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## JURIDICAL REVIEW THE EXISTENCE OF COMMISSIONER JUDGES AS AN ALTERNATIVE TO THE PRETRIAL SYSTEM

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### Abstract

What underlies the emergence of commissioner judges is to better protect human rights guarantees in the sentencing process and to avoid congestion caused by discrepancies between sentencing and different agencies. This formulation shows that commissioner judges are not institutions such as pretrial but officials or judges authorized to assess the course of investigations, prosecutions, and other powers specified in the Draft Criminal Procedure Code Article 1 paragraph (7). Based on these considerations, the commissioner judge institution is attached to the position of commissioner judge. This study aims to determine and understand the arrangements regarding commissioner judges in the Draft Law on the Criminal Procedure Code and explain the prospects for commissioner judges in realizing an integrated criminal justice system compared to pretrial. This research was conducted using a normative juridical approach. Namely, legal research examined the policy formulation of commissioner judges stipulated in the 2011 Criminal Procedure Code Bill as a substitute for pre-trial institutions. From the results of discussing the provisions regarding the terms and procedures for appointing and dismissing commissioner judges, the Criminal Procedure Code regulates them. The domination of judicial power through the Commissioner Judge can be seen from his authority to supervise the actions of investigators and public prosecutors at the preliminary examination stage. This set of authorities has implications for the positive contribution of this new institution in realizing an integrated criminal justice system that is better than pretrial. The formulation of Commissioner Judges in the 2011 Criminal Procedure Code Bill must minimize violations of suspects' rights at every stage or process of criminal justice. It can reduce judicial mafia, which is likely to occur in current judicial practice. In this case, it can be minimized by the commissioner judge because the commissioner judge has appointed a judge who specifically handles pretrial. Judges in pretrial are independent, but judges in commissioner judges have been determined by a special judge who will decide on the case filed.

**Keywords:** Commissioner Judge, Pre-trial, KUHAP, Integrated Criminal Court.

### Introduction

The criminal procedure law as contained in Law Number 8 of 1981 which has been in effect for approximately 34 years is thought to be replaced soon with a new criminal procedure law which is more in line with legal developments and public legal awareness. Legal developments in the field of criminal procedural law in laws outside the Criminal Procedure Code have regulated provisions regarding the expansion of criminal procedural law norms in the Criminal Procedure Code and some of them have secretly added new criminal procedural law norms, in addition to those that regulate provisions that deviate from procedural law norms criminal law in the Criminal Procedure Code, namely criminal procedural law regulated in special criminal law.

Consideration of drafting the Criminal Procedure Code Bill (2011 Draft) to replace Law Number 8 of 1981.

a. That the Republic of Indonesia is a legal state based on Pancasila and the 1945 Constitution of the Republic of Indonesia which upholds human rights and guarantees all citizens. concurrently with his position in law and government and is obliged to uphold that law and government with no exceptions [4] ;

b. To realize the objectives referred to in letter a, it is necessary to strive for the development of national law in the framework of creating the supremacy of law by reforming the criminal procedural law towards an integrated criminal justice system by placing law enforcers in their functions, duties, and authorities [5] ;

c. Whereas the renewal of criminal procedural law is also intended to provide more legal certainty, law enforcement, legal order, social justice, and legal protection and human rights, both for suspects, defendants, witnesses, and victims, for the sake of the rule of law [6] ;

d. Whereas several international conventions directly related to criminal procedural law have been ratified, criminal procedural law needs to be adapted to the contents of the convention.

Based on these considerations it was concluded that Law Number 8 of 1981 concerning the Criminal Procedure Code was no longer following changes in the constitutional system and legal developments in society, so it needed to be replaced with a new criminal procedure law.

In the concept of the Criminal Procedure Code Bill, the commissioner judge was reinstated as a substitute for the pretrial contained in Law Number 8 of 1981 which was considered to contain weaknesses and was ineffective in supervising or controlling the use of the powers of investigators and prosecutors in the investigation and prosecution stages. The commissioner judge is considered the best choice as a substitute for pretrial which has the same function, namely to supervise or control at the preliminary stage.

When compared with pretrial institutions, it can be seen that commissioner judges have much larger and more detailed authorities, so it is hoped that they will provide more guarantees of legal protection for human rights. In addition, the use of authority on the own initiative of the commissioner judge and the final and binding determination and decision is an extension of the pretrial institution. Even in some matters such as search warrants, confiscation, or detention, the commissioner judge replaces the duties and powers of the head of the court.

The magnitude of the authority of the commissioner judge requires an attitude of independence and objectivity as an absolute existence. This cannot be separated from the fact that this authority has departed from the authority to try judges that are known so far. Its existence will change the structure of the criminal justice system that has been underway, especially in the emphasis on the basic preliminary examination stage. This will certainly greatly affect the effectiveness of the performance of investigators and public prosecutors who are expected to be more professional and proportionate in conducting investigations and prosecutions of criminal cases.

## **Literature review**

In the concept of the Criminal Procedure Code bill, the commissioner judge was reinstated as a substitute for the pretrial contained in Law Number 8 of 1981 which was considered to contain weaknesses and was ineffective in supervising or controlling the use of the authority of investigators and prosecutors in the investigation and prosecution stages. The commissioner judge is considered the best choice as a substitute for pretrial which has the same function, namely to supervise or control at the preliminary stage. A shift in perspective from pretrial to commissioner judge will occur if previously the validity test was only carried out after the use of authority using forced measures in the form of restrictions on human rights, which is often the subjectivity of investigators and public prosecutors is more dominant. So in the commissioner judge, the legality testing is also carried out before investigators and public prosecutors use their authority to carry out coercive measures, thus it is expected to reduce the element of subjectivity again to minimize abuse of authority. The nature of the commissioner judge's decision is the first and final decision. There is no legal remedy for the commissioner judge's decision. The determination or decision of the commissioner judge cannot be appealed or cassation.

The provisions of Article 112 show that the concept of the Draft Criminal Procedure Code has placed the commissioner-judge having a major and decisive role in the preliminary examination. This big role is marked by the use of authority at the initiative of the commissioner judge himself and the decision is final (first and last). Predictive analysis or forecasting (forecasting study) regarding the inclusion of Commissioner Judges in the Criminal Procedure Code in the future needs to be carried out so that problems that arise in the future can be identified to prevent and resolve them if the Commissioner Judges are implemented. The Commissioner Judge is a better supervisory institution when compared to the pre-trial. This is because the authority possessed

by this institution is far wider and provides more guarantees for the protection of the suspect's rights. In addition, when talking about the mechanism of examination, it can be seen that the oversight function carried out by this institution is better because apart from depending on requests submitted by parties whose rights were violated at the preliminary examination stage, the commissioner judge also acts proactively and makes decisions based on his own initiative with or without there is a request. In addition, the examination period is also shorter compared to pre-trial [20] .

## Method

Research methodology is a step that is determined systematically and scientifically to observe and analyze a problem that is used by researchers so that research is well conceptualized and more structured to produce a conclusion that is useful for discovering, developing, and testing knowledge. The type of research used in this research is normative legal research, namely, research that focuses on positive legal norms in the form of laws and regulations and is carried out by studying legal materials related to the problems studied.

This research is a normative legal research that uses legal materials as research data, which consists of:

- a. Primary legal materials are all regulatory documents that are binding and implemented by competent authorities. It can be in the form of statutory regulations, legal principles, and comparative law.
- b. Secondary Legal Materials in the form of legal facts, doctrines, legal principles, and legal opinions in literature, journals, research results, documents, newspapers, the internet, and scientific magazines related to this research.
- c. Tertiary legal materials, namely materials that provide instructions and explanations of primary and secondary legal materials such as dictionaries and encyclopedias.

By looking at the types of data mentioned above which are related to the approach method in this study, the data collection method used focused on secondary data which was carried out with literature studies which are often referred to as documentary studies or "literature studies". Such as laws and regulations, jurisprudence, results of seminars, scientific works in the form of literature or research results, journals, legal dictionaries and books, and other matters related to the problem under study. This writing uses deductive data analysis techniques, namely explaining something general in nature and then drawing it into a more specific conclusion. By referring to laws and regulations as well as documents and opinions of legal experts so that they can help answer the problems under study.

## Results and Discussion

Regarding important principles in a rule of law, the principle of protection of human rights and the principle of a free and independent judiciary is the most appropriate principle to use in discussions on this matter. These two principles are expected to be able to exercise control over the behavior of state power (in this case investigators and public prosecutors). This rule of law principle is adhered to and developed to, on the one hand, protect human rights (in this case the rights of suspects and defendants) from possible threats or violations by authorities, and on the other hand, to prevent or exercise control over state power holders so they do not violate their rights. those human rights. The fair legal process is a framework for ensuring that justice will be achieved in a criminal justice system. Following the choice of a democratic form of government and the principles of the rule of law, the influence of the concept and principle of due process of law on law, especially in the criminal justice system, cannot be avoided. The independence of the judiciary is closely related to the form of the state itself, whether based on law or not (rule of law).

Regarding this, Padma Wahyono in his book argues that the theoretical requirements regarding a state based on law are:

- a. to protect human rights;

- b. there is a democratic state institutional mechanism;
- c. there is an orderly system of law;

In principle, the weakness in this pre-trial relates to 3 (three) main issues, namely:

- a. pre-trial authority;
- b. Parties entitled to submit pre-trial requests;
- c. Pre-trial examination event

Referring to the provisions of Article 77 jo, and Article 1 paragraph (10) of the Criminal Procedure Code, not all forced efforts can be requested before trial. Only whether an arrest or detention is legal or not can be requested before trial, while this is not the case with confiscation or search.

The criminal justice system as a concept has been arranged in a trap of elements contained in the provisions of the Criminal Procedure Code. Judging from the basic institutional framework and procedures, the Criminal Procedure Code divides it into three phases, namely:

- a. Pre adjudication phase
- b. adjudication phase
- c. Post adjudication phase

Marjon Reksodiputro in his book writes that the design error of the 1981 Criminal Procedure Code was because it led to compartmentalization which was one of the results of "compromises" at the time of its formation. The conclusion of the description above is that "procedure design" in the Indonesian criminal justice system must clearly and consistently state that:

1. The Criminal Procedure Code gives a dominant position to the adjudication stage, and therefore the center of authority is the judge (court).
2. The Public Prosecutor and the Investigative Police are part of the judicial power and are subject to the judge and can be reprimanded and punished by the judge/assembly of the court session concerned if they are negligent or interfere with the smooth running of the criminal court process, and violate the human rights of the suspect or defendant.

In this case, the RKUHAP tries to change this mistake by giving authority to a Commissioner Judge. Based on the explanation above, it can be concluded the following things :

1. The adjudication phase must be the most dominant stage when compared to the pre-adjudication and post-adjudication phases. This is because at this stage the defendant and the public prosecutor are in a balanced position. It is said that the position of the parties is balanced because while on the one hand the public prosecutor is obliged to prove the defendant's guilt, on the other hand, the defendant also has the same right to prove that he is innocent. In this case, both parties can submit evidence relevant to the charge and defense which will ultimately be considered by the judge to finally decide. This adjudication phase becomes very important so that it becomes a central phase because at this stage there will be judges who can examine and decide the case in question objectively based on the evidence presented.
2. Judicial power must be the most dominant subsystem when compared to other subsystems (investigators and public prosecutors). The logical consequence of this is that this subsystem must be equipped with sufficient authority to be able to supervise other subsystems.

In this case, the judge is obliged to carry out supervision from the time the investigation takes place until the correctional process for the convicted person takes place, to ensure that there is no violation of the rights of the suspect, defendant, and convict.

Referring to the previous explanation, it can be seen that the fundamental problem that arises in practice is that even though it is said that the Criminal Procedure Code adheres to the concept of an integrated criminal justice system, this concept does not seem to have materialized because it is still half-hearted. Specifically talking about the pre-adjudication phase, is not integrated because the judge has so far only been limited to

overseeing this phase through pre-trial which is equipped with very limited authority so that its effectiveness in supervising the powers of investigators and public prosecutors at the preliminary examination stage is still far from adequate.

The domination of judicial power through the Commissioner Judge can be seen from his authority to supervise the actions of investigators and public prosecutors at the preliminary examination stage in the following cases:

- 1) The authority of the Commissioner Judge is much broader to guarantee the protection of the suspect's rights;
- 2) The Commissioner Judge can decide with or without a request for an examination, in this case:
  - a) Judge Commissioner can proactively supervise the implementation of forced measures in the form of confiscation, search, and wiretapping by granting permission or approval
  - b) The Commissioner Judge can take the initiative to decide that there has been a violation of the suspect's rights when the suspect is brought before him based on the examination conducted.
- 3) The law requires investigators together with the public prosecutor to present a detained suspect to the Commissioner Judge within 5 (five) days of the detention by the investigator while the investigation is in progress;
- 4) The Commissioner Judge has the authority to determine the period of extension of the suspect's detention at the investigation stage, including deciding on the suspension or cancellation of detention where previously this authority rested with investigators and public prosecutors according to the level of examination;
- 5) The Commissioner Judge is equipped with the authority to decide whether or not to prosecute a case based on the request of the public prosecutor.

Based on the explanation above, in principle, with a set of powers granted by law, the commissioner judge will be better able to carry out the supervisory function at the preliminary examination stage. This set of authorities has implications for the positive contribution of this new institution in realizing better integration within the criminal justice system when compared to pretrial.

## Conclusion

The conclusions from the results of the Juridical Review of the Existence of Commissioner Judges as an Alternative to the Pretrial System and the Prospects of Its Arrangement in the Draft Criminal Procedure Law are as follows:

1. The draft provisions of Article 122 show that the concept of the Draft Criminal Procedure Code has placed commissioner judges having a large role. This big role is marked by the use of authority at the initiative of the commissioner judge himself and the decision is final (first and last). The absence of testing or appeals against the commissioner judge's decision can be understood from two sides, namely, in the preliminary examination it is necessary to have a simple, fast and accurate examination process, and the commissioner judge's examination material has not yet entered the subject matter of a criminal case, so the commissioner judge's decision no appeal is required.
2. Based on the commissioner judge in the Draft Criminal Procedure Code, it is hoped that it will be able to improve the weaknesses of the pre-trial institution so that the improvement of the criminal justice system towards integration can be achieved. When compared to pre-trial, the commissioner judge is a more ideal supervisory institution. Based on the explanation above, it can be concluded that in principle, with a set of powers granted by law, the commissioner judge will be better able to carry out the supervisory function at the preliminary examination stage. This set of authorities has implications for the positive contribution of this new institution in realizing better integration within the criminal justice system when compared to pretrial.

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