

Reconstruction of the authority of judges in Indonesia in performing detention based on justice value

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Abstract

The authority of judges in Indonesia in detaining suspects/defendants is a mixture of the presumption of guilt and the presumption of innocence. This, According to Indonesian Law is not right as Judges should uphold and be based on the presumption of innocence as a manifestation of the suspect/defendant's human rights. According to the author, this problem is interesting to study with the main problem of what is the weakness of the judge's authority to detain a suspect/defendant and how is the reconstruction based on the value of justice. This research type is descriptive-analytical, meaning that the results of this study attempt to provide a comprehensive, in-depth picture of a condition or symptoms being studied. The approach method used in this research is the empirical juridical approach method where the data analysis used in this research is qualitative data analysis.

The results of the study indicate that the weaknesses of the detention authority possessed by judges are found in both its substance of Law of the Republic of Indonesia Number 8 of 1981 concerning Procedural Law Crime, structure, and its legal culture and it will give rise to injustice, therefore legal reconstruction is required regarding the authority of judges in ordering detention in the Law of the Republic of Indonesia Number 8 of 1981 concerning Procedural Law Crime which is based on the authority of the Public Prosecutor to prove the charges and demands through a trial process at every level of the judiciary, so that the judge's authority to detain suspects/defendants must be reconstructed, revised or revoked.

Keywords: reconstruction, judge authority, detention, justice value

Introduction

Judicial power is an independent power separated from the executive of the state to administer the judiciary to uphold law and justice, and for general justice. It is carried out by the Supreme Court and the general judiciary under it. The justice seekers themselves started their search through the trial process which gave birth to a court decision of the first level (State Court) to the decision of the Supreme Court as the highest level of their search for justice.

The main basis for the existence of judges in examining and deciding cases submitted to courts and free judicial powers is stated in Article 24 Paragraph (1) of the 1945 Constitution which reads, "*Judicial power is an independent power to administer the judiciary to uphold law and justice*". From this article, it can be seen that in order to enforce the law and justice, a good implementation of the judiciary as a medium for extending law enforcement and justice is needed.

Article 183 of the Criminal Procedure Code states that a judge may not impose a sentence on a person except with at least two valid evidence and the judge is convinced that a criminal act has actually occurred and that the defendant is guilty of committing it. This provision is to ensure the upholding of truth, justice, and legal certainty for a person. This article requires that in order to be able to impose a sentence, there must be at least two valid pieces of evidence and conviction from the judge.

Based on Article 24 Paragraph (1) of the 1945 Constitution and Article 183 of the Criminal Procedure Code, it is clear that the judicial power is free and independent, and in imposing punishment (criminal) must have sufficient legal

proof^[1]. If this is related to the judge's authority to detain and the judge takes that authority by detaining the defendant, both for objective reasons and even more so with subjective reasons, the author is of the opinion that the judge has applied the principle of presumption of guilt against the defendant by the fact that the judge can order a detention, which is in contrary as the law mandates that the judge should uphold the principle of presumption of innocence.

With the judge detaining the defendant, the judge is bound and shackled to be able to prove that the defendant is guilty, meaning that the judge is no longer free and independent in passing decisions in the form of punishment or conviction, especially since the detention of the defendant has only started since the transfer of the case to court and was previously not carried out detention by both investigators and public prosecutors.

Police Investigators and Public Prosecutors are part of the Executive, because both are under the executive or president, for this reason, these two institutions are given the authority to carry out detention as a manifestation of the presumption of guilt against people who are suspected of having committed a criminal act, but when acting as law enforcement is both independent and should not be influenced by the executive even if separating this is quite difficult.

If a defendant who is detained is decided by a judge with an

¹ Karyoto, Karyoto & Lestari, Oktabilla. (2019). Kajian Yuridis Terhadap Penerapan Pasal 21 Ayat 1 Kitab Undang Undang Acara Pidana (Kuhap) Tentang Penahanan Atau Penahanan Lanjutan. MIZAN, Jurnal Ilmu Hukum. 8. 32. 10.32503/mizan.v8i1.497.

acquittal^[2], the accused must be immediately released from detention, receive rehabilitation and restitution or compensation from the state because the investigator or public prosecutor has detained. The question of who should provide restitution and compensation if the detention of a defendant has started since being transferred to court means that detention is not carried out by the investigator and/or public prosecutor and, of course, the state. While the judiciary is a Judicative Power that is a separate and independent power from the executive branch. Another legal logic in proceedings in criminal justice that must bring the defendant before the trial is the Public Prosecutor as well as returning the defendant to the State Detention Center (*Rutan*), so it is clear that the detainee of the accused should not be the judge.

This problem is what urges the author to study it further in a research with the following issues:

1. What are the weaknesses in the authority of judges in Indonesia in detaining suspects/defendants currently?
2. How is the ideal reconstruction of the authority of judges in Indonesia in carrying out detention based on the presumption of innocence and the value of justice?

Method of Research

The paradigm that is used in the research this is the paradigm of constructivism which is the antithesis of the understanding that lay observation and objectivity in finding a reality or science knowledge^[3]. Paradigm also looked at the science of social as an analysis of systematic against *Socially Meaningful Action* through observation directly and in detail to the problem analyzed.

The research type used in writing this paper is a qualitative research. Writing aims to provide a description of a society or a certain group of people or a description of a symptom or between two or more symptoms.

Approach method used in this research is *Empirical-Juridical*^[4], which is based on the norms of law and the theory of the existing legal enforceability of a law viewpoint as interpretation.

As for the source of research used in this study are

1. Primary Data, is data obtained from information and information from respondents directly obtained through interviews and literature studies.
2. Secondary Data, is an indirect source that is able to provide additional and reinforcement of research data. Sources of secondary data in the form of: Primary Legal Material and Secondary Legal Materials and Tertiary Legal Material.

In this study, the author use data collection techniques, namely literature study, interviews and documentation where the researcher is a key instrument that is the researcher himself who plans, collects, and interprets the data^[5]. Qualitative data analysis is the process of searching for, and systematically compiling data obtained from

interviews, field notes and documentation by organizing data into categories, describing it into units, synthesizing, compiling into patterns, selecting important names and what will be studied and make conclusions.

Research Result and Discussion

1. Weaknesses in the Authority of Judges in Indonesia in Detaining Suspects/Defendants Currently

The ineffective authority of judges in Indonesia in detaining suspects/defendants so that they are not based on values of justice is basically closely related to the weak application of the presumption of innocence. Although it has been formulated in the Basic Law of Judicial Power Number 14 of 1970 jo. Law of the Republic of Indonesia Number 4 of 2004 concerning amendments to the Law on the Principles of Judicial Power which states that "every person who is suspected, arrested, detained, prosecuted and/or brought before a court, must be presumed innocent before a court ruling, who declared his or her mistake and have obtained a permanent legal force.

Whereas in Indonesia's Criminal Procedure Code (KUHAP), the principle of presumption of innocence is not explicitly stated, but only in the general explanation of item 3c of the Criminal Procedure Code which states that: "everyone who is suspected, arrested, detained, prosecuted and/or brought before court hearing which declares guilt and obtains a permanent legal force".

Such is the case in Republic of Indonesia Law Number 39 of 1999 concerning Human Rights (UU-HAM) which contains the following: "Every person who is arrested, detained, and prosecuted because he is suspected of having committed a criminal act has the right to be considered innocent until their accused guilty has been legally proven in a court session and provided with all legal guarantees necessary for his defense, in accordance with the provisions of laws and regulations".

In the author's opinion, the sound of the article is ambiguous as on one hand, it must be presumed innocent, but on the other hand, the suspect/defendant who must be presumed innocent must undergo detention as a form of deprivation of liberty which is a violation of human rights as detention is the application of the presumption of guilt, but in the implementation of detention, the presumption of innocence must be applied until proven guilty legally in a court session^[6].

In addition, the principle of presumption of innocence is also regulated in Chapter III of the Decree of the Minister of Justice of the Republic of Indonesia Number M.01.PW.07.03 of 1982 concerning Guidelines for the Implementation of the Criminal Procedure Code, which states that:

"Some people who have not been found guilty have rights such as the right to immediately get an examination in the investigation phase, the right to immediately get an examination by the court and get the fairest verdict, the right to be told what they are suspected/accused of a crime in a language that they understood. Hence, the right to prepare his defense, the right to legal assistance, and the right to receive family visits.

Then, the second problem is closely related to detention.

² Abbon, Thomas. (2018). Penahanan Dan Penangguhan Penahanan Dalam Teori Dan Praktek. To-ra. 4. 34. 10.33541/tora.v4i1.1171.

³ Faisal, (2010), *Menerobos Positivisme Hukum*, Rangkap Education, Yogyakarta.

⁴ Johnny Ibrahim, (2005), *Teori dan Metodologi Penelitian Hukum Normatif*, Bayumedia, Surabaya.

⁵ L. Moleong, (2002), *Metode Penelitian Kualitatif*, PT Remaja Rosdakarya, Bandung.

⁶ Siregar, Padian. (2019). Syarat Objektifitas Dan Subjektifitas Penangguhan Penahanan. DE LEGA LATA: Jurnal Ilmu Hukum. 4. 175-188. 10.30596/dll.v4i2.3175.

The Criminal Procedure Code explicitly regulates and limits the period of detention and extension of detention of a person. This limited limitation of the period of detention also makes the assessment of KUHAP a monumental work of the nations.

Various books and various international instruments, both those that have been ratified and those that have not been ratified, are based on the research results and observations of the author regarding detention, which are always linked to human rights, especially the principle of presumption of innocence, not the principle of presumption of guilt. Police investigators and public prosecutors as representatives of the state to protect the people, in the opinion of the author, are quite appropriate to have the authority to detain suspects or defendants, both during the investigation process and in the prosecution process, but, regarding the question of whether the judges can hold the principle of presumption of guilt, then the answer is while in the hands of the judge (court) justice must be upheld, if the judge is given the authority to carry out detention, then the judge will automatically use the presumption of guilt, and other presumptions, how will the judge act fairly if before ruling "*For the sake of Justice based on Almighty God*" especially previously presumed guilty of a defendant who was detained, and the examination that required the defendant was only as an examination at the First Court level, namely the State Court (PN), while the High Court (PT) and the Supreme Court (MA) did not require the presence of the defendant during the process. Appeal and cassation examination.

The State Court, in exercising its authority to detain the accused, according to Siti Suryati^[7], usually continues the detention that has been carried out by the Public Prosecutor or if the Judge thinks it is necessary to carry out the detention. Based on the decision of the judge or panel of judges in the trial, the General Prosecutor (JPU) is ordered by the Chairman of the Panel to present the defendant at trial on the agreed trial day and date, In each trial as there was no detention loan letter sent to the Head of the State Detention Center (*Rutan*) who carried out the detention of the defendant, and while the defendant was undergoing the appeal process at the PT or Cassation at the Supreme Court, there was never a request to borrow prisoners from *RUTAN*. Based on the results of interviews with the respondent^[8], the authors conclude that:

- a. Judges or State Courts carry out detention based on the status of the defendant who has been detained by the prosecutor when the case is transferred to the court.
- b. The judge detains a defendant who is not detained by the prosecutor, if the judge has the opinion that the defendant should be detained, in this case the judge has prejudiced or used the presumption of innocence, and conducts a court judgment before the verdict is rendered
- c. The judge never presented the defendant at trial, even though it was the judge or court that detained the defendant.
- d. The administration of the detention center was ignored because the defendant was asked to undergo a trial process in court without being equipped with a warrant

for borrowing detainees by the detention court.

Based on the analysis of the results of the research above, the authority granted by law to the judge or court to detain the accused is not based on legal logic and is against the presumption of innocence which must be upheld firmly by the judge in carrying out the trial, because with the judge to detain the defendant, the judge is burdened and it can be said that the defendant is guilty, then he must be detained so that when the sentence of imprisonment is passed the defendant is already in detention. Thus the subjective and objective requirements for being able to carry out a detention, even if it is carried out strictly and/or selectively, this requirement remains in the position of presuming guilt, thus the authority of the judge or court to detain a defendant has various weaknesses that must be avoided at all cost.

2. Ideal Reconstruction of the Authority of Judges in Indonesia in Carrying out Detention Based on the Presumption of Innocence and the Value of Justice

The 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) states that: "Indonesia is a country based on law" and the consequence, according to the 1945 Constitution of the Republic of Indonesia, is that there is an arrangement of judicial power which regulates the position of the judges themselves. With the regulation of judicial power, it will be able to hold a court that always strives to uphold the values of truth and justice so that everything can run in accordance with the applicable law in Indonesia.

In regulating the position of judicial power, it is known that there is a concept of *Mandiri* (self-reliance), *Independen* (Independence) and *Merdeka* (Freedom) that must be upheld. Andi Hamzah distinguishes between the meaning of self-reliance, Independence and Freedom. *Mandiri* (Self-Reliance) means under one's own roof not under the roof of another department or agency.

Luhut M.P. Pangaribuan^[9] describes the *Independen* (Independence) of judicial power as "independence of judicial power is the independence of judges when hearing a case and the judiciary against the power of the legislature and the executive at the same time".

The various articles in the constitution and laws regulating judicial power can be seen in the General Elucidation of Law Number 48 of 2009 which states that:

"This independent power implies in it the judicial power which is free from interference by other state powers and freedom from coercion, directives, and recommendations that come from extra-judicial parties, except in cases permitted by law".

Freedom in exercising judicial authority is not absolute because the duty of the judge is to uphold law and justice based on Pancasila by interpreting the law and looking for the foundations and principles on which it is based through the cases presented to them, so that his decisions reflect the feeling of justice of the nation. And the Indonesian people.

In Article 1 point 1 of the Law on Judicial Power, it is stated that: "Judicial power is the power of an independent state to administer justice in order to uphold law and justice based on Pancasila, for the sake of implementing the State of Law of the Republic of Indonesia".

⁷ Interview with Dr. Siti Suryati, SH., MM. MH. East Kalimantan High Court Judge, Chair of the Bandung Hall District Court, West Java, on September 21, 2019.

⁸ Interview with Panji Suroso, SH., MH. Judge at the Central Jakarta District Court, on March 25, 2019.

⁹ Luhut M.P. Pangaribuan. (2009). *Lay Judge Dan Hakim Ad Hoc Suatu Studi Teoritis Mengenai Sistem Peradilan Pidana Indonesia*, Postgraduate FHUI, p.193.

Article 3 paragraph (2) of the Law on Judicial Power also states that:

"All interference in judicial affairs by outside parties outside the judicial power is prohibited, except in cases as stated in the 1945 Constitution of the Republic of Indonesia."

From the articles above, it can be seen that the judicial power is indeed independent in administering the judiciary in order to uphold law and justice. *Merdeka* means freedom without intervention or influence from the legislature or executive. However, this freedom is not absolute because every case that is tried must be decided to uphold law and justice based on Pancasila. In other words, judges have freedom in carrying out their duties but are limited by law and justice based on Pancasila. So it is not freedom that is not responsible but must be based on the values of Pancasila.

The scope of freedom of judges in exercising the independence function of judicial power is limited and meaningful freedom. First, free from interference by other state powers. The judiciary and judges in carrying out their judicial power functions should not be interfered with by other governmental power bodies. Executive, legislative, or other power-bodies. The executive, legislature, or any other body of power may not interfere with the running of the judiciary. Thus the judicial power in carrying out judicial functions is truly independent, not under subordination or under the influence and control of the executive, legislative or other bodies of power.

Second, free from coercion, directives, or recommendations that come from extra-judicial parties. That is, in carrying out the function of the judiciary, the law must not be forced to make the decision that the compelling party wants. The Coercion that comes from anyone and in any form is not justified. Likewise, directives and recommendations coming from outside the jurisdiction of the judiciary are not justified. Judges must have the courage of conscience to truly carry out the functions and authorities of the judiciary based on the rule of law.

Third, freedom to exercise judicial (judicial) authority which includes:

- a. To apply laws sourced from appropriate and correct laws and regulations in resolving cases that are being examined.
- b. Interpreting the right provision by means of justified interpretive approaches (systemic, sociological, linguistic, analogical, and *A Contrario* interpretation.
- c. Freedom to seek and find law (*rechts vinding*), in the form of foundations and legal principles through the doctrine of legal science, unwritten legal norms (customary law), jurisprudence or through the realism approach, namely looking for and finding laws contained in economic, moral values, religion, propriety, and custom. The main demand of an independent judicial power apart from actually upholding impartiality, in the sense of being completely free from the influence of the litigating parties, must also be free from the influence and grasp of the executive or independence from the executive power.

As stated by Yahya Harahap ^[10], the ideology and concept

of a rule of law that places independent judicial power in the sense of being free from the influence and interference of other state powers, automatically demands various consequences, including:

- a. Rule of law;
- b. Judicial power through the judiciary to become its pressure valve;
- c. Placing judicial power as the last resort;
- d. Judicial power as the implementer of law enforcement;
- e. To constitutionally acts "fundamentally undemocratic";
- f. Have "immunity" in carrying out the functions and powers of the judiciary;
- g. Judges. that are considered to occupy a separate class from other government officials;
- h. Court decisions that are treated like God's verdict.

The Self-Reliance of judicial power or the Freedom of judicial power as described above, both in the provisions of statutory regulations or positive law or based on theories put forward by experts, according to the new authors are extrinsic or the influence that comes from outside the judge himself which regulates and provides protection of judicial power and The Self-Reliance of judicial power or the Freedom of judicial power which is intrinsic in nature. Thus, according to the author, judicial power and The Self-Reliance of judicial power or the Freedom of judicial power must be extrinsic and intrinsic, meaning that the independence of judicial power must be free from factors that come from outside the judge, as well as those that come from within the judge himself.

Extrinsic factors as mentioned above are factors that affect the judge's self from external factors as described above, while the intrinsic factors are factors that come from within the judge himself.

The authority of the judge to detain the defendant, is a combination of intrinsic and extrinsic factors that can affect the independence of independent judicial power, besides the authority to carry out such detention is contrary to the Human Rights of the Defendant, especially in relation to the principle of presumption of innocence which should be upheld by the judge, because With the authority to detain the accused, the judge is faced with two contradictory matters, namely the principle of presumption of guilt with the presumption of innocence, on one hand, the defendant must be presumed innocent before a judge's decision has permanent legal force, but on the other hand, the judge is authorized to detain the accused whose note is the principle of presumption of guilt. Confronting two contradictory principles against the judge, namely the principle of presumption of guilt and the principle of presumption of innocence, will have implications for the verdict handed down by the judge, such as imprisonment decisions that are adjusted to the period of detention of the defendant or the imprisonment is only slightly larger than the length of time the accused has served detention.

Based on the description above, the writer is of the opinion that the judge should not be burdened with the authority to carry out detention, because the judge must prioritize the presumption of innocence over the presumption of guilt.

The judge's authority to detain is a burden on the judge, which will damage the judge's Self-Reliance, Independence, and Freedom, because it has implications for the punishment imposed on the accused.

The examination process that requires the presence of the

¹⁰ M. Yahya Harahap. (2005). *Pembahasan Permasalahan dan Penerapan KUHAP, Penyidikan dan Penuntutan*, Edisi Kedua, Sinar Grafika, Jakarta, p.1-2.

defendant only in the trial process at the first level, namely at the District Court, while at the appellate court at the High Court and/or cassation at the Supreme Court, the trial process does not require the presence of the defendant.

Based on the argument above, the detention authority should be transferred from the court, to the Public Prosecutor, in this case, the Public Prosecutor's Office, the High Prosecutor's Office, and the Attorney General's Office. The rationale for this is because the Public Prosecutor, in this case, the Public Prosecutor's Office, the High Prosecutor's Office, and the Attorney General's Office, since receiving the delegation of suspects from the Police Investigators, have applied the principle of presumption of guilt, so that suspects are upgraded to defendant status, and are charged with guilt in court.

Authority without supervision will give birth to arbitrariness, as well as the authority to detain a person, whether he or she is a suspect or a defendant, even though that authority is legalized by statutory regulations or positive law, but in fact, detention is a deprivation of freedom that is against human rights, for this reason, supervision of institution or institution that is given the authority to carry out detention, absolutely must be done.

Indonesia as a rule of law is making efforts to reform the Criminal Procedure Code (KUHAP) which was once called the great work of the Indonesian nation, one of these efforts is to discourse it with the term "Commissioner Judge", however, the discourse of Commissioner Judges has received criticism from a number of parties. In order to neutralize the allergic attitude of the term commissioner judge in the Draft KUHAP 2011, finally in the 2012 Draft Criminal Procedure Code the term was changed to Preliminary Examining Judge (HPP), with the same concept as Commissioner Judge although, if seen by the content, the changes that are made, are merely changes in terms, while the entire content from Article 111 to Article 120 is entirely the same as the Draft Criminal Procedure Code for 2011.

In the formulation, it is stated that the authority of HPP is to examine:

- a. Whether the arrest, detention, search, confiscation, or wiretapping is legal or not;
- b. Cancellation or suspension of detention;
- c. That the statement made by the suspect or defendant violates the right not to incriminate himself;
- d. Evidence or statements obtained illegally cannot be used as evidence;
- e. Compensation and/or rehabilitation for someone who was arrested or detained illegally or compensation for any property rights that were illegally confiscated;
- f. A suspect or defendant has the right to or is required to be accompanied by a lawyer;
- g. To determine whether the investigation or prosecution has been carried out for an illegal purpose or not;
- h. Termination of Investigation or termination of Prosecution which is not based on the principle of opportunity;
- i. Feasible or unfit for a case to be prosecuted in court;
- j. Any other violation of the suspect's rights that occurred during the investigation stage.

The delegation of the defendant to the court by the public prosecutor is within the framework of a request from the public prosecutor to the judge or court to request examination of the defendant against the indictment and

demands of the public prosecutor, these charges and demands are that the principle of presumption of guilt must be used by the public prosecutor in accusing the suspect/defendant, so that With the presumption of guilt, the public prosecutor is given the authority to detain the suspect/defendant, and the examination of the judge in court is for the sake of proving the indictment of the public prosecutor against the suspect/defendant, and the defendant must be presumed innocent as long as the guilty verdict has not been pronounced by a judge and has power on par with Court Decision, thus the examination process at the court is an attempt by the public prosecutor to prove that the public prosecutor has correctly charged and charged the defendant and asks the court's right to examine the allegation or presumption of guilt of the public prosecutor. This means that the judge should not have the attitude and authority to be able to detain the accused because the detention is presumed guilty which should be avoided by the judge to maintain the independence of the judge so that Article 20 of the Criminal Procedure Code must be reconstructed so that it reflects justice, humanity, and civility, and does not conflicted with the human rights. Especially the presumption of innocence.

Conclusion

1. The weakness of the authority of the judges in Indonesia in detaining a suspect/defendant is because it is not based on the value of justice as the authority to carry out the detention by the judge uses the presumption of guilt before making his decision, because both the detention was carried out by the investigator and the public prosecutor is subjective in nature, so it is not appropriate. If the judge is given the authority to carry out detention, because the detention carried out by the judge will have implications for the decision that will be handed down, so that it will distract the judge from the values of justice expected by justice seekers.
2. The ideal reconstruction of the authority of judges in Indonesia in carrying out detention based on the presumption of innocence and the value of justice, is to revoke the judge's authority to detain the accused and delegate it to the public prosecutor, in this case gradually delegated to the State Attorney General, Head of the State Prosecutor's Office, Attorney General's Office, Head of the High Prosecutor's Office, Attorney General and Head of the Attorney General's Office.

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