THE 5th INTERNATIONAL AND CALL PAPER
Legal Reconstruction in Indonesia Based on Human Rights

Imam As Syafei Building
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM.4 Semarang, Indonesia

UNISSULA PRESS
The 5th PROCEEDING

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Diterbitkan oleh:
UNISSULA PRESS

ISBN. 978-623-7097-23-5
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Reviewer:
Prof. Dr. H. Gunarto, S.H., S.E., Akt., M.Hum
Dr. Hj. AnisMashdurohatun, S.H., M.Hum
Prof. Henning Glaser
Prof. Dr. I GustiAyuKetutRachmiHandayani, MM
Prof. Shimada Yuzuru
Prof. Associate Dr. Dr. Ahmad ZaharudinSani

Editor:
Dr. Amin Purnawan., S.H., CN., M.Hum
Dr. Hj. Widayati., S.H., M.H
Dr. Hj. Sri EndahWahyuningsih, S.H., M.Hum
Dr. H. Ahmad Khisni., S.H., M.H
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Hal I-X, 1-358
Cetakan Pertama Tahun 2019
Penerbit PDIH UNISSULA
Jl. Raya Kaligawe Km. 4 Semarang 50112
PO BOX 1054/SM,
Telp. (024) 6583584, Fax. (024) 6594366

ISBN. 978-623-7097-23-5
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“Legal Reconstruction in Indonesia Based on Human Right”

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First of all, let’s say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnan, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.
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Legal Reconstruction in Indonesia Based on Human Right
Reconstruction Of Authority To Arrest In Doing Judge Accused Of Value-Based Justice

Agus Sugiarto
sugiartoagus816@gmail.com

Abstract

The authority of judges to make arrests based defendant subjective reasons contrary to the presumption of innocence, and the authority of PT and the Supreme Court judges to make an arrest for the purpose of examination is unfounded, because the PT and the Supreme Court did not conduct a physical examination of the defendant.

Keywords: Reconstruction, Judge Authority, Detention, defendant,

A. Preliminary

Article 1 (3) of the Constitution of the Republic of Indonesia Year 1945 stated that Indonesia is a country of law, Indonesia as a country that adheres to state schools of law, is obliged to carry out development in the field of law and order to the order of society orderly, peaceful, just and prosperous. The context of the development of the law of course, must be interpreted as a manifestation of a deep thought about how national law is established, implemented and used to regulate people’s lives, then to ditegakannya The enactment of Law No. 8 of 2981 on Criminal Proceedings or (Criminal Code) is penggati HIR (Herziene Inlandsch Reglement and as a safeguard of Human Rights (HAM) less given in HIR. Human rights are the rights of human beings because of his birth, not because it was given by the community or the state, In protecting the rights of citizens and create a fair legal process includes at least:

1. Protection from arbitrary actions of state officials;
2. The court is entitled to determine whether or not any suspects or defendants;
3. Court proceedings must be open to the public (not to be confidential);
4. The suspect and the defendant must be given guarantees to be able to defend

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275 The author is Lecturer Faculty of Law, University of Nahdlatul Ulama (UNU) Cirebon, and is completing the Doctoral Program at the Law Faculty of Law, University Islam Sultan Agung Semarang.
276 Leden Marpaung, 1992, the Criminal Case Management Process Part One, Sinar Grafika, Jakarta, p. 1-3
277 Feature State laws: power sharing, teachings Trias politica. Ideology: State material law, the State not only provide legal protection to the public but also the State that provide welfare to the community.
278 Development of a national law that done in a planned, integrated, and sustainable in the national legal system that guarantees the protection of the rights and obligations of all the people of Indonesia based on the Constitution of the Republic of Indonesia Year 1945;
Restrictions on freedom of human rights seemed at the time a person suspected of committing a crime, the law enforcement authorities to restrict their freedom, namely through arrest and detention. Related to the detention, Article 8 (1) of Law No. 48 of 2009 (Judicial Power Law) states “every person suspected, arrested, detained, prosecuted, or appear before the court shall be presumed innocent before the court decision that declare his guilt and has obtained permanent legal force”. This provision is known as the presumption of innocence (presumption of innocence).

According to article 1, paragraph (21) Criminal Procedure Code detention is the placement of the suspect or defendant in certain places by the investigator or the public penutut or judge by its adoption in the event as well as the manner contemplated Act. Judge detaining defendants who had been delegated by the Public Prosecutor, usually follow and / or forwarding Attorney, if the Prosecutor made no arrests, the judges were usually do not do. Unlike the case of Ahmad Dhani personnel of Band Dewa, whose arrest was recently carried out by the High Court of Jakarta after Ahmad Dhani is located in Rutan Cipinang as executed by the Public Prosecutor (Prosecutor) whereas Ahmad Dhani appealed the District Court decision that does not have the power fixed law. Based on this background the authors are interested in doing legal research.

1. Why is the authority of the judge in the arrest of the accused have not been based on values of justice?

2. Weakness judge in detaining the accused in Indonesia at this time?

3. How reconstruction authority of the judge in the arrest of the accused based on the values of justice?

This study is a qualitative research approach that departs sociolegal of constructivism, Also through Empirical juridical approach is a method or procedure used to solve the problem by first examining the existing secondary data and then proceed with research on primary data in the field. This approach aims to understand that the law is not solely as a statutory set of rules that are normative, but legal as mengejala community behavior in public life, interact and relate to aspects of society, socio-cultural aspects.

Results and Discussion

Criminal Procedure Code has been in force more than 38 years and was once dubbed as a masterpiece, it turns out, if considered carefully will find a variety of issues that need attention with regard to the formulation of a specific article in the Criminal Procedure Code. The problems that need attention are referred to with regard to judges the authority to make an arrest. Article 21 paragraph (1) Criminal Procedure Code states:

Detention or continued detention orders made against a suspect or defendant who allegedly committed the crime based on sufficient evidence, in terms of the circumstances which raised concerns that the suspect or the accused will escape, damage or destroy evidence or repeat a crime.

The reason of detention as stipulated in Article 21 paragraph (1) of the Criminal Procedure Code is subjective reasons. Other article relating to the authority of the judges did barrier against the accused in the

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interests of examination include: as stipulated in Article 26 (1), Article 27 (1) and Article 28 (1) Criminal Procedure Code.

Police investigators and the prosecutors are law enforcement under the executive, both agencies tasked to solve the problems in the event of a crime, the investigator and the prosecutor on behalf of the State representing the victim to process, indict and prosecute the alleged perpetrators to justice. Investigator and prosecutor in performing its duty to arrest and detention are allowed to use the presumption of innocence, for the arrest and detention contrary to human rights. While the Judicial Power Act requires the judge to use the presumption of innocence in a dispute between the State with its people in terms of the State indicting people have committed criminal acts. Hakimlah duty to prove whether the defendant actually committed the crime or not, in the process of proving the trial judge should not be subjectively objective in accordance with the presumption of innocence. If the authority of the judge’s arrest of the accused using subjective reasons, of course, the judge had removed the presumption of innocence that should be used in all civil and criminal proceedings and other litigation.

Article 27 paragraph (1) and Article 28 paragraph (1) Criminal Procedure Code, relating to the authority to make an arrest in the process of appeal in the High Court (PT) and / or the process of Cassation in the Supreme Court (MA), the provisions of these two Articles are not met, because PT and the Supreme Court did not examine the defendant, but only the decision of the District Court (PN) and the evidence that emerged in the trial PN.

Satjipto Rahardjo states that arbitrate indeed starting from texts (legislation), but let’s not stop there. Text the general law that requires accuracy or sharpening creative when applied to real events in the community. In the end, whether the state law to provide benefits to humanity, does not rely on the sound of the articles of the law, but on the behavior of law enforcement can act beyond the call of duty. In the words of Ronald Dworkin, we need to be taking rights seriously and do the moral reading of the law. Arbitrate with the new text is the beginning of a long journey to realize the goal of keeping the law can bring about justice and benefits to humanity.

Departing from the assumption justice becomes an objective value that must be met, of course, it’s not just going to run smoothly in accordance with the perspective of the ideals of a nation’s laws. Moreover, objectively something deemed to have meaning or value if the fulfillment factor element of utility (benefit) and importance (importance) and subjectively when factors fulfillment of need (requirement) and estimation (estimated) , Arief Sidharta reveal islafat that level, legal islafat reflection conducted to ascertain the irregularities in the application of the law. The focus is tendentious systematically reflection about “legal fact” which should be considered as a realization (embodiment) of the presuppositions of the law (legal ideals) , Thus the result of a feeling of reflection islafat view the law will be more justice concerning the value orientation of view of human life, because therein will be fulfilled at the same time substantial elements and formal of the ideals of social justice law.

The authority of the judges in the arrest of the accused have not been based on values of justice, judges hold the defendants using subjective reasons contrary to the presumption of innocence. Examination of the accused in the trial process is only done in the PN, the trial in the PT and the Supreme Court did not examine the defendant physically, thus retaining referred to Article 27 paragraph (1) and Article 28 (1) is unfounded. Law accord-

ing to Satjipto Rahardjo intended for people not otherwise vote for the law, for the injustice and weakness judge authorized the detention of the accused had to be reconstructed, so that the applicable law for the benefit of people.

The authority of judges to make arrests, to be reconstructed by transferring authority to judge told the prosecutor the authority of incarceration in proceedings in the District Court replaced the authority of the State Attorney, the authority of incarceration in the process persidang PT delegated Into High Court, as well as the authority of incarceration in proceedings in the Supreme Court delegated to the Attorney General.

Conclusions and suggestions

1. knot

   1. The authority of judges arrest of the accused have not been based on values of justice, because judges use subjective reasons that are contrary to the presumption of innocence.

   2. Weakness judge in detaining the accused in Indonesia at this time because it is not in all levels of justice, ie PT and MA requires the physical presence of the defendant.

2. Suggestion

   1. Judges at all levels should uphold the presumption of innocence in dispute resolution the State against the people suspected of criminal offenses melaku-

   2. Judges should not be burdened at all levels of authority to make arrests, because the detention is based on subjective reasons that should not be owned by the judges to convict a person before proceeding.

   3. Should the authority of the judge to make an arrest soon recon-

D. References


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