned in Article 77 of the Criminal Procedure Code, then normatively the legal space is not open, for those who feel disadvantaged as a result of the forced action in the court forum.

The unavailability of regulation for all acts of forced within the scope of pretrial as contained in Article 77 of the Criminal Procedure Code, as well as law enforcement practices in pretrial hearings to provide protection of citizens' constitutional rights, for someone who is subject to detention or arrest in accordance in Article 77's jurisdiction, also tends to be very weak. In practice, pretrial judges are more likely to examine only for formal completeness in

¹ See Adnan Buyung Nasution, *Praperadilan Versus Hakim Komisaris* (Some idea pertaining both), Newsletter KHN, 2002, without pages.

²Barnabas, D Johnson www.jurlandia.am/dueprocess.htm.

the two acts of forced, compared to examine and assess whether a suspect suspected of committing a crime, has been carried out based on sufficient preliminary evidence, or in the context of detention, no assessment is made concretely about the existence of a strong reason that a suspect will run away, lose evidence, or repeat his actions.³ Pretrial judges generally only submit detention assessments as subjective rights/discretion of investigators who have the authority to do so. Therefore, it become difficult for a suspect to have justice through the pretrial efforts that he through, if the above matters are still practice in pretrial hearings.

The matter raised about the possibility of the neglection of the constitutional rights of citizens due to Article 77 of the Criminal Procedure Code which is limitative, apart from the things that have been explained above, regarding the designation of a person as a suspect. Although this is not a new problem in the practice of law enforcement in Indonesia, but because of such massive news, the issue of determining a suspect is an important topic to discuss. Some legal issues that are often to be the subject of discussion in determining a suspect include, among others, the absence of a suspect status deadline (in the context of no arrests being made) after the stipulation of a person as a suspect until the transfer of cases to the court, restoration of the rights of the suspect which is erroneously or arbitrarily determined, and the question of whether the act of determining the suspect can be categorized as an act of forced.

II. Discussion

Constitutional human rights regulation, is a consequence (condition sine qua-non) of the existence of Indonesia as a state of law. As constitutional-rights, the position of human rights in Indonesia is more than just legal-rights. Constitutional rights, as explained in the previous chapters, are rights that are regulated in the constitution. The constitutional position which is the basic law in the life of the state, makes the constitutional rights a very important position. The constitution has evolved to become a bastion of protection for people's rights from deviant power. As mentioned by Sri Soemantri,⁴ that the constitutional guarantee of people's rights aims to provide protection to the basic rights of citizens.

The authority cannot and must not act arbitrarily to his citizens, because the power exercised is limited by the rights of citizens. There must be a balance between the rights of the authorities as the organizer of power in a country on the one side, and the rights of citizens on the other side. This concept is called constitutionalism. Carl J. Friedrich explained constitutionalisme with, "a set of activities organized and operated on behalf of the people but subject to a series of restrains which is needed for such governance is not abused by those who are called upon to do the governing".⁵ Constitutionalism here shows that the government is according to law, not according to humans. Encyclopedia Britannica explained that: "Constitutionalism –this means that public authority is to be exercised according to law; that state and civic institutions, executive and legislative powers, have their source in a

³See article 21 paragraph (1) Criminal Code mentioned: "A restraining order or further detention is carried out against a suspect or defendant who is suspected of committing a crime based on sufficient preliminary evidence, in the event of a situation that raise a concern of the suspect or defendant will escape, damage or eliminate evidence and or repeat the crime".

⁴Sri Soemantri M. *Prosedur dan Sistem Perubahan Konsitusi*. Bandung: Alumni, 1987. page 74.

⁵Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America*, (Weltham, Mass: Blaisdell Publishing Company, 1967), page 74.

constitution, which is to be obeyed and not departed from at the whim of the government of the day; in short, a government of law and not of men".⁶

Limitation of rights as stated in the constitution, makes all branches of state power must respect and acknowledge it. Recognition of constitutional rights as part of the constitution, means there are restrictions for state power. As part of the constitution, constitutional rights must be respected and protected through legal mechanisms. Moreover, when a violation occurs, the right owner can defend his rights.

In the Indonesian constitution, the content of human rights is regulated in full after the amendments of 1999-2002. With the inclusion of the chapter on human rights in the constitution, it means that Indonesia has given the status of the constitutional rights to those rights. In consequence, those rights become a fundamental rights. Therefore, any state action that violates the constitutional rights can be canceled by the Constitutional Court.

Among the aforementioned constitutional rights, as regulated in Article 28D paragraph (1) of the 1945 Constitution, which states that, "Every person has the right to recognition, guarantees of protection, and legal certainty that is just and equal treatment before the law. This constitutional guarantee applies to all citizens who are in conflict with the law. The process of settling criminal cases starting with arrest, detention, search, confiscation and punishment certainly creates restrictions on human rights. Legal certainty that is fair and equal treatment before the law, shows that Indonesian law is directed for the circumstances where the protection of human rights must be upheld fairly, without partiality, and without discrimination.

Human rights, as an important element of the rule of law, must be clearly illustrated in the penal code. The judiciary must be free and impartial. Criminal law enforcement itself, often shows two different faces. One side is in charge of maintaining order and security. Criminal law is the basis for obtaining state repressive acts against people suspected of committing criminal acts. On the other hand, criminal law functions to protect human rights, from all legal subjects involved in an alleged offense, perpetrators, victims, and other communities. Recognition of human rights must be interpreted as recognition of the existence of humanity in a citizen. Guaranteed protection of human rights in law enforcement, is very important in law enforcement, especially criminal law enforcement. In criminal law enforcement, human rights violations are very vulnerable.

Mardjono Reksodipoetro states that the function of regulation in criminal procedural law is to limit the state power in acting against every citizen involved in the criminal justice process.⁷ The various principles in criminal law must be aimed solely as to protecting the rights of citizens, law enforcement, and justice. Therefore, the principles of punishment established in the Criminal Procedure Code must be addressed solely for human rights, especially for suspects and defendants.

However, in the criminal process it is very possible that violations and restrictions happened on human rights, especially for a suspect. Investigators have a very large discretionary rights, thus opening up the possibility of police brutality, in the form of the use of

⁶Encyclopedia Britannica, William Benton Publisher, 1966, Volume 23, page 2881.

⁷Mardjono Reksodipoetro, *Hak Asasi Manusia dalam Sistem Peradilan Pidana*, (Jakarta: Pusat Pelayanan Keadilan dan Pengabdian Hukum Universitas Indonesia, 1995), page 25.

violence, abuse of power, and corruption. It is not only the use of discretionary rights by investigators that can reduce human rights, but starts with arrest and detention procedures. Therefore, establishing pretrial institutions is very important for the sake of legal certainty and justice for the suspect.

The discharge of the suspect is a legal administrative action conducted after the examination and investigation process. Where the mentioned series of activities are things that can not be separated from one another. Yahya Harahap⁸ states that with two phases of action in the form of one. There is almost no difference in meaning between those two activities, yet only gradual. Investigation is a series of investigator actions to search and to find an event that is suspected as a criminal offense, in order to determine whether or not an investigation can be carried out in a manner regulated by law.⁹ Whereas an investigation is a series of acts of an investigator in terms and in the manner stipulated in the law, to search and to collect evidence, which with that evidence could make clear the criminal acts that occurred and in order to find the suspect.¹⁰

Based on this definition, the determination of the suspect is an impact that occurs after the investigation process, that is, by the preliminary evidence which makes clear of a legal case, in order to find the suspect. Thus, the investigation process must be conducted according to legal procedures (due process of law), whilst still caring and protecting the human rights. If the determination of the suspect conducted randomly and unprocedural, it will be, undoubtedly damage the rights of every citizen.

Determination of the suspect results other force of effort that will be imposed on someone that has been named as a suspect, such as confiscation, search and so forth. The forced effort (*dwang midellen*) in discharging a suspect is the effort of law enforcement officials in the framework of conducting the judicial process. Forced effort is one of the authorities or a set of actions given by the law to the law officials to take deprivation of liberty, one of which is to designate a person as a suspect. If the action is conducted without the basis of the provisions of law, then it can be qualified as a violation of human rights, especially regarding the rights and personal freedoms of the person that has been prosecuted.¹¹

As explained in Article 112 paragraph (1) the Criminal Procedure Code, in the case of an investigation, a person is obliged to fulfill the summons, this is interpreted as the basis of forced efforts. In the case of forced effort made in determining a suspect are explained in Article 184 the Criminal Procedure Code, that the determination of suspects must meet valid evidence, in accordance with a minimum of two existing evidences. If the Article 184 of the Criminal Procedure Code is not fulfilled, the forced effort in determining the suspect will violate the human rights of the citizens. However, at present, the forms of forced have undergone various developments or modifications, one of which is "the determination of the suspect by the investigator". Determination of the suspect by the investigator for someone suspected to

⁸M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP Penyidikan dan Penuntutan*, (Jakarta, Sinar Grafika, Cet. 14, 2012), page 109.

⁹Article 1 Paragraph (5) Criminal Procedure Code .

¹⁰Article Paragraph 1 (2) Criminal Procedure Code.

¹¹Nikolas Simanjuntak, *Acara Pidana Indonesia Dalam Sirkus Hukum*, (Jakarta: Ghalia Indonesia, 2009), hlm. 77.

committing a crime, naturally is giving sanctions in the form of labeling (as a suspect) or status of the suspect for someone that can harm his constitutional rights.

Whereas on the other hand, the status of a suspect that has been given to a person still has its weaknesses, namely the absence of a clear deadline by when that status may be pinned to a person suspected of committing a crime. Thus, labeling the status as a suspect to a person by the state through an investigator, makes the suspect can only accept his status without any opportunity to make legal efforts to test the legality and purity of the purpose of the determination. Whereas in essence, the law must adopt the purpose of justice, expediency, and legal certainty simultaneously, so if the social life becomes more complex, then the law needs to be more scientifically and better concrete.

if a person has been declared as a suspect, then the investigator has several rights including: first, that person can be arrested, and this is limited by the provisions only for person who is allegedly committing a crime based on sufficient preliminary evidence. Furthermore the suspect can be detained in the event of a concern that he will run away, damage or lose the evidence, and or repeat the crime. The time limit for a detention is one day (24 hours), this mean that if the person got released before 24 hours, then the person cannot be brought to the court. But the suspect's status will not just disappear, and various restrictions on his freedom as citizens, can still be done by the investigator.

Second, someone with a suspect status (especially those who has widely publicized through the mass media), of course the person's good name has been "tainted" and loses his dignity in the eyes of the public. A suspect can be summoned by the investigator at any time to be investigated further, therefore he would not be free to travel out of town let alone to travel abroad (for a suspect can be banned through the immigration office). Third, as a suspect of a crime, then for the purposes of the investigation, a search of the house (office / work place) and a body search can be conduct. This can be proceed many times in accordance with the needs of investigators to uncover a crime. Fourth, if it is necessary under the pretext of discretion or subjective evaluation of the investigator, the assets' suspect may be confiscated or frozen, for the assests as a result of his crime. (for example blocking his bank account or confiscating his residence). Fifth, all letters received or in the archives of the suspect, can be read or examined by investigators, and if necessary confiscated, and their communication is tapped.¹²

For someone who becomes a suspect (stated in public or through mass media), then he may be subject to various restrictions, such as an obligation to attend the location specified by the investigator (usually the investigator's office), or a prohibition on traveling outside the city or abroad, or an obligation for submitting certain letters or documents. This position is similar to a person who is "arrested" (although physically "free"), yet not as free as other people. The suspect, whether he is in the status of being arrested, detained or not, he shall have rights and protection according to the law.

If a person determined as a suspect without a detention process, the suspect's status often creates legal uncertainty. This is more due to the absence of the time limit given by the

¹²Mardjono Reksodiputro, *Menggugat Praperadilan "Sarpin Effect", Merupakan "Malapetaka" Reformasi Peradilan di Indonesia*, Jurnal teropong (2015), page 5-6.

procedural law regarding the time limit for someone who has been suspected of committing a crime, having the status as a suspect or when the status as a suspect that he has is complete. This is very likely causing injustice, because during the investigation, this condition can be used as a tool to criminalize even factually damaging his good name. Holding the suspect's status without any significant progress in the investigation process, especially if there is not enough evidence, so that the legal process is kept silent without any certainty when to result, then it is the same as blocking the freedom of people.

The Criminal Procedure Code does not define further about "sufficient preliminary evidence", especially the sufficient preliminary evidence that can be used as a basis for determining a person to be a suspect. Some laws define about "sufficient preliminary evidence", as:

"Preliminary evidence is a condition, deed, and / or evidence in the form of information, writing, or objects that can provide a clue that there is a strong allegation of criminal act in the taxation field is being committed by anyone who can cause a loss of state income." [Article 1 number 26 of Law Number 28 Year 2007 concerning General Provisions and Tax Procedures (KUP)].

"Sufficient preliminary evidence is deemed to exist if at least 2 (two) pieces of evidence are found, and are not limited for the information or data that is spoken, sent, received, or stored either normally, or electronically, or optically." Article 44 paragraph (2) Law Number 30 Year 2002 concerning the Corruption Eradication Commission (KPK).

In the British legal system, the "sufficient preliminary evidence" or probable cause is, "...a reasonable ground for a belief in the existence of supporting facts; the existence of circumstances that would lead a reasonably prudent person to believe that the accused person committed the crime charged...".¹³ Black's Law Dictionary, defines probable cause as, "A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime. Under the Fourth Amendment, probable cause - which amounts to more than a bare suspicion but less than evidence that would justify a conviction must be shown before an arrest warrant or search warrant may be issued. Also termed reasonable cause; sufficient cause; reasonable grounds; reasonable excuse."¹⁴

The main function of sufficient preliminary evidence is, as a prerequisite for conducting an investigation¹⁵ and determine the status of the suspect.¹⁶ Based on the provisions of this function, sufficient preliminary evidence may consist of: (1) information (in the process of investigation); (2) witness testimony (in the process of investigation); (3) expert statements (in the process of investigation); and (4) evidence, not evidence (in the process of investigation and examination).¹⁷

¹³*Ibid.*, page. 41.

¹⁴Bryan A. Garner, *ed.*, *Black's Law Dictionary*, ed. 9, (St. Paul: Thomson Reuters, 2009), page. 1321.

¹⁵Explanation of Article 17 The Criminal Procedure Code jo. Article 1 item 5 The Criminal Procedure Code.

¹⁶Article 1 number 14 *jo.*, Explanation of Article 17 The Criminal Procedure Code.

¹⁷Article 7 Paragraph (1) letter h The Criminal Procedure Code. Do not equalize with the expert statements as referred to the article 184 paragraph (1) letter b of the Criminal Procedure Code where the expert

The Criminal Procedure Code does not require the number of evidence that is needed, so that the prerequisites for sufficient preliminary evidence have been fulfilled, but the Criminal Procedure Code requires that: (1) from that evidence the criminal act can be proven (to conduct an investigation); or (2) from that evidence the person who has criminal offense can be proven (to determine a suspect).¹⁸

Until now, no definitions have yet been found that can be used as an objective measure to define "sufficient preliminary evidence" in determining a person as a suspect. This results in an assessment of the existence of "sufficient preliminary evidence" for a person to be determined as a suspect, becoming the subjectivity of the investigator. This opens up opportunities for violations of one's constitutional rights regarding to the right of legal certainty and justice.

Penetapan tersangka pada faktanya dan terjadi dalam beberapa kasus, telah membawa akibat hukum hilangnya hak dari orang yang ditetapkan sebagai tersangka. Oleh karena itu, apabila tidak ada ukuran yang objektif untuk menilai sah tidaknya penetapan tersangka, serta jika tidak ada lembaga atau mekanisme pengawasan atas sah tidaknya penetapan tersangka, maka tidak tertutup kemungkinan adanya kesewenang-wenangan dalam penetapan tersangka. Putusan Mahkamah Konstitusi tidak memberikan batasan lamanya seseorang menyandang status tersangka, sehingga seseorang yang menjadi tersangka, bisa saja selamanya menyandang status tersebut tanpa adanya batas waktu yang jelas.

This conditions are very potential for the abuse of authority and violations of human rights, so that legal uncertainty is certainly very detrimental and injures the basic rights of citizens in obtaining legal certainty and justice. Legal certainty in determining the suspect, including the unclear deadline for the end of the suspect's status. The legal consequences that will be experienced by the suspect, is the labeling from the public. In fact, legally there is no certainty that someone has been found guilty, but socially the community already considers guilty. The uncertainty of the status suspect will end, has the potential to create human rights violations. The possibility of extortion by the irresponsible investigators is also very likely conducted, so that the case can be process immediately.

Various possibility of human rights violations in the process of determining a suspect show the importance of setting limitations in determining a suspect to provide protection for the constitutional rights over legal certainty and justice. Human rights protection of a suspect protected in the constitution and the law prevailing in Indonesia. The constitution is the basis for all Indonesian citizens, to use their rights as citizens in the life of the nation and state. The existence of guarantees for the basic rights of every citizen, implies that every ruler in the state cannot and may not act arbitrarily to his citizens. Even the existence of these basic rights also means that there is a balance in the state, namely the balance between power in the state and the basic rights of citizens.

information referred to article 184 of the Criminal Procedure Code is expert testimony under oath in court proceedings. Therefore the quality of witness testimony in article 7 paragraph (1) letter h of the Criminal Procedure Code is lower than the expert statement in article 184 of the Criminal Procedure Code.

¹⁸Article 1 Number 14 *jo.* Explanation Article 17 the Criminal Procedure Code; Also see Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP Penyidikan dan Penuntutan*.

In carrying out conducting the functions of examination and investigation, the constitution provides "special" rights for law enforcement officials to summon, examine, arrest, detain, search and confiscate, suspects and goods deemed related to criminal acts. However, in exercising these rights and authorities, they must obey and abide by the principle of "the right of due process".¹⁹

This issue is very important to be addressed, because in reality there are still many people who complain about the various procedures of "examination" and "investigation" that deviate from the provisions of the procedural law. Examiner or Investigator often quibble for discretion to uncover a criminal event, but his actions are very contrary to human rights which must be upheld in the inspection, examination, or investigation stage. Therefore, it must receive attention from various groups and state institutions, in order to increase compliance with "The right of due process of law enforcement."²⁰

The principle of due process of law consist the meaning as: "a legal principle that requires the government to respect all a person's right. It mean that the government must obey the law, act in a reasonable manner, and use fair procedurs when it acts to a limit a person's life, liberty, and property"²¹. Dicey stated that due process of law is:

"a fundamental, constitutional guarantee that a legal proceeding will be fair and that one will be given notice of the proceedings and an opportunity to be hear the government act take away one's life, liberty or property. Also a contitutional guarantee that law shall not be unreasonable, arbitrary, or capricus".²²

Due process of law is a characteristic of the rule of law, which has the consequence that every act of the state official is not only based on formal legal provisions governing procedures for enforcing material legal provisions that meet the conditions of justice. However, formal legal norms must be fair and the provisions of the procedure should not be arbitrary according to the taste of the organizer of state power alone.²³

Due Process of law must be interpreted as a protection for the independence of a citizen who become a suspect or a defendant, whose legal status changed when he was arrested or detained, but his rights as citizens shall not be lost. Although his independence is limited by law and subject to moral degradation, it does not mean that his rights as a suspect / defendant are lost.

In a democratic rule of law, justice must be upheld, must not be limited and eliminated. Justice is the right of citizens who should be upheld. The law should not be used to commit atrocities, so that deprivation of rights and acts of violation by law officials is considered as something that can be justified according to law. The purpose of the law as referred to Article 28I paragraph (5) of the 1945 Constitution, namely to guarantee and protect human rights in

¹⁹M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan... Op.cit.*, page 95.

²⁰*Ibid.*, page 95.

²¹Peter Grant, *Due Process of Law, Governing Wisconsin from the Wisconsin Legislative Reference Bureau*, downloaded on 9th of November 2018, http://www.legis.wisconsin.gov/lrb/gw/gw_18.pdf.

²²AV Dicey, *Pengantar Studi Hukum Konstitusi (Introduction to the Study of the Law of the Constitution)*, Nusamedia, (Jakarta, 2014), page 89.

²³*Ibid.*

accordance with the principles of a democratic rule of law, so that all the provisions stipulated in statutory regulations, including criminal procedural law, must be in accordance with the human rights principles. Even though there are restrictions on human rights in Article 28J paragraph (2) of the 1945 Constitution, those restrictions are emphasized to be conducted solely to guarantee the recognition and respect for the rights and freedoms of others.²⁴ Likewise in determining a suspect in a criminal settlement procedure.

In the context of granting the guarantees for the protection of human rights for a suspect, the Decision of the Constitutional Court Number 21/ UU-XII /2014 states that:

“...determination of the suspect is part of the investigation process which is a deprivation of human rights, then the determination of the suspect by the investigator should be an object that can be requested for protection through the efforts of pretrial institutions. This is solely to protect a person from the arbitrary actions of the investigator which is most likely occur when a person is named as a suspect, even though in the process there was an error, there are no other institutions other than pretrial institutions that can examine and decide upon them. However, the protection of the rights of the suspect does not imply that the suspect is not guilty and does not invalidate the suspicion of his criminal act, so that investigation can still be conducted according to the rules of law that apply in an ideal and correct manner. The inclusion of the validity of determining the suspect as the object of pretrial institutions is that the treatment of a person in the criminal process also keep the suspect as a human being who has the same value, dignity, and position before the law.”²⁵

Regarding the search and confiscation, the Constitutional Court issued a Decision in Case Number 65/PUU-IX/2011 said that:

“...one of the same position arrangements before the law that stipulated in the Criminal Procedure Code is the existence of a pretrial system as one of the control mechanisms over the possibility of arbitrary action by investigators or public prosecutors in conducting arrests, searches, seizures, investigations, prosecutions, cessation of investigations and stopping prosecutions, whether accompanied by a request for compensation and/or rehabilitation. The intention and the purpose that want to be upheld and protect in the pretrial process is the upholding of the law and the protection of human rights as a suspect/defendant in the investigation and in the prosecution examination. Therefore, the pretrial system regulated in Article 77 through Article 83 of the Criminal Procedure Code is for the purpose of horizontal supervision of the rights of the suspect/defendant in preliminary examination(vide explanation Article 80 the Criminal Procedure Code). The existence of the Criminal Procedure Code intended to correct past judicial practice experience, under HIR rules, which is not in line with the protection and enforcement of human rights. In addition, the Criminal Procedure Code provides protection and enforcement of human rights for suspects or defendants to defend their interests in the law process...”²⁶

²⁴The Decision of the Indonesian Constitutional Court Number 21/PUU-XII/2014, page 3.

²⁵The Decision of the Indonesian Constitutional Court Number 21/PUU-XII/2014, pages 105-106.

²⁶*Ibid.*, page106-107.

Based on the two considerations above, the Court decided that pretrial jurisdiction as regulated in Article 77 of the Criminal Procedure Code must be interpreted, including determining the suspect, search and seizure. As for the examination of letters, the Court opine that those are the part of an act of search and seizure. Based on the Constitutional Court Decision and the authority attached to the court, which to test a law against the 1945 Constitution, the pretrial object concerning the determination of a suspect, search and seizure, becomes legally valid within the scope of the jurisdiction of the pretrial institution.

Determination of the status of a person that becomes a suspect in a law enforcement process, resulting in reduced of human rights hence it creates restrictions on freedom and revocation of certain rights. In fact, the aim of the punishment is nothing but to protect the rights of the community. The definition of the community here is all the people involved in the settlement of a criminal case, not only the victim and the community, but also in someone suspected for committing an act against the law.

The forced conducted by law enforcement officers against a suspect must be monitored and controlled by the law, so that the conducted procedures are not contrary to law. When forced are made outside the procedure, it can be guaranteed that some rights will be violated. This is certainly contrary to the concept of due process of law in Indonesia as a state of law that the existence of constitutional rights is a consequence that must be fulfilled by law.

In the Decision of the Constitutional Court Number 21/PUU-XII/2014 provides interpretation of Article 1 number 14, Article 17, and Article 21 of the Criminal Procedure Code which stated that to establish a person as a suspect, at least two pieces of evidences must be fulfilled.²⁷By the "preliminary evidence" reason, then a person can be declared a suspect. The Criminal Procedure Code did not elaborate further on what is actually meant by "preliminary evidence". whereas, this "preliminary evidence" can be used as a basic for determining a suspect. The explanation of what is meant by "preliminary evidence" is explained briefly, not definitively by the Criminal Procedure Code in the explanation of Article 17 which reads, "What is meant by "sufficient preliminary evidence" is preliminary evidence to presume the existence of a crime in accordance with the Article 1 point 14."

III. Conclusion

Determination of the suspect, confiscation, and search against someone who is suspected of committing a crime, is essentially an act of forced (*dwang midellen*) by law enforcement officials. These forced actions have legal consequences for the constitutional rights of citizens that set as suspects. After a person determined to be a suspect, then it has the consequence of reducing or limiting the rights of citizens. Therefore, in order to maintain due process of law and to prevent arbitrary actions by law enforcement officials in determining the suspects, it is necessary to have a legal forum to test the validity of the determination of the suspects in an open hearing for public.

Because the determination of a suspect, confiscation, and search of a citizen to a person in a criminal event has an impact on the reduction and limitations of the citizens' constitutional rights, the legal forum to test the validity of the determination of the suspect, confiscation, and

²⁷The Decision of the Indonesian Constitutional Court Number 21/PUU-XII/2014.

search can be done through a pretrial institution. Therefore, beside issuing a decision to protect the constitutional rights of the citizens, the Constitutional Court also recommends that changes shall be made to the Criminal Procedure Law to provide legal certainty for the protection of citizens' constitutional rights.

Furthermore, the Constitutional Court also recommends in order to prevent the arbitrary from the authority to determine the suspects, search and seizure, technical guidelines or permanent procedures must be made for the examination and the investigation process, as well as supervision from the leadership within the internal scope of the law officials to ensure that the exercise of the authority has been conducted according to predetermined procedures.

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