THE AUTHORITY RECONSTRUCTION OF JUDGES IN DETAINING CHILDREN BASED ON THE JUSTICE VALUE

Agus Sugiarto
sugiartoagus2020@gmail.com
Universitas Nahdlatul Ulama Cirebon, Indonesia

Asep Hermawan
jja@unucirebon.ac.id
Universitas Nahdlatul Ulama Cirebon, Indonesia

Yanto Irianto
yantoirianto755@gmail.com
Universitas Nahdlatul Ulama Cirebon, Indonesia

Abstract

The purpose of this study is to determine the Authority Reconstruction of Judges in Detaining Children with the Justice Value. This research uses a normative approach. The resulting research states that the authority of judges including Appellate Judges or High Court Judges in detaining defendants is contrary to the principle of presumption of innocence, detention is the realm of presumption of guilt which can only be used by investigators and public prosecutors, if the judge is burdened with the authority to carry out detention, then The judge is no longer independent, because in his decision he will take into account the detention that has been carried out, even the detention carried out by the judge is within his authority, The ideal reconstruction of the judge's authority in carrying out detention based on the principle of presumption of innocence and the value of justice, is to revoke the judge's authority to detain the defendant and delegate it to the public prosecutor.

Keywords: *Children; Law; Judges; Justice.*

A. INTRODUCTION

National legal politics has established Indonesia as a country based on law *(rechtsstaat)*, as regulated in Article 1 paragraph (3) of the 1945 Constitution. Indonesia understands democracy based on the Constitution and the Constitution must also be democratic.[1] The concept of a legal state refers to the spirit of the nation (*volkgeist*) contained in Pancasila and the Proclamation of Independence as the source of all sources of law and constitutionalism. The criminal law system as a form of political embodiment of criminal law should have been formed with the inspiration of the 1945 Constitution as a juridical basis. Consequently, the criminal law system must be spelled out concretely in every statutory regulation.

1 Leli Tibaka, Rosdian., The Protection of Human Rights in Indonesian Constitutional Law after the Amendment of the 1945 Constitution of the Republic of Indonesia, *Fiat Justisia*, Vol. 11, No. 3, July-September 2017, page.266-288

However, the spirit of Pancasila and the Proclamation of Independence in the criminal law system has not yet been realized properly, for example the adoption of foreign elements problem that is challenging and has not been resolved. 4 The development of a national legal system (criminal law) must be rooted in the noble values of Pancasila which are contained in Pancasila so that it is in accordance with the spirit of the nation (*volkgeits*).[2] To realize this, the formation of criminal law politics and the draft of a national criminal law system should limit the applicability of foreign elements based on the concept of harmonization and synchronization with the Indonesian *volkgeist* contained in the Pancasila and the Proclamation of Independence, therefore the state should not carry out its activities on the basis of mere power, but must be based on law. Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, states that: "*Everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law".* Everyone referred to in Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, including children.

Officials or agencies that have detention authority according to HIR are different from the Criminal Procedure Code and/or juvenile justice system law. HIR determines that only two officials or agencies make detentions, namely prosecutors (*magistraat*) and assistant prosecutors (*hulp magistraat*) while judges only extend detention by prosecutors (*magistraat*), then the Criminal Code and/or juvenile justice system law determine that there are three kinds of officials or institutions authorized to make detentions, namely investigators or assistant investigators, public prosecutors and judges which according to the level of examination consist of judges of the district court, high court, and the supreme court. Each of these detentions can also be extended, in contrast to the previous HIR system, where the public prosecutor could not extend the detention of an assistant prosecutor.[3] The detention authority as intended is targeted for certain reasons or interests as regulated in Article 20 of the Criminal Procedure Code, namely:

For the purposes of investigation, investigators or assistant investigators on orders from investigators as referred to in Article 11 are authorized to make detentions. As for the types of detention based on Article 22 paragraph (1) of the Criminal Procedure Code, there are three types of detention, namely state detention, house arrest, and city detention.[4]

For the purposes of prosecution, the public prosecutor is authorized to make further detention or detention. The use of the authority to extend

2 Abdul Ukas Marzuki., The Criminal Law System in Indonesia from The Perspective of Pancasila, *International Journal of Social Research*, Vol. 2, No. 9, August 2023, page.3154-3161

3 Repsi Daun., Prinsip-Prinsip Penegakan Hukum Terhadap Penangkapan, Penahanan, Dan Penggeledahan Dalam Hukum Acara Pidana, *Lex Crimen*, Vol. 10, No. 4, 2021, page.144-153

4 Alan Dahlan., Review Of The Settlement Of Investigation Of The Criminal Action In Cijeungjing Sub-District, Ciamis Regency By Cijeungjing Policeresort, *Case Law: Journal of Law*, Vol. 4, No. 2, 2023, page.152-167

detention is carried out *gradually* and responsibly. It is possible for a suspect or defendant to be released from detention before the end of the detention period if the interests of the examination have been fulfilled. After 60 days, even though the case has not yet been examined or decided, the suspect or defendant must be released from detention by law.[5]

For the purpose of examining the judge in a court session with his stipulation, he is authorized to make detention. Law enforcers detain each individual there is a legal basis and the reason for its necessity is for the benefit of the examination of the case and the examination is carried out also requires time to obtain information, important evidence in a case. However, the time needed to conduct an examination is also not arbitrary, there is a time limit for each agency that carries out detention which has been regulated in the Criminal Procedure Code.[6]

The order for further detention or detention is regulated in Article 21 of the Criminal Procedure *Code*, such as: An order for further detention or detention is carried out against a suspect or defendant who is strongly suspected of committing a crime based on sufficient evidence, in the event that there are circumstances that raise concerns that the suspect or defendant will escape, destroy or destroy evidence and or repeat the crime.

Further detention or detention is carried out by an investigator or public prosecutor against a suspect or defendant by issuing a detention order or a judge's determination which includes the identity of the suspect or defendant and states the reasons for detention and a brief description of the crime case suspected or charged and the place where he was detained.[7]

A copy of the warrant for further detention or detention or the judge's decision as referred to in *paragraph* (2) must be given to his family. Requests to extend detention must be accompanied by a resume of the results of the examination, so that there are sufficient reasons for the prosecutor's office to grant an extension of detention to the suspect.[8]

Such detention can only be imposed on a suspect or defendant who commits a criminal act and/or attempts or provides assistance. Detention is a restriction on a person's freedom, especially a person's freedom of movement. So detention should be carried out if it is absolutely necessary for law enforcement purposes. Apart from that, detention also creates two conflicting principles, namely, on the one hand, detention causes loss of freedom of movement.[9]

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5 Jastis P. Singal., Pemberian Kewenangan Dalam Penahanan Penyidik Penuntut Umum Dan Pengadilan Berdasarkan Kitab Undang-Undang Hukum Acara Pidana, *Lex Administratum*, Vol. 11, No. 1, 2023, page.1-9

6 Violita Citra Kusuma Dewi., Koordinasi Antara InstitusiPenegak Hukum Dalam Hal Menangani Masalah Penahanan Berdasarkan KUHAP Sebagai Upaya Mewujudkan Sistem Peradilan Pidana Terpadu di Indonesia, *Jurnal Pendidikan Dan Konseling*, Vol. 4 No. 5, 2022, page.2668-2675

7 Agus Salim., Efektivitas Penahanan Yang Dilakukan Jaksa Penuntut Umum Terhadap Pelaku Tindak Pidana*, Journal of Lex Generalis*, Vol. 3, No. 3, 2022, page.469-485

8 Trianti, Herlina Sulaiman., Proses Penyidikan Terhadap Pencabulan Terhadap Anak Yang Dilakukan Oleh Ayah Tiri, *MJP Journal Law and Justice,* Vol. 1, No. 1, 2023, page.35-44

9 Rasdianah., Penerapan Penangguhan Penahanan Terhadap Tersangka Tindak Pidana, *Jurnal Mirai Management*, Vol. 8, Issue. 2, 2023, page.254 - 262

The authority of the appellate judge in carrying out detention according to the author's opinion is based on Article 238 paragraph (3) of the Criminal Procedure Code Jo. Article 21 paragraph (4) of the Criminal Procedure Code, in connection with it is very rare and rare for an Appeals Judge to hear (examine) the defendant's testimony in the examination during the trial at the Court of Appeal (High Court). The procedure for detention and extension of detention is as follows: Detention:

Detention of a suspect/accused may be ordered by investigators, public prosecutors or by judges based on the provisions of the applicable law. In the case of detention, the remaining period of detention which is the responsibility of the investigator may not be used by the Public Prosecutor for the purpose of prosecution. The calculation of the reduction in detention period from the sentence imposed must start from the time of arrest/detention by the Investigator, Public Prosecutor, and Court. To avoid misunderstanding on the part of the Head of Correctional Institution in calculating when the suspect/defendant must be released from the Correctional Institution, the grace period for detention must be stated clearly in the decision. Since the case is registered in the District Court Register, the responsibility for the case is transferred to the District Court, and the remaining period of detention of the Public Prosecutor may not be continued by the Judge.

Based on Said Rizal's research in a journal entitled "*Penahanan Anak yang Melakukan Tindak Pidana di Tingkat Pengadilan Tinggi pada Pengadilan Tinggi Banda Aceh*", that "the Judge's consideration of detaining children in trouble with the law, namely raises concerns that the suspect or defendant will escape, damage or eliminate evidence or repeat criminal acts, and the interests of the child or the interests of society. However, the impact of detention, staff of legal aid organizations and children's academics said, detention of children who violate the law has a bad impact, children will receive threats of violence in detention either by officers or other detainees. Children will be vulnerable to sexual harassment by other detainees.[10]

Another study by Sri Wulandari entitled "*Perlindungan Anak Nakal Yang Dikenai Penahanan Dalam Proses Peradilan Pidana*" states that "the settlement of cases against delinquent children should be different from the treatment of criminal offenders in general, even detention of children should be the last alternative if diversion and guarantees from parents do not reach consensus. Efforts to shorten detention should be considered by completing the *examination* as early as possible and detention in the settlement of children's cases becomes the final alternative according to the mechanism in the Juvenile Criminal Justice System by prioritizing the principle of the best interests of the child. So that community participation is very important in supervising, guiding and fostering children because the problem of

10 Said Rizal., Penahanan Terhadap Anak Yang Melakukan Tindak Pidanadi Tingkat Pengadilan Tinggi Di Pengadilantinggi Banda Aceh, *Ilmu Hukum Prima*, Vol. 3, No. 1, 2020, page.1-15

delinquent children is often caused by the influence of society, the child's environment and the wrong parenting of parents.[11]

Based on the above background, the purpose of this study is to determine the Authority Reconstruction of Judges in Detaining Children with the Justice Value.

B. RESEARCH METHODS

The approach method used in this research is a normative juridical approach, namely a normative approach, focusing on an inventory of positive law, legal *principles* and doctrines, legal discovery and legal history. The study was carried out through a literature study to obtain secondary data related to the Reconstruction of the Authority of the Appeal Judge to Detain Children with the Value of Justice.

C. RESULTS AND DISCUSSION

The value reconstruction is defined as the process of rebuilding or re-creating or reorganizing. Reconstruction is the interpretation of psychoanalytic data in such a way as to explain existing developments and their material meaning. The Indonesian people need to reconstruct the basic values of Pancasila, Divinity, Humanity, Unity, Democracy and Justice, because Pancasila is the nation's philosophy and national wisdom.[12]

Value reconstruction is defined as the process of rebuilding or re-creating or reorganizing. As for what is rebuilt in this case is the value.[13] According to Azyumardi Azra, the revitalization of Pancasila is the most feasible ideological joint line for the Indonesian nation- state and therefore more beneficial for this nation in the future. The law as a product of national legislation will be more perfect if Pancasila is used as a way of life based on the values of Pancasila. With the revitalization of Pancasila values, it can improve the quality of existing laws and regulations, by eliminating the slightest discrimination.

Pancasila has provided a cultural basis, namely just and civilized humanity. This is the principle of humanization in Pancasila which is divided into two parts, among others:[14]

Humanity is just; implies that humans must have awareness of attitudes and actions that are based on the potential of pure human ethics in relation to norms and norms. Potentials in relation to norms and culture in general, both towards individuals, fellow human beings, and other people or

11 Sri Wulandari., Perlindungan Anak Nakal Yang Dikenai Penahanan Dalam Proses Peradilan Pidana

12 Hasmika., Proceedings Of The 1st International Conference Of Education, Social And Humanities (Incesh 2021), *Atlantis Press*, Vol. 581, 2021, page.167-173

13 Kiki Handoko Sembiring, Teguh Prasetyo, Sri Endah Wahyuningsih., Reconstruction of Legal Protection Regulations for Teachers Who Commit Acts of Violence in an Educational Environment Based on the Value of Dignified Justice, *IJRS International Journal Reglement & Society*, Vol. 4, Issue. 1, 2023, page.47-53

14 Muhammad Yogi Triyadi, Widia Anggelina, Masduki Asbari., Pancasila As A Development Paradigm, JISMA Journal Of Information Systems And Management, Vol. 1, No. 6, 2022, page.5-13

culture in general, both towards individuals, fellow humans, as well as towards nature and animals.

Civilized humanity, humanity A just and civilized humanity is the attitude and actions of human beings that are and in accordance with the nature of human nature which is virtuous, value-conscious and cultured.

Legality or legal certainty, the legal principle that an act can only be subject to criminal punishment if the act has been clearly regulated as a criminal act in the legislation in force before the act was committed.

The placement of Pancasila as the source of all sources of State law is in accordance with the purpose of the opening of the 1945 Constitution of the Republic of Indonesia in the fourth paragraph, namely, Belief in One Supreme God, Just and Civilized Humanity, Indonesian Unity, Democracy Led by Wisdom in Deliberation. /Representation, and Social Justice for All Indonesian People.

Article 1 point 1 of the Law on Judicial Power states: "Judicial power is the power of an independent state to administer justice to uphold law and justice based on Pancasila, for the sake of the implementation of the State of Law of the Republic of Indonesia".

Article 3 paragraph (2) of the Law on Judicial Power also states that: "Any interference in judicial affairs by outside parties outside the jurisdiction of the judiciary is prohibited, except in matters as stated in the 1945 Constitution of the Republic of Indonesia". Judicial power is indeed independent in administering the judiciary to enforce law and justice. Independence means freedom without intervention or influence from the legislature or the 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 irresponsible but must still be based on the values of Pancasila.

Based on the description above, the author is of the opinion that judges should not be burdened with the authority to make detentions, because:

Judges must prioritize the principle of presumption of innocence over the principle of presumption of guilt.[15] In the process of criminal cases, the presumption of innocence is defined as a provision that considers a person undergoing a criminal process to remain innocent so that his rights as a citizen must be respected until there is a district court decision stating his guilt.

The judge's authority to make detention is a burden for the judge which will damage the independence and independence of the judge, because it has implications for the punishment that must be imposed on the defendant.

The examination process requires the presence of the defendant only in the trial process at the first level, namely in the District Court, while in the

15 Rezza Ardiansyah, Law Enforcement towards Money Laundering Prepertrators Reviewed From the Presumption of Innocence, *Corruptio*, Vol. 2, Issue. 1, 2021, page. 23-32

case of an appeal trial at the High Court and/or cassation at the Supreme Court, the trial process does not require the presence of the defendant.

Based on this, the detention authority since the defendant was delegated to the court, the detention authority should be transferred to the Public Prosecutor in this case the District Attorney,[16] the High Prosecutor's Office and the Attorney General's Office. The rationale for this is because the Public Prosecutor, in this case the District Attorney, the High Prosecutor's Office and the Attorney General's Office, has since received the delegation of the suspect from the Police Investigator, applying the principle of presumption of guilt, so that the suspect is upgraded to a defendant's status, and is charged and charged with guilt in court.

Article 32 paragraph (1) of the SPPA Law states that detention of a child may not be carried out in the event that the child obtains guarantees from parents/guardians and/or may not be carried out in the event that the child obtains guarantees from parents/guardians and/or institutions that the child will not run away, will not eliminate or damage the institution that the child will not run away, will not eliminate or damage evidence, and/or will not repeat the criminal offense. Meanwhile, in paragraph (2) in the same article states that detention of children can only be carried out on the with the condition that the child has reached the age of 14 (fourteen) years and is suspected of committing a criminal offense punishable by seven years imprisonment or criminal offense with the threat of imprisonment of seven years or more. Then in paragraph (5) states that in order to protect the safety of the child, placement of the child in the child may be placed in the Social Welfare Institution.[17]

Article 33 of the juvenile criminal justice system Law regulates the detention of children for the purpose of investigation, which can be carried out for a maximum of 7 (seven) days and can be extended by the Public Prosecutor at the request of the Investigator for a maximum of 8 (eight) days. Article 34 stipulates that in the event that detention is carried out for the purpose of prosecution, the Public Prosecutor may conduct detention for a maximum of 5 (five) days and may be extended by the Public Prosecutor at the request of the Investigator for a maximum of 8 (eight) days at the request of the Public Prosecutor may be extended by a District Court Judge for a maximum of 5 (five) days. Meanwhile, Article 35 stipulates that in the event of detention detention is carried out for the purpose of examination at the court session, the Judge may impose a maximum of 10 (ten) days detention and at the request of the Judge may be extended by the district court Judge for a maximum of 15 (five) days. Meanwhile, Articles 37 and 38 regulate detention in the examination of the appeal and cassation levels, namely each 10 (ten) days extension of 15 (fifteen) days for the appeal level

16 Fauzipaksia, Abdul Wahidb, Hamdan Hi Rampadioc., The Authority of the Prosecutor's Office in Determining the Institution for Calculating State Financial Losses as Part of the Enforcement of Corruption Laws, *International Journal of Multicultural and Multireligious Understanding*, Vol. 10, Issue. 4, 2023, page.89-99

17 Suwito, Jonneri Bukit., Educating Children On Legal Matters Through Local Wisdomprinciples Approaches And Enhancing Restorative Justice In The Criminal Law System, *Journal of Law and Policy Transformation*, Vol. 8, No. 1, 2023, page.13-26

and 15 (fifteen) days for the cassation level. Appeal level and 15 (fifteen) days extension of 20 (twenty) days for cassation level. The detaining official shall notify the child and the parents/guardians of the right to obtain parents/guardians regarding the right to obtain legal aid, otherwise the arrest or detention of the child is null and void.[18]

In the process of examining children in court, judges are not allowed to wear a toga, as stipulated in Article 22 of the SPPA Law.[19] This is intended so that the child's psychology is not depressed by attributes that can make the child fearful when being examined in court so that the child cannot give testimony freely in court freely in the trial.

Things that must be done by the Judge include the Judge's attitude in examining the child.[20] Examining the child must be calm, pay attention to the child's psychology, and create a relaxed atmosphere and freedom for the child to express their his/her opinion.

Things that must be avoided by the Judge, among others, the Judge must not say rude, indecent and vulgar words, use body language that is the child, or yell, suppress and interrupt the child's conversation. In asking questions to the child during the trial, the Judge can use the technique of starting with a warm and friendly greeting, during the question and answer remain in a friendly atmosphere and keep away the impression of intimidation, speak in a language that is easily understood by the child or if possible, use popular language/terms that are popular among children, repeating questions that the child does not understand until the child can understand, and say thank you when the child has finished giving information.

Article 21 paragraph (1) of KUHAP stipulates that detention or continued detention is carried out against a suspect or defendant who is strongly suspected of committing a criminal offense based on sufficient evidence,[21] in the event that there are circumstances that raise concerns that the suspect or defendant will circumstances that raise concerns that the suspect or defendant will escape, damage or eliminate evidence and/or repeat the criminal offense. This kind of provision in many countries also regulated, including the addition that the defendant is feared to disturb or threaten other people or the defendant is does not appear in court and so on. But in principle, in various countries have regulated what reasons detention can be carried out.

18 Andi Muhammad Sofyan, Haeranah, Handar Subhandi Bakhtiar., Criminal Justice System of Children in Indonesia, *IOSR Journal Of Humanities And Social Science*, Vol. 24, Issue. 9, 2019, page.01-07

19 Adi Mansar., The Effectiveness of Criminal Law Jurisdiction on Children in Indonesia, *Randwick International of Social Sciences (RISS) Journal*, Vol. 3, No. 4, 2022, page.891-901

20 Kyndra C. Cleveland., What's Fair in Child Welfare? Parent Knowledge, Attitudes, and Experiences, *Sage Journal*, Vol. 27, Issue. 1, 2022, page.53-65

21 Awalia Safinatunnajah, Mahrus Ali, and Papontee Teeraphan., Compliance ofthe Subjective Terms of Detention inCriminal Procedure with International Covenant on Civil and Political Rights, *Lex Publica Jurnal Ilmu Hukum Asosiasi Perguruan Tinggi Hukum Indonesia*, Vol. 9, No. 2, 2022, page.88-101

Article 20 is contrary to due process of law and contrary to a provision where there must be judicial authority? I see that with the rules regarding habeas corpus, namely through pretrial, a suspect can actually test whether his detention is legal or not can test whether his detention is legal or not. And the pretrial institution, which is a kind of habeas corpus for the Indonesian context, it can be tested, so that the detention is not arbitrary. That is, in the KUHAP the control over detention, as well as the extension of detention, and so on are regulated in the law in the KUHAP.[22]

The ideal reconstruction of the judge's authority to detain based on the principle of presumption of innocence and the value of justice, is to revoke the judge's authority to detain the defendant and delegate it to the public prosecutor, by reconstructing Article 20, Article 23, Article 26, Article 27 and Article 28 of KUHAP.

D. CONCLUSION

The authority of judges, including Appeals Judges or High Court Judges in detaining defendants is contrary to the principle of presumption of innocence, because detention is a realm of presumption of guilt that can only be used by investigators and public prosecutors. independent, because the decision will take into account the detention that has been carried out, and the detention carried out by the judge even though it is his authority, indicates the judge has decided the defendant is guilty even though the verdict has not been handed down, because the basis for detention is that there is sufficient evidence obtained by the Investigator and/or Public Prosecutor, while the evidence has not been proven in court, and it is impossible for a judge to dare to make an arrest if he does not assume that the defendant is guilty, and will be sentenced to prison The ideal reconstruction of the judge's authority in carrying out detention based on the principle of 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 in stages delegated to the District Attorney's Office, Head of the District Attorney's Office, High Prosecutor's Office, The Head of the High Prosecutor's Office, the Attorney General and the Head of the Attorney General's Office, by reconstructing Articles 20, 23, 26, 27 and 28 of the Criminal Procedure Code.

22 Muhammad Arif Agus, Ari Susanto., The Optimization Ofthe Role Of Correctional Centers In The Indonesian Criminal Justice System, *Jurnal Penelitian Hukum De Jure*, Vol. 1. No. 3, 2021, page.369-385

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