LEX JOURNAL : KAJIAN HUKUM DAN KEADILAN, 2025
Vol. 9, No. 2, 192-208
E-ISSN: 2580-9113 | P-ISSN: 2581-2033
Open access at: https://ejournal.unitomo.ac.id/index.php/hukum

Check for updates

Type: Research Article

Comparison of the *Habeas Corpus* System in England and Indonesia: Its Authority and Regulation

Dedi Wardana Nasoetion
Faculty of Law, University of Dr. Soetomo, Indonesia
E-mail: dediwardana.nasution@unitomo.ac.id

Hartoyo
Faculty of Law, University of Dr. Soetomo, Indonesia
E-mail: hartoyo.fhunitomo@gmail.com

Noenik Soekorini
Faculty of Law, University of Dr. Soetomo, Indonesia
E-mail: noenik.soekorini@unitomo.ac.id

ABSTRACT

Pretrial here is seen to have been understood differently from the purpose or function of Habeas Corpus, which is to protect and safeguard the rights of citizens against abuse of authority of the authorities (in this case criminal law enforcers). This research aims to examine the authority of pre-trial according to the Indonesian Criminal Procedure Code and compare the concept and regulation of Habeas Corpus in the English judicial system with pre-trial in Indonesia. The method used in this research is normative juridical, with statutory, conceptual, and comparative approaches. The results show that the authority of pretrial judges by the provisions in Law Number 8 of 1981 concerning Criminal Procedure Law is the validity or not of arrest, detention, termination of investigation or termination of prosecution; determination of suspects; seizure and search; and compensation and or rehabilitation for a person whose criminal case is stopped at the level of investigation or prosecution. The existence and presence of pretrial is not a separate institution. Pretrial is only a new authority and function delegated by KUHAP to each District Court (PN).

KEYWORDS

Habeas Corpus; Comparative Law; England and Indonesia

INTRODUCTION

The concept and regulation of pretrial institutions as part of the Indonesian criminal justice system can be found in Law Number 8 of 1981 concerning Criminal Procedure Law *(KUHAP).*[1] This legal institution is intended as a means of control over the authority of law enforcers, especially police investigators in carrying out several coercive measures such as arrest and detention for the sake of criminal law enforcement.[2] In essence, there must be sufficient reason for law enforcement to exercise the authority granted by criminal procedure law, arresting and detaining a person.

This control mechanism can be compared briefly to the Habeas Corpus developed in the English legal or criminal justice system.[3] It is reasonable to argue that behind the pretrial mechanism, legal protection for citizens against arbitrary arrest and detention is the same principle that lies behind Habeas Corpus. Both are ultimately intended to prevent law enforcement from acting arbitrarily when depriving citizens of some of their basic rights. The pretrial application adapted from Habeas Corpus to the Indonesian criminal justice system has grown malicious. About this maliciousness, Mathias Siems mentions:[4]

> "For 'malicious legal transplants' it follows that they can also concern any legal object and be either of an involuntary or a voluntary nature. In addition, to be 'malicious' there needs to be an intention to harm. Thus, 'malicious legal transplants' have an objective element ('harm'), for example, where one group in society imposes its social norms on another one without the need (as will be shown in the next section). In addition, the subjective element means that at least one actor in the transplant process recognizes the use of the transplant in such a manner. Thus, this is different from a situation where a legal transplant merely does not work well due to some kind of unintended consequence."

In short, the understanding and/or application of this borrowed concept in a different context (the Indonesian criminal justice system) deviates far from what is the purpose or function of the concept in the original legal system. Pretrial here is seen to have been understood differently from the purpose or function of Habeas Corpus, which is to protect and safeguard the rights of citizens against abuse of authority by the authorities (in this case criminal law enforcers).[5] The above is said about the results of the search that show clearly that the pretrial developed in the

---

1 Fachrizal Afandi, "Perbandingan Praktik Praperadilan dan Pembentukan Hakim Pemeriksa Pendahuluan dalam Peradilan Pidana Indonesia" (2016) 28:1 Mimb Huk 93–106, online: <https://journal.ugm.ac.id/jmh/article/view/15868>.

2 Ana Fauzia, Fathul Hamdani & Deva Gama Rizky Octavia, "The Revitalization of the Indonesian Legal System in the Order of Realizing the Ideal State Law" (2021) 3:1 Progress Law Rev 12–25.

3 Wahyu Januar, *Studi Komparasi Hukum Wewenang dan Fungsi Pra Peradilan menurut Hukum Acara Pidana Indonesia dengan Sistem Habeas Corpus di Amerika Serikat* Universitas Sebelas Maret, 2011) [unpublished].

4 Ramsen Marpaung & Tristam Pascal Moeliono, "Perbandingan Hukum antara Prinsip Habeas Corpus dalam Sistem Hukum Pidana Inggris dengan Praperadilan dalam Sistem Peradilan Pidana Indonesia" (2021) 5:2 J Wawasan Yuridika 224–248, online: <https://ejournal.sthb.ac.id/index.php/jwy/article/view/494>.

5 Iqbal Parikesit, *Akibat Hukum Putusan Praperadilan yang Menyatakan Tidak Sahnya Penetapan Tersangka* Universitas Islam Sultan Agung, 2022) [unpublished].

Indonesian criminal justice system was transplanted from Habeas Corpus which has long been practiced in the English criminal justice system. However, it must be recognized that the application of pretrial transplant from Habeas Corpus in legal practice has caused many problems.

METHOD

The research method used in this article is normative legal research, also known as library-based legal research. This research was conducted by examining secondary legal materials such as statutes, legal literature, and legal doctrines relevant to the issue under study. The approaches used in this research include three main approaches. First, the statutory approach involves analyzing various legal provisions that are the focus of the study, such as the Indonesian Criminal Procedure Code (KUHAP) and the Magistrates Courts Act in England. Second, the conceptual approach is based on views and doctrines that have developed in legal theory, particularly those related to the concept of pretrial mechanisms and habeas corpus, as well as theories of authority and supervision in criminal justice. Third, the comparative approach involves comparing the pretrial system in Indonesia with the Habeas Corpus system in England. The data sources used in this research include primary legal sources such as statutes, secondary sources like textbooks, journal articles, and scholarly opinions, as well as tertiary sources, which help clarify legal definitions and explanations when needed.

RESULT & DISCUSSION

I. Pre-Trial Authority Under the Indonesian Criminal Procedure Code

Pretrial consists of two words, namely pre and judicial, while when we examine the term "pretrial" according to KUHAP, the literal meaning is different. Pre means before, or preceding, meaning that "pretrial" is the same as before the examination in court.[6] Thus it can be concluded that pretrial is a voluntary examination process before the examination of the main case takes place in court. The main case is an allegation of a criminal offense, which is currently under investigation or prosecution. Therefore, pretrial is only an accessory to the main case so the decision is also voluntary.[7]

Pretrial is an action carried out by the district court to examine and decide on the validity of arrest, detention, termination of investigation, termination of prosecution, and decide on requests for compensation and rehabilitation whose criminal cases are not continued before the district court at the request of the suspect or defendant or the reporter or his family and or legal counsel.[8] The term pretrial is taken from the word pretrial, but its scope is narrower because pretrial can examine whether there is sufficient legal basis to file a prosecution of a criminal case before the court. Meanwhile, the scope of pretrial is limited to that stipulated in Article 77 of the Criminal Procedure Code and Article 95 of the Criminal

---

6 Andi Hamzah, *Kitab Undang-undang Hukum Acara Pidana dan KUHAP* (Jakarta: Rineka Cipta, 1992).

7 Darwan Prints, *Praperadilan dan Perkembagannya di dalam Praktek* (Bandung: Citra Aditya Bakti, 1993).

8 Mochamad Anwar, *Praperadilan* (Jakarta: Ind-Hil-Co., 1989).

Procedure Code. Meanwhile, in general terms, as stated in Article 1 point 10 of KUHAP, pretrial is the authority of the District Court to examine and decide in the manner provided for in this law, on:

1. Whether or not an arrest or detention is lawful at the request of the suspect or the suspect's family or other party on behalf of the suspect;
2. Whether or not the termination of investigation or the termination of prosecution is valid upon request in the interest of law and justice;
3. Request for compensation or rehabilitation by the suspect or his/her family or other party by his/her attorney whose case is not submitted to the court.

Article 95 is a further explanation of the provisions in Article 1 number 10 of the Criminal Procedure Code and Article 77 of the Criminal Procedure Code, with the addition of the element of being subjected to other actions without grounds based on the law or errors regarding the person or the law applied, other actions in the form of:

1. House income;
2. Shakedown; and
3. Forfeiture.

Other actions are not limited to these three matters. However, it is adjusted to the scope of duties and authority of the Investigator and Public Prosecutor. For example, if an unlawful act occurs or the suspect or defendant during arrest or detention, such as being tortured, shot, or even dying. Thus, if the act occurred without a legally justified reason, then the victim or his family can file a claim. A pretrial is not a separate judicial institution. It is merely a new authority and function delegated by KUHAP to each District Court, as an additional authority and function to the existing District Court. If up to now, the authority and function of the District Court is to hear and decide criminal and civil cases as its main task, then the main task is given the additional task of assessing the legality of arrest, detention, confiscation, termination of investigation, or termination of prosecution carried out by investigators or public prosecutors whose examination authority is given to the Pretrial Court.

According to R. Soeparmono, the establishment of pretrial institutions aims to uphold the law, and legal certainty and protect the human rights of suspects, because according to the KUHAP system, every action such as arrest, search, seizure, detention, prosecution, and so on which is carried out contrary to the law and legislation is an act of rape or deprivation of the human rights of the suspect. According to M. Yahya Harahap, in terms of the structure and organization of the judiciary, pretrial is not an independent institution. Pretrial is only an institution whose characteristics and existence are:[9]

1. Exists and is an inherent unit of the District Court and as a court institution is only found at the District Court level as a task force that is not separate from the District Court.
2. Pretrial is not outside next to or parallel to the District Court but is only a division of the District Court.

[9] M Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP: Pemeriksaan Sidang Pengadilan, Banding, Kasasi dan Peninjauan Kembali* (Jakarta: Sinar Grafika, 2002).

3. Judicial administration, personnel, equipment, and finances are united with the District Court and are under the leadership, supervision, and guidance of the President of the District Court.
4. The administration of the judicial function is part of the judicial function of the District Court itself.

The new institution that has its existence and characteristics is pretrial, which is an integral part of the District Court. The existence of the pretrial institution among other institutions in the Criminal Procedure Code means that there is progress in the field of criminal procedure law that gives authority to the District Court. Any act of coercion carried out contrary to the law and legislation is an act of rape or deprivation of the rights of the suspect. Therefore, there is a principle contained in the pretrial that intends and aims to carry out horizontal supervisory actions to prevent coercive legal actions that are contrary to the law.

The nature or function of pretrial which is unique, specific, and characteristic will bridge the efforts to prevent coercive measures before a person is decided by the Court, prevent actions that deprive the freedom of every citizen, prevent actions that violate the human rights of suspects/defendants so that everything runs or takes place by the applicable laws and regulations and by the rules of the game. A pretrial is also to protect human rights, especially the rights of suspects or defendants who feel harmed.

The presence of this institution was welcomed by all Indonesians in general and citizens seeking justice. The institution of pretrial was created with the intention and purpose to be upheld and protected, namely to provide supervision of legal protection and protection of the human rights of suspects at the level of investigation and prosecution which was later elaborated in Law No. 8 of 1981 *(KUHAP)* which is known as the pretrial institution. Pretrial aims to oversee the use of coercive measures by investigators prosecutors or other law enforcement agencies against suspects, so that these measures are carried out by the provisions of the law are truly proportional to the provisions of the law, and do not constitute actions that are contrary to the law. This supervision and assessment of coercive measures is not found in law enforcement actions under the HIR. Supervision is also carried out on the behavior of the community as well as on the behavior of law enforcers whose work plays a criminal role. Intended as horizontal supervision by District Court Judges on the implementation of coercive measures.

The judge in Pretrial does not mean a judicial functionary, nor a referee who adjudicates legal disputes. The judge in Pretrial is borrowed because a neutral functionary is needed to control the arrest and detention. The pretrial procedure replaces or transfers the task of supervising arrest and detention as well as the termination of investigation or prosecution from the head of the Public Prosecutor's Office or the head of the Police Department to a neutral District Court Judge. This institution aims to place the implementation of the law in its true proportion for the protection of human rights, especially the rights of suspects and defendants in the examination at the level of investigation, prosecution, and examination before the court. Coercive measures outside those prescribed by law are not the authority of the pretrial to examine them, but they can be ordinary criminal acts it could be possible to review the authority of the pretrial and add pretrial objects for pretrial authority that have not been determined by law.

Pretrial institutions are a source of hope for justice seekers. However, in practice, many pretrial motions are unsuccessful. It is worth reflecting on why pretrial motions fail or are not granted more often than they succeed. Every legal practitioner and theorist should pay attention to this issue, because as a new institution with much interest in our legal repertoire, there are still many things that have not been properly understood, or there is a legal vacuum that needs to be filled through judicial practitioners. Pretrial authority in Indonesia is limited.

The specific authority of pretrial by Article 77 to Article 88 of KUHAP is to examine the legality or illegality of coercive measures, namely arrest and detention, as well as to examine the legality or illegality of termination of investigation or termination of prosecution, but by Article 95 and Article 97 of *KUHAP,* the authority of pretrial is added with the authority to examine and decide on compensation and rehabilitation. In Minister of Health Decree No. M.01.PW.07.03 of 1982, it is stated that pretrial can also be conducted for wrongful seizure that does not include evidence, or a person who is subjected to other actions without a statutory reason due to errors in the person or the law applied. Most recently, in Constitutional Court Decision No. 21/PUU/XII/2014, pretrial authority was added to examine the validity of the determination of a suspect, which previously arose from South Jakarta District Court Decision No. 04/Pid.Prap/201.5/PN Jkt.Sel.

More clearly the authority of the District Court in Pretrial to examine and decide according to the Criminal Procedure Code *(KUHAP)* as follows:

1. Lawfulness of Arrest or Detention

This is the first authority given to Pretrial by law. To examine and decide whether or not:

a. Arrest

In investigating a criminal offense, sometimes the Investigator must arrest the alleged perpetrator, which is an action in the form of temporary restraint of the freedom of the suspect or defendant. To make an arrest, two conditions must be met, namely:

1) Formal Requirements:
   (a) Carried out by Investigators or Police on the orders of investigators. Equipped with a letter of assignment from the authorized person (arrest warrant).
   (b) Submitting the arrest warrant to the suspect and a copy to his family.
   (c) Except in the case of arrest, an arrest may be made by any person.
2) Material Requirements:
   (a) There is sufficient preliminary evidence Article 17 *KUHAP*
   (b) Arrest is for a maximum of one day 1x24 hours by Article 19 paragraph (1) of KUHAP. The arrest is made for a maximum period of one day or 24 hours. If the period elapses, the arrest shall be transferred to detention, or if the suspect is not to be detained, the suspect shall be freed.

b. Detention

Detention is the placement of a suspect or defendant in a certain place by an Investigator Public Prosecutor or Judge. The suspect may submit a pretrial investigation that the detention imposed by the investigating officer is contrary to the provisions of Article 21 of the Criminal Procedure Code. About

pretrial, it is important to know the requirements and procedures for detention. A detention that is not based on A detention that is not based on a detention order (SPP) from an investigator or public prosecutor or a judge's decision is invalid. According to Darwan Prints, detentions made against criminal offenses outside those regulated by Article 21 of the Criminal Procedure Code are invalid and therefore can be submitted to the Pretrial Institution to examine and decide on the validity of the detention in question.

c. Whether or not the Termination of Investigation or Termination of Prosecution is valid

Another case included in the scope of pretrial authority is to examine and decide whether or not the termination of investigation conducted by the investigating officer or the termination of prosecution conducted by the public prosecutor is valid. Both the investigator and the public prosecutor are authorized to stop the investigation or prosecution because the results of the investigation or prosecution are insufficient evidence to continue the case to a court hearing or that what is alleged against the suspect does not constitute a crime or criminal offense. Therefore, it is not possible to forward the case to a court hearing. It is also possible that the termination of investigation or prosecution is carried out by the investigator or public prosecutor on the grounds of *nebis in idem* because what is alleged to the suspect is a criminal offense that has been prosecuted and tried, and the decision has obtained permanent legal force. It can also be terminated by the investigator or public prosecutor because in the case alleged to the suspect, there is an element of expiration for the prosecutor. It is possible that the reason for termination is interpreted inappropriately or is completely unreasonable. Or the termination is stopped for the personal interest of the official concerned. Therefore, there must be an institution authorized to examine and assess whether or not the termination of an investigation or prosecution is valid so that the action is not contrary to the law and the interests of the law and to monitor acts of abuse of authority.

When an investigation is terminated, the law grants the public prosecutor or an interested third party the right to file a pretrial investigation on whether or not the termination of the investigation is valid. Similarly, the investigator or an interested third party may request a pretrial review of the legality of the termination of prosecution.

d. Compensation and Rehabilitation

Compensation is the right of a person to have their claim fulfilled in the form of a monetary award. The claim for compensation arises because the applicant has been subjected to the actions described in Article 77 and Article 95 of the Criminal Procedure Code. The matters set out in Article 95 of the Criminal Procedure Code are partly previously set out in Article 77 of the Criminal Procedure Code. However, Article 95 of the Criminal Procedure Code makes two main definitions that must be understood, namely the claim for compensation for cases that never reached the court and the claim for compensation for cases that have been decided by the court.

As for matters whose main case does not reach the Court, it is in the form of:

1) Unlawfully arrested
2) Unlawful detention, detention that is longer than it should be
3) Whether or not the termination of the investigation is valid
4) Whether or not the termination of prosecution is valid
5) Subjected to other unlawful acts, such as unlawful entry into a house, unlawful search, unlawful seizure
6) Wrong about the person
7) Errors in the law applied An application for compensation in such cases may be submitted no later than three (3) months after the pretrial decision is notified Article 7 paragraph (2) of Government Regulation No. 27 of 1983 on Compensation for Damages.

This means that a request for compensation under Article 95 of the Criminal Procedure Code can only be made after a pretrial decision declares the measures such as arrest and detention illegal. Rehabilitation is the right of a person to have his/her rights restored to his/her original capacity, position, and dignity. Rehabilitation can be provided at the investigation, prosecution, or court decision levels. If the case reaches the court, by Article 97 of the Criminal Procedure Code, the rehabilitation will be given together with the court decision. This means that if the defendant is acquitted or released from all legal charges, then in the verdict his position and rights are also rehabilitated. However, for cases that do not reach the court, then according to Article 97 paragraph (3) of the Criminal Procedure Code, rehabilitation must be provided through a court decision (Article 77 of the Criminal Procedure Code).

Pretrial is authorized to examine and decide on requests for rehabilitation submitted by suspects, their families, or legal advisors for arrest or detention without legal basis provided by law. Or rehabilitation for errors regarding the person or the law applied whose case was not submitted to the court session.

2. Parties Eligible to File Pretrial Proceedings and Their Reasons

Under Article 79 of the Criminal Procedure Code, two parties are also known in judicial cases, one of which is the party filing the pretrial case, commonly referred to as the petitioner, while the other party is the respondent, and the respondent is always the State, represented by officials such as the National Police, the Public Prosecutor's Office, or other agencies. Generally, the party who has the right to file a pretrial application is the person who applied itself. In a trial on the legality of arrest, detention, seizure, and search, the suspect, his family or his attorney are the parties. For more details on the reasons and parties who can file a pretrial application, see the following table:

No.	Legal Basis	Parties Who Can Apply	Reasons for Pretrial Request	Description
1.	Article 79 *KUHAP*	a. Suspect b. Family c. Lawyer	Whether or not the Arrest, Detention	- Addressed to the District Court - State the

				reason/evidence
2.	Article 80 *KUHAP*	a. Investigators b. Public Prosecutors c. Interested Third Parties	Whether or not the termination of investigation/prosecution is valid	Addressed to the District Court - State the reason/evidence
3.	Article 81 & 95 *KUHAP*	a. Suspects b. Defendants c. Heirs d. Interested Third Parties.	Whether or not an arrest is valid. Detention, or other actions (search, seizure, house entry) without a reason according to the law whose case is not submitted to the District Court or as a result of the legalization of the termination of investigation/prosecution.	Compensation (*vide* Government Regulation 27/1983)
4.	Article 81 & 97 *KUHAP*	a. Suspects b. Defendants c. Heirs d. Interested Third Parties	Requests for rehabilitation due to improper/mistaken arrest, detention, or because the case was not submitted to the District Court.	Application: - Restoration of rights; - Position; Honor and dignity
5.	Constitutional Court Decision No. 21/PUU/XII/2014	a. Suspect b. Defendant c. Family d. Legal Counsel.	Examination of the validity of the determination of suspects	- Addressed to the District Court - Cite reasons/evidence

About these matters, the parties mentioned above (suspect, suspect's family, suspect's legal counsel, investigator, or public prosecutor) may file a pre-trial petition to the chief justice. If the legal counsel as the suspect's legal representative, will file a pretrial application, a pretrial application letter is required. The application letter contains more or less several provisions as described below:[10]

a. The subject of the request is “Pretrial”;
b. The identity of the parties, i.e. the party holding the power of attorney (legal counsel) representing whom (the suspect) as the applicant, and the respondent; the government c.q. (Chief of the Resort Police / Chief of the District Attorney's Office);

[10] Zulkarnain, *Praktik Peradilan Pidana* (Malang: Setara Press, 2013).

c. The basis of the petition *(fundamental petendi),* namely what this petition is about, the reasons/situation of the problem, the consequences in the form of material and immaterial losses (if applying for compensation or rehabilitation); and
d. Petitum: this is what the pretrial appeal is about.

3. Application Registration

The Criminal Procedure Code *(KUHAP)* does not regulate the procedure for filing/submitting a request for pretrial examination, whether it may be sent through the post office or must be submitted directly to the Chief of the District Court or the relevant court clerk. However, in practice, pretrial requests to be examined must be addressed to the Chief of the District Court covering the jurisdiction where the arrest, detention, search, or seizure took place. Pretrial cases are registered separately from ordinary criminal cases. It is not explicitly stated when the Chief of the District Court shall appoint judges and court clerks to hear pretrial applications as stipulated in Article 78 paragraph (2) of *KUHAP*, but in light of Article 82 paragraph (1) letter a of *KUHAP*, such appointment must be made within 3 days after the application is registered at the district court.

4. Determination of Trial Day and Trial Period

Pretrial proceedings are conducted in an expedited manner due to the deprivation of liberty involved. After the appointment of the judge and court clerk to hear the case, the judge has set a date for the hearing. The determination is calculated 3 days from the date of receipt or 3 days from the date of registration in the registry. Based on the provisions of Article 82 paragraph (1) letter c of the Criminal Procedure Code, the decision must be rendered within 7 days at the latest. Therefore, all requests submitted to the Pretrial Court are examined and decided by a single judge assisted by a court clerk.

In practice, the above is often implemented differently. In pretrial practice, the appointment of judges by the Chief of the District Court is usually completed in 1 day and the judge within 1 day has set the day of the hearing. And the summons is usually 3 days. So, the 7-day decision period is difficult to apply, therefore usually 7 days is calculated from the start of the trial. Based on the Supreme Court's technical book (book II) 7 days is calculated from the time the parties are complete, and the summons according to the Criminal Procedure Code is at least 3 days (Article 227 of the Criminal Procedure Code).[11]

5. Trial Procedure

The procedure for pretrial hearing is explicitly regulated in Article 82 paragraph (1) of KUHAP. The pretrial hearing process is similar to a civil case hearing. It is as if the applicant acts as the plaintiff while the official concerned acts as the defendant. Some may also think that the examination tends to examine and judge the officials involved on whether or not the coercive measures imposed on the suspect are valid. In pretrial proceedings, the following stages of examination are recognized:

[11] Anggara et al, *Naskah Akademik dan Rancangan Peraturan Mahkamah Agung tentang Hukum Acara Praperadilan* (Jakarta: Institute for Criminal Justice Reform, 2014).

a. Examination of the power of attorney and or reading of the contents of the petition.
b. The next hearing is the respondent's reply.
c. The next hearing is the applicant's replication.
d. The next hearing is the respondent's duplicates.
e. Evidentiary hearing of witnesses and letters from both parties.
f. The reading out of the judge's decision.

6. Pretrial Court Decision

The Criminal Procedure Code does not specify the form of the pretrial decision. The form of the pretrial decision is quite simple without elaborating on the content of clear considerations based on the law from the law. However, the form of the pretrial decision is not regulated in the law, but two sources state that the making of the pretrial decision is coupled with the minutes of the trial examination. Based on the provisions of Article 82 paragraph (1) letter c, this provision explains that the pretrial hearing examination process is carried out in a fast-paced manner. Meanwhile, if we start from the provisions of Article 83 paragraph (3) letter a and Article 96 paragraph (1), what is meant by the form of pretrial decision is a determination. The form of a determination decision is usually a series of minutes with the contents of the decision itself. So the decision is not made specifically but is recorded in the official report as stipulated in Article 203 paragraph (3) letter d.

Regarding the content of the pretrial decision or order, it is generally regulated in Article 82 paragraph (2) and paragraph (3). Therefore, in addition to the pretrial decision containing the basic reasons for legal considerations, it must also contain an order. According to Article 83 paragraph (1) of KUHAP, no appeal may be filed against a pretrial decision. Pretrial decisions involve the types of cases mentioned in Article 79, Article 80, and Article 81. However, there are pretrial decisions that can be appealed to the Court of Appeal, as stipulated in Article 83 paragraph (2). Regarding cassation against pre-trial decisions, it is contained in Supreme Court Circular Letter (SEMA) No. 8 of 2011 concerning cases that do not meet the requirements for cassation and judicial review which at number 2 states that pre-trial decisions cannot be appealed.

7. Pre-Trial Dismissal

A pretrial examination can be forfeited, meaning that the pretrial examination is stopped before a verdict is rendered or the examination is stopped without a verdict. This is regulated in Article 82 paragraph (1) letter d which reads: if a case has begun to be examined by the district court while the examination regarding the request to pretrial has not been completed, the request is void. Taking into account this provision, the pre-trial examination is canceled:

a. If the case has been examined by the district court; and
b. At the time the case is examined by the district court, the pretrial examination has not yet been completed.

Opinion stating that the waiver of the requests specified in Article 82 paragraph (1) does not reduce/is not considered to reduce the rights of the

suspect, because all requests can be accommodated again by the District Court in the main examination.

8. Termination of Pre-Trial

The provision on pretrial termination is based on Supreme Court Circular Letter *(SEMA)* No. 5 of 1985 on pretrial termination, dated February 1, 1985. The *SEMA* states that to avoid doubt, can the ongoing pretrial proceedings be terminated at any time by the judge? Since there is no provision for this in the Criminal Procedure Code, the Supreme Court gave the following guidance: Firstly, the ongoing pretrial proceedings may be terminated by the judge at the request of the original objector; and Secondly, the termination should be done by a stipulation.

II. Comparison of the Concept and Regulation of Habeas Corpus in the English Judicial System with Pre-Trial in Indonesia

In discussing the application of Habeas Corpus and pretrial in the criminal justice system, it is necessary to compare the concept and regulation of Habeas Corpus as a mechanism of supervision over the authority of law enforcement officials related to arrest and detention in the English criminal justice system with the Indonesian criminal justice system in the form of pretrial. Furthermore, to analyze it, the theory of the legal system, criminal justice system, and the theory of authority related to supervision will be used, but because the scope of the legal system and criminal justice system is very broad, this research is limited to focusing only on matters related to Habeas Corpus and pretrial.

Lawrence M. Friedman argues that the legal system is organized into legal subsystems consisting of legal substance, legal structure, and legal culture. The harmony or synergy of the three subsystems can ensure whether a legal system can be applied properly. Legal substance is usually related to aspects of legal arrangements or laws and regulations. Meanwhile, the legal structure leads to the legal apparatus and infrastructure itself, while the legal culture includes the attitudes and behavior of the community.[12] One of these subsystems, namely the legal structure, is concretely implemented through the judiciary as one of the components of law enforcement. This judicial institution is more specifically also a separate system in its efforts as one of the components of law enforcement, in the context of criminal procedure law, the system is known as the criminal justice system.

The criminal justice system is a theory that deals with efforts to control crime through cooperation and coordination among institutions that are assigned by law to do so.[13] A criminal justice system requires a cooperative relationship between several institutions to resolve a criminal case in a permanent system. The system must be determined by law because the civil law system emphasizes the principle of

[12] Lawrence M Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975).

[13] H Supardi Agus, E, "Mewujudkan Sistem Peradilan Pidana Terpadu Melalui Case Management System (Studi di Kejaksaan Negeri Kota Bogor)" (2021) 3:1 Suara Huk 9–10.

legality in criminal law.[14] In civil law systems, the main task of the court is to apply and interpret legal norms. The main duties of courts in the common law system, viz: deciding the parties' disputes, providing guidance on how the same disputes should be resolved in the future, and the interpretation of the law given by the court in a particular case is binding on lower courts so that under common law the court's decision is the basis for the interpretation of the law.[15]

The main elements of the criminal justice system are responsible for their respective functions which can be broken down into 5 (five) roles, namely: Investigation function (the authority of the police), Prosecution function (the authority of the Attorney General's Office), Judicial function (the authority of the Supreme Court/Court), Correctional function (the authority of the Correctional Institution/Ministry of Law and Human Rights) and Legal Aid function (advocates). All of these elements in performing their functions in a coordinated manner can build and realize the criminal justice system. Regarding the various legal systems in the world, as a result of being colonized by the Dutch, Indonesia uses the legal system that applies in Continental Europe or the German Roman law system or "Civil Law System". There is also the English legal system which is commonly called the "Common Law System". However, there are many other recognized legal orders, which may also deserve the title of legal system. Furthermore, there are still people who make distinctions between the laws used in a country, even though the country belongs to the Common Law family or Roman-German law. This is because, in each country, the basic pattern of the original model has undergone a distinctive development by its environment. Thus, one can talk about US law, Chinese law, Japanese law, the law of African countries, English law, etc.[16]

Notwithstanding the above views, the UK has a distinctive criminal justice system, which is different even from countries that follow the same legal system. However, broadly speaking, the UK criminal justice system includes similar law enforcement elements to other Anglo-Saxon countries: the police, the prosecution, the courts, including juries, the legal profession, and prisons. Magistrates Courts are the courts of first instance for criminal matters. All criminal cases begin in these courts and subsequently, the vast majority, approximately 90%, end up in the Magistrates Courts, and those that are tried and adjudicated, namely:

1. Initial trial of a criminal offense;
2. Application for bail;
3. Issuance of summons and arrest/detention or search warrant;
4. Declaration of guilt;
5. Initial crown court proceedings or sentencing;

At that stage, it is a justice of the peace, generally a three-person panel of judges or a single judge/district judge. Habeas Corpus is essentially a control mechanism (supervision) of Magistrates Courts judges on procedural matters in criminal law

[14] Agus Rusianto, "Pengawasan Terhadap Kewenangan Penahanan Pada Tingkat Penyidikan Ditinjau dari Integrated Criminal Justice System" (2013) 17:334 J Varia Peradil 41.

[15] Salim HS & Erlies Septiana Nurbani, *Perbandingan Hukum Perdata: Comparative Civil Law* (Jakarta: Raja Grafindo Persada, 2015).

[16] Dwidja Priyatno & M Rendi Aridhayandi, "Resensi Buku (Book Review) Satjipto Rahardjo, Ilmu Hukum, Bandung: PT. Citra Aditya, 2014" (2018) 2:2 J Huk Mimb Justitia.

enforcement, especially on arrest and detention carried out by the British police in the Integrated System of Policing.

In connection with the control mechanism for court judges who have the authority to supervise the performance of law enforcement officers who have the authority to carry out forced arrest and detention, in general, it is necessary to examine by describing the two elements contained in the concept of authority presented by H.D. Stoud, namely: 1. the existence of legal rules; and 2. the nature of legal relations. Before the authority is delegated to the institution that carries it out, it must first be determined in the legislation, whether in the form of laws, government regulations, or lower-level regulations. The nature of the legal relationship is the nature that is related and has a link with the law, both public and private.[17]

The inherent authority of pretrial judges is regulated by the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power, while the authority of Magistrate judges is regulated by the Magistrates Courts Act.[18] The authority given to these judges, including the authority to supervise the performance of investigators (police) in carrying out forced efforts in the form of arrest and detention of a person (in this case a suspect). Because it is known that the authority of investigators is so broad, concerning the legal basis with its limitations, discretionary responsibility, both in terms of positive and negative aspects, elements of regulatory vagueness, the exercise of authority must be supervised by judges so as not to deviate from the intended purpose and objectives. The facts on the ground show that power without a qualified supervisory mechanism, the power will eventually be misappropriated, this has been emphasized by Belifante with the statement *"geen machts zonder toeziht".*[19]

The importance of the supervision factor on the performance of the supervised party in order not to make mistakes must be done in stages, so in terms of the relationship of authority, there are vertical and horizontal police supervision. Vertical supervision is supervision carried out by superior agencies/organizations against agencies/organizations based on the hierarchy of lower positions. While horizontal supervision is supervision carried out by other institutions or fields that are at the same level or level of hierarchy. This horizontal supervision is carried out by Magistrate judges in Habeas Corpus in the UK and pretrial judges in Indonesia.

The existence of a pretrial institution was sparked by the spirit to incorporate the concept of Habeas Corpus in the Indonesian criminal procedure law system. As emphasized by Oemar Seno Adji, the concept was raised as a testing mechanism for the legality of an arrest and detention action, because the action is an 'indruising' of a person's rights and freedoms, so testing from the court is very urgent to do. However, in the end, the concept of Habeas Corpus was adopted in the Indonesian Criminal Procedure Code in the form of a pretrial legal mechanism, which has broader authority but is more superficial and less stringent than the original concept.

---

[17] Salim HS & Erlies Septiana Nursyahbani, *Penerapan Teori Hukum pada Penelitian Tesis dan Disertasi* (Jakarta: Rajagrafindo Persada, 2019).

[18] *Magistrates Courts Act tentang Kewenangan Hakim Magistrate*, by Inggris.

[19] Wiryanto, *Etik Hakim Konstitusi: Rekonstruksi dan Evolusi Sistem Pengawasan* (Jakarta: Raja Grafindo Persada, 2019).

In reality, according to KUHAP, there is no provision for pretrial judges to conduct preliminary examinations or preside over them. The pretrial judge does not conduct searches, seizures, and so on like a preliminary examination. Nor does he or she determine whether or not a case has sufficient grounds to proceed to trial. The determination of the case depends on the public prosecutor. The pretrial judge does not even have the authority to assess the legality of searches and seizures conducted by prosecutors and investigators. These two matters are very important and are one of the basic principles of human rights. An unlawful search is a violation of the comfort of one's home. Similarly, unauthorized confiscation means that a person's property rights have been seriously violated by prosecutors and investigators.

The above description provides a view that the existence and presence of pretrial is not a separate institution. Pretrial is only a new authority and function delegated by *KUHAP* to each District Court *(PN),* as an additional authority and function of the existing *PN*. The purpose and objective of the pretrial institution is to uphold and protect the law and the human rights of suspects at the investigation and prosecution stage.

Despite the overall procedure as outlined above, Magistrate judges and pretrial judges have the same authority to determine the legality of coercive measures, such as arrest and detention. The obvious difference between the two is the timing of the review, as the pretrial review is only conducted after all the coercive measures have been taken, not at the commencement of the investigation. Therefore, this oversight mechanism is not efficient and effective in realizing protection for citizens, especially suspects, from possible abuse of authority by investigators and public prosecutors.

CONCLUSION

The authority of pretrial judges by the provisions of Law No. 8 of 1981 on Criminal Procedure (Article 1 point 10, Article 77, Article 78, Article 79, Article 80, Article 81, Article 82, Article 83, Article 95 paragraph (2) and paragraph (5), Article 97 paragraph (3), and Article 124) and Constitutional Court Decision No. 21/PUU-XII/2014 dated April 2015 formulates that the object of pretrial is the object of the trial: 21/PUU-XII/2014 on April 28, 2015 formulated that the objects of pretrial are:

1. Whether or not an arrest, detention, termination of investigation, or termination of prosecution is lawful;
2. The determination of a suspect;
3. Seizure and search;
4. Compensation and or rehabilitation for a person whose criminal case is terminated at the level of investigation or prosecution, so that the laws and regulations that are referred to by judges in deciding pretrial cases are regulated, but in the case *a quo* the judge has considerations related to the principles of justice and legal equality to determine a new suspect which is the domain or authority of the investigator through a series of investigative actions.

The existence and presence of pretrial is not a separate institution. Pretrial is only a new authority and function delegated by KUHAP to each District Court (PN). The purpose and objective of the pretrial institution is to uphold and protect the law and the human rights of suspects at the investigation and prosecution stage.

DECLARATION OF CONFLICTING INTERESTS

The authors state that there is no conflict of interest in the publication of this article.

FUNDING INFORMATION

None.

ACKNOWLEDGMENT

None.

REFERENCES

BOOK

Anggara et al, *Naskah Akademik dan Rancangan Peraturan Mahkamah Agung tentang Hukum Acara Praperadilan* (Jakarta: Institute for Criminal Justice Reform, 2014).

Anwar, Mochamad, *Praperadilan* (Jakarta: Ind-Hil-Co., 1989).

Friedman, Lawrence M, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975).

Hamzah, Andi, *Kitab Undang-undang Hukum Acara Pidana dan KUHAP* (Jakarta: Rineka Cipta, 1992).

Harahap, M Yahya, *Pembahasan Permasalahan dan Penerapan KUHAP: Pemeriksaan Sidang Pengadilan, Banding, Kasasi dan Peninjauan Kembali* (Jakarta: Sinar Grafika, 2002).

HS, Salim & Erlies Septiana Nurbani, *Perbandingan Hukum Perdata: Comparative Civil Law* (Jakarta: Raja Grafindo Persada, 2015).

HS, Salim & Erlies Septiana Nursyahbani, *Penerapan Teori Hukum pada Penelitian Tesis dan Disertasi* (Jakarta: Rajagrafindo Persada, 2019).

Januar, Wahyu, *Studi Komparasi Hukum Wewenang dan Fungsi Pra Peradilan menurut Hukum Acara Pidana Indonesia dengan Sistem Habeas Corpus di Amerika Serikat* Universitas Sebelas Maret, 2011) [unpublished].

Parikesit, Iqbal, *Akibat Hukum Putusan Praperadilan yang Menyatakan Tidak Sahnya Penetapan Tersangka* Universitas Islam Sultan Agung, 2022) [unpublished].

Prints, Darwan, *Praperadilan dan Perkembagannya di dalam Praktek* (Bandung: Citra Aditya Bakti, 1993).

Wiryanto, *Etik Hakim Konstitusi: Rekonstruksi dan Evolusi Sistem Pengawasan* (Jakarta: Raja Grafindo Persada, 2019).

Zulkarnain, *Praktik Peradilan Pidana* (Malang: Setara Press, 2013).

JOURNAL

Afandi, Fachrizal, "Perbandingan Praktik Praperadilan dan Pembentukan Hakim Pemeriksa Pendahuluan dalam Peradilan Pidana Indonesia" (2016) 28:1 Mimb Huk 93–106, online: <https://journal.ugm.ac.id/jmh/article/view/15868>.

Agus, E, H Supardi, "Mewujudkan Sistem Peradilan Pidana Terpadu Melalui Case Management System (Studi di Kejaksaan Negeri Kota Bogor)" (2021) 3:1

Suara Huk 9–10.

Fauzia, Ana, Fathul Hamdani & Deva Gama Rizky Octavia, "The Revitalization of the Indonesian Legal System in the Order of Realizing the Ideal State Law" (2021) 3:1 Progress Law Rev 12–25.

Marpaung, Ramsen & Tristam Pascal Moeliono, "Perbandingan Hukum antara Prinsip Habeas Corpus dalam Sistem Hukum Pidana Inggris dengan Praperadilan dalam Sistem Peradilan Pidana Indonesia" (2021) 5:2 J Wawasan Yuridika 224–248, online: <https://ejournal.sthb.ac.id/index.php/jwy/article/view/494>.

Priyatno, Dwidja & M Rendi Aridhayandi, "Resensi Buku (Book Review) Satjipto Rahardjo, Ilmu Hukum, Bandung: PT. Citra Aditya, 2014" (2018) 2:2 J Huk Mimb Justitia.

Rusianto, Agus, "Pengawasan Terhadap Kewenangan Penahanan Pada Tingkat Penyidikan Ditinjau dari Integrated Criminal Justice System" (2013) 17:334 J Varia Peradil 41.

REPORT

Inggris, *Magistrates Courts Act tentang Kewenangan Hakim Magistrate*, by Inggris.