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Detention according to *KUHAP*

Shafira Candra Dewi
Independent Researcher
Correspondence: shafira10dewi@gmail.com

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Abstract

Indonesia is a legal state formed from a set of legal norms which include justice and freedom of human rights. However, freedom of human rights does not apply to perpetrators of criminal acts that threaten the safety of others or cause injustice to others. Criminal law enforcement officers are required to strictly follow up on perpetrators of criminal acts, one of which is by detaining them. Detention is a form of coercive measures carried out to limit the freedom of a suspect or defendant who is strongly suspected of committing a criminal act based on sufficient evidence. In carrying out detention, there are conditions that must be met in order for the detention of a suspect or accused to be legal according to law, namely there must be a detention order, sufficient evidence (at least two pieces of evidence as contained in Article 184 of the *Undang-Undang Republik Indonesia Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law of the Republic of Indonesia Number 8 of 1981 concerning Criminal Procedure Law, hereinafter referred to as "*KUHAP*"), fulfilling objective and subjective elements and a copy of the detention order was given to the family. The purpose of detention is for the purposes of investigation, prosecution, and examination in court.

Keywords:

Detention; Criminal Procedure Law; *KUHAP*.

Introduction

A person's freedom of movement can be taken away through one form of coercive measures according to *KUHAP*, namely detention. According to Article 1 number 21 in conjunction with Article 21 paragraph (1) of the *KUHAP*, detention is the placement of a suspect or defendant who is strongly suspected of being the perpetrator of a criminal act based on sufficient evidence in a certain place by an investigator or public prosecutor or judge with his/her determination.

In detention there are 2 (two) conflicting principles. A person's right to movement, which is a human right that must be respected, is judicially taken away in the interests of public order which must be maintained for society from the actions of suspects or defendants. This is one proof of the specialness of criminal law, especially in the formal aspect (criminal procedural law). Therefore, Andi Hamzah reminded that detention should be carried out if it is absolutely necessary.[1] However, in practice, according to Handri Wirastuti Sawitri, investigators in carrying out investigative efforts tend to make efforts to detain suspects.[2]

Ramdhan Kasim and Apriyanto Nusa also added that detention based on subjective reasons has sometimes damaged the authority of dignified law enforcement, because it has the potential to become a commodity that can be bought and sold. Suspects or defendants who have a certain social status and good economic ability can influence the decisions of authorized officials, whereas suspects or defendants who do not have these 2 (two) assets can only accept the decision to be detained.[3]

Method

Therefore, this conceptual study focuses on the issue of detention according to the *KUHAP*. The aim is to outline detention according to the *KUHAP*. This conceptual study is a study of legal literature which originates from primary legal materials,

[1] Andi Hamzah, *Hukum Acara Pidana Indonesia* (Jakarta: Sinar Grafika, 2011), 129.

[2] Handri Wirastuti Sawitri, "Pembantaran Penahanan Terhadap Tersangka Dalam Perspektif Hak Asasi Manusia (Studi Di Polres Purbalingga)," *Jurnal Dinamika Hukum* 11, no. 1 (2011): 39.

[3] Ramdhan Kasim and Apriyanto Nusa, *Hukum Acara Pidana: Teori, Asas, Dan Perkembangannya Pasca Putusan Mahkamah Konstitusi* (Malang: Setara Press, 2019), 74. Such practices can be categorized as judicial corruption in criminal law enforcement. For more details look, Moch Choirul Rizal, "Kebijakan Hukum Pidana Untuk Penguatan Partisipasi Masyarakat Dalam Pemberantasan Judicial Corruption Di Indonesia," in *Kumpulan Tulisan Pilihan Pembaruan Peradilan*, ed. Indonesian Judicial Reform Forum (Jakarta: Indonesian Judicial Reform Forum, 2018), 109–112. The community should be empowered not to be involved in such practices, for example, by strengthening community participation in criminal law enforcement through a legal policy that provides access and protection. View more, Moch Choirul Rizal, "Kebijakan Hukum Tentang Bantuan Hukum Untuk Pemberantasan Korupsi Di Indonesia," *Al-Jinayah: Jurnal Hukum Pidana Islam* 4, no. 1 (2018): 147–171.

secondary legal materials and non-legal materials. These three sources are processed and analyzed using a statutory approach.

Discussion

Detention is carried out based on 2 (two) possibilities.[4] First, when the suspect is caught red-handed. The definition and under what circumstances "being caught red-handed" is mentioned in Article 1 point 19 of the *KUHAP*. Furthermore, according to the provisions in Article 111 of the *KUHAP*, everyone has the right[5] and those who have authority in the duties of order, peace and public security are obliged to arrest suspects to hand them over with or without evidence to investigators or investigators.

Second, the suspect was not caught red-handed. In such circumstances, it can be seen that there are conditions that must be met for detention to be carried out. Referring to Article 21 paragraph (1) of the *KUHAP*, detention can be carried out by investigators, public prosecutors or judges with their determination based on sufficient evidence. According to the Decision of the *Mahkamah Konstitusi Republik Indonesia* (Constitutional Court of the Republic of Indonesia) Number 21/PUU-XII/2014, dated April 28, 2015, sufficient evidence is a minimum of two pieces of evidence as contained in Article 184 of the *KUHAP*.[6] Failure to fulfill this condition will result in the detention being invalid.[7]

Apart from the existence of sufficient evidence according to law, there are actually other conditions that must be met in order for an investigator, public prosecutor or judge to be able to determine the detention of a suspect or defendant, namely the existence of a detention warrant, fulfilling the objective and subjective elements, and

[4] R. Atang Ranoemihardja, *Hukum Acara Pidana: Studi Perbandingan Antara Hukum Acara Pidana Lama (HIR) Dengan Hukum Acara Pidana Baru (KUHAP)* (Bandung: Penerbit Tarsito, 1983), 40–42.

[5] The meaning of "the rights" is choice. This means making an arrest or not making an arrest. The consequence of not making an arrest is that the person has allowed a criminal act to occur and can be punished under Article 164 of the *KUHP 1946* and Article 165 of the *KUHP 1946*. Look, Tolib Effendi, *Dasar-Dasar Hukum Acara Pidana: Perkembangan Dan Pembaruannya Di Indonesia* (Malang: Setara Press, 2014), 76.

[6] Look, Mahkamah Konstitusi Republik Indonesia, "Putusan Nomor 21/PUU-XII/2014, Tanggal 28 April 2015," n.d., 109.

[7] Kasim and Nusa, *Hukum Acara Pidana: Teori, Asas, Dan Perkembangannya Pasca Putusan Mahkamah Konstitusi*, 76.

a copy of the letter a restraining order was served on the family. Ramdhan Kasim and Apriyanto Nusa emphasized that these conditions were to determine the extent to which the detention action was legally valid.[8] In other words, if the conditions in question are not met, then the detention becomes legally invalid or illegal.[9]

Internally within the National Police of the Republic of Indonesia, as determined by Article 19 paragraph (1) of the *Peraturan Kepala Kepolisian Negara Republik Indonesia Nomor 6 Tahun 2019 tentang Penyidikan Tindak Pidana* (Regulation of the Chief of the National Police of the Republic of Indonesia Number 6 of 2019 concerning Investigation of Criminal Acts, hereinafter referred to as "*Perkap No. 6 Tahun 2019*"), detention is carried out by investigators against The suspect is accompanied by an arrest warrant. Thus, referring to Article 21 paragraph (2) of the *KUHAP* in conjunction with Article 19 paragraph (1) of *Perkap No. 6 Tahun 2019*, if the detention is not carried out by investigators and without a detention order, then the detention in question is invalid.

The next condition for the detention carried out against a suspect or defendant to be legal according to law is that a copy of the detention order be given to the family. This obligation is stipulated in Article 21 paragraph (3) of the *KUHAP*, namely "*Tembusan surat perintah penahanan atau penahanan lanjutan atau penetapan hakim sebagaimana dimaksud dalam ayat (2) harus diberikan kepada keluarganya* (A copy of the warrant for further detention or detention or judge's decision as intended in paragraph (2) must be given to his family)".

The next requirement is that detention must fulfill objective and subjective elements. According to Moeljatno, as quoted by Tolib Effendi, objective means the actual situation without being influenced by personal opinion, measurable and provable.[10] In terms of objective elements, according to Article 21 paragraph (4) of the *KUHAP*, detention can only be imposed on suspects or defendants in the event of: (a)

[8] Ibid., 75.

[9] In fact, it can be categorized as a criminal act that is included in the regulations regarding "Crimes against People's Freedom" as regulated by the *KUHP 1946*. View more, Moch Choirul Rizal, *Kapita Selekta Politik, Hukum, Dan Hukum Islam* (Surabaya: Bijak Publishing, 2017), 139–150.

[10] Effendi, *Dasar-Dasar Hukum Acara Pidana: Perkembangan Dan Pembaruannya Di Indonesia*, 91–92.

a criminal offense punishable by imprisonment for (5) five years or more; or (b) criminal acts mentioned in the *KUHP 1946* or other criminal law regulations even if the threat of imprisonment is less than 5 (five) years.

Ramdhan Kasim and Apriyanto Nusa revealed that this first element is referred to as the legal basis (for carrying out detention), because the law has determined the qualifications for criminal acts which result in the detention of a suspect or defendant. This means that when committing a criminal offense that carries a penalty of less than 5 (five) years, detention cannot be carried out immediately against the suspect or defendant.[11]

However, according to Article 21 paragraph (4) letter b of the *KUHAP*, law enforcement officers can detain suspects or defendants who commit criminal acts that carry a sentence of less than 5 (five) years. Even though the threat of imprisonment is less than 5 (five) years, this criminal act is considered to seriously affect the interests of public order in general and threatens the safety of people's bodies in particular.[12]

The next element is the subjective element. This element focuses on the circumstances or need for detention in terms of the circumstances surrounding the suspect or defendant.[13] In accordance with Article 21 paragraph (1) of the *KUHAP*, the situation that requires detention is that the suspect or defendant is feared to run away, destroy or destroy evidence, and/or repeat a criminal act. In various references, this element is appropriately referred to as a subjective element, because basically the assessment of the situation and concerns about the suspect or defendant becomes a subjective assessment by investigators, public prosecutors, and judges.

Supriyadi Widodo Eddyono[14] stated, there are 2 (two) indicators that can be used to see these subjective elements. First, the potential for a suspect or accused to flee can be seen from the level of mobility, employment, family, no domicile or

[11] Kasim and Nusa, *Hukum Acara Pidana: Teori, Asas, Dan Perkembangannya Pasca Putusan Mahkamah Konstitusi*, 76–77.

[12] Rafiqoh Lubis, "Pemeriksaan Pendahuluan," in *Hukum Pidana Materiil Dan Formil*, ed. Topo Santoso and Eva Achjani Zulfa (Jakarta: USAID, The Asia Foundation, dan Kemitraan, 2015), 643.

[13] Kasim and Nusa, *Hukum Acara Pidana: Teori, Asas, Dan Perkembangannya Pasca Putusan Mahkamah Konstitusi*, 77.

[14] Supriyadi Widodo Eddyono, *Praperadilan Di Indonesia: Teori, Sejarah, Dan Praktiknya* (Jakarta: Institute for Criminal Justice Reform, 2014), 89.

permanent residence address found[15]. Second, destroying or eliminating evidence can be seen from the percentage of evidence obtained by investigators and/or what kind of access, ability, and support the suspect or defendant has during the criminal justice process.

Tolib Effendi emphasized that this element is called a “subjective element” considering that only those who are concerned can understand it, it cannot be measured and cannot be proven. If these concerns do not exist, then the subjective reasons for detaining a suspect or defendant are not fulfilled.[16] In practice, this subjective element makes law enforcers too free to determine which suspects or defendants to detain or vice versa, so that “choosing” or “likes and dislikes” has the potential to occur[17] and of course ignoring legal certainty and justice in the criminal justice system in Indonesia.

Fulfilling the conditions for detention as described above makes the detention of the suspect or defendant legal according to law. So, what is the purpose of detaining a suspect or defendant?

Article 20 of the *KUHAP* states that detention is carried out for the purposes of investigation, prosecution and examination in court. Explained further by M. Yahya Harahap[18], detention is carried out as a preventive measure, namely: (a) preventing the suspect or accused from committing further criminal acts; (b) prevent suspects or defendants from intimidating victims or witnesses; (c) the suspect or defendant poses a danger to the victim, witness or other person; (d) prevent destroying or destroying evidence; and/or (e) prevent the suspect or accused from fleeing which results in the examination being obstructed.

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[15] In practice, suspects or defendants whose domicile or residential address is unknown is a problem in the process of resolving criminal cases, because it will make it difficult to summon the person concerned and make the resolution of the case protracted, so detention by law enforcement officers is the solution. Look, Hamzah, *Hukum Acara Pidana Indonesia*, 131.

[16] Effendi, *Dasar-Dasar Hukum Acara Pidana: Perkembangan Dan Pembaruannya Di Indonesia*, 91.

[17] Kasim and Nusa, *Hukum Acara Pidana: Teori, Asas, Dan Perkembangannya Pasca Putusan Mahkamah Konstitusi*, 78.

[18] M. Yahya Harahap, *Pembahasan Permasalahan Dan Penerapan KUHAP: Penyidikan Dan Penuntutan* (Jakarta: Sinar Grafika, 2015), 163.

Conclusion

Detention is the placement of a suspect or defendant who is strongly suspected of being the perpetrator of a criminal act based on sufficient evidence in a certain place by an investigator or public prosecutor or judge with his or her determination. Detention carried out against a suspect or defendant must have a detention order, sufficient evidence (at least two pieces of evidence as contained in Article 184 of the *KUHAP*), fulfill objective and subjective elements, and a copy of the detention order given to the family. If these requirements are not met, the detention is considered invalid or illegal. The purpose of detention is for the purposes of investigation, prosecution and examination in court.

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