

Pretrial Hearing In Indonesia:

Theory, History, and Practice in Indonesia



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Foreword
“Detention, in essence, is a Deprivation of Liberty”

Pursuant to the Criminal Procedural Law (KUHAP), detention against a person may be executed by the investigator, prosecutor, or judge during trial. If a detention against a suspect has to be conducted, KUHAP states three types of detention (1) detention at the State Detention House, (2) house arrest, and (3) city arrest. These type of detention may be implemented according to the characteristics of each cases. Therefore, detention at the State Detention House is not the only option.

Even though a detention may be executed, detention must be conducted for the purpose of examination. Detention itself is an *accessoir* during a criminal examination. In short, investigator will execute a detention for the objective purpose of an investigation, such as a statement for examination report (BAP), so that the suspect will not avoid the examination.

KUHAP itself states that detention “may” (not “must”) be executed against a suspect, even though the crime creates the possibility for detention. In other words, detention should not influence the principle of judicial process that is honest, just, and objective. Detention prior to trial always contradicts the presumption of innocence principle.

Detention may not be a “policy” or “common practice”, as the provisions on detention do not say anything like that. However, due to the common practice, it becomes the factor for the abuse of power from the related officials. Therefore, detention during investigation is not that necessary and may be avoided, because it may hamper the due process of law.

Unnecessary detention may be illustrated as follows: there is a detention with the exception under Article 29 of KUHAP, which made the detention period during investigation reached 120 days. If the investigation only needs 20 days, it means that the remaining 100 days are deprivation of liberty. Because deprivation of liberty is crime, there must be a method, known in many literatures as “Miranda Warning”.

In many cases, the fulfillment of detention subjective requirements by the investigator is minimum. If the investigator is concerned that the suspect will escape, making evidences disappear, and repeating the crime, then the detention may be executed.

The use of such authority is heavily depended law enforcer’s subjectivity, which is supported by KUHAP’s provisions that give the room for broad interpretation, and the law enforcers feel that they are the sole party that may interpret KUHAP. Alternative interpretation is merely considered as academic study, not for practice. This condition makes detention under the prevailing law is merely used for the abuse of power.

On the other side, the pretrial institution that was intended as the mechanism against arbitraty coercive action, is not implemented as it should be. At the initial phase, pretrial institution was intended as a part of judicial system mechanism that gives the right to the suspect to oversee the coercive action during investigation and prosecution against himself.

However, this objective cannot be implemented in KUHAP, as it only stipulates administrative oversight. For example, pretrial may not be used to examine whether (i) the legal ground and necessity aspect in a coercive action is legal from the substantial point of view; (ii) whether the

“sufficient preliminary evidences” as the ground to determine a person’s status as as suspect may be used for detention. Therefore, there is actually a “legal vacuum” regarding pretrial institution, which was actually aimed to protect the basic rights of the suspect and defendant.

The legal vacuum may be solved with court decisions or the making or new criminal procedural law that stipulate the mentioned issues, as currently discussed for RKUHAP. The research and the Guideline on Detention and Pretrial Against Detention made by ICJR and supported by Open Society Justice Initiative is indeed useful for the abovementioned topics.

Jakarta, December 2013

Dr.Luhut MP Pangaribuan, S.H., LL.M.

Foreword

Institute for Criminal Justice Reform

One of the most debated issues among the legal profession is the coercive action conducted by law enforcement officials, particularly the Investigators and Prosecutors. In general, coercive actions that are commonly acknowledged in most countries are arrest, detention, search, foreclosure, and wiretap.

Coercive actions conducted by law enforcement officials must be under the supervision of judicial institution—judicial scrutiny. So that there will be no arbitrary coercive actions conducted by law enforcement officials, which may violate the civil rights and freedom of a person.

The principle of judicial scrutiny is not regulated under the Law No. 8 of 1981 on Criminal Procedural Law, commonly known as KUHAP. When it was issued, many viewed that KUHAP is one of the greatest Indonesian legal documents at that time, because only KUHAP that explicitly stated the phrase “human rights” in its articles. However, supervision from judicial institution is always absent from every coercive action conducted by the investigators or prosecutors.

The most important issue that needs to be amended under KUHAP is the provision regarding pretrial detention. The term “pretrial detention”, however, is not stipulated under KUHAP, because it only acknowledges the detention based on which institution that conducted such action. Universally speaking, the definition of “pretrial detention” is vary, and for the purpose of this research, ICJR defines “pretrial detention” as a detention that is imposed to a suspect before the first trial at the court. In short, pretrial detention under this research refers to detention conducted by Investigators and Prosecutors.

Why this issue is crucial? One of the reason is the poor situation and condition of detention houses. Most detention houses or any other places to put the detainees in Indonesia are overcapacity, which leads to many health problems suffered by the detainees. In addition, such condition may also cause comodification practice and clash among detainees groups. Moreover, the lack of oversight from the judicial institution—through the means of pretrial against investigation institution—causes arbitrarly acts towards the detainees, in forms of physical and psychological torture during the investigation process.

ICJR identifies two main causes of such situation. Firstly, the absence of judicial oversight (judicial scrutiny) on coercive action under KUHAP. Secondly, the lack of in-depth elaboration on the requirements of detention under Article 21 of KUHAP. Even though there is a pretrial institution as a complaint mechanism against coercive action, this institution only focuses on administrative issues on coercive actions conducted by authorized officials. Additionally, the lack of procedural law for pretrial proceeding under KUHAP also needs to be revised.

The problems regarding pretrial must be corrected from the source of the problems itself, which is KUHAP. However, the discussion of KUHAP between legislators at the House of Representatives is time-consuming. Therefore, ICJR, together with other non-governmental organizations have formed the Civil Society Coalition for Criminal Procedural Law Reform (*Koalisi Masyarakat Sipil untuk Pembaharuan Hukum Acara Pidana – KuHAP*) to guard the KUHAP Draft discussion. Within the Coalition, ICJR took the initiative to be actively involved in overseeing the KUHAP discussion on pretrial detention and wiretap.

Due to the current situation, ICJR has no other option but to optimize the use of pretrial institution against arbitrarly detention conducted by law enforcement officials.

This research focuses on two main issues: to measure the effectiveness of pretrial institution and how to maximize the function and role of pretrial institution. From these main issues, ICJR offers a limited reform on pretrial institution, by providing a Guidelines for pretrial detention and a “so-called” procedural law that can be used to examine pretrial petition regarding pretrial detention.

ICJR hopes that the output of this research may be used by the related stakeholders, especially the judicial institution. ICJR hopes that this research may bring a significant improvement to revitalize pretrial institution, so that it may play its function and role to guard the basic human rights from arbitrary detention.

The research and guideline would not be realized without the support from many parties. ICJR would like to thank the Open Society Justice Initiative, which has supported ICJR’s programs since 2011. We also would like to thank the Panel of Experts: Y.M. Hakim Agung Dr. Salman Luthan, S.H., M.H., Y.M. Hakim Agung Dr. H. Andi Samsan Nganro, S.H., M.H., and Ildhal Kasim, S.H. Also to Gregory Churchill JD, and Dr. Luhut M.P. Pangaribuan, S.H., LL.M that gave many invaluable inputs for this research and guideline. In particular, we also would like to thank ICJR’s Researchers that have worked really hard to make this research realized: Supriyadi W. Eddyono, Wahyudi Djafar, Sufriadi Pinim, Sriyana, and Erasmus A.T. Napitupulu.

Jakarta, December 2013

Anggara

Chairperson, ICJR Governing Board

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PART II

GUIDELINE ON DETENTION AND PRETRIAL AGAINST DETENTION

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Part I

The Effectiveness of Pretrial:

Theoretical Studies and the Dynamics of Pretrial against Detention in Indonesia

CHAPTER I

Overview

A. Background

The issue on pretrial against detention becomes one of the most crucial problems in the Indonesian criminal procedural law. Absolute power that is awarded to investigators in conducting detention against a person who is allegedly accused of a crime, has made detention is too easy to conduct. As a consequence, detention houses managed by the Directorate General of Correctional Facilities at the Ministry of Law and Human Rights, including those that are managed by the National Police, are full of detainees.

Most of detention houses in Indonesia are overcapacity, which leads to poor condition for the detainees. In addition, limited oversight from the justice system—via the pretrial mechanism over the investigators, leads to repressive measures towards the detainees, usually in form of torture or abuse—physical or psychological—during the investigation process

This condition is caused by the light requirements in conducting detention as stipulated under the Criminal Procedural Law (KUHAP). Article 21 (4) of KUHAP states that a detention can be applied only to a suspect or defendant who has committed a crime where: (a) the crime is punishable with 5 years of imprisonment or more; (b) the crime is punishable with imprisonment under five years, under the condition that the crime that he committed has a great impact to the public order and the general safety.

In addition to the abovementioned requirements, there is also the element of concern, as stipulated under Article 21 (1) of KUHAP, which covers: (i) the accused or the defendant will escape from the process; (ii) will damage or destroy physical evidence; and (iii) will repeat the crime that he committed. Additionally, there are also more considerations, such as (i) the accused or the defendant is strongly presumed to have committed a crime; and (ii) the allegation is based on sufficient evidence.

However, due to the lack of explanations or detailed parameter for the mentioned considerations, investigators have their own discretion in conducting detention. It is not unheard of when the public sees different treatment between cases.

The Indonesian criminal procedural law acknowledges a complaint mechanism against the law enforcers, particularly in respect to arrest and detention. This mechanism is realized under the pretrial hearing, which is aimed to create a complaint mechanism against civil liberty violation, which is possible to be conducted arbitrarily by law enforcers.

This mechanism is stipulated under Article 1 (10) of KUHAP:

Pretrial is the authority of the court to conduct an investigation and decide in ways which are regulated by this law, on:

- a. whether or not an arrest and/or detention is legal at the request of the suspect or his family or other party on behalf of the suspect;
- b. whether or not the termination of investigation or prosecution upon request is valid for the sake of upholding law and justice;
- c. a request for indemnity or rehabilitation from a suspect or his family or another party on his behalf whose case has not been brought before the court

Further provisions regarding pretrial procedural law are regulated under Articles 77 to 83 of KUHAP.

When conducting judicial review on KUHAP, the Constitutional Court asserted that pretrial is a breakthrough in Indonesian criminal justice system. The Constitutional Court explained that *Herziene Indlandsche Reglement (HIR)*, which adopts inquisitorial system, does not acknowledge pretrial.

Under the inquisitorial system, the accused or defendant becomes an object of an investigation, in which there is a possibility that the investigators abuse their power, and the accused is deemed guilty. In contrast, KUHAP puts the accused or defendant as a human who has dignity and it implements equality before the law.¹

Pretrial has the objective as a mechanism to control the abuse of power from the investigators or prosecutors when they conduct an arrest, search, foreclosure, investigation, prosecution, termination of the investigation, and termination of prosecution. The pretrial may ask for compensation, rehabilitation, or even ask for nothing.

Furthermore, pretrial also aims to enforce and assure human rights implementation for the accused/defendant during investigation and prosecution. Pretrial is deemed as a horizontal oversight towards accused/defendant's rights in the preliminary examination.²

The Constitutional Court also asserted that any coercive action, such as arrest, search, foreclosure, detention, and prosecution conducted by violating the laws and regulations, is considered as a human rights deprivation. So that pretrial assures that criminal examination will be conducted in accordance to the prevailing laws and regulations.

The oversight from the district court as the court in the first instance, has the objective to control, evaluate, and examine, whether the coercive action against the accused/defendant by the enquirer/investigator or prosecutor complies with KUHAP.³

The existence of pretrial was fueled by the spirit to incorporate the concept of *habeas corpus* under the Indonesian criminal procedural system.⁴ According to Professor Oemar Seno Adji, the concept of *habeas corpus* was proposed as a test mechanism to see the legality of an arrest or a detention. Due to the nature of an arrest or a detention, which is an “*indruising*” of an individual's rights and freedom, the said arrest or detention need a review from the court.⁵ At the end of the day, the concept that was adopted under Indonesian KUHAP did not share similar concept with *habeas corpus*.

In practice, pretrial mechanism is not optimally used. There are very limited pretrial proceeding for criminal cases. It is noteworthy that accused or defendant is entitled to use this mechanism considering their civil liberty is being taken by the law enforcers. There are many factors that caused

¹ See Constitutional Court Decision No. 65/PUU-IX/2011 on KUHAP judicial review, pg. 27.

² *Ibid*, pg. 28.

³ *Ibid*, pg. 29.

⁴ See memorandum from the Legal Documentation Center Faculty of Law of Universitas Indonesia (*Pusat Dokumentasi Hukum Fakultas Hukum UI*) to Adnan Buyung Nasution, on the topic of Habeas Corpus and Bail, written by Gregory Churchill, dated 8 November 1979.

⁵ Oemar Seno Adji, *Hukum Acara Pidana – Beberapa Inovasi*, on Oemar Seni Adjie, *KUHAP Sekarang*, (Jakarta: Erlangga, 1985), pg. 66-67.

this condition. According to Luhut M.P. Pangaribuan, there is lack of effectiveness from the judges in pretrial to oversee coercive action from investigators or prosecutors.⁶

Pangaribuan further noted that pretrial is not similar to habeas corpus that is widely known, where under pretrial, the mechanism is not the same as magistrates or justice of the peace, even though pretrial has the authority to evaluate the legality of a coercive action, such as arrest and detention.

Why not *habeas corpus*? Pangaribuan elaborated that pretrial indeed examines the legality of an arrest or detention. However, such examination is conducted when those actions have been conducted, not when the investigation is started. Therefore, this mechanism becomes ineffective to assure the protection for the citizen from the possibility of violation and abuse of power from investigators.⁷

Meanwhile, Adnan Buyung Nasution, one of the most influential individual in promoting pretrial concept under KUHAP, said that such concept was promoted due to the political situation when KUHAP was drafted.

Nasution said that when KUHAP was drafted during the New Order administration, it was impossible to implement top-down oversight, which can be seen under the concept of commissioner judge. During New Order period, judges were part of the Government—Chief Justice of MA had the same position as Minister in a cabinet, and the court was under the administration of the Department of Justice, just like prosecutors and the police.

Due to this condition, it was impossible to create an objective oversight from the judges to investigators. This is why a bottom-up oversight was chosen, conducted by the accused/defendant and his legal counsel, by adopting the concept of *habeas corpus* that was implemented under pretrial institution.⁸

In addition to the abovementioned conceptual problem, another issue in pretrial implementation is the lack of public awareness to use pretrial mechanism. This situation is worsened by the lack of attorneys availability, and their reluctantcy in using pretrial mechanism. Attorneys should be the parties who counter the power and authority of the law enforcers.

The lack of attorneys is also caused by their uneven distribution, which is more concentrated in business area, and makes other regions sometimes do not have enough advocates. The availability of attorneys will at least create an equilibrium between a person who experienced coercive action, and the power and authority from the law enforcers. Why this matters? This question correalties with the lack of public understanding on the pretrial mechanism

Based on the previous research from the Institute for Criminal Justice Reform (ICJR), the issue on attorneys availability can be seen in eastern part of Indonesia, such as in Kupang, East Nusa Tenggara, where there are only 78 attorneys. The lack of attorneys in Kupang corresponds with the number or pretrial proceeding. For instance, during 2005-2010, there were only 12 pretrial petitions, from the total 2,830 criminal cases.

However, it is noteworthy that the number of attorneys does not always correlate with the number of pretrial petitions. This can be seen in South Jakarta, where there are 1,860 attorneys—the highest

⁶ Luhut M.P Pangaribuan, *Lay Judges dan Hakim Ad Hoc: Suatu Studi Teoritis Mengenai Sistem Peradilan Pidana Indonesia*, (Jakarta: Fakultas Hukum Universitas Indonesia, 2009), pg. 11.

⁷ *Ibid.*, pg. 183-184.

⁸ Adnan Buyung Nasution's statement during limited discussion on KUHP-KUHAP Draft Bill, organized by Constitution Center Adnan Buyung Nasution, Wednesday, 26 July 2013.

in Indonesia. During 2005-2010, there are only 211 pretrial petitions filed at the South Jakarta District Court, in which 75 of them were on the use of coercive detention.⁹

Besides the problem of public awareness and the lack of attorneys, many parties argued that pretrial is not effective as a complaint mechanism, as it only examines the formal procedure matters. ICJR has studied several pretrial decisions, and found out that most of the decisions only examine the formal aspect of the legality of a detention.

Some judges that supported the limitation on formal examination of a detention, did not stipulate strict parameters to measure the subjectivity of a detention.¹⁰ Additionally, as mentioned by Pangaribuan, the provisions on pretrial do not assure that a defendant will go to trial or other judicial institution. It is due to the nature of pretrial as the rights of related parties, therefore there is no obligation for pretrial as an institution to be actively involved.¹¹

As previously mentioned, the provisions on pretrial procedural law are stipulated under Articles 77 to 83 of KUHAP. Several experts and practitioners viewed that the provisions are not enough and unclear, which made many judges use the principles of civil law in handling pretrial. As a consequence, many contradictions occurred within pretrial proceedings, and it gives legal uncertainty to the defendant during pretrial.

The uncertainty can be seen from the proceeding duration. Article 82 (1) (c) of KUHAP stipulates that a judge must render a pretrial decision in 7 days. In practice, pretrial needs approximately 19 business days, starting from the submission to decision. It is due to the practice of the court that uses civil law principles, which makes the summons to the investigators/prosecutors must consider the formal aspects. The slow progress in pretrial handling is also caused by the level of officials that are summoned by the court.¹²

Another problem in relation to the use of civil law principles can be seen from the burden of proof. KUHAP requires that the element of concern (*kekhawatiran*) justifies the law enforcers to use coercive action. Therefore, the law enforcers themselves who should prove such concern when conducting an arrest/detention during pretrial.

However, pursuant to the civil law principles, the burden of proof lies on the applicant. This creates a serious impact, where the applicant will have difficulties in proving that the coercive action does not fulfill the element of concern.¹³

Investigators and prosecutors are showing their resistancy when the accused/defendant files a pretrial petition. It is quite common when investigators are finishing the examination in a hurry, so that the case could be filed to the court, therefore eliminates the possibility of pretrial. The lack of good faith from investigators in regards to pretrial, also can be seen from their reluctancy to appear during pretrial, which affects the duration of pretrial.

Judges' view that the burden of proof regarding the element of concern lies on the discretion of the authority, leads to the court rejection in examining such element. This rejection makes pretrial merely an examination over administrative aspect, which creates a paradigm that pretrial is no longer important.

⁹ Supriyadi Widodo, dkk., *Potret Penahanan Pra-persidangan di Indonesia: Studi tentang Kebijakan Penahanan Pra-persidangan dalam Teori dan Praktik*, (Jakarta: ICJR, 2012), pg. 98.

¹⁰ *Ibid.*, pg. 245.

¹¹ *Ibid.*, pg. 249.

¹² *Ibid.*, pg. 256.

¹³ *Ibid.*, pg. 256-257.

Such paradigm mostly came from the attorneys. It is noteworthy that pretrial has the main objective as a control mechanism and horizontal oversight, so the excessive coercive action from the investigators can be minimized.

During pretrial, the court does not examine the prerequisite stipulated under KUHAP regarding an arrest, detention, or any other coercive action. The court merely examines administrative procedure such as letters or any other written documentation. Hence, if all administrative requirements is fulfilled, the coercive action is deemed legal by the court.

The court itself admits that there are many problems within pretrial, such as the lack of provisions, and also the so-called “obligation” to keep the good relationship between the court and investigators/prosecutors. If the court approves pretrial petition, there is a chance that there will be a bad relationship between the court and investigators. It leads to the reluctance from the investigators—in this case the police, to guard the court in running their duties. According to the judges, this is a factor that causes the court does not examine the substantive matters of a coercive action, and merely the administrative aspects.¹⁴

Another problem that also occurs within pretrial is the lack of human resources in handling pretrial hearings. The court does not have judges that are specifically assigned to handle pretrial hearings, which makes the cases are stacking up. Pretrial judge itself is a single judge panel that is appointed by the Chairman of the district court.

In addition, there is also a problem regarding the lack of training in regards to pretrial procedural law for judges. The court itself does not have specific budget to handle pretrial hearings, which makes the budget is merged with the budget for other cases.

To optimize the function of pretrial, it is important for the Supreme Court (*Mahkamah Agung* – MA) to create a standardized pretrial procedural law. This standardization is important to assure the consistency of pretrial, which will give legal certainty for the justice seekers (*justitia bellen*).

It is also hoped that the standardization will encourage the use of pretrial as a complaint against coercive action from the investigators. The standardization can be realized by issuing a MA Regulation or other form of guidelines, specifying the procedure in handling pretrial. There is an urgency in this situation due to the lack of clarity regarding pretrial provisions under KUHAP.

B. Purpose

Based on the abovementioned background and explanation, this research aims to:

1. Study every aspects on the concept, regulation, and practice of pretrial as complaint method against detention.
2. Find the best practice on the use of pretrial or other form of complaint procedure in Indonesia, pursuant to court decisions on pretrial, and also in other countries as comparison.
3. Draft a standardized pretrial procedural law that will be stipulated under a guideline for judges.

¹⁴ *Ibid.*, pg. 257-258.

C. Research Method

Any research, regardless its name and form, aims to solve a problem. As explained by Soetandyo Wignjosoebroto, a research is an effort to find the correct answer. Therefore, such research needs a method to achieve its objective.¹⁵ Furthermore, this research is written as a legal research, which means that it is based on legal method, systematic, and theory, to analyze one or some legal problems.¹⁶

This research has the nature of “descriptive-explorative”, which means that it describes the legal framework and implementation of pretrial in Indonesia, including its dynamics. Regarding its form, this research chooses to use “prescriptive-evaluative”, which means that this research will obtain recommendation and solution to overcome and solve the problems regarding pretrial. This research also evaluates the implementation of pretrial based on KUHAP.¹⁷ To obtain authentic and reflective data—for obtaining a comprehensive recommendation—this research uses “constructivism” paradigm, by using a “reflective-dialectical” approach.¹⁸

This research also uses “juridical-formal” approach as a *das Sollen*, to see the normative aspect of “what should be done”, particularly in regards to regulatory framework on pretrial under KUHAP, including court decisions on pretrial cases. In addition, “juridical-empirical” approach as a *das Sein*, to see the implementation of pretrial in practice as a comparison.¹⁹

Data Collection

The data that are used for this research are obtained by researching the laws and regulations on pretrial, including the implementing regulations. Court decisions on pretrial cases, including textbooks are also used as a supporting material for analysis.

In regards to court decisions on pretrial cases, these decisions are obtained from five district courts (Pengadilan Negeri – “PN”) in five cities, namely PN Medan, PN South Jakarta, PN Pontianak, PN Makassar, and PN Kupang. The decisions are limited to those that in regards to the legality of a detention. This research collects the decisions from 2005 to 2010. There are 80 decisions that will be studied under this research. The detailed decisions are as follows: six decisions from PN Pontianak; two from PN Makassar; 32 from PN Medan; six from PN Kupang; and 34 from PN South Jakarta.

¹⁵ See Soetandyo Wignjosoebroto, “Penelitian Hukum dan Hakikatnya sebagai Penelitian Ilmiah”, on Sulistyowati Irianto dan Shidarta (ed), *Metode Penelitian Hukum: Konstelasi dan Refleksi*, (Jakarta: Yayasan Obor Indonesia, 2011), pg. 83.

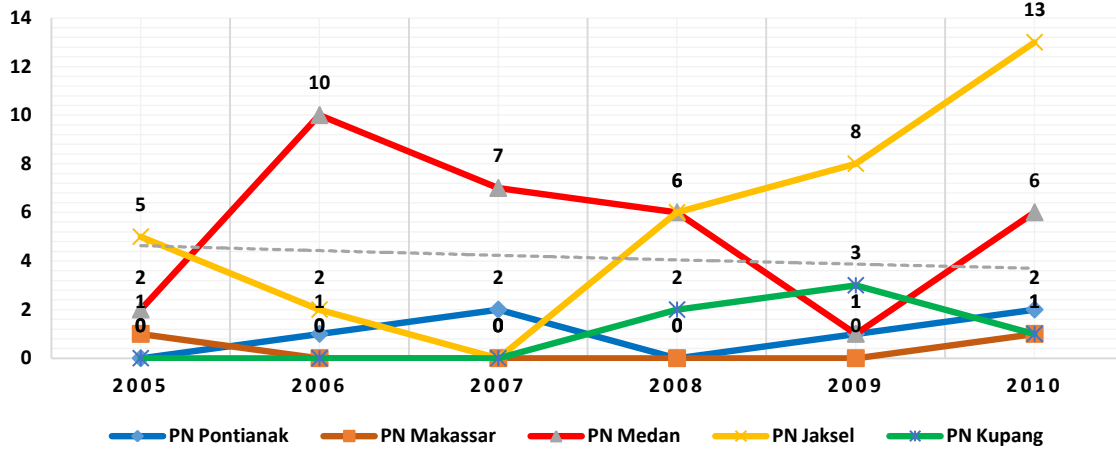
¹⁶ See Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: UI Press, 1984), pg. 43.

¹⁷ *Ibid.*, pg. 43.

¹⁸ Agus Salim, *Teori dan Paradigm Penelitian Sosial: dari Denzin Guba dan Penerapannya*, (Yogyakarta: Tiara Wacana, 2001), pg. 48-49.

¹⁹ Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar*, (Yogyakarta: Liberty, 2003), pg. 15-17.

Figur 1: Areas and year of decisions studied



Practice in other countries are also important in analytical comparison. In addition, this research adds information from focus group discussion (FGD), to obtain data from many informants, reflecting the participation of many parties in pretrial practice. The FGD acts as a process to confirm and verify the practice of pretrial.

Data Analysis

After being collected, all data are analyzed by using qualitative method, resulting in descriptive data. This method gives a whole comprehension on the regulation and implementation of pretrial, dynamic in nature, in-depth substance (detailed), and describes a circular and non-linear phenomenon.

Under qualitative method, the data are systemized, interpreted, and analyzed, by considering a clear logic and will not give a contradictive interpretation. Subsequently, there will be a conclusion, as a result of analysis, which is derived from deductive method—based on general regulations and legal issues, lead to specific conclusion.

Based on the specific conclusion, there will be a design that is used as a material framework in drafting a guideline regarding pretrial for judges. This conclusion also gives recommendation in improving the complaint mechanism against coercive action—detention in particular—under Indonesian criminal law.

CHAPTER II

Pretrial as an Oversight Instrument Against Detention

“The role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal.”²⁰

[Justice Antonin G. Scalia, 2004]

A. General concept on pretrial against detention oversight

The rise of pretrial concept was related to the need of a strict judicial scrutiny against any action that is taking away an individual civil liberty. This concept was emerged when the United Kingdom had Magna Charta in 1215, as a critic against the King’s tyranny.

While aimed to limit the King’s authority, Magna Charta incorporated an idea that human rights is more important than the King’s power. Detention, exile, foreclosure on assets against an individual is prohibited, unless there is a legal consideration. This concept was later known as ‘*habeas corpus*’. Paradigm on King’s absolutism, was replaced by the sovereignty of the people, due to the rise of rationalism movement.²¹

Historical wise, the concept of *habeas corpus* was based under the principle that any government must comply to the law, which was interpreted and enforced by judges. *Habeas corpus* was ratified by the British parliament in 17th century. After this concept was introduced, any arrest and detention must secure a court order, issued under the name of the King, and addressed to certain official. This order has a subpoena power.²²

The concept of *habeas corpus* was reaffirmed under the United States Constitution in 18th century. The First Amendment of the United States Constitution stipulated that the court must be assertive in overseeing any case that is filed, due to the nature of the case that will affect an individual’s civil liberty.²³

Similar concept was also introduced in France, at the same time of the issuance of Déclaration des droits de l’homme et du citoyen in 1789, as a result of France Revolution. Inspired by habeas corpus, the said declaration acknowledged a right over sûreté, which assured that nobody can be taken into custody or detention arbitrarily. This concept was then adopted into France’s procedural criminal law.

Prior to this declaration, the law was made and enforced by King Louis XVI, who identified himself as the “state”—L’Etat c’est moi. He acted as a judge and also the prosecutor. This condition lead to France Revolution, which put the people as the subject of law and reaffirmed the equality before the law.

²⁰ See Hamdi v. Rumsfeld, 542 U.S. 507, 576 (2004).

²¹ For more information, see Artidjo Alkostar, *Prospek HAM Abad XXI, Makalah Seminar Demokrasi dan HAM*, LP3 Universitas Muhammadiyah Yogyakarta, 1999, pg. 4.

²² See Charles Doyle, *Federal Habeas Corpus: A Brief Legal Overview*, (Washington: Congressional Research Service, 2006).

²³ *Ibid.*

The United States Supreme Court explained *habeas corpus* as “a writ antecedent to statute, ... throwing its root deep into the genius of our common law”. This has been a strong influence in United States constitutionalism ideology, particularly in regards to fair trial and the concept of due process of law.

The writ of habeas corpus or also known as great writ of liberty enables the judge to review the legality a detention, so that there is no one that will lose his right to live, freedom, and assets without legal process.²⁴ This process is differentiated from criminal cases, where *habeas corpus* is a form of civil lawsuit (non-penal process), to examine the constitutionality of a detention, which is known in United States as collateral attack.²⁵

Paul Halliday said that the concept of *habeas corpus* was not based on modern individual right. Instead, it was based on the empire’s prerogative rights and King’s discretion. In practice, this concept is based on a judge order against an institution that take away one’s freedom, to evaluate whether such action is conducted properly.²⁶ *Habeas Corpus* issued by the court for an institution that is authorized to take away an individual civil liberty, and it is conducted under a simple, direct, and open process, so that it can be used by any party.

From grammatical point of view, the term *habeas corpus* means “that you have the body”. In other words, this concept is a legal effort to challenge a detention. There are two definitions that commonly used; in substance, *habeas corpus* means a legal effort to challenge a detention against a person. While in formal definition, *habeas corpus* is realized by the issuance of a court order, namely the ‘great writ’. This court order is a way to question and review the legality of a detention. The court order regarding *habeas corpus* stipulates “the detainee is under your control. You must bring the detainee before the court and you must explain the reason of detention”.²⁷

Habeas corpus did not create a substantive law, instead it restores one’s right at the court after a violation against his right was occurred. In other words, *habeas corpus* is a law-enforcing procedure from the judicial institution to the investigation process. *Habeas corpus* asserts the importance of a court order to bring a detainee before the court for judicial process.²⁸

In its progress, the concept of *habeas corpus* is adopted by many countries with both legal system—common law and civil law. These legal systems create many variants of *habeas corpus* implementation. Indonesia, for example, interprets the concept of *habeas corpus* into pretrial.

Steven Semeraro’s argument can be used to comprehend many variants of *habeas corpus*, which in essence is an oversight to judicial process. According to Semeraro, there are two theories regarding *habeas corpus* that can be used. Firstly, the judicial power theory, which interprets a court order as an important instrument to enforce court’s position against a judge who undermine the institution of the court.²⁹

The second theory focuses on the ideology related to the court order. The history of habeas corpus viewed that social and political factors are independent to the legal system. However, Semeraro

²⁴ Brandon L. Garrett, *Habeas Corpus and Due Proces*, *Cornell Law Review* Vol. 98 (47)

²⁵ Joel Samaha, *Criminal Procedure*, (Belmont: Wadsworth, 2012), pg. 501.

²⁶ Brandon L. Garrett, *Op.Cit.*

²⁷ See Gregory Churchill, *Peranan Upaya Habeas Corpus Dalam Pengawasan Pelaksanaan Hukum Acara Pidana Di Amerika Serikat*, published paper during Peradin Work Meeting in jakarta, 29 September - 3 October 1982.

²⁸ See Nancy J. King and Joseph L. Hoffmann, *Habeas for the Twenty-First Century*, Vanderbilt University Law School Public Law and Legal Theory, Working Paper Number 09-27. Electronic version is available at: http://ssrn.com/abstract_id=1517840.

²⁹ Steven Semeraro, *Two Theories of Habeas Corpus*, Thomas Jefferson School of Law, Research Paper Series on Public Law and Legal Theory, 2005. Electronic version is available at: http://ssrn.com/abstract_id=740467.

asserted that in order to understand the doctrine of habeas corpus, an ideology must be taken into consideration to see its impact to the society, politics, and the law itself. This second theory justifies the adoption of habeas corpus into Indonesian criminal law system, which is implemented into pretrial mechanism.

B. Legal instruments protecting a person from arbitrary detention

After being affirmed by the United Kingdom, the United States, and France, the abovementioned principle was brought at international level and stipulated under the Universal Declaration of Human Rights (UDHR) in 1948. Article 9 of UDHR states that "No one shall be subjected to arbitrary arrest, detention or exile."

The said article is regulated into detail under Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR),³⁰ which states that:

- (1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
- (2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
- (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- (5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The objective of Article 9 of ICCPR can be seen in details under CCPR General Comment No. 8. The Human Rights Committee said that the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. The Committee also asserted that any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power and more precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days.³¹

The liberty of person under Article 9 relates to a very specific aspect, which is a restraint against the freedom of bodily movement.³² Therefore, Article 9 correlates the civil liberty with a detention against a person in certain location, such as prison, mental facility, and other places.³³

³⁰ Indonesia has ratified ICCPR under the Law No. 12 of 2005.

³¹ General Comment No. 08: Right to liberty and security of persons (Art. 9). See [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument). The Human Rights Committee is currently drafting General Comment No. 5 Article 9 liberty and security of persons, detailing the objectives and scope of Article 9 of ICCPR. See the Drafts on <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

³² See Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, 2nd revised edition, NP Engel Publisher, 2005, pg. 212.

³³ See Manfred Nowak, *UN Covenant ... Ibid.*, pg. 214 -215.

The topics covered under Article 9 of ICCPR are freedom from torture, arbitrary action, right to information, special rights, right to *habeas corpus* (the legal principle stating that a detainee has the right to evaluate his detention under a judicial process without any delay),³⁴ and right to compensation.

According to Article 9 of ICCPR, pretrial in Indonesia does not fulfill the existing provisions. ICCPR clearly states that a detainee must (a) be informed regarding the reasons of detention; (b) must be informed regarding the the charge; (c) anyone who is arrested or detained must (i) be brought before the judge or other official that execute judicial power; (ii) be taken into trial in a reasonable amount of time.

In addition to the abovementioned legal instruments, the United Nations General Assembly has issued Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment in 1988, which is a guideline to implement the principles under UDHR and ICCPR in regards to pretrial against detention. This document details the required effort to protect the human rights of every detainee. One of the provision under the Body Principles states that:

(i) A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful; (ii) The proceedings referred to in Paragraph I of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.³⁵

It is hoped that the Government may create a procedure to review the legality of a detention, and the detainee may be released if such detention is illegal. Such procedure must be simple, quick, and free of charge if the detainee cannot pay.³⁶ Principle 39 of the Body Principles states that:

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

Prior to ICCPR, there was also a regional level instrument, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome, 4 November 1950, which assured that no one can be subjected to arbitrary arrest or detention. Article 5 paragraph (3) and (4) of this Convention states that:

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

³⁴ See Manfred Nowak, *UN Covenant ... Ibid.*, pg. 235.

³⁵ See Principle 32 (1) *Body Principles for the Protection of All Persons under Any Form of Detention and Imprisonment* 1988.

³⁶ See Principle 32 (2) *Body Principles for the Protection of All Persons under Any Form of Detention and Imprisonment* 1988.

- (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

According to the said Article, after a person is arrested, he must be brought before a judge or other official that may execute judicial power. In this trial, a judge or an officer must examine the conditions that support or disapprove the detention, and the judge must render a decision whether such detention is legal or not.

This mechanism must be conducted, because there may be a possibility that a detention is executed without a clear legal basis. Additionally, according to European Human Rights Court Decision, the detainee must also be physically present during this trial.³⁷ In another decision, the European Human Rights Court Decision also asserts that the trial must be done in a timely manner.³⁸

In accordance with the abovementioned international human rights legal instruments, Indonesia has ratified ICCPR under the Law No. 12 of 2005. Therefore, Indonesia is obliged to adopt all provisions under ICCPR including Article 9 of ICCPR, particularly in regards to criminal procedural law provision. Prior to ICCPR ratification, Indonesia has asserted the civil liberty under its Article 28G paragraph (1), which states that:

Every person shall have the right to protection of his/herself, family, honour, dignity, and property, and shall have the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right.

The said Article asserted that citizen's civil rights cannot be taken away arbitrarily, without a clear procedure under the law and must be brought before the court (due process of law).

Similar to Article 9 of ICCPR, Law No. 39 of 1999 on Human Rights also guarantees every citizen not to be arrested arbitrarily. Article 34 of the Human Rights Law states that, "No one shall be subject to arbitrary arrest, detention, torture or exile".

Therefore, it is a certainty that Indonesian criminal law must guarantee the protection of such human rights that are stipulated as a citizen's constitutional rights, or that are stipulated under international human rights legal instruments.

C. Comparison with other countries

Each legal system will have a different complaint mechanism against a coercive action, regulated under each country's criminal procedural law. This situation, as explained by Semeraro, is due to the development of ideology, politics, and legal system that will affect the development of *habeas corpus* doctrine. Under the Anglo Saxon legal system, adopted by archipelagic European countries, United States of America, and other countries, there are also many variants of *habeas corpus* implementation.

The Habeas Corpus Act, for example, gives a right to a person to challenge an official (police or prosecutor) that take away his civil liberty. Such challenge is given to examine whether the action is legal under the prevailing laws and regulations. This concept is useful to assure that the coercive

³⁷ See *Shiesser v. Swiss*, European Court of Human Rights, 4 December 1979.

³⁸ See *Brogan v. United Kingdom*, European Court of Human Rights, 29 November 1988. Further discussion on European Human Rights Court decisions regarding criminal procedural law, see Jeremy McBride, *Human rights and criminal procedure: The case law of the European Court of Human Rights*, (Starsbourg: Council of Europe Publishing, 2009).

action has been conducted in accordance with the prevailing laws and regulations, including the principle of human rights.

Meanwhile, countries that adopted civil law system or continental law system—mostly countries in European mainland, do not implement the concept of *habeas corpus*. However, they assert the importance of supervision by the judicial institution over any coercive action that take away a person's civil liberty (strict judicial scrutiny). France, for example, acknowledges *Judge d'Instruction*, who orders and leads a criminal investigation. Meanwhile, the Netherlands introduces *Rechter Commissaris* who acts as a supervisor. The following paragraphs explain the variants of *habeas corpus* implementation in some countries.

1. United States of America

Habeas corpus is an important protection to prevent illegal detention and imprisonment.³⁹ Article I Section 9 paragraph (2) of the United States of America Constitution, asserted that the privilege and habeas corpus will not be postponed, except for cases such as rebellion or invasion, where the security condition allows such postponement. This guarantee enables a detainee to be released by filing a petition to the court regarding habeas corpus order to examine whether his detention is constitutional or not.

In the United States of America criminal justice system, preliminary examination judge (*Magistrat*) has been involved in pretrial process, starting when the criminal investigation is conducted or a person filing a complaint regarding a crime. When explaining crime control model, Herbert L. Packer explained, in most cases, the function of a *magistrat* is "... to provide an assurance of regularity on the record, not to protect any special right of the defendant".⁴⁰

The pretrial process under *habeas corpus* is conducted in three phases: preliminary hearing, arraignment, and pretrial conference. In addition to these three phases, the federal judicial system and other states in United States acknowledge the grand jury institution. However, not every state implement this grand jury institution.

Preliminary hearing is conducted upon police's request who needs an arrest warrant or search warrant, after receiving a report on a crime. According to James A. Inciardi, the main objective of preliminary hearing is to give a protection for the accused from a judicial process that is conducted without a proper warrant.

Based on crime or report regarding a crime, investigator will appear before the court to obtain a judge's evaluation regarding probable cause that a person is a criminal, so that he can be detained and bring into the court. If there is no probable cause, the case will be stopped.⁴¹

The next step is grand jury, who receive complaints and accusations of crime, hear preliminary evidence on the complaining side, and make formal accusations or indictments. This institution is used to keep the indictment is fairly conducted.

United States constitution drafters saw the importance of this institution, which leads to the Fifth Amendment, stating "No person shall be held to answer for a capital, or otherwise infamous, crime,

³⁹ John N. Ferdico, Henry F. Fradella, and Christopher D. Totten, *Criminal Procedure for the Criminal Justice Professional*, (Belmont: Wadsworth, 2009), pg. 15.

⁴⁰ See Herbert L. Packer, *The Limits of The Criminal Sanction*, (California: Stanford University Press, 1968), pg. 222-223.

⁴¹ Daniel E. Hall, *Criminal Law and Procedure, Fifth Edition*, (New York: Maxwell, 2009), pg. 446-447.

unless on a presentment or indictment of a Grand Jury". Grand Jury consists of 12 to 23 individuals, chosen under the same mechanism as the *jury petit* (jury that decide a person guilty or not guilty). Grand Jury has the same objective with preliminary hearing, which will decide whether there is a probable cause of a crime.⁴²

In the federal system, grand jury is used for felony and not all states use grand jury mechanism in its criminal justice system. Additionally, states that use grand jury, varies between those that use it for felony or just certain crimes. Members of grand jury are originated from the citizens, from 16 to 23 individuals, with 12 minimum votes to make an indictment.⁴³

Meanwhile, the arraignment and pretrial conference are conducted after a probable cause has been determined in a preliminary hearing or grand jury. An arraignment is an examination before a judge or his deputy after the indictment is read and the accused is asked whether he pleads guilty or not.

In the arraignment phase, the accused may choose (1) deny all the indictment and proceed to the trial (not guilty); (2) the accused admits the indictment and being sanctioned without trials (guilty plea); or (3) nolo contendere, which is similar to guilty plea, however, under this option, there still will be trials. Before the trial begins, the accused will appear before a pretrial conference, which aims to plan the trials, particularly on burden of proof and discovery of evidence.⁴⁴

By pleading guilty, the accused admit all charged in the indictment document, unless a deal has been made with the district attorney representing the state/people, which is known as a plea bargain. It is common for the prosecutor to disregard an indictment or multiple charges as an award for guilty plea. Plea bargain is one of the most important aspect in United States criminal procedure. Ninety percent of all crimes that categorized as felony are settled by plea bargain.⁴⁵

2. France

France adopts the civil law system, where the criminal law mixes inquisitorial and adversarial model. Judges (*Procureur*) and investigative judges (*Judge d'Instruction*) conduct many level of oversight and control towards police activities, involved in investigation, and also rendering a decision.⁴⁶

Under the inquisitorial criminal justice model, the investigation prioritizes the case, not the person, where this activity is conducted by Enquirer court. They are looking for the "truth", and not representing the interest of the prosecutor or the defense. Pretrial becomes more important than the trial, as a phase to solve the factual issues and evidence discovery.

Traditionally, the investigation is written and confidential. However, this investigation is supervised by *Judge d'Instruction* or *Procureur*. As *magistrats*, these two parties share some authorities and act for the public interest. Under this system, both of them are responsible for every aspects of investigation.⁴⁷

⁴² Daniel E. Hall, *Criminal Law ... Ibid.*, pg. 447. Grand jury was introduced in the United Kingdom when King Henry II was in power in 1166. It comprised of 12 knights or good and lawful men.

⁴³ Roland del Carmen, *Criminal Procedure: Law and Practice*, (Belmont: Chengage Learning, 2007), pg. 8. See also James A. Inciardi, *Criminal Justice*, (Oxford: Oxford University Press, 2001), pg. 426.

⁴⁴ Daniel E. Hall, *Op. Cit.*, pg. 456.

⁴⁵ *Ibid*, pg. 455.

⁴⁶ See Jacqueline Hodgson, *Conceptions of the Trial in Inquisitorial and Adversarial Procedure*, electronic version is available at <http://ssrn.com/abstract=1503969>.

⁴⁷ See Jacqueline Hodgson, *Constructing the pretrial role of the defence in French criminal procedure: An adversarial outsider in an inquisitorial process?* Electronic version is available at <http://ssrn.com/abstract=1503997>.

Meanwhile, *judge d' instruction* has the authority to question the accused, witnesses, and other evidences. He may also make an examination report, execute detention, foreclosure, even decide whether a case may go to the court or not. It should be noted that only major cases with certain difficulties that are examined through *judge d' instruction*.⁴⁸

France police will asks several questions in the beginning of the investigation to identify the accused. A police may arrest a person, and put him into *garde à vue*, if there is enough suspicion that the person conducted a crime or allegedly conducted a crime, where such crime is subject to minimum one year imprisonment, and the police feels such detention is needed for enquire purpose. Subsequently, the police must notify the *Procureur*. If a report from citizen regarding a crime does not followed by the police, the victim may bring it to the *judge d' instruction*.⁴⁹

Detention at *garde à vue* is allowed for 24 hours and *Procureur* may authorize an extension to another 24 hours. *Procureur's* supervision guarantees the protection of the accused. In more serious cases (organized crime, drug trafficking, and terrorism), *garde à vue* detention may be extended up to 48 hours. This extension is conducted by *des juge libertés et de la* or *judge d' instruction* upon request from *Procureur*. The accused must be examined by a doctor, who will determine whether the accused can be detained for 48 hours. In this case, the right to legal counsel may be postponed up to 72 hours (depending on the crime).

The accused must be notified in a language that he understands regarding the crime and the date of the crime that he committed, his right to inform another person from detention, right to be examined by a doctor, right to legal counsel, right to make a statement, right to answer questions, and right to remain silent. The accused must also be notified regarding the detention period, and also right to interpreter if needed.

Procureur is responsible to direct police activities, supervise every detainee, interrogate the accused in *garde à vue*, including the discretion on whether such investigation may be continued or not, or whether there is another alternative of settlement. In a few cases (only 4%), *procureur* referes to an order from *judge d' instruction*, who has broader authority in investigation. Authority and procedure will differ based on the violation that has been committed.

In criminal cases, the involvement of *judge d' instruction* is mandatory, based on *procureur's* request, or if such crime is a *delit*. There is no time limitation on *judge d' instruction* involvement, so he will be involved until the preliminary examination is concluded. In some cases, *judge d' instruction* plays bigger role in consultation with the police (and also prosecutor's office) to direct the investigation.

Judge d' instruction is responsible after supervising the case. However, if he cannot or may not conduct certain action, the police is allowed to do it under the *commission rogatoire*. In practice, the police enjoys a broad independency in investigation, even though the *Procureur* or *judge d' instruction* are involved. This happens in major cities, where court's workload is quite large.

Procureur or *judge d' instruction* intend to delegate the investigation to the police, unless it is a major or serious crime. This delegation must be officially given by *judge d' instruction*. The search on domicile and communication interception must be validated by *judge d' instruction*, unless in certain violation where the police has broader authority. Some responsibilities are cannot be delegated, including arrest warrant and formal interrogation on witness.

⁴⁸ Andi Hamzah, *Perbandingan Hukum Pidana Beberapa Negara*, Jakarta: Sinar Grafika, 2002, pg. 193.

⁴⁹ See Jacqueline Hodgson, *French Criminal Justice ... Op.Cit.*, pg. 41.

If *procureur* tends to oversee police investigation, *judge d'instruction* is responsible on investigation order. In other words, this system may be called as "supervised investigation", by the involvement of *judge d' instruction*. After *judge d' instruction* is involved in a investigation, the *procureur* is no longer has the responsibility on the case, until the documents of the case is filed back to the *judge d' instruction*.

3. Netherlands

In Netherlands, oversight towards any coercive action is conducted by commissioner judge or *Rechter Commissaris*. Under this title, a judge acts as a supervisor, and may conduct an execution. A judge does not merely act as an examining judge, but also as an investigating judge, where he may examine witnesses and the accused.⁵⁰ This is known as a *preliminary judicial investigation*. However, not every criminal investigation is supervised by an investigating judge. It may also under the oversight of the police, directed by the prosecutor.⁵¹

Criminal investigation that is initiated by the police, is immediately conducted after a report regarding a crime. The purpose of this investigation is to collect information on the violation and the accused. The accused is a person who is allegedly conduct the violation. The police has the authority to question any person in relation with the violation.

However, there is no obligation towards any person to answer police question. The police will prepare a written notes to question the accused, related persons, and other facts. This written notes is made under oath and may be used as an evidence during trials. The police is also authorized to execute coercive actions, such as arrest or search, as long as such actions are based on the prevailing law.⁵²

In a case that involves an investigating judge, the preliminary hearings will assert the principle of equality of arms between the prosecutor and legal counsel, and gives an opportunity for the defense to be actively involved. Preliminary examination will be supervised by the investigating judge is more open than police investigation, even though it may be kept confidential for the purpose of investigation.

During investigation, legal counsel has the right to attend every trial, including to hear the testimonials from witnesses and experts, unless it is prohibited for the investigation purpose. He may recommend the questions that may be asked by the investigating judge to the witnesses and experts. If the defense is not present at the trial, the substance of the process will be immediately notified to the counsel, unless it is contradict with the investigation purpose.

During preliminary hearings, the judge has the full power to decide the investigation that may be conducted, and decide what questions from the defense that must be answered by the witnesses and experts. For the defense, they may ask for additional witnesses or experts in reasonable numbers. In other words, the defense has broader opportunity in an investigation that is led by investigating judge, compared to a police-led investigation.⁵³

With respect to oversight mechanism, Netherlands also acknowledges *submissie and compositie* institution, in addition to *rechter commissaris*. *Submissie* in conducted upon the accused's request, approved by the prosecutor, which disussing the problems of burden of proof during trials. This

⁵⁰ Loebby Loqman, *Praperadilan di Indonesia*, Jakarta: Ghalia Indonesia, 1987), pg. 47

⁵¹ P.J.P. Tak, *The Dutch Criminal Justice System*, (Nijmegen: Wolf Legal Publishers, 2008), pg. 82.

⁵² *Ibid.*, pg. 82.

⁵³ *Ibid.*, pg. 83-84.

agreement is submitted to the judge to be decided, so that there will be no court evidentiary. In *compositie*, the prosecutor may stop the indictment, if the accused pay a certain amount of money. This aims as a redemption, particularly for petty crime.

These two institutions related to the cases that are difficult to be proved and can be settled outside the court through negotiation. However, there is an exception for a crime that is subject to six years of imprisonment and criminal violation. "Out of the court settlement is conducted by the prosecutor before a case went through trial."⁵⁴

4. Germany

Germany is the founder of European continental law and it adopts inquisitorial system in its criminal procedural law. German has indictment system that is fully independent from the police and the court. However, such system is similar to the judicial institution and is considered as quasi-judicial authority. Meanwhile, the prosecutor office is structured under the Minister of Justice in certain states.

Similar to other European countries, the Minister of Justice is allowed to direct the prosecutor office regarding the indictment on individual cases, even though this situation is rarely happened. Due to the fact that the prosecutor is considered as a part of quasi-judicial authority that is adversarial, it is viewed as a neutral and objective institution, and it has the responsibility on the continuity of a case. In particular, the prosecutor must calculate and present all evidences to the court. The prosecutor authorizes every investigation process, including police-led investigation.⁵⁵

If the prosecutor decides to file an indictment after the investigation, he will file it at the court including the supporting documents. This document consists of every report from relevant witnesses. In addition, it is also consists of background information prepared by court's clerk.

When the indictment is filed at the court (*Amstgericht* or court in the first instance, and *Landgericht* or court of appeal), the chief of panel is responsible for pretrial, pretrial against detention, evidence, and examining all circumstances. The court will decide whether there are enough evidence to go to the next level. The judge may direct further investigation, including re-examination of a certain witness. They may also conduct separate investigation—although it is rarely happened.

If the judge decides that there are enough evidences to go to trial, he will notify the prosecutor and the accused, including the trial date and summons relevant witnesses. The accused has the opportunity to reject such decision, and may ask the judge to consider additional evidences. When the judge decides the accused's request, it is final and binding decision. The accused may also ask the judge to summon additional witnesses to give testimony before the court or the accused may call those witnesses under his own personal expenses.

The judges may also arrange a meeting with the prosecutor and accused before the trial begins, to limit the issues and number of witnesses that may appear. It is a common practice in local district courts. There is also a plea bargain before the trial begins, involving the prosecutor, accused, and judge, that may change the indictment.⁵⁶

⁵⁴ See Ties Prakken and Taru Spronken, *The Investigative Stage of the Criminal Process in the Netherlands*, Faculty of Law, Maastricht University, electronic version is available at <http://ssrn.com/abstract=1440214>.

⁵⁵ See Sarah J Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, (Portland: Hart Publishing, 2007), pg. 31.

⁵⁶ See Thomas Scheffer, Kati Hannken-Illjes, and Alexander Kozin, *Criminal Defence and Procedure Comparative Ethnographies in the United Kingdom, Germany, and the United States*, (New York: Palgrave Macmillan, 2010), pg. 106-107.

5. Denmark

Denmark's criminal procedural law adopts two systems, adversarial and inquisitorial. Compared to other European countries, the parties in Denmark control the trials. In its penal system, the police is under prosecutor office (local prosecutor), consisting of 12 commissioners. In addition to local prosecutors, there are also 6 prosecutors in second level, and director of prosecutor in the third level.

Under this organizational structure, there is a close relationship between the police and prosecutor in Denmark. Local prosecutor initially has the authority over small cases. However, since 1992, almost every crime and violation are under their authority.

Meanwhile, regional prosecutor is limited to the authority to decide whether a case is under their jurisdiction. They also may appeal at the Court of Appeal, and overseeing all criminal cases that are handled by local prosecutors. The highest authority in prosecutor office lies on the hand of Director of Prosecutor, which is a non-political position. The Director and all prosecutor offices report to Minister of Justice.

The police, on the other hand, is under the supervision of prosecutor office when it conduct an investigation. The police conducts an independent investigation and submit it to the prosecutor office when it is done. However, such independent investigation cannot be conducted for sophisticated economic crimes. In addition, cases that need coercive action and court order for pretrial against detention, the police must secure prosecutor's approval, because the prosecutor office will obtain such court order.

Meanwhile, the prosecutor will determine whether a case is continued or stopped. When the investigation is concluded, the police must handover all investigation results to the prosecutor. The prosecutor then will determine whether it has the jurisdiction or not.

Unlike other European countries, there is no "legality principle" in Denmark for indictment. However, the procedural law determines the condition where the case may be discontinued without indictment, and also other conditions where there is a discretion to disregard indictment.

Case that is not going to the court, the accused may give financial compensation without court involvement, which is called as "social process". If the prosecutor disapproves a case that is without indictment or, the victim or other parties representing them may file an objection to the regional prosecutor. However, they do not have the right to file an appeal to the court.

Meanwhile, mediation between the victim and perpetrator is conducted for every case, as a additional method, instead as a alternative to indictment. It occurred when the case is yet to be tried and the result will be added to the documents. Cases that may be solved with mediation is determined by the police.

With respect to police authority, they may detain a person for 24 hours without a court order. Afterwards, they seek a court order from the prosecutor for pretrial against detention, under the reasonable argument that a violation has been committed. The petition to detain a person including the cost, must be filed at the court and presented before a judge in an open trial.

Within this process, the accused has the right to a legal counsel, including the first 24 hours of detention. If the accused cannot afford an attorney, the State will provide one. The accused must pay for this cost if he is proven guilty. The accused regularly accompanied by an attorney during

investigation, who will also attend pretrial against detention hearings. If the accused is subject to pretrial against detention, he may be released without a court order, but under the direction of the prosecutor.

If the accused goes into detention, he must be brought before a judge once in every four weeks to review the detention order and investigation process. In addition, the maximum period of pretrial against detention for adults is six months, if the crime is subject to six years of imprisonment, and one year if the crime is subject to more than six years of imprisonment. If the accused is under 18 years of age, the maximum period is reduced to four months and eight months respectively. However, most detention is done in maximum period.

There is also a provision that a pretrial against detention may not exceed the imprisonment. If it exceeds, the accused must obtain a compensation. The accused may also file a petition to the court regarding the investigation progress or trial date, if the prosecutor has not filed indictment in timely manner.

If the prosecutor decides to file indictment after the investigation is concluded, the indictment will be filed at the court, along with supporting documents, consisting testimonials from relevant witnesses. The judges will use this document to prepare the trial, and the parties are responsible in determining witnesses that will appear during trials.

6. Italy

Prior to the revolution of Italian criminal procedural law on 24 October 1988, Italy adopted inquisitorial procedural system, similar to other European continental countries. This system has been adopted by Itali since 1808, when Napoleon ruled Italia and enforce *French d'instruksi Criminelle Code*. Napoleon's system was codified in 1865, after Italy's independence in 1861.

The new system, however, still adopted Napoleon's system. It was changed when the fascist government took power in 1930, and separated the penal system into two phases: investigation ("*istruzione*") and testing ("*dibattimento*"), where investigation phase plays larger part in the whole penal system. When the system is enforced, an investigating judge ("*Giudice istruttore*") will be appointed, who has a broad authority.⁵⁷

The investigating judge has the authority to give recommendation to the prosecutor, to direct investigation for the purpose "affirming the truth", to hear witnesses and experts, and evidence discovery. The investigating judge may also summon and question the accused. All evidences that are obtained during investigation will be noted in the investigation document, and the judge will render a decision based on the document. This is very similar to Indonesian model of examination report (*Berita Acara Pemeriksaan* or BAP).

Such investigation model will have a significant impact during trials. The existence of investigation documents have made trial as a process to merely control the things that have been decided under the BAP. The trials merely officially reading the notes that have been made during investigation. Witnesses may appear before the court and they may change their testimonials from the original investigation. However, there is a possibility that judges render decisions merely based on the investigation documents, and disregard evidences that are presented at the court.⁵⁸

⁵⁷ Giulio Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, Washington University Global Studies Law Review, Vol. 4, 2005. Electronic version is available at http://law.wustl.edu/wugslr/issues/volume4_3/p567Illuminati.pdf.

⁵⁸ *Ibid.*

This situation made the Italians frustrated, and forced the Italian parliament in 1988 to repeal inquisitorial system with adversarial system, a system that is common in Anglo-American criminal procedural law.

Under the new system, the role of investigative judge was significantly reduced in the process of making investigation documents, and the responsibility of evidence collection is on the parties. The accused must summon his own witness to give testimonials, even though such witness already gave testimony to the police, and the accused has the right to cross-examine the witnesses and present evidences that are contradict with witnesses' testimonials.

However, the changes were not easy to be implemented, and it need radical ways to improve the old Italian laws, and fully implemented adversarial model. A movement against Italian old procedural law only initiated by the police, and some Italian Constitutional Court decisions that weakened the basic principles of adversarial system. The Italian parliament cannot do anything towards those decisions, because the Constitutional Court was introduced in the Italian Constitution—similar to Indonesia.

In 1999, Italian Parliament made an amendment to the Constitution, particularly on Article 111 on fair trial, to fully alter the Italian criminal procedural law into adversarial model, and to strengthen accused's rights. The next change on Italian criminal procedural law was made on 2001 based on the new Italian constitution.⁵⁹

Under the Law No. 63 of 2001, the Italian Parliament ratified *The Nuovo Codice di Procedura Penale*, with adjustment according to the amended Constitution. The new criminal procedural law incorporated the adversarial system in the Italian judicial structure. This change, in particular, addressed the separation between the institution that is responsible for investigation, institution for prosecution, and the institution that may execute judicial process. According to the new criminal procedural law, Italian penal system is divided into three phases: (1) preliminary investigation (*indagini preliminari*), (2) preliminary examination trial (*udienza preliminare*), and (3) trial.⁶⁰

According to the new criminal procedural law, the responsibility of an investigation lies on the prosecutor, to keep the impartiality of judges, instead of delegating such authority to judge or police. In few hours after a crime is committed or the police received a report on a crime, the police will notify the prosecutor, who will have six months to conclude the investigation and collect all evidences.

In regards to unavailable witnesses and evidences, the prosecutor may ask for '*probatorio incidente*', which allows "trial from witnesses", to keep witnesses' testimonials for trials. These testimonials will be included in the documents for trial. Because Italian system requires an indictment, the prosecutor must explicitly ask a discontinuation of an investigation from the judge, if they are handling a weak case.

During investigation, the prosecutor will collect evidences for initial trial, which will determine whether a case goes to the court or else. In the end of investigation, and before the preliminary trial,

⁵⁹ William T. Pizzi and Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, Michigan Journal of International Law Vol. 25, 2004. Electronic version is available at <http://lawweb.colorado.edu/profiles/pubpdfs/pizzi/PizziMJIL.pdf>.

⁶⁰ Julia Grace Mirabella, *Scales of Justice: Assessing Italian Criminal Procedure Through the Amanda Knox Trial*, Boston University International Law Journal, Vol. 30, No. 1, 2012. Electronic version is available at http://www.bu.edu/law/central/jd/organizations/journals/international/volume30n1/documents/note_mirabella.pdf.

the accused will be notified on the charges, so that the accused may give additional evidences to the prosecutor, and ask the prosecutor to conduct additional investigation for 30 days.⁶¹

In addition to prosecutor-led investigation, the Italian criminal procedural law also acknowledges preliminary examining judge (*Giudice per le indagini preliminari*) or GIP, who is assigned in every investigation process. GIP determines prevention (*misure cautelari*) that needs to be taken, such as detention in prison, or gives a permit to the prosecutor to intercept communication.

In preliminary trial, preliminary trial judge (*Giudice per l'udienza preliminare*) evaluates all evidences from the prosecutor and decide whether the case may go to the court, annuls the indictment (*rinvio a giudizio*), or archives the case.

The supervision from judge limits the authority of the prosecutor, compared to the old Italian inquisitorial system.⁶² Similar to the United States, Italian criminal procedural law introduces jury system for felony. The decision on felony cases will be rendered by a mixed system, where two judges and six jurors will made such decision. The jurors are randomly appointed. The decision will be taken by majority votes, where judges and the jury will discuss the case and render a decision.⁶³

7. Japan

Prior to World War II, Japan's system was inquisitorial and it has been conducted for more than a century. Under Tokugawa regime, the investigation responsibility lied on Keshogunan that examine the evidences and questioned the accused and witnesses' motives, and written into a document, similar to BAP. After World War II, the occupation authority tried to change Japan's system into American sytem.⁶⁴

Firstly, they reorganized the judicial system to secure the court independency from political institution. In terms of investigation, preliminary examination was erased, including the role of examining judge. The authority to investigate was transferred from the judge to the jury.

The most important improvement is the protection procedure, guaranteed by the new constitution. Such protections are the right to remain silent, right to an open trial, and the right to state-funded attorney if it is needed. The investigator now must secure a warrant for search and arrest, and the accused must be notified regarding the charges, immediately after the arrest has been made.⁶⁵

Criminal process in Japan is initiated by a report from the victim or citizen. An arrest without warrant is allowed if the accused is caught red-handed. After assuring that the crime has been committed, the police will conduct an investigation and secure a warrant from the judge. Subsequent to the arrest, the accused must be brought before a police and notified about his rights, such as the right to remain silent and the right to an attorney (*benkai-rokushu*).

Afterwards, the police must bring all evidences to the prosecutor in 48 hours, otherwise the police must release the accused. In 24 hours after examining the accused, the prosecutor must bring him to

⁶¹ Julia Grace Mirabella, *Scales ... Ibid.*

⁶² Giulio Illuminati, *The Frustrated ... Op.Cit.*

⁶³ Ethan J. Leib, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, Ohio State Journal of Criminal Law, Vol. 5, 2008. Electronic version is available at: <http://moritzlaw.osu.edu/students/groups/osjcl/files/2012/05/LeibFromPublisher.pdf>.

⁶⁴ Haruo Abe, *Criminal Procedure in Japan*, Journal of Criminal Law and Criminology, Vol. 48 (1958).

⁶⁵ Ingram Weber, *The New Japanese Jury System: Empowering the Public: Preserving Continental Justice*, East Asia Law Review Vol. 4, 2009. Electronic version is available at [https://www.law.upenn.edu/journals/earl/articles/Volume4/issue1/Weber4E.AsiaL.Rev.125\(2009\).pdf](https://www.law.upenn.edu/journals/earl/articles/Volume4/issue1/Weber4E.AsiaL.Rev.125(2009).pdf).

the judge for further detention or release the accused. The judge decides this based on investigation purposes. Before the first detention period is expired, the judge may give an extension for a limited amount of time. In the end of detention period, the police and prosecutor must conclude the investigation, and the prosecutor must decide to indict or release the accused. During detention, the police and prosecutor may interrogate the accused.⁶⁶

The previous paragraph mentioned *Benkai-rokushu*, which is similar to Miranda Rule under the American criminal procedural law. There are four elements under *Benkai-rokushu*: (1) mandatory arrest warrant; (2) petition to make first detention; (3) the obligation to inform the accused on his right to an attorney; and (4) the availability of an attorney appointed by the government when the accused is detained under a court order.

A search warrant is the initial phase of investigation by the police, followed by a petition for detention. If the court police does not discover any reason to detain the accused, he must be released. *Benkai-rokushu* must be given immediately to the accused, after a detention is conducted or after the court police receives the detainee from non-judicial police, including common citizen that conduct an arrest.⁶⁷

In addition to mandatory *benkai-rokushu*, the court police that conducts interrogation is obligated to make an interrogation situation report. This report was introduced in 2003 by the Japan's cabinet, when it planned a judicial system reform. This report is necessary for the accused to assure that the investigation is properly conducted.

During detention, the police must make a daily report on interrogation situation, including the cost, date, and time of interrogation, statement that has been made, and also meeting with the legal counsel. The statement does not necessarily be written in the report. The interrogation situation report will be presented as an evidence during trial, under the condition that the accused's testimonials are questionable.⁶⁸

After being transferred from the police, the prosecutor may ask the judge to detain the accused if the prosecutor needs to conduct further investigation. To do this, the judge must conduct a detention trial, with the physical presence of the accused and determine whether he can be detained or not. If the judge admits any reason for detention, the accused will immediately detained. Otherwise, the judge will order the release of the accused.

During detention trial, the attorney may not be present and the accused may only access limited information on the reason for detention. If the accused wants further information, he must ask an expose to reveal the reasons for detention. This expose must be an open trial, attended by the prosecutor and the defense, who present their written or verbal argument.

This process merely reveals the reasons for detention, and if the accused wants to challenge his detention, he must file an appeal. The appeal will be conducted by a panel of judges, where both prosecutor and defense may attend this appeal, and the decision must be rendered in a few days.⁶⁹

⁶⁶ The United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), *Criminal Justice in Japan* (2011), electronic version is available at <http://www.unafei.or.jp/english/pages/CriminalJusticeJapan.htm>.

⁶⁷ *Ibid.*

⁶⁸ Taisuke Kanayama, *Transparency of Criminal Investigations in the United States and Japan*, Occasional Paper 06-06, Program on U.S.-Japan Relations, Harvard University (2006).

⁶⁹ *Ibid.*

Similar to Italy, Japan imitates United States in its criminal procedural law. In serious crimes, Japan also uses jury system to render a decision. The modification on jury system was made in 2009 after the criminal procedural law reform. This jury is a mix between the society and the judges, who will collectively render a decision. Such system is known as *saiban-in*, which is made to accommodate public opinion in court decisions. This system also aims to improve the public trust and awareness on judicial system, along with creating a democratic basis for judicial system.⁷⁰

⁷⁰ Matthew J. Wilson, *Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time*, Fordham International Law Journal, Vol. 33 (2009).

CHAPTER III

Pretrial Under KUHAP

A. The history of pretrial in Indonesia

During pre-independence period, there were two applicable penal systems in Indonesia—Dutch Indies. For European citizens, the applicable system was *Strafvordering* (Rv), and for the local citizens was *Inland Reglement* (IR), which was changed into *Herziene Indische Reglement* (HIR) due to the issuance of Staatsblad No. 44 Tahun 1941.⁷¹ The procedural law for Europeans had a better system and protect the basic rights of the accused. In contrast, *Inland Reglement* and *Herziene Indische Reglement* (HIR), put the local citizens as community in an occupied territory.

With respect to commissioner judge (*rechter commissaris*) provision, it can be found under the system for Europeans (Rv), as stipulated under the second chapter on *Van de rechtercommissaris*. This institution supervised whether coercive action, including arrest, search, foreclosure, or documents examination, were legal or not.

The commissioner judge acted as a supervisor on preliminary examination, which is a part of criminal justice process. This institution may also summon witnesses, accused, visiting their domicile, and examine along with conduct a detention to the accused. These authorities showed that the commissioner judge was active and had a large responsibility in preliminary examination. As a summary, *Van de rechter-commissaris* was authorized to conduct executive actions to summon relevant persons, including witnesses (Article 46) and the accused (Article 47), to visit their domicile (Article 56), and to conduct a detention and examine such detention (Article 62).

IR that stipulated criminal procedural law, was published on 3 April 1848 and had been enforced on 1 May 1848, for local citizens in Java and Madura, while there are different regulations—under *Ordonantie*—for local citizens outside those areas. These *ordonantie* were codified under the title *Recht-reglement buitengewesten* (Reglement Daerah Seberang, Stb. 1927-227), even though there was a hesitation from the Governor General Rochussen on the applicability of this law, so that it was under a probation period. Mr. Wichers had tried to improve this codification, and led to several amendments, which was issued under Staatsblad 1941 No. 44, under the title *Herziene Inlands Regelement* atau HIR.⁷²

The crucial part in the amendment from IR to HIR was the formation of *Openbaar Ministerie* (OM) or public prosecutor, which was placed under Pamong Praja when IR was applicable. With this amendment, *Openbaar Ministerie* was unified (*een en ondeelbaar*) and under the control of *Officier Van Justitie* and *Procureur General*.

⁷¹ Pursuant to the announcement of Dutch Indies Governor General on 3 December 1847 (Staatsblad No. 57), one of the legal framework that was applicable on 1 May 1848 was *Inlands Reglement* or IR. There were several applicable codifications during that time in Indonesia, namely: (1) *Reglement op de Rechterlijke Organisatie* (R.O) regarding the judicial organizational structure and judicial discretion; (2) *Inlandsch Reglement* (I.R) regarding civil case procedural law and criminal procedural law at *landraad* for local citizens (Indonesians) and Asians, while applicable codification in Java and Madura was *Rechtsreglement voor de buitengewesten* (Rbg, Stb.927-227); (3) *Reglement op de Strafvordering* (Stb.1849 No 63) regarding criminal procedural law for Europeans and those that had the same status as Europeans; and (4) *Landgerechtsreglement* regarding procedural law at *landgerecht* and stipulated minor cases for all citizens.

⁷² For the natives or local citizens, there were other courts such as *districtsgerecht* and *regentschapsgerecht*, in addition to provisions under IR dan HIR. Outside Java and Madura, there was also a *magistraatsgerecht*, which according to *Reglement Buitengewesten*, was used to handle minor cases. As the highest level court in Dutch Indies, an institution titled *Hooggerechtshof* was formed and its decisions were called as *Arrest*. Its duties were stipulated under Article 158 *Indische Staatsregeling* (IS) dan RO.

Other changes can be seen from the following aspects: IR did not have an independent prosecutor, while HIR incorporated such provision, even though there was no *volwaardigh*; *Regen*, patih and the Head of *Afdeeling* (*Resident* or assistant *Resident* under IR acted as investigator, HIR did not incorporate this); temporary detention under IR did not need specific requirements, while HIR incorporated such specific requirement; Temporary imprisonment ordered by the assistant *Resident* was replaced by arrest (*gevangenhouding*) for 30 days, which can be extended for another 30 days, with approval from the Head of *Landraad*; Temporary imprisonment or detention was only allowed for major crime (subject to five years of imprisonment, Article 62 HIR). House search needed an approval from the Head of *Landraad*, unless the accused was caught red-handed and under urgent circumstances (Article 77 and 78 HIR); the authority to foreclose an asset for evidence was delegated to public prosecutor.

HIR introduced a unified public prosecutor, which no longer under *Pamong Praja*, instead it was placed under *officer van justitie* and *procuceur general*. While HIR was implemented in Java and Madura, particularly in major cities such as Jakarta, Bandung, Semarang, Surabaya, and Malang, IR was still used in other cities outside Java and Madura.

After Indonesia's independence in 17 August 1945, colonial laws and regulations, including criminal procedural law, were still applicable, due to Article II of Transitional Rules of the 1945 Constitution, until a new law was issued to replace them.

Pursuant to the said Article, HIR was still applicable in Indonesian courts and it was reaffirmed under Article 6 of Law No. 1 Drt/1951. This Law aimed to unify two criminal procedural law that was divided into procedure for *Landraad* and procedure for *Raad van Justice*. This dualism was caused by the differentiation of judicial system for native Indonesians and Europeans.

Due to the implementation of HIR after Indonesia's independence, the concept of *Regter Commissaris* was no longer used, because such concept was not incorporated under HIR. While there was a supervision from the judge under HIR, for instance regarding the extension of temporary detention (Article 83 C ayat (4) HIR), in practice, this supervision was deemed useless, because such supervision was confidential and merely a bureaucratic matter.

Within that process, every approval for detention extension was signed by the judge, or any other appointed official, without further examination. It caused many detention lasted for years and the accused had no other legal effort to challenge this. The accused only waited for the judge to release him during trial.

Pursuant to the 1974 KUHAP Draft Bill, similar supervision was placed under the oversight of commissioner judge (*hakim komisaris*). The newly-introduced institution under the 1974 KUHAP Draft Bill led to an improvement of the relationship between the police, prosecutor, judge, and commissioner judge, with their own duties and responsibilities.

B. Oversight towards arrest and detention under KUHAP Draft Bill and its discussion

The plan for KUHAP Draft Bill was initiated by the President's letter, dated 15 August 1967, No. R 07/Pres/8/1967⁷³, which encouraged a Cipayung-Bogor meeting on 19-20 December 1967. The meeting resulted in an agreement on the rule of law enforcement in form of legal certainty and

⁷³ Bambang Purnomo, *Orientasi Hukum Acara Pidana Indonesia*, (Yogyakarta: Amarta Buku, 1984), pg. 11.

human rights protection, based on fairness and objective truth in case handling, starting from preliminary examination, prosecution, trial, summon, cost, and detention.

Such agreement was further stipulated under a joint directive, issued by the Minister of Justice, Chief Justice of MA, Attorney General, and the Head of the National Police, on December 1974, known as Cibogo I joint directive. This agreement was expanded into a plan on the improvement of Indonesian criminal procedural law, by including law enforcers, which was stipulated under Cibogo II agreement, dated 11 July 1967, and Cibogo III agreement, dated 23 February 1973.⁷⁴

After Cibogo I meeting in 1967, a committee was formed under the Department of Justice to draft the Indonesian criminal procedural law. Subsequently, the 2nd National Law Seminar was held in Semarang, which discussed the Criminal Procedural Law and Human Rights. This seminar was organized by the National Law Development Institution (LPHN, now BPHN).

Based on the seminar's discussion, an inter-department team (Attorney General's Office, Department of Defense and Security, The National Police, and Department of Justice) was formed, under the leadership of Minister of Justice, to discuss basic principles that will be incorporated under the Draft Bill on Criminal Procedural Law (referred as RCUHAP 1974).

RKUHAP 1974 was submitted to the Cabinet Secretary, who asked for further comments from the MA, Attorney General's Office, Department of Defense and Security, the National Police, and the Department of Justice, through several coordination meetings. The RCUHAP 1974 was then proposed to the House of Representatives in 1974, under the Minister of Justice Letter No. 116/SM/K/11/74 on Draft Bill Concept on Criminal Procedural Law, which was addressed to the President, dated 19 November 1974. RCUHAP 1974 re-introduced supervisory function by the judge, under the title commissioner judge (*hakim komisaris*).

The concept of commissioner judge was introduced due to many problems on coercive action, and also as an effort to protect human rights during criminal case handling, along with to prevent conflict between investigators from different institutions. The problems that were the point of discussion were illegal arrest and detention (civil liberty violation), illegal foreclosure (civil ownership violation), and illegal search.

In addition, the concept of commissioner judge was in line with the mandate under Article 27 of the Law No. 14 of 1970 on Judicial Power, which stated that judges do not merely involve during trials, but also actively involve before and after trials. The commissioner judge provision affected the appointment of related institutions within criminal cases handling.

Pursuant to the active involvement of the judge, preliminary examination duties will be handed to commissioner judge, while the oversight after the decision being rendered will be handed to the Head of competent court (Article 33 Law No. 14 of 1970). Under RCUHAP 1974, the provisions regarding commissioner judge were incorporated in the following article:

Article 99

- (1) In every district court will be appointed one or more commissioner judge for criminal cases for two years period.
- (2) The appointment and dismissal of a commissioner judge will be done by the Minister of Justice.
- (3) Commissioner judge during his service will be released from the position as a trial judge.

⁷⁴ *Ibid.*

- (4) For commissioner judge operational at the competent district court, a secretariat will be formed.

Elucidation

According to Article 11 (1) of the Law No. 14 of 1970, which stipulates that an institution organizing the general judicial process, religion judicial process, military judicial process, and state administrative judicial process that has own organizational structure, administration, and finance, it is determined that under Article 99 (2) that the appointment of a commissioner judge will be done by the Minister of Justice. The relevant materials from district court will be submitted to the Minister of Justice via the Chief Justice of MA. To prevent any issues that may hamper the examination, a commissioner judge will be released from his duty as a trial judge.

Article 100

- (1) Commissioner judge supervises all arrest, search, house search, foreclosure, and documents examination.
- (2) Commissioner judge may conduct an arrest, detention, search, house search, and documents examination upon the request from investigator/prosecutor.
- (3) If there is an investigation conducted at the same time by different institution, Commissioner Judge, upon investigator request, may determine which investigator that can continue such investigation.
- (4) Commissioner Judge may receive objectiones from parties that subject to coercive actions.

Elucidation

The formation of commissioner judge position to supervise arrest, detention, search, foreclosure, and documents examination, was meant to protect the accused's human rights that have been reduced, so that such action will not be too excessive or even eliminate such human rights which leads to the loss of the accused. In addition, Commissioner Judge is authorized to prevent the conflict between investigators from different institutions, where such conflict will hamper the accused's right to a fairness of a trial. In the event of conflict between investigators, commissioner judge will determine which investigator that will continue the investigation.

Article 101

Commissioner judge is authorized to obtain relevant statements from related officials and parties.

Elucidation

Related officials are those who has connection with the ongoing criminal investigation, such as official under the Post and Telecommunication Office that responsible for documents examination.

Article 102

If Commissioner Judge rejects investigator's request as stated under Article 100 (3), the investigator may file such rejection to the Head of competent district court for a settlement.

Elucidation

Due to the fact that commissioner judge is an official in a district court, and responsible for the criminal cases within the competent district court, the decisions from commissioner

judge may be annulled by the Head of district court. If such event occurred, the Head of district court may issue different discretion to ease the investigation and the continuity of such case.

Article 103

- (1) If any action under Article 47 (1) contradict with the law, commissioner judge will notify this issue to the investigator.
- (2) If the investigator does not comply to the notification, commissioner judge will further notify the Head of the District Court and copied it to the investigator.
- (3) Commissioner judge's notification to the Head of the District Court under paragraph (2) will be a consideration for the trial judge who handle the case.

Pursuant to the abovementioned provisions under RKUHAP 1974, commissioner judge is an actively-involved institution during preliminary examination. Commissioner judge is not merely a supervisory institution in preliminary examination, but also has a larger authority to settle the conflict between investigators. During that time, both the police and the prosecutor have the authority to investigate, as stipulated under the Law on Police and the Law on Prosecutor, which leads to many conflicts between the two institutions.

The rationale behind the concept of commissioner judge was influenced by the European Continental system, particularly the Netherlands, where the criminal procedural law aims to seek and discover the truth, along with to implement the criminal law. The criminal law has the fundamental principle where there is no crime and no punishment without a pre-existing penal law (*nullum delictum nulla poena praviae sienta lege poenali*).

This principle was incorporated under Article 1 of the Netherlands *Wetboek van Strafrecht*, which affects the whole process of criminal case handling, including investigation, prosecution, and search. A person is declared as an accused or a defendant, the law obliges there is a strong allegation that such person has committed a crime.

A detention must also fulfill the requirements that such person is guilty for the crime that has been committed. It also applies to house search that there must be a strong allegation that a crime has been committed. Otherwise, the accused may file a challenge (*verzet*) that may be approved by the judge.

The concept of commissioner judge also aims to oversee the process of criminal procedural law, particularly the investigator and prosecutor, who conduct coercive action in form of arrest, detention, search, foreclosure, and documents examination, as the purpose for preliminary examination. The supervision from commissioner judge is a right to control from the judicial institution to the executive institution. This is the reason why the judge is given a broad authority to intervene the investigator and prosecutor during preliminary examination.

In the discussion process, there were many pros and cons regarding the concept of commissioner judge, due to the large authority that he owns. The pros and cons was started when the RKUHAP 1974 was submitted to the House, including within the House and the government. Strong disapproval came from the prosecutor and the police. The police viewed that its authority is in accordance with HIR, Law on Police, and Law on Prosecutor.

There was also an assumption from the police that there were many institutions involved during preliminary examination, so that commissioner judge will only act as a bureaucratic obstacle. Meanwhile, the group that supported this concept viewed that investigation process needs

horizontal oversight from the commissioner judge, in addition to vertical oversight from the police or prosecutor, due to many violations when conducting coercive actions.⁷⁵

The debate was stopped when the RKUHAP 1974 discussion was postponed, due to the end of Oemar Seno Adji's service as the Minister of Justice. Afterwards, there was no discussion on commissioner judge during 1974 to 1979. A new meeting in 1979 was initiated by Minister of Justice Mudjono, who invited the Attorney General, Head of National Police, and representative from the MA.

The meeting led to another debate, because RKUHAP 1979 erased commissioner judge and changed it into the authority of a district court. There were no longer provisions on violation of coercive action, and neither the actively-involved judge in preliminary examination. This situation can be seen from the Government statement read by the Minister of Justice before the House plenary meeting, which discussed the Draft Bill on Criminal Procedural Law, dated 9 October.⁷⁶

The new RKUHAP was officially read during the House plenary meeting on 13 September 1979. There were no comments from the lawmakers in regards to commissioner judge, even though they questioned the minimum level of oversight against coercive action in inquiry, investigation, and prosecution phases, particularly on arrest and detention.

In its comments, the Development Functional Faction (*Fraksi Karya Pembangunan - FKP*), delivered by Albert Hasibuan, asserted the importance of judge ruling regarding the legality of an arrest and detention,⁷⁷:

“...In addition to our intention to make fundamental improvement on the provision regarding arrest and detention, we viewed that it is also important for a correct oversight in form of judge ruling regarding the legality of arrest and detention”.

Albert Hasibuan's response was triggered by a case involving Yan Bodong, few weeks earlier before the plenary meeting. Regarding the case Albert said that:

“...Yan Bodong has been detained at Metro Jaya Police Office for a year and never went to trial. He has been charged with Article 363 of the Criminal Code (KUHP). He felt that his status has been disregarded by the law enforcers and he sent a letter to legal aid institution for an legal assistance. He said that he has been tortured in the detention”.

Albert also reminded the lawmakers regarding the event on previous months before the plenary meeting:⁷⁸

“... Six underage children were detained, because they made obstacles on the street. They were detained in a small room, with minimum ventilation in South Sumatera. The day after the detention, they were found dead, because they inhaled gas exhaust from a generator”.

⁷⁵ See Loebby Loqman, *Praperadilan ... Op.Cit.*, pg. 31. Lukman's notes was based on the hearing between the House and academics from the Faculty of Law of Universitas Indonesia in 1974.

⁷⁶ President Mandate No. R.06/PU/IX/1979 to the House, RKUHAP is submitted for discussion. RKUHAP was read during House plenary meeting on 13 September 1979. There were four level of discussion: First Level, Government statement before the House plenary meeting; Second Level, general comments from representatives and government response; Third Level, report on joint discussion between Commission I and III of the House; Fourth Level, final comments (*stemmotivering*) from factions.

⁷⁷ See comments from United Development Faction regarding the Draft Bill on Criminal Procedural Law, in Department of Information Legal Bureau of the Republic of Indonesia, *Undang-undang Hukum Acara Pidana dan Proses Pembahasannya*, (Jakarta: Deppen, 1981), pg. 172.

⁷⁸ *Ibid.*

Albert Hasibuan viewed that the oversight towards coercive actions is necessary to prevent similar events from happening.

Meanwhile, comments from the United Development Faction (*Fraksi Persatuan Pembangunan - FPP*), delivered by Abullah Basyir, stated that:

“... Comparable to a double-edged sword, the history knew a document called “*lettre De Cachet*” in France, which was a detention order that has been signed and stamped by the King, and ready to be used any time. *Lettre de Cachet* has victimized many innocent people in prison, or those that must faced *guillotine*. *Lettre de cachet* had been abused and became a commodity” he added “.....we viewed that the detention must apply the principle of ‘due process by the court/fair trial’ so that there will be a checks and balance mechanism”.⁷⁹

The Indonesian Democratic Party Faction (*Fraksi Partai Demokrasi Indonesia FPD*) also gave a critical comment on RCUHAP, as delivered by V.B da Costa, stating:⁸⁰

“... is there any different motivation regarding the arrest and detention under colonial HIR and the independent country? There is not. No difference whatsoever. Arrest first, detain first, evidence can be found later. In our view, this is a colonial power character that need to be removed. The current number of arrest and detention are larger than the period of colonialism...”.

Furthermore, the Armed Forces Faction (*Fraksi ABRI*) gave a more general comment, as delivered by Danny SH, stating:⁸¹

“... with respect to supervision, the Draft Bill has incorporated the right and obligation of every officials in investigation, prosecution, and trial. However, we don’t see any coordination system and oversight towards each duties. To prevent undesirable issues, there should be a system to overcome such issues...”.

From all factions, only FPP that did not comment on coercive action. It only gave a general comments on government plan regarding criminal procedural law.

On 23 September 1981, the Government gave its response towards lawmakers comments. In regards to arrest, detention, and supervision under the Draft Bill, Mudjono said that:⁸²

“... Responding to factions comments that there are no supervision system towards law enforcers responsibilities, we viewed that many articles under the Draft Bill have stipulated such supervision and relationship between law enforcers. The supervision is conducted by their own superior, which is a “built-in control” without any prejudice. If such supervision is not enough, checks and balances between law enforcers may be stipulated under this Draft Bill, according to a proper administration method and system, horizontally or vertically...”.

The response showed that the government intentionally wanted to erase the supervision against coercive action in investigation and prosecution phase. In general, Mudjono’s response was more

⁷⁹ *Ibid.*, pg. 199.

⁸⁰ *Ibid.*, pg. 238.

⁸¹ *Ibid.*, pg. 247.

⁸² *Ibid.*, pg. 259.

about the comparison between HIR and the Draft Bill. While there was no response regarding provisions on commissioner judge that have been erased from the Draft Bill.

Commenting on the situation, Greg Churchill wrote:⁸³

“... When the first KUHAP concept introduced, the public celebrates, because for the first time Indonesia will replace one colonial codification. It was considered as a good legislation, because during transitional period, the most common procedural law was adopted. It was not the best criminal procedural law, which was only applicable for Europeans and Far East during colonial time. After years of discussion, there are some idea that this law must be revised and codified as Indonesian legislation ...”.

When RCUHAP proposed by the Government, during Minister of Justice Mudjono period in late 1979, there were criticisms from the society, including the Indonesian Legal Aid Foundation (YLBHI), Indonesia Advocates Association (Peradin), academics, and the press, who viewed that the draft bill was worse than HIR that will be replaced. These parties argued that the Draft Bill was still authoritarian and did not protect the rights of the accused/defendant. Afterwards, a group named “*Komite Aksi Pembela Pancasila dalam KUHAP*”, consisted of YLBHI and universities legal aid institutions, academics, and the press, rejected the Draft Bill and demanded the Government to revoke the Draft Bill.

The group proposed an alternative Draft Bill, which was also followed by Peradin. When a meeting between the group, Peradin, and the Government—led by Mudjono—was held, the Government rejected such recommendation, but agreed to arrange a new Draft Bill with the House, by incorporating the recommendations from the group, Peradin, and other institutions.

The available Draft Bills were competing each other, as explained by Greg Churchill:⁸⁴

“... in the process, there was a concept proposed to the House. Followed by meetings and discussions. There was also a concept from the Prosecutor. The key actor during that time was Bob Haz Nasution, a prominent prosecutor. The Prosecutor was very repressive back then, and did not bring Indonesia to human rights enforcement, but served the interest of law enforcers. It caused heavy criticism from the public and legal practitioners. At the end of the day, the House went back to the initial draft bill, and incorporated several changes. It was very political. I cannot comprehend the situation, where at the same time, there was also another Draft Bill that was being proposed to be KUHAP...”.

The House and the Government agreed to hand over the Third Level Discussion on RCUHAP to the Commission III and I. For almost eight months, this team continued the discussion on several phases: (a) general discussion;⁸⁵ (b) drafting the substance; and (c) finalization.⁸⁶

During the Third Level Discussion, there were many inputs and critics from the public. One of the most significant input was the idea on pretrial. It was officially recommended during a meeting with Mudjono by the ‘*Komite Pembela Pancasila dalam KUHAP*’, and it was supported by Peradin.

⁸³ ICJR limited discussion monograph, *Commissioner Judge Under RCUHAP 2012*.

⁸⁴ *Ibid.*

⁸⁵ From 24 November 1979 to 22 May 1980 by the joint commission.

⁸⁶ A joint meeting on 22 May 1980 formed a team to finish and finalize the Draft Bill. The team met from 25 May 1980 to 27 February 1981 at Mega Mendung, Bogor, and agreed on the Draft Bill provision, excluding some postponed issues (this was called as the First Book). Streamlining on the language and the substance was conducted on 7-9 September 1981. Validation by the Joint Commission plenary meeting was held on 10 September 1981, and approved the fifth draft or the final draft.

Mudjono accepted the recommendation and asked assistance from experts, namely Gregory Churchill, an American lawyer who lectured at the Faculty of Law of Universitas Indonesia. The group recommended *habeas corpus* and bail to be incorporated into RKUHAP.⁸⁷

The team at the House finally agreed a document known as “13 Agreement” on 10 Desember 1979, covering many topics, including criminal process oversight:⁸⁸

“...supervision over criminal case handling process will be conducted by intensifying (a) “*built in control*” (a structural-procedural oversight in every level of process, named as vertical oversight); (b) horizontal oversight. If (a) (b) are not enough, before a case goes to trial, there may be an institution similar to *habeas corpus* or pretrial.”

However, the recommendation on *habeas corpus* was considered too progressive, and it was not incorporated under the concept of pretrial.⁸⁹ According to Adnan Buyung, his concept regarding pretrial was stronger than the current provision under KUHAP, which was reduced into a merely formal examination.

For instance, if a person challenge his detention, the judge will ask whether there is an arrest warrant. If there is a warrant, it is enough. Note that the original concept of pretrial questioned the legal basis of such arrest warrant, including the evidences and urgent interest that led to the issuance of an arrest warrant.⁹⁰

The original concept was changed into the current practice of pretrial, which is deemed as neutralizing conflict of authority between the investigator and prosecutor. There was also a complicated process regarding the competence of investigation between the prosecutor and the police.

Therefore, the supervision over coercive action by the court during investigation by the police and during prosecution by the prosecutor, was considered an intervention. Due to this reason, the concept of pretrial was reduced for the sake of “functional differentiation”.

The government statement explained that:

The two institutions—the police and prosecutor—that are authorized to investigate, have led to a confusion, due to the lack of clarity of duty between the function of investigation and prosecution...this needs a clearer categorization.

The functional differentiation, which separated the investigation and prosecution as acknowledged now, was meant to overcome the confusion due to the concept under HIR. However, the government did not elaborate the negative impact of such confusion towards the rule of law and human rights. Based on experience, if the prosecutor acts as an investigator, the examination can be

⁸⁷ See Universitas Indonesia Legal Documentation Center Memorandum, 8 November 1979. See also Gregory Churchill, *Habeas Corpus: Peranan Upaya Habeas Corpus dalam Pengawasan Pelaksanaan Hukum Acara Pidana di Amerika Serikat*, paper presented at Pretrial Seminar held by Peradin in Jakarta, 29 September – 3 Oktober 1982.

⁸⁸ Legal Bureau of the Department of Information of the Republic of Indonesia, *Undang-undang ... Op.Cit.*, pg. 272.

⁸⁹ The concept of bail was rejected due to several reasons. One of them being the possible discrimination between the rich and poor accused/defendant.

⁹⁰ See “Buyung: Tidak Perlu Ada Hakim Komisaris”, on <http://hukumonline.com/detail.asp?id= 9001&cl=Berita>, access 27 June 2013.

duplicated, and even there is a competition between the two institution, which creates losses for the justice seekers.⁹¹

Government statement was responded by FKP, "...it does not solve such confusion and dualism within the investigation, and there is no clear direction". They also added:

"...one condition cannot be forgotten...the prosecutor is responsible before the court on the implementation of criminal procedural law...starting from the investigation to the prosecution so that they have a strong case. It may be concluded that the Draft Bill provisions regarding the investigation has the tendency to compartmentalize the investigation, prosecution, and trial, which could lead to disconnection of a judicial process of a case. This will not bring a positive impact for the accused as justice seeker whom human rights have been violated due to an abuse during the process".⁹²

This was responded by the Government, by saying "...those have been incorporated under the Draft Bill".

In the Third Level Discussion between the House and the Government, the concept of pretrial was improved under the Draft Bill. During the discussion, on behalf of the Joint Commission III and I, on 23 September 1981 Andi Mochtar said:⁹³

"...pretrial as a horizontal control mechanism to examine and decide the legality of an arrest, a detention, and other issues, including compensation request or rehabilitation if a case does not go to the court".

During this phase, the discussion on pretrial was no longer complicated, unlike the debate on arrest, detention, search, which was on heat for three months. Legal aid provision also discussed lively.⁹⁴ The discussion on pretrial was concluded, because most of the team agreed that "...the protection of human dignity will not be perfect if there is no tool to protect the human rights from arbitrary action from law enforcers, similar to colonial period".⁹⁵ The discussion, however, gives a limitation that the court may not intervene the police and prosecutor on coercive action.

At the Fourt Level discussion, which is the final phase, every faction gave its final comments (*stemmotivering*), and most of them applauded the result of the discussion and some of them highlighted new provisions under the Draft Bill. Only FKP that commented on pretrial, as delivered by Taufik Hidayat:

" ... realizing that the good or the bad practie of law enforcement institution depends on the skill and the honesty of the human resoures, therefore under this law, the oversight mechanism is given a specific provision and attention...".

"... The pretrial as a supervisory institution, in which a judge is appointed to examine and decide the legality of an arrest or a detention or any other coercive action, to examine whether it is reasonable or not to stop the investigation or prosecution, and to give compensation or rehabilitation to the accused that does not go to trial. Even though

⁹¹ See Luhut M.P Pangaribuan, *Lay Judges ... Op.Cit.*, pg. 46.

⁹² FKP General Comment on Department of Information Legal Bureau of the Republic of Indonesia, *Undang-undang ... Op.Cit.*, pg. 172.

⁹³ *Ibid.*, pg. 272.

⁹⁴ See Drs, I.G.N Gde Djaksa, *Proses Pembahasan Penyusunan KUHAP Menuju Perlindungan Hak-Hak Asasi Manusia*, paper published on 10 December 1981, pg. 14-15.

⁹⁵ *Ibid.*

pretrial judge has a specific duty, he is still an officer/judge in the competent district court, because pretrial is not an independent institution...pretrial judge must also be differentiated from a commissioner judge, because he does not actively involved in supervision, and his appointment is done by the Head of District Court, it is also not permanent position, in which the district court will appoint a pretrial judge after there is a request for pretrial, so the procedure is similar to judge appointment in regular cases...".

"... pretrial, which becomes the trademark of the criminal procedural law will be the symbol of human rights protection in Pancasila state".⁹⁶

From its initial discussion, the issue on supervision has created a suspicion on the concept of commissioner judge, which will actively involved in the oversight of the investigation and prosecution. FPDI, as delivered by IGN Gde Jaksa, stated that:⁹⁷

"... the protection for human dignity will not be perfect if there is no tool to protect such human rights from the arbitrary action of law enforcers, as we experienced during colonial time...with the pretrial institution, any action that will degrade human rights, is subject to strict supervision, both vertical and horizontal with other law enforcement institution and the related third parties...".

On 31 December 1981, the President signed the RCUHAP, and it was issued as the Law No. 8 of 1981.

In essence, provisions regarding pretrial under KUHAP was actually a new recommendation, made by the House and the Government, by accomodating recommendations from the public. The incorporation of pretrial is regarded as form of democratic legislation, and disregard the previous version of KUHAP Draft Bill. While pretrial was accomodated under Law No. 8 of 1981 on KUHAP, it is unfortunate that the duty and responsibilit of a pretrial is limited. It was not merely due to the limitation on knowledge regarding pretrial at that time, considering it was a new concept, it was also due to the repressive political situation, which made it impossible to make a broader human rights protection.

The pretrial that has been agreed upon, must be seen as the most optimum result that may be achieved, considering the political power position, from the police and prosecutor, which was heavily power-oriented. Some parties said that the pretrial provisions under KUHAP are not comprehensive enough, which was acceptable, because there was no genuine concept that was discussed, and also the lack of supporting materials and documents for the discussion. The team only had a limited materials on such concept, not to mention that there was minimum numbers of literature on criminal procedural law. No wonder that it resulted into a weak provisions on pretrial and supervision. Luhut M. Pangaribuan further explained that:

"...At that time, when the debate on pretrial provision under KUHAP, we only knew about human rights documents and *habeas corpus* from Greg Churchill, who informed how *writ habeus* was implemented in the United States. I was sure at that time that there is no textbook on criminal procedural law theory, not to mention on *habeas corpus*. There was only the book written by Wirjono Projodikoro about criminal procedure at the court. In essence, criminal procedural law implements criminal law. That was the only theory: by who and when. Therefore, there was no concept or theory of criminal procedural law being discussed. They were satisfied when human rights were incorporated under KUHAP. It

⁹⁶ Legal Bureau at the Department of Information of the Republic of Indonesia, *op. cit.*, pg. 329.

⁹⁷ *Ibid.*, pg. 357.

leaves the implementation issue. All provisions regarding human rights under KUHAP were not implemented. There was no one that has the skill to evaluate it".⁹⁸

C. Pretrial in the examination of the legality of arrest and detention

The term "pretrial" has different meaning on its literal definition and objectives. From its literal meaning, "pretrial" is defined as prior to court examination (before examining prosecutor's indictment).⁹⁹ However, under KUHAP, there is no provision stating that a pretrial judge will conduct preliminary examination or even leading it.

Pretrial judge may not conduct search, foreclosure, or any action that is commonly known under preliminary examination. He also may not decide whether a case may go to trial or not, which actually the responsibility of the prosecutor. Pretrial judge does not the authority to examine the legality of a search or foreclosure conducted by prosecutor and investigator. Note that these two issues are important, where it relates to human rights. Illegal search is a violation over a person's domicile and illegal foreclosure is a violation over a person's ownership.¹⁰⁰

The main objective of a pretrial is the law enforcement and the protection for the accused during investigation and prosecution, as stipulated under Articles 77-83 of KUHAP, as a supervision over accused's right in preliminary examination. This supervision is conducted by means of: (a) vertical control; and (b) horizontal control between the investigator, prosecutor, the accused and his family, including other parties.¹⁰¹

Pretrial under KUHAP is stipulated under Chapter X, First Section, as a part of judicial authority of a district court. Pretrial is not independent from the whole judicial institution. It is neither an institution that may render a decision regarding a criminal case.

Pretrial is only a new institution that is integrated into a district court. It is not outside nor has the same position with district court. Instead, it is a division within a district court, and has an integrated judicial administrative, personnel, equipment, and finance with a district court, and it is under the control of the Head of District court.¹⁰²

Pursuant to KUHAP, pretrial is defined as¹⁰³ district court's authority to examine and decide: a. the legality of an arrest/detention, upon the request of the accused or his family, or other party based on a power of attorney; b. the legality of the suspension of inquiry or prosecution for the sake of law and justice; c. request on compensation or rehabilitation from the accused or his family, or other party based on a power of attorney, in the event that the case does not go to trial.

The provision under Article 1 (10) of KUHAP is reaffirmed under Article 77 of KUHAP, which states that a district court is authorized to examine and decide the legality of arrest, detention, investigation or prosecution suspension, compensation or rehabilitation for a person whose case does not undergo trial.

⁹⁸ ICJR limited discussion monograph, *Commissioner Judge Under RRUHAP 2012*.

⁹⁹ See BPHN, *Penelitian Hukum Tentang Perbandingan Antara Penyelesaian Putusan Praperadilan Dengan Kehadiran Hakim Komisaris Dalam Peradilan Pidana* (2007).

¹⁰⁰ *Ibid*.

¹⁰¹ See Moch. Faisal Salam, *Hukum Acara Pidana Dalam Teori dan Praktek*, (Bandung: CV. Mandar Maju, 2001), pg. 322.

¹⁰² See M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP Pemeriksaan Sidang Pengadilan, Banding, Kasasi dan Peninjauan Kembali, Edisi Kedua*, (Jakarta: Sinar Grafika, 2006), pg. 1.

¹⁰³ Article 1 (10), KUHAP.

Elucidation of Article 77 of KUHAP states: “the prosecution suspension is not the suspension for the public interest, which is the authority of the Attorney General”. Article 80 of KUHAP states: “the request to examine the legality of investigation or prosecution suspension may be filed by the investigator or prosecutor or third party that has interest to the Head of District Court by explaining the argument”.

The prosecutor needs to prevent itself from pretrial based on Article 80 of KUHAP. A good coordination with the investigator is also an effort to prevent the prosecutor being involved in a pretrial.¹⁰⁴

The duty of pretrial institution in Indonesia is indeed limited. Under Article 78 KUHAP, in conjunction with Article 77 of KUHAP, states that this institution executes district court’s duty in: (a) examining the the legality of an arrest/detention, and the suspension of inquiry or prosecution; (b) compensation and or rehabilitation for a person whose criminal case is terminated at the stage of investigation or prosecution.

Pretrial is led by a single judge appointed by the Head of District Court, and he is helped by a court clerk. In its elucidation, Article 80 aims to enforce law, fairness, and truth by means of horizontal supervision. Pretrial is not an independent institution, by only a part of the whole judicial system. Pretrial is authorized to conduct the following responsibilities:

- a. the legality of an arrest, detention, and termination of investigation or prosecution (unless it is the authority of the Attorney General) (Article 77);
- b. compensation and or rehabilitation for a person whose criminal case is terminated at the stage of investigation or prosecution (Article 77).
- c. The legality of a foreclosure for the purpose of evidence discovery (Article 82 (1) and (3)).
- d. A demand for compensation from a suspect or his heir for the arrest or detention and other actions without any lawful reason or due to a mistake with regard to the identity or the applicable law, whose case has not been submitted to the district court (Article 95 (2)).
- e. A request for rehabilitation by a suspect due to arrest or detention without any lawful reason or a mistake with regard to identity or the applicable law, whose case has not been submitted to the district court (Article 97 (3)).

Article 95 is the basis for the accused, defendant, or convicted, to request for compensation, in addition to the legality of arrest, detention, prosecution, and trial. It is also the basis for other unreasonable actions or any other coercive action, which causes material losses (*dwangmiddel*) such as: (a) house entry; (b) search; and (c) confiscation of evidence or documents. These matters are incorporated under Article 95, due to the importance of protection towards ownership right and privacy right against unlawful action.

The abovementioned explanation shows that pretrial is not an independent institution. It is only run the authority of a district court that are delegated by KUHAP, in addition to other district court’s responsibilities. Prior to KUHAP, the district court organize trials and decide criminal and civil cases. After KUHAP, it has more authorities to examine the legality of arrest, detention, foreclosure, termination of investigation/prosecution.

It can be seen under Article 1 (10) of KUHAP, which states that pretrial shall be the authority of district court to hear and decide: (1) legality of an arrest and or a detention; (2) the legality of a termination of investigation or prosecution; (3) request for compensation or rehabilitation from a

¹⁰⁴ Article 1 (10), KUHAP.

suspect or his family or other parties based on a power of attorney granted to them whose case has not been brought before the court.

The main objective of a pretrial is the law enforcement and the protection for the accused during investigation and prosecution

C.1. Examine and decide the legality of coercive action in pretrial

The previous paragraph discussed the authority of pretrial institution. This research, however, limits its study on the supervision of detention by means of pretrial. The following paragraphs will explain the authorities of pretrial under KUHAP, to examine and decide the legality of an arrest or a detention.

C.1.1. Detention under KUHAP

The provisions on detention refers to Articles 20-31 of KUHAP. Detention under KUHAP is defined as the placement of a suspect or a defendant in a certain place by an investigator or public prosecutor or a judge under his stipulation, in matters and according to the procedure as regulated under KUHAP.¹⁰⁵ Based on the said definition, every law enforcement institution is authorized to execute a detention. Detention under KUHAP is divided into:

- (1) Detention for the purpose of investigation. In this case, the investigator is authorized to conduct detention. The purpose of investigation will be determined objectively based on facts, depending on the need from the investigator to conclude a perfect investigation for trial examination. If the investigation is enough, detention is no longer needed, unless there is another reason to detain the accused.¹⁰⁶
- (2) Detention for the purpose of prosecution, conducted by the prosecutor.¹⁰⁷
- (3) Detention by the court, for the purpose of examination before the court. Penahanan yang dilakukan oleh Peradilan. Penahanan ini bermaksud untuk kepentingan pemeriksaan di sidang pengadilan. The judge has the authority to make a detention based on the purpose of examination during trial.¹⁰⁸

C.1.2. Grounds of detention

The grounds for detention cover the legal ground, condition, and the requirements that give the opportunity to the law enforcers to execute detention. These elements are supporting each other, and if one is absent, then the detention will not fulfill the legality principle. According to Yahya Harahap, while the absent of one element will not be classified as illegal, this condition is still considered as not fulfilling the legality principle. For instance, if it only fulfills the legal grounds (objective element), but not supported by necessity (subjective element) and other requirements, then such detention is irrelevant and is not urgent.

a. Legal element

The first element is the legal basis, because the law determines which articles that can be used for detention. Not every crime is subject to detention. The Law has determined, generally or specifically, which crime that is subject to detention.

¹⁰⁵ Article 1 (21), KUHAP.

¹⁰⁶ Article 20 (1), KUHAP.

¹⁰⁷ Article 20 (2), KUHAP.

¹⁰⁸ Article 20 (2), KUHAP.

Article 21 (4) of KUHP states that a detention may be arranged against a person who committed a criminal act or abetted such criminal act that is subject to five years of imprisonment or more. It means that if the criminal act is subject to less than five years of imprisonment, detention is not allowed. Criminal act that is subject to more than five years of imprisonment is crime against life, stipulated under Chapter XIX of KUHP (Article 338 and so forth), and also special crimes that are regulated after the issuance of KUHP.

In addition to the abovementioned provisions, a detention may also be arranged for a person who commits a crime that is subject to less than five years of imprisonment. This may be done if such crime is considered has significant impact to the public order, or it threatens the life of a person.¹⁰⁹

b. Element of Concern

This element stresses the necessity of a detention based on the suspect/defendant's conditions. It is subjectively evaluated by the law enforcer. The conditions are stipulated under Article 21 (1), which are: (1) the suspect/defendant will escape; (2) damage or make evidence disappear; (3) or or repeat the criminal act.

These situations correspond with the suspect/defendant himself. While the law enforcer that determine the level of concern, based his determination on the subjective evaluation. In practice, the element of concern will be determined by the subjective evaluation of the related official. There are, however, several indicators that may be used to evaluate the subjective element:

1. The possibility to escape can be seen from suspect's mobility, profession and occupation, family's support, there is no known domicile, or no permanent resident, etc.
2. Damaging or making evidence disappear can be seen from how many evidences that have been obtained by the investigators. It also can be seen from the lack of evidence and there is a possibility to make evidence disappear. Further, it also can be seen from suspect's access and capability to make evidence disappear or threatening key witnesses.
3. Repeating criminal act can be seen from suspect's criminal record, victim's condition, and the type of criminal act: rape, manslaughter, narcotis, terrorism.

c. Fulfilling the requirement under Article 21 (1) of KUHP

In addition to the abovementioned elements, the detention must fulfill the requirements under Article 21 (1) KUHP: (1) a suspect or a defendant who is strongly presumed to have committed a criminal act; (2) there is sufficient evidence.

Note that the detention requirements are different with an arrest, where evidence is the crucial factor. An arrest is based on a sufficient preliminary evidence. While a detention is based on sufficient evidence. Therefore, the level of evidence within detention is higher than an arrest.

KUHAP Elucidation does not elaborate "sufficient evidence". However, pursuant to Article 62 (1) of KUHP and Article 75 of HIR, detention must be based on statements that indicate the suspect is

¹⁰⁹ As intended in Article 282 paragraph (3), Article 296, Article 335 paragraph (1), Article 351 paragraph (1), Article 353 paragraph (1), Article 372, Article 378, Article 379a, Article 453, Article 454, Article 455, Article 459, Article 480 and Article 506 of the Criminal Code, Articles 25 and 26 of Rechten-ordonnantie (violations against the Customs and Excise Ordinance, amended by Staatsblad Year 1931 No. 471), Articles 1, 2 and 4 of the Law on Immigration Offenses (Law No. 8 Drt of 1955, State Gazette No. 8 of 1955), Article 36 paragraph (7), Articles 41, 42, 43, 47, and 48 of Law No. 9 of 1976 on Narcotics (State Gazette No. 37 of 1976, Supplement to State Gazette No. 3086).

guilty. Under HIR, the requirement is sufficient evidence to state that a suspect or accused is guilty. KUHAP does not elaborate this issue, so that it must be proportionally determined. In investigation phase, evidence is sufficient if the minimum requirement is fulfilled as stipulated under Article 184 of KUHAP.

C.1.3. Detention procedure

The detention procedure, both that are conducted by investigator, prosecutor, or judge, refers to Article 21 (2) and (3) of KUHAP.

a. With an order/determination of detention

If the investigator or the prosecutor arrange a detention, they will show a letter of detention order. If it is conducted by a judge, a letter of detention determination will be showed. While having different names, both letters covers similar substance:

- Identity of the suspect/accused, name, age, occupation, sex, and domicile
- Reason for detention, e.g., for the purpose of investigation or trial.
- Brief explanation of the alleged crime, so that the person know and may prepare for a defense, and also for a legal certainty.
- Clearly stating the detention place, to give a certainty for the person and his family.

Without such letter, the detention is illegal and unlawful. During HIR period, detention without a letter was common, where such practice also occurred when KUHAP was issued. To overcome this, the Minister of Justice has issued Directive No. J.C.5/19/18 of 1964 on the Release of Detainee Who is Detained Without Proper Warrant of Detention Order, which directed Heads of Directorate of Correctional Facilities; Heads of Regional Correctional Facility Inspectorates; Director of Regional Correctional Facilities; and Director/Head of Correctional Facilities, not to accept detainee without proper warrant, and to release a detainee who such detention is extended without proper letter. Until recently, many detention without proper letter still occurred, even though KUHAP has strict provision on this issue.

At investigation level, detention must have arrest warrant issued by investigator or his superior. The detention may be conducted after an expose. The warrant is signed by the related official and carbon copied to the suspect's family and legal counsel.¹¹⁰ Without the warrant, the detention is illegal.

b. Copy of letter for suspect's family

The copy of letter of detention order, or the letter of detention extension, must be sent to the detainee's family. This is a control mechanism for the suspect's family to evaluate whether the detention is legal or not. The family has the right under the law to ask the court on the legality of such detention through the pretrial institution.

c. Special mechanism

Detention against a person with special treatment according to the laws and regulations, is executed after securing an approval from certain officials. In general, the procedures for this detention is

¹¹⁰ Article 45 of the Chief of the National Police Regulation No. 14 of 2012 on Investigation Management.

similar to KUHAP. The authorized official that issues the warrant is the investigator or his/her superior. The copy of the warrant must be sent to the detainee's family or lawyer.¹¹¹

Under tax crime cases, Article 20 of the Law No. No. 14 of 2002 on Tax Court states that: (1) the Chairman, Deputy Chairman, or Judges of the Tax Court may be arrested or detained under the order from the Attorney General after securing President's Approval, for the exception on the following condition: a. Caught red-handed when committing a crime; or (b) Allegedly committing a crime subject to capital punishment or crime against the national security. The arrest or detention under point (i) must be reported the the Chief Justice of the Supreme Court in 48 hours.

On domestic violence cases, Article 35 of the Law No. 23 of 2003 on the Elimination of Domestic Violence states that: (1) The police may arrest and detain a suspect without a warrant, even though the domestic violence was committed in another jurisdiction; (2) After the arrest and detention is conducted, a warrant must be issued in 24 hours; (3) The suspension of detention will not apply for this condition. Meanwhile, Article 36 states that: (1) To protect the victim, the police may arrest the suspect with sufficient preliminary evidence; (2) The arrest may be continued with a detention, by issuing a warrant in 24 hours.

If the suspect is a Head or Deputy Head of Region, pursuant Article 36 (4) of the Law No. 32 of 2004, lastly amended by the Law No. 12 of 2008 on Regional Government, the detention must obtain a written approval from the President. If within 30 days the approval is not given, the detention may be executed.¹¹² This procedure may be disregarded if the official:

- a. Is caught red-handed when committing a crime; or
- b. Allegedly committing a crime subject to capital punishment or crime against the national security.

The investigation must be reported to the President within 48 hours.¹¹³

The mentioned procedures is also used if the suspect is the member of regional house of representatives. Pursuant to Article 53 of the Regional Governments Law states that investigation against a member of the regional house of representatives may be conducted after a written approval from the Minister of Interior Affairs on behalf of the President, if the suspect is a member of provincial house of representatives, and from the Governor on behalf of the Minister of Interior Affairs, if the suspect is a member of regency/municipality house of representatives

The application for such approval must include a clear elaboration on the alleged crime. If the approval is not given within 60 days after it was filed, the investigation followed-up by a detention may be executed.

Such approval is excluded on the following conditions:

- a. Caught red-handed when committing a crime; or
- b. Allegedly committing a crime subject to capital punishment or crime against the national security,

¹¹¹ Article 46 of the Chief of National Police Regulation No. 14 of 2012 on Investigation Level Management

¹¹² Previously, an investigation against the Head or Deputy Head of Region must be approved by the President, as stipulated under Article 36 (1) and (2) of the Regional Governments Law. This article was revoked by MK on 26 September 2012. MK also applies a constitutionally conditonal on Article 36 (3) and (4). According to the new provision, President's approval is only needed for detention, and the timeframe is now set at 30 days. If there is no approval, a detention may be executed. The judicial review on this article was filed by a number of anticorruption activists and academics. The full decision can be accessed at http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_73%20PUU%202011telah%20baca%2026%20Sept%202012.pdf.

¹¹³ Article 36 (5) Regional Government Law.

In regards to the crime against national security, Elucidation of Article 53 (4) (b) of the Regional Government Law states that the crimes under this category are terrorism and separatism. For this exception, the investigation must be reported to the related official in 48 hours.

If the suspect is the member of BPK, Article 25 of the Law No. 15 of 2006 on BPK states that the BPK's member may conduct necessary action without any order the Attorney General or approval from the President on the following conditions:

- a. Caught red-handed when committing a crime; or
- b. Allegedly committing a crime subject to capital punishment.

The necessary action must be reported to the Attorney General within 24 hours, and it will be notified to the President, the House of Representatives, and BPK itself.

Article 17 (1) of the Law No. 3 of 2009 on the Second Amendment to the Law No. 14 of 1985 on the Supreme Court states that detention against the Chief Justice, Deputy Chief Justice, Deputy, and Justices of the Supreme Court may only be executed under the order from the Attorney General after securing President's approval, for the exception on the following condition:

- a. Caught red-handed when committing a crime; or;
- b. Allegedly committing a crime subject to capital punishment or crime against the national security, based on the sufficient preliminary evidence.

If the arrest and detention are executed based on the exception, such arrest and detention must be reported to the Attorney General in 48 hours.

Article 26 of the Law No. 49 of 2009 on the Second Amendment to the Law No. 2 of 1986 on General Court states that the Chairman, Deputy Chairman, and Judges of the general court may be arrested or detained under the order from the Attorney General after securing Chief Justice's approval, for the exception on the following conditions:

- a. Caught red-handed when committing a crime;
- b. Allegedly committing a crime subject to capital punishment; or
- c. Allegedly committing a crime against the national security.

Article 25 of the Law No. 50 of 2009 on the Second Amendment to the Law No. 3 of 2006 on Religion Court states that the Chairman, Deputy Chairman, and Judges of the religion court may be arrested or detained under the order from the Attorney General after securing Chief Justice's approval, for the exception on the following conditions:

- a. Caught red-handed when committing a crime;
- b. Allegedly committing a crime subject to capital punishment; or
- c. Allegedly committing a crime against the national security.

Article 26 of the Law No. 51 of 2009 on the Second Amendment to the Law No. 5 of 1986 on State Administrative Court states that the Chairman, Deputy Chairman, and Judges of the religion court may be arrested or detained under the order from the Attorney General after securing Chief Justice's approval, for the exception on the following conditions:

- a. Caught red-handed when committing a crime;

- b. Allegedly committing a crime subject to capital punishment; or
- c. Allegedly committing a crime against the national security.

Further, Article 123 (4) of the Law No. 13 of 2010 on Horticulture states that if the execution of the authority under paragraph (2) needs an arrest and detention, civil investigator (*penyidik pegawai negeri sipil*) should coordinate with the police according to the laws and regulations.

Article 10 of the Law No. 18 of 2011 on the Amendment to the Law No. 22 of 2004 on Judicial Commission states that the Chairman, Deputy Chairman, and member of Judicial Commission may be arrested or detained under the order from the Attorney General and after securing President's Approval, for the exception on the following conditions:

- (i) Caught red-handed when committing a crime; or
- (ii) Allegedly committing a crime subject to capital punishment or crime against the national security, based on the sufficient preliminary evidence.

If the arrest and detention are executed based on the exception, such arrest and detention must be reported to the Attorney General in 48 hours.

If it is a cybercrime, Article 43 (6) of the Law No. 11 of 2008 on Electronic Information and Transaction states that the arrest and detention against a suspect must secure a determination from the Chairman of the District Court via the Prosecutor in 24 hours.

C.2. Pretrial procedural law

The procedural law and examination process of pretrial are stipulated under KUHAP.¹¹⁴ The existing provisions are quite short and do not give clarity on which procedural law that may be used for the purpose of the burden of proof.

In practice, the procedural law for pretrial is civil procedural law. With respect to detention, the use of civil procedural law makes the applicant/suspect as the party that must prove that the detention is violating Article 21 (1) KUHAP. In addition, civil procedural law makes the court merely examine the administrative aspects of detention, such as the issuance of letter of detention order.

It also causes the applicant acts as a plaintiff, and it creates a term "applicant" for pretrial process. KUHAP does not acknowledge "applicant". Instead it acknowledges an authorized official that will testify before a judge, as stipulated under Article 82 (1) (b) of KUHAP.

According to Yahya Harahap, such practice has hampered pretrial process, due to the fact that the related officials are reluctant to attend the pretrial, and forced the judge to use such condition to violate Article 82 (1) (c) of KUHAP.¹¹⁵

C.2.1. Procedures in filing pretrial

The procedure to file pretrial is stipulated under Articles 77-83 of KUHAP, and Articles 7-15 of the Government Regulation (PP) No. 27 of 1983. KUHAP does not clearly stipulate and detail the procedure to file a pretrial petition by a applicant (victim of false arrest). In practice, the procedure imitate a civil case when a lawsuit is filed.¹¹⁶

¹¹⁴ Article 82, KUHAP.

¹¹⁵ See M. Yahya Harahap, *Pembahasan ... Op.Cit.*, pg. 16

¹¹⁶ See BPHN, *Penelitian Hukum tentang Perbandingan Antara Penyelesaian Putusan Praperadilan dengan Kehadiran Hakim Komisaris dalam Peradilan Pidana*, 2007, pg. 49.

C.2.2. Parties that are entitled to file a pretrial

In pretrial case there are two parties, namely the applicant, and respondent (*termohon*) who is usually the government, represented by police officials, prosecutor, or other institution. With respect to the legality of arrest, detention, foreclosure, and search, the entitled parties are the suspect, his family, or his attorney-in-fact, as stipulated under Article 79 of KUHAP. These parties are also entitled to file a pretrial for compensation for illegal arrest or detention.

C.2.3. Petition registration

KUHAP does not specify the procedure in submitting a pretrial petition, whether it may be sent via postal service, directly submitted to the Head of District Court or directly submitted to the appointed court clerk.

In practice, such petition must be submitted to the Head of competent district court, which has the jurisdiction over the arrest, detention, search, or foreclosure. Such petition will be registered by the court clerk. The petition consists of:¹¹⁷ (1) complete identity of the applicant and respondent; (2) facts regarding the losses of the applicant due to the action of the respondent

After the court clerk received the petition and register it (separate register from regular cases), the Head of District Court will immediately appoint a judge and a court clerk to examine the petition. There is no time limitation on such appointment.

However, considering Article 82 (1) (a) of KUHAP, such appointment must be made in three days after the petition is registered at the district court. It is in accordance with the provision stating that the trial date must be determined in three days after the pretrial petition is accepted.

To make the pretrial is properly conducted, the court clerk will ask the Head of District Court to immediately appoint the judge and court clerk for the pretrial.

C.2.4. Requirements to file a pretrial regarding detention

Pursuant to Article 79 of KUHAP, pretrial petition on the legality of a detention must be filed by the suspect, his family, or his attorney-in-fact, to the Head of District Court, by explaining the reasons of such petition. The applicant must explain that the detention has violated the following provisions:

- Competent authority in accordance with Article 20 of KUHP,
- The reasons of detention are not in line with Article 21 (1) and (4) of KUHAP,
- The letter of detention order is not given to the suspect or his family, as stipulated under Article 21 (2) and (3) of KUHAP.
- The letter of detention did not detail the suspect's identity, reasons for detention, brief explanation on the charges, and the detention place, as stipulated under Article 21 (2) of KUHAP.

C.2.5. Trial date and pretrial timeframe

Pretrial is conducted with "express examination" due to the nature of the case. This is the reason that Article 82 (1) (a) of KUHAP asserted that the Head of District Court must appoint the judge and

¹¹⁷ Article 77 (1), KUHAP.

court clerk, including the trial date, within 3 days after the petition is received. This timeframe is calculated from the date of petition receipt or petition registration.¹¹⁸

The judge will also call the parties, including the applicant and other related officials, such as investigator or prosecutor. It is made in form of summon, therefore it cannot be done verbally, even though, in practice, some parties state that verbal summon is allowed.

According to Article 82 (1) (c) of KUHAP, the decision must be rendered in 7 days at maximum. A single judge will examine the pretrial, so that all pretrial petitions will be examined by a single judge panel, assisted by a court clerk.¹¹⁹

In practice, the timeframe may be different. The Head of District Court may appoint a judge in a day, and also determine the trial date. While the summon takes 3 days. Therefore, the 7 days limitation is difficult to be implemented, because it is calculated from the trial date. Pursuant to MA technical guideline (second book), the 7 days limitation is calculated from the date when all parties are attending the trial.

Summon according to KUHAP needs 3 days (Article 227 KUHAP), after a petition is registered at the district court. The valid summon is three days before the trial date, and Saturday-Sunday are not included. After the trial date is set, the 7 days limitation is started. However, it is unclear whether it is 7 business days or 7 calendar days.

The criteria on pretrial judge appointment is determined by the Head of District Court. Usually the Head of District Court will read the petition, and consider which judge that can process the petition. New or junior judges usually prioritized, unless the petition attracts the attention of senior judges. There is no specific arrangement, because the appointment is at the discretion of the Head of District Court.

C.2.6. Trial procedures

The examination in pretrial does not merely examine the applicant, but also the official that committing an action, such as an illegal arrest, which caused the pretrial petition is filed. The investigator that conduct such arrest will be summoned and examined, and the process is similar to civil case examination. The applicant acts as an applicant, and the official acts as a respondent. Some parties viewed that it examines and judges the legality of coercive action that has been conducted. Pretrial consists of following phases:

- Examination of power of attorney or recitation of petition
- Response from the respondent
- Counter response from the applicant
- Rebuttal from the respondent
- Examination over witnesses and documents.
- Decision.

KUHAP does not specify whether pretrial petition must be in written format or may verbally submitted. In practice, however, the petition is written by the attorney-in-fact, which is similar to a lawsuit in civil case.¹²⁰ The format of a petition consists of:

¹¹⁸ Pursuant to this provision, Yahya Harahap argued that the determination of a trial date must be calculated from the date of petition registration or registration in the court's log book, instead of calculating it from the appointment of a pretrial judge by the Head of District Court. See M. Yahya Harahap. *Peninjauan Kembali*, (Jakarta: Sinar Grafika, 2010), pg. 13.

¹¹⁹ See Article 78 (2) KUHAP.

- Identity of applicant and respondent,
- Reasons and legal basis (*fundamentum patendi/posita*),
- Motion (*petitum*) to be decided by the judge,
- Registration of Petition

The appearance of an official in a pretrial is not similar to party in civil case. An official merely gives a statement, as consideration for the judge to render a decision. Therefore, the decision is not only based on applicant's statement, but also from the related official. The statement from the official is a counter argument to the applicant, which makes it similar to counter response in a civil case trial. The official may be called as quasi-defendant.

The position as quasi-defendant leads to the objection from investigator and prosecutor, which hampers the pretrial examination. For instance, the official is reluctant to attend the trial at specified date. They should put themselves as law enforcers that is accountable for their action for the sake of law enforcement.

The judge must render a decision in 7 days, as stipulated under Article 82 (1) (c). However, there is no clarity when the 7 days timeframe is started. Some viewed that it is started since the trial date, while the applicant mostly viewed that it is started since the date of registration.

According to Yahya Harahap, 7 days started from the registration is the closest interpretation to the Article 82 (1) (c), which in accordance with the principle of speedy trial. Such interpretation may be implemented when all parties are in good faith. The appointed judge must determine the trial date immediately after the appointment, and order the court clerk to summon the applicant and related official. If the related official quickly responded to this summon, the pretrial may render a decision in 7 days. Article 82 (1) (c) uses the word "must", so that the judges is obliged to render a decision in 7 days.

C.3. Pretrial decision

While KUHAP does not elaborate the format of pretrial decision, Yahya Harahap set some references on such format. Because pretrial is conducted on express examination, pretrial decision must also in accordance with express examination decision. Therefore, the pretrial decision is brief enough, without reducing the legal consideration. The simplicity of the decision maynot reduce the basis of comprehensive consideration. Note that the format for pretrial decision is not regulated under KUHAP. However there are two sources stating that the decision is merged with the trial examination minutes.

If the decision is based on Article 82 (1) (c) of KUHAP, the pretrial is conducted in accordance with express examination procedure, with the consistency with the format of such procedure, where the decision is merged with the trial examination minutes. Under the express examination procedure, it is enough to merge the decision with the trial examination minutes.

If the decision is based on Article 82 (3) (a) and Article 96 (1), the decision will be made in form of determination (*penetapan*), which is commonly known under civil case decisions. The determination, which is volunteer in nature, is made with *ex parte*, where the decision is a part of the minutes. The pretrial decision is indeed similar to civil case deision. It is also fair to say that pretrial decision is a

¹²⁰ See H.M.A Kuffal, *Penerapan KUHAP dalam Praktik Hukum* (Malang: Universitas Muhammadiyah Malang, 2004), pg. 278-279.

declaration in nature. Therefore, the decision is not specifically on separate document, but instead is a part of minutes, as stipulated under Article 203 (3) (d).

The substance of pretrial decision is stipulated under Article 82 (2) and (3), as in addition to put the legal consideration, it must also put the order/verdict (*amar*). The verdict must be written in the determination, in accordance with the reasons of pretrial request. The verdict must state the legality of an arrest or detention, if the pretrial examine such issue.

C.4. Nullification of a pretrial

A pretrial may be nulled before a decision being rendered, which is stipulated under Article 82 (1) (d): in the event that the examination of a case has been commenced at a district court, while the examination of the request for pretrial hearing has not been completed, such request shall be null and void. The reason of nullification: (1) if the case has been examined by the district court; (2) when the district court examine the case, the pretrial has not been concluded. If the case has been examined by the district court, while the pretrial has not rendered a decision, the pretrial will automatically nulled, to prevent different decision.

The pretrial decision during investigation will not annul or eliminate the suspect's right to file a pretrial petition during prosecution, if the reason for such petition is allowed by the law. This effort is allowed for multiple times.¹²¹ The nullification is determined based on the fact that the district court has examined the case.

There is an argument that the nullification will not reduce the suspect's right, because the petition may be included in the examination by the district court. On the legality of an arrest, a detention, search, or foreclosure, it may be examined during trial in the district court. If the judge views that the detention is unlawful, he may order a release for the accused. In regards to compensation and rehabilitation, the law only allows such request to be filed when the decision is final and binding. If such request is filed at the pretrial, it will have a faster process.¹²² In practice, this argument is rejected by judges and never be implemented.¹²³ Judges viewed that it will create problems in regards to the place and time of action from the investigator.

C.5. Appeal in pretrial

Not all pretrial decisions may be appealed and vice versa. Article 83 KUHAP stated that pretrial decisions based on Articles 79, 80, and 81 cannot be appealed. However, most of pretrial decisions cannot be appealed, which is caused by the objective of pretrial to give a quick decision and legal certainty.

However, pursuant to Constitutional Court Decision No. 65/PUU-IX/2011, 1 May 2012, on the judicial review of KUHAP, all decisions that are excluded under Article 83 (2) cannot be appealed to the Court of Appeal. The Constitutional Court viewed that the pretrial aims to create a speedy trial, and to give equal opportunity for the suspect/accused and the investigator/prosecutor, so that the

¹²¹ For instance, the suspect may file a first petition on the legality of an arrest, a second petition on the legality of a detention, and a third petition on the legality of a foreclosure, and even fourth petition on the legality of a detention during prosecution.

¹²² See M. Yahya Harahap, *Pembahasan ... Op.Cit.*, pg. 16.

¹²³ ICJR limited discussion monograph, *Commissioner Judge Under RCUHAP 2012*.

right to file an appeal, which was given to the investigator/prosecutor in Article 82 (2) contradicts the 1945 Constitution.¹²⁴

C.6. Termination of pretrial

The provisions of the termination of pretrial can be found under MA Circular Letter No. 5 of 1985 on Termination of Pretrial, dated 1 February 1985. The Circular stated: first, the pretrial may be terminated by the judge upon request from the applicant; and second, the termination must be made into a determination.

¹²⁴ In Decision No. 65/PUU-IX/2011, the applicant asked the Constitutional Court to state that Article 82 (1) and (2) of KUHAP contradict the 1945 Constitution. However, the Court only partially approved the petition, by stating that Article 82 (2) contradicts the 1945 Constitution. As a consequence, all pretrial decisions may not be appealed.

CHAPTER IV

Pretrial against detention in practice

A. Overview

In the view of KUHAP's drafter, pretrial is considered as the best option to supervise coercive action by the investigator, particularly in regards to arrest and detention. When Indonesia used HIR, this mechanism was not used and there was no other supervision mechanism towards arrest and detention.

Article 75 HIR stated that if the available statements showed that the suspect is guilty, the prosecutor may conduct a detention to prevent the suspect from escaping the process. There were no provision to examine such detention. HIR stated that the court's involvement when the prosecutor will arrange a search or foreclosure, which needed an approval from the Head of District Court.¹²⁵

Based on the initial discussion, KUHAP's drafters seemed want to make a strict provision towards detention for the purpose of examination. It can be seen from an article from Professor Oemar Seno Adjie, who wanted the formation of preliminary examination judge (*rechter-commissaris*). According to him, such position is important to handle coercive action (*dwang-middelen*), such as detention, forclosure, body search, house search, and documents examination.

He asserted, this position under European Continental legal system is the center of criminal investigation. This position was acknowledged in Indonesia under criminal procedural law for Europeans, but not for native citizens. Seno Adji, however, said that such position may be incorporated in the next criminal procedural law.¹²⁶

KUHAP's drafters agreed on pretrial concept as the mechanism to oversee coercive action, particularly arrest and detention. Previously, some parties recommended *rechter-commissaris* as the center of criminal investigation, or fully implementing *habeas corpus* in KUHAP.¹²⁷ In practice, the objective of pretrial does not well-implemented. In addition to the confusion of pretrial procedural law, the current practice merely examine administrative aspects, not the substantial issues on the legality of an arrest or a detention.

No wonder, the concept of commissioner judge (*rechter-commissaris*) was recommended again, and also the idea to revise KUHAP. Based on the facts, the practice of pretrial does not show a well-implemented control between sub-system in the Indonesian criminal justice system.

Pretrial is yet to give protection for suspect's rights, because KUHAP limits the authority of pretrial, and the judge limits the pretrial to examine the administrative aspects of an arrest and detention.¹²⁸ This issue had been addressed by Oemar Seno Adji, who admitted that the available provision on

¹²⁵ See R. Tresna, *Komentar atas Reglemen Hukum Acara di dalam Pemeriksaan di Muka Pengadilan Negeri atau H.I.R.*, (Jakarta: Pradnya Paramita, cetalan ke 5, 1975), pg. 96-98.

¹²⁶ See Oemar Seno Adji, *Pembaharuan-pembaharuan dalam Kodifikasi Hukum Pidana dan Hukum Acaranya*, on Oemar Seno Adji, *Hukum – Hakim Pidana*, (Jakarta: Erlangga, 1984), pg. 87-88. This article was presented by Seno Adjie in 1976 during "Singapore Meeting on Innovation in Criminal Justice", 10 September 1976.

¹²⁷ See Oemar Seno Adji, *Hukum Acara Pidana – Beberapa Inovasi*, dalam Oemar Seno Adji, *KUHAP Sekarang*, (Jakarta: Erlangga, 1985), pg. 66-67.

¹²⁸ See Supriyadi Widodo, dkk., *Potret Penahanan ... Op.Cit.*, pg. 249.

remedy for the suspect/detainee, especially on the legality of arrest/detention, are not clear enough, which lead to more technical question.¹²⁹

Even though KUHAP provides pretrial as the mechanism to examine the legality of an arrest/detention, it is rarely used. ICJR's study in 2010 shows the minimal use of pretrial. In Medan, for example, there were 34 pretrial cases in 2009, 19 cases in 2010, and 17 cases in 2011. Only Philip Jong's petition with Decision No. 13/Prapid/2011/PN-Mdn that was granted by the court. This is the only pretrial case in Medan that is granted by the court during 2000 to 2010.¹³⁰

ICJR's study also found out that there were only 211 pretrial cases in PN South Jakarta from 2005 to 2010. Seventy five of these cases were about detention. Only one petition that was granted by the court, which is Decision No. 19/Pid.Prap/2006/PN.Jak.Sel in 2006.

In Kupang, ICJR found out that PN Kupang only handled 12 pretrial cases during 2005-2010. There was no case at all in 2007. In details, PN Kupang handled 2 cases in 2005, 3 cases in 2006, 2 cases in 2008, 3 cases in 2009, and 2 cases in 2010.

ICJR concludes that there are several factors for this condition. The lack of knowledge from the suspect regarding pretrial and the lack of legal counsel availability are the main factor that lead to the rarity in using pretrial as a control mechanism against arrest and detention.¹³¹

This chapter will summarize the current practice of pretrial, by analyzing the cases and pretrial decisions from district court. It is hoped that this research mau give a comprehensive descriptin on the practice of pretrial. It is also hoped that there will be a consistency in the implementation of pretrial, to assure the legal certainty and fairness for the justice seekers. This analysis may also be an evaluation towards the practice of pretrial, in order to form a new mechanism that protects citizen's rights when the civil liberty is taken away.

B. The dynamics of pretrial practice

In order to understand the use of pretrial mechanism and its tendency in practice, this study analyzes 80 pretrial decisions on arrest and detention. The previous chapter has explained the origins and the date of the decisions.

B.1. Criminal acts in which the detention is challenged at pretrial

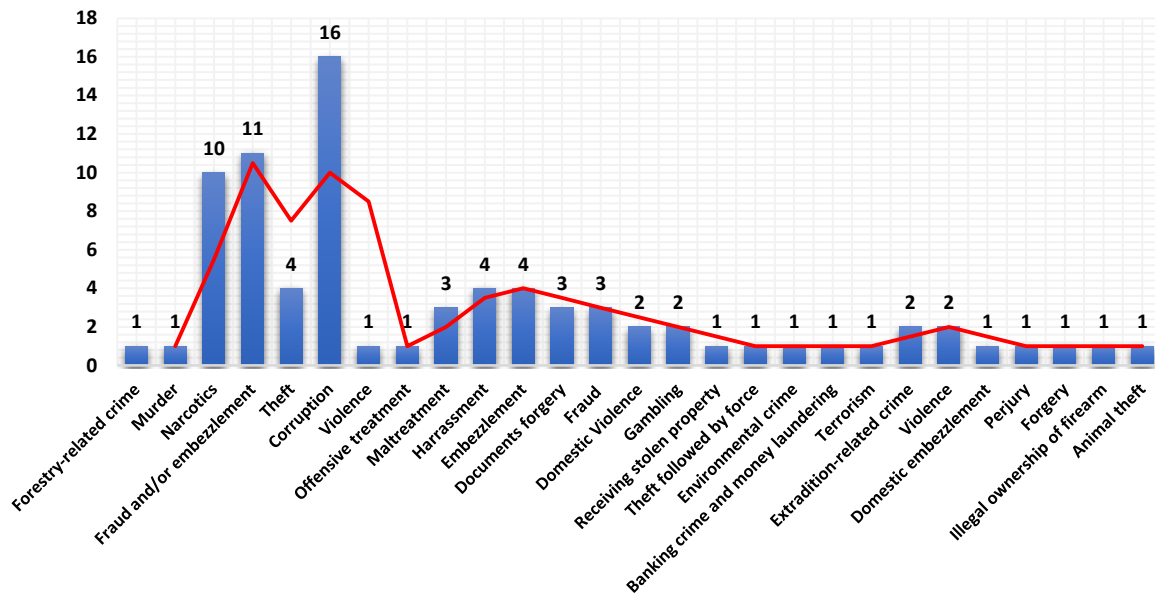
From the 80 decisions, most cases that use pretrial are corruption cases, where there are 16 corruption cases that use this mechanism. It is followed by obscuration and or fraud with 11 cases, and narcotic with 10 cases. Other cases that also used pretrial mechanisme are theft, harassment, and fraud, with four cases each.

¹²⁹ See Oemar Seno Adji, *Hukum Acara Pidana ... on Ibid.*

¹³⁰ Diperoleh dari buku Register Perkara Pengadilan Negeri Medan.

¹³¹ Lihat Supriyadi Widodo, dkk., *Potret Penahanan ... Op. Cit.*, pg. 238.

Figur 2: Types of criminal act



B.2. Legal Counsel

Based on the evaluation, the availability of an advocate affect the use of pretrial mechanism. It can be seen from pretrial cases that are represented and not represented by a legal counsel. From 80 decisions, 77 petitions were represented by legal counsel, and only 3 petitions were filed by the suspect/accused himself. This figure shows that the availability of legal counsel determines the use of pretrial, considering the lack of knowledge and comprehension towards pretrial. It also can be seen from the facts that most cases that use pretrial are corruption cases, where the suspect may be a middle-high class who have better access to legal counsel.

B.3. Reasons for pretrial submission

KUHAP provides coercive actions in form of arrest, detention, search, foreclosure, and documents examination. These actions sometimes considered as one whole process that cannot be separated. Detention, for instance, is related to its prior action which is an arrest, and the following action—detention extension.

Pretrial petition may consists one or more motions, such as arrest and detention, while it is also occurred that the petition only consists one motion (only detention). If there are more than one motions, the applicant does not explain the basis of each motion. Instead, the applicant only elaborate the main motion, and the rest are disregarded.

Note that KUHAP states that each coercive action is independent and has its own element, even though they are related. An arrest has its own elements that must be elaborated by the applicant in his pretrial petition, as well as the petition on detention and detention extension.

In practice, it is common where a applicant made his petition based on the first action from an official that is considered illegal, which will justify the illegality of the next coercive actions. For instance, a petition asserted that his detention is illegal, because the arrest was illegal. Petitioner also disregard the elements of detention as stipulated under Article 21 of KUHAP.

As an example, in Decision No. 06/PID.PRA/2010/PN.PTK (P-1), the applicant filed three motions: arrest, detention, and foreclosure. The applicant also ask the judge to issue a letter of investigation termination order. The applicant explain the chronology of his case and also his motion.

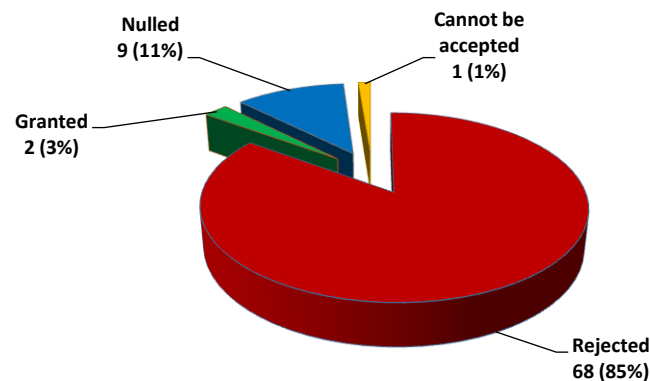
However, the applicant did not make a reasonable argument for his motion. The petition focused on the illegality of his arrest, which justified the illegality of the detention and foreclosure. His motion is as follows:

“...from the mentioned reasons, the arrest by the respondent was illegal and violated the law, which make the foreclosure, the letter of foreclosed assets, and letter of detention order, based on the illegal arrest warrant to the I and II Petitioners, were unlawful, and mutatis mutandis must be revoked”.

Similar situation is also found under Decision No. 09/PID.PRA/2009/PN.PTK (P-3), in which the petition filed a two motions on arrest and detention. The applicant only gave a brief explanation, and he only focused on the arrest, while the argument on the legality of the detention was not available. On the illegality of the detention, the applicant said:

“The arrest that was conducted by the respondent (in the decision written as “applicant”) on 27 May 2009 at 08.30 am is illega, therefore the detention is also illegal because it violated Article 19 (1) KUHAP, and the applicant must be released”.

The situation does not occur when the applicant only file one motion. For instance, if the applicant filed a pretrial on detention, the elaboration is very detailed and comprehensive, as can be seen on Decision No. 05/PID.PRA/2008/PN.KPG (P-78).¹³²



Figur 3: **Composition of pretrial decisions**

Such presentation will not give advantage to the applicant. It can be seen from the decisions, that the judge rejected all pretrial petitio that are not elaborated in detail, even though it is not the only

¹³² Decision No. 05/PID.PRA/2008/PN.KPG is from PN Kupang, filed by applicant named Mochamad Ali Arifin and his attorney-in-fact Petrus Bala Pattyona, for corruption case which was started when the applicant was examined as a witness. The applicant then fulfill the summon from the respondent and examined as a suspect and being detained. The applicant felt that the respondent did not have the sufficient preliminary evidece for detention, and there is no element of concern that the applicant will escape, or repeat the crime, or making evidences disappear, then file a pretrial petition at PN Kupang. The Court then decided to grant the applicant’s petition, by stating that the detention against the applicant was not legal, and the applicant must be released from detention.

reason. In contrast, two petitions were granted, where those petitions are detailing the elaboration on the motion. From 80 analyzed decisions, only two petitions approved (3%), 65 petitions rejected (85%), 9 petitiones nullified (11%), and 1 petition cannot be accepted.

B.4. The view of applicant, respondent, and judge on the legality of a detention

KUHAP does not elaborate when the investigator may conduct a coercive action. In regards to detention, KUHAP only states that such action is at the investigator’s discretion, and it elaborates some elements that must be met.

Pursuant to Article 21 of KUHAP, the elements of detention are four folds: (i) legal element; (ii) element of concern that the suspect or the defendant will escape, damage or make evidence disappear and/or repeat the criminal act; (iii) element of allegation that a suspect or a defendant has committed a criminal act; and (iv) element of formal-procedural. KUHAP, however, does not elaborate whether these elements are cumulative or alternative. In practice, a person may be detained, while another is not, even though the elements are quite the same.

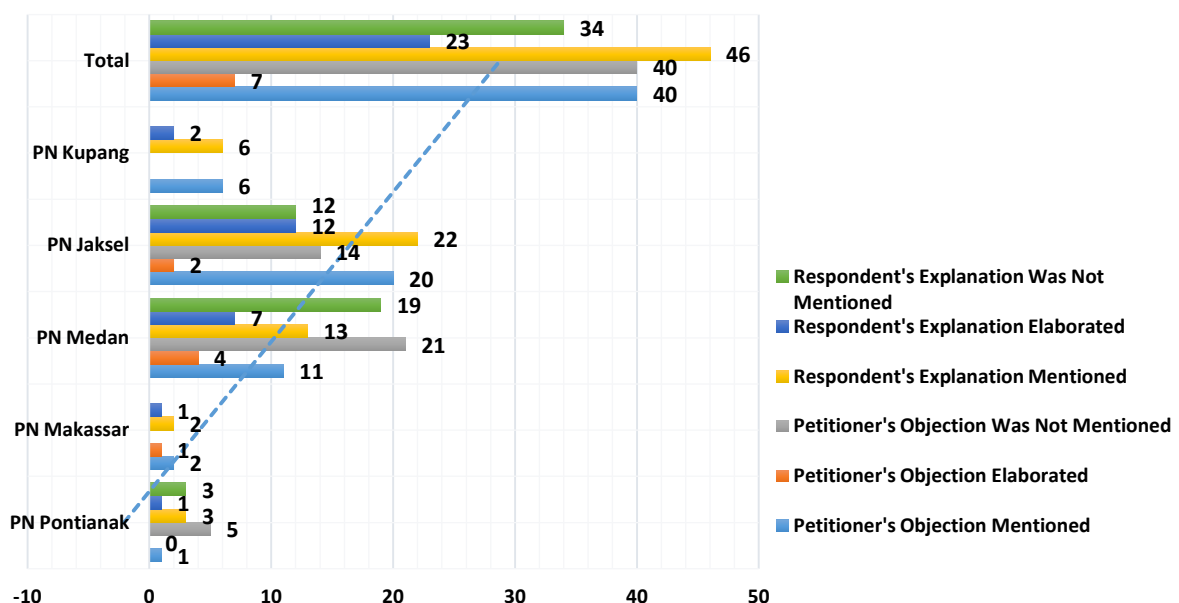
When the applicant does not elaborate his motion in details, it will affect the response from the respondent and also the decision from the judge. If the elaboration is simple, then the reponse from the respondent, including the decision will also be simple.

In regards to legal elements that being the basis of a detention, based on the study on the decisions, there are several aspects that need to be highlighted: (i) responses from parties on the legal element (charges); and (ii) response from the parties on the crimes under KUHAP

B.4.1. Elaboration under pretrial petition regarding objective legal basis element

From 80 decisions, 40 applicants stated the charges, while the rest of them did not. However, from those 40 applicants, only 7 of them that gave detailed elaboration. A better elaboration occurred from the response of the respondent. Meanwhile, from 80 decisions, 46 of them give an explanation on the penalty that will be sanction, and 23 out of 46 give a detailed elaboration. There are 34 petitions that do not such elaboration. The following figure reflects those numbers:

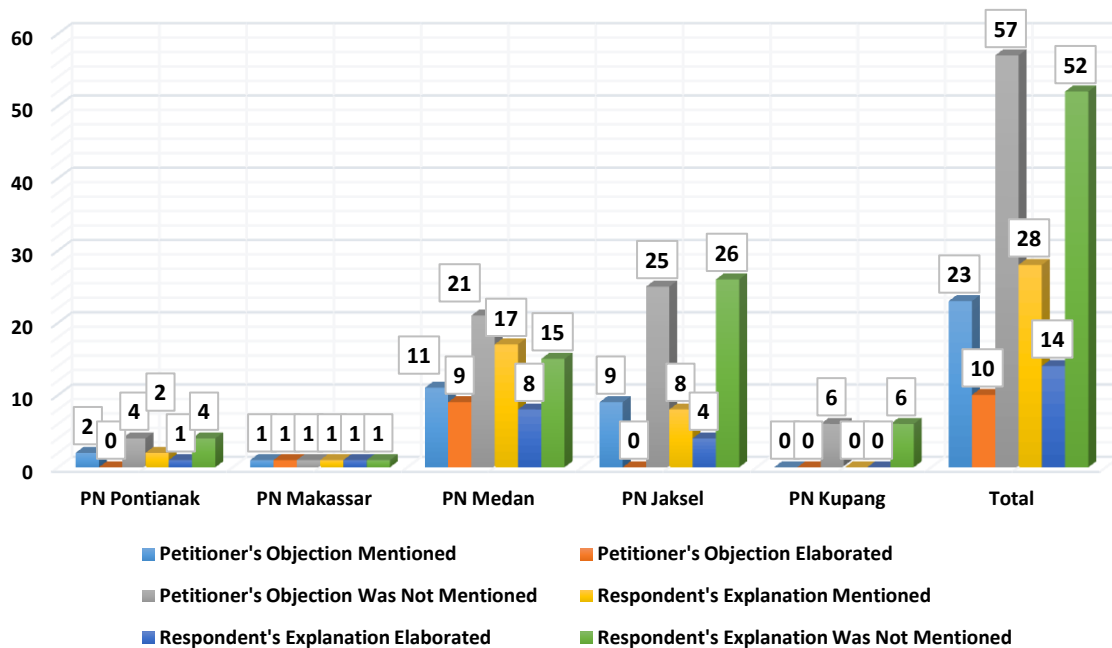
Figur 4: Comparison on the applicant elaboration on first legal element



B.4.2. Elaboration under pretrial petition regarding special crimes

Similar situation also occurred on the response from the parties on the offence that is stipulated under KUHAP or other laws. From 80 petitions, only 23 that elaborate such offense, and only 10 of them gave a detailed elaboration. Fifty-seven petitions do not discuss such element. From the respondent's response 28 of them elaborate the offence, while 52 of the rest do not. The following table depicts these figures:

Figure 5: Comparison on applicant and respondent elaboration on second legal element



Such situation can be seen under Decision No. 09/PID.PRA/2009/PN.PTK, where the applicant did not elaborate the illegality of the detention in detail, which affect the response from the respondent that did not discuss the basis for the detention.

Even though the detention is the motion from the applicant, the judge's consideration did not discuss such detention. In his consideration, the judge said:

“Considering the facts that the detention conducted by the respondent as an investigator is in accordance with Article 17 of KUHAP so that the panel views the detention is legal and it is based on sufficient evidence”.

In contrast, the applicant's detailed elaboration will result in a detailed respondent's response and judge's decision. It can be seen from Decision No. 04/Pra.Pid.B/2010/PN.Mks (P-7)¹³³, in which the

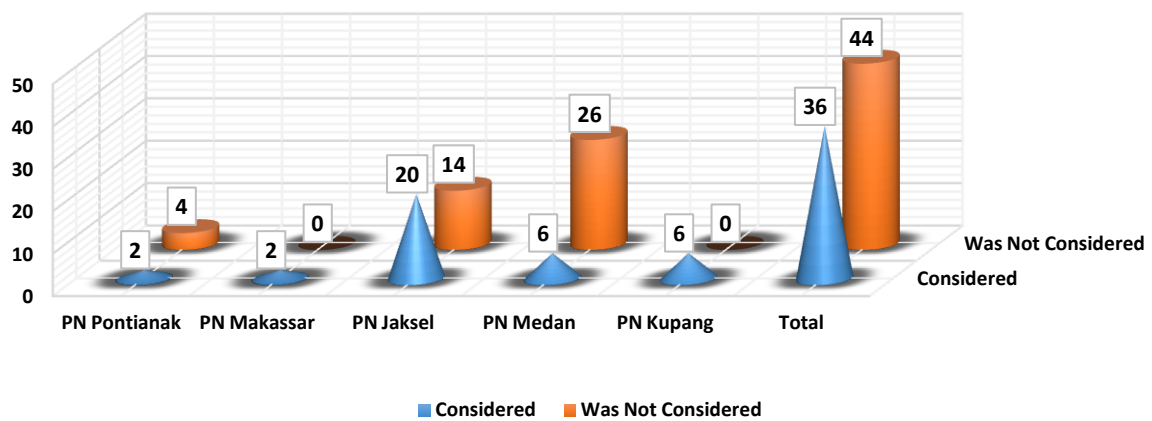
¹³³ Decision No. 04/Pra.Pid.B/2010/PN.Mks comes from PN Makassar, filed by Applicant named Agus Budi Hartono and Applicant II Kasman MS, when they were summoned and examined as witnesses for corruption case. According to the Applicants, the summon was vague and unclear, and the Applicant asked the Respondent to revise the summon and objected the examination. The Respondent then detained the Applicants. The Applicant felt that the detention is without any ground because they have not been examined, and they have not been notified on the alleged corruption. In addition, there is no element of concern that the

applicant elaborate in details the illegality of the arrest and detention, where such details also occurred on the response and judge’s consideration.

B.4.3. Judge’s consideration on objective legal element

In regards to judge’s consideration, in 44 out of the 80 decisions, the judges did not consider the first legal element. Only 36 decisions that do so. However, 20 decisions put of 34 pretrial decisions in PN South Jakarta considered this legal element. Different situation occurred in Medan, where only 6 decisions out of 32 decisions that considered this legal element, the rest of them did not..

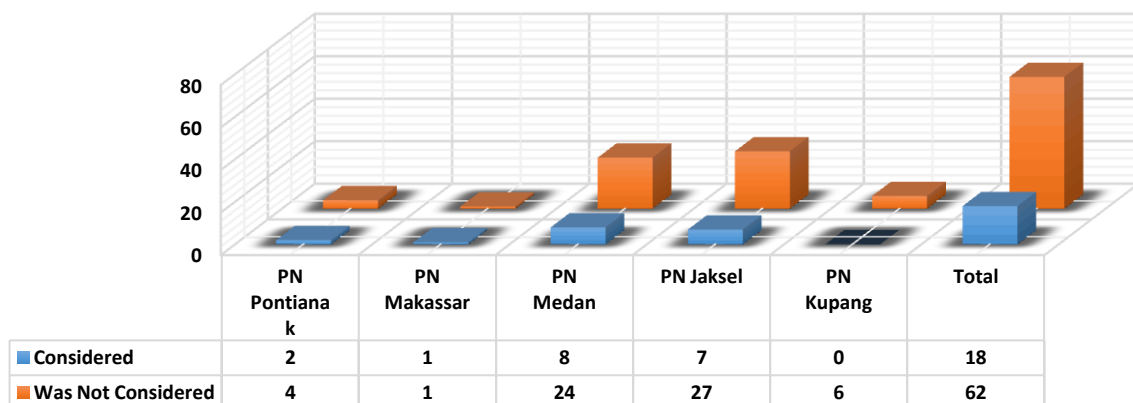
Figur 6: Comparison on judge’s consideration on the first legal element



B.4.4. Judge’s consideration on the speial crime element

In regards to the special crimes stipulated under KUHP or other laws and regulations, only 18 out of 80 decisions where the judge consider this element, while the rest 62 did not. At PN South Jakarta, only 7 out of 34 decisions that consider such element. The following table depicts the judge consideration:

Figure 7: Comparison on judge consideration on second legal element



applicant will escape, repeat the crime, or making evidences disappear. PN Makssar decided to grant the petition, by stating that the detntion was illegal and the applicants must be released from the detention

B.5. Views on the element of concern and strong allegation

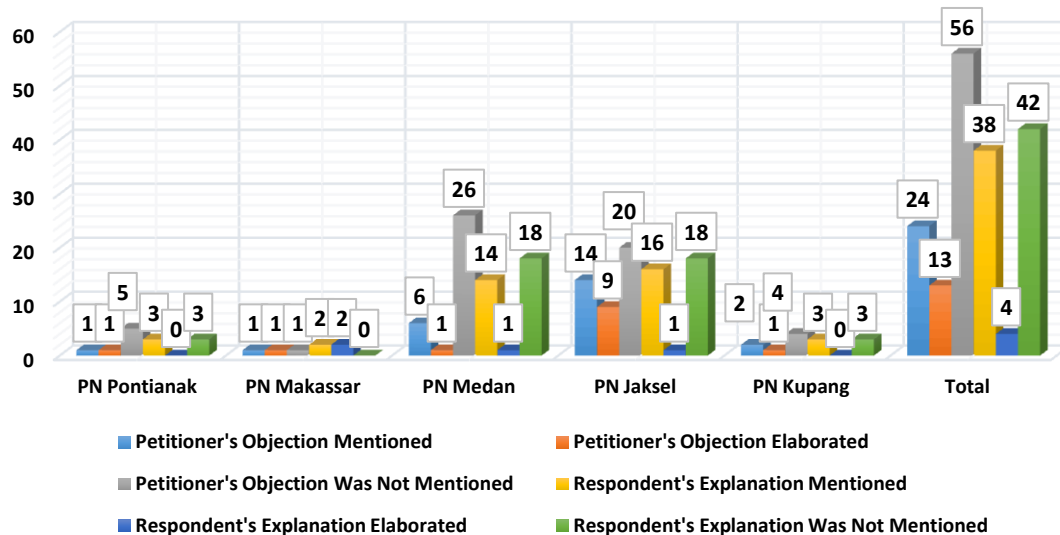
One of the detention requirements under Article 21 (1) of KUHP is the element of concern, which is divided into three category: concern that the suspect will escape, or damage the evidence, or repeat the criminal act. The view from applicant, respondent, and the judge on this element is quite the same, that it is alternative in nature. It can be seen from the pretrial decisions and profiling of the petition, defendant’s reply, and judge’s consideration.

The following statistics will show the reality of the use of the element of concern in pretrial practice.

B.5.1. Applicant and respondent’s view on element of concern escaping the investigation

From the study on 80 pretrial decisions, 56 applicants did not mention the element of escaping the process, only 24 applicants did mention such element. Out of 24, only 13 that elaborated in detail such element. From the respondent’s side, 38 cases mentioned the use of such element, however only 4 of them that elaborated in detail on the use of such element. It means that most of them only mention the normative provisions, without mentioning the case position. In the rest of 42 cases, the respondent did not mention such element.

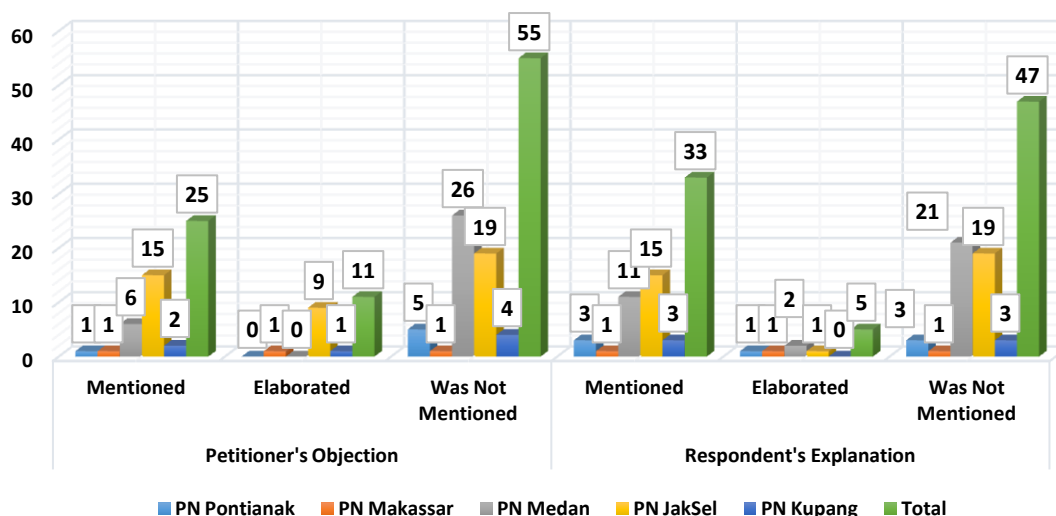
Figure 8: Element of concern: escaping the investigation



B.5.2. Applicant and respondent’s view on the element of concern in regards to damaging and making evidence disappear

Similar description can be seen regarding the second element of concern, which is the concern that the suspect will damage the evidence or make it disappear..

Figure 9: Element of concern: the suspect will damage the evidence or make it disappear

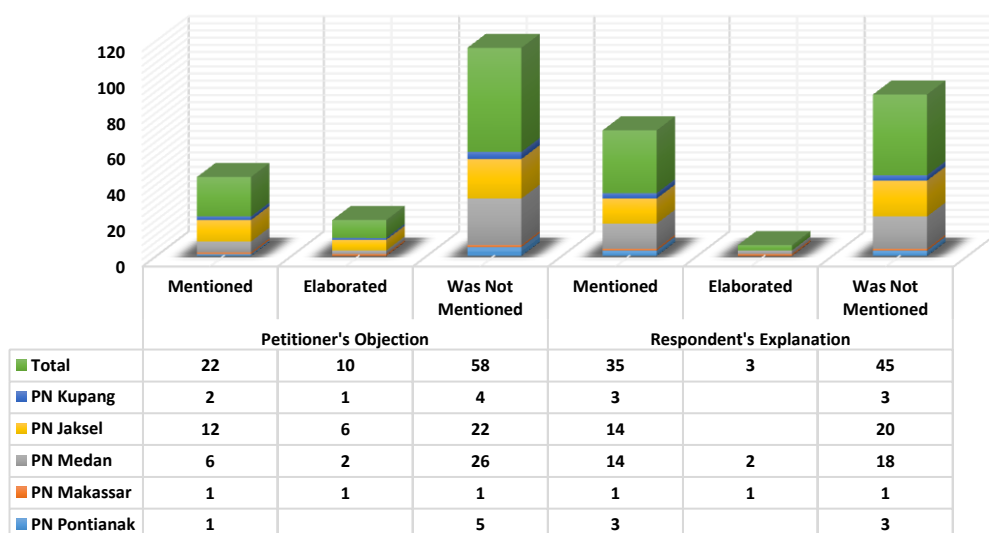


From 80 decisions, only 25 petitions objected the use of this element. Only 11 of them that elaborate such element of concern. Fifty-five petitions did not mention such element. This situation is similar to respondent's response, where only 33 out of 80 cases that mentioned such element, and only 5 of them that elaborated in detail. It means that the respondent only copied its response from the KUHAP provision. Meanwhile, the other 47 cases did not mention such element.

B.5.3. Applicant and respondent's view in the element of repeating the criminal act

In regards to the third element of concern, which is the possibility of a suspect to repeat a criminal act, the following table depicts the situation:

Figure 10: Element of concern: repeating the criminal act



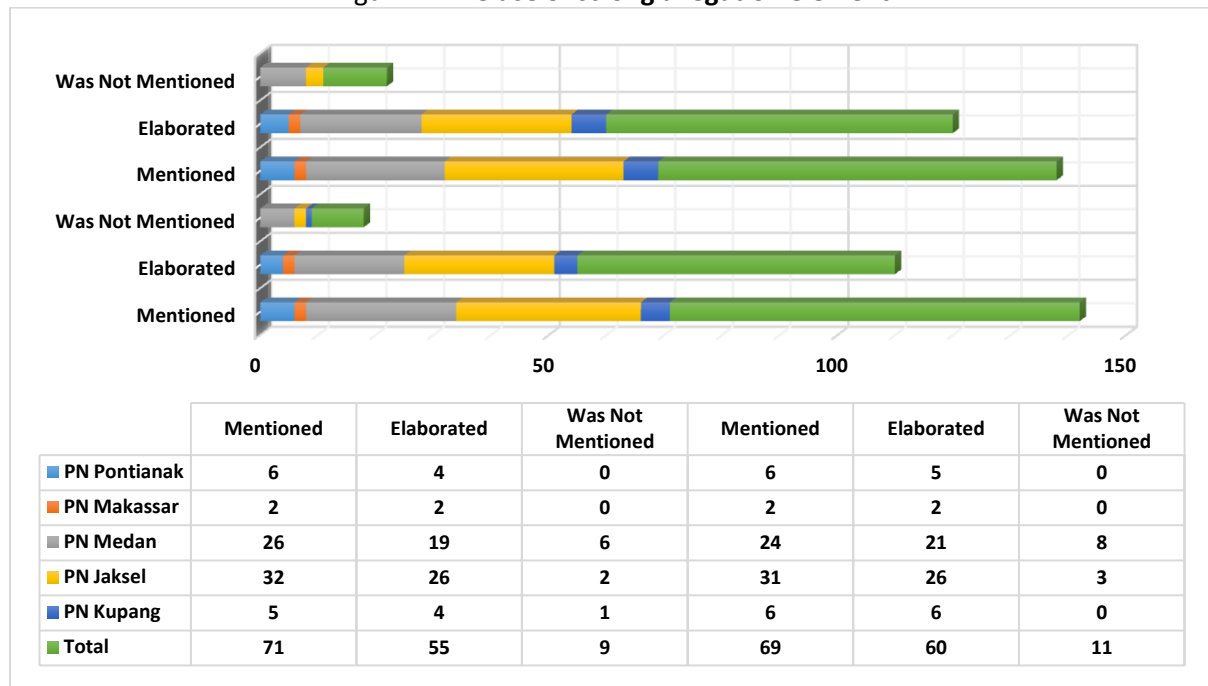
The table shows that most petitions—58 petitions—did not mention such element of concern, only 22 of them mentioned it, and only 10 petitions elaborated in detail. In regards to respondent's response, in 45 cases they did not mention such element. Only 35 cases where the respondent

mentioned it, and only 3 of them elaborated it in detail. The rest of them only copied the provision under Article 21 of KUHP.

B.5.4. Petitioner and repondent’s view on strong allegation element

A better situation was found on the use of strong allegation as the basis for detention. In the petition, most applicants use this basis and elaborated it in detail. From 80 pretrial cases, 71 of them mentioned such basis, and 55 of them elaborated it in detail. Only 9 petitions that did not mention the use of strong allegation as the basis for detention. The responses from respondents are quite similar. From 80 cases, 69 of them mentioned response on strong allegation, where 60 of them elaborated it in detail. Only 11 cases in which the respondent did not mention the use of this strong allegation.

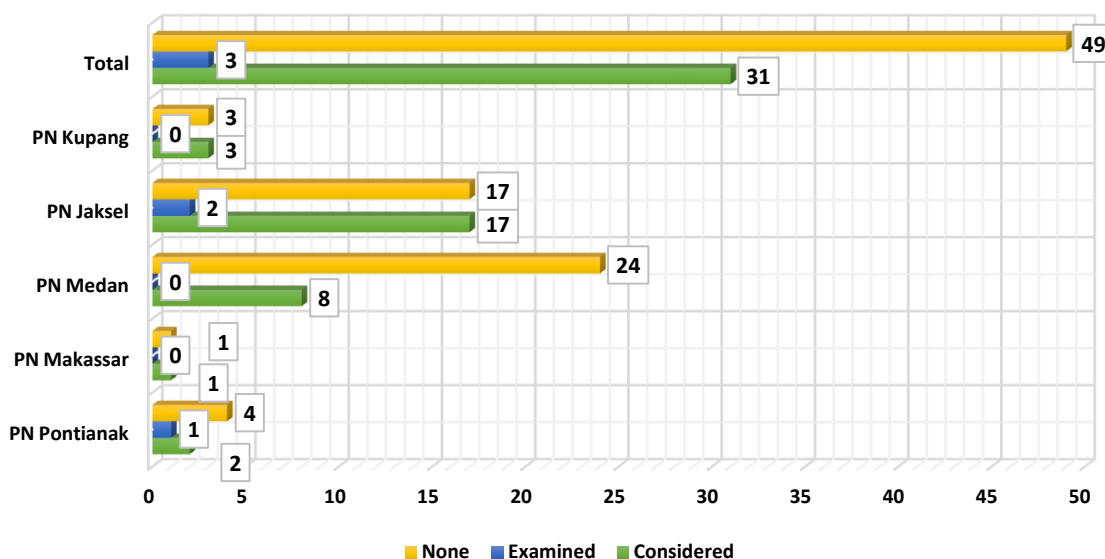
Figur 11: The use of strong allegation element



B.5.5. Judge’s stance on the concern that the suspect will escape

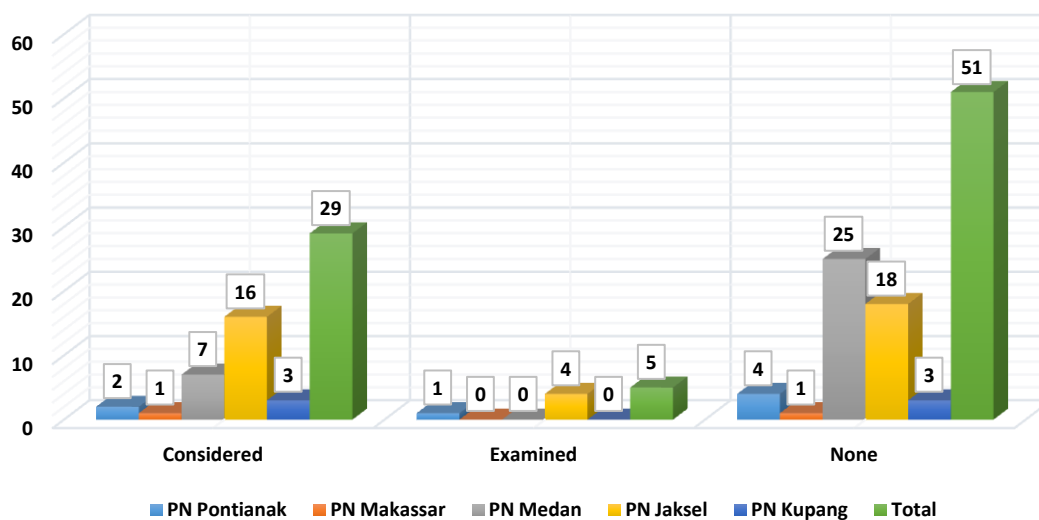
Judge’s consideration also varies on the use of concern as the basis of detention. In regards to the concern that the suspect will escape the investigation, 49 out of 80 decisions did not mention such issue. Only 31 petition mentioned it, and only 3 that were examined. Only judges at PN South Jakarta that are quite consistent in considering this concern, where 17 out of 34 decisions, where only 2 that were examined

Figure 12: Judge's stance on the concern that the suspect will escape



On the second element of concern, where the suspect may damage the evidence or make it disappear, most of the judges did not mention it in the decisions (51 out of 80 decisions). Only 29 judges that considered this element in the decision, where only 5 that were examined. The rest of them only discussed it normatively.

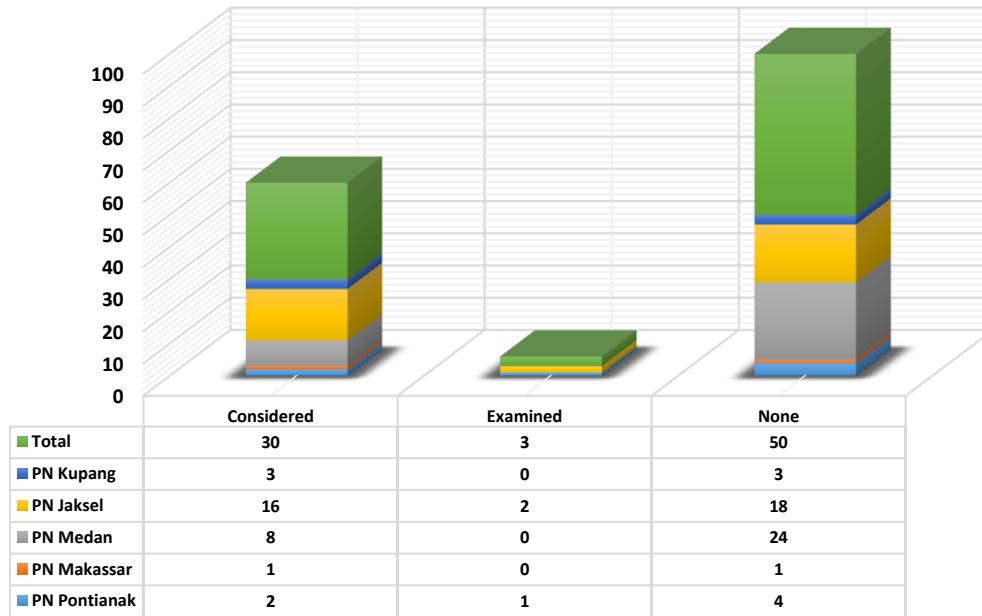
Figure 13: Judge's stance on the concern that the suspect will damage the evidence



B.5.6. Judge's stance on the concern that the suspect will repeat the criminal act

Similar practice also implemented in the third element of concern, which is the concern that the suspect will repeat the criminal act. The figure is depicted on the following table:

Figure 14: Judge's stance on the concern that the suspect will repeat the criminal act

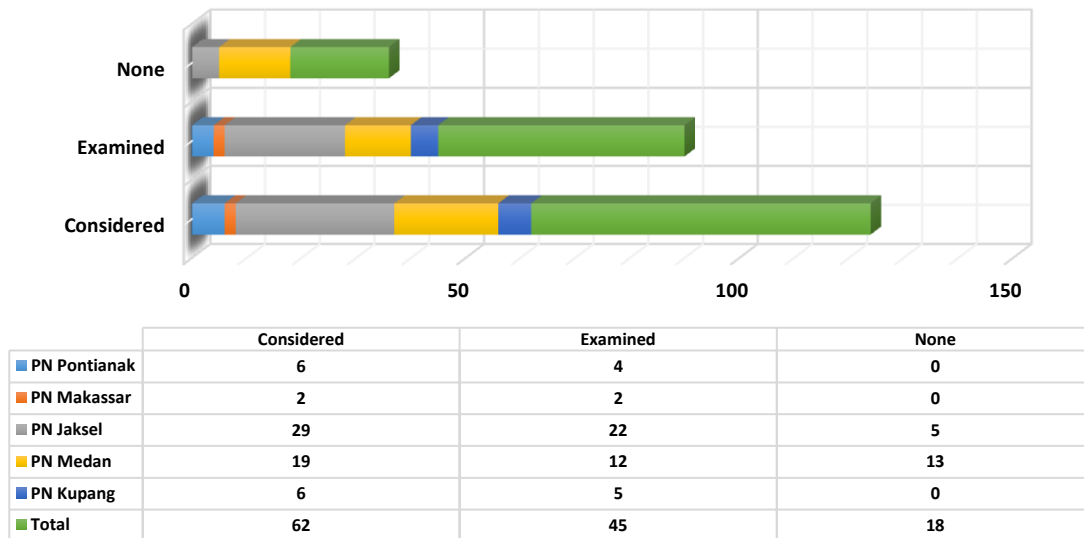


The table shows that only 30 out of 80 decisions that considered the concern where the suspect will repeat the criminal act, and only 3 that were examined. Most of the pretrial cases are yet to consider this element in the decisions.

B.5.7. Judge's stance on the element of strong allegation

An interesting fact rise in the judge's opinion when considering the strong allegation element in the decision that the suspect is allegedly committed a criminal act. Most judges considered this element, where out of 80 decisions, 62 of them considered the strong allegation element, and 42 were examined. Only 18 cases where the judges did not considered such element. It is in line with the detailed elaboration from the applicant and respondent.

Figure 15: Judge’s stance on the element of strong allegation



Such condition may be seen from Decision No. 06/Pid.Pra/2007/PN.Ptk (P-4),¹³⁴ the applicant said:

“...The element of concern: the suspect will escape, make the evidence disappear, or repeating the crime are not fulfilled, and it can be proven by the applicant, where he was cooperative during investigation, responding to all subpoenas (written and verbal). Therefore, respondent’s action has violated Article 21 (1) of KUHP”.

Regarding this point, the respondent said his response:

“...the detention towards the applicant, based on the sufficient evidence, the suspect was allegedly committed embezzlement that is subject to detention, there was a concern that the suspect will escape, damage the evidence, repeat the criminal act, and it was the authority of the respondent to determine it”.

Even though the elements of concern were not elaborated in detail by the respondent, the judge viewed that such response was sufficient, particularly on the last two elements. In the consideration, the judge said:

“Considering the element of concern that the applicant will make the evidence disappear, or repeating the criminal act, the detention was legal, because the applicant worked in private sector and did not have any responsibility to particular institution, based on the statement of the applicants and two respondents, and exhibit T-19 to 42, P-3 and P-4,

¹³⁴ Decision No. 06/Pid.Pra/2007/PN.Ptk comes from PN Makassar, filed by applicant named Phang Nyit Sin a.k.a Daniel Chandra the son of Cong Bui Jung, for the case of fraud and/or embezzlement, in which the Applicant is a businessman who made a verbal cooperation agreement. The Applicant had difficulties in giving the profit due to fire accident. The Applicant finally returned all the capital and profit as agreed. However, the Applicant is considered failed to pay the money as per the agreement. The Applicant was reported to the Respondent, and after the expose, the Applicant was detained. The Applicant felt that the detention has no legal ground, and he filed a pretrial petition. PN Pontianak rejected the petition.

there were sufficient reasons for the detention, therefore applicant's argument that he was cooperative during investigation cannot be accepted".

In the next point, the judge also said similar argument:

"Considering that some documents have been foreclosed from the applicant and under the possession of the respondent as an investigator, and due to subjective requirements are consisted from some alternative concerns, while the alternative discretion is at the investigator's hand, the detention has been fulfilled the subjective requirements".

Many parties vied that the element of concern is the subjective right of law enforcers, whereas there is subjective requirement to affirm such right. This division, however, is now acknowledged under KUHAP.

This kind of paradigm leads to the arrogance of the officials during detention. Detention is also used as a tool by the official to detain many persons from many background. There are no strict indicators as references to see whether the concern from the official is reasonable enough to conduct a detention, at least for the suspect.

From profiling process, some applicants elaborated their concern of such element. However, respondent claimed its authority in this issue. Such claim is depicted from the response: (1) only showed the related article as the basis of detention; and (2) only stated that the respondent concerned that the suspect will escape, or damage the evidence or make it disappear, or repeating the crime, without giving further elaboration on the concern.

In pretrial decision can be seen respondent's answer regarding the subjective requirement on the element of concern. In Decision No. 23/Pid.Prap./2008/PN.Jkt.Sel (P-56)¹³⁵, respondent said:

"the subjective requirements in conducting detention towards the applicant is an authority given to the investigator based on Article 20 (1) of KUHAP, and it is not subjective reason from the applicant, where only him that can know his subjectivity".

Such answer can be found in Decision No. 05/PID.PRA/2008/PN.KPG (P-78), in which the respondent said:

"The concern from investigator/prosecutor as given by the law is subjective and is at investigator/prosecutor's discretion towards suspect/defendant during investigation or prosecution, so that the investigator/prosecutor is authorized to conduct detention".

Such responses showed the the inability of investigators to elaborate in detail the indicators on element of concern when conducting a detention. Investigator cannot elaborate the aim of "concerned condition" that the suspect or defendant will escape, damage the evidence or make it disappear, or repeat the criminal act.

¹³⁵ Decision No. 23/Pid.Prap./2008/PN.Jkt.Sel comes from PN Jaksel, filed by the applicant named Romli Atmasmita, during corruption case when the Applicant held the position as the Director General of General Legal Administration at the Ministry of Law and Human Rights of the Republic of Indonesia. The Applicant has been declared as a suspect and being detained. The Applicant felt that there is no necessity for detention, due to the lack of strong allegation, sufficient preliminary evidence, and due to unilateral action from the Respondent. PN Jaksel rejected the petition.

Most of the judge's decisions shared similar view with the respondent, where the subjective requirements are the subjectivity of the investigator/respondent. However, the judges are very moderate in defining the word "subjective", by asserting that it also the domain of suspect/applicant. In Decision No. 05/PID.PRA/2008/PN.KPG (P-78) the judge said:

"The reason in point 1 is a subjective reason, therefore the detention depends on the subjectivity of the suspect that will be detained and also the official that will conduct the detention and there are no strict parameters to measure the level of concern..."¹³⁶

If the respondent does not give a detailed response regarding the coercive action, and the judge's consideration does not emphasize on the legal basis of such coercive action, it is normal. However, it becomes odd when it comes to the essence of pretrial, which is to examine the legality of a coercive action.

Pretrial is a complaint mechanism for the suspect that is subject to coercive action. It is an indication that there the coercive action is wrong. It is wiser for the respondent and the judge to give a detailed explanation on the coercive action. It also should be noted that every coercive action takes away a person's civil liberty, even though it is legal.

Furthermore, a comprehensive consideration reflects the willingness of the court to examine that the coercive action has been done properly, as in accordance with the original spirit of pretrial under KUHAP, which protects the basic citizen's rights.

In general, there are different point of views between the applicant, respondent, and judge in examining the elements of detention. In this case, the respondent and the judge have the same understanding, where the elements have alternative nature. The respondent, usually the police and prosecutor, viewed that when one or two elements have been fulfilled, a detention may be made.

Profiling process shows that the respondent relies on a strong allegation, which is actually to the evidence discovery. While element of concern and formal-procedural, are not elaborated in detail, or even are not discussed at all.

The same view also showed by the judges in the considerations. Some of them explain and examine the elements of detention in detail, but mostly do not, and viewed that those elements are alternative in nature—instead of cumulative.

These point of views are different to applicant's argument that the elements should be cumulative, where the applicant viewed that all elements must be fulfilled. However, the profiling process shows that most applicants do not elaborate all elements of detention. It correlates with the abovementioned explanation on the basis of pretrial petition submission.

Respondent and judge's point of view, of course, create losses for the applicant. First, KUHAP gives a large opportunity to the law enforcers to detain a person; second, KUHAP gives a broad authority to the law enforcers to interpret those elements; third, to challenge such broad authority, KUHAP closes the opportunity to the public for the examination of the accuracy of law enforcer's interpretation on the elements of detention; fourth, judge has the same paradigm with law enforcers in coercive action, so that the examination is not optimal in implementation.

¹³⁶ See also Decision No. 04/Pra.Pid.B/2010/PN.Mks (P-7).

With this condition, it is fair that many petitions are rejected. It also has caused many parties to see that pretrial is pointless. At the end, unlawful act such as bribery is potential to be happened during investigation and prosecution.

The abovementioned discussion may reflect the main objective of pretrial institution. What is the real objective of this institution? With the current situation, it is necessary to review the provisions on pretrial under KUHAP.

The measurement of element of concern should not be monopolized by the law enforcers, where it should be the domain of the suspect/applicant, and it must be examined by the judge during pretrial proceeding. If it is not, the understanding of such issue must be accompanied with certain indicators as a reference for related parties to measure the official's concern. These problems made the essence of pretrial is difficult to be achieved.

B.6. Cacat administrasi tidak menyebabkan penangkapan dan penahanan tidak sah

The formal-procedural element in a detention covers the existence of letter of detention order/determination and copy of such letter to the family. This letter must consists of identity of the suspect/defendant, reason for detention, brief explanation on the crime that is charged, and the detention plaes. When the elements are not fulfilled, many applicants will likely file a pretrial petition. Study on 80 pretrial decisions discovers the following information:

Tabel 1: Response from parties on detention warrant

| Parties | Legal | Illegal | Without Detention Warrant | Not Mentioned |
|------------|-------|---------|---------------------------|---------------|
| Applicant | 4 | 48 | 6 | 22 |
| Respondent | 68 | 0 | 0 | 12 |

Most applicants said that the letter of detention order from the investigator is invalid (48 petitions), 6 of them said that there was no detention order. There were 22 petitions that did not mention this issues, while only 4 petitions saying the detention order was legal. From the respondent's side, 68 of them said that the detention procedure is legal with the issuance of detention order, and only 12 cases that did not mention this issue.

From the judge's side, this issue have neve been examined as the crucial aspect on the legality of detention. The typographical error of identity, lack of copy for suspect's family, are disregarded by the judge under the reason that it is not the main case. While it is regarded not important, 61 of 80 decisions examined this issue, 16 of them did not mention it, and 3 of them did not examine it.

Tabel 2: Judge's stance on detention warrant

| District Court | Criterias | | |
|----------------|-----------|--------------|---------------|
| | Examined | Not Examined | Not Mentioned |
| Pontianak | 6 | | |
| Makassar | 2 (-1) | | |
| Medan | 18 | 1 | 13 |
| South Jakarta | 29 | 2 (+2) | 3 |
| Kupang | 6 (-1) | | |
| Total | 61 | 3 | 16 |

From the Decision No. 12/Pra.Pid/2005/PN-Mdn (P-10)¹³⁷ it can be found that the applicant based its petition on the typographical error on the detention order, for instance the order wrote “Name: Sri Maryani, Religion: Buddhist”, where it should be “Name: Siti Maryani, Religion: Islam”, or “Sex: Male”, where it should be “Sex: Female”. While the respondent admitted this error, they asserted that such error did not nullify the arrest and detention. In the examination, the judge approved respondent’s response. In the consideration, the judge said:

“Based on the elaboration, the pretrial judge said that the typographical error in the Detention Order (Exhibit P-4), where the sex was written as male, while it should be female, however the person that is detained after the report from SUSANTO AMAT, is the one that committed the criminal act so that the Respondent’s action based on the detention order (exhibit P-4) is legal, and the error was merely typographical error, where it is a common knowledge that a person named SITI MARYANI is a female, not a male”.

Previously, the judge also said that the typographical error does not make the detention as *error in persona*, and the applicant is Chinese descendant so that it is perceived that applicant is a Buddhist, will mislead the respondent.

Similar maladministration also occurred in the detention extension. In Gayus Tambunan case, the maladministration can be found from the exhibits that are submitted by the applicant and respondent. The maladministration is the delay from the official to sign and send the detention order to the suspect. In this case, the judge said:

“...after exhibit P3 is compared with T8, it is the same (the copy of P3 is not clear enough), and it has been validated by the authorized official, and it is lawful. However, the delay of petition’s signature (exhibit T9/P4), while there is no timeframe in KUHAP, this is a warning for the respondent to work faster, more professional, and such complaint may be filed to the hierarchy in the respondent’s institution. The delay, however, does not make the detention extension since 12 August 2010 is illegal...”.

C. Pretrial: between civil and criminal mechanism

Up until now, there is no consensus on the proceeding mechanism for the pretrial, whether it will use criminal proceeding mechanism or civil proceeding mechanism, or adopt a different mechanism. In general, the provisions regarding the pretrial procedural law under KUHAP are not sufficient and unclear, which makes many judges use civil proceeding mechanism to handle pretrial petition.

As a result, there are many contradictions between the two procedural law, which leads to legal uncertainty and creates losses for suspect in using pretrial mechanism. Article 82 (1) (c) of KUHAP states that the pretrial is conducted under express examination and the judge must render a decision in 7 days. According to the recent practice, it is fair to say that the pretrial procedural law is a mix between criminal proceeding and civil proceeding.

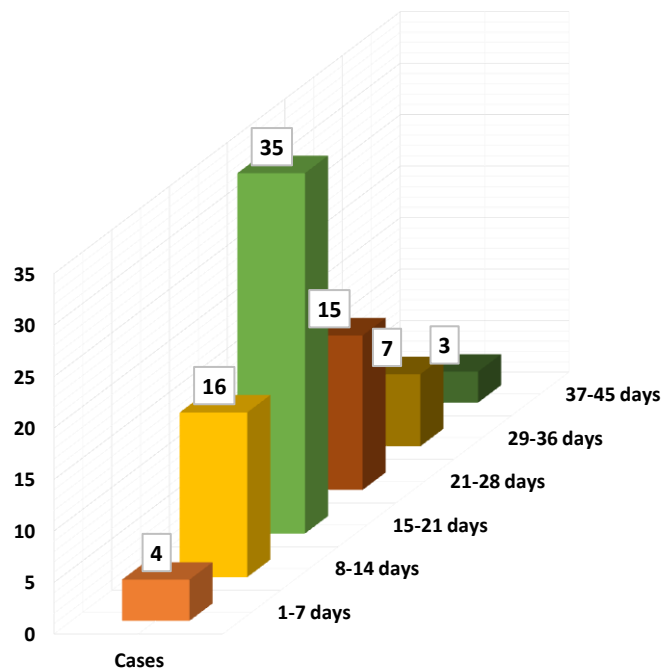
¹³⁷ Decision No. 12/Pra.Pid/2005/PN-Mdn comes from PN Medan, filed by an applicant named Siti Mariani, on the case of theft occurred at the Applicant’s workplace. Due to the pressure, the applicant admitted that she committed the theft. The Applicant then was reported to the police and arrested. The Applicant stated that detention needed sufficient preliminary evidences, and the detention was irrational due to the small room of time from arrest to detention and many mistakes in the detention warrant. PN Medan rejected the pretrial petition.

Based on the observation over 80 decisions, both systems are accommodated in pretrial cases. However, it is ambiguous when the case that is tried is actually originate from a criminal case. In regards to timeframe, KUHAP asserts that the judge must render a decision in 7 days.

However, in practice, it needs 19 days to render a decision, starting the submission of petition to decision from the judge. The fastest timeframe is 12 days, and the longest is 33 days. From 80 decisions, 35 cases are concluded in average of 15-21 days, and only 4 cases that are concluded in 1 to 4 days. The following figure depicts the complete information.

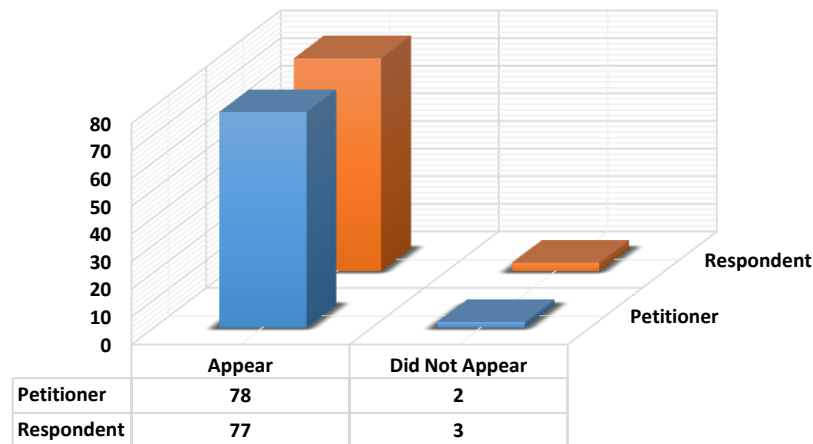
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Figure 16: Days needed in pretrial



This situation occurs because the Court applies civil procedural law principles, so that the summon must consider the formal requirement on a summon. One of the factor that makes pretrial is so slow is the level of position of the official. While KUHAP does not acknowledge the term “respondent”, in pretrial such term is used, so the court must also hear the statement from the respondent. That is why the court must wait the appearance of the respondent to be heard and give responses. Based on the statistics, both parties are quite committed in attending the trial. Out of 80 pretrial cases, 78 of them were attended by the applicant, and 77 of them were attended by the respondent.

Figure 17: Parties attendance during trial



The tendency to use civil procedural law in pretrial is also can be seen from the settlement effort during trial, even though most cases are failed to reach a settlement. Only 5 out of 80 cases that reached settlement, while 75 of them failed.

However, some judges in their considerations implied that the proceeding mechanism in pretrial is criminal proceeding, which can be seen from Decision No. 11/Pra.Pid/2004/PN.Mdn in PN Medan.

The applicant in this case write the complete identity of the respondent, and it was directly adressed to the individual who is responsible to the coercive action, as known under the civil proceeding. Regarding such format, the respondent said that it makes the petition obscure, because the position of the individual should not be mentioned, instead it should be the State cq. The institution. The judge in his consideration admitted that such format is not proper, by saying:

“...the petition that directly named the position of the respondent, without adressing it to the State cq. Department of Finance cq. Directorate General of Customs and Excise Type A at Belawan, is not correct according to the law. However, considering the approach not to use formalistic legal thinking, the error that made by the applicant should not make the petition obscure and should not make it unacceptable, because the main issue is to see whether the action from the Respondents to Petitioner is according to the law, fairness, and truth”.

Judge’s consideration can be interpreted in two folds: First, the judge said that such format was incorrect, because it was not a civil proceeding; and second, the judge admitted that there is a specific mechanism for pretrial, including the format in writing the correct identity.

However, there is another question when another judge at PN Medan included “peaceful settlement” (*upaya damai*) in concluding the pretrial case, where it is a term in civil proceeding. In Decision No. 06/Prapid/2005/PN.Mdn (P-9), the judge said that:

“Considering that the judge at District Court of Medan has tried to reconcile both parties, and failed, the examination of this case is commenced by reading the petition, and for it the attorney-in-fact sticks to the petition”.

Meanwhile in PN South Jakarta, the judge asserted the mix system of criminal and civil proceeding in pretrial case. The consideration in Decision No. Putusan No. 04/Pid.Pra/2009/PN. Jkt. Sel (P-55), the judge said:

“Considering that pretrial lawsuit is a criminal case with civil proceeding mechanism, the pretrial lawsuit must be submitted to the competence district court where the respondent is domiciled”.

D. The effectiveness of pretrial mechanism

The abovementioned explanation shows that it is difficult for the applicants to win the pretrial case. From 80 petitions, only two cases that won by the applicants. It leads to preliminary conclusion regarding the basic problems in pretrial, so most of the petitions are not approved by the judge.

Pretrial proceedings, in essence, are not so different with other proceedings when there are two parties. Pretrial also examine the petition that is submitted and decided with *ex aequo et bono*. If there is an argument that a fair decision is impossible, at least the proceeding is fairly conducted.

From the profiling on the proceeding, judge’s consideration on pretrial focused on the formal document examination, such as letter of arrest order, detention, notification to the family, and other supporting documents. It is in line with the judge decision that rarely approved the petition when there are gaps of formal document ownership between the applicant and respondent—both in quality and quantity.

The profiling shows that only limited applicants that own proper documents to support its petition. In general, the applicants only relied on the statement and reasons of illegality of detention or other reasons why he should not be detained. In contrast, the respondent was very intense in providing documents and witnesses, to support that his coercive action is lawful.

Another problem with the use of civil procedural law is the burden of proof. Theoretically, Article 21 of KUHAP requires that the element of concerns is the domain of authorized official that may detain a person. So that the party that should prove the condition and situation where a person must be detained is the related official.

However, by using civil procedural law principle, the applicant must prove that there is no element of concern that is required under Article 21 of KUHAP. This brings serious impact, because the applicant will have difficulties to prove it.

From this point of view, the pretrial should play its role not merely on formal documents examination, but also to examine the basis of petition and respondent’s response. The judge must examine whether the investigator’s authority in conduction arrest, detention are in accordance with the criminal procedural law, examine whether there are sufficient preliminary evidence, and “subjective requirements” from the investigator to detain a person.

This hope is not merely aimed to prevent pretrial from formalistic paradigm, but also to make the pretrial decisions reflect the essence of pretrial institution, which deterines the effectiveness of pretrial existence. As mentioned previously tha the existence of pretrial in Indonesia is to give protection for the citizen’s right when their liberty is taken away.

CHAPTER V

Reform on Pretrial Against Detention

A. The weakness of pretrial under KUHAP

There are many studies that highlighted the weaknesses of KUHAP, including the subject on supervision over coercive action by means of pretrial. The studies are made by: (i) Indonesian Advocates Association (*Ikatan Advokat Indonesia – Ikadin*) in 1987, on the evaluation of KUHAP implementation; (ii) Indonesia Legal Aid Foundation (*Yayasan Lembaga Bantuan Hukum Indonesia – YLBHI*) in 1996, on the evaluation of KUHAP, including the drafting of academic paper on the Draft Bill regarding KUHAP Amendment; (iii) the National Planning and Development Agency (*Badan Perencanaan dan Pembangunan Nasional – Bappenas*) in 2000 through the legal diagnostic studies.

Further, (iv) the National Law Development Agency (*Badan Pembinaan Hukum Nasional – BPHN*) in 2007 on the comparison between pretrial proceedings with commissioner judge under criminal justice system; (v) the National Law Commission (*Komisi Hukum Nasional – KHN*) in 2007 on the study regarding the abuse of power by the police during investigation and by the prosecutor during prosecution in criminal proceeding; (vi) Luhut MP Pangaribuan in his doctoral dissertation in 2009 on Lay Judge and Adhoc Judge; and (vii) ICJR in 2011 on the policy regarding detention in theory and practice..

From those studies, an interesting conclusion came from BPHN's study in 2007, which states that:

“there are many legal loopholes under KUHAP, where the implementation depends on the discretion of law enforcers, and the position of suspect/accused or his attorney-in-fact is weaker compared to the law enforcers. In this context, the practice of blackmailing by the law enforcers towards suspects/accused or called as judicial blackmail, often happened” .¹³⁸

According to the study, every coercive action always followed by taking away human rights, even though the essence of law enforcement is the protection of human rights. Therefore, the coercive action should not be too excessive and proportionally conducted, in accordance with the original spirit of the coercive action.

However, the pretrial that was intended as the control mechanism against coercive action, is conducted after the coercive action has been arranged, and before the proceeding at the court. According to BPHN, pretrial is a repressive oversight, instead a preventive one. This problem may be resolved if there is a procedure where the investigator is obliged to report every coercive action, so that there will be no abuse of power during the arrest or detention.¹³⁹

In the current practice of pretrial, judges are paying more attention on the administrative aspects of an arrest or a detention, whether there is a detention order or not, and does not examine and measure the material issues, while the material requirements are the most important aspects in conducting a coercive action. The pretrial disregards the fact whether the investigator or prosecutor has fulfilled all material requirements or not. The existence of sufficient preliminary evidence, in

¹³⁸ See BPHN, *Penelitian Hukum Tentang Perbandingan Antara Penyelesaian Putusan Praperadilan Dengan Kehadiran Hakim Komisaris Dalam Peradilan Pidana*, Jakarta, 2007.

¹³⁹ See BPHN, *Penelitian Hukum ... Ibid.*, pg. 111.

practice, was never been discussed by the pretrial judges, because they viewed that this issue is not their authority, instead it is the domain of the judge during the proceeding at the district court.¹⁴⁰

Regarding detention, judges are not measuring whether there are sufficient evidence that a suspect or accused allegedly committed a criminal act, whether there is a real argument that creates concern that the suspect will escape, make evidence disappear, or repeat the criminal act. The pretrial judge usually accepted these concerns, and viewed that it is the discretion of the investigator and prosecutor.¹⁴¹

KHN's study in 2007 also found that there are many abuse when detention is arranged during investigation by the police and during the prosecution by the prosecutor.¹⁴² This study also found that such situation is caused by the laws and regulations such as KUHAP and its implementing regulations, that give a large discretion to the law enforcers. The use of such discretion depends on the subjective measurement from the law enforcers, and also caused by the laws and regulations that allow broad interpretation from the law enforcers. KHN said that:¹⁴³

Detention reduces human rights that are freedom of movement and activities, and due to detention a person's freedom is reduced even gone, in addition, detention also relates to someone's reputation, because a person that has been detained will have a negative stigma, even though the criminal law use the presumption of innocence principle, and for public officials, detention may leads to character assassination. On the other side, detention is needed to maximize the investigation to prove a criminal act at the court, if the detention is arranged based on sufficient preliminary evidence and the alleged person is not detained it will hamper the investigation, even though it is legal.

In the current situation where law enforcement surrounded by judicial mafia, detention under KUHAP gives an opportunity to the law enforcers to interpret a detention subjectively, which means that the authority to detain a person is not merely based on legal basis, in this situation, the law enforcement and legal instrument are supporting each other for the abuse of power.

KHN's study also said that the possibility of abuse of power also occurred on the interpretation of "sufficient preliminary evidence", because KUHAP does not further elaborate such provision. The interpretation of this provision lies on the law enforcers and causes legal uncertainty. It also affects the investigator's method, where detention comes first, followed by verification of evidence. KHN said that:

The unclarity or the limitation of "sufficient preliminary evidence" shows that KUHAP is inconsistent with the original spirit, which is to support human dignity along with human rights. Sufficient preliminary evidence is the basis to arrange a coercive action, particularly arrest and detention, and these actions reduce the human right that is liberty, so that such actions must be based on accurate evidence, because an arrest, a detention, or other coercive action relate to a person's reputation. Even though the criminal law implements the presumption of innocence principle, the public gives a negative stigma to a person that has been detained. Sufficient preliminary evidence should be in relation with Article 183 of KUHAP, which states that the minimum evidence, in which two valid evidence and judge's conviction.

¹⁴⁰ See BPHN, *Penelitian hukum ... Ibid.*, pg. 113.

¹⁴¹ See BPHN, *Penelitian Hukum ... Ibid.*, pg. 113.

¹⁴² See KHN, *Penyalahgunaan Wewenang Dalam Penyidikan Oleh Polisi Dan Penuntutan Oleh Jaksa Dalam Proses Peradilan Pidana* (2007).

¹⁴³ *Ibid.*

Police investigation is a process to prove whether a suspect/defendant is a perpetrator, where it is a chain of activities to collect and evaluate valid evidence to be examined before the court. The court will examine the indictment and the evidences are valid to convict a person.

However, not all evidences are admitted by the court, therefore it is more correct to say that during the investigation the evidences are called as "initial evidences" (*calon alat bukti*), which corresponds to the presumption of innocence principle.

The unclarity of "sufficient preliminary evidence" affects the examination by the judge in a pretrial, where pretrial only examines the administrative aspects of an arrest, a detention, a termination of investigation/prosecution, but it does not examine the substantial aspect, which is the fulfillment of evidence in arranging an arrest, a detention, a termination of investigation/prosecution.

KHN also found that the supervision over the broad authority in determining sufficient preliminary evidence is weak. KHN recommended that the authority of the judge needs to be reviewed in determining the necessity of a detention, instead merely determining the legality of detention in a judicial proceeding.¹⁴⁴

There should be an internal vertical control within each law enforcement institution. However, this supervision is not enough, because it depends on the willingness of the institution itself, therefore, a horizontal control is needed, where supervision is conducted at the same level.¹⁴⁵

KHN concluded that KUHAP needs to be revised, particularly the supervision mechanism between law enforcers and institutions within judicial subsystem,¹⁴⁶ which is between the investigation, prosecution, defense, examination by the judge and legal proceeding.

KHN also concluded that pretrial merely examines the legality of an arrest, a detention, a termination of investigation/prosecution (examinator judge), but does not examine the action of investigator, therefore, it is hoped that examiner judge may be changed into investigating judge.¹⁴⁷

KHN viewed that the authority of pretrial needs to be expanded, so there will be no losses for the justice seekers. Further, KHN recommended "...the sufficient preliminary evidence must secure an approval from the commissioner judge before a coercive action is arranged, including the recommendation on (i) examination without legal assistance (ii) detention must secure judge's approval".¹⁴⁸

Ikadin has evaluated KUHAP implementation in 1987. They viewed that KUHAP needs to be changed by adding several provisions. The change covers detention and pretrial, "...the authority of pretrial needs to be expanded, for example on detention, it should not merely examine the formality but also substantial reason".¹⁴⁹

Furthermore, ICJR's study in 2010 and 2011 also supported the abovementioned findings. ICJR highlighted the following issues:

- (i) detention mechanism is still limited on administrative aspect, there is no awareness from the law enforcers to pay attention on the strict requirement of a detention; (ii) at the

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*, pg. 81-82.

¹⁴⁶ See *Menguak Misi KHN dan Kinerjanya, Kilas Balik 6 Tahun KHN RI (2006)*, pg. 37.

¹⁴⁷ See KHN, *Penyalahgunaan Op.Cit.*

¹⁴⁸ *Ibid*

¹⁴⁹ See Luhut MP. Pangaribuan, *Lay Judge ... Op.Cit.*, pg. 147.

investigation level, the police is more dominant to use objective reason first when considering whether a detention may be arranged or not. However this objective reason is still subjective, because based on the observation, there are investigators that intended to detain first, and find the objective reasons and legal basis later on; (iii) not all investigators are able to describe in details the indicators of element of concern when conducting a detention. Investigator are unable to explain the “situation leads to concern”, such as that the suspect or the defendant will escape, damage the evidence or make it disappear, or repeat the criminal act.¹⁵⁰

On pretrial, ICJR found out:

(i) the number of pretrial on detention submitted by the detainee is very limited. There is a lack of confidence from the suspect to file such pretrial; (ii) provisions on pretrial under KUHAP is not sufficient and unclear, so in practice, it uses civil procedural law approach. As a result, many contradiction between the two procedural law, where it causes losses for the suspect in using pretrial mechanis; (iii) investigator and prosecutor are resistant with the pretrial. When a case is brought to pretrial, investigator will speed up the investigation process, so that it can go to the court, and the pretrial is nulled; (iv) judges viewed that the element of concern is at the discretion of the official that is authorized to arrange a detention, so the court reject the examination on this issue, which makes the examination is limited to administrative aspects of a detention; (v) the lack of human resources in handling pretrial. The court does not have a specific judge to handle pretrial, so pretrial cases are stacked up with other cases.¹⁵¹

Many findings in the studies regarding detention, pretrial, and supervision over coercive action show a same topic. The weaknesses of pretrial on detention are as follows:

A.1. Pretrial authority is merely ‘Post Factum’

The position and function of a judge in the initial phase of pre-adjudication is important to arrange a coercive action. In determining the sufficient preliminary evidence, by the investigator, which will be submitted to the prosecutor, there is a possibility of a biased consideration, so it needs a strong oversight.

Under KUHAP, if a person is subject to a coercive action in investigation phase or pre-adjudication, the suspect may file an examination to the pretrial judge. If such examination is arranged, the judge may examine the coercive action.

However, judge’s authority in this matter is very limited, unlike the concept of magistrate or justice of the peace, because pretrial is not similar to *habeas corpus* institution as known in many literatures. Even though a pretrial judge may determine the legality of an arrest, a detention, a termination of investigation/prosecution, this authority is conducted after a coercive action is arranged.¹⁵²

This condition is due to the fact that pretrial authority exists after coercive action is arranged, in other words after the investigator determine a determination or arrange a coercive action. Therefore, the pretrial authority is not when such actions are conducted. The position of pretrial judge in the pre-adjudication phase becomes ineffective to supervise the wrongful action from the

¹⁵⁰ Further discussion see Supriyadi Widodo, et.al, *Potret Penahanan ... Op.Cit.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

investigator that is given by the laws and regulations. This is very different with the supervision over coercive action under the concept of magistrate or justice of peace, where it is not merely an approval for investigation, but also involving public participation.¹⁵³

One of the most crucial aspects regarding the preliminary evidence discovery by the investigator. This provision is important because it is used by the investigator to determine a person's status as a suspect. And after the investigator determine the probable cause, a suspect may be detained. The problem lies when the probable cause under KUHAP is solely determined by the investigator. This determination may not be question as long as it is notified to the suspect and his family.

The sufficient preliminary evidence or probable cause and reasonableness to detain a person does not fall under the authority of pretrial. Where in concept, pretrial was aimed to control the power of the investigator. It is due to the nature of pretrial that only examine the legality (*post factum*) of an arrest or a detention.¹⁵⁴

There should be a supervision on pre-adjudication and post-adjudication. In these phases, independent judges will concentrate to determine the evidences at the court, and the judges may evaluate the pre-adjudication and determine what should be done during post-adjudication.

This will be affected during what happened on pre-adjudication phase. If there is no fair process during pre-adjudication, the adjudication process will be ineffective. As a result, the judges must work hard because the lack of knowledge during pre-adjudication. No wonder that many rejection towards examination minutes by the suspects or witnesses during trials.¹⁵⁵

A.2. Examination on detention: limited to administrative review and objective basis

In practice, pretrial only examines the formal-administrative aspects of a detention, such as the existence of arrest warrant, letter of detention order, and it does not examine the substantial matter. It should be noted that substantial matter will determine whether a person should be arrested or detained by the investigator or prosecutor.

Detention provisions under KUHAP gives an opportunity to the law enforcers to interpret the provisions subjectively, which means that the detention depends on the investigator, who will also use a subjective legal basis,¹⁵⁶ under this situation, the law enforcement institution and the legal instrument are supporting each other for the abuse of power. According to KHN and ICJR study, investigator and prosecutor are using their "guts" to detain or extend a detention of a suspect.

As a result, ther are many abuse of power in an arrest or detention of a suspect/defendant by investigator/prosecutor, because there is no institution to examine it. Under the system of *habeas*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ See KHN, *Kajian terhadap Rancangan Undang-Undang Kitab Undang-Undang Hukum Acara Pidana (RKUHAP)*, 2009.

¹⁵⁶ Article 21 (1) of KUHAP states " A warrant for detention or further detention shall be given to a suspect or a defendant who is strongly presumed to have committed a criminal act based on sufficient evidence, in cases where there are circumstances which give rise to a concern that the suspect or the defendant will escape, damage or make evidence disappear and/or repeat the criminal act". This article is subjective consideration, and the objective consideration is stipulated under Article 21 (4) of KUHAP which states" Such detention may only be applied to a suspect or a defendant who has committed a criminal act and/or has attempted or abetted such criminal act in which: a. the criminal act is subject to imprisonment of five years or more; b. the criminal act is as intended in Article 282 paragraph (3) ad so forth"

corpus, the institution determines the legality of a detention and whether a detention may be conducted or not.

Therefore, it is incorrect when a pretrial judge only examines administrative aspects and disregard substantial matters. This contradicts with the objective of criminal proceedings, which is to find put substantial truth. It will be very difficult to find substantial truth if during pre-adjudication, the judge only examine administrative aspects, as commonly implemented in the pretrial (as the part of pre-adjudication process).¹⁵⁷

A.3. Passive judge during pretrial

In using his authority, a pretrial judge is passive, so the pretrial judge will execute it if there is a petition, otherwise he may not execute such authority. Pretrial judge waits for a petition from a applicant that feels violated due to an action from the investigator or prosecutor

Pretrial judge may not actively involved or taking an initiative to examine an alleged violation on the action from the investigator/prosecutor towards a suspect or accused. If there is an alleged violation, the judge does not have the authority to correct it or supervise it. If he knows it, he may use such knowledge during trial to determine whether such action is in accordance with the law or not. For instance, a judge knows that there is a violation during evidence discovery, a detention that does not follow the procedure, will be used to give a minor penalty.

Pretrial may not examine the legality of detention without a request from a suspect, or his family, or his attorney-in-fact. Therefore, even though a detention is not comply with the procedure and there is no petition from the suspect, the pretrial may not be arranged.

A.4. A null pretrial that erases suspect's right

A pretrial is null if the case has been tried by the district court, or when the case is submitted to the district court, the pretrial is yet to be concluded. It is meant to prevent different ruling on the same case. So that the pretrial is stopped and all related issues with the case will be examined during trials at the district court

Many theorists viewed that such provision does not reflect fairness, because when it happens the legality of an official action cannot be determined. If there is a request for pretrial against a judge, it must be rejected by the issuance of a letter outside the trial (Supreme Court Circular Letter No. 14 of 1983), which states that if a detention is arranged by a judge, the case will be examined, therefore the pretrial will be pointless. This provision limits the authority of pretrial because the case is nulled when the district court starts the trial. If the nullification of a pretrial is due to technical reason, not a principle matter, the objective of a pretrial will be lost and obscure.

The pretrial is aimed to give a legal evaluation on preliminary examination against a suspect as stipulated under Article 77 KUHAP, in which the decision will be the basis to release a suspect from illegal detention and to give compensation. Therefore, pretrial should assure a final decision. A legal system that complies to the principle of "due process of law" must assure that the pretrial is concluded, until there is a final and binding decision. Otherwise the issue on preliminary examination under Article 7 of KUHAP will be unanswered, causes losses to the suspect, and tarnish the reputation of the law and justice.¹⁵⁸

¹⁵⁷ See KHN, *Kajian terhadap ... Op.Cit.*

¹⁵⁸ Harjono Tjitrosoebono, *Komentar DPP Peradin Terhadap Hukum Acara Pidana (HAP)*, Jakarta, tahun 1981, pg. 28.

The nullification of a pretrial closes the opportunity for a applicant to find out the legality of an arrest or a detention arranged by an official. There should be a legal effort to protect those that have been arrested, detained, or investigation is terminated, because the case has been examined in a trial. Otherwise, there will be an abuse of power from the related officials, who will speed up the process and directly submitted the case to the court, so that the pretrial is nullified.

A.5. Pretrial procedural law issues: between criminal and civil proceeding, and the lack of regulation

Some part of pretrial procedural law and proceedings are stipulated under KUHAP. However, those provisions are too short and do not stipulate which procedural law that will be used. In practice, pretrial uses the civil procedural law. In regards to pretrial on detention, it brings a consequence where the applicant/suspect that must prove that the detention violates Article 21 (1) of KUHAP. Other than that, the use of civil procedural law will force the court to merely examine the administrative aspects of detention such as the existence of letter of detention order.

This situation is due to the lack of provisions regarding pretrial procedural law under KUHAP, and because the nature of pretrial is a petition, the judge then refer to civil procedural law, where in such procedural law, the petition is filed at the competent district court where the respondent is domiciled. Some topics that are not covered under KUHAP: (i) summon towards "respondent"; (ii) procedure in submitting pretrial by applicant;¹⁵⁹ (iii) the lack of provision regarding burden of proof, which leads to inconsistency. For instance, if the parties did not attend the pretrial, pretrial judge will not render a *verstek* decision, because there is no such rule under KUHAP.

A.6. Issue on pretrial case management and timeframe

There are three different views to determine pretrial timeframe. The first one states that a pretrial decision must be rendered in 7 days after the determination of trial date, which means that the summons and proceeding must be conducted within that timeframe. The submission and registration of pretrial will not be accounted for. The time period between the petition submission and determination of trial date is derived from Article 82 (1) (c). Note that this Article mandates the pretrial proceeding must be conducted under express examination, so that the 7 days time frame is started since the determination of trial date, where such interpretation does not in line with express examination, it is incorrect and does not comply with the law.

The second opinion states that the 7 days timeframe is started since the first proceeding, after the pretrial is registered and the head of district court appoints a judge, because there is a 3 days process in determining the trial date. The valid summon is 3 days before the trial date, and Saturday-Sunday are not included. After the trial date is set, the 7 days limitation is started. However, it is unclear whether it is 7 business days or 7 calendar days. Many judges viewed that the 7 days timeframe is started after the first trial.

The third opinion states that the 7 days timeframe is started after the registration date, and it is closer to the definition under Article 82 (1) (c). The judge must render a decision in 7 days after the petition is registered by the court's clerk, where such practice is in line with the principle of speedy trial. Theoretically, the judge must refer to the provision under the law. However, the judge cannot fulfill such timeframe properly.

¹⁵⁹ BPHN, *Penelitian Hukum ... Op.Cit.*, pg. 49.

According to Yahya Harahap, the delay on pretrial is caused by psychological factor from the law enforcers, where most of them are reluctant to implement Article 82 (1) (c), as a tolerance to the officials that are involved in the pretrial. According to the Article 82 (1) (c), the pretrial judge will hear the statement from the applicant and the related official. Usually, there is no from the applicant, because he will be cooperative during the proceeding. The problem occurs when the related officials did not attend the proceeding and reluctant to be examined. Yahya Harahap said:

“... The related official’s role is only to give a statement. However, there is a reluctancy from them, where they feel as the guilty parties. This is maybe the reason why they are reluctant to attend the pretrial proceeding. They disobey the summon, and it creates a bad reputation for them and shows their arrogancy, unprofessional, lack of responsibility in doing their duty...”.

Regardles the related official’s reasons not to obey the pretrial summon, their action is a factor that hampers and delays the pretrial proceeding. Their lack of attendance causing the judge to be unable to render a decision in 7 days, especially for a doubtful judge and put too many tolerance to the law enforcers, and it becomes an excuse for the judge to violate Article 82 (1) (c) of KUHAP.

“... this violation is because the judge is not assertive enough. For the sake of good relationship with other law enforcers, the judge has undermined the law and the interest of the justice seekers. The lack of assertiveness is maybe because the judge is unable to implement the law. The judge postpone to render the decision just to hear the statement from the official, where such practice is incorrect. To prove such error, we may examine Article 82 (1) (b) *juncto* Article 82 (1) (c)...”.

According to Article 82 (1) (b) the law mandates the judge to hear the statement from the applicant and the related official. However, such obligation is not imperative. There is no obligation under that provision. So it means that statement from both parties may be heard. The lack of attendance from the applicant or related official should not hamper the judge to render a decision. There is an argument if a party did not attend the proceeding, he waive his right to defend his interest. If the applicant did not attend the proceeding, it means that he does not care with the decision.

The judge need not to be manipulated by the lack of attendance from the related official. The condition where judge render a decision when a applicant did not attend the proceeding should not be happened, if it does not apply when the official did not attend the proceeding. Yahya Harahap asserted that the lack of attendance of a party should not be an excuse to violate the law. If the judge depends on the attendance of both parties, the pretrial will be ineffective. It can be imagined if the related official did not attend all proceedings, the decision will not be rendered.

Article 82 (1) (c) strictly obliges the judge to render a decision in 7 days after a petition is registered or after the determination of trial date, so that Article 82 (1) (b) cannot be separated from Article 82 (1) (c). It should not be a problem if the statement from the applicant or the related official have been heard or not. The judge must render a decision in 7 days. Such assertiveness will give an educational approach for the applicant and related official to comply with the law. The judge should show his assertiveness and disregard his tolerance for the related official. He may not undermine the law enforcement process.

B. The development of pretrial detention and its oversight under RKUHAP

According to RKUHAP drafts from 2000 to 2006, the detention system has not been changed since KUHAP. There is even an additional timeframe for detention into 30 days, where KUHAP states 20

days. Significant change occurred after the ratification of ICCPR, because article 9 of ICCPR obliges that a suspect must be brought physically to a judge, before he is detained

When the RUU KUHAP drafters put 15 detention days by the investigator, with 1 additional days for arrest (total 16 days), the Amnesty International and Prof. Dr. iur. Stephen C. Thaman (criminal law and criminal procedural law expert from the United States), criticized the draft.

They reminded that the detention must comply with the ratified ICCPR, so that the tolerance is only 2 period of 24 hours of detention by the investigator.¹⁶⁰ An extension must secure an approval from the preliminary examination judge, because according to ICCPR, the judge is authorized to arrange a detention, even though the prosecutor that submit an application of detention to the judge.¹⁶¹

In relation with the detention period, ICCPR states that the detention by investigator must be as short as possible and the suspect must be immediately brought before a judge. However the practice may vary in many countries.

The United States of America interprets “immediately” as 2 period of 24 hours. While most European countries interpret it as 5 days (1 day of arrest and 4 days of detention). KUHAP still uses 20 days of detention, and it must be corrected to comply with ICCPR.¹⁶² The original plan is to make detention during investigation expires in 5 days, however, the 2012 RUU KUHAP this timeframe is expanded.

In regards to 5 days of detention, RUU KUHAP drafters argued on the difficulty of communication in Indonesia, and Indonesia’s geographical condition as an archipelagic country, so that the 2 period of 24 hours is impossible to be implemented.

On this recommendation, Thaman argued that 5 days of detention only applies for remote areas and islands, but it may not be implemented for major city like Jakarta. However, it is difficult to determine which area that may implement 5 days of detention and which area that must implement 2 period of 24 hours, so the same rules applies for all areas in Indonesia. To prevent violation of ICCPR, after 2 period of 24 hours, the prosecutor should be notified.¹⁶³

B.1. Detention timeframe

If the drafts of RKUHAP from 2006 to 2012 are evaluated, especially on the detention period, the current RKUHAP went back to the concept before 2006-2007 period. Many viewed that this is due to the pressure from the parties that objected the RKUHAP 2011.

¹⁶⁰ During a comparative study to France, the RKUHAP drafters found out that the detainees are brought by the police to the prosecutor office (in France the detention by the investigator expires in 24 hours, and extended by the prosecutor for another 24 hours). The next detention is arranged by the “*judge des liberte et de la detention*” (judge of release and detention). It can be seen that the word *liberte* (liberty or release) comes first before detention, which means that the detention is an *ultimum remedium* (obat terakhir). The judge may issue an extension for 400 days. 400 hari. The suspect will be brought to the judge by the police and prosecutor to request an extension. The suspect’s legal counsel may also attend it and may request that the detention should not be arranged for certain reasons. The judge will decide whether the suspect will be detained or not. However, there are not extension applications that are rejected.

¹⁶¹ See 2012 RKUHAP Academic Draft, pg. 6

¹⁶² See RKUHAP 2010 Academic Draft, pg. 66

¹⁶³ There are parties viewed that the ICCPR should not be fully implemented. However, in regards to human rights, the deviation may not be too far. From 2x24 hours into 5x24 hours is too much deviation. The Russian Federation, for example, which is politically, economically, and military worse than Indonesia, complies to the ratified international legal instruments as stipulated under Article 1 (3) of Russia’s KUHAP.

While the current detention period is not in line with the original plan in its academic paper, it will affect the duration of detention by the investigator, which ruins the original concept of detention period during pre-adjudication phase. The detention period should be shortened to be in line with the current development of criminal procedural law that protects the human rights.

On this issue, Gregory Churchill commented:

“... there are many compromise, new ones and old ones. It is our homework to identify which one that is unnecessary. For instance, the academic paper is written as a justification from the drafters. There are detailed explanation, the ICCPR’s concept of 2x24 hours, how it implemented in many countries, including Russia. They said 5 days should apply for all Indonesian regions. To prevent violation towards ICCPR, in three days after the 2x24 hours period, the detention must be notified to the Prosecutor. This is the kind of arrogance the we always find. There is an accepted international practice, however Indonesia makes it as loose as possible. The notification to the prosecutor is not a form of responsibility, so we need a *judicial scrutiny*.¹⁶⁴

In RKUHAP 2004, the detention order expires in 30 days.¹⁶⁵ If the investigation is not concluded, the detention may be extended for another 30 days by the prosecutor, after securing an approval from the Head of Regional Prosecutor Office.¹⁶⁶ The suspect may be released before the detention period expires if the investigation has been concluded.¹⁶⁷ If the detention exceeds 60 days, the investigator must release the suspect from the detention.¹⁶⁸ Similar provision applies to detention arranged by the prosecutor, where the extension must secure an approval from the Head of District Court.¹⁶⁹

Under RKUHAP April 2007, the investigator is authorized to arrange a detention with approval from the prosecutor for 15 days.¹⁷⁰ It may be extended after the approval from the commissioner judge. If the detention is arranged by prosecutor during investigation: (a) the approval is given by the Head of Regional Prosecutor office, if the detention is arranged by the Regional Prosecutor Office; (b) the approval is given by the Head of High Prosecutor office, if the detention is arranged by the High Prosecutor Office; (c) the approval is given by the Director of Investigation at the Attorney General Office, if the detention is arranged by the Attorney General office, with detention period of 15 days.¹⁷¹

In another extension is needed for the purpose of investigation/prosecution, the judge at district court is authorized to arrange a detention for 30 days at maximum.¹⁷² The dention may be extended for another 30 days, and if it is necessary another extension 30 days may be arranged.¹⁷³ If the detention exceeds 30 days, investigator/prosecutor must release the suspect from detention.¹⁷⁴

Meanwhile, under RKUHAP December 2007, another change was made. This draft states that for the purpose of examination during investigation, the investigator is authorized to arrange a detention for 5 days.¹⁷⁵ If the investigator needs to extend it, he must request to the prosecutor to file a

¹⁶⁴ See ICJR limited discussion monograph, commissioner judge under RKUHAP 2012.

¹⁶⁵ See Article 22 (1) RKUHAP 2004.

¹⁶⁶ See Article 22 (2) RKUHAP 2004.

¹⁶⁷ See Article 22 (3) RKUHAP 2004.

¹⁶⁸ See Article 22 (4) RKUHAP 2004.

¹⁶⁹ See Article 23 (1) RKUHAP 2004.

¹⁷⁰ See Article 20 (1) RKUHAP April 2007.

¹⁷¹ See Article 20 (2) RKUHAP April 2007.

¹⁷² See Article 22 (3) RKUHAP April 2007.

¹⁷³ See Article 22 (4) RKUHAP April 2007.

¹⁷⁴ See Article 22 (5) RKUHAP April 2007.

¹⁷⁵ See Article 58 (1) RKUHAP Desember 2007.

submission of detention extension to the commissioner judge, for 25 days.¹⁷⁶ If another extension is needed for the purpose of investigation/prosecution, the judge at a district court is authorized to arrange a detention for 30 days, based on the prosecutor's request.¹⁷⁷ If the detention period expires, the investigator/prosecutor must release the suspect from detention.¹⁷⁸

Another change was made again under RCUHAP 2008, 2009, and 2010 drafts. In these drafts, the investigator is authorized to arrange a detention without any approval for 2x24 hours. If the detention exceeds the period, the investigator must secure an approval from the prosecutor. The detention during investigation may be arranged for 5 days at maximum.¹⁷⁹

If the prosecutor arranges a detention during investigation that exceeds 2x24 hours, but less than 5 days, it needs an approval from: (a) the Head of Regional Prosecutor office, if the detention is arranged by the Regional Prosecutor Office; (b) the Head of High Prosecutor office, if the detention is arranged by the High Prosecutor Office; (c) the Director of Investigation¹⁸⁰ at the Attorney General Office, if the detention is arranged by the Attorney General office.¹⁸¹

Detention extension may be arranged for 25 days, after the approval from the commissioner judge.¹⁸² If another extension is necessary, the judge at the district court is authorized to arrange a detention upon the request from the prosecutor, for 30 days, and it may be extended for another 30 days.¹⁸³ If the detention period expires, the investigator/prosecutor must release the suspect from the detention.¹⁸⁴

Tabel 3: Comparison of detention period during investigation

| Drafts | Detention during investigation | Authorized institutions | First detention extension | Authorized institution |
|---------------|---------------------------------------|---|----------------------------------|--|
| 2004 | 30 days at maximum | Investigator | 30 days at maximum | Prosecutor with approval from the Head of Regional prosecutor Office |
| 2007 April | 15 days at maximum | Investigator with approval from the prosecutor | 15 days at maximum | Commissioner judge |
| 2007 Desember | 5 days at maximum | Investigator, if only for 2x24 hours. Prosecutor if exceeds 2x24 hours. | 25 days | Commissioner judge |
| 2008 | 5 days at maximum | Investigator, if only for 2x24 hours. Prosecutor if exceeds 2x24 hours. | 25 days | Commissioner judge |
| 2009 | 5 days at | Investigator, if only for | 25 days | Commissioner |

¹⁷⁶ In the event that the Investigator needs to extend the detention, the Investigator will request the prosecutor to file a detention extension to the Commissioner Judge. See Article 60 (1), (2) and (5) RCUHAP December 2007.

¹⁷⁷ See Article 60 (6) dan (7) RCUHAP December 2007.

¹⁷⁸ See Article 60 (8) RCUHAP December 2007.

¹⁷⁹ See Article 60 (1) RCUHAP 2008.

¹⁸⁰ In 2009 and 2010 drafts, the name changed into Director of Prosecution.

¹⁸¹ See Article 58 (2) and (3) RCUHAP 2008.

¹⁸² See Article 60 (5) RCUHAP 2008.

¹⁸³ See Article 60 (7) and (8) RCUHAP 2008.

¹⁸⁴ See Article 60 (9) RCUHAP 2008.

| | | | | |
|------|--------------------|---|---------|-------------------------------|
| | maximum | 2x24 hours. Prosecutor if exceeds 2x24 hours. | | judge |
| 2010 | 5 days at maximum | Investigator, if only for 2x24 hours. Prosecutor if exceeds 2x24 hours. | 25 days | Commissioner judge |
| 2011 | 5 days at maximum | Investigator, if only for 2x24 hours. Prosecutor if exceeds 2x24 hours. | 25 days | Commissioner judge |
| 2012 | 10 days at maximum | Investigator for 5x24 hours, and may be extended by the prosecutor for another 5 x 24 hours | 20 days | Preliminary examination judge |

Under RKUHAP 2011, the investigator is authorized to arrange a detention without any approval from 2x24 hours for the purpose of examination during investigation.¹⁸⁵ If the prosecutor changes the detention from 2 x 24 hours into 5 x 24 hours, it needs an approval from:¹⁸⁶ (a) the Head of Regional Prosecutor office, if the detention is arranged by the Regional Prosecutor Office; (b) the Head of High Prosecutor office, if the detention is arranged by the High Prosecutor Office; (c) the Director of Prosecution at the Attorney General Office, if the detention is arranged by the Attorney General office.¹⁸⁷ For the purpose of examination during investigation, the commissioner judge approves the detention extension upon request from investigator via the prosecutor.¹⁸⁸

B.2. Detention oversight: the authority of preliminary examination judge

It must be admitted that the preliminary examination judge (*hakim pemeriksa pendahuluan* – HPP) under RKUHAP 2012 has a broader and more complete authority towards law enforcer’s action during pre-adjudication phase, compared to the current provision under KUHAP. This is a progressive movement on the criminal procedural law reform. The new mechanism, supervision, and control from HPP must be seriously supported. The expansion of HPP’s authority has been emerged since 2002, particularly under RKUHAP 2004 and it was incorporated under RKUHAP 2011.

Under RKUHAP 2004, a commissioner judge is authorized to decide and determine:¹⁸⁹ a. the legality of an arrest, a detention, a foreclosure, termination of investigation, termination of prosecution that is not based on opportunity principle; b. the necessity of a detention as stipulated under Article 53;¹⁹⁰ c. compensation and/or rehabilitation for a person who is illegally detained; commissioner judge’s decision is made upon suspect or victim’s request, while the determination is made upon judge’s initiative upon receiving a copy of warrant on arrest, detention, foreclosure, termination of investigation, or termination of prosecution that is not based on opportunity principle.¹⁹¹

¹⁸⁵ Article 58 (1) RKUHAP 2011.

¹⁸⁶ Detention conducted by the Prosecutor for the purpose of investigation pursuant to Article 6 (c). A detention that exceeds five days must be conducted by the commissioner judge.

¹⁸⁷ Article 58 (2) RKUHAP 2011.

¹⁸⁸ Article 58 (3) RKUHAP 2011.

¹⁸⁹ See Article 72 (1) RKUHAP 2004.

¹⁹⁰ Article 53 RKUHAP 2004 on the legal aid for suspect-accused who is facing death sentence, or a crime that is subject to 15 years of imprisonment and it is not related to the said detention.

¹⁹¹ See Article 72 (2) RKUHAP 2004.

Under RKUHAP April 2007, a commissioner judge is authorized to determine or decide:¹⁹² a. the legality of an arrest, a detention, a foreclosure, termination of investigation, termination of prosecution that is not based on opportunity principle; b. detention upon prosecutor request; c. compensation and/or rehabilitation for a person who is illegally arrested or detained; d. whether an examination during investigation and prosecution phase may be conducted or not without the presence of a legal counsel based on suspect or victim's request, suspending a detention, and whether a case may be prosecuted or not to the trial upon the request of the prosecutor.

Commissioner judge determines the legality of of an arrest, a detention, a foreclosure, termination of investigation, termination of prosecution that is not based on opportunity principle, based on his own initiative upon receiving a copy of warrant on arrest, detention, foreclosure, termination of investigation, or termination of prosecution that is not based on opportunity principle.¹⁹³

Commissioner judge may also order an examination towards a witness that cannot attend the proceeding, upon the request from suspect, accused, or prosecutor.¹⁹⁴ Such examination is conducted before the suspect or accused and prosecutor, so a cross-examination may be arranged.¹⁹⁵ Determination or decision from the commissioner judge may not be appealed or being filed at cassation level.¹⁹⁶

Commissioner judge renders a decision through trial by examining suspect, accused or witnesses, after hear the conclusion from the prosecutor. Commissioner judge is an institution that is placed between the investigator and prosecutor on one side, and judges on the other. The commissioner judge's authority is broader and more complete than the pretrial.¹⁹⁷

In conclusion, the RKUHAP April 2007 incorporated new authorities for commissioner judge that are: (i) rendering a determination on detention, based on his own initiative, upon receiving a copy of detention order; (ii) determining whether a case may or may not go to prosecution at trial upon the request of prosecutor.¹⁹⁸ These authorities are called as passive and active authority of a commissioner judge.

Under RKUHAP December 2007, a commissioner judge is authorized to determine or decide:¹⁹⁹ a. the legality of an arrest, a detention, a search, a foreclosure, or an interception;²⁰⁰ b. the revocation or suspension of a detention; c. statement from the suspect or accused by violating the right on not to self-incriminate; d. evidence or statement is illegally obtained and may not use as an evidence; e. compensation or rehabilitation for a person who is illegally arrested or detained, or compensation for ownership that is illegally foreclosed; f. the suspect or accused has the right to an attorney; g. that the investigation or prosecution has been conducted for illegal purpose; h. termination of investigation, termination of prosecution that is not based on opportunity principle;²⁰¹ i. whether a case may or may not be prosecuted at trial; and j. any violation of suspect's rights during investigation phase.

¹⁹² See Article 73 (1) RKUHAP April 2007.

¹⁹³ See Article 73 (3) RKUHAP 2007.

¹⁹⁴ See Article 73 (4) RKUHAP 2007.

¹⁹⁵ See Article 73 (5) RKUHAP 2007.

¹⁹⁶ See Article 81 RKUHAP 2007.

¹⁹⁷ Elucidation of Article 73 (1) (a) and (2) RKUHAP 2007.

¹⁹⁸ See Elucidation of (f). The provision under this article is a new institution named "pretrial".

¹⁹⁹ See Article 111 (1) RKUHAP Desember 2007.

²⁰⁰ Elucidation of See Article 111 (1) (a), "opportunity principle" refers to See Article 111 (2) RKUHAP Desember 2007.

²⁰¹ Elucidation: Commissioner judge's authority relates to prosecutor's authority as stipulated under Article 42 (3) RKUHAP Desember 2007.

The mentioned authorities must be conducted upon receiving a petition submitted by the suspect, his legal counsel, or the prosecutor. The issue on whether a case may or may not be prosecuted at trial, may only be filed by the prosecutor.²⁰² This draft was quite progressive by stipulating that a commissioner judge may render a decision on certain issues based on his own initiative.²⁰³

Under RKUHAP 2008, a commissioner judge is authorized to determine or decide:²⁰⁴ a. the legality of an arrest, a detention, a search, a foreclosure, or an interception; b. the revocation or suspension of a detention; c. statement from the suspect or accused by violating the right on not to self-incriminate; d. evidence or statement is illegally obtained and may not use as an evidence.

Further, e. compensation or rehabilitation for a person who is illegally arrested or detained, or compensation for ownership that is illegally foreclosed; f. the suspect or accused may be or must be accompanied by an attorney;²⁰⁵ g. that the investigation or prosecution has been conducted for illegal purpose; h. termination of investigation, termination of prosecution that is not based on opportunity principle;²⁰⁶ i. whether a case may or may not be prosecuted at trial; and j. any violation of suspect's rights during investigation phase.

Under RKUHAP 2009, 2010, and 2011, the provision remains the same, where a commissioner judge is authorized to determine or decide: a. the legality of an arrest, a detention, a search, a foreclosure, or an interception; b. the revocation or suspension of a detention; c. statement from the suspect or accused by violating the right on not to self-incriminate; d. evidence or statement is illegally obtained and may not use as an evidence; e. compensation or rehabilitation for a person who is illegally arrested or detained, or compensation for ownership that is illegally foreclosed; f. the suspect or accused may be or must be accompanied by an attorney; g. that the investigation or prosecution has been conducted for illegal purpose; h. termination of investigation, termination of prosecution that is not based on opportunity principle; i. whether a case may or may not be prosecuted at trial; and j. any violation of suspect's rights during investigation phase.

The petition is filed by the suspect, or his legal counsel, or the prosecutor. The issue on whether a case may or may not be prosecuted at trial, may only be filed by the prosecutor.²⁰⁷ Commissioner judge may decide on his own initiative, except for the issue on whether a case may or may not be prosecuted at trial.

Commissioner judge renders a decision through trial by examining suspect, accused or witnesses, after hear the conclusion from the prosecutor. Commissioner judge is an institution that is placed between the investigator and prosecutor on one side, and judges on the other. The commissioner judge's authority is broader and more complete than the pretrial.²⁰⁸

B.3. Debate on the supervision over pretrial detention: commissioner judge or preserves pretrial?

The concept of horizontal oversight under RKUHAP, both commissioner judge or HPP is a concept that should be supported. It is a long overdue concept on Indonesian criminal procedural law

²⁰² See Article 111 (2) RKUHAP Desember 2007.

²⁰³ See Article 111 (3) RKUHAP Desember 2007.

²⁰⁴ See Article 111 (1) RKUHAP 2008.

²⁰⁵ See elucidation (f), The suspect may not be accompanied by a legal counsel on the case of gross human rights violation, terrorism, or arms trade.

²⁰⁶ See elucidation (h). Commissioner judge's authority relates to prosecutor's authority as stipulated under Article 42 (3).

²⁰⁷ See Article 111 (2) RKUHAP 2010, see also Article 111 (2) RKUHAP 2011.

²⁰⁸ See Article 111 (3) RKUHAP 2010, see also Article 111 (3) RKUHAP 2011.

reform, and it must be incorporated, because it has been systematically erased from KUHAP discussion during 1979-1981.

The concept of commissioner judge has created many responses, even though it was not finalized until 2012. There are many pros and cons since 2000. According to Indriyanto Seno Adji, there are three major responses on this concept: (i) those who reject it; (ii) those who support it; (iii) and those who want to mix it by expanding the authority of pretrial.²⁰⁹

The groups that supported the concepts are the drafters themselves, civil society organizations, and advocates. Advocates that supported this concept, for instance, is Indonesian Advocates Associatio (*Asosiasi Advokat Indonesia - AAI*), because under this concept, advocate has stronger position when doing their duty. AAI hoped that "...there will be no more cases when the justice seekers that are advocate's client are arbitrarily arrested or detained by the police/investigator".²¹⁰

It is also echoed by civil society organization that are focusing on human rights and legal reform issues, where they supported the supervisio over coercive action from the investigator and prosecutor. Some comments from international organizations also need to be highlighted, such as Amnesty International and Human Rights Watch, who supported the supervision over state apparatus in regards to coercive action under RCUHAP.

Amnesty International, in its report on RCUHAP during 2006-2009, stated that the right to question the legality of a detention, and the necessity to be immediately brought before a judge or other judicial official, must be strengthen under RCUHAP.²¹¹

Amnesty International asserted that ICCPR has stipulated that Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.²¹² Therefore, anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.²¹³ The Human Rights Committee said that the delays must not exceed a few days.²¹⁴ With respect to the material of KUHAP revision, Amnesty International said that:

"...Under the draft revised KUHAP, only the first of these two rights is provided for. There is no requirement that a person who is arrested or detained be brought promptly before a judge or other judicial officer. The purpose of prompt judicial review is to eliminate the risk of individuals being detained illegally and to reduce the risk of other human rights violations, such as torture or ill-treatment and "disappearances". Prompt judicial review also allows a judicial officer to ensure that detainees are aware of and can exercise their rights".²¹⁵

Revised RCUHAP introduced new institution, which is commissioner judge, to be appinted from the judges at the district court, particularly on the issue of pretrial, including the question on the legality of an arrest, a detention, and an investigation. This is a positive development, where a commissioner

²⁰⁹ See Indriyanto Seno Adji, *Praperadilan Ataukah Hakim Komisaris: Ide Ke Arah Perluasan Wewenang*, paper during public hearing on RUU KUHAP Department of Law and Human Rights of the Republic of Indonesia, Jakarta (2002), pg. 3.

²¹⁰ See "RUU KUHAP Matangkan Peran Hakim Pemeriksa Pendahuluan", on <http://www.antaraneews.com/berita/375442/ruu-kuhap-matangkan-peran-hakim-pemeriksa-pendahuluan>.

²¹¹ Amnesty International, *Indonesia: Comments on the draft revised Criminal Procedure Code*, 7 September 2006.

²¹² Article 9 paragraph (4) ICCPR.

²¹³ Article 9 paragraph (3) ICCPR.

²¹⁴ The Human Rights Committee General Comment No. 08: Right to liberty and security of persons Article 9, UN Doc. HRI\GEN\1\Rev.1 at 8 (1994), paragraph 2.

²¹⁵ Amnesty Internasional, *Indonesia ... Op.Cit.*

judge is closer to detention center to give access for the detainees. Suspects that has been arrested and detained has the right to question the legality and necessity of their detention. Commissioner judge is also authorized to examine the legality and necessity of a detention, on his own initiative, upon receiving a detention/arrest warrant.

The abovementioned provisions are not satisfying just yet, particularly on the requirements on the obligation to bring a suspect or detainee before a judge or official with judicial power. The procedure to request an examination before a commissioner judge depends on the awareness of the detainees to use right to question the legality of their detention. The revised RCUHAP did not state that the official must bring all detainees to a judge without any delay. The lack of such provision may cause a person to be detained for uncertain amount of time without any explanation on the legality of their detention.

There are no recommendation under revised RCUHAP that the investigator, prosecutor, and judge are obliged to hear the suspect or accused or his legal counsel, before determining a detention or extending it. It seems that such decision may be made based on archive information. If a suspect wants to be heard regarding his detention, he must do it with the investigator, investigator's superior, or before a commissioner judge.²¹⁶

The Working Group considers that the length of the permissible delay before presenting the accused before a prosecutor or a judge represents a violation of the rights enshrined in article 9, paragraph 3, of the International Covenant on Civil and Political Rights and that the relevant provisions of the KUHAP should be modified accordingly and there should be a legal obligation to present the detained person before a judge or any other authority authorized by law to exercise such functions, promptly and in person.²¹⁷

Amnesty International recommended that the revised KUHAP should require that any person arrested and detained on a criminal charge be brought in person before a judge or other judicial authority promptly. This role may be fulfilled by a commissioner judge, which must examine the legality of a detention, the necessity of detention extension, and whether the suspect has been informed about his rights. Commissioner judge is also authorized to request every aspect of suspect's detention.

The groups that reject the concept of commissioner judge are the police and prosecutor. These groups argued that commissioner judge will cause many losses, for example burden for the government regarding: (i) cost for operations and trainings; (ii) office facilities, houses, and transportation. Actually, their rejection regards to their reluctance to be supervised. In essence, their rejection is similar to their position during RCUHAP discussion in 1974 to 1981. These group succeed to weaken the concept of pretrial, as can be seen under current KUHAP.

The police stands on its position to reject commissioner judge, because it may hamper police's work during investigation. They viewed that the improvement on pretrial is better than making a newly introduced concept that is unfamiliar. The draft revised KUHAP stipulates that each regency/municipality will own two commissioner judges. The police said that it is not sufficient, "because the duties of commissioner judge will be extensive". While the concept is not too far with the current pretrial authority, the police viewed that commissioner judge must investigate the legality of a coercive action from the investigator. This differs with the pretrial authority, which only examine the administrative aspects.

²¹⁶ See Article 115 RCUHAP.

²¹⁷ Report of the Working Group on Arbitrary Detention on its visit to Indonesia (31 January-12 February 1999), UN Doc. E/CN.4/2000/4/Add.2, paragraph 99.

The amount of commissioner judges—two judges in every regency/municipality—is also not sufficient, because they must go to the field and examine many things. However, if the number is added, it will not solve the problem, because the limited amount of judges in Indonesia. Pursuant to draft revised KUHAP, a commissioner judge is appointed by the President for a two-year period, from the local court. Before being appointed, he will be released from the responsibility to handle other cases. The limited number of judges make the police argued that it is better to improve the pretrial mechanism.

To identify the direction of RKUHAP, the National Police has made a research on commissioner judge in 2010,²¹⁸ involving Faculty of Law of Gadjah Mada University (FH UGM) and Faculty of Law of Padjadjaran University (FH Unpad). FH UGM made a research titled, “Position, Function, and Role of Commissioner Judge under the KUHAP Draft Bill” (*Kedudukan, Fungsi, dan Peranan Hakim Komisaris Dalam Rancangan Undang-Undang Hukum Acara Pidana*), while FH Unpad made a research titled “The Position and Function of Commissioner Judge Under KUHAP Draft Bill From the Indonesian Criminal Justice System Perspective” (*Kedudukan dan Fungsi Hakim Komisaris Dalam RKUHAP Ditinjau Dari Perspektif Sistem Peradilan Pidana Indonesia*).

The essence of FH UGM’s research stated: (i) commissioner judge is not a new concept, because it was incorporated under *Strafvordering* (Sv), which was the procedural law for *Wetboek van Strafrecht* (WvS). In 1974, this concept also proposed under the KUHAP draft Bill. It was emerged again under RUU KUHAP in 2009, drafted by National Working Group. The concept was proposed because there were coercive action that cannot be pre-tried, the pretrial judge only examine administrative aspect, and unequal position between the suspect and official.

Further, (ii) the research summarizes three topics, law enforcer’s view on commissioner judge concept, the problem on the implementation, and the prospect of the concept. Most respondents in that research rejected the commissioner judge. The problem on the implementation lies on geographical factor, the lack of human resources, and infrastructure issue. On the prospect of the concept, most law enforcers reject the commissioner judge.

Further, FH UGM’s research explained: a) commissioner judge concept will fundamentally change the paradigm in criminal proceeding; b) the function and position of commissioner judge in relation with investigation and prosecution have many problems; c) the implementation of such concept is hampered by geographical factor, human resources, and infrastructure; d) there are three main views on the concept: approve it, reject it, and moderate. Most respondent and FGD participants rejected commissioner judge under KUHAP draft bill; and e) the possible solution is to extend the authority of pretrial.

FH UGM’s research recommended: a) according to most responses, pretrial must be preserved and its authority must be extended to overcome the existing problems; b) criminal procedural law should protect the human rights of the perpetrator, suspect, victim, and the public.

Meanwhile, FH Unpad’s research showed the following results:

1. Pretrial institution under KUHAP is not effective to protect the suspect, which leads to the proposal on commissioner judge under RKUHAP 1974. The authority of commissioner judge under KUHAP draft bill is broader, which created pros and cons regarding such concept;

²¹⁸ *Laporan Paparan Hasil Penelitian Mengenai RUU tentang Hukum Acara Pidana (HAP)*, Divisi Pembinaan Hukum Mabes Polri, 22 Juli 2010.

2. The research is directed to the development of criminal procedural law, the politics of criminal law, the law enforcement institution, and what model that Indonesia will adopt for its criminal justice system (due process model, crime control model, or family model);
3. The research involved respondents to answer whether pretrial may/may not limit and supervise preliminary examination, and most of them answered that pretrial may do such function;
4. The perception on commissioner judge under RKUHAP gives more protection for the suspect/defendant, by objectively considering the condition of suspect/defendant. In practice, however, commissioner judge will face difficulties in achieving such objectives;
5. The problem on commissioner judge lies on the lack of human resources, infrastructure, and internal mechanism of law enforcers, and the coordination between law enforcers and commissioner judge;
6. Law enforcers viewed that pretrial is yet to give sufficient protection of suspect/defendant/victim human rights, so it cannot implement the *due process of law*. Commissioner judge gives more protection on the rights of suspect/defendant, but not for victims.

In its conclusion, FH Unpad's research stated: a) there are similarities between commissioner judge and Pretrial Hearing (common law system), Pre Trial Chamber (Rome Statute), and *Rechter Commissaris* (Netherland's KUHAP), while there are also differences in supervision mechanism; b) commissioner judge does not give equal protection for suspect, defendant, and victim, where it asserts the protection for suspect/defendant. The problem on commissioner judge lies on the lack of human resources, infrastructure, and internal mechanism of law enforcers, and the coordination between law enforcers and commissioner judge; c) commissioner judge under RKUHAP will fundamentally changed the Indonesian criminal justice system.

Further, the research stated that the formation of a new institution is not the right solution right now. The research then recommended: a) if commissioner judge will be incorporated in Indonesian criminal justice system, there must be a further study on the similar institution in other legal system such as Pretrial Hearing (common law system), Pre Trial Chamber (Rome Statute), and *Rechter Commissaris* (Netherland's KUHAP), to see which system that is more proper; b) there must be an improvemtn towards the current pretrial institution; c) if commissioner judge will be implemented, there must be some anticipation on the problem and negative impacts.

Both research became the basis of National Police's argumentation to reject commissioner judge. In addition to police's rejection, both research also showed rejection from the academics at FH UGM and FH Unpad.²¹⁹

As a response to those research, Indrianto Seno Adji said that it was normal. He said that commissioner judge or magistrate judge, is a common practice around the world. Indonesia incorporates it into pretrial, which adopts the concept of *habeas corpus*. This concept aims to give balance of interest between witnees, suspect, victim, state, and the public.

Unfortunately, pretrial only examine administrative aspects, where it should have the authority as investigatng judge and administrative judge. This is the reason of commissioner judge proposal. According to Indriyanto, let the lawmakers decide. The commissioner judge concept itself is a proposal to change the mind set of supervision over coercive action, from crime control into due

²¹⁹ See several statements from academics at the two faculties. For instance, Romly Atmasasmita (FH Unpad), during a hearing with Commission III; Marcus Priyo Gunarto (FH UGM), on his argument regarding KUHAP draft, in "Faktor Historis, Sosiologis, Politis Dan Yuridis Dalam Penyusunan KUHAP".

process model. Indriyanto explained that the National Working Group has realized the problems as explained by FH UGM and FH Unpad.

However, the National Working Group tries to find a solution of those problems, while FH UGM and FH Unpad only identified the problems and not the solution. Indriyanto asserted that the existence of commissioner judge cannot merely measured from the duty and authority, but also as a part of criminal justice system.

Indriyanto further said that it will be better if the conflict of interest in KUHAP draft bill discussion is disregarded, and instead, the parties must find a solution to optimize pretrial. Indonesia needs to build a new system, under the paradigm that preliminary examination institution must be preserved in the criminal justice system.

Meanwhile, Adnan Buyung Nasution, who took part in the previous KUHAP discussion, stands firm on his position. While there are additional authority for commissioner judge compared to pretrial, such concept still has several weaknesses. He identified the conceptual differences:

First, commissioner judge asserts the right to control from judicial power against preliminary examination by the executive, while pretrial is adopted from *habeas corpus* right that gives an opportunity for a person to challenge a coercive action, by filing a motion before the court. Meanwhile, the commissioner judge puts a person's liberty at state's mercy, particularly on judicial power to execute supervisory function. It is different with pretrial, which gives a right to a person to challenge the state.

Second, examination by the commissioner judge is closed and individually conducted by the judge towards investigator, prosecutor, witness, and the accused. While it may be objective and professional, there is a possibility that there will be no transparency and public accountability.

Third, in Continental European countries such as Netherland, commissioner judge is an integral part of the hierarchy supervisory system, done by the judge (*justitie*), towards prosecutor (*Openbaar Ministrie*) and the police. If such system will be implemented, then the whole process from inquiry, investigation, prosecution, and trial, is a collective hierarchy function, sharing duties and responsibilities and complete each other.

Nasution explained that Indonesia has implemented the system, but ever since President Decree 5 July 1959, such system was eliminated, and during the Guided Democracy era, the three institutions—police, prosecutor, and judge—are independent from each other. Each institution will not take another institution intervention.

Nasution then asserted that if commissioner judge will be implemented, then there must be fundamental change to the whole justice system, so it will went back to the old Continental European system during *Strafvordering* (Rv). As a consequence, all laws and regulations must also be amended. He, however, does not reject the concept of commissioner judge, as long as all parties are able to do such heavy responsibility.

Romli Atmasasmita rejected the concept of commissioner judge. He said that such concept has no difference with pretrial, where both are acting as a filter of investigation and prosecution power. The only difference lies on the broader authority of commissioner judge, covering pro-justitia 10-steps (Article 111 KUHAP Draft Bill). While pretrial is only authorized to four investigator's authority

(Article 1 (10) KUHAP). He viewed that the authority expansion will not improve the criminal justice system, both substantial or procedural.²²⁰

Atmasasmita further explained that when the commissioner judge's authority is expanded, then the use of investigator and prosecutor's authority will be stricter, which will make the criminal justice system become inefficient. As a consequence, such criminal justice system will only encourage procedural fairness, instead of substantial. It adds up with the short timeframe for commissioner judge in examining a coercive action.

Atmasasmita also criticized the absolute adoption of ICCPR by the drafters of RUU KUHAP. He said that ICCPR incorporates an exception on the human rights protection for suspect/accused, and according to him, human rights protection is not absolutely related to criminal justice system mechanism.

He also argued that the broad authority of commissioner judge is irrelevant with the international convention in preventing and eradicating transnational crime. For instance, as Atmasasmita said, Netherlands and France are not adopting absolute human rights protection when handling transnational crimes.²²¹

Atmasasmita further highlighted the commissioner judge authority to determine whether a prosecution may be continued to the trial, which in his opinion is absurd. He said that prosecution is the authority of Attorney General as the *master of dominus litis*, hence, there may not be any other opportunity for another institution to intervene. Such authority has entered the case, which should be the authority of the panel of judges. While commissioner judge is only to improve pretrial institution. He added, the authority of commissioner judge is unnecessary if the internal control and supervision mechanism within the police and prosecutor is well-operated.

Commissioner judge will create new problem within the criminal justice system, because it will be the third party within the system and also the referee, as stipulated under Article 111 (1) RKUHAP. Atmasasmita also questioned the objectivity of commissioner judge, because there is a conflict of interest in it. He also addressed human resources problem, as can be seen from ad hoc judges performance that involved with bribery and gratification. Atmasasmita recommended that pretrial is preserved and its authority should be expanded.²²²

²²⁰ See Romli Atmasasmita, *Beberapa Catatan atas RUU KUHAP* (2012).

²²¹ According to Romli Atmasasmita, there is no crime that is "common" in nature, where almost every crime has transnational character. Judicial proceeding and investigation must consider these character so that it will not hamper the effectiveness and efficiency of law enforcement.

²²² See BPHN, *Hakim Komisaris dalam Sistem Peradilan di Indonesia*, 2011. Predictive analysis or forecasting study on the implementation of commissioner judge in Indonesia needs to be arranged to see the possible problems and the solution for it. Pessimist response also came from Justice Komariah E. Sapardjaja. She said that while commissioner judge is a good and ideal concept, it cannot be implemented for current situation. Komariah reminded the lack of judges, and the low numbers of pretrial from the public. In addition, there must be commitment from the government, because the formation of commissioner judge will need an enormous energy and cost. Marcus Priyogunarto also gave pessimist view, where he addressed the lack of judges in Indonesia, so it will be impossible to implement commissioner judge concept. Mathematically speaking, there are 352 district courts, with 3,191 judges, and 400 judges at appeal court. If each district court has 5 commissioner judges, then there must be an additional 1,760 judges. Priyogunarto viewed that commissioner judge must be placed outside the general judiciary (*peradilan umum*), because it is only authorized to examine the legality of an arrest, search, and detention by the police, without any power to handle a case. Meanwhile, Harifin Tumpa argued that there are three requirements in the formation of commissioner judge: first, the readiness of district courts; second, the requirement to become a commissioner judge is heavier than the Head of District Court (10 years of experience), while most type II courts are filled with junior judges; third, conflict between law enforcers must be prevented. Bureaucracy and efficiency aspect must also be taken into consideration

C. Pretrial detention under RKUHAP 2012

Under RKUHAP 2012, there is a fundamental change regarding the detention during investigation and prosecution phase. The change is not merely on the procedure to extend a detention, but also the timeframe of detention during investigation phase.

C.1. Detention authority

Under RKUHAP 2012, detention is a placement for a suspect or defendant in a specific place by the official that is authorized to detain under the law.²²³ Therefore the authority to detain is shared between the investigator, prosecutor, preliminary examination judge, district court judge, up to the Supreme Court, in accordance with the level of process.

At the investigation level, the investigator has the duty and authority: "...d. conducting arrest, detention, search, foreclosure, documents examination, and interception;²²⁴ for the purpose of examination during investigation, the investigator is authorized to detain a suspect²²⁵ and in one day after detention, the suspect must be examined by the investigator.²²⁶

The suspect, his family, or his legal counsel may request a challenge to the detention.²²⁷ Investigator may approve such request by considering the necessity of detention.²²⁸ If within three days such request is not approved by the investigator, the suspect, his family, or his legal counsel may submit such request to the investigator's superior,²²⁹ who also may approve the request by considering the necessity of the detention.²³⁰ Investigator or his superior may approve the request with or without requirements.²³¹

The prosecutor has the duty and authority: "...extending a detention for 5 days, requesting a signature for detention order from preliminary examination judge; requesting a signature for detention order from district court judge, appointed by the head of district court; and requesting a detention suspension to preliminary examination judge or district court judge..."²³²

If the prosecutor detains a person during an investigation phase for more than 5 days, it needs an approval from: a. the Head of Regional Prosecutor office, if the detention is arranged by the Regional Prosecutor Office; b. the Head of High Prosecutor office, if the detention is arranged by the High Prosecutor Office; and c. the Director of Prosecution at the Attorney General Office.²³³

For the purpose of examination at investigation phase, preliminary examination judge (*hakim pemeriksa pendahuluan* - HPP) upon request from the investigator, is authorized to approve detention extension.²³⁴ At the prosecution level, the approval for detention will be given by the

²²³ Article 1 (21) RKUHAP.

²²⁴ Article 7 (1) RKUHAP.

²²⁵ See Article 58 (1) RKUHAP.

²²⁶ See Article 27 RKUHAP.

²²⁷ See Article 28 (1) RKUHAP.

²²⁸ See Article 28 (2) RKUHAP.

²²⁹ See Article 28 (3) RKUHAP.

²³⁰ See Article 28 (4) RKUHAP.

²³¹ See Article 28 (5) RKUHAP.

²³² See Article 42 (1) d, e, f, and g RKUHAP.

²³³ See Article 58 (2) RKUHAP.

²³⁴ See Article 58 (3) RKUHAP.

district court judge upon request from the prosecutor.²³⁵ At trial level, the judge that handles the case is authorized to arrange the detention.²³⁶

C.2. Detention requirements

A detention may only be arranged based on the detention warrant or judge determination to a suspect or a accused who committed a criminal act and/or has attempted or abetted such criminal act in which: a. the criminal act is subject to imprisonment of five years or more; b. the criminal act is as intended in Article 282 paragraph (3), Article 296, Article 335 paragraph (1), Article 351 paragraph (1), Article 353 paragraph (1), Article 372, Article 378, Article 379a, Article 453, Article 454, Article 455, Article 459, Article 480 and Article 506 of the Criminal Code.²³⁷ A suspect or accused that does not have a permanent domicile, may also be detained, even though it does not fulfill the criteria under paragraph (1).²³⁸

A detention may only be arranged based on detention warrant or judge determination, which must stipulate: a. identity of the suspect or the accused; b. reasons for detention; c. brief explanation on the criminal act; and d. The detention place.²³⁹

Within 1 day at maximum since the detention, a copy of the warrant must be sent to: a. suspect/accused's family; b. head of the village where the suspect/accused was arrested; c. a person who is appointed by the suspect/accused; and/or d. suspect/accused's commander, in case the suspect/accused is a member of the Indonesian National Army.²⁴⁰

C.3. Detention timeframe

Detention for the purpose of examination at investigation phase, is arranged for 5 days at maximum by the investigator, and may be extended for another 5 days by the prosecutor. During detention, the investigator may submit a written request to extend the detention to the preliminary examination judge (HPP), and send a copy to the prosecutor.

After receiving such request, HPP must notify and explain the suspect via letter or direct visit, regarding: a. the charges; b. suspect's rights; and c. detention extension. HPP will determine whether a detention extension is necessary or not. If it is necessary, the extension will apply for 20 days at maximum, and HPP must notify this to the suspect.²⁴¹

If another extension is needed for the purpose of: a. investigation, district court judge will arrange a detention upon the request of investigator for 30 days at maximum;²⁴² and b. prosecution, district court judge will arrange a detention upon the request from the prosecutor, for 30 days at maximum.²⁴³ These may be extended for another 60 days (upon request from the prosecutor).²⁴⁴ If the detention period expires, the investigator and prosecutor must release the suspect.

²³⁵ See Article 58 (4) RKUHAP.

²³⁶ See Article 58 (5) RKUHAP.

²³⁷ See Article 59 (1) RKUHAP.

²³⁸ See Article 59 (2) RKUHAP.

²³⁹ See Article 59 (3) RKUHAP.

²⁴⁰ See Article 59 (4) RKUHAP.

²⁴¹ See Article 60 (1) RKUHAP.

²⁴² See Article 60 (8)a RKUHAP.

²⁴³ See Article 60 (8)b RKUHAP.

²⁴⁴ See Article 60 (9) RKUHAP.

District court judge may also issue a determination on detention for 30 days at maximum.²⁴⁵ For the purpose of unconcluded examination, such detention may be extended by the Head of District Court for another 30 days at maximum.²⁴⁶ This extension may be extended once again, by the Head of District Court for 30 days at maximum.²⁴⁷

If the examination is concluded, the accused may be released from detention before the detention expires.²⁴⁸ If the detention exceeds this timeframe, the accused must be released, even though the examination is yet to be concluded.²⁴⁹ Similar rule applies to the examination at the appeal, where such authority is given to the appeal court judge, and the extension authority is given to the Head of Appeal Court.²⁵⁰

Justice is also authorized to issue a determination on detention for the purpose of examination at cassation level, for 30 days at maximum,²⁵¹ which can be extended by the Chief Justice of MA for 60 days at maximum.²⁵² If the examination is concluded, the accused may be released from detention before the detention expires.²⁵³ If the detention exceeds this timeframe, the accused must be released, even though the examination is yet to be concluded.²⁵⁴

Under 2012 draft, detention is only arranged at State Detention House, and no longer incorporates house arrest and city jail.²⁵⁵ Arrest and detention period will reduce the verdict.²⁵⁶ The duration of detention may not exceed the maximum penalty.²⁵⁷ If the HPP determines that the detention is illegal, the suspect is entitled to a compensation.²⁵⁸

C.4. Challenge against detention

RKUHP 2012 allows the suspect to challenge a detention that is conducted by the investigator.²⁵⁹ This right is executed by filing a challenge against the detention to the investigator that arranges it.²⁶⁰ Investigator may approve such request by considering the necessity of detention.²⁶¹

If within three days such request is not approved by the investigator, the suspect, his family, or his legal counsel may submit such request to the investigator's superior.²⁶² The challenge must be filed within the detention period, which is 5 days, otherwise, such challenge may not be conducted. Investigator's superior may approve the request by considering the necessity of the detention.²⁶³ Investigator or his superior may approve the request with or without requirements.²⁶⁴

²⁴⁵ See Article 61 (1) RKUHAP.

²⁴⁶ See Article 61 (2) RKUHAP.

²⁴⁷ See Article 61 (3) RKUHAP.

²⁴⁸ See Article 61 (4) RKUHAP.

²⁴⁹ See Article 61 (4) RKUHAP.

²⁵⁰ See Article 62 (1), (2), (3), and (4) RKUHAP.

²⁵¹ See Article 63 (1) RKUHAP.

²⁵² See Article 63 (2) RKUHAP.

²⁵³ See Article 63 (3) RKUHAP.

²⁵⁴ See Article 63 (4) RKUHAP.

²⁵⁵ See Article 64 (1) RKUHAP.

²⁵⁶ See Article 64 (2) RKUHAP.

²⁵⁷ See Article 66 RKUHAP.

²⁵⁸ See Article 65 (1) RKUHAP.

²⁵⁹ This right has been stipulated on 2008 KUHAP draft.

²⁶⁰ See Article 28 (1) RKUHAP.

²⁶¹ See Article 28 (2) RKUHAP.

²⁶² See Article 28 (3) RKUHAP.

²⁶³ See Article 28 (4) RKUHAP.

²⁶⁴ See Article 28 (5) RKUHAP.

C.5. Detention postponement

Upon request from the suspect or the accused, HPP or district court judge may suspend a detention with bail.²⁶⁵ HPP or district court judge, upon request from the prosecutor, may also revoke such suspension, if the suspect or the accused violates the suspension requirements.²⁶⁶

Against the detention suspension, the prosecutor may challenge such suspension to the competence Head of District Court.²⁶⁷ During the challenge from the prosecutor, the accused is still detained, until the Head of District Court issue a determination.²⁶⁸

If the Head of District Court approve the prosecutor's challenge, the judge must issue a detention order, within 1 day after the determination from the Head of District Court.²⁶⁹ The period between detention suspension and re-detention will be not calculated as detention period.²⁷⁰

C.6. Treatment during detention

If during detention at the investigation, prosecution, or trial phase the suspect or accused is ill and needs hospital treatment, there may be a treatment for him (*pembantaran*), and this period is not counted as detention period.²⁷¹ During *pembantaran*, the suspect/accused will be under the supervision of investigator, prosecutor, or judge.²⁷²

D. Overseeing pretrial detention: highlighting preliminary examination judge under RKUHAP 2012

After being criticized, RKUHAP 2012 changes the title "commissioner judge" into "preliminary examination judge" or *hakim pemeriksa pendahuluan* (HPP), with the similar concept with commissioner judge. The change is merely term changes, and the provisions from Articles 111 to 120 are similar to RKUHAP 2011. The article states that HPP is authorized to examine:²⁷³

- a. the legality of an arrest, a detention, a search, a foreclosure, or an interception;
- b. the revocation or suspension of a detention;
- c. statement from the suspect or accused by violating the right on not to self-incriminate;
- d. evidence or statement is illegally obtained and may not use as an evidence;
- e. compensation or rehabilitation for a person who is illegally arrested or detained, or compensation for ownership that is illegally foreclosed;
- f. the suspect or accused may be or must be accompanied by an attorney;
- g. that the investigation or prosecution has been conducted for illegal purpose;
- h. termination of investigation, termination of prosecution that is not based on opportunity principle;
- i. whether a case may or may not be prosecuted at trial; and
- j. any violation of suspect's rights during investigation phase.

²⁶⁵ See Article 67 (1) RKUHAP.

²⁶⁶ See Article 67 (2) RKUHAP.

²⁶⁷ See Article 67 (3) RKUHAP.

²⁶⁸ See Article 67 (4) RKUHAP.

²⁶⁹ See Article 67 (5) RKUHAP.

²⁷⁰ See Article 67 (6) RKUHAP.

²⁷¹ See Article 67 (7) RKUHAP.

²⁷² See Article 67 (8) RKUHAP.

²⁷³ See Article 111 (1) RKUHAP.

According to RKUHAP academic paper, the abovementioned authority are already given to pretrial judge, except for point c, d, f, g, i and j. HPP may execute these authorities based on his own initiative, except to determine whether a case may or may not be prosecuted at trial.²⁷⁴

On the current draft, some authorities that were under Head of District Court, are now delegated to HPP, including the permit on search, foreclosure, and interception. Including the detention extension at the investigation and prosecution phase, which was the authority of the prosecutor (for 40 days), is now under HPP (for 25 days), and may be extended for 3 x 30 days by the district court judge, even though the form must be filled by the prosecutor.

When held the position as HPP, a judge is no longer work at the District Court office, instead he has an office in the State Detention House or near it. It is to ease the process to meet with the detainees. During the two years transitional period, the Deputy Head of District Court will act as HPP.

D.1. Procedural Law

HPP must render a decision within 2 days upon receiving the request. The decision is based on the examination over arrest warrant, detention warrant, search warrant, foreclosure warrant, interception warrant, and other relevant documents. HPP may hear statements from the suspect or his attorney, investigator, or prosecutor. If it is needed, HPP may request a statement under oath from relevant witness.

HPP's decision and determination must include the legal basis and reasons. If HPP decides that a detention is illegal, the investigator or prosecutor must release the suspect from detention. If a foreclosure is declared illegal, the foreclosed assets must be returned to the owner within one day after the decision. If the termination of investigation or prosecution is illegal, the investigator and prosecutor must continue the investigation or prosecution. If the detention is declared illegal, HPP will determine compensation or rehabilitation.

HPP examines the request on compensation or rehabilitation with the following requirements: within 5 days upon receiving a request, HPP must proceed with the trial; before rendering a decision, HPP must hear the applicant, investigator, or prosecutor; within 7 days after the first trial, HPP must render a decision. If the case is being examined by the district court, request on compensation or rehabilitation may not be submitted to HPP.

D.2. Appointment, dismissal, and position of HPP

A judge that will be appointed as HPP, must fulfill the following criteria: (1) has a high capability and moral integrity; (2) has worked as a district court judge for 10 years at minimum; (3) 35 years of age at minimum and 57 years of age at maximum; (4) has minimum rank at III/C.

HPP will be appointed and dismissed by the President, based on the recommendation of the competent Head of High Court. HPP will serve for 2 years and may be re-elected for one more period.

HPP will be dismissed with honor from his position, due to the following reasons: (1) his period of service expires; (2) upon personal request; (3) continuous physical and mental illness; (4) is not eligible to do the duty; or (5) deceased.

²⁷⁴ See Article 111 (3) RKUHAP.

Meanwhile, dishonorable dismissal is due to the following reasons: (1) convicted due to criminal act, where the decision is final and binding; (2) questionable moral act; (3) continuously neglect his duty and responsibility; (4) violates the oath of office; (5) held concurrent position that is prohibited under the laws and regulations.

During his service as HPP, a district court judge will be released from the responsibility to handle cases and other duties related to the district court. After his service expires, HPP will be returned to his previous position, as long as he has not reached retirement age.

HPP is a single judge panel, who examines, determines, and decides the cases by himself. In running his duties, HPP is assisted by a court's clerk and secretariat staffs. HPP's determination or decision may not be appealed or challenged at cassation level.

E. Notes on pretrial detention and its oversight under RKUHAP 2012

Previous paragraphs have elaborated RKUHAP 2012, particularly on the requirement and element of pretrial detention, along with the rules on RKUHAP related to the formation of preliminary examination judge, including its function, authority, and impact. The following paragraphs will give an analysis on the downside and incompleteness of provisions under RKUHAP and the possible impacts if there are no improvement.

E.1. The lack of provision on detention requirement

Detention requirements under RKUHAP 2012 are not too different with KUHAP, where it divided into absolute and relative requirements. Absolute requirement is exactly the same as Article 21 (4) of KUHAP, where a detention is only allowed towards a suspect or a defendant who has committed a criminal act and/or has attempted or abetted such criminal act in which the criminal act is subject to imprisonment of five years or more.

If the penalty is less than 5 years, the suspect or accused may not be detained. In addition to general provisions mentioned above, detention may also be arranged even though the penalty is less than five years, as long as the criminal act has significant impact to the public order. Therefore, the absolute requirement under RKUHAP 2012 is the same with KUHAP.

Regarding the relative requirement, there are differences between RKUHAP 2012 and KUHAP. RKUHAP 2012 adds the phrase "allegedly committed a criminal act based on sufficient evidence", however, at the same time, it erases the phrase "conditions causing concerns" (*adanya keadaan yang menimbulkan kekhawatiran*) and replaces it with "concerns" (*ada kekhawatiran*).

The replacement of phrase "conditions causing concerns" under Article 21 (1) of KUHAP with "concerns" (*ada kekhawatiran*) under Article 59 (5) 2012 KUHAP draft, has the potential to affirm the current pretrial practice, where it only examines administrative aspects. Article 21 (1) of KUHAP was criticized by the Constitutional Court on Decision No. 018/PUU-IV/2006:

"...this phrase may be used as the basis to determine the conditions that causing concerns for investigator or prosecutor to arrange a detention, and if such condition is weak, the pretrial judge may declare that a detention is illegal".²⁷⁵

²⁷⁵ See Constitutional Court Decision No. 018/PUU-IV/2006, pg. 74.

In the current pretrial practice, such situation is a condition that is subjectively measured by the law enforcer. The phrase “concerns” (*ada kekhawatiran*) under Article 59 (5) of RKUHAP 2012 will affirm the current practice, because such subjectivity cannot be examined by the Court.

On the strong allegation implementation in some countries, it varies on the degree of suspicion and needs further interpretation, such as “*serious indications of guilt*” (Belgium), “*exigent suspicion*” (Austria and Germany), “*reasonable assumption*” (Bulgaria and Slovak), “*reasonable suspicion*” (Cyprus), “*serious indications*” (France, Italy, and Greece), and “*grave presumptions*” (Netherland).

In general, these have been stipulated under KUHAP: (a) risk of absconding; (b) obscuring evidence; and (c) risk of reoffending. In addition to the mentioned elements, some countries also implement other condition for the consideration of pretrial detention, such as risk of posing a serious threat to public order, gravity of the offence), and the risk of interference with the course of justice including risk of collusion.

Those conditions are related to suspect or accused and the official that measure such condition based his measurement on his subjectivity. Additionally, because the detention at investigation phase (10 days) is the discretion of investigator and prosecutor, the measurement of absolute and relative requirements are based on investigator’s subjectivity.

RKUHAP 2012 does not elaborate “allegedly committed a crime based on sufficient evidence”, so the element of “prima facie evidence” is at the discretion of investigator and prosecutor. This provision is important because it is the basis to determine a person’s status as a suspect, which will followed by detention. In many literatures, this is called as reasonableness or probable cause.

The problem occurs when RKUHAP 2012 gives the interpretation of reasonableness or at the discretion of investigator. Investigator’s action may not be questioned as long as it is notified to the suspect or his family. After the detention is arranged, suspect’s family may only challenge the investigator in the internal oversight, as stipulated under Article 82 of RKUHAP 2012.

The mentioned provision shows similar pattern with KUHAP, where investigator and prosecutor are given the discretion without any examination from the court. The investigator and prosecutor will assert on the absolute and relative requirements.

Moreover, the detention procedure under KUHAP does not oblige the investigator and prosecutor to send a copy of detention warrant to HPP. Ideally, the investigator should consult with the judge in determining sufficient preliminary evidence, as an implementation of judicial scrutiny. The consultation state enables a verbal process between the judge, investigator, suspect, or suspect’s attorney—*pretrial stage*.

E.2. The unclarity of complaint mechanism from the suspect against detention

RKUHAP 2012 allows the suspect to challenge his detention. However, there is no clear procedure in conducting this challenge; whether it may be done in verbal or written, the type of challenge and other procedure. This mechanism is to minimize the abuse of power at the investigation phase.

Regardless the unclarity of the provision, such mechanism must be appreciated, where it shows a tendency to control and supervise the detention at investigation phase, even though it is not properly drafted, because the oversight under this mechanism only applies in vertical structure within the investigator’s institution.

E.3. Incompleteness of authority of the preliminary examination judge

In general—based on some literatures and experiences from other countries—the function and authority of HPP covers the supervision over all pre-adjudication process (since the investigation and determination of a suspect). HPP may declare the the investigation or prosecution is arranged for illegal purpose, which is an important provision, because there is an oversight towards investigation and prosecution phase. In addition, one of HPP’s authority is to filter criminal cases that may or may not go to trial, which also applies to petty crimes that have been settle outside the court.

Further, HPP’s authority is to examine: statements from suspect or accused that made by violating the right to not self-incriminate; illegal evidence or statement. The suspect or accused is entitled to or may accompanied by an attorney; and any violation to he suspect during investigation phase.

If HPP is given 10 or more authorities to determine or decide the legality of pre-adjudication procedure, then there should be more 10 or more implications or legal consequences from the HPP’s determination or decision. Unfortunately, the current RCUHAP does not elaborate this issue.

There are only four legal consequences from HPP’s determination or decision on the legality of pre-adjudication process, including: illegal detention, illegal foreclosure, illegal termination of investigation or prosecution, and determination of compensation or rehabilitation.

Meanwhile, other legal consequences on the decision regarding the legality of an arrest, search or interception, revocation or suspension of detention, statement from the suspect or accused was made by violating the right to not self-incriminate, illegal evidence or statement, the right to an attorney, the investigation or prosecution has been conducted for illegal purpose, and any violation of suspect’s rights during investigation phase, are not elaborated in the draft.

Another provision that must be criticized is the one that stating: request to HPP does not suspend the investigation. This provision is acceptable for the legality of arrest, detention, search, foreclosure, or interception. However, for other issues that directly related to investigation, such as the suspect is not accompanied by an attorney, or the investigation is for illegal purpose, the investigation should be suspended, until HPP render a decision or determination.

If HPP determine or decide that the investigation is null and void, the ongoing investigation will be pointless. There are no provisions on HPP’s authority if the report from justice seekers are not responded by the investigator or prosecutor. In fact, there are many reports/complaints that are not responded.

E.4. Preliminary examination judge mereley *post factum*

In the context of detention, the weaknes of HPP in conducting supervision, is that all HPP’s authority may only be conducted after the coercive action is arranged (*post factum*). The involvement of judge does not cover the pre-coercive action.

It is due to the determination of sufficient preliminary evidence, the necessity reason, and legal element in arranging a detention, are not covered on the preliminary examination judge authority. Ideally, HPP should be the central position in pre-adjudication phase in arranging coercive action, including the determination of sufficient preliminary evidence, because there is a possibility that a prosecutor is biased.

However, judge's authority as HPP is limited, unlike the concept of *magistrate* or justice of the peace. The position of HPP within pre-adjudication phase becomes ineffective to protect the suspect from the error of investigator.

The lack of HPP's authority to examine detention before it is arranged, relates to judge's authority in examining absolute and relative requirements of a detention. The question remains, whether HPP will have access to all those requirements?

Unfortunately, the current KUHAP draft does not elaborate this issue, even though this is a crucial point, because the frame of functional differentiation within the law enforcers becomes the basis in executing their function and authority. The lack of provisions clarity makes the subjective reasons on detention cannot be examined by the judge. Without such examination, HPP's authority is merely symbolic, and it is only another form of pretrial.

E.5. The unclarity of active involvement of preliminary examination judge

In the pre-adjudication involvement, HPP is active and passive. Passive means that HPP will use his authority if there is a request on the legality on law enforcer's action during preliminary examination. HPP waits for a request from a applicant that feels violated by the investigator or prosecutor, and also request on compensation.²⁷⁶

There is also active involvement, which means that HPP may decide on an issue based on his own initiative. Without having to wait a request from a suspect or suspect's legal counsel or prosecutor, HPP may execute an active control over pre-adjudication process.

This situation shows that HPP has a large responsibility on the preliminary examination in a criminal case. Active involvement may be used if there is an abuse of power in a coercive action. This is different with pretrial judge that only has passive involvement, therefore HPP's active involvement must be further elaborated to prevent contradiction with other law principles.

HPP's active control may be executed by monitoring the pre-adjudication process in his jurisdiction, and if there is a procedural error, HPP must be active in resolving such issue. HPP must conduct an examination to render a determination and decision that is in accordance with KUHAP with all the possible legal consequences. It means that HPP has the authority to conduct a sudden inspection to investigator or prosecutor institution to see whether there is any abuse of power that violates pre-adjudication procedure. This examination may be followed by a determination or decision to fix such violation, so that it will be in accordance with KUHAP provision. However, there are no provisions that stipulate this matter.

However, on the context of detention supervision, HPP's active involvement is still a *post factum*, where HPP on his own initiative examine the legality of a coercive action, after such action is arranged.

²⁷⁶ For comparison, passive involvement of pretrial under KUHAP means that pretrial judge may not on his own initiative to perform examination on the alleged violations of the legal action undertaken by the investigator or the public prosecutor against the suspect or defendant. If there are allegations of violations committed by the investigator or the public prosecutor, the trial judge did not have the authority to make corrections or supervision, but to judge that handles the case may use his authority during trial to see whether such action is legal or not. For example, the questionable evidence may not be used during trial, or detention that is not in accordance with the procedure may be a consideration for a lighter penalty..

E.6. The lack of procedural law provision for preliminary examination trial

RKUHAP 2012 stipulates that HPP must render a decision in 2 days upon receiving a request from the suspect or his legal counsel or prosecutor, where such request is on HPP's authority. If the number of the reequest is high, this obligation will burden the judge. In addition, on the request on compensation or rehabilitation, KUHAP draft only gives short timeframe for HPP to examine the request and render a decision.

Therefore, a work mechanism for HPP needs to be stipulated, such as the detail on the principle of fair trial that must be followed by HPP, for example; proof; equality of arms; non-discrimination; presumption of innocent; right to an attorney; free, speedy, and simple trial; and open trial.

The procedural law for HPP is relatively similar with pretrial that adopts civil proceeding, because the objects that are examined are documents or archives, which supported by witness examination. The provision on examination based on request already stipulated in detail, while the procedure for HPP that use his own initiative is not elaborated under RKUHAP 2012. The lack of such provision will disturb the preliminary examination process, considering that HPP's decision is final and binding, so that there is no further legal action.

Furthermore, there is no clarity on the burden of proof; who must take such action and how to examine proof from both parties. This is important, considering RKUHAP 2012 puts the absolute authority to detain to the investigator and prosecutor. Pretrial practice, in which put the burden of proof to the suspect or his legal counsel, causes loss for the suspect, because it is impossible for the suspect to do it when the authority and measurement on the detention is the absolute authority of the investigator and prosecutor.

Some say that fair trial is difficult to be implemented by HPP, considering the short timeframe, while impartial, independent, and publicly-controlled trial is an absolute matter. The short timeframe cannot assure the trial transparency, accountability and public access to information. This view is not entirely true, while it needs better attention. Therefore, the examination mechanism by HPP must be supported by the justice system that is based on transparency, accountability, fairness, and impartiality. Some are worried that HPP only an additional bureaucracy issue that will burden the suspect.

In addition to the abovementioned weaknesses, there are some procedural law for HPP that must be appreciated, while has the weakness potential. For instance, the provision stating "when the case has been examined by the district court, the request on compensation or rehabilitation may not be submitted to HPP". This provision implies that excluding the rerequest on compensation and rehabilitation, any issues that fall under HPP's authority may still be submitted to HPP to be examined for the validity.

Based on the mentioned provision, even though the case goes to trial, it does not limit the suspect's right to examine the formal and substantial issue on the pre-adjudication that has been conducted by investigator and prosecutor. Unfortunately, RKUHAP 2012 does not elaborate the consequences of such examination to the trial of the case, if there is any procedural violation in the pre-adjudication process, whether the case will be terminated or continued. The consequence, ideally, should give advantage to the suspect, such as the release from detention, if the detention is declared illegal.

Considering the importance to stipulate the continuity of a case if there is a violation during pre-adjudication process towards suspect's right, explicit provision under KUHAP is a must. It will not as strong as it should be, if the stipulation only incorporated in KUHAP's implementing regulation.

E.7. HPP's decision and legal action against it need improvement

RKUHAP 2012 does not elaborate when HPP must render a determination, and when HPP must render a decision. In the civil procedural law, a judge renders a determination upon a request and renders a decision upon a lawsuit. Under KUHAP draft, these issue raises some question on whether a judge renders a determination upon petition from the applicant, or whether a judge renders a decision on the legality of a pre-adjudication upon his own initiative. Detailed provision on this issue must be incorporated to avoid confusion, both in the draft or in the implementing regulation.

HPP's decision is final and binding, and there is no further legal action against it. This differs from pretrial decision on the legality of termination of investigation on prosecution, which may be appealed to the court of appeal, where such decision from the appeal is final and binding. Therefore, parties that object to HPP's decision may not file further legal action against it.

As a comparison, Article 83 (2) of KUHAP stipulates the control or re-examination on pretrial decision, if there is a human error factor from the pretrial judge. Theoretically, this mechanism assures the legal certainty on the conflict regarding the legality of an action conducted by investigator and prosecutor, and on the termination of a investigation or prosecution that will harm law enforcement during preliminary examination.

The final and binding HPP's may become a significant factor in the protection of suspect's human rights and the continuation of pre-adjudication process, related to investigation or prosecution. The decision from KUHAP drafters to make HPP's decision as final and binding, is more fair and better compared to KUHAP—which only gives privilege to the investigator and prosecutor by allowing an appeal for pretrial decision on the legality of the termination of investigation or prosecution.

Meanwhile, suspect and his legal counsel may not file an appeal against a pretrial decision on the legality of an arrest or a detention. Similar provision also applies to the determination on compensation or rehabilitation, which cannot be appealed. This discriminative provision has violated the principle of the equality before the law, which is one of the KUHAP's principles.

From the fairness perspective, the final and binding nature of HPP's decision, regardless the motion, is justifiable. In addition, this provision is in accordance with the principle of speedy, simple, and low cost. However, if the HPP is not fair enough in rendering such decision, there will be an unjust decision.

E.8. The position of preliminary examination judge

RKUHAP 2012 states that HPP will have an office at or near the State Detention House (*Rumah Tahanan Negara*- RUTAN). The draft's academic paper explained that this choice is taken to ease HPP's access to detainee, and after HPP determines or signs detention extension, the detainee will be placed near his office.

This provision is proper to create efficiency, where it would be easier to conduct a preliminary trial. Detainees and investigator or prosecutor may attend the trial without obstacles. Whereas, the draft encourages the investigator to bring the detainee before the HPP on the examination over detention extension or the legality of a detention.

On this issue, Gregory Churchill explained the possible negative impact:²⁷⁷

“... for the reason to ease the process, HPP is willingly to take office near RUTAN. It is not an easy duty for a judge to be surrounded by police, warden, a place with high tension, and must examine the evidence, reasons for detention, or any violation wisely. In most Indonesian cities, court is not too far from RUTAN. In my opinion, it is important—psychologically—for a person to be brought before the court at actual court. If HPP is placed in or near RUTAN, the judge will be under pressure, and not long enough will be the part of RUTAN. It is important for HPP to have a daily conversation with judges at a court, instead of having lunch with a warden”.

HPP is a single judge and he examines, determines, and decides by himself alone. However, it is unclear whether “single” means during trial or the only HPP within the jurisdiction. The elucidation does not elaborate this issue. According to the drafters, “single” means that there is only one HPP in a district court jurisdiction.²⁷⁸

Considering the broad authority of HPP, including his workload and work culture, the provision on “single judge” must be revised. Such provision requires an experienced judge, with capability and high moral integrity, considering the protection of suspect’s human rights during pre-adjudication and preventing the abuse of power from investigator and prosecutor.

E.9. HPP management and organizational structure

Based on the current practice of pretrial under KUHP, there is no problem on the availability of the judge in handling pretrial cases. It is due to the fact that pretrial judge is embedded to the district court judge and it is the responsibility of district court to organize pretrial using the available facilities in the district court, even though it is known that pretrial judge is considered as an additional duty and is undermined under the criminal procedural law. It differs with HPP that is more complex in terms of appointment and facilities. HPP is an independent institution and it is not a part of subordinate of a district court, and it needs its own facilities and office.

Understanding that HPP organization needs to be studied, there must be a standardized planning on this issue. One of the plans is to organize HPP within the state apparatus empowerment, coordination, synchronization, integration, oversight and control, where all these aspects are important matters for an organization.

Standard is a value in management field to be used as a reference.²⁷⁹ Such standard must be implemented with the formation of HPP as a part of Indonesian judicial system. This standard based on the important function of human resources, covering: human resources management; HPP management; planning, recruitment, placement, and development of HPP; performance management; implementation of discipline standard and code of ethics; remuneration; and the effectiveness of the formation.²⁸⁰

²⁷⁷ See ICJR limited discussion monograph, *Hakim Pemeriksaan Pendahuluan Dalam RKUHAP 2012*.

²⁷⁸ See KHN, *Kajian terhadap Rancangan ... Op.Cit.*

²⁷⁹ Rusli Ramli and Adi Warsidi, *Asas-Asas Manajemen*, (Jakarta: Universitas Terbuka, 1999), pg. 86.

²⁸⁰ See Sunarko, *Efektivitas Pembentukan Hakim Komisaris dalam Perspektif Penegakan Hukum Pidana di Indonesia Terkait Rancangan Undang-Undang Hukum Acara Pidana (RUU KUHP)*, paper published during a seminar on “Efektivitas Pembentukan Hakim Komisaris dalam Perspektif Penegakan Hukum Pidana di Indonesia terkait RUU KUHP”, Jakarta, 26 January 2003.

Another serious problem in HPP formation is the uneven distribution of judges in Indonesia, and the high mobility of judge due to the significant increase of cases at the court. As a consequence, the requirements on minimum 10 years experiment, minimum rank at III/C, and minimum age at 35 are impossible to be fulfilled by class II courts outside Java Island, because most of those courts are filled with junior judges with experience less than 6-8 years.

The recommendation by the Head of High Court to the President on the appointment of HPP is also a problem. Ideally, it should be the Head of District Court that submit such recommendation, because he is the person that know the most about the capability and integrity of the judge that will be recommended.

The question remains, why not the Chief Justice of MA that submit such recommendation to the President, instead of the Head of High Court. Under this scheme, the bureaucracy procedure is clearer and there is no tendency that the Head of High Court overlaps the Chief Justice of MA.

The period of HPP service, which is only for two years, and may be extended for another period, will also be a problem in implementation. HPP will be deemed as a minor position, because the KUHAP draft release HPP from handling other cases. If it is strictly limited to 2 years it will not be a problem. However, it will be difficult to find a judge that want to extend his service as HPP.

The recommendation that HPP position is a requirement that must be taken before taking the next level on the judge career must be considered. Therefore, a judge must held HPP position before he can hold a position as the head of district court or other positions.²⁸¹

This must be considered, because judges with rank III/C already handled serious cases, and judges with rank III/D already held the position as Deputy Head at class II district court. If HPP position is not a required position for career development, HPP will not be an interesting position for judges.²⁸²

The KUHAP draft does not elaborate whether a judge that already served as HPP in a district court, may serve as HPP in another district court, if he is being transferred. In terms of work distribution and career development, these issues must be incorporated under KUHAP draft and its implementing regulations.

HPP organization as mentioned previously, raises the issue on human resources management. In this case, the supervision on HPP is a must to keep HPP position stays in its original objectives. The KUHAP draft has stipulated the honorable and dishonorable dismissal of HPP. One of the reasons for honorable dismissal is due to his inability to run its duties. The measurement of this research is done by a supervision team as the mechanism in the high court.

²⁸¹ See KHN, *Kajian terhadap Rancangan ... Op.Cit.*

²⁸² See Komariah E Sapardjaja, *Hakim Komisaris dalam Perspektif Peradilan Pidana dan Perspektif Kompetensi dan Rekrutmen Hakim (Beberapa Catatan terhadap RUU KUHAP)*, paper during seminar "Efektivitas Pembentukan Hakim Komisaris dalam Perspektif Penegakan Hukum Pidana di Indonesia terkait RUU KUHAP" (2003).

CHAPTER VI

Epilogue

A. Conclusion

Based on the findings under this study, by referring to data, information from documents and parties directly involved in pretrial practice, ICJR research team has made several conclusion:

On the norm and practice of pretrial against detention

1. The authority of pretrial is merely 'Post Factum' in nature, because pretrial's authority occurred after a coercive action is conducted and it is not occurred when coercive action is about to be executed. Therefore, the position of pretrial judge during preadjudication becomes ineffective to give protection from the broad authority of the investigator and wrongfully executed due to laws and regulations factor.
2. Examining detention: limited to administrative examination and objective basis of detention. In practice, pretrial only examines the administrative requirements of detention. Judges emphasize on the arrest warrant, detention warrant, but do not examine and evaluate the material requirement. Note that the material requirement will determine a person to be imposed a coercive action in form of arrest or detention by the investigator or prosecutor.
3. Judge's passive involvement in pretrial. In using his/her authority, pretrial judge has passive involvement, which means that judge will use his/her authority when there is a pretrial petition. Pretrial judges wait petition from the applicant who viewed that his/her right is abused due to coercive action from investigatio or prosecutor.
4. The problem on pretrial procedural law, pretrial cases management, and lack of provision regarding pretrial timeframe. KUHAP partly regulates the procedural law and proceeding of pretrial. However, the existing provisions are not enough to give the clarity on which procedural law that must be used. Due to tis condition and the form of pretrial as petition, judges usually refer to civil procedural law. Some issues that are not regulated under KUHAP: (i) summon to the respondent; (ii) procedure in submitting pretrial by applicant; (iii) the lack of provisions regulating the burden of proof; and (iv) pretrial time frame.

Revision through RKUHAP

1. The lack of provisions regarding detention requirements. RKUHAP 2012 does not elaborate "allegedly committed a crime based on sufficient evidence", so the element of "prima facie evidence" is at the discretion of investigator and prosecutor. This provision is important because it is the basis to determine a person's status as a suspect, which will followed by detention. In many literatures, this is called as reasonableness or probable cause. The problem occurs when RKUHAP 2012 gives the interpretation of reasonableness or at the discretion of investigator. Investigator's action may not be questioned as long as it is notified to the suspect or his family. After the detention is arranged, suspect's family may only challenge the investigator in the internal oversight, as stipulated under Article 82 of RKUHAP 2012.

2. The unclarity of complaint mechanism from the suspect against detention. RKUHAP 2012 allows the suspect to challenge his detention. This mechanism, however, is not aimed properly, because the oversight under this mechanism only applies in vertical structure within the investigator's institution.
3. Preliminary examination judge merely post factum. In the context of detention, the weakness of HPP in conducting supervision, is that all HPP's authority may only be conducted after the coercive action is arranged (post factum). The involvement of judge does not cover the pre-coercive action. Without the examination from the judge on the subjective requirements of a detention, HPP's authority is merely symbolic, and it is only another form of pretrial.
4. The unclarity of active involvement of preliminary examination judge. In the pre-adjudication involvement, HPP is active and passive. Under RKUHAP 2012, HPP may decide on an issue based on his own initiative. Without having to wait a request from a suspect or suspect's legal counsel or prosecutor, HPP may execute an active control over pre-adjudication process. However, on the context of detention supervision, HPP's active involvement is still a post factum, where HPP on his own initiative examines the legality of a coercive action, after such action is arranged.
5. The lack of procedural law provision for preliminary examination trial. The procedural law for HPP is relatively similar with pretrial that adopts civil proceeding, because the provision on examination based on request already stipulated in detail, while the procedure for HPP that use his own initiative is not elaborated under RKUHAP 2012. The lack of such provision will disturb the preliminary examination process, considering that HPP's decision is final and binding, so that there is no further legal action. Furthermore, there is no clarity on the burden of proof; who must take such action and how to examine proof from both parties. This is important, considering RKUHAP 2012 puts the absolute authority to detain to the investigator and prosecutor. Pretrial practice, in which puts the burden of proof to the suspect or his legal counsel, causes loss for the suspect, because it is impossible for the suspect to do it when the authority and measurement on the detention is the absolute authority of the investigator and prosecutor.

B. Recommendation

Based on the abovementioned conclusion, ICJR recommends the following:

There is a need for a transitional rules regarding the law of pretrial against detention in Indonesia, which will stipulate the following provisions:

1. The certainty of pretrial timeframe. The existing laws and regulations are not stipulating the timeframe for pretrial. There is a disparity between the legal norms and the practice on the implementation of pretrial timeframe. There is a need for oversight and special recommendation from MA in regards to this issue.
2. There must be a specific regulation on pretrial procedural law. MA must give more attention on the practice of pretrial procedural law. The uncertainty between the use of criminal or civil procedural law for pretrial proceeding, must be minimized by a strict procedural law, including the procedures, and the standard of the burden of proof.
3. There must be a general oversight towards pretrial practice, in particular pretrial on detention, because the current available information is not significant from the aspect of accessibility or the report of pretrial in every court.

4. Pretrial cases management at PN level needs improvement

The minimum standard of pretrial against detention provision under the upcoming RKUHAP must consider the following issues:

1. RKUHAP 2012 must oblige the investigator to elaborate “allegedly committed a crime based on sufficient evidence”, so the element of “prima facie evidence” is at the discretion of investigator and prosecutor. This provision is important because it is the basis to determine a person’s status as a suspect, which will followed by detention. In many literatures, this is called as reasonableness or probable cause.
2. Subjective element must be examined at the pretrial against detention. Subjective element stresses the necessity of a detention based on the suspect/defendant’s conditions. It is subjectively evaluated by the law enforcer. In practice, the element of concern will be determined by the subjective evaluation of the related official. Additionally, because the detention at investigation phase (10 days) is the discretion of investigator and prosecutor, the measurement of absolute and relative requirements are based on investigator’s subjectivity..
3. Detention must be decided by HPP that have the authority over investigator and prosecutor right before the detention. The question remains, whether HPP will have access to all those requirementes? If so, RKUHAP should explain this topic. Unfortunately, the current KUHAP draft does not elaborate this issue, even though this is a crucial point, because the frame of functional differentiation within the law enforcers becomes the basis in executing their function and authority. The lack of provisions clarity makes the subjective reasons on detention cannot be examined by the judge. Without such examination, HPP’s authority is merely symbolic, and it is only another form of pretrial.
4. Provisions on procedural law for preliminary examination trial must be strengthened. Therefore, a work mechanism for HPP needs to be stipulated, such as the detail on the principle of fair trial that must be followed by HPP, for example; proof; equality of arms; non-discrimination; presumption of innocent; right to an attorney; free, speedy, and simple trial; and open trial. The procedural law for HPP is relatively similar with pretrial that adopts civil proceeding, because the objects that are examined are documents or archives, which supported by witness examination. The provision on examination based on request already stipulated in detail, while the procedure for HPP that use his own initiative is not elaborated under RKUHAP 2012. The lack of such provision will disturb the preliminary examination process, considering that HPP’s decision is final and binding, so that there is no further legal action. Furthermore, there is no clarity on the burden of proof; who must take such action and how to examine proof from both parties. This is important, considering RKUHAP 2012 puts the absolute authority to detain to the investigator and prosecutor. Pretrial practice, in which put the burden of proof to the suspect or his legal counsel, causes loss for the suspect, because it is impossible for the suspect to do it when the authority and measurement on the detention is the absolute authority of the investigator and prosecutor.

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Appendix: List of pretrial decisions

| No. | Code | Decision Number | Area |
|-----|------|--------------------------|--------------|
| 1 | P-1 | 06/Pid.Pra/2010/PN.Ptk | PN Pontianak |
| 2 | P-2 | 03/Pid.Pra/2010/PN.Ptk | PN Pontianak |
| 3 | P-3 | 09/Pid.Pra/2009/PN.Ptk | PN Pontianak |
| 4 | P-4 | 06/Pid.Pra/2007/PN.Ptk | PN Pontianak |
| 5 | P-5 | 03/Pid.Prap/2007/PN.Ptk | PN Pontianak |
| 6 | P-6 | 05/Pid.Pra/2006/PN.Ptk | PN Pontianak |
| 7 | P-7 | 04/Pra.Pid.B/2010/PN.Mks | PN Makassar |
| 8 | P-8 | 06/Pid.B/Pra/2005/PN.Mks | PN Makassar |
| 9 | P-9 | 06/Prapid/2005/PN.Mdn | PN Medan |
| 10 | P-10 | 12/Pra.Pid/2005/PN.Mdn | PN Medan |
| 11 | P-11 | 01/Pra.Pid/2006/PN.Mdn | PN Medan |
| 12 | P-12 | 08/Pra.Pid/2006/PN.Mdn | PN Medan |
| 13 | P-13 | 09/Pra.Pid/2006/PN.Mdn | PN Medan |
| 14 | P-14 | 13/Pra.Pid/2006/PN.Mdn | PN Medan |
| 15 | P-15 | 17/Pra.Pid.B/2006/PN.Mdn | PN Medan |
| 16 | P-16 | 25/Pra.Pid/2006/PN.Mdn | PN Medan |
| 17 | P-17 | 26/Pra.Pid/2006/PN.Mdn | PN Medan |
| 18 | P-18 | 36/Pra.Pid/2006/PN.Mdn | PN Medan |
| 19 | P-19 | 37/Pra.Pid/2006/PN.Mdn | PN Medan |
| 20 | P-20 | 39/Pra.Pid/2006/PN.Mdn | PN Medan |
| 21 | P-21 | 06/Pra.Pid/2007/PN.Mdn | PN Medan |
| 22 | P-22 | 09/Pra.Pid/2007/PN.Mdn | PN Medan |
| 23 | P-23 | 12/Pra.Pid/2007/PN.Mdn | PN Medan |
| 24 | P-24 | 17/Prapid/2007/PN.Mdn | PN Medan |
| 25 | P-25 | 24/Pra.pid/2007/PN.Mdn | PN Medan |
| 26 | P-26 | 26/Pra.pid/2007/PN.Mdn | PN Medan |
| 27 | P-27 | 27/Pra.pid/2007/PN.Mdn | PN Medan |
| 28 | P-28 | 01/Pra.pid/2008/PN.Mdn | PN Medan |
| 29 | P-29 | 04/Pra.pid/2008/PN.Mdn | PN Medan |
| 30 | P-30 | 09/Pra.Pid/2008/PN.Mdn | PN Medan |
| 31 | P-31 | 26/Pra.Pid/2008/PN.Mdn | PN Medan |
| 32 | P-32 | 27/Pra.Pid/2008/PN.Mdn | PN Medan |
| 33 | P-33 | 28/Pra.Pid/2008/PN.Mdn | PN Medan |
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PART II

Guideline on Detention and Pretrial Against Detention

Guideline on Detention and Pretrial Against Detention:

Referring to the Criminal Procedural Law (KUHAP), relevant laws and regulation, and international human rights law principles

(The Guideline is intended as a reference for law enforcement officials in conducting coercive actions, and for justice seeker to complaint by using pretrial mechanism against detention. It is hoped that the Guideline will help the judges in examining pretrial cases)

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Overview

A. Pretrial detention issue

The protection for a person's civil liberty, especially the one that relates to legal proceeding, will depend on the clarity and details of pretrial detention policy. It is also related to the following reasons: Firstly, law enforcers (investigators in particular) have a very broad authority in interpreting the use of detention policy. Secondly, the discretion of the investigators in certain condition is vulnerable to the abuse of power, which will lead to corruptive action and unfairness treatment. Thirdly, social and economic losses of a person who is accused as a perpetrator is not considered in the implementation of pretrial detention policy.

The international law instruments on human rights explicitly prohibited the implementation of arbitrary pretrial detention. Even though a person has been determined as a suspect, and waiting for trial proceeding, he or she may be permitted to be back to the community as a citizen. This, of course, by imposing certain requirements to the suspect as abiding the law and must attend the trial at the determined date.

Ideally, a pretrial detention is conducted when there is a strong reason to assure that the person is a perpetrator. In addition, there must be a risk that the suspect will escape from the whole legal proceeding, and therefore creating threat to the public or disrupt the judicial process.

The most outstanding impact from the use of arbitrary pretrial detention is the impairment of the presumption of innocence principle, which is the manifestation of fair trial concept. Arbitrary pretrial detention also contributes to the over capacity in the detention houses. A more rational implementation of pretrial detention will give the possibility to the government in reducing over capacity in many detention houses.

B. The importance of pretrial detention

Pretrial under the Indonesian criminal justice system is a new institution that was established after the enactment of the Law No. 8 of 1981 on Criminal Procedural Law (KUHAP). Pretrial is stipulated under Chapter X Part One of KUHAP, as a part of judicial authority of the court.

Pretrial is aimed to enforce and protect the rights of the suspect against arbitrary actions conducted by investigators and prosecutors when they executing coercive actions. In short, pretrial has the objective to oversee the protection towards the rights of the suspect during the preliminary examination (preadjudication).

C. Purpose of the Guideline

Pursuant to the prevailing laws and regulations in Indonesia, this Guideline is aimed to provide direction related to pretrial detention by using human rights standards. In particular, this Guideline is made so that every stakeholders that are related in the implementation of pretrial detention policy may easily obtain a comprehensive information—the norms and indicators for the implementation—in a single compiled document.

D. Scope of the Guideline

KUHAP does not differentiate detention based on the level of examination. In contrast, KUHAP only states that detention may be conducted by the investigators, the prosecutors, or the court. This authority is given for the purpose to ease the examination on criminal proceeding—before and during the trial. Therefore, the use of “pretrial detention” term under this Guideline refers to the detention conducted during investigation and prosecution phases.

CHAPTER I

Norms and Principles of Pretrial Detention

A. General

KUHAP defines detention as “the placement of a suspect or accused in a certain place by the investigator or prosecutor or judge under a determination, according to the procedures stipulated under this law”.²⁸³

Another definition can be found under the Law No. 3 of 1997 on Juvenile Court, which states that detention is “a placement of a suspect or accused in the State Detention House, Branch of State Detention House or in certain place”.²⁸⁴

KUHAP itself does not differentiate the detention based on examination level. Therefore, as mentioned previously, the use of “pretrial detention” will refer to the detention during investigation and prosecution levels. By referring to KUHAP, this Guideline will limit the authorized official on detention process to the investigators and prosecutors.

KUHAP acknowledges three types of detention: detention in the State Detention House, house arrest, and city arrest. These types of detention may be used on every level of examination. In regards to places for detention, this Guideline limits itself on the pretrial detention at State Detention Houses or detention facilities organized by the police and prosecutors.

The main basis in executing detention against a person, as stipulated under the international law instruments on human rights, is that the restraint against a person’s liberty must be implemented properly. In addition, detention is the last resort, in which the legality can be tested before the court. While KUHAP does not acknowledge judicial scrutiny on every level of criminal proceeding, there is an instrument that may be used to see whether the pretrial detention is legal or not, which is the pretrial institution.

Unfortunately, pretrial as an institution is only considered as a judicial authority that conducts a mere administrative-procedura control against detention from the investigators and prosecutors. ICJR’s study shows that this situation occurred since the enactment of KUHAP until now. As a response to this condition, the Constitutional Court (MK) rendered a decision on a judicial review petition against Article 21 (1) of KUHAP, which states:²⁸⁵

“A judicial institution (*rechtsinstituut*) that is stipulated under Article 77 of KUHAP, which is aimed to check the legality of a detention, should not merely examine the formal or administrative aspect of a detention, but also a deeper aspect that is the rationality on the necessity of the detention”.

Based on MK’s decision, the rationality of whether a detention is necessary or not must be elaborated sharply, clearly, and measurable, by using relevant indicators for authorized official’s consideration.

²⁸³ Article 1 (21), KUHAP.

²⁸⁴ Article 1 (4) of the Law No. 3 of 1997 on Juvenile Justice

²⁸⁵ See MK Decision No. 018/PUU-IV/2006.

Therefore, the use of pretrial detention by placing the suspect in the State Detention House of detention facilities managed by the police or prosecutor can be minimized. For instance, by using non-custodial alternative action.

B. Legal basis for pretrial detention

To make a detention is not arbitrarily conducted and is in line with the principles of civil freedom protection, law enforcers must refer to a number of applicable legal instruments as the basis in executing detention. These instruments are obtained from international law, both hard laws and soft laws, and also obtained from the national laws and regulations.

The legal instruments regarding pretrial detention may be categorized as follows:

| Source of Law | Regulations |
|--------------------------------------|---|
| International Law | <ol style="list-style-type: none"> 1. Universal Declaration of Human Rights (UDHR) 2. International Covenant on Civil and Political Rights (ICCPR) 1976 (ratified under the Law No. 12 of 2005) 3. Convention on the Rights of the Child (ratified under the Presidential Decree No. 36 of 1990) 4. Basic Principles for Treatment of Prisoners 5. Body Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 6. Standard Minimum Rules for the Treatment of Prisoners 7. Minimum Rules for Non Custodial Measures 8. Rules for the Protection of Juveniles Deprived of their Liberty 9. Standard Minimum Rules for the Administration of Juveniles Justice |
| National Laws and Regulations | <p><u>Laws</u></p> <ol style="list-style-type: none"> 1. Law No. 8 of 1981 on Criminal Procedural Law 2. Law No. 5 of 1983 on Exclusive Economic Zone 3. Law No. 26 of 2000 on Human Rights Court 4. Law No. 15 of 2003 on the Determination of the Government Regulation in lieu of a Law No. 1 of 2002 on the Eradication of Terrorism 5. Law No. 23 of 2004 on Elimination of Domestic Violence 6. Law No. 11 of 2008 on Electronic Information and Transaction 7. Law No. 35 of 2009 on Narcotics 8. Law No. 6 of 2011 on Immigration 9. Law No. 11 of 2012 on Juvenile Justice System <p><u>Implementing Regulations</u></p> <ol style="list-style-type: none"> 1. Supreme Court Regulation No. 2 of 2012 on the Establishment of Petty Crime Limitations and Penalties in the Criminal Code 2. Supreme Court Circular Letter No. 4 of 2010 on the Placement of Drugs Abuse and the Victims of Drugs Abuse to the Medical and Social Rehabilitation Institution 3. Supreme Court Circular Letter No. 3 of 2011 on the Placement of |

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| | <p>the Victims of Narcotics Abuse to the Medical and Social Rehabilitation Institution</p> <p>4. Chief of the National Police Regulation No. 14 of 2012 on Criminal Investigation Management</p> |
| | <p><u>Court Decisions</u></p> <p>1. MK Decision No. 018/PUU-IV/2006 (judicial review against Article 21 (1) KUHAP)</p> <p>2. MK Decision No. 65/PUU-IX/2011 (judicial review against Article 83 (2) and (3) KUHAP)</p> |

C. The principles of pretrial detention

1. Non-discrimination

Detention that is imposed to the suspect may not violate the non-discrimination principle. However, the authorized official has the power not to detain women, especially those who are in pregnancy, breastfeeding women, children, elderly people, a person with illness, and disabled persons. Such decision of not detaining the mentioned persons may not be interpreted as a discriminative decision.

2. Presumption of innocence

There is a significant difference between a detained and convicted person. Due to this condition, the presumption of innocence principle must be at the top of consideration before an authorized official make the decision to detain such person. If a detention must be made, the suspect has the right to be treated differently than the person that has been convicted by the Court.

3. Last resort

The action to execute pretrial detention must be minimized at as far as possible. In essence, pretrial detention involves a person that has not been convicted by the court. The decision to conduct a pretrial detention may bring a negative impact on the presumption of innocence principle. Therefore, pretrial detention must be used as the last resort during criminal proceeding.

4. Reasonable and necessary

Pretrial detention may only be used if there is a real necessity in doing so. The human rights law asserts that there must be a strict condition if a pretrial detention will be imposed to a person.

5. Immediate examination at the court

While KUHAP does not stipulate the mechanism for a detainee to appear before the court for the examination of his/her detention requirements and condition, the obligation under Article 21 of KUHAP must be satisfied.

The exclusion of such definition can be found under Article 43 (6) of the Law No. 11 of 2008 on Electronic Information and Transaction (ITE Law), which states that every arrest and detention must be approved by the Chairman of the Court. While this article is a significant improvement in terms of civil freedom, such provision is not fully in line with Article 9 of ICCPR.

6. The right to examine the legality of pretrial detention

Every suspect who is under the pretrial detention must be given the right to file a complaint to examine the legality of his/her pretrial detention without any delay. Every suspect may not be

detained without any chance to challenge the legality of his/her detention and the extension of such detention before the court at any convenient time.

7. A periodical examination on the legality of detention without application

When the pretrial detention has been executed and has been examined with a pretrial mechanism, the suspect still has the right to examine the pretrial detention periodically without any obligation to do any legal effort. The suspect must be released from the detention if there is no viable reason pursuant to the law.

D. Detention authority

Based on the provision on the authorized officials, KUHAP differentiates three types of detention. This differentiation also shows the level of ongoing criminal proceeding. The three types of detention are:

- (i) Detention by the investigators, for the purpose of investigation;²⁸⁶
- (ii) Detention by the prosecutors, for the purpose of prosecution;²⁸⁷ and
- (iii) Detention by the court, for the purpose of court examination. The judge is authorized to execute detention with a determination based on the necessity of a detention for the purpose of court examination.²⁸⁸

D.1. Detention during investigation

KUHAP is the main reference to seek the authority of the investigators in executing detention against a suspect.²⁸⁹ In addition, the authority to execute detention can also be found in several laws:

- a. Law No. 3 of 1997 on Juvenile Court. Article 44 (1) of the Law states that for the purpose of investigation, Investigator as mentioned under Article 41 (1) and (3) (a), is authorized to detain a minor allegedly committing a crime, based on sufficient preliminary evidences.
- b. Law No. 26 of 2000 on Human Rights Court. Article 12 (1) of the Law states that the Attorney General as the investigator and prosecutor is authorized to execute detention and extension of detention for the purpose of investigation and prosecution.
- c. Law No. 35 of 2009 on Narcotics. Article 75 of the Law states that for the purpose of investigation, the National Narcotics Agency's (BNN) investigators are authorized to arrest and detain a person that is allegedly committing narcotics and narcotics precursors abuse and illicit trafficking.²⁹⁰

Pursuant to the abovementioned provisions, investigators are authorized to execute detention. The measure of the investigation necessity will be based on the purpose of the investigation itself that will refer to objective considerations.

The legal responsibility towards the suspect that has been detained is on the the investigator that issues detention warrant. Meanwhile, the responsibility on the suspect's physical condition lies on the head of the detention house (the institution that arrange detainees treatment).²⁹¹

²⁸⁶ Article 20 (1), KUHAP. It also covers detention for the investigation under specific laws.

²⁸⁷ Article 20 (2), KUHAP.

²⁸⁸ Article 20 (3), KUHAP.

²⁸⁹ Article **20 (1)**, KUHAP

²⁹⁰ Article 75 (g), Law No. 35 of 2009 on Narcotics.

²⁹¹ Article 43, Chief of the National Police Regulation No. 14 of 2012 on Criminal Investigation Management.

D.2. Detention during prosecution

Article 20 (2) of KUHP states that the detention conducted by the prosecutor is aimed for the purpose of prosecution. In using this authority, the prosecutor must always refer to the Law No. 16 of 2004 on The Prosecutor of the Republic of Indonesia (Prosecutor Law) as a guideline.

Article 8 (4) of the Prosecutor Law states that in doing its duties and authorities, prosecutor must always act according to the law by considering the norms of religion, civility, decency, and must uphold the society values, and always maintain the honor and dignity of the profession.

E. The right to legal aid and access to a lawyer

E.1. The significance of the access to a lawyer

Legal aid from advocate is important and essential to protect the human rights of the person undergoing pretrial detention. The presence of advocate will assure the freedom of the court from unnecessary pressure, so that the illegal detention may be examined based on the prevailing laws.²⁹² The right to legal aid from an advocate is guaranteed because it is related to the right to fair trial. This right must be given immediately after the detention is executed.

ICCPR states that in the determination of any criminal charge against a person, such person shall be entitled to the following minimum guarantees, in full equality: (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; ... (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him,²⁹³

The Standard Minimum Rules for the Treatment of Prisoners states that for the purposes of a detainee's defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.²⁹⁴

Under the Body Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.²⁹⁵

²⁹² The significance of this right is asserted under Article 14 of ICCPR. In addition, The Standard Minimum Rules for the Treatment of Prisoners also guarantees the right to an advocate for the detainees during the initial phase of criminal proceeding. Other three legal instruments, UN Guidelines on the Role of Prosecutors, UN Basic Principles on the Role of Lawyers, and UN Basic Principles on the Independence of the Judiciary, also give similar emphasize, to protect individual rights during detention.

²⁹³ Article 14 paragraph (3) ICCPR.

²⁹⁴ The Standard Minimum Rules for the Treatment of Prisoners, Rule 93.

²⁹⁵ Body Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 17 paragraph (1).

If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.²⁹⁶

Under the UN Basic Principles on the Role of Lawyers, the Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

In addition, all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.²⁹⁷

The United Nations Human Rights Committee has admitted that the right to an advocate means the right to an effective advocate. In other words, the advocate that is appointed as the legal representative must have the ability to represent the defendant.²⁹⁸ The advocate must also represent the interest of such person and help him/her for the purpose of the mentioned interest.²⁹⁹

Further, the United Nations Human Rights Committee also asserted that a person's right to choose his/her own advocate must be given immediately when the detention is executed. The Committee does not acknowledge a country's legal system that gives a terrorist suspect the right to an advocate chosen by the government, during the first five days of the detention.³⁰⁰ While Article 14 (3) (d) of ICCPR does not guarantee the right to personally choose an advocate, the Committee asserted that the said Article obliges the government to take necessary measure that will guarantee the appointed advocate will give an effective representation for the accused.³⁰¹

Practice in other Regions

Within the practice of human rights protection in the United States, the right to an advocate means that the accused is allowed to get legal aid when he/she is detained for the first time. This definition refers to the explanation from the Inter-American Commission on Human Rights, when they examine the laws that prevent detainee to get an advocate during administrative detention and investigation. The Commission sees that the deciding evidences may be obtained during the initial detention phase, and states that the absence of legal aid in this phase is considered as a serious violation against the right to defense.³⁰² To guarantee the access to an advocate will also prevent other basic human rights violation. In addition, the advocate must be permitted to accompany the accused during statement, interrogation, or validating the statement.³⁰³

Meanwhile, in Europe region, the European Commission stated that in interpreting the right to an advocate under the European Convention, it is not sufficient for the government to merely appoint an advocate for undeprileged accused. The European Commission asserted that the government must provide an effective advocate and is obliged to assure that the appointed advocate is executing his/her job well. If necessary, the authorized officials must oversee the appointed advocate and pushed the advocate to do his/her job well.³⁰⁴

²⁹⁶ Ibid, Principle 17 paragraph (2).

²⁹⁷ UN Basic Principles on the Role of Lawyers, Principle 7.

²⁹⁸ Elena Beatriz Vasilskisv v. Uruguay (80/1980) (31 March 1983).

²⁹⁹ Miguel Angel Estrella v. Uruguay (74/1980) (29 March 1983).

³⁰⁰ Official Records of the General Asseby, Forty-sixth Session, Supplement No. 40 (A/46/40).

³⁰¹ Palu Kelly v. Jamaica (253/1987) 8 April 1991.

³⁰² OAS, Annual Report of the Inter-American Commission non Human Rights (OEA/Ser.LV/II.68, rev 1).

³⁰³ OAS, Report on the Situation of Human Rights in the Republic of Guatemala (OEA/Ser.LV/II.6, doc 47 rev 1).

³⁰⁴ Application No. 9127/80, 6 Oktober 1981, Digest of Case Law vol. 2, pg. 846.

In a case at European Human Rights Court, a domestic court in Europe has denied to a lawyer appointed by the court, even though there is a report from the accused that the appointed lawyer was not doing the duty. The European Human Rights Court stated that, by not approving the replacement of the said appointed lawyer, the government has denied the accused's right to an effective lawyer.³⁰⁵ However, the court does not implement strict oversight towards the appointed lawyer.³⁰⁶

The European Human Rights Court stated that the appointment of a lawyer is mandatory if the expertise of the advocate is needed for a proper defense.³⁰⁷ If the appointment is needed, the accused must make a statement on the appointed lawyer.³⁰⁸ The right to an advocate covers the right to consult to the advocate without the presence of detention officer. This right also applies to private visit and correspondence between the detainee and his/her lawyer.³⁰⁹

In several cases, the European Commission stated that the right to proper facilities for preparing defense will affect the right to reasonable access to prosecutor's documents.³¹⁰ The accused have the right to any relevant information owned by the prosecutor, in order to help them to acquit the charges or reducing the sentences.³¹¹

Pursuant to the abovementioned international human rights legal instrument, and practice in several regions, access to lawyer must be given as soon as possible after a person is suspected to commit a crime.

Detention facilities sometimes made the detainees may only meet their lawyers in the morning or afternoon, while most of the lawyers are attending trials or handling other cases. Therefore, the management of detention places should consider to allow detainees to meet their lawyers after business days or during the days without trials to ease the relationship between the detainees and their lawyers.³¹²

Further, detention facilities must provide a specific room for lawyer visit that is separated from the public visit room. The room must guarantee the individual freedom and face-to-face meeting and must provide proper facilities to work (desks and chairs).³¹³

If the pretrial detainee cannot understand the language of the country where he/she is detained and the lawyer is not fluent of the language of the detainee (usually due to the appointment from the court), the government must protect the detainee's right to prepare his/her defense and to obtain proper representation by providing interpreter in every lawyer visits.

Based on the rights under the international standards, law enforcers must notify the detainees regarding the abovementioned rights. In addition, there is no detainee that can be convicted or sanctioned because they give such information on the abovementioned rights to other detainees. A

³⁰⁵ See Artico case. The Court stated that the nomination of a lawyer does not guarantee an effective legal aid, because the appointed lawyer may be passed away, suffer from illness, or neglecting the duty. If they are notified about these conditions, law enforcers must replace the lawyer with someone else or push the appointed lawyer to fulfill the duty.

³⁰⁶ Kamsinski Case, Digest of Case Law vol. 2, pg. 168.

³⁰⁷ Artico Case, Digest of Case Law vol. 2, pg. 18.

³⁰⁸ Packelli Case, Digest of Case Law vol. 2, pg. 15.

³⁰⁹ Schonenberger and Durmaz Case, juga S v. Swiss.

³¹⁰ X.v.Austria No. 7138, 1975.

³¹¹ Guy Jaspers v. Belgia No. 8403/78.

³¹² S Casale dan Plotnikoff, Regimes for Remand Prisoners (Prison Reform Trust 1990), pg. 20.

³¹³ Ibid., pg. 21.

detainee may not also be sanctioned for appealing for those rights on behalf of himself/herself or other persons.

5.2. The right to legal aid and access to advocate

In the criminal justice system, the presence of an advocate is important to protect the suspect and defendant's right in obtaining a fair trial. Therefore, a legal aid is declared as a citizen's constitutional rights to obtain access to justice.

Article 35 of the Law No. 14 of 1970 on Judiciary states that the right to legal aid applies to every person that is involved in a case. Under the criminal justice system, Article 36 of the Judiciary Law asserts that legal aid for the suspect is given when the arrest and detention are executed.

The abovementioned articles are re-emphasized under the Law No. 48 on 2009 on Judiciary, Law No. 49 of 2009 on the Second Amendment to the Law No. 2 of 1986 on General Court, Law No. 50 of 2009 on the Second Amendment to the Law No. 7 of 1989 on Religion Court, and Law No. 51 of 2009 on the Second Amendment to the Law No. 5 of 1986 on State Administrative Court. These laws stipulate the right to legal aid for a person involved in a case and it is an obligation for every court to form a legal aid center.³¹⁴

Legal aid is stipulated specifically in KUHAP under Chapter XVII on Legal Aid, particularly under Articles 54 to 57 and Articles 59 to 62. Meanwhile, legal aid for the underprivileged citizens or defendant charged with 5 years of imprisonment or capital punishment, is stipulated under Article 56 of KUHAP.

The said provision under KUHAP is implemented by the Minister of Justice Directive No. M.24-UM.06.02 of 1985 tentang on the Implementing Guideline of Legal Aid for Underprivileged Citizens. This Directive is the basis for the formation of legal aid centers at the court, and also the legal basis to obtain funding that will be managed by the local district court.

For minors that are involved in a crime, Articles 51 and 52 of the Law No. 3 of 1997 on Juvenile Court guarantee the right of every minor that is allegedly involved in a crime, to obtain legal aid starting from the arrest or detention and on every level of examination.

The provision under the Juvenile Justice Law is strengthened by the enactment of the Law No. 23 of 2002 on Child Protection, which under Article 17 states that a child is entitled to obtain a legal aid or any kind of aid effectively during every level of legal proceeding, for the purpose of defense and obtain a justice before an objective and impartial juvenile court, with a closed session.

Further, Article 18 (1) of the Law No. 39 of 1999 on Human Rights states that every individual that is arrested, detained, and indicted due to the alleged criminal, has the right to be presumed innocence until proven otherwise by the court and has the right to every legal guarantee for the defense, according to the prevailing laws and regulations. Meanwhile, Article 22 (1) of the Law No. 18 of 2003 on Advocate states that every advocate is obliged to give legal aid for underprivileged citizens.³¹⁵

³¹⁴ The Law is implemented by the Supreme Court Circular Letter No. 10 of 2010 on the Guideline in Providing Legal Aid. The Circular states that a legal aid center must be re-activated within every district court, religion court, and state administrative court. The Circular is repealed and replaced due to the enactment of the Law No. 16 of 2011 on Legal Aid.

³¹⁵ This provision is implemented by the issuance of the Government Regulation No. 83 of 2008 on the Requirements and Procedures in Providing Legal Aid, and the issuance of the Indonesian Advocates Association Regulation No. 1 of 2010 on Implementing Guideline in Providing Legal Aid.

The Law No. 16 of 2011 on Legal Aid also guarantees the right of legal aid beneficiaries to obtain access to justice and to realize the constitutional rights of the citizens according to the principle of the equality before the law.³¹⁶ Due to the enactment of the Legal Aid Law, underprivileged citizens that cannot fulfill their basic rights, may receive legal aid for private, criminal, and state administrative cases, both litigation and non-litigation.³¹⁷

F. The right to be free from torture and degrading treatment

A person that is undergoing pretrial detention, due to the charge of committing a crime, often being the subject of torture, to make his/her confess about the crime and to give information regarding the crime. Therefore, the prohibition on torture is an important principle under the Standard Minimum Rules for the Treatment of Prisoners.

If there is any indication that a detainee is suffering from torture, the possible impacts are:

- (i) The statements obtained from torture will not be used as evidences that will criminate a person;
- (ii) The report on alleged torture must be investigated immediately and the perpetrator must be indicted;
- (iii) Practical efforts, by not including the evidences obtained from torture, are needed to assure the right to be free from torture.

UDHR states no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.³¹⁸ Similar provision is also provided under ICCPR, which states that no one shall be subjected without his free consent to medical or scientific experimentation.³¹⁹

Further, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) states that:

1. Each country shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.³²⁰
4. Each country shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.³²¹
5. Each country shall make these offences punishable by appropriate penalties which take into account their grave nature..³²²
6. Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.³²³

³¹⁶ Article 3 (b) and (c), Law No. 16 of 2011 on Legal Aid.

³¹⁷ Articles 4 and 5, Legal Aid Law.

³¹⁸ Article 5, UDHR.

³¹⁹ Article 7, ICCPR.

³²⁰ Article 2, Convention Against Torture.

³²¹ Article 4 (1), Convention Against Torture.

³²² Article 4 (2), Convention Against Torture.

³²³ Article 5, Convention Against Torture.

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that it shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.³²⁴

No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.³²⁵

The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.³²⁶ A detained or imprisoned person, or his counsel when provided by law, shall have access to the information on the interrogation.³²⁷

Meanwhile, the UN *Guidelines on the Role of Prosecutors* states that when prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, they shall refuse to use such evidence against anyone other than those who used such methods.

Such provision exists because unlawful methods are a gross violation against suspect's rights, especially that involved torture or other cruel, inhuman or degrading treatment or punishment. Prosecutors must inform such unlawful methods to the court and the Government, and take all necessary steps to ensure that those responsible for using such methods are brought to justice.³²⁸

The United Nations Human Rights Committee further states that complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation.³²⁹

In the view of the Committee the prohibition must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure. Even such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to Article 7 of ICCPR.

Moreover, Article 7 of ICCPR clearly protects not only persons arrested or imprisoned, but also pupils and patients in educational and medical institutions. It is also the duty of public authorities to ensure protection by the law against such treatment.³³⁰

G. Detention at the State Detention House

The main reference for the treatment of pretrial detainees is the Standard Minimum Rules for the Treatment of Prisoners, which was adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council under the Resolution 663 C (XXIV) on 31 July 1957 dan 2076 (LXII) on 13 May 1977.

³²⁴ Body of Principles for the Protection of All Persons Any Form of Detention or Imprisonment, Principle 21 (1).

³²⁵ Body of Principles for the Protection of All Persons Any Form of Detention or Imprisonment, Principle 21 (2).

³²⁶ Body of Principles for the Protection of All Persons Any Form of Detention or Imprisonment, Principle 23 (1).

³²⁷ Body of Principles for the Protection of All Persons Any Form of Detention or Imprisonment, Principle 23 (2).

³²⁸ Guidelines on the Role of Prosecutors, Article 16.

³²⁹ CCPR General Comment No. 7, paragraph 1.

³³⁰ CCPR General Comment No. 7, paragraph 2.

The Standard Minimum Rules contain detailed provisions that describe the condition of a person during pretrial detention or imprisonment. Some of that provisions are implemented for pretrial detention that is based on presumption of innocence.

Further, in 1988, the United Nations General Assembly issued the Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment. This is the main reference to implement the general principles under UDHR and ICCPR for pretrial detention. The basic principles detail the necessary measures to protects detainee's human rights.

Just a few years after the Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment was issued, the United Nations General Assembly issued Resolution No. 45/111, on 14 December 1990, which adopted the Basic Principles for the Treatment of Prisoners, as a recommendation for all countries in the world to incorporate the elementary principles for the treatment of detainees.

In Indonesia, the Elucidation of Article 22 (1) of KUHAP states that if there is no State Detention House in a city or location, detention may be conducted in the police office, prosecutor office, in correctional facilities, hospitals, or in other places due to urgency.

As a response to international recommendations, the Government has issued Government Regulation No. 27 of 1983 on the Implementation of KUHAP, which stipulates that a State Detention House will be formed in every regency and municipality. If it is necessary, a branch of State Detention House will be formed in a certain sub-district.

To implement the Government Regulation, the Minister of Justice then issued Minister of Justice Decree No. M.04 UM.01.06 of 1983 on the Determination of Certain Correctional Facilities as a State Detention House.

The Decree has two appendices:

- (i) Appendix I, which lists the Correctional Facilities that may be used as a detention house;
- (ii) Appendix II, which lists the Correctional Facilities that some of the rooms may be used as a detention house.

In regards to a person that may be placed at a State Detention House, such provision may be found under Article 19 of the Government Regulation No. 27 of 1983 *juncto* Article 1 of the Minister of Justice Decree No. M.04.UM.01.06 Tahun 1983. Detainees placed in a State Detention House are those that are undergoing investigation, prosecution, and examination at District Court, Court of Appeal, and the Supreme Court. Under these provisions, all detainees will be placed at the State Detentio House without exception. However, the detention will be differentiated between sexes, ages, and the level of examination.

For crime committed by minors, Article 44 (6) of the Law No. 3 of 1997 on Juvenile Court states that detention on children will be conducted in a specific place for children at State Detention House, branch of the State Detention House, or in certain places. The Elucidation of this article states that, "certain places" are detention facilities dedicated for minors, separated from detention facilities for adults.

If there is no State Detention House or a branch of the State Detention House in a region, or both places are full, detention against minors may be used in other places, by taken into consideration the interest of the respective minor and the case examination.

Further, the Law No. 11 of 2012 on the Juvenile Criminal Justice System states that minor that are detained must be placed at the Temporary Juvenile Correctional Facilities (*Lembaga Pemasyarakatan Anak Sementara – LPAS*). Article 33 (4) and (5) of the Juvenile Criminal Justice System Law states that detention against a minor will be conducted at LPAS, and if there is no LPAS, detention may be conducted at Social Welfare Institution (*Lembaga Penyelenggara Kesejahteraan Sosial – LPKS*).

Detention against a minor must also consider the minor's condition. Article 32 (1) of the Juvenile Criminal Justice System Law states that a detention is conducted for the purpose of examination, but the detention must consider the minor's interest, particularly in regards to his/her physical and mental development, along with the social and public interest.

Pursuant to Chief of the National Police Regulation No. 14 of 2012 on Criminal Investigation Management, the treatment and placement against a detainee must be differentiated between male adults, women, and minors.

Treatment of male adults detainees are:

- a. Must be treated humanly;
- b. Based on presumption of innocence;
- c. The detainee has the right to know the reason of detention and the charges;
- d. May only be detained at State Detention House;
- e. The family and his lawyer must be informed regarding the detention place;
- f. Has the right to legal aid;
- g. Has the right to meet his family and lawyer;
- h. Has the right to medical treatment;
- i. Has the right to interpreter, if he cannot speak Indonesian;
- j. Must be separated from detention for women and minors;
- k. Has the right to execute his beliefs; dan
- l. The time for visit will be determined by the head of each state detentio house..

Treatment for women detainees are:

- a. Must be placed in special detention room for women;
- b. Has the right to special treatment;
- c. Must be separated from detention for male adults and minors;
- d. Special procedures for women protection.

Treatment for minors are as follows:

- a. The right to accompaniment from their parents or legal guardian;
- b. The right to be accompanied by special officer for minors;
- c. The right to privacy from the publication of his/her identity;
- d. Must be placed in detention room for minors;
- e. Must be separated from detention for male adults and women; and
- f. Special procedures for child protection.³³¹

³³¹ Article 54, Chief of the National Police Regulation No. 14 of 2012 on Criminal Investigation Management.

CHAPTER II

Evaluation on the Pretrial Detention Necessity

A. General requirements on pretrial detention

The basis for detention covers the legal basis, condition, and the requirements that give the possibility to the law enforcers to execute a detention. These elements are supporting each other, and if one element is absent, the detention will not fulfill the legality principle.

Pursuant to KUHAP, pretrial detention may be conducted if it satisfies the following requirements:

1. The suspect or the defendant is an alleged perpetrator;
2. The allegation is based on the sufficient evidence;
3. The suspect or the defendant has committed a crime or has participated in a crime that subject to five years of imprisonment or more;
4. Condition that causes concern: (i) the accused or the defendant will escape from the process; (ii) will damage or destroy physical evidence; and (iii) will repeat the crime that he committed.

A person may be detained if he/she has been determined as a suspect by the investigator after the investigation resulted in sufficient preliminary evidence, namely two types of evidence.³³² In determining the sufficient preliminary evidence, investigator will conduct an expose.³³³

Sufficient preliminary evidences are determined by the police report and two types of evidences, namely:³³⁴

- (i) Witness statement obtained by the investigator;
- (ii) Expert statement obtained by the investigator;
- (iii) Letters; atau
- (iv) Clues.

The main point in executing pretrial detention is to assure that the suspect/defendant will attend the trial. To assess this condition, there are four indicators that may be used:

1. There is a risk that if the suspect is not detained, he/she will not attend the trial;
2. There is a risk that if the suspect is not detained, he/she will conduct an act that will hamper the judicial process;
3. There is a risk that if the suspect is not detained, he/she will committ another crime;
4. There is a risk that if the suspect is not detained, he/she will cause public disturbance;

In addition, considering the condition of the crime, such as physical violence agains another person's body or property, may also be used as an indicator. Other indicator that may also be used is by considering the level of the crime, whether it is a serious crime—which will cause threat for other person's safety or property—or not.

³³² Article 66 (1) of the Chief of National Police Regulation No. 12 Tahun 2009.

³³³ Article 66 (1) of the Chief of National Police Regulation No. 12 Tahun 2009..

³³⁴ Article 66 (2) of the Chief of National Police Regulation No. 12 Tahun 2009..

B. The evaluation standards on pretrial detention

Pretrial detention may only be used for the purpose of law enforcement, by considering other available options to assure the attendance of the suspect during trial. In addition, suspect that is detained must be prioritized to be tried as soon as possible.

In principle, a person that is accused of committing a crime, has the right to not be detained while waiting for the trial to begin, unless the authorized official may show the relevant and sufficient reasons to justify the detention. During detention, the authorized official must prove that they have conducted an in-depth examination on the element of concern that lead to the detention.

Due to the level of criminal penalty or for the purpose of further examination or due to the possibility that the suspect is about to be convicted, will not automatically legitimize the execution of pretrial detention. The authorized official must conduct an in-depth examination and must elaborate the element of concern so that the pretrial detention is legal.

Some important issues about the health condition, children that are under their parents protection, and the possibility of alternative option in form of non-custodial act, must be considered for the legality of the pretrial detention. In terms of follow-up investigation, the authorized official may not use the same reason for the pretrial detention.

During pretrial, it is important to assure that the detention is not conducted arbitrarily. Therefore, the determination of detention must be based on strict, certain, and measurable criterias, so that the authorized officials may implement their duty in certain manner. In detail, the requirements and criteria for pretrial detention are elaborated below:

a. Subject to 5 years of imprisonment or more (legal ground)

This requirement is known as legal basis, because the laws have determined which articles that may be used for the basis for detention. The laws have also determined—in general and detail—the crimes in which the perpetrator may be detained, therefore not every perpetrator may be imposed pretrial detention.

KUHAP asserts that a detention may only be imposed against a suspect or defendant that commit a crime or participate in a crime subject to 5 years of imprisonment or more.³³⁵ In contrast, if the crime subject to less than five years of imprisonment, then the perpetrators may not be subject to detention.

In regards to crime committed on exclusive economic zone, Article 13 (c) of the Law No. 5 of 1983 on Exclusive Economic Zone states that in executing the sovereign rights, jurisdiction, and other obligaiton under Article 4 (1) of the Law, law enforcers may take necessary measures according to KUHAP, with the exception under point (c). In regards to detention, crimes stipulated under Articles 16-17 of the Exclusive Economic Zone Law are categorized as crime according to Article 21 (4) (b) of KUHAP.

Further, pursuant to the Elucidaiton of Article 13 of the Exclusive Economic Zone Law, ships and crew that are allegedly committing a crime in the sea, based on the sufficient preliminary evidence, especially foreign ships and crew, are subject to follow-up examination by arresting the ships and

³³⁵ Article 21 (4), Chief of the National Police Regulation No. 12 of 2009.

the people in it. Meanwhile, domestic ships and crew may be ordered to go the nearby seaport appointed by the investigator for further examination.

Detention may also be imposed against a perpetrator committing a crime under KUHP and other specific laws, even though the crime subject to less than 5 years of imprisonment. Such detention may be executed if the crime is considered hampering the public order, and threat against an individual.

These types of crime are:

1. Articles 282 (3), 296, 335 (1), 351 (1), 353 (1), 372, 378, 379 a, 453, 454, 455, 459, 480, and 506 of KUHP;
2. Articles 25 and 26 of *Rechtenordonantie* (violation against Custom and Excise *Ordonantie*, lastly amended by *Staatsblad* of 1931 No. 471),
3. Articles 1, 2, and 4 of the Law No. 8/Drt/1955 on Immigration Crime;
4. Articles 36 (7), 41, 42, 43, 47, and 48 of the Law No. 9 of 1976 on Narcotics.
5. Article 109 of the Law No. 6 2011 on Immigration states that suspect and defendat that committ immigration crime under Articles [118](#), [119](#), [120](#), [121](#), [122](#), [123](#), [126](#), [127](#), [128](#), [129](#), [131](#), [132](#), [133 \(b\)](#), [134 \(b\)](#), and [135](#) are subject to detention.

Investigator/prosecutor may not modify the detention by imposing the articles that make the suspect/defendant is possible to be detained, while the actual crime is not.³³⁶

b. Necessity

This element take into consideration the condition or the necessity of a detention based on the suspect or defendant's condition. This condition is subjectively assessed by the related law enforcers.

The condition or necessity of detention under Article 21 (1) of KUHP may be assessed from:

- (i) The suspect or defendant will escape;
- (ii) The suspect or defendant will damage or make the evidences disappear; or
- (iii) The suspect or defendant will repeat the crime.

Pursuant to the Chief of the National Police Regulation No. 14 of 2012 on Criminal Investigation Management, detention against a suspect may be conducted by considering:³³⁷

- (i) There is a concern that the suspect will escape;
- (ii) There is a concern that the suspect will repeat the crime;
- (iii) There is a concern that the suspect will make evidences disappear; and
- (iv) The suspect may harm the investigation process.

The abovementioned elements will be elaborated below:

b.1. Suspect will escape

The authorized official must properly examine the risk or the condition that make the suspect escape, based on several evidences. The condition and the risk, for instance, if the crime is subject to capital punishment or life sentence, or the suspect when committing a crime has committed two or

³³⁶ Dalam tingkat penyelidikan dan penyidikan hal ini telah dilarang berdasarkan Pasal 29 Perkap No. 12 Tahun 2009. Pelarangan juga ditegaskan oleh Perkap No. 14 Tahun 2012.

³³⁷ Pasal 44 Perkap No. 14 Tahun 2012.

more crimes. The main points used to examine the element of concern that the suspect will escape, are elaborated below:

1. Suspect's characters (including physical and mental condition);
2. Suspect's moral situation,
3. Suspect's current employment,
4. Suspect's property,
5. The stability of family kinship,
6. The period of domicile in suspect's neighbourhood,
7. The bond with the neighbourhood,
8. Past history and the absence of criminal track record,
9. Track record of past crimes, or
10. Suspect's track record when attending trials.

The absence of permanent domicile cannot be used as the argument to justify pretrial detention. In addition, the possibility of suicide may not be used as the argument that the suspect will escape. The lack of personal guarantee that will assure the suspect's attendance during trial and other information regarding the possibility of the supervision failure towards the suspect in the society, may not also be used as justification to conduct detention.

b.2. Damaging or making evidences disappear

The presence of risk when the suspect will hamper judicial process must be stated clearly based on relevant factors. The risk may not be abstract in nature, but must be supported by factual evidences. For instance, the suspect/defendant will influence witnesses, which will make witnesses are reluctant to give honest statement.

In long terms, however, the argument that the investigation is still necessary is not sufficient as the basis to continue the detention. In normal condition, threats or risk will be reduced as the time goes by, including the proper statement and evidence gathering process that will prove the crime.

Some indicators that may be used to assess this condition are:

- (i) If the suspect has the ability to hamper or hinder judicial process;
- (ii) If the suspect has the ability to threaten the safety of the witnesses; or
- (iii) If the suspect has the ability to take some actions that will threaten the judges safety.

b.3. The suspect will repeat the crime

The use of this element must be clearly stated and understood by considering relevant factors, especially by evaluating the condition of the case and the track record and the personality of the suspect.

The suspect's track record and character include the absence of past crimes or history of the suspect in fulfilling the requirements that have been set from the previous judicial process. Another indicator is related to the time when crime is committed—whether it happened when the suspect is in probation period, parole, suspension, transfer of detention, appeal, cassation, or newly conducted.

c. Concern that there will a public disturbance

KUHAP does not incorporate the threat of public order as one of the prerequisites in executing detention. In practice, however, this issue is one of the considerations from the authorized officials.

Therefore, to make pretrial detention is not executed arbitrarily, it is important to establish a standard for this argument.

The level of crime and public reaction against the suspect may be used as the justifiable reason to execute pretrial detention, by using public order. However, the implementation of pretrial detention may be used temporary. It means that this reason cannot be used to extend the detention period. The authorized official must show the proof that indicates the release of the suspect from the pretrial detention may endanger the safety of the suspect.

The threats against the suspect and public order will be reduced as the times goes by. Therefore, the authorized official must provide concrete and specific reasons for the public interest in the light of showing the necessity of the extended detention.

The nature and serious possible threats are occurred when the suspect is released from the pretrial detention that must be proved based on the clear and assuring evidence—not theoretical and potential evidence.

In the implementation, a suspect of narcotics crime who is a use, cannot be detained by using the reason of the presence of threat against public order. The reason of threatening public order may be implemented for the person that is accused of committing sexual crimes or crimes against children.

d. Special consideration for children

The criminal justice system upholds the rights of the children or minors to improve themselves. Therefore, the criminal proceeding for the children must guarantee the interest of the children, and promote the physical and mental health of the children. In particular, the expropriation of the liberty against the children conflicted with the law must be prevented, and may only be used as the last resort if there is no more non-custodial alternative.

Detention against minors may only be executed if the minor has reached 14 years of age or more and allegedly committed crime that is subject to 7 years of imprisonment or more. Detention against minors cannot be used if the minor has a personal guarantee from their parents or legal guardian or from certain institution, which assures that the minor will not escape, will not damaging or making evidences disappear, and/or will not repeat the crime.

At the international level, the United Nations General Assembly, in 1985, has issued UN Standard Minimum Rules for the Administration of Juvenile Justice or known as the Beijing Rules. Two further instruments were issued to implement Beijing Rules, namely UN Guidelines for the Prevention of Juvenile Delinquency and UN Rules for the Protection of Juveniles Deprived Of Their Liberty.

The objective of the abovementioned standards are to give a treatment that is oriented to nurture the minor that is conflicted with the law, and to prevent those minors from repeating the crime. At the same time, the minors have the right to equal treatment during judicial process, to protect them that are accused committing crime.

The Rules for the Protection of Juveniles Deprived of their Liberty states that the principles in the treatment for the children covers:

- (i) Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases;
- (ii) Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the Beijing Rules; and

- (iii) To minimize the negative impact of liberty deprivation and other side effects.

e. Special consideration for narcotics users

Pursuant to the Law No. 35 of 2009 on Narcotics, drugs users are still categorized as criminal offenders that subject to imprisonment, stipulated under Article 127 of the Narcotics Law. In practice, narcotics user caught red-handed, are accused for violating Articles 111-114 of the Narcotics Law.

The implementation of pretrial detention against narcotics users, especially those that are indicted with other articles than Article 127 of the Narcotics Law, must be prevented. Alternatives such as diversion and rehabilitatio may be used. Alternative option is in line with the Supreme Court Circular Letter No. 4 of 2010, which states that if the suspect is categorized as user, medical or social rehabilitation may be used.

f. Special consideration for petty crimes (the value of loss under IDR 2.5 million)

The value of goods under KUHP was lastly amended on 1960, due to the issuance of the Government Regulation in lieu of a Law No. 16 of 1960. Therefore, some crimes stipulated under Articles 364, 373, 379, 384, 407, and 482 of KUHP cannot be implemented. Suspects that commit crime that fall under the category of Articles 364, 373, 379, 384, 407, and 482 of KUHP must be classified as petty crimes.

In the implementation, authorized official must refer to the Supreme Court Regulation No. 2 of 2012, as the legal ground to determine the suspect of committing petty crime. Therefore, there is no need to impose pretrial detention against the suspect.

g. Requirements under Article 21 (1) of KUHAP

In addition to the abovementioned elements for detention, a detention must also fulfill the requirements under Article 21 (1) of KUHAP, namely:

- (i) The suspect or defendant is allegedly accused as the perpetrator of the crim;
- (ii) The strong allegation is based on sufficient evidence.

Unlike an arrest that is based on the “sufficient preliminary evidence”, detention must be executed based on “sufficient evidence”. Therefore, the requirement on the evidence for detention is on the higher level compared to an arrest.

KUHAP’s Elucidation does not define “sufficient evidence”. However, Article 62 (1) and 75 of HIR states that a detention must be based on such requirements if there are statements that show the suspect is guilty.

Because KUHAP does not define “sufficient evidenvé”, this provision must be seen proportionally. At the investigation level, it is sufficient if the “minimum limit of proof” is satisfied, so that the case may be brought before the court, by using the evidences stipulated under Article 184 of KUHAP.

CHAPTER III

Procedures and Period of Detention

A. General

A person that is arrested or detained must be given notification on the reason of the arrest or the detention and their rights, including the right to a lawyer and the right to know the charges. This information is crucial for a person to examine the legality of the arrest or the detention. And if they are charged, this information is important for them to prepare their defense.³³⁸

The main objectives in informing the reason of arrest or detention is to examine the legality of the detention. Therefore, the reason must be specified, which covers the elaboration and factual reason on the arrest and detention. In regards to this, the United Nations Human Rights Committee states that it is not sufficient of the arrest or detention against a person is executed for security reasons, without any clear indication.³³⁹

ICCPR also states that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.³⁴⁰

Meanwhile, under the Body of Principles for the Protection of All Persons Any Form of Detention or Imprisonment states that anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.³⁴¹ A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.³⁴²

Some Affirmation

The United Nations Human Rights Committee showed its concern on the detention in Sudan under the reason of “national security”. The Council recommended that the national security must be defined under a law and by the law enforcers such as the police, and the detention must be accompanied by the reason for detention, must be available for the public, and must be able to be examined before the court.³⁴³ The Council also said that there was a violation against Article 9 (2) of ICCPR on the case where a detainee just been informed regarding the reason of the arrest and detention for murder investigation, when he asked it during trial. During few weeks, he did not know the detail on the reason of the arrest and detention, including the facts on the crimes.³⁴⁴

In regional context, the European Human Rights Court explained that Article 5 (2) of the European Convention states that everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.³⁴⁵ Furthermore, the

³³⁸ Article 9 (2) ICCPR; Paragraph 2 (B) African Commission Resolution; Principle 10, the Body of Principles for the Protection of All Persons Any Form of Detention or Imprisonment; Article 7 (4) American Convention; Article 5 (2) European Convention; Principle 11 (2), the Body of Principles for the Protection of All Persons Any Form of Detention or Imprisonment.

³³⁹ *Drescher Caldas v. Uruguay*, (43/1979), 21 July 1983, 2 Sel.Doc.80.

³⁴⁰ Article 9 (2) ICCPR.

³⁴¹ Principle 10, the Body of Principles for the Protection of All Persons Any Form of Detention or Imprisonment.

³⁴² Principle 11 (2), the Body of Principles for the Protection of All Persons Any Form of Detention or Imprisonment.

³⁴³ Concluding observations of the Human Rights Committee on Sudan, UN Doc. CCPR/C/79/add.85, 19 November 1997, paragraph 13.

³⁴⁴ *Kelly v. Jamaica* (253/1987), 8 April 1991, HRC Report, (A/46/40), 1991, paragraph 5. In another case, the Human Rights Council said that there were violations against Article 9 (2) ICCPR, when a local lawyer was detained for 50 hours without being informed on the reason of detention (*Portorea Case, Republic of Dominique*, (188/1984), 2 Sel.Doc.214).

³⁴⁵ *Fox, Campbell and Hartley*, (18/1989/178/234-236), 30 August 1990, paragraph 40-41.

European Convention states that the reason on detention must be informed promptly. The term “promptly” must be interpreted as directly, unless there are several issues, such as the lack of interpreter.³⁴⁶ The European Human Rights Court has stated that the limit on “several hours” between detention and interrogation, which made the detainee knew the reason for detention during interrogation, cannot be considered as the reason for postponing such notification.³⁴⁷

The European Commission states that Article 5 (2) of the European Convention required that every person that is detained must be informed on the facts and events that become the basis of the detention. It means that the defendant must be able to say that whether he/she admits the charges or not.³⁴⁸ The requirements on prompt information has two objectives. Firstly, to inform the detainees that they may examine the legality of their detention. Secondly, to open the possibility for anyone that are facing trial and being detained, to prepare the defense.³⁴⁹ The European Convention is the only international convention that explicitly states the obligation to inform the reason of the detention.³⁵⁰

To be more effective, information must be given in the language that is understood by the suspect/defendant. Any person that is arrested, indicted, or detained, and does not understand the language of the authorized official, has the right to obtain information in the language that he/she understands—what are the rights, how to use it, why they are arrested or detained, and what are the charges.

They also have the right on written explanation on the reason of detention, the time of detention, and the transfer of detention place, date and the time of judge examination, who conducts the arrest or detention, and where are they detained.³⁵¹ In addition, they also have the right to an interpreter that will help them during the legal process after the arrest for free or paid—if necessary.³⁵²

If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.³⁵³

B. Detention procedures

The procedures on detention, conducted by the investigator, prosecutor, or judge refer to Article 21 (2) and (3) of KUHAP. If the investigator or prosecutor conduct the detention, they must issue a warrant. If the judge conducts it, he/she must issue a Detention Determination Letter (*Surat Penetapan Penahanan*).

³⁴⁶ Article 5 (2), European Convention

³⁴⁷ Fox, Campbell, and Hartley, (18/1989/178/234-236), 30 August 1990, paragraph 42.

³⁴⁸ Lihat X. v. Federal Republic of German (8098/77), 13 December 1978, 16 DR 11, hal.114.

³⁴⁹ Similar provision found under Principle 13 of the Body of Principles for the Protection of All Persons Any Form of Detention or Imprisonment, which states that “Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights”. Also under the Principle 5 of the Basic Principles on the Role of Lawyers, which states that Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

³⁵⁰ Article 5 (2) European Convention.

³⁵¹ Principle 14, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

³⁵² Principle 14, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

³⁵³ Article 36, Vienna Convention on Consular Relation. See also Principle 16 (2), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

The matters stipulated under the Detention Order/Determinatin Letter are:

1. The identity of the suspect/defendant, name, age, occupation, sex, and domicile
2. Stating the reason for detention. For instance, for the purpose of investigation or court proceeding.
3. Short elaboraton on the crime that is charged, for preparing the defense and for the legal certainty.
4. Clearly stating the place of detention to give legal certainty for the detainee and his/her family.

At the level of investigation, the detention must be accompanied by a warrant issued by the investigator or his superior. The detention is executed after an expose. Warrant that has been signed by the officia must be sent to the detainee's family and/or lawyer.³⁵⁴ Without the warrant, the detention will be illegal.

The Minister of Justice issued Minister of Justice Directive No. J.C.5/19/18 of 1964 on the Release of Detainee Who is Detained Without Proper Warrant or Detention Order, which directed Heads of Directorate of Correctional Facilities; Heads of Regional Correctional Facility Inspectorates; Director of Regional Correctional Facilities; and Director/Head of Correctional Facilities, not to accept detainee without proper warrant. If such situation is occurred, the correctional facilities must release the respective person, after informing the institution that transferred the detainee.

The detention warrant or order must be sent to the detainee's family, to give certainty and as a control mechanism to see whether the warrant is in accordance to the law or not. The detainee's family is given the right by the law to examine the legality of detention via the pretrial institution.

Detention without a detention order may only be used for domestic violence cases. Article 35 of the Law No. 23 of 2003 on the Elimination of Domestic Violence states that:

1. The police may arrest and detain a suspect without a warrant, even though the domestic violence was committed in another jurisdiction;
2. After the arrest and detention is conducted, a warrant must be issued in 24 hours;
3. The suspension of detention will not apply for this condition.

Further, Article 36 states that:

1. To protect the victim, the police may arrest the suspect with sufficient preliminary evidence;
2. The arrest may be continued with a detention, by issuing a warrant in 24 hours.

Another exception may also be found for cybercrime, even though the requirements for detention are more difficult. Pursuant to Article 43 (6) of the Law No. 11 of 2008 on Electronic Information and Transaction, an arrest or a detention against a suspect must be approved by the chairman of the local district court, via the prosecutor in 24 hours.

³⁵⁴ Article 45, Chief of the National Police Regulation No. 14 of 2012.

Detention procedures in general



C. Procedures for special detention

Detention against a person with special treatment according to the laws and regulations, is executed after securing an approval from certain officials. In general, the procedures for this detention is similar to KUHAP. The authorized official that issues the warrant is the investigator or his/her superior. The copy of the warrant must be sent to the detainee's family or lawyer.³⁵⁵

The special treatment for detention procedures applies to the following positions:

a. Penahanan Ketua, Wakil Ketua Pengadilan atau Hakim

Article 20 of the Law No. No. 14 of 2002 on Tax Court states that the Chairman, Deputy Chairman, or Judges of the Tax Court may be arrested or detained under the order from the Attorney General after securing President's Approval, for the exception on the following condition:

- (i) Caught red-handed when committing a crime; or
- (ii) Allegedly committing a crime subject to capital punishment or crime against the national security.

The arrest or detention under point (i) must be reported to the Chief Justice of the Supreme Court in 48 hours.

Meanwhile, detention against the Chief Justice, Deputy Chief Justice, Deputy, and Justices of the Supreme Court may only be executed under the order from the Attorney General after securing President's approval, for the exception on the following condition:

- (i) Caught red-handed when committing a crime; or
- (ii) Allegedly committing a crime subject to capital punishment or crime against the national security, based on the sufficient preliminary evidence.

If the arrest and detention are executed based on the exception, such arrest and detention must be reported to the Attorney General in 48 hours.³⁵⁶

Further, Article 26 of the Law No. 49 of 2009 on the Second Amendment to the Law No. 2 of 1986 on General Court states that the Chairman, Deputy Chairman, and Judges of the general court may be

³⁵⁵ Article 46, Chief of the National Police Regulation No. 14 of 2012 on the Management of Investigation Level

³⁵⁶ Article 17, Law No. 3 of 2009 on the Second Amendment to the Law No. 14 of 1985 on the Supreme Court.

arrested or detained under the order from the Attorney General after securing Chief Justice's approval, for the exception on the following conditions:

- d. Caught red-handed when committing a crime;
- e. Allegedly committing a crime subject to capital punishment; or
- f. Allegedly committing a crime against the national security.

Similar provisions may also be found under Article 25 of the Law No. 50 of 2009 on the Second Amendment to the Law No. 3 of 2006 on Religion Court, and Article 26 of the Law No. 51 of 2009 on the Second Amendment to the Law No. 5 of 1986 on State Administrative Court.

b. Detention against Prosecutor

Article 8 of the Law No. 16 of 2004 on the Prosecutor of the Republic of Indonesia states that summon, examination, search, arrest, and detention against a prosecutor that allegedly committing a crime may only be executed after securing Attorney General's approval. According to its Elucidation, this effort aims to give protection to prosecutor, as stipulated under the *Guidelines on the Role of Prosecutors and the International Association of Prosecutors*.

The mentioned Guidelines state that the Government ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

c. Detention against a Head or Deputy Head of Regions

Prior to the MK Decision No. 73/PUU-IX/2011, 26 September 2012, if the suspect is a Head or Deputy Head of a Region, the investigation and detention must secure a written approval from the President, pursuant to Article 36 of the Law No. 32 of 2004 on Regional Governments.

Investigator must submit an application for inquiry and investigation to the President, by elaborating the alleged crime. If within 60 days the President does not give approval, the inquiry and investigation may proceed, including the detention.

This procedure, as stipulated under Article 36 (4) of the Regional Government, may be excluded on the following conditions:

- (i) Caught red-handed when committing a crime; or
- (ii) Allegedly committing a crime subject to capital punishment or crime against the national security,

The investigation must be reported to the President within 48 hours.

After MK Decision No. 73/PUU-IX/2011, 26 September 2012, President's approval for inquiry and investigation against the head and/or deputy head of regions was declared unconstitutional. Meanwhile, President's approval for investigation followed-up by detention was declared unconstitutional with condition.

d. Detention against the member of the regional house of representatives

Article 53 of the Regional Governments Law states that investigation against a member of the regional house of representatives may be conducted after a written approval from the Minister of

Interior Affairs on behalf of the President, if the suspect is a member of provincial house of representatives, and from the Governor on behalf of the Minister of Interior Affairs, if the suspect is a member of regency/municipality house of representatives.

The application for such approval must include a clear elaboration on the alleged crime. If the approval is not given within 60 days after it was filed, the investigation followed-up by a detention may be executed.

Such approval is excluded on the following conditions:

- c. Caught red-handed when committing a crime; or
- d. Allegedly committing a crime subject to capital punishment or crime against the national security,

In regards to the crime against national security, Elucidation of Article 53 (4) (b) of the Regional Government Law states that the crimes under this category are terrorism and separatism. For this exception, the investigation must be reported to the related official in 48 hours.

e. Detention against the member of the Audit Board of the Republic of Indonesia (BPK)

If the suspect is the member of BPK, Article 25 of the Law No. 15 of 2006 on BPK states that the BPK's member may conduct necessary action without any order the Attorney General or approval from the President on the following conditions:

- c. Caught red-handed when committing a crime; or
- d. Allegedly committing a crime subject to capital punishment

The necessary action must be reported to the Attorney General within 24 hours, and it will be notified to the President, the House of Representatives, and BPK itself.

f. Detention against the Chairman, Deputy Chairman, and Member of Judicial Commission

Article 10 of the Law No. 18 of 2011 on the Amendment to the Law No. 22 of 2004 on Judicial Commission states that the Chairman, Deputy Chairman, and member of Judicial Commission may be arrested or detained under the order from the Attorney General and after securing President's Approval, for the exception on the following conditions:

- (iii) Caught red-handed when committing a crime; or
- (iv) Allegedly committing a crime subject to capital punishment or crime against the national security, based on the sufficient preliminary evidence.

If the arrest and detention are executed based on the exception, such arrest and detention must be reported to the Attorney General in 48 hours.

g. Detention against the Chairman and member of Bank Indonesia Board of Governors

Article 49 of the Law NO. 23 of 1999 on Bank Indonesia *juncto* Law No. 3 of 2004 states that summon, inquiry, and investigation against the Chairman and member of Bank Indonesia Board of Governors must be approved by the President.

D. Detention period

ICCPR guarantees the right to be tried in reasonable time, otherwise the suspect must be released.³⁵⁷ It is related to the period of pretrial detention that is considered reasonable according to ICCPR and other international regional legal instruments. Under the The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, a person that is detained for an alleged crime has the right to be tried in reasonable time or he/she must be released.³⁵⁸

The United Nations Human Rights Committee stated that the right to trial without postponement must be interpreted as the right for final decision without postponement.³⁵⁹ Unreasonable postponement during trial is a violation against the international standards. Therefore, every country must be responsible to assure that all judicial process are concluded without postponement

The Council also asserted that a country cannot avoid from the responsibility of a postponement, by arguing that a suspect should demand to be tried promptly.³⁶⁰ The Council said that the 6 months time limitation for pretrial detention is too long if it is compared to Article 9 (3) ICCPR.

Regulation in other Regions

American Convention on Human Rights prohibited a pretrial detention without time limitation. The Inter-American Human Rights Commission stated that the lack of time limitation for the release of the suspect or the lack of information on the charges are violations against the suspect's rights.³⁶¹ If the period of pretrial detention exceeds the time limitation, the detention is a serious violation against the detainee's rights.³⁶²

By interpreting the right to be tried in reasonable time or must be released to wait trial, as stipulated under Article 5 (3) of the European Convention, the European Human Rights Court states that this provision cannot be interpreted as the right for the court officials to choose whether they bring he suspect for trial or release them.³⁶³

The reasonableness of detention period is evaluated separately from the reasonableness of trial postponement, pursuant to Article 6 (1) of the European Convention the detention for the same period cannot be conducted.³⁶⁴ The European Commission explained that Article 5 (3) of the European Convention aims to limit the detention period and not to improve the quick trial.³⁶⁵

In regards to guarantee to trial in reasonable time, the European Human Rights Court States that a detainee has the right to be prioritized for his case and to have a quick examination.³⁶⁶ During the case of Moreira de Azevedo, the Court decided that the applicant has no obligation to be more active for immediate trial.³⁶⁷ Even such person has no obligation to actively cooperate with court officials in regards to criminal proceeding..³⁶⁸

³⁵⁷ Article 9 (3) ICCPR.

³⁵⁸ Principle 38, Body of Principles for the Protection of All Persons Any Form of Detention or Imprisonment.

³⁵⁹ Adolfo Drescher Caldas v. Uruguay.

³⁶⁰ Earl Pratt and Ivan Morgan v. Jamaica (210/1986 and 225/1987).

³⁶¹ OAS, Report on the Situation of Human Rights in Paraguay (OEA/Ser.L/V/II. 4, doc 13) (1978), pg. 53.

³⁶² OAS, Report on the Situation of Human Rights in Panama (OA/Ser.L/V/II.44, doc 38 rev.I (1978), pg. 58.

³⁶³ Neumester Case, 27 June 1968, European Human Rights Court, series A, No. 8, pg. 37 par. 4.

³⁶⁴ Matznetter Case, 10 November 1969.

³⁶⁵ Dieter Haase v. Federal Republik of Germany (No. 7412/76).

³⁶⁶ Wemhoff Case, and Stigmulle Case, 10 November 1969.

³⁶⁷ Moreira de Azevedo Case, 23 October 1990, also Gincho case, 10 July 1984.

³⁶⁸ Eckle Case, 15 July 1982.

According to the abovementioned legal instruments, countries must set the time limitation on the maximum detention period without trial. If a person is detained without trial in longer period, he has the right to be released.

In determining the maximum detention period, countries must calculate the maximum time of liberty deprivation that may be imposed for a crime. The maximum period of pretrial detention must be in accordance with the possible conviction.

The maximum period under this Guideline will not affect the implementation of international standards that limit the detention period before an examination on the detention at the court. Such standards and this Guideline are two different issues, because those standards guarantee for promptly trial, while this Guideline tries to limit the pretrial detention period.

Some organizations and penalization expert have recommended that no one may be detained without any communication or under a non-stop supervision (*garde a vue*) for more than 24 hours.³⁶⁹

D.1. The Principle of detention period under KUHAP

KUHAP provision that limits the detention period and detention extension period is considered monumental, and this is not negotiable. In regards to this, there are some principles as the main reference, so that there will be no longer a person that do not know when his detention period is over.

The principle of detention period limitation is strict. If an institution exceeds the time limitation, such institution can be brought into pretrial or the trial, to give compensation to the suspect or defendant. In addition, KUHAP also acknowledges that the detainee must be released if the detention exceeds the time limitation.

D.2. Detention period during investigation

Pursuant to Article 24 (1) of KUHAP, investigator may detain a person for 20 days. For the purpose of unconcluded investigation, the investigator may request to the prosecutor for 40 days of extension. (Article 24 (2) of KUHAP).

With the time limitation, the detention during investigation may only be conducted for 60 days. Under the condition that it is still possible to release the suspect from the detention, if the investigation has been concluded (Article 24 (3) KUHAP):

- a. The extension from the prosecutor does not have to be 40 days, as it is the maximum limitation. It means that the prosecutor may give partial extension for the purpose of investigation.
- b. If the investigation needs more time, then it may comply to the maximum limitation under Article 24 (2) of KUHAP.
- c. After the 60 days limitation exceeded, the investigator must release the suspect without any procedure.

³⁶⁹ See Arab-Africa Seminar Recommendation on Criminal Justice and Improvement on Penalization (Tunisia, 2 Desember 1991).

The detention period during investigation depends on the necessity to conclude an investigation, which will be forwarded to the prosecutor for the purpose of trial. If the investigation is sufficient, detention is no longer needed, unless there is another reason to detain the suspect.³⁷⁰

a. Detention period for minors

Prior to the enactment of the Law No. 11 of 2012 on the Juvenile Criminal Justice System, Article 44 of the Law No. 3 of 1997 on Juvenile Court states that the detention against a minor may only be conducted for 20 days. It may be extended with prosecutor's approval for 10 days. Within the time limitation (30 days after the extension), the investigator must send the docket to the prosecutor. If the time limitation is exceeded and the docket is not sent, the suspect must be released from detention.

Meanwhile Article 33 (1) to (3) of the Law No. 11 of 2012 on the Juvenile Criminal Justice System, detention for the purpose of investigation may be conducted for 7 days at maximum. If it is necessary, the Prosecutor may approve for 8 days of extension. If the time limitation is exceeded, the minor must be released.

Pursuant to Article 50 (1) and (2) of the Juvenile Court Law, the detention may still be conducted by the investigation based on reasonable argument, for instance the suspect suffers from physical and mental condition, after medical examination. The detention period for this argument is set at 15 days, with possible extension of another 15 days. Sub-paragraph (5) of the said article states that after 30 days, the suspect must be released. While pursuant to sub-paragraph (6) of the same article, the suspect may file an objection against the extension of detention to the Chairman of the High Court.

b. Detention period for gross violation of human rights cases

In regards to the suspect of gross violation of human rights, Article 13 of the Law No. 26 of 2000 on Human Rights Court states that:

1. The detention for investigation purpose may be conducted for 90 days.
2. The detention may be extended for another 90 days after being approved by the Chairman of the Human Rights Court in the respective jurisdiction
3. If the investigation is yet to be concluded, the detention may be extended for 60 days after being approved by the Chairman of the Human Rights Court in the respective jurisdiction.

c. Detention period for crime of terrorism

In regards to terrorism cases, pursuant to Article 25 of the Law No. 15 of 2003 on the Determination of the Government Regulation in lieu of a Law No. 1 of 2002 on Eradication of Terrorism as a Law, the investigator is authorized to detain a person for investigation purposes for 6 months at maximum.

³⁷⁰ Article 20 (1) KUHAP.

D.3. Detention period during prosecution

Pursuant to Article 25 (1) of KUHAP, the prosecutor may conduct detention for 20 days and a possible 30 days of extension (maximum) after being approved by the Chairman of District Court (Article 25 (2) of KUHAP).

The extension is requested by the prosecutor due to unconcluded prosecution. The maximum detention period after the extension is 60 days:

1. It is still possible to release the defendant from the detention even though the maximum limitation is not exceeded just yet (Article 25 (3) of KUHAP).
2. The Chairman of the District Court does not have the obligation to grant every extension request. The Court may reject such request if there is sufficient argument to reject the extension. The extension may be given according to the need for prosecution. If the Chairman of the District Court partially granted the request, the prosecutor may ask for another extension until the time limitation is fulfilled as stipulated under Article 25 (2) KUHAP.
3. If the Chairman of the District Court grants the extension, it is not legal to transfer the type of detention.
4. After the time limitation is exceeded, the suspect must be released from the detention.

D.4. Exception on the detention period

In addition to detention period limitation, there are some exceptions under Article 29 of KUHAP, which states that the abovementioned institution that are authorized to detain a person may implement an extension more than “normal period” as stipulated under Articles 24, 25, 26, 27, and 28 of KUHAP.

For the purpose of examination, the detention may be extended on the following conditions:

- (i) The suspect or defendat suffers from physical and mental disorder, after medical examination (Article 29 (1) (a) if KUHAP); or
- (ii) The crime is subject to nine years of imprisonment or more, as stipulated under Article 29 (1) (b) of KUHAP.

Both conditions validate the implementation of the extension. There are no other available arguments to justify the extension.

An extension to detention may be implemented if the suspect or defendat suffers from physical and mental disorder after medical examination. Due to this condition, an extension that exceeds the maximum time limitation under KUHAP may be conducted.

Pursuant to Article 29 KUHAP, there are two types of crime that may obtain exclusion from the maximum time limitation:

1. Crimes that subject to nine years of imprisonment or more may be excluded from maximum detention period limitation. The extension is set at 60 days for the purpose of examination
2. Crimes that subject to less than nine years of imprisonment may not obtain an exclusion from maximum detention period limitation. However, if the suspect of these crimes suffers from physica and mental disorder, an exclusion may be implemented.

The exclusion of detention period limitation is stipulated under Article 29 (2) of KUHAP:

1. Maximum two times of extension. If it exceeds, the suspect or defendant must be released.

2. Each extension may not exceed 30 days. The maximum of extension according to Article 29 of KUHAP is 60 days.
3. The extension must be given gradually, 30 days of each extension. If the first 30 days is not sufficient for the purpose of examination, then another extension may be given.
4. It is still possible to release the suspect/defendant from the detention, which depends on the urgency of the examination and the detention. If the extension has expired in 60 days, then the suspect/defendant must be released.

D.5. Extension in regards to the exclusion of detention period

The extension of detention is given by the authorized official, depending on the level of examination. The extension will be given after the request and report according to Article 29 (3) of KUHAP:

1. During investigation and prosecution, the extension request is sent by the investigator and prosecutor to the Chairman of District Court.
2. During examination at the district court, the extension request is sent to the High Court and must be approved by the Chairman of the High Court..
3. During appeal process, the extension request is sent to the Supreme Court. However, it is unclear whether such request must be approved by the Chief Justice.
4. During cassation, the extension request must be approved by the Chief Justice of the Supreme Court.

E. Mechanism on the objection against detention

An objection may be filed against an extension of detention according to Article 29 (7) of KUHAP:

1. If the extension is granted during investigation or prosecution, the authorized party to examine the legality of extension is the Chairman of the High Court.
2. If the extension is granted during trial at the district court or high court, the complaint will be examined by the Chief Justice of the Supreme Court

The implementation of the objection against an extension must refer to Article 29 (7) of KUHAP which states that:

1. Even though the docket has not been sent to the district court, the objection against the legality of the detention during investigation or prosecution, may be filed to the Chairman of the High Court to be examined and decided.
2. Against an extension during cassation, may be challenged
3. The person that may file the objection is the suspect or defendant. It does not stipulate their family or lawyer.

F. Transfer of detention

The limitation on the detention authority on each institution, will affect on the transfer of responsibility on the detention.

Such transfer aims to:

- (i) Calculate the definitive detention period;
- (ii) Determine when the detainee has been under illegal detention; and
- (iii) Ease the related parties to know the whereabouts of the detainee

The vagueness of detention transfer will violate the legal certainty under KUHAP

If the case of a person that the detention has been postponed is transferred from one institution to another, there is a transfer of responsibility according to Point 8 (g) and (h) Appendix of the Minister of Justice Decree No. M. 14-PW. 07.03/1983.

F.1. The mechanism of transferring detention postponement from investigator to prosecutor

If the docket has been sent to the prosecutor and the prosecutor viewed that it is complete, while the suspect's detention is postponed with bail, the investigator must consult with the prosecutor to consider the detention postponement during prosecution.

If the prosecutor agrees with the investigator's advise to end the postponement, the investigator will issue a warrant to stop the postponement and followed-up up by a detention warrant issued by the prosecutor

However, if the prosecutor grants the postponement, it may be continued during prosecution phase. If this happens, there must be a renewal on the postponement agreement.

F.2. The mechanism of transferring detention postponement from prosecutor to the Chairman of District Court

The mechanism of transferring detention postponement from prosecutor to the Chairman of District Court is stipulated under Point 8 (h) Appendix of the Minister of Justice Decree No. M.14-PW.07.03/1983:

1. If the prosecutor feels that the postponement is no longer needed during court examination at the district court, the prosecutor must issue a warrant that terminate the postponement before the docket is sent to the district court.
2. If the prosecutor views that the detention postponement may be continued during court examination, the prosecutor will file a request to the Chairman of the District Court.
3. Chairman of the District Court may approve or reject the prosecutor's request.
4. Rejection or approval must be written by the Chairman of the District Court.
5. If the Chairman of the District Court rejected the request, the detention postponement is no longer valid.

CHAPTER IV

Non-Custodial Alternative Measure

A. General

Article 9 of ICCPR states that it is not a common practice that a person waiting for trial must be detained, however a release may be given if there is a guarantee to attend the trial at every phase, if it is said so.

Consequently, the said provision is implemented by the United Nations Standard Minimum Rules for Non-Custodial Measures known as the Tokyo Rules, which aims to improve the condition of all pretrial detainees by recommending that the detention is only executed when non-custodial measures such as bail cannot be conducted.

It is a general knowledge that the overcapacity in detention facilities is due to the high number of pretrial detention that are excessive, as a result of the inefficiency of the ongoing investigation. Therefore it is highly recommended that most of the detainees must be released.

Tokyo Rules stipulated the foundation on the policy to use non-custodial measures as an alternative to detention, so countries are encouraged to develop non-custodial measures in their legal system to give many options in order to reduce the imprisonment mechanism

Tokyo Rules also asserted the importance to avoid pretrial detention, because it is a last resort in the criminal justice system. Non-custodial alternative measures must be considered during the early phase of a criminal proceeding.

B. The necessity to release detainees

In particular, the objective of the release of pretrial detainees is to provide procedures for them that are accused of committing a crime, to keep the integrity of judicial process, to protect the victims, witnesses, and the public from the threat, risk, or disturbance.

Judges and official court will decide to release the defendant from the detention, based on personal statement without any bail, or release the defendant based on bail, or to continue the detention according to the procedures.

The release of detainees may be based on several considerations such as costs, the realization that pretrial detention is a repressive action that will hamper defendant's livelihood and psychological condition. Further, these conditions may also affect defendant's capability to defend himself/herself.

The release of detainees may also be conducted based on several requirements such as diversion and other alternatives. In releasing pretrial detainees, the court must determine the requirements to assure that:

- (i) The defendant will attend the trials; and
- (ii) Protection for the victims, witnesses, and other parties.

These conditions may cover the participation during rehabilitation, diversion, or other pre-adjudication alternatives.

The Court must have many programs or options to promote the release of pretrial detainees, by considering the abovementioned consideration, and in accordance with the risk and special need from the defendant. If there is no guarantee, the defendant may be still detained after several procedures.

For petty crimes that do not need detention, the defendant will attend the trial by using a summon from the court official (mandatory reporting) as a replacement to the arrest warrant during pretrial.

In determining that a criminal act as a petty crime or not, many factors must be considered such as the presence of violent threat, guns, or violation against court order.

In detail, the requirements to release detainee are as follows:

1. Every jurisdiction must adopt the procedure that is designed to promote the release of a detainee based on their own confession or if necessary with bail. Additional requirements must be used to release a detainee if this is necessary to make the detainee's presence during trials; to protect the public, victims, witnesses, or other people; and to maintain the integrity of judicial process
2. When the release only based on the defendant's confession is not sufficient to assure his/her presence during trials, bail by using money may be imposed.
3. Release based on bail may only be used to guarantee defendant's attendance during trials. Before using bail, the the court must consider the release without bail. if the bail is not enough for a release, the bail must be set a lower level to assure defendant's attendance and to help the defendant's financial condition.
4. Bail using money should not be used to consider the crimes that relate to public safety.
5. The court may net the bail using money as the main requirements for release
6. It is prohibited towards compensation on bail, the defendant must be released when bail is set, and the court may not take 10% of the bail

The policy that support the release of detainee and the selective use of pretrial detention will bring a big impact on the necessity to see the significant number of defendant that being postponed from the adjudication process. Therefore, to be more effective, this policy needs proper information and oversight.

C. Non-custodial measures

Chapter II of this Guideline has mentioned the importance of authorized officials to consider some principles and rules, when executing detention, especially for minors and narcotics users. Non-custodial measures must be prioritized for minors, as stipulated under the Juvenile Criminal Justice System Law and international human rights law, because detention will affect the physical and mental development of the children.

Meanwhile, non-custodial alternative measures for narcotics users may be conducted by putting them into medical and social rehabilitation institution, as stipulated under the Supreme Court Circular Letter. In addition, pursuant to the Supreme Court Regulation No. 2 of 2012, pretrial detention is no longer needed for petty crimes

KUHAP stipulates the non-custodial alternative measures in State Detention House, as stipulated under Article 22 (1) of KUHAP. Types of detention, pursuant to the said article are detention at State House Detention; house arrest; and city arrest. Therefore it can be interpreted that house or city arrest are the forms of non-custodial alternative measures.

a. House arrest

House arrest is implemented in the suspect/defendant's house or domicile and there will be a supervision towards it. KUHAP does not determine on how to conduct the supervision for house arrest. Therefore, the rules on the supervision of house arrest depend on official that executes the detention.

The main objective of supervision on house arrest is to prevent the difficulties in investigation, prosecution, and court examination. A suspect or defendant that is currently under house arrest may leave his/her house after being approved by the authorized official. This is in accordance with the Elucidation of Article 22 (2) and (3) of KUHAP.

b. City arrest

City arrest may be implemented in the city where suspect/defendant is domiciled. The term "city arrest" also covers the detention in villages. There will be no supervision on the suspect or defendant that is currently under city arrest. However, KUHAP obliges the mandatory reporting for the suspect/defendant, as stipulated under Article 22 (3) of KUHAP.

The schedule for mandatory reporting is not stipulated under KUHAP and will be at the discretion of the official that execute the city arrest. The suspect or defendant that is currently under city arrest may not leave the city without permission from the authorized official, as stipulated under Article 22 (2) and (3) of KUHAP.

c. Change of detention type and its mechanism

Investigator may change the detention from the State Detention House into a house or city arrest, for the purpose of investigation and suspect's interest.

The change of detention may be given by considering:³⁷¹

- (i) Request from the suspect, suspect's family, or suspect's lawyers by including the reason for transfer;
- (ii) Medical examination result of suspect's health; and
- (iii) Recommendation from expose.

Change of detention must be accompanied by an order letter from the investigator or its superior.

Detention at the State Detention House is the heaviest type of detention, followed by house arrest, and city arrest. Therefore, Article 23 of KUHAP opens the possibility on the change of detention type.

In detail, Article 23 of KUHAP states that the change of detention type may be conducted on the following conditions:

- (i) By the investigator and prosecutor, with the issuance of specific warrant that aims the change the type of detention;
- (ii) If the change of detention is conducted by the judge, the order of the change must be written in a determination letter;
- (iii) Copy of order letter of the change of detention type, or the determination of the change must be sent to the suspect or defendant and to the related institutions.

³⁷¹ Article 49, Chief of National Police Regulation No. 14 of 2012.

Related institutions are those that are involved in the detention process, such as the head of the village that lead the area where the house arrest is located. The head of the village will be considered as the related institution. Therefore, copy order letter of the change of detention type must be sent to the head of the village.

Further, KUHAP only states the authority of an official that may change the type of detention, because KUHAP does not stipulate the right of a detainee to request such change of detention type. However, this does not mean that the detainee cannot file for such request. In practice, detainee's family may file such request to the official that executed the detention. Based on several consideration, the request may be granted. In contrast, the authorized official may change the type of detention without any request.

D. Detention postponement

Detention postponement is regulated under Article 31 KUHAP, which states that it is a release of a suspect or defendant from the detention before the detention period is over. The status of detention is still exist and not yet expired. Under the detention postponement, a suspect or defendant is being released from the detention when the official detention is currently implemented.

Article 31 of KUHAP has not yet regulate the procedures for detention postponement, neither the requirements and guarantee that must be imposed to the detainee that undergo detention postponement. The said article does not give any clue about bail, and merely stating the requirements for detention postponement, namely mandatory reporting, house arrest, or city arrest. Second paragraph of the Elucidation of Article 31 only mentioned the status of the detainee that is being released from the detention.

Further provisions on detention postponement are stipulated under Chapter X, Articles 35 and 36 of the Government Regulation No. 27 of 1983 that regulate bail on detention postponement; and Chapter IV, Article 25 of the Minister of Justice Regulation No. M.04.UM.01.06/1983 that regulate the implementation of detention postponement.

Pursuant to Article 31 (1) of KUHAP, detention postponement may be conducted:

- (i) Upon suspect/defendant's request;
- (ii) If The said request is approved by the officials that are authorized to execute detention and legally responsible for the detention with certain requirements and bail; and
- (iii) If there is an approval from the detainee to fulfill the mandatory requirements and pay the bail.

In terms of detention postponement, the detainee must promise to fulfill the requirements and the bail that have been determined by the related institution. Meanwhile, the institution that execute the detention must release the detainee from the detention by postponing the detention. Detention postponement may be approved if it fulfills the requirements under Article 31 (1) of KUHAP *juncto* Articles 35 and 36 Government Regulation No. 27 of 1983.

Meanwhile, the party that may file the request for detention postponement, pursuant to Article 31 (1) of KUHAP is the suspect/defendant. On the other hand, the right to grant detention postponement is at the discretion of the institution that is authorized to execute detention. The right is given to the detainee when he/she is sill under the custody of the said institution. This auhority is no longer valid when the detainee is transferred to another institution.

The reason for detention postponement is not stipulated under Article 31 of KUHAP nor in its Elucidation. In practice, however, the most common arguments for detention postponement can be found under Article 21 (1) and (4) (a) of KUHAP.

The requirements that are the legal basis for detention postponement can be found under the last sentence of Article 31 (1) of KUHAP, which states that “according to the determined requirements”. Therefore, the requirements from the institution that may grant the detention postponement is the legal basis for postponement. Without the determined requirements and the lack of willingness from the detainee to comply with the said requirements, postponement will not be granted.

Therefore, the determined requirements and the willingness to comply with the said requirements are the basic principles for detention postponement. The requirements that may be determined by the authorized institution are mandatory reporting, city arrest, and house arrest. The institution that executes the detention may choose one or two of these requirements. The most common is mandatory reporting, added by another requirement.

At the level of investigation by the police, detention postponement must be accompanied by a detention postponement order letter, issued by the investigator or investigator’s superior. If necessary, the detention postponement may be preceded by an expose. Another obligation is that the detention postponement must be reported to the superior of the official that issue the detention postponement order letter.³⁷²

The suspect that has been granted a detention postponement, may be detained again by the issuance of detention postponement termination letter, issued by the investigator or investigator’s superior. Such letter is issued because the suspect has violated the detention postponement requirements. Detention postponement termination letter must be followed by a detention continuance warrant, issued by the investigator or investigator’s superior.³⁷³

At the prosecutor office, pursuant to Attorney General Circular Letter No. B-98/E/Ejp/05/2002, 15 May 2002, the change of detention type and detention postponement must consider the fulfillment of legal aspects, by conducting the following things:³⁷⁴

1. On every case, especially important and sensitive cases, the case management must be coordinated with the investigator and intelligence, and must consider the possibilities that may occur if the suspect is detained or not.
2. If the decision to detain or not to detain the suspect has been considered, the implementation of it must be consistent and it is hoped that the decision is not altered, even though after the public pressure, because the change of detention type will ruin the prosecutor’s reputation.
3. If a request for detention postponement is filed, it should refer to Deputy Attorney General For General Crime Letter No. B-675/E/Epoll2/1994, 1 December 1994 on the Detention Postponement and City/House Arrest and Mandatory Reporting.

³⁷² Article 47, Chief of National Police Regulation No. 14 of 2012 on Investigation Level Management

³⁷³ Article 48, Chief of National Police Regulation No. 14 of 2012 on Investigation Level Management

³⁷⁴ The Circular was issued as a response from many reports that there are detention postponement and change of detention type for several detainees, due to the pressure from detainee’s supporter that objected the detention. The pressure are committed by physical and psychological threats, and even physical assault against the prosecutor or prosecutor office’s property.

Pursuant to Deputy Attorney General For General Crime Letter No. B-675/E/ Epoll2/1994, 1 December 1994, in order to prevent the impact related to detention postponement request and mandatory reporting, prosecutors are encouraged:

1. To process detention postponement request for detainee in detention. It is not allowed to issue a detention postponement letter if the suspect is not under detention;
2. The change of suspect's status transferred by the investigator to the prosecutor may only be conducted with strong argument. Therefore, the manipulation of detention may be prevented
3. Mandatory reporting may only be imposed for a suspect that is under a house arrest, city arrest, and postponement of detention;

D.1. Bail on detention postponement

Article 31 (1) of KUHAP stipulated that the bail on detention postponement may be given in form of cash money or personal guarantee. KUHAP, however, has not stipulate in detail on the implementation of such bail. Bail in form of cash money or personal guarantee may be implemented collectively or separately.

Without bail, the detention postponement is still valid, because the element of bail may be disregarded. However, to make the detention postponement requirements are complied, the detention postponement is executed at the same time with bail. Bail is imposed to prevent the suspect/defendant from escaping the ongoing judicial process.³⁷⁵

a. Cash money

Pursuant to KUHAP, detention postponement with or without bail is implemented by making an agreement between the suspect/defendant or suspect/defendant's lawyer and the institution that execute the detention. If the bail is in form of cash, the related official will determine the amount of the bail. The amount of the bail must be clearly stated in the agreement.

In regards to this, there are several rules that must be considered:

1. The cash money is stored in the District Court registrar. Regardless the institution that grants detention postponement, whether it is the investigator, prosecutor, High Court, or the Supreme Court, the bail deposited in Court registrar.
2. The Bail is deposited by the applicant or the legal counsel or the family, based on the deposit form issued by the authorized official. If the investigator that grants the detention postponement, the institution will issue the deposit form, to be submitted to the registrar of the district court.
3. The proof of deposit must be made in three copies, as stipulated under Point 8 (a) Appendix of Minister of Justice Decree No. M.14-PW.07.03/1983. The first copy for the archive at the district court's registrar, the second copy is for the party that deposits the bail, and the third copy to the institution that grants the detention postponement.
4. Based on the proof of deposit, the authorized official will issue a detention postponement letter.

There are two ways to confirm the deposit:

- (i) The deposit proof is shown by the applicant or the lawyer or the family; or
- (ii) Based on the deposit proof that is sent to the registrar.

³⁷⁵ Bail for detention postponement is stipulated under Chapter X, Articles 35 and 36 Government Regulation No. 27 of 1983; and Chapter IV, Article 25 of the Minister of Justice Regulation No.M.04.UM.01.06/1983,.

If the defendant escaped and cannot be traced after three months, the bail will be determined as the state's assets. The person that guarantee the defendant must pay the bail as set under the agreement, otherwise the court will foreclose the asset of that person for further auction or bid. The person that give personal guarantee cannot be brought before the court, if the defendant is escaped.

In relation to the duty of the court, the standard of court service is set under the Chief Justice of the Supreme Court Decree No. 026/KMA/SK/II/2012:

1. defendant /suspect/ lawyer may apply for a detention postponement to the judges, orally or in writing. The request letter should state the reason for the detention postponement.
2. defendant/lawyer/family/guardian can provide guarantee for detention postponement in form of cash money or personal guarantee
3. defendant /suspect/lawyer should mention the amount of cash in the Determination of Detention Postponement. The court is obliged to deposit the cash to the registrar and the deposit proof is sent to the defendant / suspect or their family.
4. defendant/suspect/lawyer must make a statement to the judge that he was willing to take responsibility if the defendant is escaped. Under the Determination of Detention Postponement, the identity of the personal guarantor and the amount of the cash must be clearly stated.
5. defendant/suspect/lawyer may only withdraw the cash if there is a legally binding decision

a.1. Cash will be state's asset

The cash for bail is still at the ownership of the applicant. It must be returned to the applicant after the detention postponement agreement is ended and every requirements are fulfilled. If the applicant violates the requirements, the cash will be turned into state's asset, pursuant to Article 35 (2) of the Government Regulation No. 27 of 1983 and Point 8 (i) of Appendix of the Minister of Justice Decree No. M.14-PW.07.03/1983. Pursuant to Article 35 of the Government Regulation No. 27 of 1983, if the suspect escape for three months, the bail will be state's assets after the three months period is expired.

Point 8 (i) of Appendix of the Minister of Justice Decree No. M.14-PW.07.03/1983 stipulates the procedures in transferring the bail into state's assets by the enactment of district court's determination. If the suspect escape and after three months cannot be located, the District Court will issue a determination on:

- (i) the cash will be state's asset;
- (ii) ordering the registrar to deposit the cash to state's account.

a.2. Refunds of Bail

In practice, the cash for refund must be returned if the detention postponement is ended. The suspect/defendant in question or his family or his lawyer may file a refund request to the district court's registrar. If the court has rendered a legally binding decision, the detention postponement will be ended. Regardless what is the decision, it will end the detention postponement.

b. Personal guarantee

Personal guarantee is stipulated under Article 36 of the Government Regulation No. 27 of 1983 and Point 8 (c), (f), and (j) under the Appendix of the Minister of Justice Decree No. M.14-PW.07.03/1983, which share the similar procedures like cash.

Personal guarantee is when a person voluntarily acts as a guarantor for the suspect/defendant. He may be the lawyer, the family, or other person that has no relationship with the suspect/defendant. The Guarantor will make a statement and assurance that he will be responsible if the suspect/defendant escape the judicial process.

The procedures for personal guarantee are as follows;

1. Stating the identity of the guarantor in the detention postponement agreement.
2. The institution sets the money that must be borne by the guarantor
3. The detention postponement agreement must also stipulate the sum of money that must be pay by the guarantor if the suspect/defendant escapes.

For personal guarantee, the bail is not directly stored. It will be conducted if the suspect or defendant escapes and after three months cannot be located. The bail will be deposited to the state's account by the registrar.

Pursuant to Article 36 (3) of the Government Regulation No. 27 of 1983 and Point 8 (j) under the Appendix of the Minister of Justice Decree No. M.14-PW.07.03/1983, the deposit of such money does not need court order, under the condition that the guarantor will deposit such money to the registrar. Otherwise, the Court will issue an order for the deposit of the bail, stating a confiscation.

The implementation of seizure in execution or *executorial beslag* is conducted by the bailiff in accordance with the civil procedural law. Therefore, the process of deposit and auction will be conducted in accordance with Article 197 of HIR or Article 208 of RBG .

Seizure in execution against the property of individual that gives personal guarantee, pursuant to Article 35 (3) of the Government Regulation No. 27 of 1983, is comparable to *executorial beslag* against debtor's property, based on the court decision with binding force to fulfill the debt payment to the creditor.

The Chairman of the District Court may order the seizure in execution against the individual that gives personal guarantee, under the condition that the seizure must be conducted firstly against movable property, as in accordance with Article 1131 of the Civil Code *juncto* Article 197 (1) of HIR.

If the moveable property does not fulfill the mandatory bail payment under the detention postponement agreement, the seizure will be continued on the immovable property until it is considered sufficient to pay the bail. The auction on the result of seizure in execution is conducted according to Article 220 of HIR or Article 215 of RBG.

After the bailiff is done with seizure in execution against the property of individual that gives personal guarantee, it will be followed up by an auction as stipulated under the Civil Case Procedural Law. The result of such auction will be stored at the state's account via the registrar, under the amount of bail that has been set under the detention postponement agreement.

If the auction does not give a satisfactory result, the Chairman of the District Court may issue a determination letter for the bailiff to execute a follow-up seizure in execution against the property of an individual that gives personal guarantee, until the bail is fully paid.

D.2. Release of a detainee due to detention postponement

The procedures in releasing a detainee due to detention postponement is stipulated under Article 25 of the Minister of Justice Regulation No. M.04.UM.01.06/1983:

1. The release must be based on the order letter or determination from the institution that execute the detention;
2. In releasing the detainee, the State Detention House official must:
3. Examine the order letter or detention from the respective institution
4. Make a minute of detainee release from the State Detention House, and send a copy to the respective institution
5. Take notes on the detention postponement documents and take fingerprints from the detainee and put it at the available logbook
6. Examine the medical state of the detainee to the State Detention House's doctor, and send the result to the respective institution
7. Handover the detainee's belongings and make a note of it under the logbook.

Note that, pursuant to Article 31 (2) of KUHP, the investigator, prosecutor, and judge is authorized at any time to revoke the detention postponement if the suspect or defendant 'violated' specified requirements.

E. Treatment during detention

If during detention at the investigation, prosecution, or trial phase the suspect or accused is ill and needs hospital treatment, there may be a treatment for him (*pembantaran*) and the detention is suspended. It also applies to the condition when the suspect is suffering from mental illness, the detention will be postponed. Detainee that needs medical attention at the hospital may be given treatment (*pembantaran*), which must be accompanied by a treatment warrant issued by the investigator or investigator's superior.

The treatment warrant is issued by considering:

- (i) The result of medical examination stating the urgency for medical attention; or
- (ii) Request from the suspect/family/lawyer for medical treatment, by attaching health record.

The treatment warrant must be signed by the investigator or his superior.³⁷⁶

If the health condition is going better, the treatment must be ended and continued by a detention, by issuing a treatment termination letter from the investigator or his superior. The consideration that is used is the result of medical examination, stating that the health condition is going well, and may be continued for full detention.³⁷⁷

Warrant for the said detention must be signed by the investigator or his superior, by considering:

- (i) The suspect is in a good condition and detention is still needed; and
- (ii) The suspect escaped during treatment and caught.³⁷⁸

³⁷⁶ Article 50, Chief of National Police Regulation no. 14 of 2012.

³⁷⁷ Article 51, Chief of National Police Regulation no. 14 of 2012.

³⁷⁸ Article 52, Chief of National Police Regulation no. 14 of 2012.

CHAPTER V

Pretrial on the Legality of a Detention

A. General

A person who is deprived from the civil liberty, is entitled to examine the legality of their detention before the case went to the court. There must be a procedure to periodically examine the detention. This is different compared to the right for prompt trial, because this right is initiated by the detainee, not by the institution that detain the person. It also covers the protection for the right to freedom and gives protection against arbitray detention and other human rights violations.³⁷⁹

In the countries where the government may detain a person in an unofficial detention facility, such right is the mechanism to determine the existence and physical condition of the detainee, and the party that is responsible for their detention.³⁸⁰

If the detention is started, the authorized official must detain the detainee without any postponement. The court will then examine the legality of the detention must decide it promptly. The court also must order the release of the detainee if the detention is not legal.

The decision for this examination must be implemented promptly, including the initial decision on whether the detention is legal and on the appeal process against the decision provided by the national law.³⁸¹

ICCPR states that Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.³⁸²

Meanwhile, under the Body Principles for the Protection of All Persons under Any Form of Detention or Imprisonment:

- (i) A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful;³⁸³
- (ii) The proceedings referred above shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.³⁸⁴

In many legal system, the right to challenge the legality of a detention and the right to remedy, is called as amparo or by filing a written request on habeas corpus. The United Nations Human Rights Committee and the Sub-Committee on Prevention of Discrimination and Protection of Minorities ask all countries:³⁸⁵

³⁷⁹ Article 9 (4) ICCPR, Principle 32 the Body Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Article XXV American Declaration, Article 7 (6) of American Convention, Article 5 (4) of European Convention; and Article 7 (1) (a) of African Charter.

³⁸⁰ Article 9 (1) of Declaration on the Protection of All Persons from Enforced Disappearance.

³⁸¹ Navarra v. Perancis, (38/1992/383/461), 23 November 1993.

³⁸² Article 9 (4) ICCPR.

³⁸³ Principle 32 (1) , Body Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

³⁸⁴ Principles 32 and 39, Body Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 32 applies to persons deprived from their liberty; Principle 39 applies to persons detained due to crime).

³⁸⁵ Commission Resolution 1992/35 and Sub-Commission Resolution Komisi 1991/15.

calls upon on all States that have not yet done so to establish a procedure such as habeas corpus by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful.

ICCPR further states that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.³⁸⁶ This formula is also asserted under the Body Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which states that Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules on liability provided by domestic law.³⁸⁷

The right to reparation applies to persons that undergo arrest or detention that violate the domestic law or international standard and procedures, or both. The procedures for the implementation of this right is not set. It commonly conducted by individuals by filing lawsuit against an institution, state, or the person that is responsible for the wrong detention.³⁸⁸

Meanwhile, the European Human Rights Court in its decision stating that the examination against the legality of a detention must assure that the detention complies with the procedures under the domestic law, and the argument for the detention is correct under the domestic law.

Detention must substantially and procedurally fulfill the national laws and regulations. Meanwhile, the court must assure that the detention is not arbitrary and in accordance with the international law standards.³⁸⁹

American Convention also gives similar explanation that the right to examine the legality of a detention is crucial for the protection of other rights. This Convention does not allow the suspension to execute such right, even though under emergency situation.³⁹⁰

This is similar to the statement of the United Nations Human Rights Committee and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities that called all states to to maintain the right to such a procedure at all times and under all circumstances, including during states of emergency.³⁹¹

From the abovementioned international instruments, and regional practice, the general standards for the judicial process to examine the pretrial detention may be elaborated as follows:

1. After the preliminary examination hearing that show the indictment, and the law enforcers provide the clear and assuring evidences that show the difficulty in releasing the detainee, the court must order to execute the pretrial detention.
2. In rendering the decision, the court must consider the following factors:

³⁸⁶ Article 9 (5), ICCPR.

³⁸⁷ Principle 35 (1), Body Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

³⁸⁸ The form of reparation including but not limited to: restitution, compensation, rehabilitation. Basic Principles and Guideline on the Right to Reparation for the Victims of the Violation of Human Rights and International Humanitarian Law. PBB doc: E/CN.4/1997/104, by the United Nations Human Rights Commission, also adopted by the United Nations General Assembly, based on the study made by Theo Van Boven, former Special Rapporteur of the Sub-Commission on on the Prevention of Discrimination and Protection of Minorities PBB doc: E/CN.4/Sub.2/1993/8. See also Inter-American Court, Vasquez Rodriguez, 28 Juli 1988, alinea 166-174.

³⁸⁹ Navarra v. Perancis, (38/1992/383/461), 23 November 1993.

³⁹⁰ See: "Habeas Corpus During Emergency Situation", Advisory Opinion OC-8/87, 30 Januari 1987, Annual Report Inter-American Court, 1987, OAS/Ser.L/V/III.17 doc.13, 1987; and "Judicial Guarante in Emergency States", Advisory Opinion OC-9/87 6 October 1987, Annual Report of the Inter-American Court, OAS/Ser.L/V/III.19 doc.13, 1988.

³⁹¹ Commission Resolution 1992/35 and Sub-Commission Resolution Komisi 1991/15.

- a. The crime and the punishment
 - b. The risk that threatens the public if the defendant is not detained;
 - c. The quality of the evidence;
 - d. The character of the defendant, physical and mental condition, family relationship, occupation, financial condition, the duration of domicile, including the possibility that the defendant will leave the jurisdiction, the relationship with society, track record on drug and alcohol abuse, criminal record, and attendance record during trial;
 - e. Whether the defendant is on probation, parole, waiting for trial, punishment, appeal, or finishing a sentence, when he was committing a crime;
 - f. The presence of third parties that agree to help the defendant in attending the trial and other relevant information regarding the oversight;
 - g. Every facts that justify the concern that the defendant will cause serous risk, and dangerous for public or personal threat;
3. For financial crimes or crimes subject to life sentence without parole, there must be an assumption that the defendant is detained because there is no possible situation to assure the public order or to assure the defendant's attendance during trial. If the defendant provide information to deny such accusation, the reason for detention must be accompanied by clear and assuring evidences.

If the detention is an exception to a policy that support a release, there must be a rule on the criterias and procedures in executing pretrial detention. Based on this rule, the court may decide that the defendant will case great risk or threat against public order, the victims or witnesses, or the integrity of the judicial process.

The detention status of defendant must be supervised and the feasibility for release must be examined during adjudication process. A defendant that is detained must be prioritized to be tried before the court.

The court must also consider the impact of detention. The court must be very careful to decide the necessity in detaining the defendant, considering the possible impacts. During this process, the judicial independency is being tested. The decision to approce a detention or to release a detainee may not be influenced by any parties, including public opinion.

B. Pretrial against detention

KUHAP stipulates that a pretrial against detention may be conducted after the detention by the investigator or prosecutor (*post factum*), because in executing detention, investigator and prosecutor is given the authority without any court approval in the first place.

The rule on pretrial is stipulated under Article 82 of KUHAP. Unfortunately, the said article is quite short, hence does not give any clarity on the procedural law that may be used, particularly on burden of proof. In practice, the procedura law that is being used during pretrial hearing is procedural law for private cases.

Because pretrial uses the procedural law for private cases, party that files pretrial acts as an applicant, while the official is called as respondent. The term "respondent" is now acknowledged under KUHAP, because Article 82 (1) (b) states that the official gives a statement to the judge.

Examination during pretrial against detention covers all elements that are required in executing detention. The details are as follows:

| No. | Detention Requirements | Indicators |
|-----|------------------------|---|
| 1. | Legal element | Crime subject to five years imprisonment or more |
| 2. | Condition | <p>(1) Suspect or defendant will escape:</p> <ul style="list-style-type: none"> a. Suspect's character (including physical and mental condition) b. Suspect's moral condition, c. Current occupation, d. Properties owned, e. Stable family, f. Duration of living in his neighborhood g. The bond with the neighborhood, h. Past history, including the absence of criminal record, or i. Criminal record, or j. Suspect's track record in attending trials k. The lack of permanent domicile may not be used as the reason for pretrial detention l. The condition that the suspect may commit suicide may not be used as an argument that the suspect will escape m. The lack of individuals that will guarantee the suspect to attend trials and relevant informations on the failure of supervision against the suspect in the public <p>(2) Damaging or making evidences disappear:</p> <ul style="list-style-type: none"> a. Disappearing actual evidences or potential evidences b. There is a risk that case witnesses will not give honest statement during preliminary examination <p>(3) The suspect will repeat the crime:</p> <ul style="list-style-type: none"> a. This reason must be elaborated and must be understood by considering the relevant factors b. Considering the case and suspect's track record and personality c. Suspect's track record and character d. Including the lack of criminal record or suspect's history in fulfilling the mandatory requirements in the previous judicial process e. The crime is committed when the suspect is during probation, parole, detention postponement or change of detention type, appeal, or cassation. <p>(4) Threats or special risk:</p> <ul style="list-style-type: none"> a. Threat or risk if the suspect will hamper the judicial process must be elaborated clearly with relevant factors. b. Such threat must be supported with real evidences. c. Hampering the judicial process d. Threatening the witnesses, e. Threatening the judges. |

| | | |
|----|----------------------------------|--|
| | | <p>(5) Threat against public order:</p> <ol style="list-style-type: none"> a. The level of crime b. Public's reaction against the suspect may be used as the argument to execute pretrial detention c. Showing the evidences that indicate if the suspect is released from pretrial detention, it will endanger the safety of the suspect d. Suspect on narcotics abuse case as a user may not be used as condition that it will threaten the public order. e. Condition in which the suspect is accused of committing sexual crime or child molestation |
| 3. | Elements on detention procedures | <p>(1) Detention warrant</p> <ol style="list-style-type: none"> a. Suspect/defendant's identity, name, age, occupation, sex, and domicile b. Reason for detention, such as for the purpose of investigation or court examination c. Necessity and real condition d. Without detention, the investigation will be hampered e. Quick elaboration on the crime that is charged f. Stating the detention place <p>(2) Copy of detention warrant must be sent to the suspect's family or lawyer</p> <p>(3) Comply with the Detention Procedures with Special Treatment.</p> |
| 4. | Detention period | <p>(1) Must not exceed 20 days limitation and 40 days of extension during investigation</p> <p>(2) Must not exceed 20 days limitation and 40 days of extension during prosecution</p> <p>(3) Must not exceed 7 days limitation and 8 days of extension for minors.</p> <p>(4) Must not exceed 90 days limitation for cases in human rights court</p> <p>(5) Must not exceed six months limitation for terrorism cases</p> |

C. Procedures in applying for pretrial against detention

The procedures in applying for pretrial against detention are stipulated under Articles 77 to 83 of KUHP. In addition, Government Regulation No. 27 of 1983 is also the reference for the implementation, as can be found under Articles 7 to 15. In practice, the pretrial procedures are similar to private lawsuit—in form of lawsuit.³⁹²

There are two parties in pretrial case, namely the party that submit pretrial petition or known as “applicant”, and on the other side is “respondent”. The respondent in pretrial cases is always the Government, represented by the police, prosecutor, or other institutions that may execute detention.

³⁹² See BPHN's study, *Hukum tentang Perbandingan Antara Penyelesaian Putusan Praperadilan dengan Kehadiran Hakim Komisaris dalam Peradilan Pidana*, Hasil Penelitian 2007, pg. 49.

Pursuant to Article 79 of KUHAP, pretrial on the legality of arrest, detention, foreclosure, and search, the party that may submit the pretrial petition is the suspect, his family, or his lawyer. This provision also applies to compensation request due to illegal arrest or detention.

a. Pretrial petition registration

KUHAP does not stipulate the procedures in filing pretrial petition, whether it may be sent from the post office, or must be directly sent to the Chairman of the District Court or relevant registrar. In practice, however, the pretrial petition must be directed to the Chairman of respective district court that has the jurisdiction on the arrest, detention, search, or foreclosure. It is registered to the respective district court's registrar.

In essence, pretrial petition consists of:³⁹³

1. Complete identity of the applicant and respondent,
2. Elaborating the facts that the applicant has suffered from losses due to the coercive actions of the officials (respondent),
3. For instance, due to arrest or detention, etc, and elaborating the reasons.

After the registrar accepted the petition and being registered at the pretrial logbook, the Chairman of the District Court will appoint a single judge and a registrar to examine the pretrial petition. While KUHAP does not explicitly state the period in appointing such judge and registrar, the appointment must be conducted in three days after the petition is registered, as can be found under Article 82 (1) (a) of KUHAP, which states that the trial must be set in three days after the pretrial petition is accepted.

Pursuant to the mentioned articles, it can be said that pretrial proceeding is categorized as express examination. Therefore, after being registered, the registrar must put it in the logbook. Subsequently, the registrar will ask the Chairman of the District Court to appoint a judge and registrar that will examine the petition. If the Chairman of the District Court has formed a special permanent work unit that handles pretrial cases, then the pretrial will be given to the unit.

b. Requirements in filing pretrial against detention

Pursuant to Article 79 of KUHAP, pretrial petition on the legality of detention is filed by the suspect, his family, or his lawyer, to the Chairman of the District Court by elaborating the reasons.

The applicant must elaborate that the detention executed by the investigator or prosecutor contradicts the:

1. Institution that is authorized to execute detention as stipulated under Article 20 of KUHAP,
2. Reasons for detention are not in accordance with Article 21 (1) *juncto* 21 (4) of KUHAP,
3. Detention warrant was not given to the suspect, or the copy of the warrant was not given to his family, as mandated under Article 21 (2) *juncto* 21 (3) of KUHAP,
4. Detention warrant did not elaborate the identity of the suspect, reasons for detention, quick elaboration on the crimes that has been committed, and did not state the detention place, as mandated under Article 21 (2) of KUHAP.

³⁹³ Article 77 (1) KUHAP.

c. Determination of trial date and pretrial proceeding timeframe

Article 82 (1) (a) of KUHAP asserted that the Head of District Court must appoint the judge and court clerk, including the trial date, within 3 days after the petition is received. This timeframe is calculated from the date of petition receipt or petition registration..³⁹⁴

The judge will also call the parties, including the petitioner and other related officials, such as investigator or prosecutor. It is made in form of summon, therefore it cannot be done verbally, even though, in practice, some parties state that verbal summon is allowed.

According to Article 82 (1) (c) of KUHAP, the decision must be rendered in 7 days at maximum. A single judge will examine the pretrial, so that all pretrial petitions will be examined by a single judge panel, assisted by a court clerk.³⁹⁵

d. Assignment of prosecutor in pretrial proceeding

Pursuant to the Deputy Attorney General of General Crime Circular Letter No. B-249/E/5/1996, 15 Mei 1996, there are many inconsistencies when conducting pretrial in each region. This inconsistency may be seen from the assignment of prosecutor, in which some of them were assigned by Order Letter (*Surat Perintah*), and some of them were assigned by Special Power of Attorney (*Surat Kuasa Khusus*).

In regards to this, there must be a guideline for the practice:

1. Pretrial is the authority of the court that covers the authority to examine the legality of arrest, detention, termination of investigation, termination of prosecution, and examination of compensation request or rehabilitation. By considering these topics, pretrial is clearly the sub-system of integrated criminal justice system and sub-system of private cases proceeding. It is clearer by considering Article 77 (b) of KUHAP that stipulate compensation of rehabilitation for a person that the case is terminated during investigation or prosecution. In practice, the parties are not called as "plaintiff" and "defendant", but "applicant" and "respondent".
2. It is not correct that the assignment of a prosecutor that handles the pretrial is stipulated under a "Special Power of Attorney", which is commonly used during civil and state administrative cases. It is more proper if the assignment is stipulated under an "Order Letter".
3. In handling pretrial examination, it is recommended to assign the prosecutor that conduct research on the docket during preprosecution, therefore it is hoped that the comprehension on the case should be given to another prosecutor.

D. Trial procedures

D.1. Model for pretrial examination

The examination in pretrial does not merely examine the petitioner, but also the official that caused the pretrial petition. For instance, illegal arrest. The investigator that conduct such arrest will be summoned and examined, and the process is similar to civil case examination. The petitioner acts as an applicant, and the official acts as a respondent. Some parties viewed that it examines and judges the legality of coercive action that has been conducted.

³⁹⁴ Pursuant to this provision, Yahya Harahap said that the determination of trial date is calculated from the registration of the petition at the registrar, not from the appointment of a judge by the Chairman of the District Court. See M. Yahya Harahap, *Peninjauan Kembali*, (Jakarta: Sinar Grafika, 2010), pg. 13.

³⁹⁵ Article 78 (2) KUHAP.

D.2. Pretrial examination phases

Pretrial consists of following phases:

1. Examination of power of attorney or recitation of petition
2. Response from the respondent
3. Counter response from the petitioner
4. Rebuttal from the respondent
5. Examination over witnesses and documents.
6. Decision.

During pretrial examination, the judge will examine the pretrial petition. KUHAP does not specify whether pretrial petition must be in written format or may verbally submitted. In practice, however, the petition is written by the attorney-in-fact, which is similar to a lawsuit in civil case.

The format of a petition consists of:

1. Identity of petitioner and respondent,
2. Reasons and legal basis (*fundamentum patendi/posita*),
3. Motion (*petitum*) to be decided by the judge,
4. Registration of petition.

An official merely gives a statement, as consideration for the judge to render a decision. Therefore, the decision is not only based on petitioner's statement, but also from the related official. The statement from the official is a counter argument to the petitioner, which makes it similar to counter response in a civil case trial. The official may be called as quasi-defendant.

D.3. Timeframe for the proceeding on pretrial against detention

Pursuant to Article 82 (1) (c) KUHAP, pretrial examination is conducted by using express examination, and in 7 days at most the judge must render a decision. The appointed judge must set the trial date and order the registrar to summon the respondent and related officials. Further, Article 82 (1) (c) uses the word "must", so that the judges is obliged to render a decision in 7 days.

The parties must also repond to the summon of pretrial proceeding. If the applicant or respondent does not attend the trial, it should not hamper the judge to examine and decide the case. The lack of attendance is not a factor to hamper the examination process and may not affect the judge to render a decision in 7 days. It is not a problem on whether the statement from the respondent has been heard or not. Exceeding the 7 days limitation means violating Article 82 (1) (c) of KUHAP.

D.4. Pretrial examination

Pursuant to Article 82 (1) (b) of KUHAP, during pretrial examination on the legality of detention, the judge hears the statement from the applicant and related official. To this regard, law enforcers must provide clear and assuring evidences on the detention requirements.

This provision, however, it not imperative. Therefore, the judge may heard the statement from both parties. If the applicant or related officials do not attend the trial, it should not hamper the judge to examine and decide the pretrial petition.

In practice, there is a rule that the lack of attendance during trial may be used as a consideration that it is a voluntary action from the party to waive its right in defending its interest. In short, the judge is encouraged to hear the statement from applicant and related officials. However, the lack of attendance may not be used as the argument to violate the law.

E. Pretrial decision

Because pretrial is conducted on express examination, pretrial decision must also be in accordance with express examination decision. Therefore, the pretrial decision is brief enough, without reducing the legal consideration. The simplicity of the decision may not reduce the basis of comprehensive consideration. Note that the format for pretrial decision is not regulated under KUHAP.

If the decision is based on Article 82 (1) (c) of KUHAP, the pretrial is conducted in accordance with express examination procedure, with the consistency with the format of such procedure, where the decision is merged with the trial examination minutes. Under the express examination procedure, it is enough to merge the decision with the trial examination minutes..

If the decision is based on Article 82 (3) (a) and Article 96 (1), the decision will be made in form of determination (*penetapan*), which is commonly known under civil case decisions. The determination, which is voluntary in nature, is made with *ex parte*, where the decision is a part of the minutes. The pretrial decision is indeed similar to civil case decision. It is also fair to say that pretrial decision is a declaration in nature. Therefore, the decision is not specifically on separate document, but instead is a part of minutes, as stipulated under Article 203 (3) (d).

The substance of pretrial decision is stipulated under Article 82 (2) and (3), as in addition to put the legal consideration, it must also put the order/verdict (*amar*). The verdict must be written in the determination, in accordance with the reasons of pretrial request. The verdict must state the legality of an arrest or detention, if the pretrial examines such issue.

In regards to pretrial decision, MK says in the Decision No. 65/PUU-IX/2011 regarding the judicial review against KUHAP, starting 1 May 2012, all pretrial decisions may not be appealed to the High Court. Considering that pretrial examination is using express examination, therefore the pretrial decision is excluded from appeal.

F. Nullification of a pretrial

A pretrial may be nulled before a decision being rendered, which is stipulated under Article 82 (1) (d): in the event that the examination of a case has been commenced at a district court, while the examination of the request for pretrial hearing has not been completed, such request shall be null and void.

The pretrial may be nullified under the following conditions:

- (i) the case has been examined by the district court; dan
- (ii) when the district court examines the case, the pretrial has not been concluded.

If the case has been examined by the district court, while the pretrial has not rendered a decision, the pretrial will automatically be nulled, to prevent different decision. Therefore it is appropriate to nullify the pretrial examination, and all the issues relevant to the case are included in the examination at the district court.

The pretrial decision during investigation will not annul or eliminate the suspect's right to file a pretrial petition during prosecution, if the reason for such petition is allowed by the law. The applicant still has the right to file a pretrial petition during prosecution if there is an argument justified by the law.

Pretrial on the legality of detention conducted by prosecutor or investigator may still be filed during prosecution phase. The interested third party may also file pretrial petition. This effort is allowed for multiple times.³⁹⁶ The nullification is determined based on the fact that the district court has examined the case.

Ada pendapat yang menyatakan bahwa pengguguran permintaan yang ditentukan dalam Pasal 82 ayat (1) KUHAP tidak mengurangi hak tersangka, karena semua permintaan itu dapat ditampung kembali oleh Pengadilan Negeri dalam pemeriksaan pokok. Jika tentang sah atau tidaknya penangkapan, penahanan, penggeledahan atau penyitaan, dapat langsung diperiksa Pengadilan Negeri dalam sidang.

There is an argument that the nullification will not reduce the suspect's right, because the petition may be included in the examination by the district court. On the legality of an arrest, a detention, search, or foreclosure, it may be examined during trial in the district court. If the judge views that the detention is unlawful, he may order a release for the accused. In regards to compensation and rehabilitation, the law only allows such request to be filed when the decision is final and binding. If such request is filed at the pretrial, it will have a faster process. In practice, this argument is rejected by judges and never be implemented. Judges viewed that it will create problems in regards to the place and time of action from the investigator.

G. Termination of pretrial

The provisions of the termination of pretrial can be found under MA Circular Letter No. 5 of 1985 on Termination of Pretrial, 1 February 1985. This Circular was issued to answer the questions on whether the ongoing pretrial may be terminated by the judge, because such issue is not regulated under KUHAP.

In the Circular, the Supreme Court gives the following recommendation:

- (i) the pretrial may be terminated by the judge upon request from the petitioner;
- (ii) the termination must be stipulated under a determination.

³⁹⁶ For instance, the suspect may file a first petition on the legality of an arrest, a second petition on the legality of a detention, and a third petition on the legality of a foreclosure, and even fourth petition on the legality of a detention during prosecution.