



Arrest and Detention in Indonesian Criminal Procedure Code under Human Rights Perspective

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Abstract

This paper aims to analyze the regulatory framework on arrest and detention in Indonesian Criminal Procedure Code under human rights perspective. This study employed doctrinal legal research using statute and conceptual approaches. The findings of this research reveal that the principles of law enforcement and human rights, which include the principles of legality, necessity, and proportionality, are essentially general principles that can be used to determine whether state actions that interfere with citizens' rights and freedoms violate or do not violate human rights. The legal provisions concerning arrest and detention did not fit the human rights standpoint particularly in the context of procedure and the length of detention. The proportionality and the necessity principle have not been fully considered as the ethical basis for arresting the perpetrator of a crime. Hence, what is needed is to amend the Criminal Procedure Code considering the adoption of both necessity and proportionality principle in the arrest and detention.

Keywords Arrest; Detention; Criminal procedure code; Human rights principle

INTRODUCTION

The fundamental issue driving the passage of Law number 8 of 1981 concerning the Criminal Procedure Code, which went into effect two years after it was approved, was the necessity for human rights protection for offenders who are frequently abused by law enforcement agents. The Criminal Code will address the situation of low human rights protection for suspects and defendants confronting criminal law enforcement with varied levels of authority.

The Code's content is inextricably linked to how the state respects and upholds the human rights of anybody who is utilized as a suspect or defendant. The introduction of human rights legislation into Indonesia's criminal procedural law is marked by a rather comprehensive explanation of suspects' and defendants' rights in the Criminal Procedure Code. Any actions by law enforcement officials that have human rights implications must be in accordance with human rights principles, such as the principle of legality, the principle of necessity, and the principle of proportionality, at all stages of the investigation, prosecution, and examination process in court proceedings. Disregard for such standards may result in violations of the suspect's or defendant's human rights.

This study aims to examine the normative framework of arrest and detention in the Criminal Code from a human right standpoint. What kind of arrests and detentions are made by officials with the authority to do so in accordance with law enforcement principles while also respecting human rights? Three law enforcement principles are employed as an analytical framework to investigate it. This study begins with an extensive exposition of the three principles, then moves on to an examination of the Criminal Procedure Code's arrest and detention procedures. Finally, the description is aimed towards a human rights-based critical study of arrests and detentions.



METHOD

This study employed doctrinal legal research that mainly focused on the legal norms promulgated in the Criminal Procedure Code of Indonesia regulating the specific procedure of arrest and detention for criminal suspect. In addition, the research used both statute and conceptual approach. The basic understanding of principles of law enforcement and human rights has important role in explaining the comprehensive regulatory framework toward the specific criminal procedure of arrest and detention that fit the human rights perspective. This study used literature as a tool to obtain the data. This study then was analyzed qualitatively.

RESULTS AND DISCUSSION

Principles of Law Enforcement and Human Rights

The principles of law enforcement and human rights, which include the principles of legality, necessity, and proportionality, are essentially general principles that can be used to determine whether state actions that interfere with citizens' rights and freedoms violate or do not violate human rights. These concepts apply to all areas of law in which state actors are involved, not just criminal law or criminal procedural law. Although it must be noted that these three principles are only relevant in the context of the use of guns at the police level. That is, aside from the use of firearms, the authorities regard these three to be criminals. That is, the police believe that, aside from the use of guns, these three do not need to be utilized as the primary criteria for determining the presence or absence of human rights violations in any judicial action.

The first premise is legality, which is one of the most important factors that underpins every government administration and statehood in every legal state. The idea of legality in state administrative law states that the government is subject to laws. Legislation should underpin all citizen-binding provisions. The government's activities should not be in violation of the law. Furthermore, the government only possesses specific rights to the extent that they are granted or mandated by law. State administrative officers must utilize their authority in accordance with laws and regulations.¹

The principle of legality in criminal law is concerned with assessing whether a criminal law regulation can be applied to actual criminal conduct. So, if a criminal conduct occurs, it will be investigated to see if there are any legal provisions that regulate it and if the existing laws can be extended to new criminal activities.² The principle of legality, according to Jerome Hall, has four different interpretations:³

1. There is no such thing as a criminal offense without the preceding statute (*nullum crimen, noela poena sine lege praevia*). As a result of this interpretation, it should not be applied retroactively to criminal law provisions.
2. There is no such thing as a criminal offense or a criminal without a written law (*nullum crimen, nulla poena sine lege scripta*). As a result of this interpretation, all criminal provisions must be written down. Acts that are banned, as well as criminal activities that are threatened by prohibited acts, must be expressly mentioned in the legislation.



3. There is no such thing as a criminal offense or a criminal without precise statutory guidelines (*nullum crimen, nulle poen sine lege certa*). Criminal activities must be clearly defined to avoid being open to several interpretations and jeopardizing legal certainty.
4. There is no such thing as a criminal offense or a criminal without stringent laws (*nullum crimen, noela poena sine lege stricta*). To avoid the creation of new criminal activities, criminal provisions should be rigidly interpreted. To put it another way, analogies are not permitted in criminal law.

To keep the state's authority in check, the notion of legality is required. This restriction is important since the state has enormous authority to carry out activities that have far-reaching consequences for citizens' daily lives, and even to violate citizens' human rights in some cases. As a result, the state can only carry out actions if they are authorized by law. The principle of legality's main principle is that the state's laws must contain and adhere to the notion of a clear expression.⁴ In the framework of human rights legislation, if the law's authors wish to meddle in citizens' rights and freedoms, the law must contain clear and unambiguous legal rules.⁵ Clear norms of law are associated with the protection of individual rights in a way that improves legislative clarity, democratic government, and promotes constitutional and other key legal objectives. The idea of legality can also serve as a form of rights protection, and it is the principal means of safeguarding citizens' rights in a country that pays little attention to them.⁶

The implementation of the legality principle is meant to safeguard a few people's fundamental rights, including the right to property, individual liberty, freedom of expression, freedom of transfer, the right to a healthy environment, and access to justice. There are two elements that lawmakers and judges must consider for this principle to be applied in a way that is consistent with human rights principles.⁷ First, politicians are only authorized to intervene in citizens' rights through clearly established laws, not through generalized terminology or statements. Second, judges are only permitted to carry out legal interpretations if they are consistent with the legislator's intentions and aims.⁸

The principle of necessity is the second. If the principle of legality is concerned with the limitation of governmental power, the principle of necessity is related to the idea of proportionality because its existence is a requirement of the latter. To put it another way, understanding that the principle of necessity is a requirement for the concept of proportionality's applicability is the first step toward making it more effective. The notion of necessity establishes a lower limit for the proportionality principle. When the concept of necessity is broken, the principle of proportionality is also broken.

Prasetyo applies the principle of necessity to the use of firearms, stating that the use of force must be a one-of-a-kind deed. Nonviolent methods should be used first, and firearms should be used only if nonviolent methods are ineffective or do not promise to produce the desired goals. Officers of the law may only use force when it is necessary and to the extent that it is required to carry out their responsibilities. As a result, the notion of necessity is linked to the existence or absence of other efforts that must be made to attain the desired results. If such activities continue, law police or the government must act.⁹



The idea of proportionality can be simply defined as the preservation of a correct ratio between two components. Proportionality is linked to masculinity as well. When a reasonable action is taken, it is considered proportional; when a reasonable action is taken, it is called disproportionate.¹⁰ Illegality and procedural impropriety are the words that have the same meaning as unmasking. Proportionality relates to the seriousness of a crime and the harshness of criminal penalties in criminal law. The more serious the crime, the harsher the criminal penalties that could be imposed on the perpetrator.¹¹ When a major offense is threatened with lenient criminal penalties, it is said to be disproportionate. Severe criminal threats against petty crimes are also thought to violate the proportionality principle.¹²

Ordinal proportionality and cardinal proportionality are the two principles of proportionality. The notion of ordinal proportionality applies to all levels of the punishment scale, including the maximum punishment and its legal distance; it does not have to be proportional to the magnitude of the deed's attack. In fact, whether that level should exist within a given state is a point of contention, based on criminological study and inevitably constrained by social conventions. Cardinal proportionality, on the other hand, refers to an evil that must be punished in comparison to a similar crime and a character that is more or less serious than other crimes.¹³ However, the principle of proportionality necessitates the preservation of a relationship between the relative importance of the crime and the punishment.¹⁴ Barbara A. Hudson stated this as '*..ranking offences according to seriousness and then establishing a scale of penalties of commensurate severity.*'¹⁵

The notion of proportionality is represented in human rights legislation in Article 2 paragraph (1) of the International Covenant on Civil and Political Rights, which states that 'each State Party to the Covenant promises to respect and protect the rights recognized in the Covenant for all people living on its territory and under its jurisdiction, regardless of race, color, sex, language, religion, politics, or other beliefs, national or social origin, property, birth, or other status'. The article requires States Parties to uphold the Covenant's human rights and to ensure that those rights are respected by all people who live in their territory. When the government imposes restrictions, it is both necessary and permissible.

The principle of proportionality is also found in Article 2 paragraph (2) of the International Covenant on Economic, Social, and Cultural Rights, which states that 'the State Parties to this Covenant undertake to ensure that the rights provided for in this Covenant are exercised without discrimination based on race, color, sex, language, religion, politics, or other opinions, national or social origin, wealth, birth, or other statuses. The essay also claims that a treatment distinction based on specific factors is not discriminatory if it is justified rationally and objectively. It comprises a determination of whether the goal and effect of the actions taken are legitimate, considering the nature of the Covenant's rights, and primarily for the purposes of the Covenant. Furthermore, there must be a true and sensible proportional link between the desired outcomes and the actions taken and their outcomes.

One of the issues of human rights legislation nowadays is proportionality. "Embedded throughout the totality of the European Convention on Human Rights is the quest for a fair balance between the demands of society's public interest and the needs for the preservation of individuals' basic rights," the European Court of Human Rights expresses. In other words, the Court is aware of the necessity to strike a balance between the restriction of rights and the goals to be pursued.¹⁶



A proportionality test is used to determine if a negative state responsibility has been broken in the context of state responsibilities.¹⁷ In the narrow sense, the test has four parameters: legitimate purpose, appropriateness, necessity, and proportionality. Naturally, each country has its own version of this. The German Constitutional Court, for example, adopted a three-part proportionality principle: (1) appropriateness, i.e., the action taken must be in accordance with the goal to be achieved; (2) necessity, i.e., if equally effective, the use of means that at least restrict citizens' human rights should be pursued; (3) proportionality in a narrow sense, i.e., the action taken must be balanced with the goal to be achieved.¹⁸ In a 2003 legal opinion on the legal requirements and rights of illegal immigrants, the Inter-American Human Rights Court declared that offering disparities in treatment to illegal immigrants is not an offense if it is justified and valid using objective, rational, and proportional standards.¹⁹

The proportionality threshold was also determined in the Oakes decision by the Supreme Court of Canada. Other countries' courts, including New Zealand, the United Kingdom, South Africa, and Zimbabwe, as well as the European Court of Human Rights and the Inter-American Court of Human Rights, followed suit. According to him, there are three criteria for evaluating the principle of proportionality: 1) how citizens' human rights are to be rationally related to the objectives to be achieved; 2) rights should be reduced as small as possible to achieve the goal; and 3) a balance between the effect of the restriction on the rights and the objectives to be achieved from restriction.²⁰

Meagher, speaking specifically to the third issue, stated that courts are not only needed to examine whether legislation interferes with/violates citizens' human rights, but also to analyze whether such violations are justified using the principle of legitimized purpose. The essence of the latter is an assessment of whether the violation of rights through the legislative process nothing is more than required to attain the legislative aims. In other words, if there are still fewer effective alternatives to achieving the same aim, yet legislative action is still taken, it is deemed a violation of the proportionality principle.²¹

The concept of margin of appreciation is also crucial to note because it has anything to do with the principle of proportionality. National courts have a deeper understanding of local customs, values, and needs than international courts. This notion demands the state to incorporate the country's cultural traditions and values when determining the extent and meaning of human rights, and to make it a norm in the courts' application of human rights protection. Traditions, values, and local requirements are all essential criteria for determining whether official measures restricting citizens' human rights follow the principle of proportionality. Even the proportionality criterion has already been established, how it is applied in practice will vary from country to country due to variances in traditions, values, and requirements.²²

Arrest and Detention in Criminal Procedure Code: A Regulatory Framework

The Criminal Procedure Code defines arrest as "an investigative action in the form of temporary restraint on the freedom of the suspect or defendant if there is sufficient evidence for the purposes of investigation, prosecution, or justice in the case and according to the manner provided for in this law." There are a few things to keep in mind about the arrest. First, there are those who have been given the power to make arrests. Only investigators can make arrests under the Criminal Procedure Code. However, the investigator may order an arrest for the purposes of the investigation (Article 16 paragraph (1) of the Criminal Procedure Code). As a result, the investigator's authority to make an arrest is limited to the



investigation stage, and only at the investigator's request. The investigator is not authorized to conduct an arrest if there is no direction from him.

The second point to discuss is the reason for the arrest. According to the definition of arrest given above, an arrest is permissible if "sufficient proof" exists. This phrase is defined as "a person who is highly suspected of committing a criminal offense based on substantial preliminary evidence," according to Article 17 of the Criminal Procedure Code. Because it is unclear what is meant by "adequate preliminary evidence," the investigator is left to his or her own devices in practice. According to the author, a clear definition of sufficient preliminary evidence is required. For example, an arrest should only be made by an investigator or at the investigator's request if it is based on at least two valid pieces of evidence as stipulated in Article 184 of the Code. The rationale for this is so that, in addition to minimizing the use of the investigator's or investigator's subjectivity in making arrests, the investigators' arrests nevertheless pay attention to and protect the suspect's or defendant's human rights.

The third step is the arrest procedure. The warrant was delivered to the suspect by the investigator or investigator who made the arrest. The warrant identified the suspect's identification, indicated the basis for the arrest, and gave a brief description of the suspected crime and the location where he was inspected. An arrest warrant is not required if you are caught. However, the arrestee must immediately report the arrest to the nearest investigator or auxiliary investigator, along with any available evidence (Article 18). The suspect who committed the crime is not arrested unless he has been legitimately summoned twice in a succession and has failed to appear for that summons without a valid excuse. The fourth point is the period of detention. Arrests can be made for a maximum of one day, according to Article 17 of the Criminal Procedure Code. This means that a person can be arrested in fewer than 24 hours, but not more than 24 hours. Arrests that last more than 24 hours should be deemed null and unlawful, as they are a violation of human rights.²³

Detention, in contrast to arrest, is defined as "the placement of a suspect or defendant in a specified place by an investigator, a public prosecutor, or a judge with his determination, in the case and in the manner allowed for in this legislation" under Article 1 number 21 of the Criminal Procedure Code. Investigators, public prosecutors, and judges are among those who have detention authority (Article 20 of the Criminal Procedure Code). Subjective and objective factors can both be used to justify detention. Subjective reasons include: 1) suspects or defendants who are strongly suspected of committing criminal acts based on sufficient evidence; 2) circumstances that raise concerns that the suspect or defendant will flee; or 3) suspects or defendants who are strongly suspected of committing criminal acts based on sufficient evidence or reoffending crime (Article 21 paragraph (1) of the Criminal Procedure Code).

Only in the following circumstances can an objective ground of detention be imposed on suspects or defendants who perform criminal acts and/or provide aid in such criminal activities: a. the offense entails a sentence of five years or more; b. specific criminal acts under the Criminal Code.



State detention, house arrest, and municipal detention are the three types of detention. House arrest is carried out in the suspect's or defendant's residential house or residence under supervision to avoid anything that could cause problems in the investigation, prosecution, or examination during a court hearing. Municipal detention takes place at the suspect's or defendant's home city or place of residence, with the suspect or defendant being required to report at the specified time. The time spent in custody or imprisonment is totally deducted from the sentence given. The reduction is one-fifth of the amount of detention time for municipal custody, and one-third of the amount of detention time for house arrest as stipulated in Article 22.

The Criminal Procedure Code distinguishes between the stages of investigation, prosecution, and examination at the court hearing when it comes to the length of detention time. Suspects can be held for a maximum of 20 days and can be extended for a total of 40 days by investigators. The suspect can be held for a maximum of 20 days by the public prosecutor, which can be extended to a total of 30 days. A defendant may be held for a maximum of 30 days by a district court judge, with the possibility of an extension to 60 days. High court judges can hold suspects for a maximum of 30 days, with the possibility of an extension to 60 days. Supreme court judges can hold prisoners for up to 50 days, with the possibility of an extension.

Arrest and Detention under Human Rights Perspective

The above three law enforcement and human rights principles are used to determine whether the arrests and detentions undertaken by investigators or other law enforcement personnel are appropriate or in violation of human rights norms. The first is the legality principle. Arresting and detaining a suspect or defendant is only legal and does not violate human rights if it is done by a government official with authority. Even though the perpetrator is a recidivist and the crime he committed is a serious crime such as terrorism, genocide, or crimes against humanity, arrests must be made by officials who do not have the authority to do so, such as investigators or investigators acting on the investigator's orders. In the meantime, detectives, public prosecutors, and courts are all involved in the custody process. If the official who made the arrest or detention lacked authorization, the state has infringed on individual citizens' right to freedom and independence.²⁴

The principle of necessity is the second. It must be acknowledged that law enforcement officers rarely employ this principle to determine if their activities are following human rights norms. Even at the police level, the application of this principle is confined to the use of firearms. This principle is rarely used as a foothold by law enforcement so that the actions done are concerned and in compliance with human rights norms.²⁵ Arrests and detentions are two examples. Even if the perpetrator is captured doing a criminal act, the investigator must adhere to this guideline when making an arrest. The sort of crime committed, whether it is a minor or serious crime, the capacity of the offender, whether it is the first time committing a crime or has done so previously, and the amount and quality of evidence that the investigator has are all things to consider.²⁶



In terms of detention, this principle is reflected in the Criminal Procedure Code's three subjective reasons for detention, which allow authorized officials to detain a person if they are strongly suspected of committing a criminal act based on sufficient evidence, escaping, tampering with, or removing evidence, or repeating a criminal act. It's just that, without considering the peculiarities of the criminal conduct and the quality of the offender, the author's savings, these three reasons cannot be utilized by the authorized official for all criminal activities. Although the Criminal Procedure Code allows for the detention of a person if there is a risk of escape, the investigator does not always follow this logic. If authorized officials continue to imprison the suspect even though he is too old to flee or the evidence is already in the investigator's office, human rights violations occur. If an investigator's arrest and detention aren't the final resort for exposing a criminal offense, he can't hide behind the principle of legality.

The proportionality principle is the third. The essence of this principle is that there is a balance between constraints on suspects' or defendants' freedom or independence and the goals of arrest and detention, which include gathering evidence and helping the judicial examination process. When trying to arrest or detain a person, state officials with the ability to arrest and detain suspects or defendants must make the principal goal of the arrest and detention a basic foothold. The investigator, public prosecutor, or court may not make an arrest or detention if evidence may be collected without having to arrest the suspect or defendant. He shall not be detained if the defendant is either on or off family bail, or if the other party is willing to attend the examination at the level of investigation, prosecution, or examination at the court hearing. The detention that was carried out has ramifications for the restriction of one's right to physical and mental freedom, and it is not directly proportional to the detention's principal aim.²⁷

Fourth, arrest and custody procedures. This legislation pertains to officers being given the authority to make arrests and detentions considering a country's cultural traditions and values from a human rights standpoint. Because respect for human dignity and humanity is at the heart of human rights, arrest and detention must be able to reflect this. Although officials are given the ability to arrest or detain a person in accordance with applicable laws and regulations based on legality, it is vital to pay attention to traditions and values of ethics and morality. Even if a person is a suspect or defendant, polite and non-degrading treatment must be considered. It is also necessary to relate to how to arrest and detain a person to the ethical and moral principle.

CONCLUSION

Law grants investigators, public prosecutors, and judges the authority to arrest and detain suspects and defendants based on the principle of legality, even though it intersects with the deprivation of suspects' and defendants' freedom. The existence of sufficient evidence for the arrest, as well as subjective and objective reasons for the detention, violates the suspect's or defendant's human rights. As a result, law enforcement personnel must not only use the idea of legality as the legal foundation for arrest and imprisonment, but also the principles of necessity and proportionality.



The last two principles are inextricably linked. The criterion of proportionality is inherently breached if arrest and detention violate the norm of necessity. The principle of necessity states that the use of force must be a rare occurrence, in the sense that if there are other options to arresting and detaining suspects or suspected, those options must be pursued. The idea of proportionality emphasizes the necessity to strike a balance between restricting rights and achieving goals. The right here is the right to the suspect's and accused's freedom. Meanwhile, the purpose is to gather evidence and make the judicial examination process easier, which has ramifications for the search for material truth. If the purpose may be reached without arresting or detaining the suspect and accused, the activities of the investigator, public prosecutor, and court, who continue to detain both on the pretext that they have been given authority by law, violate the suspect's or defendant's right to liberty. Because the criterion of legality is not the sole factor to consider when determining whether human rights abuses have occurred, it must be balanced against the principles of necessity and proportionality.

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