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PRELIMINARY EXAMINATION JUDGE IN INDONESIAN JUSTICE SYSTEM DESIGN

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Abstract

The legislation process for the Draft of Indonesian Criminal Procedure Law (RKUHAP) currently being discussed by the Indonesian House of Rpresentatives (DPR-RI) has created pros and cons, especially in relation to law enforcement authorities. Conceptually, the criminal justice system is related to power limitation because every use of power related to fundamental rights shall comply with the principles of judicial scrutiny.

This short essay will try to elaborate one part from RKUHAP, which is the Preliminary Examination Judge (HPP). In the previous RKUHAP, HPP was called "Commissioner Judge". HPP became very important realizing fair, impartial and objective Criminal Justice System to prevent power monopoly, interpretation and even arrogance. HPP can also prevent the possibility of corruptive behaviors of the law enforcement authorities who are in power. This essay will analyze and recommend how HPP in RKUHAP presents judicial scrutiny.

Keywords: Preliminary Examination Judge (HPP), Pre Trial, Criminal Justice System, Principles of Judicial Scrutiny

A. Introduction.

Nowadays the Indonesian Criminal Justice System is in the change process. This change is through a draft, i.e., the Draft of Indonesian Criminal Procedure Law (RKUHAP) which has been prepared by the government. This RKUHAP is expected to replace KUHAP that was signed into Law in 1981. This change happened very quickly in the midst of the community nowadays, especially in Information & Technology which bring consequences to various areas of life, including in criminal justice.

It is called Criminal Justice System (SPP) change because RKUHAP will not only replace the Law but also build a Criminal Justice System which is able to respond every existing justice system and at the same time can anticipate the

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criminal procedure law in line with the future demands.

KUHAP is the Law to replace the colonial criminal procedure product, which is HIR. Aside from the issue of human rights, the issue of the law enforcement authorities systems became a hot issue during its design and discussion. This process then produced the concept followed by the existing KUHAP, which is the concept of apparatus "functional differentiation". This means that every law enforcement officers (investigator, prosecutor, and judge) is recognized to have their own function in accordance to their respective Laws, without coordination but rather through a "bridge", such a pre-prosecution, transition process between investigation and prosecution by the Attorney General Office (AGO) to connect them.

Lack of coordination in its implementation resulted in extra-legal forum such as (MAHKEJAPOL)[1], a mix between executive and legislative. This forum became very important, even more important than KUHAP itself. This forum produced agreements on criminal offense handling. For example, unfinalized acquittal, even though Article 67 and 244 of KUHAP states that judicial review may be proposed by the prosecutor on matters of the rights of the "convict or their heir". During the reform era, this kind of form was ended and institutionalized. One of the most prominent institutionalization concepts today, such as the investigation unit and prosecutor in a commission like KPK, including its court. However, the court was taken out of the concept of "institution unity" based on the Constitutional Court because it was considered negating the judicial power independency. The concept of "institution unity" is applied based on the principle of *lex specialis legi generali*.

RKUHAP legislation process which is currently being discussed at the House of Representatives caused pros and cons, especially related to the KPK's authority. This kind of pros and cons are common, as it would occur for everything related to change. Moreover, conceptually, Criminal Justice System (SPP) is always related to limitation of power so that it will not be excessive. The limitation is applied with the purpose of having a balanced, objective, accountable and fair SPP that is not in monopoly. The existence of monopoly is very dangerous because it can be the source of demoralization of the personnel in the system. This kind of discourse was started in 1215 when Magna Charta Charter was signed in England. This charter was in line with the "agreement" between the ruling and the controlled, in a legal process to avoid violation of due process of right.

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[1] See Supreme Court Joint Decision, Justice Minister, Attorney General, and Kapolri No. 08/KMA/1984, No. M.02-KP.10.06 of 1984, No. KEP-076/J.A/3/1984, No. Pol KEP/04/III/1984 concerning Improvement of Coordination in Crime Case Handling (Mahkejapol)

If RKUHAP later on becomes Law, it is expected that eventually the norm inside of it which regulates SPP will be better than KUHAP in such a way that it will become the criminal justice system of Indonesia. As a state justice system whose basic concept was laid out in the Constitution of the Republic of Indonesia and the Law concerning the power of judge, this system will be truly for pro-justitia and/or *sans-prejudice* based on Pancasila as Indonesia's ideals and it can be eventually as a decision with the following *irah* "For Justice Based on One Almighty God" by court; not how to try and punish as severe as possible.

This new law will not facilitate the purpose of punishing every person brought before it with the most severe punishment where the orientation is solely about punishment and in literature, this model is called crime control model or administrative model. On the contrary, the new law is directed to fair, objective and accountable process in every law violation as the main goal and in literature, this model is called due process model. In other words, every use of power related to fundamental matters shall adhere to judicial scrutiny. A decision is not sufficient if it is based solely on discretionary such as the determination of status as suspect and or arrest/detention. The implementation is not sufficient if it is only through announcement, but it should rather be a court order where decency shall also be considered. The model through announcement will be potential to be the source of moral hazard from the law enforcement authorities because it provides the impression that they are the holy inquisition like in the medieval age.

This short essay will try to elaborate one part from RKUHAP that is the Preliminary Examination Judge (HPP). In the old concept of KUHAP, this preliminary examination judge was used to be called "commissioner judge". But due to loud controversy, then it was re-formulated and it is now called preliminary examiner judge. HPP in short is important in fair, impartial and objective SPP in order to prevent monopoly of power, interpretation and even arrogance. HPP can also prevent the possibility of corruptive behavior from law enforcement authorities who are in power.

Both commissioner judge and preliminary examination judge are developed to improve the function of pre-trial existing in KUHAP. Hence, Dr. Adnan Buyung Nasution once proposed to maintain the term pre-trial but accompanied with improvement in substance, mechanism, and procedure of the pre-trial. The term commissioner judge indeed can connote old because it was practiced way in the past, especially in continental Europe such as France and Dutch.

Regardless the controversy of the term, in reality pre-trial institution existing in KUHAP has failed to control the implementation of forced effort. As known,

the determination of forced effort is done easily towards a person's status as a suspect and then followed by arrest and detention. I think this failure is due to: first the view towards the pre-trial institution itself. Second, there is no effective mechanism to control excessive forced effort, especially in the preliminary examination stage (pre-adjudication) or investigation process because the basis to determine the status of a person as a suspect is due to "the existence of initial evidence" and "sufficient evidence" to arrest is not transparent nor accountable, but rather based on internal process and discretionary. On this stage, it should also follow due process of law. Unfortunately, the implementation is oftentimes only through announcement in the media, without any information about how the process goes and it has never been audited. This is why in RKUHAP, HPP is designed to be authorized to control the implementation of forced effort.

B. Pre-trial

Prior to discussing Preliminary Examination Judge, the writer will first elaborate in more detail about pre-trial which has been considered failed in its mission. KUHAP regulates that pre-trial is authorized to examine: (i) the validity of the arrest, detention, termination of investigation, or termination of prosecution; (ii) compensation and/or rehabilitation for a person whose criminal case is terminated at the investigation or prosecution level. Pre-trial is the authority of the district court prior to examining the principal case. If the principal case has been examined, then the authority is no longer there. In practice, the examination is submitted to the judge assigned for that on a certain period in each district court called "pre-trial judge". The term "pre-trial judge" is officially not stated in KUHAP unlike Preliminary Examination Judge in RKUHAP. It is rather a judge assigned to examiner the case requested by the pre-trial in that district court.

When the pre-trial institution surfaced, it was initially welcomed with euphoria and considered as masterpiece because it was suspected to be the equivalent of habeas corpus, as laid out in Magna Charta charter. Pre-trial function is expected to be the "horizontal supervision" in forced effort implementation but the authority is still post factum. More than that, the institution and its mechanism are not really habeas corpus, so implementation was disappointing. In fact, pre-trial institution does not function as horizontal supervision between law enforcement authorities, especially from the perspective of a person facing forced effort. In practice, the justification for what has been done by let's say an investigator is not able to be controlled by the judge in the pre-trial examination. The judge is vulnerable to the power of investigator such as a big police, even though theoretically the judge is independent.

As mentioned above, this concept of forced effort itself such as arrest and detention is determined only through discretionary. The existing requirements such as objective, juridical, subjective, and necessity requirements in arrest for example are merely pro-forma. The clause stating ”the existence of concerning situation” from the investigator regulated as requirement in KUHAP is part of the stipulation and cannot be tested without pre-trial judge. Indeed, this is where the problem lies because the clause exists but it cannot be tested whether it has been met or not.

Hence, based on evaluation from the experience in pre-trial, there is a need to improve the SPP. The research carried out by the State Legal Commission (*Penelitian Komisi Hukum Negara*) (KHN)[2] concluded that, ”in relations to integrated criminal justice system, KUHAP needs to be revised, especially related to the mechanism of mutual control such as the authority of a commissioner judge existing in RKUHAP which was changed into preliminary examination judge. Then the research also concludes that , ”Pre-trial as a control effort needs to be expanded in terms of scope, for example, towards an indication that there is an effort to buy time in a completion of a case, then pre-trial can be proposed”. Additionally, it is also recorded that historically, pre-trial institution in the draft was intended as habeas corpus that is related to human rights. In the process of KUHAP enactment, pre-trial from the concept of habeas corpus shifted towards more administrative matters. This means that if there is a decision letter and notification from investigator, then it is almost automatic that the implementation of forced effort is considered valid.

In addition to forced effort, the implication from the system mechanism which does not run smoothly in KUHAP is investigator who is ”reluctant” to accept ”profitable statements” to be included in the police investigation report, which is the rights of the suspect.[3] If the police investigator define matters that are not regulated in KUHAP such as what is actually ”sufficient initial evidence”? [4] but not with the what and the how on the ”profitable statement”? As part of the police investigation report. Probably the clause of ”sufficient initial evidence” becomes the basis for the investigator to arrest and detain a person, so it is very

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[2] KHN, Uncovering KHN’s Mission and Its Performance, A Reflection on 6 years of KHN of the Republic of Indonesia, Jakarta 2006, page 37

[3] Even LPK Investigator in practice interpretes that the defendant’s right for ”profitable information” is allowed in front of judge, hence they reject it at investigation level.

[4] Kapolri Decision Letter No Pol: Skep/1205/IX/2000 concerning Revision on Compilation of Crime Investigation Implementation Guidelines and Technical Guidelines dated September 11, 2000.

necessary. ”Profitable statement” is to abolish suspicion, so it is avoided. In practice, due to the absence of rules in KUHAP – let alone the sanction – then it becomes a reason for the investigator to not include ”profitable statement” in the police investigation report. The “best” thing the investigator can do is to suggest conveying the “profitable statement” in case examination in the court. This is why in becomes relevant if it can be included in the authorities of the Preliminary Examination Judge.

Investigators in crime case examination can do arrest. Even though lately some interpret this similar to KPK where every suspect “shall” be detained. So the work “can” is changed to “shall” be detained. In the evaluation of arrest at the investigation level by KHN, it was concluded that the existence of facts of arrest as follows:

> The authority of the investigator to arrest or not arrest a suspect is sometimes not used with consideration for the interest of case examination and in line with what was required by KUHAP that is feared to escape, eliminate the evidence, repeat criminal acts. This use of authority is sometimes used by the investigator to obtain rewards from the suspect/family. The position of suspect/family in this case becomes the party who really needs “help” from the investigator and the investigator become the only “rescuing god”, so it is very possible a transaction occurs. For most of suspects, arrest is sometimes related to the image in the surrounding, someone who has been arrested is as if stigmatized by the community as a guilty person, so with various ways the suspect and/or family will try to not be arrested, in this kind of condition, the investigator sometimes take advantage by asking for certain rewards for not doing the arrest.[5]

Then why is arrest by investigator is done as elaborated above? The research indicated several factors, one of them is “Enactment of Law (KUHAP and Technical Regulations on Investigation and Prosecution).”

KUHAP or its Implementation Rules are considered by many as giving too many ”discretionary” authorities to law enforcement personnel. The use of such authority is very dependent on subjective assessment of the law enforcement personnel, coupled with stipulations which provides rooms for interpretations. In the end, it seems that law enforcement personnel are legitimate to interpret the stipulations of KUHAP, other interpretations are considered ”discourse” which only applies in college, not in practice.

> The potential for misuse of authority also exists in the stipulations of KUHAP regarding ”sufficient initial evidence”, KUHAP never

[5] KHN, Misuse of Authority in Investigation by Police and Prosecution by Prosecutor in the Criminal Justice Process, Research Executive Summary, Research Report, Jakarta 2007: 6

> explains adequately about the definition and limitation of sufficient initial evidence. The explanation on Article 17 of KUHAP says that "sufficient initial evidence" is initial evidence to suspect that there is a crime as stated in Article 1 paragraph 14. This article shows that the order to arrest cannot be carried out indiscriminately, but it is aimed at those who have actually committed a crime … The unclarity regarding "sufficient initial evidence" eventually is interpreted by the law enforcement personnel and this can cause legal uncertainty, and additionally, it will affect the work method of the investigator who still holds on to past practices, that is arresting first, proving later. KUHAP should reverse this procedure into careful investigation with scientific crime detection. [6]

Based on this research, KHN suggests "considering the high level of complaints regarding issues in arrest, the judge's authorities need to be reviewed in terms of forced effort. The judge should have more roles in determining the need for arrest, ... and not just determining the validity of arrest in pre-trial process".[7]

In SPP, the judge indeed becomes the knot when it comes to certain action towards somebody's rights –especially for fundamental things – which have been regulated by law. Stipulations which do not provide authorities to judges in carrying out forced-effort are actually in contrary to KUHAP which makes human rights as values in its implementation. Consistent with the recognition of Human Rights, then every arrest shall be based on judicial scrutiny based on the court determination, not based on "announcement" through the media or investigator.

The latest Law No. 11 Year 2008 on Electronic Information and Transaction has been amended. In conducting arrest and detention, investigator through the public prosecutor "shall request for determination from the head of the local public court in 24 hours".[8] This concept should have been followed in the upcoming SPP. Hence, testing is done prior to taking action, not afterwards.

In KUHAP, what needs to be discussed is the pre-adjudication change or preliminary examination, including the role of judge *in casu* HPP. Just like the concept of criminal justice, since the very beginning the examination of criminal case should already take its role. Even in other countries' system to lead the investigation. That is why RKUHAP includes commissioner judge institution-then turned into HPP – but not to lead the investigation. In its initial concept,

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[6] Ibid page 10

[7] Ibid page 40-1

8 Article 43 paragraph (6) Law No. 11 Year 2008: 11 on Electronic Information and Transaction

the commissioner judge is authorized to assess the ongoing investigation and prosecution and other authorities regulated by the Law[9], including the application of means of coercion. At the investigation phase, the investigator coordinates with public prosecutor.[10] When they are arrested, in a period of one day after the arrest, examination should be started.[11] Next, public prosecutor can propose for a case to the commissioner judge to decide the appropriateness for prosecution at the court. [12]Related to verification, it was designed that evidence is included as evidence. Evidence is "goods or tools that are directly or indirectly to commit a crime or proceeds of a crime (real evidence or physical evidence)".[13]Valid evidence should be obtained in accordance with the law and to only evidence obtained according to the law which can be used to prove the guilt of the accused.[14]

C. Preliminary Examination Judge ("HPP") in RKUHAP.

HPP which is called commissioner judge in initial RKUHAP has the authorities to determine and decide:

(i) The validity of arrest, detention, search, confiscation, or wiretapping,
(ii) Cancellation or postponement of arrest,
(iii) That the statement made by the suspect or convict has violated the rights to not incriminate oneself,
(iv) Evidence or statement obtained illegally cannot be used as evidence,
(v) Compensation and/or rehabilitation for a person arrested or detained illegally or compensation for any property seized illegally,
(vi) Suspect or convict is entitled/shall be assisted by an advocate,
(vii) That investigation or prosecution has been carried out for unauthorized purposes,
(viii) Termination of investigation or prosecution that is not based on the principle of opportunity,
(ix) The appropriateness of a case to proceed with prosecution at the court,
(x) Violation of suspect's right which occur during the investigation stage as elaborated above is basically the judge assigned at the district court. [15]

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[9] Article 1 paragraph 6 RKUHAP

[10] Article 8 paragraph (1) RKUHAP

[11] Article 27 RKUHAP

[12] Article 44 RKUHAP

[13] Article 179 RKUHAP

[14] *ibid*

[15] RKUHAP Article

To be appointed as HPP, a judge shall have at least 10 years of experience. HPP has a work period of two years and can be extended for one more period. So in total 4 years of work. During their assignment as HPP, a judge shall be exempted temporarily from their task as the public court judge and they will return back to their initial assignment once their position as HPP is completed. There is no external source such as ad hoc judge in special courts lately.

Hence, HPP is not similar to magistrates or justice of the piece which are practiced in most countries. Additionally, HPP is not authorized to assess whether the status determination of a person is valid or not. Nevertheless, there are many technical matters in which magistrates and justice of the piece principally have similar task. But there is a difference in concept where magistrates or justice of the piece are the "community's participation in court" so conceptually they are the "mediator" between the big power the investigators have and Human Rights protection for a person who is also the sufferer. At the same time, the community's participation is a symbol of credibility to SPP because it is considered neutral if it involved the community.

But the most important thing is that there are probably cause and reasonableness as reasons to determine the status and arrest of a person and this is not explicitly included in HPP authorities. So, if let's say HPP in RKUHAP is approved into law, there will still be no shift in the determination of suspect. It will still be through "announcement" in the media by the investigators like what is being practiced lately. That is why this kind of concept needs to be changed, the authority to determine the presence of probably cause and reasonableness should be added to HPP. Additionally, HPP's authorities is not post factum like in pre-trial.

The fact that it is post factum, legally there are many issues regarding means of coercion, especially in arrest and detention. Pre-trial failure is because of its largely post factum mechanism. If this is maintained, then the concept of RKUHAP for determining a suspect is still based on the consideration of the investigators *(discretionary)*. Hence there is a concern that HPP will have the same fate like the existing pre-trial institution in the current KUHAP. RKUHAP will then be short-lived considering its weaknesses which are not improved.

In addition, HPP is also expected to be able to provide inputs to investigators. BAP in investigation is only description of evidence with the standard of indicated "preliminary evidence" not *prima facie evidence* let alone material truth itself as described in the "resume" as BAP. The misunderstanding about BAP's position has encouraged judges at the court who is presiding a trial of a case turn into semi prosecutor. This is shown by question on each description provider "have you read the BAP?"; "Have you initialed each sheet?"; "Have you signed it?";

"Was there any pressure?" etc. These questions are logical but they are incorrect when it was asked by a judge who should have been objective in their position between the interests of two parties. This is all due to BAP's central position in SPP.

D. Closing

As closing is how HPP presents judicial scrutiny when the investigator carries out means of coercion, from the determination of status as suspect up to the application of means of coercion. The determination of a person as a suspect is not sufficient if it is only through announcement which was taken internally and closed because it would still be misused. With this kind of method, investigators become super power, monopolizing law and its interpretations. This method caused the absence of due process law in determining a person as a suspect and their arrest become imperative.

Important notes from HPP discussion are as follows:

a. HPP's authorities should not be *post factum* like in pre-trial. If HPP's authorities is still post factum, then the determination of suspect and arrest is still based on the consideration of the investigators themselves (discretionary). Hence, there is a concern that HPP will have the same fate like the pre-trial institutions existing in the KUHAP.

b. HPP is authorized to provide BAP input to the investigator, as a description of the evidence with the indicated standard of the existence of "preliminary evidence".

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