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Legal Certainty Regarding the Determination of the Suspect for the Second Time by Corruption Eradication Investigators

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Abstract

The background of writing this journal article is the second time the determination of a suspect against Ilham Arief Sirajjudin (Petitioner), the former mayor of Makassar by investigators from the Corruption Eradication Commission (KPK). Previously, the Corruption Eradication Commission named the Petitioner as a suspect, but the Corruption Eradication Commission lost in pretrial because it named the Petitioner as a suspect but did not fulfill at least 2 valid pieces of evidence according to the Criminal Procedure Code. Therefore the pretrial judge granted the Petitioner's request and declared the KPK's determination of the suspect invalid with decision number 32/Pid.Prp/2015/Pn.Jkt.Sel on (Pretrial volume 1). Then, after the Pretrial Appellant was granted by the pretrial judge, several days later, the KPK again named the Petitioner as a suspect. However, the Petitioner again carried out pretrial efforts with one of his petitions namely that the Petitioner had won in the previous pretrial and the decision was final and binding on all parties, so if the KPK again named the Petitioner as a suspect it would create legal uncertainty for the Petitioner. However, in pretrial volume 2, the pretrial judge did not grant the Petitioner's request on the grounds that the KPK had determined the Petitioner according to procedure. And finally the Judge rejected the Petitioner's Pretrial with decision number 55/Pid.Prp/2015/Pn.Jkt.Sel. In the Pretrial Decision of the South Jakarta District Court Number: 32/Pid.Prp/2015/Pn.Jkt.Sel and 55/Pid.Prp/2015/Pn.Jkt.Sel there are two legal issues that the author will raise in this journal article In this case, the first problem is related to the determination of a suspect for the second time by Corruption Eradication Commission investigators against someone whose pretrial has been granted in relation to the principle of legal certainty. The second legal issue is related to the principle of Ne bis in idem in the Criminal Code which is linked to decisions Number: 32/Pid.Prp/2015/Pn.Jkt.Sel and 55/Pid.Prp/2015/Pn . Jkt.Sel regarding the determination of the suspect for the second time against someone. The purpose of writing a journal article to be achieved is to analyze the determination of a suspect for the second time by KPK investigators against someone who has been granted a pretrial based on the principle of legal certainty. Then the second objective is to analyze the existence of the Ne Bis In idem principle in the Criminal Code by pretrial decision regarding the determination of the suspect to return for the second time against someone. The conclusions drawn based on the writing of this journal article are first, the determination of a suspect for the second time against someone who has been

granted pretrial by KPK investigators does not conflict with the principle of legal certainty, because pretrial is purely administrative or formal in nature. Therefore, if the investigator is still convinced that the person has committed a crime, the investigator can re-establish that person as a suspect through the correct legal procedures. The second conclusion, the principle of ne bis in idem in the Criminal Code does not apply to pretrial decisions regarding the determination of a suspect for the second time against someone, because pretrial is administrative (formal) in nature, namely it only has the authority to examine and decide legal matters, not forced efforts and provide protection of human rights in a person at the level of investigation and prosecution and not examining matters at the time of trial or the main case.

Keywords: Legal Certainty, Second Time Suspect, Corruption

A. INTRODUCTION

1. Background

Pretrial is a new thing in the Indonesian judiciary. Pretrial is one of the new institutions introduced by the Criminal Procedure Code in the midst of law enforcement life, placed in Chapter X Articles 77-83 of the first part of the Code of Criminal Procedure as one part of the scope of judicial authority for district courts.

According to Article 1 point 10 of the Pretrial Code of Criminal Procedure, it is the authority of the district court to examine and decide in the manner provided for in the law regarding the lawfulness of an arrest and/or detention at the request of the suspect or his family or other parties on the suspect's authority, whether or not the termination of investigation and prosecution is valid on request for the upholding of law and justice, a request for compensation or rehabilitation by the suspect or his family or other parties for His attorney whose case was not brought to court. So pretrial intends to provide human rights protection to a person during the investigation process.

Against the pretrial decision referred to in Article 79 of the Code of Criminal Procedure regarding the request for examination on the lawfulness or lawfulness of an arrest or detention submitted by the suspect, family or kuasanaya to the chairman of the district court by stating the reasons, Article 80 of the Code of Criminal Procedure regarding the request to examine whether or not a termination of investigation and prosecution can be submitted by an investigator or public prosecutor or an interested third party

to the chairman of the district court with states the reasons, and Article 81 of the Code of Criminal Procedure regarding requests for compensation and / or rehabilitation due to unlawful arrest or detention or the legitimate consequences of stopping investigations or prosecutions submitted by suspects or interested third parties to the chief justice of the district court by stating that the reasons cannot be appealed.

The investigator will determine that a person is a suspect a second time even if the person has received a pretrial verdict if the investigator still believes the person committed a crime. This is a manifestation of legal certainty according to pretrial authority, where the rules in the law and its implementation must run properly. Legal certainty provides legal security for individuals from government arbitrariness and knowing what the government may charge or do to individuals.[1] But on the other hand, according to suspects who have been declared pretrial winners or granted pretrial and then determined again as suspects, this makes a law does not provide certainty for him because a court decision that he has obtained seems invalid.

Not only that, according to the suspect that the determination of the suspect for the second time in the same case where the suspect already has a pretrial ruling that has binding legal force, is not valid according to law because it is contrary to the principle ne bis in idem. What is meant by the principle of Ne bis in idem based on Article 76 of the Criminal Code (KUHP) is that unless the judge's decision can still be changed, people may not be prosecuted twice for acts that Indonesian judges have tried against him with a permanent verdict.

What we need to know based on the decision of the Constitutional Court (MK) Number 21/PUU-XII/2014 annex page 110 regarding the determination of suspects expands pretrial authority. The expansion of this Constitutional Court decision is contained in Article 77 Letter a of the Criminal Procedure Code, namely regarding the lawfulness or absence of arrest, detention, termination of investigation or termination of prosecution expanded to whether or not arrest, detention, termination of investigation or termination

[1] Peter Mahmud Marzuki, *Introduction to Law,* Jakarta : Kencana, 2009, p. 158.

of prosecution has no binding legal force as long as it is not interpreted including the determination of suspects, searches and seizures. This Constitutional Court ruling provides protection for the human rights of a person who experiences erroneous legal proceedings when determined as a suspect.

In this regard, there is a case related to a pretrial application that was initially granted on the first pretrial attempt and has permanent legal force, but because it was determined to be a suspect again by KPK investigators, the applicant made a second pretrial attempt but was not granted by the judge and finally the applicant was officially determined as a suspect in a corruption case, namely the verdict numbered: 32/Pid.Prp/2015/Pn.Jkt.Sel and 55/Pid.Prp/2015/Pn.Jkt.Sel. The case regarding Pretrial Volume 1 occurred in the South Jakarta District Court filed on April 10, 2015 by Ilham Arief Sirajuddin, former mayor of Makassar for the period 2004-2014 which allegedly harmed the State in the implementation of cooperation in rehabilitation, management and transfer of Panaikang Water Management II installation, between PDAM Makassar city and PT. Traya Tirta Makassar in 2007-2013.That on March 14, 2014, the Applicant was reported to the Corruption Eradication Commission (KPK) as stated in the Corruption Crime Incident Report Number: LKTP13/KPK/03/2014. And based on the report, the Applicant was then announced and determined as a Suspect by the Respondent on May 7, 2014.Furthermore on November 20, 2014 the Respondent issued an Investigation Warrant Number: Sprin.Dik20A/01/11/2014 which established the Applicant as a suspect.

However, on June 4, 2015 the KPK again issued an Investigation Incident Report Number: LPTK-8 / KPK / 06/2015 and a Corruption Incident Report Number: LPTK-9 / KPK / 06/2015, then on June 5, 2015 the KPK again issued an investigation warrant Number: Sprint.Dik-14/01/06/2015, and an investigation warrant Number: Sprint.Dik-15/01/06/2015 along with the determination of the APPLICANT as a SUSPECT for the same case for the second time. Then the applicant refiled a Pretrial attempt at the South Jakarta District Court on June 15, 2015 through his Attorney. There are several reasons for the applicant to apply for Pretrial for the second time contained in

the pretrial decision Number: 55 / Pid.Prp / 2015 / Pn.Jkt.Sel attachment page 19, one of which is that the Pretrial decision of the APPLICANT mentioned above has permanent legal force (*inracht van gewijds*) so that it binds the litigants and also the determination of Ilham Arief Sirrajudin as a Suspect in the same case for the second time is invalid because Contrary to the principle of nebis in idem.

This was affirmed by Indonesian Muslim University (UMI) Criminal Law Expert Prof. Hambali Thalib who asserted that "the new status of ILHAM (Applicant) has weaknesses in legal science. A person should not be charged twice with the same case because it would contradict the principle of *nebis en idem* which has the understanding that a person who has obtained a court decision cannot be re-prosecuted with the same case, then the same case, the same object and the same subject, cannot be tried twice for the same trial. Not only that, in the decision of another case, the pretrial case from La Nyala number 19/pra.per/2016/PN. SBY page 108 The judge also considered that the investigation for the second time into the East Java Province grant to the Chamber of Commerce must be declared a ne *bis in idem case.* Finally, on July 9, 2015, Pretrial Judge Amat Khusaeri, SH., M.Hum handed down Amar's decision with Number: 55/Pid.Prp/2015/Pn.Jkt.Sel appendix to the page judgment which contained the rejection of the Application of Petitioner Ilham Arief Sirajuddin in its entirety.

2. Problem Formulation

Based on the background described above, the following problems can be formulated:

1) Are suspects who have been granted pretrial and then re-designated as suspects for the second time by investigators of the Corruption Eradication Commission in the same case not contrary to the principle of legal certainty?
2) Does the *principle ne bis in idem* contained in the Criminal Code apply to pretrial rulings related to the second conviction of a suspect against a person?

B.DISCUSSION

1. The determination of a suspect for the second time by the Corruption Eradication Commission investigator against a person who has been granted pretrial in decision Number: 32/Pid.Prp/2015/Pn.Jkt.Sel is associated with the principle of legal certainty.

In principle, the main purpose of pretrial institutionalization in the Code of Criminal Procedure is to carry out horizontal supervision of acts of coercive efforts against suspects while they are under investigation, investigation or prosecution, so that they do not contradict the provisions of law and law.

According to Article 1 point 10 of the Pretrial Code of Criminal Procedure, it is the authority of the district court to examine and decide in the manner provided for in the law regarding the lawfulness of an arrest and/or detention at the request of the suspect or his family or other parties on the suspect's authority, whether or not the termination of investigation and prosecution is valid on request for the upholding of law and justice, a request for compensation or rehabilitation by the suspect or his family or other parties for His attorney whose case was not brought to court. What is formulated in Article 1 number 10 is affirmed in Article 77 Letters a and b, which explains: The District Court has the authority to examine and decide, in accordance with the provisions stipulated in this law on:

1) Whether or not the arrest, detention, termination of investigation or termination of prosecution is lawful,
2) Indemnity and/or rehabilitation for a person whose criminal case is dismissed at the level of investigation and prosecution.

The meaning of Article 77 Letter a above has been expanded by the decision of the Constitutional Court (MK) Number 21 / PUU-XII / 2014 annex page 110 with the words "Article 77 Letter (a) of Law Number 8 of 1981 concerning the Code of Criminal Procedure is contrary to the Constitution of the Republic of Indonesia Year 1945 as long as it is not interpreted including the determination of suspects, searches and penyitaan.MK making this

decision by considering Article 1 Paragraph 3 of the Constitution 45 which states that Indonesia is a State of law, so *the principle of due process of law* is upheld by all law enforcement agencies in order to respect one's human rights.

The invalid arrest **clause** in Article 77 (a) includes:

1) Based on Article 18 Paragraph 1 of the Code of Criminal Procedure, during the arrest process, the investigator does not show evidence of an arrest warrant that explains the identity of the potential suspect, a description of the reason for arrest and the place where he was examined.
2) Based on Article 18 Paragraph 2 of the Code of Criminal Procedure, when caught the arrest is made without a warrant, provided that after arrest it is not immediately handed over to the nearest investigator or auxiliary investigator along with the available evidence.
3) Pursuant to Article 18 Paragraph 3 of the Code of Criminal Procedure, a copy of the warrant as per Paragraph 1 is not given to his family immediately after the arrest occurs.
4) Based on Article 19 Paragraph 1 of the Code of Criminal Procedure, arrests are made for more than 1 day without any further process towards detention.

Arrest according to Article 1 Number 20 of the Code of Criminal Procedure is an investigative action in the form of temporary restraint of the freedom of a suspect or defendant if there is sufficient evidence for the purposes of investigation or prosecution and / or trial in the case and in the manner provided for in this law. From this explanation it can be understood, arrest is nothing other than the "temporary restraint" of the freedom of the suspect/accused, for the purposes of investigation or prosecution. According to Article 19 Paragraph 1 of the Code of Criminal Procedure, arrests have a maximum time limit of one day and must use an arrest warrant.[2] Pursuant to Article 17 of the Code of Criminal Procedure "An arrest order is made against a person convicted of committing a criminal offence based on sufficient preliminary evidence". The Criminal Procedure Code does not provide an explanation of sufficient preliminary evidence, such as a minimum limit on the

[2] M.Yahya Harhap, *Op.CIT* H 161.

number of evidence to determine a person to be a suspect. The definition of preliminary evidence according to Lamintang that: from the definition of preliminary evidence in 17 of the Code of Criminal Procedure, it is translated as "minimum evidence" in the form of evidence as referred to Article 184 (1) of the Code of Criminal Procedure, which can be a guarantee that the investigator when carrying out his duties in the form of investigating a person suspected of committing a crime, after the person should be suspected based on two valid evidence determined as a Suspect.[3]

Furthermore, another object of pretrial is detention. What is meant by unlawful detention includes:

1) Based on Article 21 Paragraph 2 of the Code of Criminal Procedure, further detention or detention is carried out by the investigator or public prosecutor against the suspect or defendant by not giving an arrest warrant or a judge's determination stating the identity of the suspect or defendant and stating the reason for detention and a brief description of the crime suspected or charged and the place where he is detained.
2) Based on Article 21 Paragraph 3 of the Code of Criminal Procedure, copies of detention warrants or continued detention or judge's determination as referred to in Paragraph 2 are not given to his family.

In Article 1 Number 21 of the Code of Criminal Procedure, detention is the placement of suspects or defendants in certain places by investigators or public prosecutors or judges with their officials, in the case and in the manner provided for in this law.

The restraining order given by the investigator as referred to in Article 20 of the Code of Criminal Procedure is only valid for a maximum of 20 days. If still needed again, it can be extended by the competent public prosecutor for 40 days.the purpose of this detention is for the purposes of investigation. If the interests of this investigation have been fulfilled for examination before the court, detention is no longer necessary.[4] Arrests and detentions are carried out by police officials of the Republic of Indonesia and certain civil servant officials

[3] Harun M. Husein*, Investigation and Prosecution of Criminal Proceedings*, Jakarta: Rineka Cipta, 1991, p.112.

[4] *Ibid*., h. 169.

who are given special authority by law stipulated in Article 6 Paragraph 1 of the Code of Criminal Procedure.

On other pre-judicial objects it is about the cessation of probation and prosecution. The cessation of probation and prosecution is said to be invalid when :

1) The reason for termination is interpreted incorrectly as not having legal grounds.
2) The termination is carried out in the personal interest of the official concerned.[5]

Investigation according to article 1 point 2 of the Code of Criminal Procedure is a series of actions carried out by investigators in accordance with the manner provided for in this law to search for and collect evidence that with that evidence makes light of the criminal act that occurred while finding the suspect or perpetrator of the crime.[6]

The formula contained in Pasa l number 2 KUHAP, the elements contained in the sense of the investigation are:

1) Investigation is a series of actions that contain actions that are interconnected with each other;
2) Investigations are conducted by public officials called investigators;
3) The investigation is carried out on the basis of the rules of law.
4) The purpose of the investigation is to find and collect evidence, which with that evidence makes light of the criminal act that occurred, and find the suspect.

Based on these four elements before the investigation, a criminal act was known but the crime was not clear and it was not yet known who committed it. The existence of criminal acts that are not yet clear is known from the investigation process.[7]

Meanwhile, prosecution according to Article 1 number 7 of the Code of Criminal Procedure is the action of the public prosecutor to transfer criminal

[5] *Op. cit* h 5.
[6] *Ibid*., h 109.
[7] Adami Chazawi, *Material Criminal Law and Formil Corruption in Indonesia,* Malang; Bayumedia Publishing, 2005, p 380.

cases to the competent district court in the case and in the manner provided for in this law with a request to be examined and decided by a judge in a court session. According to Article 137 of the Code of Criminal Procedure, the public prosecutor is authorized to prosecute anyone charged with a criminal act within his jurisdiction by transferring the case to the court authorized to prosecute. What is meant by public prosecutor according to Article 1 Number 6b is a prosecutor who is authorized by this law to conduct prosecutions and carry out the determination of judges.

The termination of the investigation and prosecution occurred because one of them was the results of the investigation or prosecution examination did not have enough evidence to continue the case to the court hearing. It could also be a case that is being investigated and will be prosecuted on the grounds *of Ne bis In Idem*, because it turns out that what is alleged against the suspect is a criminal act that has been tried or what is alleged to the suspect is not a criminal act.[8]

What is said to be the determination of suspects is invalid, among others, based on the decision of the Constitutional Court Number 21 / PUU-XII / 2014 regarding the determination of suspects annex pages 109-110 number 1.2 expanding pretrial authority and also Article 109 of the Criminal Procedure Code paragraph 1 is:

1) Sufficient preliminary evidence has not fulfilled at least 2 valid pieces of evidence as referred to in Article 184 of the Code of Criminal Procedure.
2) Not preceded by Sprindik's letter in the event that the investigator has begun investigating an event that constitutes a criminal offense, the investigator notifies the public prosecutor or the date on Sprindik is made after the determination of the suspect.

The determination of a suspect is the process of changing status from a non-suspect to a suspect based on Article 1 number 14 of the Criminal Procedure Code explaining that a suspect is a person who, because of his actions or circumstances based on preliminary evidence, should be suspected of being a criminal offender.

[8] M. Yahya Harahap.,*O.Cit*, H. 5.

The Constitutional Court (MK) Decision Number 21 / PUU-XII / 2014 annex page 109 has clarified the phrase sufficient preliminary evidence in Article 1 Number 14, Articles 17 and 21 of the Criminal Procedure Code, Preliminary evidence is regulated in Article 17 of the Criminal Procedure Code which explains that sufficient preliminary evidence is preliminary evidence to suspect a criminal act in accordance with Article 1 Number 14 of the Criminal Procedure Code.

Pretrial regarding the unlawful determination of a suspect may be filed by the suspect, his family or legal counsel under Article 95 of the Code of Criminal Procedure. Article 17 of the Criminal Procedure Code explains that sufficient preliminary evidence is preliminary evidence to suspect a criminal act in accordance with Article 1 Number 14 of the Criminal Procedure Code. Article 1 number 14 of the Criminal Procedure Code explains that a suspect is a person who, because of his actions or circumstances based on preliminary evidence, should be suspected of being the perpetrator of a criminal act.

According to Article 95 of the Code of Criminal Procedure, if an investigator commits such an act as the suspect or the owner of the house, his family or legal counsel may conduct pretrial efforts on the basis of an unauthorized search. A search pursuant to Article 1 Number 17 of the Code of Criminal Procedure is an investigator's action to enter residential houses and other closed places to carry out inspection and or seizure and/or arrest actions in the case and in the manner provided for in this law. According to Article 95 of the Code of Criminal Procedure, if the investigator commits such an act as the suspect or the owner of the house, his family or legal counsel may make pretrial efforts on the basis of unauthorized confiscation.

Confiscation according to Article 1 Number 16 of the Code of Criminal Procedure is a series of actions by investigators to take over and or keep under their control movable or immovable objects, tangible or intangible for the purposes of proof and investigation, prosecution and trial. The determination of suspects, searches and seizures is an extension of article 77 Letter a of the Code of Criminal Procedure by the Constitutional Court.Unlawful searches and seizures according to law are part of Article 95 Paragraph 1 of the Chapter on Indemnity and rehabilitation.

The regulation on the decision of the Constitutional Court (MK) Number 21/PUU-XII/2014 appendix pages 109-110 ''concerning the determination of suspects and preliminary evidence'', is closely related to the first pretrial case regarding the determination of suspects for alleged corruption cases with decision number 32/Pid.Prp/2015/Pn.Jkt.Sel in which KPK investigators determined Ilham as a suspect unlawfully because it was not preceded by sufficient preliminary evidence, namely with at least 2 pieces of evidence as stipulated in Article 184 of the Code of Criminal Procedure. It was on this consideration that the pretrial judge granted Petitioner's application for an invalid determination of the suspect. However, shortly after that KPK investigators determined the applicant as a suspect again and the applicant again made pretrial efforts for the second time with the same case, the pretrial judge based on decision number 55/Pid.Prp/2015/Pn.Jkt.Sel did not grant the petitioner's lawsuit because KPK investigators determined Ilham as a suspect based on sufficient preliminary evidence as stipulated in Article 184 of the Code of Criminal Procedure.

The expansion of the Constitutional Court decision number 21 / PUU-XII / 2014 annex page 110 contained in article 77 letter a of the Criminal Procedure Code, namely regarding the lawfulness or not of arrest, detention, termination of investigation or termination of prosecution is expanded to whether or not arrest, detention, termination of investigation or termination of prosecution has no binding legal force as long as it is not interpreted to include the determination of suspects, searches and seizures, Having legal considerations according to Criminal Law expert Bernard Arief Sidharta, namely the determination of suspects is part of the investigation process which is a deprivation of human rights, then the determination of suspects by investigators should be an object that can be requested for protection through pretrial institutional legal efforts.[9]

The element of legal protection emphasized through this decision is legal certainty that investigators must carry out investigative actions in accordance with applicable legal procedures. Talking about the principle of

[9] Iqbal Parikesit et al, *Review of Pretrial Objects in the Criminal Justice System in Indonesia,* Diponegoro Law Journal, No.1 Vol.6, 2017. p. 21.

legal certainty means also having to talk about the principle of legality. This must always be together and cannot be separated because the principle of legal certainty is the desired result of the principle of legality. The principle of legality contained in Article 1 paragraph 1 of the Criminal Code states that no act can be punished except for the provisions of criminal rules in laws and regulations that existed before the act was committed. If after the act is committed there is a change in the laws and regulations, then the lightest sanction is used for the defendant Article 1 Paragraph 2 of the Criminal Code.[10] The purpose of this principle is to establish legal certainty and prevent the arbitrariness of the rulers of the State.[11]

The Code of Criminal Procedure is designed to ensure a fair and consistent legal process commonly called *due process of law*and in *due process of law tests* two things, namely:

1) Whether the state has removed the right to life, liberty and title of the Suspect without the legal regulation procedures in place;
2) If using applicable legal regulation procedures, whether the procedure is in accordance with due *process.*[12]

From the pretrial understanding and also about the purpose and purpose of the emergence of pretrial institutions above, to a legal certainty regarding the pretrial decision number: 32 / Pid.Prp / 2015 / Pn.Jkt.Sel, namely against a suspect named Ilham Arief Sirajuddin, former mayor of Makassar for the period 2004-2014 who was determined as a suspect by investigators from the Corruption Eradication Commission (KPK) who then made pretrial efforts for the determination of unauthorized suspects, Then it was granted by the judge by declaring Ilham free from suspect status on Tuesday, May 12, 2015, then determined as a suspect again by KPK investigators on June 4, 2015 and made a second pretrial attempt on the grounds that the determination of the suspect was invalid according to law on June 15, 2015 but was rejected by the judge through decision number

[10] Moeljatno,Asas-Asas *Government Pidana,* Jakarta:Rineka Cipta, 1993 h 25.

[11] Teguh Prasetyo, *Criminal Law*, Depok: Raja Grafindo: 2017. h 39.

[12] M Schinggyt Tryan P et al, *Juridical Review of the Implementation of the Presumption of Innocence in the Criminal Justice Process,* Diponegoro Law Journal, Vol.5, 2016. h 11

55/Pid.Prp/2015/Pn.Jkt.Sel. According to suspects who have been declared pretrial winners or granted pretrial and then determined again as suspects, this makes the applicable law not provide certainty for him because a court decision that he has obtained seems invalid.

However, the author disagrees if the reassignment of a suspect against someone who already has a pretrial ruling declaring himself free from suspect status is contrary to the principle of legal certainty. According to Article 83 Letter a of the Criminal Procedure Code, pretrial decisions in matters referred to in Articles 79, 80 and 81 cannot be appealed.

The pretrial decision may change if the investigator makes another investigation and determines the person to be a suspect again through a procedure based on law or *due process of law* , which is based on sufficient preliminary evidence, and also the investigator must be sure that the person is really the perpetrator of the crime and guilty. This rule states that it is permissible not and the procedure is in writing, this is a reflection of the principle of legality in the Criminal Procedure Code. The meaning of this principle of legality is none other than and may not mean that no act is prohibited and threatened with crime if the act has not been stated in a written rule first. This means that the Criminal Procedure Code does state that way and from the existence of the rule it must be applied in order to create legal certainty.[13]

The principle of legality or *nullum dilectum nulla poenasine praevia lega* is a principle initiated by Von Feurbach which originally came from his own theory, namely the theory of *vorn psychologichen zwang* , which reads that determining the actions prohibited in the regulations must not only be written clearly, but also with the types of crimes listed. The formulation of this theory is now called the principle of legality and cannot be separated from the principle of legal certainty.[14]

So based on the results of the above analysis, the author concludes that the determination of suspects for the second time,'' which is regulated in

[13] Teguh Prasetyo, *Op.Cit*, p 39.

[14] Deni Setyo Bagus Yuherawan, *Deconstruction of the Principle of Legality of Criminal Law,* Malang: Setara Press, 2014, p. 37.

Constitutional Court Decision Number 21 / PUU-XII / 2014 annex page 110 expansion of Article 77 Letter a of the Criminal Procedure Code, namely regarding the validity or not of arrest, detention, termination of investigation or termination of prosecution expanded to the validity or not of arrest, detention, termination of investigation or termination of prosecution has no binding legal force as long as not interpreted to include the determination of suspects, searches and seizures'', against a person who has been granted pretrial does not contradict the principle of legal certainty. Because the pretrial stipulated in Article 83 Letter a of the Criminal Procedure Code does not recognize any appeals, based on Law Number 5 of 2004 concerning Amendments to Law Number 14 of 1985 concerning the Supreme Court in Article 45A paragraphs 1 and 2 it is not allowed to carry out cassation and based on the Supreme Court Regulation (PERMA) Number 4 of 2016 concerning the prohibition of review of pretrial decisions in Article 3 is also not allowed to conduct a review because Pretrial is a quick, simple and only administrative procedural trial (Formil). This is a manifestation of the principle of legal certainty applied through existing written regulations or the principle of legality. Therefore, the investigator will determine the suspect for the second time against a person who already has a pretrial ruling declaring himself free from suspect status, provided that the investigator still believes that the person has indeed committed a crime through *due process of law*or procedures based on the law.

2. The principle of *ne bis in idem* contained in the Criminal Code is associated with pretrial decisions Number: 32/Pid.Prp/2015/Pn.Jkt.Sel and 55/Pid.Prp/2015/Pn.Jkt.Sel.

Speaking of the Criminal Procedure Code, in the Criminal Procedure Code lawmakers have deliberately created a horizon of criminal procedural law full of Indonesian human rights ornaments, as a light of prosecution that also serves as a shield for themselves in the face of the authority given by law to law enforcement officials. The Criminal Procedure Code has also raised and placed the dignity of suspects or defendants in an equal position, as God's beings who have complete human dignity. Suspects or defendants have been

placed in *the position of his entity and dignity as a human being,* which must be treated in accordance with noble human values The law must be enforced, but in its implementation law enforcement against suspects must not be stripped of the main human rights inherent in them. The main rights prohibited by the Criminal Procedure Code are lived in from the suspect's person, along with rights and positions and obligations before the law, must be presumed innocent.[15]

Legal certainty contains two meanings, namely the first, the existence of general rules that make individuals know what actions can or cannot be done. The second is in the form of legal security for individuals from government arbitrariness because with the general rules, individuals can find out what the State may charge or do to individuals[16].

To create justice and certainty, a person who has received a court decision should not be re-prosecuted with the same case, the same time and the same place, because this will put pressure on the defendant who has obtained the judge's decision. One of the rules for the realization of legal certainty in criminal law is to recognize the term *azasne bis in idem*which is regulated in article 76 of the Criminal Code. According to article 76 paragraph 1 of the Criminal Code (KUHP), *the principle ne bis in idem* is that a person may not be prosecuted twice for actions that have received a verdict that has the force of law. The enactment of *the Ne bis In Idem Principle* depends on one of the things that states that a decision has been made against a person that remains irreversible by the judge for a criminal event such as the imposition of punishment, acquittal from all lawsuits and acquittal. The implementation of the *principle ne bis in idem* is affirmed by the Supreme Court Circular No. 3 of 2002 concerning the Handling of Cases Related to *the Principle of Ne bis in idem* that the heads of the courts to be able to implement *the Principle of Ne bis in idem* properly for the sake of certainty for justice seekers by avoiding different decisions.

The case related to *Ne bis In idem* is closely related to the case that the author will analyze, namely the Pretrial decision regarding the determination

[15] M. Yahya Harahap, *Op.Cit*, H. 1.
[16] Peter Mahmud Marzuki, Op.Cit, h. 159.

of suspects for alleged corruption cases Number: 32 / Pid.Prp / 2015 / Pn.Jkt.Sel which granted the Petitioner's pretrial lawsuit for the determination of unauthorized suspects, then not long ago was prosecuted and determined as a suspect again by the Corruption Eradication Commission investigators and conducted a pretrial lawsuit again for a second the time but not granted by the judge with decision number: 55/Pid.Prp/2015/Pn.Jkt.Sel. Corruption is a criminal act as referred to in Law R.I Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Criminal Acts such as the act of enriching oneself with the position he has.

While the Criminal Procedure Code does not specify the form of pretrial rulings, Yahya Harahap sets a benchmark for how to formulate the form of pretrial rulings. Departing from the principle of speedy proceedings, the form of pretrial rulings should adapt to the nature of the speedy proceedings. So the form of pretrial judgment is quite simple without prejudice to the content of clear considerations based on law and statute. Do not let the simplicity of the form of judgment deprive clear and adequate consideration.[17] Judges in handing down pretrial decisions tend to use more juridical considerations than non-juridical considerations[18], because pretrial is only formal or administrative only by looking at legal aspects not coercive efforts, therefore will not look at circumstances such as the background of the act, the consequences of the act, the psychological condition of the defendant, his socioeconomic and religious conditions. Juridical considerations are judges' considerations based on juridical facts revealed in the trial and by law have been determined as matters that must be contained in the judgment, which are intended, including, the charges of the public prosecutor, statements of defendants and witnesses, evidence, articles in criminal law regulations, and so on. Non-juridical considerations are more suitable to be used in the trial of

[17]Salman Luthan et al, *Pretrial in Indonesia: Its Theory, History, and Practice,* Institute for Criminal Justice Reform, South Jakarta, 2014, p. 30.

[18] Rusli Muhammad, *Contemporary Criminal Procedure Law*, Bandung : Citra Aditya Bakti, 2007 , p. 212

the subject matter or conviction, because it looks at the side of the defendant's life situation. These living circumstances will be described below: [19]

1) Background of deeds
2) Consequences of the defendant's actions
3) The condition of the defendant
4) The social state of the defendant's economy
5) Religious factors of the defendant

The form of pretrial rulings is almost similar to voluntary rulings in civil proceedings. It can be said that pretrial rulings are also declaratory in nature which contain statements about the lawfulness of arrest, detention, search or seizure. Of course, without prejudice to the nature of the condemnatoir in the compensation award, the order to remove the suspect or defendant from custody if the detention is declared invalid. Also an order to continue the prosecution if the termination of the investigation is declared invalid. This reason is sufficient to be the basis for the form and making of the decision, namely by the form of determination that contains a series of unity between the minutes and the content of the decision. So the decision is not made specifically but recorded in the minutes as stipulated in Article 203 of the Code of Criminal Procedure paragraph (3) letter d.

Meanwhile, the content of the decision or pretrial determination is regulated by Article 82 of the Criminal Procedure Code paragraph (2) and paragraph (3). Article 82 Paragraph 2, reads: "The judge's decision in the pretrial examination on matters referred to in article 79, article 80 and article 81, must clearly contain the basis and reason".

Article 82 Paragraph (3), reads: "The content of the decision in addition to containing the provisions referred to in Paragraph (2), also contains the following:

1) In the event that the verdict establishes that a termination or detention is invalid, then the investigator or public prosecutor at the respective level of examination shall immediately release the suspect.

[19] *Ibid*., h. 216-221

2) In the event that the judgment determines that an investigation or prosecution is invalid, the investigation or prosecution of the suspect shall continue.
3) In the event that the decision determines that an arrest or detention is invalid, the amount of compensation and rehabilitation provided is not stated in the judgment while in the event that a termination of investigation or prosecution is valid and the suspect is not detained, then the judgment includes rehabilitation.
4) In the event that the judgment stipulates that the seized object is not included in the evidence, then the judgment states that the object must be immediately returned to the suspect or from whom the object was seized.

Thus, in addition to containing the basic reasons for legal considerations, pretrial determinations must also contain orders. The order that must be included in the determination is adjusted to the reason for the inspection request on which the content of the determination is based. Then the pretrial determination may be a statement containing the pretrial application. For pretrial whether or not an arrest or detention is legal, the judgment must also contain a statement about the lawfulness of the arrest or detention.[20] If the decision is based on the provisions of Article 82 paragraph (1) point c, then this provision explains that the pretrial hearing examination process is carried out with a speedy event.

Returning to the principle, from the understanding of the ne *bis in idem principle* in the content of the Criminal Code regulations and pretrial decisions above, the author has examined the relationship between *the ne bis in idem* principle in the Criminal Code and pretrial decisions as follows: pretrial verdict on behalf of Ilham arief sirajjudin, former mayor of Makassar for the 2004-2014 period, who was determined as a suspect by investigators from the Corruption Eradication Commission (KPK) who later carried out Resistance through pretrial efforts against the determination of invalid suspects, was granted by the judge by declaring Ilham free from suspect status on Tuesday, May 12, 2015 based on decision number: 32/Pid.Prp/2015/Pn.Jkt.Sel.

[20] *Ibid.,* h. 56.

However, Ilham was named as a suspect again by KPK investigators on June 4, 2015, and made a second pretrial attempt on the grounds that the determination of the suspect was not valid according to the law because it had deviated the principle ne *bis in idem contained* in the Criminal Code. However, on June 15, 2015, his pretrial application was rejected by the panel of judges through decision number 55/Pid.Prp/2015/Pn.Jkt.Sel.

From the above legal issues, the author provides the following legal reasoning: The pressure point *of nebis in idem lies* in the prosecutorial authority possessed by the State, the principle of *nebis in idem provides* protection to ensure that a person is tried only once in a fair trial for an act alleged to him (but not in the sense of ordinary and extraordinary legal remedies). The alleged act must be exactly the same, based on tempus delicti and *locus deliciti.* In other words, if a person commits another criminal act or another act with a different locus and tempus or repetition of the crime, then he can carry out another prosecution. Pretrial only has the authority to examine and decide on coercive measures such as arrest, detention, termination of investigations and prosecutions from law enforcement officials as well as matters of compensation and determination of suspects, searches and seizures. Pretrial is established to provide human rights protection to a person at the level of investigation and prosecution. Pretrial focuses on pretrial actions, so pretrial does not have the authority to examine matters at the time of the hearing or subject matter. Explicitly this can be seen in Article 82 of the Code of Criminal Procedure paragraph 1 letter d which states that "in the event that a case has begun to be examined by the district court, while the examination regarding the request to pretrial has not been completed, the request is void". The arrangement shows that there are different dimensions and jurisdictions from pretrial to subject matter examination. Directly pretrial is also only intended to examine the formal aspect. This aspect is only legitimate, not a coercive effort and is not related to the examination of the subject matter.[21] The enactment of the legal basis *of Ne bis in idem* or the condition *of Ne bis in idem*depends on the matter, that a decision has been

[21]www.hukumonline.com/2017/12/ ne-bis-in-idem-i-in-pretrial-this-so-expert-explanation.

made against a judge with an unmodified sentence, in which the decision contains:

1) *Veroordering*. According to the judge, the defendant has been proven to have legally and convincingly committed a criminal act based on at least 2 pieces of evidence contained in Article 184 of the Code of Criminal Procedure. In this case by the judge it was decided that the defendant had been guilty of the criminal event for which he was accused.
2) Acquittal or acquittal from prosecution (*onstlag van rechtvervolging*). According to Article 191 Paragraph 2 of the Code of Criminal Procedure In this case the judge decides that the alleged event is proven by sufficient evidence or light enough, but in the judge's view it is not a criminal event.
3) Free verdict (*vrzjspraak*). According to Article 191 Paragraph 1 of the Code of Criminal Procedure, this decision means that the guilt of the accused that has been accused is not enough valid and convincing evidence because there is no element of unlawful acts committed by the defendant.

If there is already a judge's decision, then a person cannot be prosecuted a second time or in the sense of deviance *Azas nebis in idem*, unless it is still possible to have higher legal remedies such as appeals and cassation and even judicial review. Against convictions, release and acquittal cannot be re-prosecuted, efforts that can be made are higher legal remedies such as appeals, cassation and judicial review. If within the stipulated time there is no higher legal challenge, then it means that the court decision has the force of binding law or *Incraht*. However, based on Article 67 of the Criminal Procedure Code, it states that free and free verdicts cannot be appealed, according to Article 244 of the Criminal Procedure Code, free judgments cannot make cassation, that means free verdicts can still make cassation without first appealing. Based on Article 263 of the Code of Criminal Procedure, free and free verdicts cannot be requested for judicial review.In its development, the Constitutional Court through its decision No.114/PUU-X/2012 has deleted the phrase except for the free verdict of Article 244 of the Criminal Code. Previously, Article 244 of the Criminal Code stated that free verdicts could not be requested for cassation legal remedies, but with this Constitutional Court decision, all free verdicts, whether pure or impure, could be requested for cassation legal remedies. In

the author's view, this is a setback to the protection of the rights of defendants and does not provide legal certainty to defendants who have been found not guilty in court proceedings

Although the **decision** has permanent legal force, not all types of judges' decisions that have the force of law remain with the same criminal case cannot be prosecuted and retried and declared as criminal cases that have been *Ne Bis In Idem*. In this case, it can still be prosecuted, if the verdict handed down by the court in a criminal case is on the eventthat the act charged against the defendant is proven but the act is not a criminal offense, then the defendant is discharged from all lawsuits. This means that the release judgment can still be prosecuted again in other courts, namely civil or administration. If the crime charged against the defendant is outside the criminal event or the charge is defective, which is in the form of a formal verdict, then the judgment cannot be attached to the element *Ne bis in idem***.** Decisions that have the force of law will still be examined and reheard and cannot be declared to have fulfilled the elements ne *bis in idem* has the following characteristics:

1) Verdict declaring the Indictment Null and Void.
2) The verdict declaring the Indictment inadmissible.
3) A ruling declaring the court not authorized to adjudicate.

"Of the three types of judgments mentioned above, there cannot be attached *ne bis in idem elements*, because the verdict handed down by the judge is a verdict that does not concern criminal events and only until the conviction of the defendant, even though the verdict has permanent legal force".[22] The three rulings above will actually hear matters related to the substance of the case, not about the lawfulness of coercive efforts as in pretrial trials. However, because there are formal matters that are not fulfilled, therefore the judge declared it null and void and can still be re-sued. This emphasizes that pretrial rulings are still possible to repeat the determination of someone as a suspect again because pretrial is a trial that is formal or administrative just like the decision above.

[22] Mairiko Alexander Kotu, *Application of the Nebis In Idem Principle in Putusan Perkara Pidana*, Lex et Societatis, Vol. IV/No. 2/Feb/2016/Edisi Khusus. H. 106.

So based on the analysis of the case above, the author concludes that the *principle ne bis in idem* regulated in Article 76 of the Criminal Code (KUHP) is irrelevant if it is used for pretrial decisions related to the determination of suspects again for the second time against someone who already has a pretrial decision, because pretrial trials are only administrative (formal), meaning in regulated Pretrial In Article 77 letter a of the Criminal Procedure Code and the decision of the Constitutional Court (MK) Number 21 / PUU-XII / 2014 annex page 110 it only has the authority to examine and decide whether or not it is valid regarding coercive efforts such as arrest, detention, termination of investigation and prosecution from law enforcement officials including the determination of suspects, searches and seizures. This aspect is only legitimate, not a coercive effort and is not related to the examination of the subject matter. As the author explained above, the *principle of Ne bis in idem* does not apply to formal or administrative decisions. Pretrial is established to provide human rights protection to a person at the level of investigation and prosecution. Pretrial focuses on pretrial actions, so pretrial does not have the authority to examine matters at the time of the hearing or subject matter. Explicitly this can be seen in Article 82 of the Code of Criminal Procedure paragraph 1 letter d which states that "in the event that a case has begun to be examined by the District court, while the examination of the request to pretrial has not been completed, the request is void". The arrangement shows that there are different dimensions and jurisdictions from pretrial to subject matter examination.

C. CONCLUSION

1) The determination of a suspect for the second time in a Corruption Crime by a Corruption Eradication Commission Investigator against a person who has had a pretrial verdict does not contradict the principle of legal certainty because pretrial is only administrative or formal. This means that the examination still does not touch the subject matter of the case even though based on the decision of the Constitutional Court Number 21 / PUU-XII / 2014 annex page 110 has expanded the object of pretrial which includes Article 77 Letter a of the Criminal Procedure Code, namely

regarding the lawfulness or not of arrest, detention, termination of investigation or termination of prosecution expanded to whether or not arrest, detention, termination of investigation or termination of prosecution has no binding legal force as long as Not interpreted to include the determination of suspects, searches and seizures. Thus, the determination of suspects for the second time by KPK investigators does not contradict the principle of legal certainty and also the rights of suspects protected by the Criminal Procedure Code, because based on the Constitutional Court decision Number 21 / PUU-XII / 2014 annex page 109 investigators in determining the status of a person to be a suspect or defendant must be based on at least 2 valid evidence jo Article 183 of the Criminal Procedure Code.

2) The principle *of Ne bis in idem* regulated in Article 76 paragraph 1 of the Criminal Code (KUHP) cannot be applied to pretrial decisions related to the determination of suspects for the second time, because the principle of *ne bis in idem* as stipulated in Article 76 of the Criminal Code only applies to matters of examining the subject matter. This is in accordance with the understanding of the principle of *Ne Bis In Idem*Article 76 paragraph 1 of the Criminal Code which reads: a person may not be prosecuted twice for actions that have received a verdict that has the force of law. Explicitly this can be seen in Article 82 of the Code of Criminal Procedure paragraph 1 letter d which states that in the event that a case has begun to be examined by the District court, while the examination of the request to pretrial has not been completed, the request is void. The arrangement shows that there are different dimensions and jurisdictions between pretrial examination and subject matter examination.

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