LEGAL PROTECTION AGAINST THE RIGHTS OF A SUSPECTIVE IN SUBMITTING A PRETRIAL REGARDING THE CONFISCATION OF EVIDENCE NOT RELATED TO A CRIME

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ABSTRACT
Article 82 paragraph (1) letter d of the Criminal Procedure Code is a regulation regarding the cancellation of a pretrial application with the object of Article 79, Article 80, and Article 81 of the Criminal Procedure Code. However, since the pretrial object was expanded through the Constitutional Court Decision Number 21/PUU-XII/2014, namely the determination of suspects, confiscation and search. Thus, the three objects are not part of Article 82 paragraph (1) of the Criminal Procedure Code. In this study, the researcher proposes the formulation of the problem as follows: (1). How is the regulation of forced confiscation efforts in the Criminal Procedure Code in Indonesia? and (2). How is the legal protection for the suspect in filing the confiscation of evidence that is not related to a criminal act? The research method used is a legal research method using a statutory approach, a conceptual approach and a case approach. The data is sourced from secondary data, namely data collected through library studies. The data analysis used descriptive qualitative analysis method. Based on the results of the study, it can be concluded that (1). The Constitutional Court has placed confiscation as an instrument of preventive protection which is associated with the obligation to carry out confiscation based on the precautionary principle; and (2). The act of confiscation as an object of Pretrial is not included in Article 82 paragraph (1) of the Criminal Procedure Code. So, according to the researcher, the pretrial process in examining the act of confiscation—as long as it is not related to Article 39 of the Criminal Procedure Code, cannot be invalidated by the inclusion of an examination in the main case.

KEYWORDS
Foreclosure, Pretrial, Criminal Procedure

INTRODUCTION

The Criminal Procedure Code (KUHAP) which was promulgated through Law Number 8 of 1981 concerning the Criminal Procedure Code, has been asked to be a 'Masterpiece' of the Indonesian nation. This majesty, starting from an awareness of the legislators, to leave the colonialism era mindset, namely by prioritizing respect for human rights (HAM) as a consequence of the accommodation of constitutionalist democratic legal principles, and the normative pre-trial authority at the District Court3 to examine every act of coercion carried out by Investigators and Public Prosecutors.

In its development, there has been a critique of the implementation of this authority, particularly the absence of procedural law in the pretrial process. Thus, in carrying out the process of examining a pretrial application using the Civil Procedure Code or quasi Civil Procedure Law. As a result, the submission of a pretrial application only seeks formal truth. This situation received criticism from the Constitutional Court through the Constitutional Court Decision Number 21/PUU-XII/2014 dated April 28, 2015 which emphasized the following: protection of human rights, so that at that time the pretrial rules were considered as part of the masterpiece of the Criminal Procedure Code. However, along the way, it turns out that the pretrial institution cannot function optimally because it is unable to answer the problems that exist in the pre-adjudication process. The supervisory function played by the pretrial institution is only post facto so that it does not arrive at the investigation and the examination is only formal which puts forward the objective element, while the subjective element cannot be supervised by the court. This actually causes pretrials to be trapped only on matters that are formal in nature and are limited to administrative problems so that they are far from the essence of the existence of pretrial institutions." In line with the construction of the logic of the Constitutional Court, in the end, the Constitutional Court expanded the object of pretrial in Article 1 number 10 in conjunction with Article 77 of the Criminal Procedure Code by adding 3 (three) objects, namely the determination of suspects, searches, and confiscations. At this point, as a result of the Constitutional Court Decision Number 102/PUU-XIII/2015 dated November 9, 2016 which amended Article 82 paragraph (1) letter d of the Criminal Procedure Code. Article 82 paragraph (1) letter d of the Criminal Procedure Code confirms the following: "The pre-trial examination procedure for matters as referred to in Article 79,

Article 80 and Article 81 is determined as follows: in the event that a case has begun to be examined by a district court, while the examination of the request to the pre-trial has not been completed, then the request is void." Referring to the Constitutional Court Decision Number 102/PUU-XIII/2015, amending the editorial Article 82 paragraph (1) letter d of the Criminal Procedure Code as follows:

"Stating Article 82 paragraph (1) letter d of Law Number 8 of 1981 concerning Criminal Procedure Code (State Gazette of the Republic of Indonesia of 1981 Number 76, Supplement to the State Gazette of the Republic of Indonesia Number 3258) is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as the phrase "a case has begun to be examined" does not mean "the pretrial request is invalid when the subject matter has been delegated and the first trial of the principal case on behalf of the defendant/pretrial applicant has been started". Based on the above-mentioned editorial changes, the Constitutional Court's Decision Number 102/PUU-XIII/2015, only expands the meaning of the phrase "a case has begun to be examined". Thus, not the entire editorial of Article 82 paragraph (1) letter d of the Criminal Procedure Code is changed. Thus, there is a norm anomaly when the researcher refers to the elements of the object of study from Article 82 paragraph (1) of the Criminal Procedure Code only to Article 79, Article 80 and Article 81 of the Criminal Procedure Code.

Bearing in mind that the editorial changes in Article 82 paragraph (1) letter d of the Criminal Procedure Code remain in effect only for pretrial applications relating to (1) the legality of an arrest or detention; (2) whether or not a termination of an investigation or prosecution is legal; and (3) compensation and or rehabilitation. However, it becomes a legal problem when the pretrial application—referring to the Constitutional Court Decision Number 21/PUU-XII/2014, with the object of confiscation when the examination process on the principal case (the criminal act) has entered the trial process in court, especially decision number 6/Pid.Pre/2022/PN JKT.Sel dated March 7, 2022.

In order to maintain the originality of this research, the researcher describes several previous studies, which are as follows:

1. Meki Wahyudi, who conducted a thesis research entitled "Reformulation of Pretrial Objects Regarding Determination of Suspects in the Criminal Procedure Code" at the Masters Program (S2) of Legal Studies at the Postgraduate Program of the Islamic University of Riau, Pekanbaru in 2021. suspect
2. Daud Yaferson Dollu, who conducted a thesis research entitled "The Fall of Pretrial After the Decision of the Constitutional Court Number 102/PUU-XIII/2015" in the Master of Litigation Law Study Program, Graduate Program, Faculty of Law, Gadjah Mada University, Yogyakarta in 2019. This research analyzes the interpretation of law enforcement officials on the phrase the first trial in the Constitutional Court's decision Number 102/PUUXIII/2015 regarding the fall of pretrial and reviewing and formulating provisions regarding the failure of pretrial applications after the issuance of the Constitutional Court's decision Number 102/PUU-XIII/2015.

METHOD

Normative law research method uses normative case studies in the form of products of legal behavior, for example reviewing laws. The subject of the study is the law which is conceptualized as a norm or rule that applies in society and becomes a reference for everyone's behavior. So that normative legal research focuses on an inventory of positive law, legal principles and doctrines, legal findings in cases in concreto, legal systems, synchronization levels, legal comparisons and legal history.

This research is normative legal research or dogmatic law research or doctrinal research. Then as normative legal research, the approach method applied to discuss research problems is through a statutory approach (Statute Approach), a conceptual approach (Analytical and Conceptual Approach), and a case approach (Case Approach) using abduction reasoning in order to obtain and find the truth. objective.

The data collection technique used in this research is literature study which is the main research data that is dominantly used is literature in the field of criminal law, especially Criminal Procedure Law, Legal Philosophy, Legal Theory, and Legal Systems as well as materials relevant to the issues to be discussed.

RESULTS

Article 77 of the Criminal Procedure Code has been applied for as an object of judicial review related to the expansion of the object of pretrial, which through the Constitutional Court Decision Number 21/PUU-XII/2014 dated 28 April 2015, has added 3 (three) pretrial objects, namely (1). Determination of the suspect; (2). Search; and (3). Foreclosure. Thus, currently, Article 77 letter a of the Criminal Procedure Code has 8 (eight) objects that can be tested through the exercise of pretrial authority, namely: 1. whether the arrest is legal or not, 2. the detention is legal or not, 3. whether or not

the termination of an investigation or prosecution is legal. , 4. whether or not the determination of the suspect is valid, 5. the search is valid or not, 6. the confiscation is legal or not, 7. compensation for a person whose criminal case is terminated at the level of investigation or prosecution, and/or 8. rehabilitation for a person whose criminal case terminated at the level of investigation or prosecution.

Based on the Constitutional Court Decision Number 21/PUUXII/2014, it shows that there is an expansion of the object of pretrial and procedural law that should be used by the District Court in carrying out pretrial authority. As stated in the legal considerations in the Decision of the Constitutional Court Number 21/PUU-XII/2014, as follows:

"That the nature of the existence of pretrial institutions is as a form of supervision and objection mechanism to the law enforcement process which is closely related to the guarantee of the protection of human rights, so that at that time the rules regarding pretrial were considered as part of the masterpiece of the Criminal Procedure Code. However, along the way, it turns out that the pretrial institution cannot function optimally because it is unable to answer the problems that exist in the pre-adjudication process. The supervisory function played by the pretrial institution is only post facto so that it does not arrive at the investigation and the examination is only formal which puts forward the objective element, while the subjective element cannot be supervised by the court. This actually causes pretrial to be trapped only on matters that are formal and limited to administrative problems so that it is far from the essence of the existence of pretrial institutions. That in order to fulfill the aims and objectives to be enforced and protected in the pretrial process, it is the enforcement of the law and the protection of human rights as a suspect/defendant in the investigation and prosecution (vide the Court's legal considerations in Decision Number 65/PUU-IX/2011, dated 1 May 2012, in conjunction with the Court's decision Number 78/PUU-XI/2013, dated February 20, 2014), as well as taking into account the values of human rights contained in Law Number 39 of 1999 concerning Human Rights and the protection of human rights contained in In Chapter XA of the 1945 Constitution, any action by an investigator who does not adhere to the precautionary principle and is suspected of having violated human rights can be requested for protection from the pretrial system, although this is limited by the provisions of Article 1 point 10 in conjunction with Article 77 letter a of the Criminal Procedure Code. . In fact, the determination of a suspect is part of the investigation process in which there may be arbitrary actions from investigators which are included in the deprivation of a person's human rights. Whereas Article 77 letter a of the Criminal Procedure Code, one of which regulates whether or not the termination of an investigation is legal or not. Meanwhile, the investigation itself according to Article 1 point 2 of the Criminal Procedure Code is a series of actions by investigators to seek and collect evidence with which evidence makes clear about the criminal acts that occurred and in order to find the suspect."

Referring to the legal considerations above—which also has a function as a determination, it can be understood that so far the implementation of pretrial authority has used quasi-civil procedure law which has led to the search for formal truths. Thus, the Constitutional Court stipulates a change in the pretrial procedural law to be able to examine subjective actions in order to find material truth in the investigation process. In fact, the investigative process that uses these powers and authorities must comply with the Precautionary Principle. Therefore, if the investigator violates the precautionary principle, even though it has been limited by Article 77 letter a in conjunction with the Constitutional Court Decision Number 21/PUU-XII/2014, it is an object of testing in pretrial. Confiscation, based on Article 1 point 16 of the Criminal Procedure Code, is a series of actions by an investigator to take over and or keep under his control movable or immovable, tangible or intangible objects for the purpose of proof in investigation, prosecution and trial. Confiscation carried out by investigators must be based on permission from the Head of the local District Court (vide Article 38 paragraph (1) of the Criminal Procedure Code). In urgent circumstances, investigators can only confiscate movable objects and for this reason investigators are obliged to immediately report them to the head of the local District Court for approval (vide Article 38 paragraph (2) of the Criminal Procedure Code). However, in the case of being caught red-handed, without permission from the Head of the District Court, the investigator may confiscate objects or tools that are in fact or reasonably suspected to have been used to commit a crime or other objects used as evidence (vide Article 40 of the Criminal Procedure Code).

DISCUSSION

1. Regulation of Forced Confiscation in Indonesian Criminal Procedure Code

Confiscation as a continuation of forced search efforts, has long been regulated in the Criminal Procedure Code. Both are operated based on permission from the Chief Justice and can only be applied to someone who has been determined to be a suspect, except in the case of being caught in the act. In fact, although the Criminal Procedure Code provides an opportunity not to apply for a permit to the Head of the District Court in advance, the Criminal Procedure Code has imperatively ordered investigators and public prosecutors to obtain approval immediately after the implementation of the two coercive measures.

The conceptual legitimacy of the confiscation itself can be constructed through the concept of an investigation, as regulated in Article 1 point 2 of the Criminal Procedure Code which confirms "An investigation is a series of actions by an investigator in terms of and according to the method regulated in this law to seek and collect evidence which with that evidence makes clear information about the crime that occurred and in order to find the suspect".

The concept of an investigation has given investigators the authority to "seek and collect evidence" that will be used to make light of a criminal act. The phrase "making light" itself is a legal act carried out by an Investigator as a Public Official that gives rise to legal consequences for someone suspected of committing a crime. Therefore, the phrase "make light" is a representation of the activities of Law, namely Interpretation or Interpretation.

With regard to the types of evidence that can be confiscated through a search process—as a manifestation of the phrase "seek and collect evidence", it refers to Article 184 paragraph (1) letter c of the Criminal Procedure Code in conjunction with Article 187 of the Criminal Procedure Code in conjunction with Article 39 of the Criminal Procedure Code, namely:

1. Letter of Evidence, in the form of:
   a. Minutes and other letters in official form made by the authorized public official or made before him, containing information about events or circumstances that he heard, saw or experienced himself, accompanied by clear and unequivocal reasons for the statement;
   b. a letter made according to the provisions of the legislation or a letter made by an official regarding matters that are included in the management for which he is responsible 79 and which is intended to prove something or a situation;
   c. a statement from an expert containing an opinion based on his expertise regarding a matter or a situation that is officially requested from him;
   d. another letter that can only be valid if it has something to do with the contents of other evidence
2. Evidence in the form of:
   a. goods or claims of a suspect or defendant which are wholly or partly suspected of being obtained from a criminal act or as a result of a criminal act;
   b. objects that have been used directly to commit a crime or to prepare it;
   c. objects used to hinder the investigation of criminal acts;
   d. objects specially made or intended to commit a crime;
   e. other objects that have a direct relationship with the crime committed;
   f. Goods that are in confiscation due to a civil case or due to bankruptcy may also be confiscated for the purposes of investigation, prosecution and trial of criminal cases, as long as they comply with the provisions of Article 39 paragraph (1) of the Criminal Procedure Code; 80
   g. In the event that the investigator is caught red-handed, the investigator may confiscate objects and tools which are evidently or reasonably suspected to have been used to commit a criminal act or other objects that can be used as evidence.

In the study of legal protection, the Constitutional Court through the Decision of the Constitutional Court Number 21/PUU-XII/2014 has prepared preventive protection facilities and at the same time prepared preventive protection facilities. Preventive means of protection are realized by the emergence of two things, namely first, the shift from quasi-civil procedural law to criminal procedural law by questioning every subjective action of the Investigator; and second, the emergence of the Precautionary Principle which functions as an instrument to prevent disputes from occurring by imposing on investigators to act based on respect for human rights.

Meanwhile, in the legal considerations of the decision, there is also a means of repressive legal protection, namely by providing legal instruments for the public to be able to submit a pretrial application, if there are subjective actions that are detrimental and there is a violation of the Prudential Principle in the investigation process.

2. Legal Protection Against Suspects in Filing the Confiscation of Evidence Not Related to a Crime

The essence of the regulation of the procedural law is intended for law enforcers to only act based on their functions and authorities, as stipulated in the Considerations for Considering letter c of the Criminal Procedure Code. Thus, the regulation regarding the Criminal Procedure Code has the aim of preventing abuse of authority that results in human rights losses from people who are drawn into the investigation process.

The abuse of authority actually stems from the ability to interpret criminal cases that are being investigated in relation to the phrase "search and collect evidence". That is, an investigator will perform an automat juris between the elements of the article and the evidence and what evidence represents the elements of the article. Mistakes in interpreting this can then lead to a violation of the precautionary principle. As stated in the District Court Decision Number 6/Pid.Pra/2022/PN JKT.SEL dated March

7, 2022, where the Prosecutor's Investigator—in the case of the Corruption Crime, has determined Br. Muddai Madang as a suspect in the alleged crime of corruption and money laundering, starting from the letter from the Governor of South Sumatra Number 503/3760/IV/2009 concerning the Joint Venture Principle Permit between PDPDE and PT. Dika Karya Lintas Nusa "PT. PDPDE 82 GAS" and the Joint Venture Agreement (JOINT VENTURE) between the Regional Mining and Energy Company of South Sumatra and PT. Dika Karya Lintas Nusantara regarding the Utilization of 15 MMSCFD Gas in South Sumatra (JOB Pertamina-HESS Jambi Merang) Number 05- PKP/PDPDE.DKLN/XII/2009 No. 044/DKLN/XII/2009 dated December 17, 2009 and the Deed of Establishment of a Limited Liability Company PT. PDPDE GAS Number 10 drawn up by Notary Syarifudin, SH, on December 21, 2009. The Petitioner in the pretrial petition, has argued that the Petitioner was married on May 14, 1994 and has owned and obtained joint assets in the form of:

1. A plot of land and a house building with an area of 1.423M2 and has a certificate of Ownership No. 01868 in the name of Ratna Yulia purchased in 2003, having her address at Kelurahan Cipete Selatan, Kec. Cilandak, South Jakarta;
2. A plot of land and a house building with an area of 523M2 and has a certificate of Ownership No. 00025 in the name of Ratna Yulia purchased in 2003, having her address at Kelurahan Keramat Pela, Kec. Kebayoran Baru, South Jakarta;
3. A plot of land and a house building with an area of 325M2 and has a certificate of Ownership No. 01139 in the name of Muddai Madang purchased in 2004 having his address at Kelurahan Cipete Selatan, Kec. Cilandak, South Jakarta

If the above description is observed, the three assets in the form of land and buildings cannot be classified as Evidence as regulated in Article 184 paragraph (1) of the Criminal Procedure Code. Thus, the study of the clustering of what has been confiscated leads to Article 39 paragraph (1) of the Criminal Procedure Code.

The study of Article 39 paragraph (1) of the Criminal Procedure Code is, in essence, very closely related to the study of the doctrine of tempus delicti or the time of the crime. For example, evidence that is included in the classification of Article 39 paragraph (1) letter a of the Criminal Procedure Code which confirms "objects or claims of a suspect or defendant which are wholly or partly suspected of being obtained from a criminal act or as a result of a criminal act." So, the time to obtain the evidence is after the criminal act is completely completed and provides benefits or results for the perpetrator.

If it is related to the case above, then the confiscated property should be the property purchased by the suspect, namely after the criminal act is complete and obtains the results of the crime. So, logically it is above 2009, because the alleged crime is a crime that stems from the success or failure of the cooperation.

If, the researcher connects the forced confiscation of land and buildings it is associated with Article 39 paragraph (1) letter c of the Criminal Procedure Code which affirms "objects used to hinder the investigation of criminal acts." Thus, it is irrational and illogical if the prosecutor's investigators argue that the land and buildings are used to "obstruct" the investigation of criminal acts.

And lastly, if it is related to Article 39 paragraph (2) of the Criminal Procedure Code which confirms "Objects that are in confiscation due to civil cases or due to bankruptcy can also be confiscated for the purposes of investigation, prosecution and trial of criminal cases, as long as they meet the provisions of paragraph (1)." Thus, the land and buildings are not in a civil confiscation or bankruptcy institution, and referring to the period of acquisition and the occurrence of a criminal act, there is no visible interest in the investigator to carry out the forcible confiscation.

CONCLUSION

Based on the descriptions in the analysis and discussion, the researcher conveys the following conclusions:

1. Forced efforts in the form of confiscation have long been regulated in the Criminal Procedure Code through Article 38 to Article 46 of the Criminal Procedure Code. However, the confiscation action, prior to the Constitutional Court Decision Number 21/PUU-XII/2014 was not the object of the pretrial examination. In fact, it should be known juridically, the act of confiscation is a logical consequence of the search. Both the search and seizure actions can only be carried out against a person, if that person has been designated as a suspect by the investigator. Thus, the Constitutional Court has placed confiscation as an instrument of preventive protection which is linked to the obligation to carry out confiscation based on the precautionary principle.
2. The decision of the Constitutional Court Number 21/PUU-XII/2014 has expanded the object of Pretrial and by providing guidelines for Investigators in carrying out investigative functions through the precautionary principle against every act of coercion including the determination of suspects, searches and confiscations. However, there are loop holes in the Procedural Law for Pretrial. Where, in Article 82 paragraph (1) of the Criminal Procedure Code only regulates the failure of pretrial

applications only to Article 79, Article 80, and Article 81 of the Criminal Procedure Code. Meanwhile, the act of confiscation as an object of pretrial is not included in Article 82 paragraph (1) of the Criminal Procedure Code. So, according to the researcher, the pretrial process in examining the act of confiscation—as long as it is not related to Article 39 of the Criminal Procedure Code, cannot be invalidated by the inclusion of an examination on the subject matter of the case.

SUGGESTION

1. The Dispute Council is included in the amendment of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which contains regulations regarding the placement of the Dispute Council's decision in further arbitration proceedings as well as provisions or legal instruments governing the execution process of the Dispute Council's decision.
2. Government Regulation Number 22 of 2020 must be accompanied by provisions concerning: a specific time limit for the establishment of the Dispute Council; independent party authorized in the event of disagreement on the appointment of members of the Dispute Board; procedures and period of implementation of the decision of the Dispute Council which is final and binding.
3. That the Regulation of the Minister of Public Works and Public Housing (PUPR) Number 11 of 2021 concerning Procedures and Technical Instructions for the Construction Dispute Council may be amended to apply to all construction service sectors.

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