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REFORMULATION OF THE PRELIMINARY EVIDENCE AUDIT TYPE IN TAXATION: WHEN LEGAL HERMENEUTICS MEETS THE RULE OF LAW (PART 1 OF 2)[1]

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Abstract

The existence of facts in the form of two pretrial decisions decided that the two preliminary evidence examinations were invalid and declared null and void. It needs to address the shift in meaning that led to this type of preliminary evidence examination. Two conclusions can be drawn based on the legal hermeneutics method, which is framed within the framework of the rule of law. First, there has been a shift in the meaning of preliminary evidence examination contained in the KUP Law, namely the existence of a closed type of preliminary evidence audit in Government Number 74 of 2011 and PMK Number 239/PMK.03/2014. This meaning can be a problem in terms of tax enforcement that must be proportional to upholding legal certainty, public benefits, and justice, and in terms of administering government administration which must be based on the principle of legality, the focus of protection of human rights, and the general direction of good governance. Second, the reformulation of preliminary evidence audit must be carried out by eliminating the prevailing type of closed preliminary evidence audit. As the understanding and explanatory side of legal hermeneutics has defined preliminary evidence examination as a series of activities carried out by preliminary evidence auditors against individuals and or entities related to circumstances, actions, and/or evidence that can provide indications of a strong suspicion that a crime in the taxation sector is being or has occurred and can cause losses to state revenue. It is necessary to delete the legal text related to the type of closed preliminary evidence audit in a secure manner.

1. INTRODUCTION

Audit of Preliminary Evidence has become the object of pretrial, as the discovery of 2 (two) recent pretrial decisions related to the study of origin in the field of taxation in Indonesia. First, the District Court (PN) Sanggau, West Kalimantan, in 2021, decided the ini-

[1] *Disclaimer: This article is a private scientific study of the researcher and does not reflect the institution's opinion/policy.

tial examination of a tax crime against PT. SLM is legally flawed and invalid.[2] Second, the decision of the Siantar District Court, which decided the Preliminary Evidence Audit against CV. FJ is invalid and declared void.[3]

These two decisions show that the judge has made a legal discovery regarding the pretrial audit of preliminary evidence. This can be a problem in the study of insufficient evidence in the future, especially in the case of conducting a closed preliminary evidence audit which, although carried out by civil servant investigators (PPNS) within the Directorate General of Taxes (DGT), is identical to investigations that can only be carried out by the Indonesian National Police (Polri). Or in other words, a closed examination of preliminary evidence has the potential or vulnerability to be submitted to pretrial by the Assessable as explained in Article 43A paragraph (1) of Law Number 6 of 1983 concerning General Provisions and Tax Procedures as amended several times, most recently by Law Number 7 of 2021 concerning the Harmonization of Tax Regulations (UU KUP) states that the examination of preliminary evidence has the same purpose and position as the investigation, even though Article 1 point 4 of Law Number 8 of 1981 concerning the Criminal Procedure Code has confirmed that the investigator is an official the state police of the Republic of Indonesia who is authorized by this law to conduct investigations. Thus, the pretrial victory must be the basis for the DGT to improve the regulations for examining preliminary evidence in obtaining and increasing state revenues from the tax sector. One focus of improving the code on preliminary evidence audit is the type of preliminary evidence audit, which is based on the prevailing law in the Government Regulations and Minister of Finance Regulations (PMK), which currently consists of an open and closed Preliminary Evidence Audit.

The existence of two types of preliminary evidence audit in the taxation sector can be a problem considering that a preliminary evidence audit is a form of law enforcement in the DGT environment. This means that tax law that is implemented and enforced must always pay attention to the elements of legal certainty, expediency, and justice.[4] As its scope reaches out to the role of taxes to continue to encourage sustainability and social justice for all assessable in Indonesia while still paying attention to assessable rights in the form of the right to life, the right to self-improvement, the right to actively participate in developing the country, and the right to participate in the recovery and mitigation of tax revenue losses suffered by the state.[5] It confirms that proper examination of preliminary evidence must provide judicial protection against arbitrary actions and meet public

[2] Investor, "Ditjen Pajak Kalah Praperadilan Pemeriksaan Bukti Permulaan", 7 Juli 2021, available at https://investor.id/national/250798/ditjen-pajak-kalah-praperadilan-pemeriksaan-bukti-permulaan, accessed on March 30, 2022.

[3] Beritasatu, "Dirjen Pajak Kalah Lagi Praperadilan di PN Pematang Siantar", 11 Mei 2022, available at https://www.beritasatu.com/nasional/925989/dirjen-pajak-kalah-lagi-praperadilan-di-pn-pematang-siantar, accessed on June 29, 2022.

[4] Sudikno Mertokusumo, 2022, Mengenal Hukum: Suatu Pengantar, Yogyakarta: CV. Maha Karya Pustaka, p. 223.

[5] Henry Dianto Pardamean Sinaga, and Anis Wahyu Hermawan. (2020). Reconstruction Of The Ultimum Remedium Principle Of Administrative Penal Law In Building A Sociological- Opposed Tax Investigation In Indonesia. A Y E R Journal, 27(2), 50 - 71. pp. 50,67.

expectations of the benefits of implementing tax enforcement (not otherwise causing unrest in the community).[6] However, it is realized that tax enforcement must always be based on laws and regulations that are general in nature, binding on everyone, and equal in nature, which have the potential to be constrained by imperfections and or incompleteness and or ambiguity of the applicable laws and regulations so that disputes or conflicts or problems or injustices can occur in its implementation.[7] As one of the facts, it can be seen from several decisions of the District Court judges who decided that some preliminary evidence audits carried out by the DGT were invalid or legally invalid and declared null and void.

Potential legal problems related to the shift in the meaning of this type of preliminary evidence audit must be addressed immediately. In this case, it is sufficient to use the study of legal hermeneutics in revealing the meanings given by law enforcers for law enforcement and their implications, considering that one of the duties of law enforcement is to interpret legal texts or statutory regulations that are used as the basis for consideration and interpret events and legal facts. The use of legal hermeneutics in interpreting the types of preliminary evidence examination is expected to answer the two problems that exist in redesigning the ideal type of preliminary evidence audit. First, how does the meaning of the type of preliminary evidence audit shift in the prevailing law? Second, how is the legal reformulation of preliminary evidence audit in Indonesia in the future?

2. METHODS

Considering that the object of this study is a (legal) text related to the type of preliminary evidence audit, this study is adequate by using a qualitative approach with the hermeneutic method. Data in the form of thoughts and ideas related to law and preliminary evidence checks are collected based on a study of literature and rules and regulations associated with this study, both those that are still valid and those that are no longer valid or have been revoked. Legal hermeneutics can be understood as a "method of interpretation of legal texts" where the correct interpretation of legal texts must always be related to the contents (legal rules), both expressed and implied, or between the sound of the law and the spirit of the law. In the hermeneutic sense, the essential function of language in human life is understood as the structure and meaning, its use in life, and the process of language, which describes the entire human reality.[8]

For the interpretation of (legal) texts related to the type of preliminary evidence examination to be correct, the study of hermeneutics uses scientifically justifiable methods to adequately explain the conceptual factors involved in using such interpretations.[9] Methodological hermeneutics presupposes that there is a truth behind the text, and to re-

[6] Sudikno Mertokusumo, 2020, Bab-Bab Tentang Penemuan Hukum, Bandung: PT. Citra Aditya Bakti, pp. 1-2.
[7] Sudikno Mertokusumo, 2020, Penemuan Hukum: Sebuah Pengantar Yogyakarta: CV. Maha Karya Pustaka, p. 46.
[8] Kaelan, Filsafat Bahasa Semiotika dan Hermeneutika, (Yogyakarta: Penerbit Paradigma, 2017), p. 264.
[9] Fajar Sugianto, Tomy Michael, dan Afdhal Mahatta, *Op.cit.*, p. 309.

veal this truth, requires methods of performance that are relatively good while at the same time finding objective meaning with valid methods.[10] So with the use of the hermeneutic approach, this study can explore and examine the legal implications behind the phenomena contained in the type of preliminary evidence examination through interpretation, [11] and objective measures in legally interpreting a legal uncertainty can be achieved.[12] The hermeneutic method is expected to produce conclusions and suggestions on what to do to overcome existing problems (prescription).[13]

3. REVIEW LITERATURE

A. Legal Hermeneutics and the Rule of Law

Tax enforcement should be framed with a legal hermeneutics perspective so that common ground can be obtained and easier to implement.[14] This is based on tax enforcement which cannot be separated from interpretation and explanation, as interpretation and reason in the perspective of legal science as a normative science which is two sides in hermeneutics.[15] Then, legal hermeneutics is growing with the basic assumption that law as a social construction is a text, discourse, or argument that needs to be constantly observed and interpreted.[16]

Several ideas show the urgency of using legal hermeneutics in law enforcement. Dewi emphasized the urgency of using legal hermeneutics so that legal reviewers can explore and examine legal meanings from both the reader's perspective and from justice seekers, considering that legal hermeneutics is to free legal studies from the authoritarianism of positive jurists.[17] Sugianto, Michael, and Mahatta assert that hermeneutics plays a vital role in new legal materials and in processing legal materials into legal decisions to deal with problems that want legal justice to be achieved, as the purpose of hermeneutics in legal science is to interpret and explain texts written legal texts and their characteris-

[10] Nyana Wangsa dan Kristian, *Hermeneutika Pancasila: Orisinalitas & Bahasa Hukum Indonesia*, (Bandung: PT. Refika Aditama, 2015), p. 13.
[11] M. Syamsudin, Pemaknaan Hakim tentang Korupsi dan Implikasinya pada Putusan: Kajian Perspektif Hermeneutika Hukum, Mimbar Hukum, Vol. 22, No. 3, 2010, p. 501.
[12] Fajar Sugianto, Tomy Michael, dan Afdhal Mahatta, *Op.cit.*, p. 311.
[13] Soerjono Soekanto, 2010, Pengantar Penelitian Hukum, Jakarta: Penerbit Universitas Indonesia, p. 10.
[14] Agus Budi Susilo, Penegakan Hukum yang Berkeadilan dalam Perspektif Filsafat Hermeneutika Hukum: Suatu Alternatif Solusi Terhadap Problematika Penegakan Hukum di Indonesia, Perspektif, Vol. 16, No. 4, 2011, p. 214.
[15] Fajar Sugianto, Tomy Michael, dan Afdhal Mahatta, Konstelasi Perkembangan Hermeneutika dalam Filsafat Ilmu sebagai Atribusi Penafsiran Hukum, Negara Hukum, Vol. 12, No. 12, 2021, p. 323.
[16] Urbanus Ura Weruin, Dwi Andayani B.., St. Atalim, Hermenutika Hukum: Prinsip dan Kaidah Interpretasi Hukum, Jurnal Konstitusi, Vol. 13, No. 1, 2016, p. 101.
[17] Anak Agung Istri Atu Dewi, Urgensi Penggunaan Hermenutika Hukum dalam Memahami Problema Pembentukan Peraturan Daerah, Kertha Patrika, Vol. 39, No. 3, 2017, p. 161.

tics, both grammatical and historical meanings, to achieve the text being studied is relevant and significant in answering the existing problems.[18]

Then, Mahfud argued that the urgency of legal hermeneutics lies at the core of its activities to interpret juridical texts to distill the legal rules contained in the juridical text and thereby determine the meaning and area of application.[19] Meanwhile, Gregory Leyh asserts that legal hermeneutics does not presuppose the existence of a single or dogmatic conception in hermeneutics, considering that the law has a stable and definite tendency, so that legal hermeneutics is an effective tool to promote a more civilized and just politics in dispelling any attempt to understand formalistic law that always uses stability and certainty as his shield.[20] Furthermore, Francis Lieber stated that the law must use hermeneutics to understand the text, word, or content of the law itself because people often use this science field to manipulate language, interpretation, and construction for their interests and purposes in carrying out 'evil interpretations.' ', 'wrong interpretation,' or 'deviation by throwing new terms' to cover up violations in the hope that there will be a legalizing effect from using new words that sound technical.[21] Meanwhile, Alef Musyahadah emphasized that the legal hermeneutic approach can be used as an effort to build a comprehensive legal interpretation so that legal construction is not trapped in the performance of the text alone but still takes into account the relationship between the text, context, and contextualization in revealing the truth.[22]

Several related thoughts show that the meaning and application of the type of preliminary evidence audit cannot be separated from the legal hermeneutics contained in the texts of tax laws and regulations, both in grammatical and historical meanings. The application of legal hermeneutics must be within the framework of the rule of law so that it can reveal the truth and can achieve legal justice in the field of taxation in improving compliance with the implementation of rights and fulfillment of tax obligations of each legal subject. The application of legal hermeneutics to legal truth and justice in the field of taxation must still contain the attributes of a state of law, which according to Dicey, consists of the supremacy of law, equality before the law, and due process of law,[23] and which was further developed by Fuller into 8 (eight) attributes, namely generality, publicity, prospectivity, clarity, non-contradictoriness, the capability of compliance, stability, and the congruence between declared rules and the acts of administrators.[24] . The urgency of the use of legal hermeneutics for the type of preliminary evidence examination which is the text of tax laws and regulations that should be within the framework of the rule of law, has not

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[18] Fajar Sugianto, Tomy Michael, dan Afdhal Mahatta, *Loc.cit*.

[19] Mahfud, Hermenutika Hukum dalam Metode Penelitian Hukum, Kanun Jurnal Ilmu Hukum, No. 63, Tahun XVI, 2014, p. 216.

[20] E. Fernando M. Manullang, Sesat Pikir Aplikasi Hermeneutika Hukum Menurut Hans-Georg Gadamer, Jurnal Hukum & Pembangunan, Vol. 48, No. 2, 2018, p. 407

[21] Urbanus Ura Weruin, Dwi Andayani B.., St. Atalim, *Op.cit.*, p. 103.

[22] Alef Musyahadah R., *Op.cit.*, p. 293.

[23] A. V. Dicey. 1952. *Introduction to The Study of The Law of The Constitution*. London: Macmillan, pp. 202-203.

[24] Rodolfo Sarsfield, 2020. Conceptualizing the Rule of Law. Dalam Juan Antonio Le Clercq dan Jose Pablo Abreu Sacramento. Rebuilding the State Institutions: Challenges for Democratic Rule of Law in Mexico. Cham: Springer Nature Switzerland AG, p. 33.

yet reflected the fulfillment of several attributes of the state based on law, such as clarity, non-contradictoriness, the capability of compliance, stability, and the congruence between declared rules and the acts of administrators.

B. General Provisions of Preliminary Evidence Audit

Article 23A of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) has mandated that all tax collections be based on the law, including the examination of preliminary evidence. Article 43A of the KUP Law stipulates that preliminary evidence examinations are based on information, data, reports, and complaints (IDLP). Article 43A of the KUP Law has existed since the issuance of Law Number 28 of 2007 concerning the Third Amendment to Law Number 6 of 1983 concerning General Provisions and Tax Procedures.

Examining preliminary evidence in Article 43A of the KUP Law has been further regulated in the order of several Government Regulations (PP) and Minister of Finance Regulations (PMK). At the beginning of the implementation of Law Number 28 of 2007, the provisions of Article 43A of Law Number 28 of 2007 did not regulate all the types of preliminary evidence examination as the formulation was not contained in Government Regulation Number 80 of 2007 concerning Procedures for the Implementation of Tax Rights and Obligations Based on Law Number 6 of 1983 concerning General Provisions and Tax Procedures, as has been amended several times, most recently by Law Number 28 of 2007 and PMK Number 202/PMK.03/2007 concerning Procedures for Examination of Preliminary Evidence of Criminal Acts in the Taxation Sector. However, since the issuance of Government Regulation Number 74 of 2011 regarding Procedures for the Implementation of Tax Rights and Fulfillment of Tax Obligations which revoked Government Regulation Number 80 of 2007, there is a formulation in Article 60 paragraph (2) of Government Regulation Number 74 of 2011 which stipulates that Preliminary Evidence Audit can be carried out in private or openly, as has been formulated in. Likewise in PMK Number 18/PMK.03/2013 concerning Procedures for Audit of Preliminary Evidence of Criminal Acts in the Taxation Sector, which revoked PMK Number 202/PMK.03/2007, and PMK Number 239/PMK.03/2014 concerning Procedure for Audit of Preliminary Evidence of Crimes in the Taxation Sector, which revokes PMK Number 18/PMK.03/2013, which regulates the type of Preliminary Evidence Examination which consists of Open Preliminary Evidence Audit and Closed Preliminary Evidence Audit.

The definition of open preliminary evidence audit is formulated in Article 60 paragraph (4) of Government Regulation Number 74 of 2011 and Article 4 paragraph (3) of PMK Number 239/PMK.03/2014. Article 60 paragraph (4) of Government Regulation Number 74 of 2011 formulates that an open preliminary evidence audit is carried out with written notification to the Assessable, while Article 4 paragraph (3) of PMK Number 239/PMK.03/2014 formulates that an open preliminary evidence audit carried out by notification in writing to the individual or entity whose preliminary evidence audit is being carried out. The definition of closed preliminary evidence audit is formulated in Article 60

paragraph (3) of Government Regulation Number 74 of 2011 and Article 4 paragraph (4) of PMK Number 239/PMK.03/2014. Article 60 paragraph (3) of Government Regulation Number 74 of 2011 formulates that a closed preliminary evidence audit is carried out without notification to the Assessable, while Article 4 paragraph (3) of PMK Number 239/PMK.03/2014 formulates that a closed preliminary evidence examination is carried out without written notification to an individual or entity whose insufficient evidence has been examined. To better understand the types of preliminary evidence audits in the taxation sector, it is necessary to make a brief description of the similarities and differences between open and closed preliminary evidence audits based on the juridical text in Government Regulation Number 74 of 2011 and PMK Number 239/PMK.03/2014, as summarized in Table 1 below.

Table 1
Similarities and Differences between Open Preliminary Evidence Examination and Closed Preliminary Evidence Examination

No.	Description	Preliminary Evidence Check		Legal basis
		Openly	Closely	
1.	Period	12 months from the date the Preliminary Evidence Examination Order is received by the Preliminary Evidence Examiner until the date of the Preliminary Evidence Examination Report		Article 5 paragraph (1) and paragraph (2) of PMK Number 239/PMK.03/2014
2.	Term Extension	Not later than 24 months from the end of the 12 months		Article 5 paragraph (4) PMK Number 239/PMK.03/2014
3.	General Standard	Conducted by Civil Servant Investigators in the Directorate General of Taxes		Article 7 PMK Number 239/PMK.03/2014
4.	Implementation Standard	Supervised by the head of the Preliminary Evidence Audit Implementing Unit, preceded by good preparation, carried out at the DGT office and/or other places deemed necessary, carried out within a certain period, docu in the Preliminary Evidence Examination Working Paper (KKPBP), and conclusions obtained based on valid and sufficient evidence.		Article 8 PMK Number 239/PMK.03/2014
5.	Reporting Standard	The Preliminary Evidence Audit Report (LPBP) is prepared based on the KKPBP and discloses the implementation, conclusions, and follow-up proposals for the Preliminary Evidence Audit.		Article 9 PMK Number 239/PMK.03/2014
6.	Follow-up Preliminary Evidence Examination	Investigation of Criminal Acts in the Taxation Sector (if evidence of a criminal act in the field of taxation is found); a written notification to the Assessable that the Assessable has not been investigated if the Assessable who has publicly examined preliminary		Article 60 paragraph (7) Government Regulation Number 74 of

		evidence has revealed the untruth of his actions; issuance of an underpaid tax assessment based on Article 13A of Law Number 28 of 2007; termination of the Preliminary Evidence Audit if an individual assessable who was conducted the Preliminary Evidence Audit dies or if no preliminary evidence of a criminal offense in the taxation sector is found; or re-do the Preliminary Evidence Audit (if new Evidence Material is obtained after the closed Preliminary Evidence Audit is completed) which may lead to a different conclusion from the conclusion in the Preliminary Evidence Audit Report.		2011 and Article 30 and Article 34 of PMK Number 239/PMK.03/2014
7.	Obligations of an individual or entity for which the Preliminary Evidence Examination is carried out	Provide the opportunity for the Preliminary Evidence Auditor to enter and/or examine the place or space, movable and/or immovable property which is suspected or reasonably suspected to be used to store the Evidence Material, provides the opportunity for the Preliminary Evidence Auditor to access and/or download the required data—managed electronically, showing and/or lending Evidence Materials to Preliminary Evidence examiners, providing oral and/or written statements to Preliminary Evidence Auditors, and providing assistance to Preliminary Audit Auditors for the smooth Preliminary Evidence Audit.	-	Article 10 paragraph (2) PMK Number 239/PMK.03/2014
8.	The rights of individuals or entities that are subjected to Preliminary Evidence Examination	Submit notification letter for Preliminary Evidence Examination, show Preliminary Evidence examiner ID card, show Preliminary Evidence Audit Warrant or Change Preliminary Evidence Audit Warrant, and return Evidence Material that has been borrowed and is not needed in the Investigation process.	-	Article 11 PMK Number 239/PMK.03/2014
8.	Authority of Preliminary Evidence Exam-	Borrow and examine books or records, documents that form the basis of bookkeeping or recording, and other		Article 60 paragraph (5) Government Regula-

	iner	documents related to income earned, business activities, Assessable independent work, or objects that are tax payable ; access and/or download electronically managed data; entering and inspecting a place or space, movable and/or immovable goods which are suspected or reasonably suspected to be used to store books or records, documents that form the basis of bookkeeping or recording, other documents, money, and/or goods that can provide clues about income earned obtained, business activities, Assessable free work, or objects that are tax payable; sealing certain places or spaces as well as movable and/or immovable goods; requesting the required information and/or evidence from a third party that has a relationship with the Assessable which is carried out by the Preliminary Evidence Audit; requesting information from the parties concerned and stated in the minutes of the request for information; and take other necessary actions in the context of Preliminary Evidence Audit.		tion Number 74 of 2011
9.	Obligations of Preliminary Evidence Examiner	Submit a notification letter for Preliminary Evidence Audit to the individual or entity conducting the Preliminary Evidence Audit.	-	Article 15 PMK Number 239/PMK.03/2014
10.	Collection of Information and/or Evidence by the Preliminary Evidence Examiner	a. Able to enter and/or inspect the place, space, and/or movable and/or immovable property which cemented suspected or reasonably suspected to be used to store Evidence Material, by	-	Article 17, Article 18, Article 21, Article 22, and Article 26 of PMK Number 239/PMK.03/2014

		borrowing the Evidence Material and making a receipt for the loan. However, suppose the Evidence Material has not been obtained. In that case, the Preliminary Evidence Auditor can make a loan with a loan letter which must be submitted no later than 14 days after sending the letter. b. Able to be obtained by requesting information from parties related to the alleged crime in the taxation sector, namely private persons or representatives of entities that are subjected to the Preliminary Evidence Audit, employees, customers, suppliers, banks, public accountants, notaries, tax consultants, administrative offices, legal consultants, financial consultants, and other related parties. c. Able to perform Sealing, using a seal mark and witnessed by at least 2 (two) people other than members of the Preliminary Evidence Audit team, on specific places or spaces as well as movable and/or immovable goods to obtain or secure Evidence Material Sealing.		
		It can be done by making a written request to a third		

		party that has a relationship with actions, work, business activities, or independent work of individuals, entities, and/or agency representatives who are subjected to Preliminary Evidence Audit to obtain information and/or evidence following the laws and regulations in the field of taxation.		
11.	Correction of Notification Letter (SPT)	An individual or entity as an assessable may voluntarily disclose the untruth of the SPT as long as the notification letter for the commencement of the investigation has not been submitted to the public prosecutor through an official investigator of the Indonesian National Police.	Evidence Auditor may consider the correction of the SPT made by an individual or entity as an Assessable, which is carried out in a closed Preliminary Evidence Audit in the conclusion of the Preliminary Evidence Audit results.	Article 23 and Article 27 of PMK Number 239/PMK.03/2014

The summary of similarities and differences between open preliminary evidence examination and closed preliminary evidence examination based on the juridical text in Government Regulation Number 74 of 2011 and PMK Number 239/PMK.03/2014 above shows that Assessable and Preliminary Evidence Auditor cannot rely solely on formal-legislative thinking and or only interpreted as a system of rules that are lexed scripta, lex certa, and lex strict, considering that law is a legal construction in its form in the form of a text, discourse, or argument that must be observed and interpreted. With the guidance of legal hermeneutics, the correct interpretation of legal texts refers to the rules of law, both expressed and implied, or between the sound of the law and the spirit of the law. This is to anticipate the misuse of laws and regulations related to examining preliminary evidence as a weapon of "justification" that is not true or unfair from dirty elements.[25]

(To be Continued)

[25] *Ibid.*, hlm. 96.