



## POLITICAL STUDY OF LAW LAW NUMBER 8 OF 1981 CONCERNING THE CRIMINAL PROCEDURE CODE IN TERMS OF PRETRIAL LEGAL ASPECTS

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### Abstract

*The development of the authority of pretrial institutions in Indonesia begins with increasing the pretrial authority to the authority of investigators to be able to re-establish legal subjects (persons and / or legal entities) as suspects with the same evidence. The state organ that plays a dominant role in determining changes to the authority of pretrial institutions in Indonesia is the Constitutional Court (MK) which in terms of the aspect of state organ power is in the judicial branch of power (not executive or even legislative). It's just that the legal products stipulated by the Constitutional Court are more in the nature of forming laws and regulations which are the authority of the legislative and executive state organs. Since its inception, the Constitutional Court has been designed to oversee the constitution in the sense of keeping the law consistent, in line, and not contrary to the Constitution. In this case, there is a kind of constitutionalism barrier that strictly limits the Constitutional Court as a constitutional judiciary not to interfere in the realm of legislative power. Therefore, as a judicial institution, the Constitutional Court in principle should only state that articles/paragraphs/parts or all laws are contrary or not contrary to the constitution. In such duties and authorities, the Constitutional Court should not be allowed to make decisions of a regulatory nature, should not cancel laws or the contents of laws that the Constitution declares open (handed over arrangements to the legislature), and should not also make decisions that are ultra petita (let alone those that are positive legislature).*

**Keywords:** *Legal Politics, Pretrial, Criminal Procedural Law.*

### 1. INTRODUCTION

Legal politics is the policy of the state through state bodies authorized to establish the desired regulations in society and to achieve what is aspired to. Legal politics is a certain social and legal activity in society. <sup>1</sup> One of the policies of the state in criminal law enforcement in Indonesia is regarding pretrial institutions.

The term pretrial used by Law Number 8 of 1981 concerning the Criminal Procedure Code has a different meaning and literal meaning. Pre means before, or preceding, means "pretrial" the same as before the hearing at the trial court. In Europe such an institution is known, but its function is indeed to actually carry out a preliminary examination, because in addition to determining the lawfulness of the arrest, detention, confiscation, it also conducts a preliminary examination of a case.<sup>2</sup>

The definition of pretrial has been regulated in Law Number 8 of 1981 concerning the Criminal Procedure Law (KUHAP), namely the authority of the district court to examine and decide according to the manner stipulated in this law, concerning:

- a. Whether or not an arrest and or detention is lawful at the request of the suspect or his family or other parties on the suspect's behalf.
- b. Whether or not the termination of the investigation or the termination of the prosecution is valid upon request for the sake of the establishment of law and justice.
- c. A request for damages or rehabilitation by the suspect or his family or other parties on his behalf whose case was not brought before the court.<sup>3</sup>

<sup>1</sup> Ma'shum Ahmad *Politics Law Post Amendment Authority Justice Law Basic 1945*, Total Media, Yogyakarta, 2009, Pp. 27.

<sup>2</sup> Andi Hamzah, *Procedural Law Punishment Indonesian*, Light Grafika, Jakarta, 2008, p 187.

<sup>3</sup> Article 1 number 10 of Law Number 8 of 1981 concerning the Code of Criminal Procedure.

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The aforementioned pretrial understanding in its development underwent a very fundamental change. These developments from the political aspect of the law are very worthy of study. One of the reasons for consideration is that although the new Criminal Procedure Code (replacing Law Number 8 of 1981 concerning the Criminal Procedure Code) has not yet been passed, there are already new rules regarding pretrial that are binding in criminal law enforcement in Indonesia.

Pretrial is a single entity and is an inseparable part of the District Court. Everything concerning the administration and performance of Pretrial duties, falls under the scope of the discretion and governance of the Chief Justice of the District Court. Based on this fact, whatever is to be presented to the Pretrial, it is inseparable from the body of the District Court.<sup>4</sup>

The persons summoned and examined in the Pretrial hearing, are not only the petitioner, but also the official who gave rise to the reason for the request for filing a Pretrial hearing. Looking at the parties summoned and examined, the process of Pretrial examination is similar to the hearing of a civil case examination. Some may assume, as if the pretrial hearing examination tends to examine and prosecute the officials involved about the lawfulness or not of the act of coercion it imposes on the suspect. Indeed, at first glance this seems to be the case. However, in terms of law, this is not the case.<sup>5</sup>

The authority of the district court in the scope of pretrial under Law Number 8 of 1981 concerning the Code of Criminal Procedure is: "The district court is authorized to examine and decide, in accordance with the provisions stipulated in this law concerning:

- a. Whether or not an arrest, detention, termination of investigation or termination of prosecution is lawful; and
- b. Indemnity and or rehabilitation for a person whose criminal case is terminated at the level of investigation or prosecution."<sup>6</sup>

Provisions regarding pretrial examination events based on Law Number 8 of 1981 concerning the Criminal Procedure Code, are regulated as follows:

- a. Within three days of receipt of the request, the appointed judge sets the day of the hearing.
- b. In examining and deciding whether or not an arrest or detention is valid, whether or not a cessation of an investigation or prosecution is valid, a request for compensation and or rehabilitation due to the invalidity of the arrest or detention, the result of the legal termination of the investigation or prosecution and there are objects seized that do not include the means of proof, the judge hearing information either from the suspect or the applicant or from an authorized official;
- c. The torture was done quickly and no later than seven days the judge must have handed down his verdict.
- d. In the event that a matter has already begun. examined by the district court, while the examination of the request to the pretrial has not been completed, then the request is void.
- e. The pretrial verdict at the level of the investigation does not rule out the possibility of holding an examination, pretrial again at the level of examination by the public prosecutor, if for that a new request is made.<sup>7</sup>

Based on the description above, the author is interested in conducting a study on the development of the authority of the pretrial institution in terms of the political aspects of law, with the title: "**Political Study of Law Law Number 8 of 1981 concerning the Criminal Procedure Code in terms of Pretrial Legal Aspects**". The formulation of the problem in this study is: How is the development of the authority of pretrial institutions in Indonesia? And which state organ plays a dominant role in determining changes to the authority of pretrial institutions in Indonesia?

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<sup>4</sup> M. Yahya Ha, *Discussion Problems and Application KUHAP*, Light Grafika, Jakarta, 2008, p 12.

<sup>5</sup> *Ibid.* p 13.

<sup>6</sup> Article 77 of Law Number 8 of 1981 concerning the Code of Criminal Procedure.

<sup>7</sup> Article 82 paragraph (1) of Law Number 8 of 1981 concerning the Criminal Procedure Code.



## 2. IMPLEMENTATION METHOD

This type of research is normative legal research. The data collection method used in this study is by means of literature studies by conducting literature studies related to the object of this study. Data analysis in this study was carried out systematically based on research problems that were described qualitatively.

## 3. RESULTS AND DISCUSSION

### 3.1 Development of Pretrial Institutional Authority in Indonesia

The pretrial goal is to protect human rights, in this case the human rights of the suspect or defendant. The human rights to be protected are specifically the right *to liberty* and the rights related to or are "derivatives" of the *right to liberty*. A person's freedom is threatened because in the determination of the suspect (or defendant) there is the possibility of involvement of acts or coercive attempts by the state in the form of arrest and/or detention, which in fact is also seizures and searches. It is the use or involvement of this forced attempt that must be strictly controlled, both the terms and the procedure for its use, by law. Why should it be with the law? Because, in a country of law, which respects and guarantees respect for human rights, restrictions on human rights are only valid if they are carried out by law [*vide* Article 28J paragraph (2) of the 1945 Constitution].<sup>8</sup>

However, when looked at further, there are implicitly two interests that are to be protected in a balanced way through pretrial, namely the interests of the individual (*in casu* suspect or defendant) and the public or community interest. From the perspective of individual interests (suspects or defendants), the introduction of this pretrial institution in the Criminal Procedure Code is as a "counterweight" to the authority given to investigators and public prosecutors to use forceful efforts in the examination of criminal acts as mentioned above. There must therefore be a guarantee that, firstly, the said coercive attempt was actually used in the interest of examining the alleged criminal offence (or charged) and, secondly, the said coercive attempt was actually carried out in accordance with the provisions of the statute. It is to meet the demands of the bail that the pretrial institution is introduced. The act of assigning a suspect is not a coercive attempt and therefore by itself does not fall within the scope of pretrial. Whenever in the process of determining a person as a suspect objections or doubts arise (for example because there is not sufficient evidence), the solution is not pretrial but the termination of the investigation.<sup>9</sup>

Based on the provisions of Article 83 paragraph (1) of the Criminal Procedure Code *juncto* Article 45A of Law Number 5 of 2004 *juncto* Supreme Court Regulation Number 4 of 2016, it is clear that the intention of the lawmaker (*original intent*) that the pretrial decision is final and binding or in other words, there is no legal remedy whatsoever against the pretrial decision.<sup>10</sup>

Before there is a change in the authority of pretrial institutions in Indonesia, it is worth paying attention to the opinions below:

Pretrial mechanisms can be used by suspects or defendants to test whether or not it is legal to arrest and/or detainees that have been made. In addition, pretrial is essentially the special authority that the district court has to examine and decide: Whether or not the termination of the investigation is valid, or the termination of the prosecution on request for the sake of the establishment of law and justice, as well as the request for damages or rehabilitation by the suspect, or his family, or any other party in his power, whose case was not brought before the court.<sup>11</sup>

A pretrial position in the criminal system was sued by an employee of an oil company, Bachtiar Abdul Fatah, to the Constitutional Court (MK) in 2014. Where Bahctiar was subjected to suspect status by the Attorney General's Office. Based on the Criminal Procedure Code at that time, the status of suspects could only be revoked by the authorities. What if residents object? The Criminal

<sup>8</sup> Copy of Constitutional Court Decision No. 21/PUU-XII/2014, p. 115.

<sup>9</sup> *Ibid.* Pp. 115.

<sup>10</sup> Copy of Constitutional Court Decision No. 42/PUU-XV/2017, p. 28.

<sup>11</sup> A. Patra M. Zen and Daniel Hutagalung (Editor), *Guide Help Laws in Indonesia: Guidelines You Understand and Finish Problem Law* YLBHI, Jakarta, 2007, Pp 245.

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Procedure Code does not provide the slightest loophole to remove the status of a suspect, so that a person can become a suspect forever. Therefore, Bachtiar sued the Criminal Procedure Code to the Constitutional Court (MK). The rule that is being challenged is Article 77 letter a of the Criminal Procedure Code which provides for pretrial only the right to adjudicate: 1). Whether or not the arrest is lawful; 2). Whether or not detention is valid; 3). Whether or not the termination of the investigation is valid; 4). Whether or not the termination of the prosecution is valid. The petitioner expects the Constitutional Court to grant additional pretrial authority to test the determination of a person's suspect status. Dipper chimed in. The Constitutional Court, based on the judgment No. 21/PUU-XII/2014, granted Bachtiar's application.<sup>12</sup>

On October 28, 2014, the Constitutional Court added the meaning of Article 77 letter a, i.e., pretrial also tried: 1). Whether or not the arrest is lawful; 2). Whether or not detention is valid; 3). Whether or not the termination of the investigation is valid; 4). Whether or not the termination of the prosecution is valid; 5). Whether or not the determination of the suspect is valid; 6). Whether or not the search is valid; 7). Whether or not the seizure is legal. Based on the legal considerations of the Panel of Judges in the case, the inclusion of the validity of the determination of the suspect as the object of pretrial institution is so that the treatment of a person in the criminal process pays attention to the suspect as a human being who has the same dignity, dignity, and position before the law.<sup>13</sup>

Based on the foregoing, the question arises, what if a person's suspect status is aborted pretrial? Does it mean that he is free and can't be a suspect anymore? The Constitutional Court replied that it remained true. A person can be re-imprinted as long as the investigator has new evidence, at least two pieces of evidence. Based on the legal considerations of the Panel of Judges in *a quo* case, it is stated that namun thus, the protection of the rights of the suspect is not then interpreted to mean that the suspect is innocent and does not abort the alleged criminal act, so that it can still be re-investigated in accordance with the applicable legal rules ideally and correctly. The Constitutional Court emphasized that the nature of the existence of pretrial institutions is as a form of supervision and a mechanism for objections to the law enforcement process that is closely related to the guarantee of human rights protection. So that in his day the rules on pretrial were considered part of the constitutional code. Over time, the Constitutional Court assessed the need to include the determination of suspects as pretrial objects. In other words, the precautionary principle must be firmly held by law enforcement in determining someone to be a suspect<sup>14</sup>

The aforementioned Constitutional Court ruling was not unanimous. Constitutional judge Patrialis Akbar approved the determination of suspects in the pretrial realm, but he had his own reasons, in contrast to the other 6 constitutional judges. The constitutional judges I Dewa Gede Palguna, Aswanto and M Alim considered the opposite, namely that the determination of suspects did not fall into the pretrial realm. According to Palguna, not including the determination of the accused in the pretrial scope is not contrary to Article 9 of the ICCPR. Thus, not including the determination of suspects in the pretrial scope is not an act that can be blamed under international law (*internationally wrongful act*) that can be used as a basis for demanding *state responsibility, in casu* Indonesia. According to constitutional judge Aswanto, the Constitutional Court has no right to increase pretrial authority, because it is the authority of the DPR to revise the Criminal Procedure Code, not with the authority to interpret the Constitutional Court. According to Aswanto, the purpose of determining suspects as one of the pretrial objects that were not previously contained in the Criminal Procedure Code is to create a new norm that is not the authority of the Constitutional Court but the authority to shape the law. In another case, La Nyalla Matalitti, was made a suspect three

<sup>12</sup> Andi Saputra, *Whether Win Pretrial It Could Be Suspect Again? Ini MK saiddeep:* <https://news.detik.com/berita/d-3666395/apakah-menang-praperadilan-bisa-jadi-tersangka-lagi-ini-kata-mk>, retrieved 18 April 2022.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*



times, and three times won pretrial. This is because the determination of the re-conviction of La Nyalla was carried out after the above verdict of the Constitutional Court. This year, the revocation of the status of suspects against Setya Novanto surprised many. This is because the KPK is believed to have pocketed strong evidence of the involvement of the Speaker of the House of Representatives in the e-KTP corruption case worth more than Rp 5 trillion.<sup>15</sup>

Based on the judgment of the single judge, judge Cepi Iskandar on Setya Novanto's pretrial application. In his ruling, Cepi ruled that KPK investigators could not make a new suspect for Setya Novanto with the same evidence.<sup>16</sup> However, the judgment was indirectly responded to by Mahkamah Konstitusi.

The Constitutional Court (MK) confirmed that investigators can determine the suspect again who won the pretrial. The Constitutional Court did not dispute the status of the new suspect even though investigators used the same evidence. The consideration was made while adjudicating the application of Anthony Chandra Kartawiria. Anthony is a suspect in the Mobile 8 case, had won in pretrial, and was re-charged by the Attorney General's Office. According to the chairman of the Constitutional Court panel, Arief Hidayat in an open-to-the-public hearing at the Constitutional Court Building, the determination of new suspects with the same evidence, is not constitutional. This is not a question of the constitutionality of the norms of Article 83 paragraph (1) of the Criminal Procedure Code but is a matter of implementation and in such a case does not prejudice the right of the Petitioner to use the pretrial mechanism against it.<sup>17</sup>

The Constitutional Court emphasized that investigators could have continued to use the previous evidence with a record of substantial improvement. According to the Constitutional Court, although the evidence is not new and still related to the previous case, it is evidence that has been substantially refined and is not a mere formality so that basically the evidence in question has become a new evidence that is different from the previous evidence. Thus, there will be legal certainty not only for suspects who are not easily designated as suspects again but also for law enforcement who will not easily release a person from criminal entanglement. With that in mind, the Constitutional Court rejected Anthony's application. Where Anthony asked, he should not be able to be reconsidered with the same evidence.<sup>18</sup>

The Constitutional Court affirmed that the determination of suspect status against a person can be re-established even if he wins pretrial. This was confirmed by the Constitutional Court after hearing a material test of article 83 paragraph 1 of the Criminal Procedure Code submitted by the former Director of PT Mobile 8, Anthony Candra Kartawiria. In the judgment read by the Constitutional Court judge in the courtroom, the petitioner's application was said to be unwarranted under the law.<sup>19</sup>

Anthony has filed a pretrial lawsuit related to the determination of himself as a suspect in the PT Mobile 8 tax restitution case. Then, the South Jakarta PN judge granted his application and declared the determination of the suspect invalid. In his plea for judicial review, the petitioner argued that the issuance of a *sprindik* on the accused who won the pretrial had violated human rights because it was contrary to the principle of legal certainty and injured the principle of presumption of innocence. However, this is not the case according to the Constitutional Court judges. The Constitutional Court judge also considered the application filed by Anthony to be unwarranted under

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<sup>15</sup> *Ibid.*

<sup>16</sup> Andi Saputra, *Mk: Investigators Can Suspect Repeat with Same Evidencedeep*: <https://news.detik.com/berita/d-3678140/mk-penyidik-bisa-tersangkakan-ulang-dengan-bukti-yang-sama>, retrieved 18 April 2022.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Priska Sari Pratiwi, *Mk: Win Pretrial, Suspect Can Ensnared Again*, deep: <https://www.cnnindonesia.com/nasional/20171010161458-12-247460/mk-menang-praperadilan-tersangka-bisa-dijerat-lagi/>, retrieved 18 April 2022.

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the law. In consideration of judgment no. 42/PUU-XV/2017, pretrial is actually only concerned with the procedures or provisions for handling suspects suspected of committing criminal acts.<sup>20</sup>

Furthermore, regarding the petitioner's arguments about the two new valid evidence being different from those presented in the pretrial hearing, the court disagreed. According to the Constitutional Court, any evidence submitted in the new investigation is evidence that has been used in previous investigations that was rejected perhaps for reasons of mere unfulfilled formality and could only be substantially met by the investigator at the new investigation.

Thus, indeed the evidence in question has become a new piece of evidence. So that the evidence that has been refined by the investigator is not allowed to be set aside and can still be used as a basis for a new investigation and a basis for re-establishing a suspect. Moreover, regarding the petitioner's concern over the threat of the investigator issuing a new investigation and assigning the suspect with the same evidence and only minor material changes, the Constitutional Court considered that it did not prejudice the right to conduct a pretrial mechanism. On that basis, the Constitutional Court also considered that it was not a question of constitutionality, but a problem in implementation.<sup>21</sup>

### 3.2 State Organs that Play a Dominant Role in Determining Changes to the Authority of Pretrial Institutions in Indonesia

Based on the description above, the state organ that plays a dominant role in determining changes to the authority of pretrial institutions in Indonesia is the Constitutional Court (MK) which in terms of the aspect of state organ power is in the judicial branch of power (not executive and even legislative). It's just that the legal products stipulated by the Constitutional Court are more in the nature of forming laws and regulations which are the authority of the legislative and executive state organs.

The presence of such an important Constitutional Court in the constitutional system gave rise to such great expectations for this institution of judicial power holders. If at the beginning of its pioneering in the world the Constitutional Court was plotted as an institution that carried out the function of a *negative legislator*, but later it demanded that the Constitutional Court be an active legislator (*positive legislator*). The idea of forming the Constitutional Court was originally intended to carry out the role of a *negative legislator* as conveyed by Hans Kelsen. It was this idea that then laid down the inevitability of the existence of special powers to control the results of legislation issued by the legislature.<sup>22</sup>

Later, this idea was read by Bojan Bugarcic as an attempt by Hans Kelsen to bring up a *positive legislature* played by parliament, while the negative legislative model was played by the Constitutional Court. With this model, it means that the Constitutional Court is a part that can influence the legislative process in the legislature. In contrast to Hans Kelsen, John Farejohn and Pasquale Pasquino stated that the role taken by the Constitutional Court in deciding whether the Law is contrary to the constitution can be constructed as an institution that carries out positive legislative functions. Regardless of the difference in views on whether the Constitutional Court can play the role of a positive legislator or whether it is only an institution that is limited to the role of negative

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> Sekretariat General and Clerkship Court Constitution Republic Indonesian Cooperate with Navel Study Law Constitution Faculty Law of the Islamic University of Indonesia, *Implication Verdict Court Constitution Number 22-24/PUU-VI/2008 About Case Request Testing Law Number 10 Year 2008 About Election Common Member DPR, DPD, and DPRD towards Policy Affirmative Action Representation Women in the DPRD Province and regency/city se-Daerah Istimewa Yogyakarta* Navel Study Law Constitution Faculty Law of the Islamic University of Indonesia, Yogyakarta, 2010, Pp. 38.



legislation, the Constitutional Court is a major influencer for the establishment of a national legal system, especially for the modern legal state.<sup>23</sup>

Since its inception, the Constitutional Court has been designed to oversee the constitution in the sense of keeping the law consistent, in line, and not contrary to the Constitution. In this case, there is a kind of constitutionalism barrier that strictly limits the Constitutional Court as a constitutional judiciary not to interfere in the realm of legislative power. Therefore, as a judicial institution, the Constitutional Court in principle should only state that articles / paragraphs / parts or all laws are contrary or not contrary to the constitution. In such duties and authorities, the Constitutional Court should not be allowed to make decisions of a regulatory nature, should not invalidate laws or the contents of laws that the Constitution declares open (handed over the arrangements to the legislature), and should not also make *decisions that are ultra petita* (let alone those that are *positive legislature*).<sup>24</sup>

Before becoming a Constitutional Judge, Moh. Mahfud MD., asserted that the judgments containing *the ultra petita*, including the *positive legislature*, are essentially interventions in the legislative sphere. In other words, a violation of this principle can be said to be a simplification of the principle of separation of powers and *checks and balances* adopted in the Indonesian constitutional system.<sup>25</sup>

If observed, the authority of the Constitutional Court to test the Law against the Constitution as referred to in the Constitution and also the Constitutional Court Law is directed to seat the Constitutional Court as a *negative legislature*. However, if then there is a phenomenon of shifting from *negative legislature* to *positive legislature*: it is none other than because the practice and needs of the field want it to be so.

Regarding the shift of the Constitutional Court from just *negative legislature* to *positive legislature*, Ronald Dworkin said that the Constitutional Court has implemented *judicial discretion*. With *judicial discretion*, *the legislature* does not necessarily mean that the Constitutional Court has the authority of the legislator as the legislature makes laws. The Constitutional Court remains a judicial institution with the authority to adjudicate and decide cases. For this reason, because *of the judicial discretion*, Martitah agreed to say that the Constitutional Court found the law, not made the law.<sup>26</sup>

#### 4. CONCLUSION

The conclusions of this study, are as follows:

- a. The development of the authority of pretrial institutions in Indonesia begins with increasing the pretrial authority to the authority of investigators to be able to re-establish legal subjects (persons and / or legal entities) as suspects with the same evidence. At this time the pretrial is authorized to adjudicate: 1). Whether or not the arrest is lawful; 2). Whether or not detention is valid; 3). Whether or not the termination of the investigation is valid; 4). Whether or not the termination of the prosecution is valid; 5). Whether or not the determination of the suspect is valid; 6). Whether or not the search is valid; 7). Whether or not the seizure is legal. The inclusion of the validity of the determination of the suspect as the object of pretrial institution is so that the treatment of a person in the criminal process pays attention to the suspect as a human being who has the same dignity, dignity, and position before the law. In addition to the foregoing, at this time, for the sake of legal certainty, a person can be reconsidered with the same evidence. Thus, there will be legal certainty not only for suspects who are not easily designated as suspects again but also for law enforcement who will not easily release a person from criminal entanglement.

<sup>23</sup> *Ibid.* Pp. 38-39.

<sup>24</sup> Martitah, *From Negative Legislature, Court Constitution, to Positive Legislature?* Constitution Press, Jakarta, 2013, Pp. 174-175.

<sup>25</sup> *Ibid.* Pp. 175.

<sup>26</sup> *Ibid.* Pp. 175.

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- b. The state organ that plays a dominant role in determining changes to the authority of pretrial institutions in Indonesia is the Constitutional Court (MK) which in terms of the aspect of state organ power is in the judicial branch of power (not executive or even legislative). It's just that the legal products stipulated by the Constitutional Court are more in the nature of forming laws and regulations which are the authority of the legislative and executive state organs. Since its inception, the Constitutional Court has been designed to oversee the constitution in the sense of keeping the law consistent, in line, and not contrary to the Constitution.
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