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The Concept of Habeas Corpus Act in Regulating the Legality of Suspects' Determination as an Object of Pretrial in Indonesia

Andi Sinjaya^{1*}, Janaek Situmeang²

¹andisinjaya@gmail.com, ²janaeksitumeang@gmail.com

Universitas Bhayangkara Surabaya

*Corresponding Author: Andi Sinjaya

Email: andisinjaya@gmail.com

ABSTRACT

The Habeas Corpus Act is a legal principle that protects individuals from arbitrary detention, but its implementation in the Indonesian legal system has been challenging, especially in pretrial proceedings. The regulation of suspect determination as an object of pretrial in Indonesia is debatable today, because the establishment of a suspect is not an act of coercion. This research aims to determine the concept of the Habeas Corpus Act in regulating the determination of suspects as pretrial objects. This research uses normative legal methods with statutory, conceptual, historical, and comparative approaches, and collects legal materials which are analyzed using legal theories. The results showed that pretrial was inspired by the Habeas Corpus Act. However, the regulation of suspect determination as an object of pretrial has actually deviated from the concept. Nevertheless, the Habeas Corpus Act was founded on the principle of human rights protection. Therefore, the regulation of the validity of the suspect's determination as an object of pretrial in Indonesia is consistent with the principles of the Habeas Corpus Act, which is to ensure the protection of human rights.

Keywords: Concept of Habeas Corpus Act, Pretrial, Suspect Determination

INTRODUCTION

Pretrial institution is expected to become a horizontal control or supervision tool to examine the legality of authority granted by the police and prosecutors. The existence of a pretrial institution that monitors the efforts of the police and prosecutors which are in alignment with legal provisions is highly needed due to the amount of authority possessed by investigators and public prosecutors in managing a criminal case, specifically in the process of investigation, prosecution, pre-prosecution and adjudication. It aims to correct and supervise each other, so as to create a fair legal process (due process of law).¹

In principle, within the authority possessed by investigators and public prosecutors, there is formal authority. Unrealized authority, its purpose and limits will always tempt its holders to behave arrogantly. According to Lord Acton, authority tends to corrupt, the greater the authority, the greater the tendency to corrupt.² Therefore, it is important to have a monitoring or control tool, one of which is a pretrial institution. The authority of the pretrial institution should be balanced with the authority possessed by the investigator and prosecutor. Thus, it is not limited to the current provisions and legal reform initiatives are expected.

During the development of law in Indonesia, especially in the criminal justice system, through “Constitutional Court Decision No. 21/PUU-XII/2014 dated April 28, 2015,” the object of pretrial is “the validity or invalidity of suspect determination, investigation and confiscation,” which previously referred to Article 77 of Law No. 8/1981 on the Criminal Procedure Code (hereinafter simply referred to as KUHAP). Thus, currently the objects of pretrial are the validity or invalidity of arrest, detention, termination of investigation or prosecution, compensation and or rehabilitation for a person whose criminal case is terminated at the investigation and prosecution level, the validity or invalidity of the determination of a suspect, investigation, and confiscation.³

Indeed, the soul of pretrial institution as an effort to monitor the use of authority is to ensure the “protection of human rights.” This is stated in the Considerance letters (a) and (b) in the Criminal Procedure Code which states that “the Republic of Indonesia is a state of law based on Pancasila and the 1945 Constitution which upholds human rights and guarantees all citizens equal status in law and government and must uphold the law and government with no exceptions, and that such national legal development in the field of criminal procedure law is to make the public appreciate their rights and obligations and to improve the attitude

¹ Ko Triskie Narendra, Didik Endro Purwoleksono, and Taufik Rachman, “The Existence of Pretrial Institutions in the Enforcement of Criminal Law,” *Pena Justisia: Media Komunikasi dan Kajian Hukum* 22, no. 3 (August 7, 2024), <https://jurnal.unikal.ac.id/index.php/hk/article/view/4927>.

² Brian Martin, “Power Tends to Corrupt,” in *Information Liberation* (Freedom Press, 1998).

³ Lily Bauw et al., “Pre-Trial As Investigation Process Control System,” *SASI* 28, no. 4 (December 30, 2022): 608, <https://fhukum.unpatti.ac.id/jurnal/sasi/article/view/1077>.

of law enforcement officials in accordance with their respective functions and authorities towards the establishment of law, justice and protection of human dignity, order and legal certainty for the implementation of a state of law in accordance with the 1945 Constitution.”⁴ The 1945 Constitution of the Republic of Indonesia (hereinafter simply referred to as the 1945 Constitution) has regulated the protection and certainty of a fair law for every citizen. This is contained in Article 28D Paragraph (1) of the 1945 Constitution which states that “every person shall have the right to recognition, guarantees, protection and certainty of a just law and equal treatment before the law.”⁵

Furthermore, the Indonesian Government is very serious in guaranteeing human rights to its citizens, especially in the use of the right to legal proceedings through the Pretrial Institution. It is guaranteed in Article 17 of Law No. 39/1999 on Human Rights (hereinafter simply referred to as Human Rights Law) which stated that “every person, without discrimination, has the right to obtain justice by filing applications, complaints and lawsuits, both in criminal, civil and administrative cases and to be tried through a free and impartial judicial process, in accordance with procedural law that guarantees an objective examination by an honest and fair judge to obtain a proper and fair trial.” Moreover, Indonesia has ratified the International Covenant on Civil and Political (hereinafter abbreviated as ICCPR) through Law No.12/2005 on the Ratification of the International Covenant on Civil and Political Rights (hereinafter simply referred to as the International Covenant Law), which is one of the main international instruments containing the confirmation of human rights principles.

The historical background of pretrial institutions is the adoption of the concept of habeas corpus. The origins of pretrial can be traced back to Adnan Buyung Nasution’s statement. He explained the background of the pretrial institution, an option that was considered more reasonable at the time (during the 70-80s) than a commissioner judge as a supervisor. Moreover, the judicial power was still part of the government (Old Order and later New Order).⁶ This situation made it impossible to assign judges as supervisors of investigating institutions. As an alternative, the choice was made to adopt the concept of “habeas corpus act formalized in the form of pretrial institution.” Oemar Seno Adji emphasized that the concept of habeas corpus act in the Indonesian criminal procedure system was deliberately created as a means of testing the validity of the process (application of coercive measures) of arrest and detention, especially because both coercive

⁴ Aji Febrian Nugroho, “Legal Protection for Victims of Fair Trial Rights as a Form of Human Rights Protection in the Indonesian Justice System,” *Policy, Law, Notary and Regulatory Issues (POLRI)* 2, no. 1 (2023).

⁵ Pemerintah Indonesia, *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Amandemen Ke-4*, 2002.

⁶ Adnan Buyung Nasution and A. Patra M. Zen, *Instrumen Internasional Pokok Hak Asasi Manusia* (Jakarta: Sinar Grafika, 2006).

measures are actually “indruising” basic human rights and freedoms. Thus, the authorization of the court to test the validity of these legal measures is necessary.⁷

Based on the previous case, it means that there is a need to expand the authority of the pretrial institution, in order to create respect for human rights for every citizen who is involved in a legal case and is being investigated or prosecuted. According to Jan Martenson, human rights are rights inherited from our nature without which we cannot live as human beings.

RESEARCH METHODOLOGY

This research aims to determine the concept of habeas corpus act in regulating suspect determination as pretrial object. To achieve this purpose, this research uses normative legal research method. This method focuses on the study of applicable legal norms by examining various laws and regulations, legal doctrines, and relevant concepts. The approaches used include statute approach, conceptual approach, historical approach, and comparative approach. The statutory approach is used to examine regulations relating to pretrial objects in the Indonesian legal system. The conceptual approach aims to understand more deeply the legal theories underlying the existence of pretrial. Meanwhile, the historical approach was used to trace the development of the concept of habeas corpus act in the legal system over time. A comparative approach is used to compare the pretrial arrangements in Indonesia with the legal systems in other countries that have similar concepts.⁸

In this research, the legal materials collected consisted of primary, secondary and tertiary legal materials. The Criminal Procedure Code and decisions from the Constitutional Court that broaden the scope of pretrial proceedings are examples of primary legal materials. Secondary legal materials include books, journals, and opinions of legal experts discussing pretrial and the habeas corpus act. Meanwhile, tertiary legal materials were used as additional references to enrich the analysis. The technique of collecting legal materials was conducted through literature study by reviewing various relevant legal documents. The analysis of legal materials was conducted using a deductive approach, in which legal theories and basic concepts were analyzed and then linked to applicable regulations and their implementation in judicial practice in Indonesia. Through this method, the research is expected to provide a comprehensive understanding of the regulation of the validity or not of the

⁷ Dr. Salman Luthan, Dr. H. Andi Samsan Nganro, and Ifdhal Kasim, *Praperadilan Di Indonesia: Teori, Sejarah, Dan Praktiknya*, ed. Anggara Anggara (Jakarta Selatan: ICJR: Institute for Criminal Justice Reform, 2014).

⁸ Theresia Anita Christiani, “Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object,” *Procedia - Social and Behavioral Sciences* 219 (May 2016): 201–207, <https://linkinghub.elsevier.com/retrieve/pii/S1877042816300660>.

suspect's determination as an object of pretrial in the perspective of the concept of the habeas corpus act.⁹

RESULT AND DISCUSSION

Regulation of the Validity of the Suspect's Determination as an Object of Pre-Trial in Indonesia

Article 1 point 10 of Criminal Procedure Code confirms that "pretrial is the authority of the District Court to examine and decide in accordance with the procedures stipulated in the law." Pretrial covers several aspects, including the legitimacy of an arrest or detention made at the suspect's, his or her family's, or other parties' request; the legitimacy of ending an investigation or prosecution for the purposes of law and justice; and, in the event that the case is not brought before the court, the validity of the suspect's, his or her family's, other parties', or his or her lawyer's demand for compensation or rehabilitation.

The provision in Article 1 point 10 of KUHAP is clarified in Article 77 of KUHAP, which states that "the District Court is authorized to examine and decide in accordance with the provisions stipulated in the law." Pretrial matters consist of whether an arrest, imprisonment, investigation, or prosecution is lawful, and whether a person whose criminal case is closed at the investigation or trial stage is eligible for compensation and/or rehabilitation.¹⁰

In addition to the provisions in Article 1 point 10 and Article 77 of KUHAP, there is a Constitutional Court decision that changes the scope of pretrial. Through Constitutional Court Decision No. 21/PUU-XII/2014, the scope of pretrial was expanded so that the provisions of Article 77a of KUHAP no longer have permanent legal force if they are not interpreted to include suspect determination, investigation, and confiscation. Therefore, after the Constitutional Court's decision, these three matters legally became the object of pretrial.

Regulation of the Validity of Suspect Determination as an Object of Pretrial in Indonesia from the Perspective of Habeas Corpus Act Concept.

In the previous discussion, we have already recognized that the concept of Habeas Corpus Act is focused on the act of coercion (*dwang middelen*) in the form of detention. This is obviously in accordance with the contents of the writ of Habeas Corpus, which states the detainee is under your control. You must bring the detainee before the court and you must explain the reason for detention.

There are two emphases in this concept though the first is the attempt to challenge a person's detention, and the second is the step to test the validity of that

⁹ Dr. Wiwik Sri Widiarty, *Buku Ajar Metode Penelitian Hukum* (Yogyakarta: Publika Global Media, 2024).

¹⁰ Tatang Prajitno, "Analisa Lembaga Praperadilan Sebagai Kontrol Tugas Penyidik Dalam Proses Penegakan Hukum," *Jurnal Ilmu Kepolisian* 17, no. 3 (December 28, 2023): 23, <https://www.jurnalptik.id/index.php/JIK/article/view/418>.

detention. Historically, the Habeas Corpus Act was also inspired by the Magna Carta of 1215. The concept of Magna Carta was intended to limit the power of the king, under the premise that human rights were more important than the power of the king. The emphasis is on the principle of fundamentally ratio law and fair process as a condition for limiting a person's human rights (deprived of human rights).¹¹

It is possible that the concept of pretrial in Indonesia was inspired by the Habeas Corpus Act, with the main purpose as a mechanism of supervision and correction of the authority of law enforcement officers. The authority of law enforcement officers contains formal authority which if not monitored, may tempt its holder to act arbitrarily. Therefore, it is important to have a means of control such as a pretrial institution.

The basic principle of habeas corpus inspired the creation of a forum that provides those who have been deprived or restricted of their liberty with the right to challenge and examine the veracity of authority's actions. The prohibition of coercive measures (*dwang middelen*)-such as arrest, detention, confiscation, search, seizure, or disclosure of documents-by the police, prosecutor's office, or other authorities, was created because there was no evaluation mechanism to ensure the effectiveness of these coercive measures. According to Oemar Seno Adji, habeas corpus functions as a mechanism to test the validity of arrest and detention, because these actions are a form of "indruising" against a person's rights and freedoms.¹²

During its development, the concept of habeas corpus was adopted by many countries, including Indonesia in Criminal Procedure Code through pretrial mechanism. Adnan Buyung Nasution argued that the choice of pretrial was inspired by the political situation when drafting the Criminal Procedure Code, which required control from suspects, defendants, or their lawyers over the legal apparatus.

Regarding the validity of suspect determination as an object of pretrial in the perspective of the Habeas Corpus Act, it should be understood that suspect determination is not part of coercion. According to the Habeas Corpus Act, coercion refers to the act of detention. Thus, making suspect determination as a pretrial object deviates from the concept of habeas corpus itself. However, since the purpose of habeas corpus is the protection of human rights, the relevance of this arrangement needs to be further examined by considering human rights theories and the purpose of Criminal Procedure Code.

Human rights are very important because they concern a person's right to life. According to Jan Martenson, human rights are rights inherited from our nature,

¹¹ Hendrik Tarigan, "Rekonstruksi Regulasi Pra Peradilan Berbasis Nilai Keadilan" (Universitas Islam Sultan Agung Semarang, 2024).

¹² Ramsen Marpaung and Tristam Pascal Moeliono, "Perbandingan Hukum Antara Prinsip Habeas Corpus Dalam Sistem Hukum Pidana Inggris Dengan Praperadilan Dalam Sistem Peradilan Pidana Indonesia," *Jurnal Wawasan Yuridika* 5, no. 2 (September 30, 2021): 224, <http://ejournal.sthb.ac.id/index.php/jwy/article/view/494>.

without which we could not survive as human beings. The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from slavery, recognition as a person before the law, and immunity from prosecution under laws that apply retroactively are several examples of non-derogable rights that cannot be diminished under any circumstances.¹³

Everyone who is identified as a suspect has their human rights reduced, such as restrictions on freedom of travel, social impacts due to labeling, and difficulties in finding a job due to SKCK requirements. In criminology, labeling can create “career criminals” (criminogetic), as social stigma and community reactions can encourage further involvement in illegal activities. Therefore, the determination of suspects must be closely monitored.

In Indonesia, laws and regulations stipulate that a person with suspect status can be temporarily dismissed from their position. For example, Article 33(2) of Law No. 30/2002 on the Corruption Eradication Commission states that KPK leaders who become suspects in a crime will be temporarily dismissed. Similarly, Article 10 Paragraph (1) of Government Regulation No. 3/2003 states that members of the Indonesian National Police who become suspects can be temporarily dismissed until there is a court decision with permanent legal force.

In general, suspect determination is an administrative action of the police after the investigation and prosecution process. However, the impact on the suspect is significant, as the police can freely use coercive measures against him. According to National Police Chief Regulation No. 6/2019 on Criminal Investigation, coercive measures include summoning, arresting, detaining, searching, confiscating, and examining letters. Thus, the determination of a suspect is not part of coercion.

In Constitutional Court Decision Number 21/PUU-XII/2014, the Court emphasized that pretrial should be a means to ascertain whether the decision to make someone a suspect is justified. The 1945 Constitution guarantees the right to recognition, security, protection, and legal justice. Therefore, the determination of a suspect must be protected by a pretrial mechanism to prevent abuse of authority.

The basic idea in the Constitutional Court’s decision refers to the humanitarian principles in Pancasila, especially the second principle (Fair and Civilized Humanity) and the fifth principle (Social Justice for All Indonesian People). These principles indicate that the protection of individuals and the interests of society must be consistent with the law.¹⁴

In Indonesia, the concept of coercive measures is still debated. The Criminal Procedure Code and the National Police Chief Regulation have different interpretations of force. At the beginning of the enactment of Criminal Procedure

¹³ Nur Asiah, “Hak Asasi Manusia Perspektif Hukum Islam,” *Jurnal Syari’ah dan Hukum Diktum* 15, no. 1 (2017): 55–66.

¹⁴ Suri Indriani and Hadi Rianto, “Analisis Nilai Keadilan Sosial Bagi Seluruh Rakyat Indonesia Untuk Mengembangkan Sikap Keadilan Di Desa Pusat Damai Kecamatan Parindu Kabupaten Sanggau,” *JPKN: Jurnal Pendidikan Kewarganegaraan* 3, no. 2 (2019).

Code in 1981, suspect determination was not yet an important issue, so coercion was only defined as arrest, detention, investigation, and prosecution. However, in its development, the state can label a suspect with a certain deadline without a legal mechanism that ensures its validity.

Law is dynamic and must be able to adapt to the development of society. As Aristotle said, distributive justice is about giving everyone what they are entitled to, and corrective/commutative justice seeks to compensate the aggrieved party. John Rawls also emphasizes that justice must guarantee basic freedoms and fair opportunities for all people. Thus, in determining the status of a suspect, law enforcement officials must be careful and uphold the principles of justice and the protection of human rights.¹⁵

The researcher reviewed pretrial from three main perspectives, namely juridical, theoretical and sociological. From the juridical review, the researcher compared the existence of pretrial in various countries inspired by the concept of Habeas Corpus Act. In the United States with an Anglo-Saxon legal system and the Netherlands with a Continental European legal system, this concept was adapted to ensure the protection of human rights. Indonesia, which also adheres to the Continental European legal system, applies a similar concept in the form of pretrial as stipulated in Article 77 of KUHAP and strengthened by Constitutional Court Decision No. 21/PUU-XII/2014. However, Indonesia has expanded the scope of pretrial to include the review of the determination of a suspect, which did not exist in the original concept of the Habeas Corpus Act. However, the researcher considers that this expansion may occur in line with the development of legal politics in Indonesia to avoid abuse of authority by law enforcement officials.

From the theoretical review, this research uses human rights theory as the basis of analysis. The researcher sees that the expansion of pretrial authority in Indonesia is still in line with the soul of the Habeas Corpus Act, which aims to protect individual freedom from arbitrary actions of law enforcement officials. This concept is also linked to the Magna Carta, which emphasizes that human rights are more important than the absolute power of the ruler. In this context, testing whether or not the determination of a suspect is valid is important due to the potential limitation and restraint of a person's freedom. Thus, the pretrial mechanism serves as a control tool against abuse of power in law enforcement and becomes an instrument to ensure the protection of human rights.

From a sociological review, the researcher considers that the law is dynamic and must adapt to the development of society. Looking at judicial practice in Indonesia, such as in pretrial cases at the South Jakarta District Court, it appears that the courts have begun to recognize the need to test whether or not the determination of a suspect is valid. These decisions show that the legal system in Indonesia continues to develop in accordance with the needs of society and the

¹⁵ Stéphane Bauzon, "The Concept of Fairness in Aristotle's Philosophy," *Corpus Aristotelicum* (2024).

concept of responsive law, which makes law a tool to adapt to social change and community aspirations. Therefore, according to the researchers, the regulation on whether or not the determination of a suspect is valid in pretrial proceedings is still relevant to be maintained because it reflects the evolving legal needs in Indonesia.

CONCLUSION

The regulation of the validity of suspect determination as an object of pretrial in Indonesia is part of efforts to ensure the protection of human rights, both juridically, theoretically and sociologically.

Juridically, this regulation aims to create a fair and proper legal process (due process of law). Theoretically, the regulation of whether or not the determination of a suspect is valid as an object of pretrial is intended to create legal certainty, justice, and expediency, so that suspects brought to trial actually through the process in accordance with the applicable rules of law. Meanwhile, sociologically, this arrangement is a response to legal developments in Indonesian society, which aims to provide legal protection from arbitrary actions of law enforcement officials.

The concept of the habeas corpus act cannot be separated from the Magna Carta, which aimed to limit the power of the king. It contains the idea that human rights are more important than the power of the king. No one could be arrested, deprived of their property, or exiled without legal consideration. The paradigm of the king's absolutism shifted towards the sovereignty of the people, where the restraining power was destroyed by the rationalism tradition. The concept of habeas corpus act then inspired various countries, including Indonesia, in protecting their citizens juridically, theoretically and sociologically. The concept also inspired the formulators of Criminal Procedure Code to include a horizontal control institution over the authority of investigators and prosecutors in carrying out their duties, known as pretrial.

In the perspective of the habeas corpus act, juridically, the regulation of the validity of suspect determination as an object of pretrial becomes a control mechanism for the authority of law enforcement officials provided by law. This aims to ensure that coercive actions or efforts are carried out according to the correct procedures, with a cautious attitude, and without abuse of authority. Theoretically, although this regulation has deviated from the basic concept of the habeas corpus act, the main principle, namely the protection of human rights, is still accommodated in the regulation of the validity of suspect determination as an object of pretrial. Sociologically, this arrangement reflects the dynamic nature of law and always follows the development of society, which demands changes in the basics of law in order to achieve justice.

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