

The Authority of Pretrial Judges in Assessing the Authority to Calculate State Financial Losses in Proving the Elements of the Corruption Offence

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Abstract. Pretrial is a court process used to assess the actions of law enforcement in search, seizure, arrest, detention, and suspect determination. The scope of pretrial was expanded after a Constitutional Court decision in 2015. However, there are different interpretations of this decision. Some pretrial decisions focus on the institution's authority declaring state financial losses, while others only look at formal evidence without assessing quality. This study aims to determine whether pretrial judges can assess which institution has the authority to declare state financial losses. The research method used is normative through statute and case approaches. This research concludes that the authority to assess which institution has the authority to declare the existence of state financial losses is included in the subject matter of the case. Supreme Court Regulation No 04/2016 on Prohibition of Judicial Review of Pretrial Decision states that pretrial judges only assess the formal aspects of the fulfilment of 2 (two) evidence and do not enter the subject matter. A Supreme Court regulation or circular letter should specify the pretrial object and authority for declaring state losses to ensure consistency in pretrial decisions and legal certainty. A special task force of pretrial judges appointed by the District Court Chief Justice should also be created to handle pretrial decisions and ensure consistency and legal certainty.

Keywords: Pretrial Authority, State Financial Losses, Constitutional Court Decision, Judicial Consistency, Supreme Court Regulation.

INTRODUCTION

Pretrial is a series of integrated criminal justice subsystems. In the criminal system, there are four subsystems of power: the power of investigation, prosecution, trial and execution of decisions/convictions [1]. The criminal justice system is implemented to create a fair legal process [2] or another term, namely 'due process of law' [3]. Professor Hiariej, a criminal law expert from Gajah Mada University, emphasised that 'due process' involves the behaviour of law enforcement officials and the procedures they follow [4]. Pretrial, as defined in Article 1 point 10 of KUHAP, allows the District Court to review cases involving arrests, detentions, searches,

seizures, closures of investigations or prosecutions, and requests for compensation and rehabilitation [5].

In 2015, the scope of the pretrial was broadened by a ruling from the Constitutional Court, Decision No 21/PUU-XII/2014, dated 28 April 2015. According to the court's decision, pretrial proceedings can now be initiated in cases involving restricted conditions outlined in Article 77 of the Criminal Procedure Code and against the identification of suspects [1]. However, the Constitutional Court's decision did not elaborate on what kind of suspect determinations could be filed for pretrial [6]. Thus, following the ruling by the Constitutional Court, there were requests

made before trial concerning the identification of potential offenders, causing concern that it would undermine the concept of a speedy, efficient, and affordable legal framework [7]. The Supreme Court has issued instructions for judges in charge of pretrial matters in determining whether a suspect should be subject to pretrial proceedings according to Article 2 § 2 of Supreme Court Regulation 4/2016 on Prohibition of Pretrial Review. The regulation states that pretrial judges should only consider the presence of two pieces of evidence (quantitative) and should not delve into the details of the case material.

Following the ruling by the Constitutional Court regarding identifying a suspect as a ground for filing a pretrial appeal, in cases of corruption, a pretrial appeal may be filed based on the suspect's potential impact on state finances or the economy [8]. The Constitutional Court Decision No 25/PUU-XIV/2016 altered the way the elements of the article are interpreted, moving from being viewed as a formal offence to a material offence that is actual and quantifiable. This has led to varying interpretations of which institutions have the authority to determine state financial losses. The Supreme Audit Agency (BPK), by attribution, as stated in Article 10 § 1 of Law No 15 Of 2016 on the Supreme Audit Agency regulates 'BPK assesses and/or determines the number of state losses caused by unlawful acts either intentionally or negligently committed by treasurers, managers of State-Owned Enterprises/ Region-Owned Enterprises, and other institutions or bodies that organise state financial management' [9]. Moreover, according to Article 3 letter e) of Presidential Regulation No 192 of 2014 regarding BPKP, it is stipulated that BPKP is empowered to assess financial damages incurred by the state.

The Supreme Court has released Supreme Court Circular Letter No 04/2016, clarifying that only the BPK has the constitutional authority to declare financial losses. Other institutions can calculate state financial losses but cannot officially declare them. Departing from the polemics related to the differences in interpretation regarding the authority of institutions that declare state financial losses, there is a pretrial application related to the determination of suspects, which questions the institutions used by investigators in calculating state financial losses [10]. The pretrial motion presents discrepancies in pretrial rulings regarding the jurisdiction of pretrial judges over

the role of institutions performing financial loss audits to meet the requirements outlined in Article 2 § 1 and/or Article 3 of the Anti-Corruption Law.

Based on the author's observations, discrepancies exist in pretrial rulings regarding the expansion of pretrial subjects following Constitutional Court Decision No 21/PUU-XII/2014.

METHODS

To address this issue, normative research methods are used [11]. Primary legal sources like laws and regulations and secondary legal sources like literature are utilised. The methodology includes a statutory approach to examine and compare regulations and a case-based approach to analyse court rulings with legal impact.

RESULTS AND DISCUSSION

The Authority to Assess Which Institution is Authorised to Calculate State Financial Losses is an Object of Pretrial Investigation. Pretrials are one of the authorities available to the District Court, which can be seen from its regulation in the Criminal Procedure Code, namely in Chapter X, Section One, which is the scope of judicial authority for the District Court. Based on this, it can be said that the existence of a pretrial is a grant of authority based on KUHAP to the District Court to conduct pretrial hearings.

The term pretrial, according to Article 77 letter a) of KUHAP and Constitutional Court Decision No 21/PUU-XII/2014 dated 28 April 2015, involves reviewing the actions of investigators when using their authority through coercive measures, suspect identification, investigation termination, and compensating suspects for rehabilitation. Pretrial is a form of horizontal supervision of the actions of law enforcement officers (APH) which requires supervision of the actions of coercion carried out by law enforcement officers (APH) because coercion is an action that takes away a person's human rights, so the corridors of statutory provisions must ensure the action of taking away a person's human rights.

Constitutional Court Decision No 21/PUU-XII/2014 has broadened the definition of pretrial, giving suspects more opportunities to challenge

legal actions taken by law enforcement through pretrial applications. Suspects of corruption crime use this loophole to escape from the criminal offence by filing pretrial proceedings. This is inseparable from the nature of the crime of corruption, which is an extraordinary crime, and the subject of the perpetrators are people who have power, commonly called white-collar crime [12].

Although pretrial proceedings primarily examine criminal cases, the process is civil or contradictory, as Article 101 of KUHAP stipulated. Concerning the civil nature of the pretrial examination process, there are two logical consequences, namely, 1) the truth sought is the formal truth, and 2) the pretrial process only addresses procedural issues. Pretrial only addresses procedural issues. Based on this, it can be concluded that in the pretrial process, what is sought is formal truth.

In several pretrial cases related to corruption offences, there were pretrial applications related to the determination of suspects, which specifically discussed the authority of the institution used by investigators to declare state losses. The individual who submitted a pretrial application did so based on the Circular Letter from the Supreme Court of Indonesia, which outlines the guidelines for courts in implementing their duties. This letter specifies that only the Supreme Audit Agency (BPK) can declare state financial losses, not any other institution. The debate over which entity has the right to declare state losses was evident in Pretrial Decision No 3/Pid.Pra/2021/PN.Son, where it was mentioned that:

"Considering that the evidence of the letter issued by the Financial and Development Supervisory Agency (BPKP) Representative of West Papua Province in the form of an Audit Report on the Calculation of State Financial Losses No LAPKKN-30/PW27/5/2021, dated 22 February 2021, does not have binding legal force because it was carried out outside the provisions stipulated in Supreme Court Regulation (SEMA) No 4 of 2016".

The pretrial judge at the Sorong District Court approved the petitioners' pretrial request in full, finding the Investigation Order and Suspect Designation Letter issued by the Investigator of the Sorong District Attorney to be null and void under legal grounds previously mentioned.

The limitations of pretrial procedures that determine the authority of the institution responsible for calculating state losses lack clarity. Article 2 § 2 of Supreme Court Regulation No 04/2016 addresses this issue by stating that pretrial evaluations focus solely on the presence of two valid pieces of evidence without delving into the case's specifics. Additionally, Article 2 § 4 of the same regulation specifies that pretrial reviews are limited to cases of short duration and only concern formalities in the evidentiary process. Due to Supreme Court Regulation No 04/2016, what is pursued in pretrial is only related to the fulfilment of two evidence in quantity and not related to the quality of the evidence. The Indonesian legal system relies on the *Negatief Wettelijk Bewijstheorie* as the foundation for determining proof according to the judge's belief arising from evidence in the law negatively. Article 183 of the Criminal Procedure Code clearly states that for a judge to convict a defendant, at least two credible pieces of evidence must support their belief.

Interpreting the authority of pretrial judges in assessing the quality of evidence related to the authority of institutions authorised to declare state losses should be seen from Supreme Court Regulation (SEMA) No 04/2016. If pretrial judges rely on Supreme Court Regulation (SEMA) No 04/2016 to assess which institution is authorised to declare the existence of state losses, this is not appropriate. If examined, the provisions of SEMA No 04/2016 regulate the subject matter of the trial. This is by making a grammatical interpretation which gives meaning to an object, which is in the 4th point of SEMA 04/2016, which states:

"In some instances, the judge, based on the trial facts, can assess the existence of state losses and the amount of state losses".

The crucial point in the SEMA is related to the *'facts of the trial'*, which can be obtained in the ordinary examination procedure and evidence, as in the Fourth Part of KUHAP, which is related to Evidence and Verdict in the Ordinary Examination Procedure. The interpretation of the SEMA can be done by systematically interpreting the regulation as a system of regulations which are always related to other regulations. SEMA 04/2016, when associated with PERMA No 04/2016, namely in § 2 of Article 2, indicates that the pretrial assessment of a suspect focuses solely on formal aspects, such as the presence of two pieces of evidence, and does not delve into the case's

substance. Additionally, this is related to § 4 of Article 2 of PERMA No 04 of 2016, which emphasises that evidence is only evaluated in terms of formalities. Consequently, it can be deduced that during this stage, the evaluation is restricted to verifying the existence of two pieces of evidence, which are quantitatively determined, without considering the substance or quality of the evidence. Hence, the examination conducted by the authorised institution to determine state losses is considered evidence in the main case.

How is the Consistency of Pretrial Decisions Regarding the Authority to Calculate State Financial Losses in Proving the Elements of Article 2 § 1 and Article 3 of the Anti-Corruption Law? Investigators rely on various audit institutions to handle

corruption cases involving state financial losses. In the Alleged Corruption case related to the National Export Financing by the Indonesian Export Financing Agency (LPEI), the Attorney General's Office utilised the State Loss Audit Report (LHPPKN) from the Supreme Audit Agency (BPK). On the other hand, in the corruption case concerning the tin commodity trading system within the mining business permit (IUP) area of PT Timah Tbk for the years 2015-2022, the Attorney General's Office relied on the State Loss Audit Report (LHPPKN) from the Financial and Development Supervisory Agency (BPKP).

The following can be noted regarding pretrial decisions that question the institution's authority to declares state financial losses (see Table 1).

Table 1 – Pretrial Decision

No	Decision Number	The Verdict	Ratio Decidendi
1.	3/Pid.Pra/2021/PN.Son	Granted	According to Regulation No 04 of 2016 by SEMA, only the Supreme Audit Agency (BPK) can determine when state losses occur.
2.	2/Pid.Pra/2021/PN Tdn	Granted	The significance of state losses can only be determined by the Supreme Audit Agency (BPK) by SEMA No 04 of 2016
3.	2/Pid.Pra/2023/PN Tdn	Rejected	SEMA No 04/2016 is intended for case examining judges, and pretrial judges do not have the authority to conclude or calculate state financial losses.
4.	7/Pid.Pra/2023/PN. Dps	Rejected	There are four requirements for evidence to be admissible: relevancy, admissibility, exclusivity and quality; the court thinks that this can only be used during the examination of the main case a quo where all evidence submitted by the respondent is carried out comprehensively. At the same time, it is only the pretrial stage, which is only a formal aspect, namely at least two valid pieces of evidence that do not enter the case material.
5.	1/Pid.Pra/2024/PN Tdn	Rejected	According to the judge, the argument of state financial loss submitted by the Applicant is part of the elements of the criminal offence alleged against the Petitioner. Therefore, it concerns the subject matter of the case.

Different opinions exist regarding the authority of the institution responsible for calculating state financial losses, as evidenced by five pretrial decisions. Two of these decisions have supported the Supreme Audit Agency (BPK) as the entity authorised to declare state financial losses, based on SEMA No 04 of 2016. However, three other pretrial decisions have argued that the authority to calculate state financial losses lies within the main case, with judges focusing solely on formal aspects

and not entering into the main case. The inconsistencies in these pretrial decisions stem from varying interpretations of SEMA No 04/2016, leading to uncertainty in the criminal justice system. Therefore, uniformity is needed in applying laws related to the competence of the institution's authority in calculating state financial losses.

CONCLUSIONS

Referring to the provisions of Indonesian Supreme Court Circular Letter No 04/2016 on the Implementation of the Formulation of the Results of the 2016 Plenary Meeting of the Supreme Court Chambers as Guidelines for the Implementation of Duties for the Courts associated with Indonesian Supreme Court Regulation No 04/2016 on the Prohibition of Judicial Review of Pretrial Decisions with grammatical and systematic interpretation, it is known that pretrial only examines the fulfilment of two pieces of evidence as in Article 184 of KUHP and only assesses the formal/quantity, not assessing the material/quality of the evidence.

There are inconsistencies in pretrial decisions, where pretrial judges accommodate the issue of

institutions that have the authority to declare the existence of state financial losses, which is the competence of pretrial judges. However, some pretrial judges state that pretrial judges do not have the competence to state which institution has the authority to declare the existence of state financial losses, and this is already the subject matter of the case. Hence, it is essential to have a Supreme Court Regulation or Circular Letter specifying the purpose of pretrial determination for suspects to the authority of the institution responsible for identifying state losses and ensuring legal clarity. Furthermore, establishing a pretrial judge task force by the Chief Justice of the District Court is necessary to ensure consistency in pretrial rulings, particularly in cases involving the authority of the institution assessing state financial losses..

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