



## Compliance of the Subjective Terms of Detention in Criminal Procedure with International Covenant on Civil and Political Rights

Awalia Safinatunnajah<sup>1</sup>, Mahrus Ali<sup>1\*</sup>, and Papontee Teeraphan<sup>2</sup>

<sup>1</sup> Faculty of Law, Universitas Islam Indonesia, Yogyakarta, Indonesia

<sup>2</sup> Thaksin University, Songkhla, Thailand

\*Corresponding author: [mahrus\\_ali@uii.ac.id](mailto:mahrus_ali@uii.ac.id)

**Abstract.** Detention is one of the coercive measures carried out in the investigation stage. Detention is regulated in Article 21 of the Criminal Procedure Code, in that article there are subjective conditions for detention. Conditions that must be met after the objective conditions. The subjective terms contained in Article 21 paragraph (1) of the Criminal Procedure Code contain an element of concern. This concern has an abstraction in the determination of detention. This can be dependent on the point of view of law enforcement. The International Civil and Political Rights Covenant (ICCPR) has been ratified by Indonesia. The agreement also regulates detention in Article 9 and Article 14 of the ICCPR. The purpose of this study was to determine the suitability of the provisions regarding the subjective conditions of detention in the Criminal Procedure in accordance with the principles of detention in ICCPR. This study uses a normative juridical research method with legal materials and uses a conceptual approach which then draws a conclusion. The result is that the detention regulations in Article 21 paragraph (1) of the Criminal Procedure Code are not in accordance with the principles contained in Article 9 and Article 14 of the ICCPR. To be precise, the principle of legality, the principle of necessity, the principle of proportionality, the principle of equality before the law and the principle of presumption of innocence. Subjective terms in Indonesia rely on the views of law enforcement without any clear boundaries that creates legal uncertainty.

**Keywords:** ICCPR, Detention, Subjective terms, Criminal Procedure Code, Indonesia

**Abstrak.** Penahanan merupakan salah satu upaya paksa yang dilakukan dalam tahap penyidikan. Penahanan diatur dalam Pasal 21 KUHAP, dalam pasal tersebut adanya syarat subjektif penahanan. Syarat yang harus dipenuhi setelah syarat objektif. Syarat subjektif yang terdapat dalam Pasal 21 ayat (1) KUHAP mengandung unsur kekhawatiran. Kekhawatiran ini terdapat keabstrakan dalam penentuan penahanan. Hal ini dapat menjadi ketergantungan sudut pandang pada penegak hukum. Internasional Covenant Sipil and Political Rights (ICCPR) telah diratifikasi oleh Indonesia, perjanjian tersebut mengatur juga tentang penahanan pada Pasal 9 dan Pasal 14 ICCPR. Tujuan penelitian ini untuk mengetahui kesesuaian ketentuan tentang syarat subjektif penahanan dalam KUHAP sesuai dengan prinsip penahanan dalam Internasional Covenant on Civil and Political Rights (ICCPR). Penelitian ini menggunakan metode penelitian yuridis normatif dengan bahan hukum dan menggunakan pendekatan

Received: November 8, 2022 | Revised: November 20, 2022 | Accepted: December 30, 2022



*konseptual yang kemudian diambil suatu kesimpulan. Hasil dari penelitian ini yaitu peraturan penahanan pada Pasal 21 ayat (1) KUHAP belum sesuai dengan asas-asas yang terkandung dalam Pasal 9 dan Pasal 14 ICCPR. Tepatnya asas legalitas, asas nesesitas, asas proporsionalitas, asas persamaan dihadapan hukum dan asas praduga tidak bersalah. Karena dalam syarat subjektif mengandalkan pada pandangan penegak hukum tanpa ada batasan yang jelas sehingga menimbulkan ketidakpastian hukum.*

**Kata kunci:** ICCPR, Penahanan, Syarat Subjektif, KUHAP, Indonesia

## 1. Introduction

Detention is also one of the efforts of hard coercion (*dwang middelen*, enforcement) which can be carried out for the purposes of investigation.<sup>1</sup> Article 21 paragraph (1) of the Criminal Procedure Code states that an order for detention or further detention shall be made against a suspect and defendant who is strongly suspected of having committed a crime based on sufficient evidence, in the event that there are circumstances which raise concerns that the suspect or defendant will run away, damage or lose property. evidence and or repeating a crime.<sup>2</sup> Detaining someone means that person is strongly suspected of having committed one of the offenses listed in Article 21 paragraph (4). Objective detention requirements stipulate that criminal acts for which detention can be carried out are the threat of imprisonment for five years or more and one of the offenses listed in Article 21 paragraph (4), while the subjective detention requirements are contained in Article 21 of the Criminal Procedure Code paragraph (1) which raises concerns that the suspect or defendant will run away, damage or destroy evidence and or repeat the crime.

The provisions of these subjective terms are cumulative provisions in which all requirements must be met. However, this subjective requirement does not mean that it becomes a legal requirement for a detention, but rather that the legality of detention is stated in Article 21 paragraph (4) of the Criminal Procedure Code or is called the objective requirement of detention. While the subjective conditions are only in the form of conditions for the need to hold a detention.<sup>3</sup> In the practice of using subjective terms of detention, there are differences in usage. As in the Lanjar Sriyanto case, which was detained, while the Rasyid Rajasa case was not detained. Then, for example, in the case of Aditya Wisnu Wardana, he was not detained for committing a criminal act of corruption, and the corruption cases involving Didiet Hartanto, Firjan Taufan, and Tirtha Adhi Kazmi were detained. Thus subjective conditions can give rise to several opinions which eventually become legal uncertainties. This is not in accordance with the provisions of Article 14 of the ICCPR which has been ratified in Law No. 12 of 2005 concerning Ratification of the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights, where all people have the same position before the court and court bodies, as well as the principles contained in the International Covenant on civil and political rights, to be precise the

---

<sup>1</sup> Wortley, Richard. *Situational prison control: Crime prevention in correctional institutions*. Cambridge university press, 2002.

<sup>2</sup> The Criminal Procedure Code (KUHP)

<sup>3</sup> Hamzah, Andi. *Hukum Acara Pidana Indonesia*. Jakarta: Sinar Grafika, 2017, p. 130.

principles of legality, the principle of necessity, the principle of proportionality, and the principle of the presumption of innocence.

Human rights are essentially the most basic rights possessed by all human beings as the highest gift from God Almighty, wherever humans live, because with these rights humans can become dignified and civilized beings.<sup>4</sup> Therefore, no one or authority can deprive or reduce basic human rights. If the Criminal Procedure Code is designed for state officials, then the ICCPR applies to protect the rights of citizens in law, as well as Civil Rights and Political Rights. So the state is obliged to fulfill the rights of its citizens in equal justice before the law in accordance with the principles contained in Article 9 and Article 14 of the ICCPR. Accordingly, the formulation of the problem is whether the subjective terms in the Criminal Procedure Code are in accordance with the principle of detention in the International Covenant on Civil and Political Rights (ICCPR)?

## 2. Research methods

The research method used by the author is the method of normative law. The approach method used is the statutory approach and the conceptual approach. The legal materials required in this study use secondary legal materials in the form of primary legal materials, secondary legal materials and tertiary legal materials. The technique of collecting legal materials for this research uses document studies or documentation for data collection tools as well as literature studies. The method of analysis of legal materials in this writing uses descriptive analysis methods, by means of legal materials obtained from the answers to the problems raised. The purpose of this study was to determine the conformity of the provisions regarding subjective conditions of detention in the Criminal Procedure Code in accordance with the principles of detention in the International Covenant on Civil and Political Rights (ICCPR).

## 3. Research Results and Discussion

Forced measures are specifically regulated in Law Number 26 of 2000 concerning Human Rights Courts in the form of arrest and detention.<sup>5</sup> Forced measures are given in order to expedite the implementation of law enforcement

---

<sup>4</sup> Tadros, Victor. "Rethinking the presumption of innocence." *Criminal Law and Philosophy* 1, no. 2 (2007): 193-213; Tadros, Victor, and Stephen Tierney. "The presumption of innocence and the human rights act." *The Modern Law Review* 67, no. 3 (2004): 402-434.

<sup>5</sup> Herbert, Jeff. "The legal framework of human rights in Indonesia." In *Indonesia: Law and society*, Timothy Lindsey (ed.), pp. 456-482. The Federation Press, 2008.

duties. The term coercive effort is known in Perkap Number 14 of 2012 concerning Criminal Investigation Management. This is reaffirmed in Article 20 of the Criminal Procedure Code regarding the purpose of detention.<sup>6</sup> The definition of detention in Article 1 number 21 of the Criminal Procedure Code reads "Placement of a suspect or defendant in a certain place by an investigator or public prosecutor or a judge with his stipulation, in matters and according to the procedures stipulated in this law". In the detention institution according to the Article there are three elements, there are (a). the suspect/defendant placed in a certain place, (b). with a stipulation by the investigator/public prosecutor/judge, and (c) according to the method stipulated in the Criminal Procedure Code.<sup>7</sup>

The definition of detention is also stated based on the provisions of Law Number 48 of 2009 concerning Judicial Power, which explains that the act of detention only concerns people and is not related to objects, rights and so on. And the definition of detention also includes people who are summoned for examination, asked to stay at the place of examination and also people who are being examined<sup>8</sup>. It can be concluded that detention concerns the value of (a) deprivation of liberty and independence of persons detained, (b) concerning human values and human dignity, and (c) concerning good name by itself is a limitation and temporary repeal of human rights.<sup>9</sup>

The basis of detention which includes the legal basis, circumstances, and conditions make it possible to carry out detention measures.<sup>10</sup> The legal basis for detention based on the Criminal Procedure Code is found in Article 20 to Article 31 of the Criminal Procedure Code, which includes an explanation of the legal basis, conditions and conditions for detention. Article 21 of the Criminal Procedure Code explains whether detention can be legal or not. In that article there is a description of the conditions of detention that must be met, namely the objective conditions and subjective conditions of detention.

The reason for the detention was because it was feared that the suspect or defendant would run away, damage or destroy evidence and or repeat the crime. This is described in Article 21 of the Criminal Procedure Code paragraph (1) which is a subjective element of detention. If law enforcers feel there is concern, detention can be carried out. On the other hand, detention is not necessary if law

---

<sup>6</sup> Harahap, M. Yahya. *Pembahasan Permasalahan dan Penerapan KUHAP Penyidikan dan Penuntutan*. Jakarta: Sinar Grafika, 2017, p. 165

<sup>7</sup> Lindsey, Timothy, ed. *Indonesia, law and society*. The Federation Press, 2008.

<sup>8</sup> Subrata, Tedy. "Title" And "Judiciary Power Based On Law Number 48 Of 2009." *Legal Brief* 11, no. 5 (2022): 2875-2881; Nasution, Krisnadi. "Indonesian Judicial Power Post Amendment." *Mimbar Keadilan* 13, no. 1 (2020): 85-95.

<sup>9</sup> Renggong, Ruslan, *Hukum Acara Pidana: Memahami Perlindungan HAM dalam Proses Penahanan di Indonesia*. Jakarta: Prenadamedia Group, 2014, p. 70.

<sup>10</sup> Harahap. *Pembahasan Permasalahan...*, p. 165.

enforcement officials are not concerned that the suspect will destroy evidence or have other concerns. In Article 21 paragraph (1) the elements of detention that must be met have been determined, namely the element “strongly suspected” and sufficient evidence. As well as the objective conditions being the legal provisions of detention as stated in Article 21 paragraph (4) of the Criminal Procedure Code<sup>11</sup>. Objective requirements regulate the provisions of criminal acts that can be detained, namely crimes that are punishable by imprisonment of “five years or more. These provisions are regulated in Article 21 paragraph (4a) while the elucidation of Article 21 paragraph (4b) regarding the types of articles of criminal acts that can be subject to detention.

Subjective terms are elements that focus on the circumstances or necessity of detention in terms of the subjectivity of the suspect or defendant as assessed by law enforcement<sup>12</sup>. According to Moeljatno, these subjective conditions only depend on the person who ordered the detention whether or not these conditions exist.<sup>13</sup> Subjective terms can be understood as an investigator's assessment of a suspect or defendant, whether or not detention is necessary based on considerations of whether the accused tends to run away, destroys or destroys evidence or reduces criminal acts.<sup>14</sup> Elements of Article 21 paragraph (1) regarding the existence of a situation that raises concern, namely: a) The suspect or defendant will run away, b) Damaging or destroying evidence, or, c) fear of repeating the crime.<sup>15</sup>

This formulation of concern is a subjective condition for detention, because the assessment of the three points is a unilateral assessment of the competent law enforcers, namely the police.<sup>16</sup> Worry can arise in response to a real or imagined threat. Worry arises when thinking about something unpleasant that will happen and worrying is an abstract attitude where worry has no clear boundaries and it is difficult to measure the measure of its judgment.<sup>17</sup>

The provisions of concern in Article 21 paragraph (4) of the Criminal Procedure Code are not explained regarding the understanding or further explanation in the Criminal Procedure Code.<sup>18</sup> It can be concluded that the limitation of concern for this subjective condition depends on each authorized party in making detention. In other words, if the authorities in detaining do not

---

<sup>11</sup> Hamzah. *Hukum Acara Pidana Indonesia*, p. s130.

<sup>12</sup> Harahap. *Pembahasan Permasalahan...*, p. 165,

<sup>13</sup> Moeljatno, M. *Asas-asas Hukum Pidana*. Jakarta: Rineka Cipta, 2002.

<sup>14</sup> Lindsey, Tim, and Helen Pausacker, eds. *Crime and Punishment in Indonesia*. Routledge, 2020.

<sup>15</sup> Butt, Simon, and Tim Lindsey. "The Criminal Procedure Code." In *Crime and Punishment in Indonesia*, pp. 44-69, Lindsey, Tim, and Helen Pausacker, eds. Routledge, 2020.

<sup>16</sup> Chandranegara, Ibnu Sina. "Defining Judicial Independence and Accountability Post Political Transition." *Constitutional Review* 5, no. 2 (2019): 294-329.

<sup>17</sup> Moeljatno, *Asas-asas Hukum Pidana*.

<sup>18</sup> *Ibid*.

feel worried about what will happen to the suspect or defendant in Article 21 paragraph (1), then the suspect or defendant does not need to be detained.<sup>19</sup> As in the case that occurred, namely the case of Lanjar Sriyanto who became a suspect and was detained because he was suspected of committing negligence which caused another person, namely his wife, to die, so he was detained. And the case of Rasyid Rajasa (22), who is the son of the Coordinating Minister for the Economy Hatta Rajasa, who had an accident on the Jagorawi Toll Road and killed two people, was not detained. The concern contained in Article 21 paragraph (1) of the Criminal Procedure Code is a loophole for abuse of authority, which could become a place for material extortion against suspects or defendants in the detention process.

This case became one of the reasons that the terms of subjective detention did not yet have clear and clear limits which caused dissimilarities between the accused and the victim in this case. There is social inequality, where a person who has wealth and rank in social life seems to have special privileges in treatment before the law. However, for ordinary citizens without power or position, proper legal proceedings will be carried out and sometimes there will be an abuse of law enforcement authority against suspects or defendants. In the context of administering criminal justice so that it is truly directed and the desired goals are achieved, namely justice (including legal order and fair legal certainty), then in the substance of the procedural policy (in this case the Criminal Procedure Code) must stipulate guidelines in the form of the legal principle that binds all parties involved in the administration of criminal justice, so that in enforcing the law the desired goals will be achieved so far.<sup>20</sup> With the State of Indonesia ratifying international agreements, the contents of these international agreements are valid and binding. One of the agreements ratified by Indonesia is the International Covenant on Civil and Political Rights (ICCPR).

The State of Indonesia ratified the ICCPR on October 28, 2005 through Law of the Republic of Indonesia Number 12 of 2005 concerning Ratification of the International Covenant On Civil and Political Rights (ICCPR).<sup>21</sup> After ratifying the international covenant, all provisions contained in the ICCPR are binding. The ICCPR also determines that no one is subject to arbitrary arrest, no one can be subject to torture in the process of law enforcement, and stipulates that everyone who is subject to arrest must be immediately brought before a judge.<sup>22</sup> The

---

<sup>19</sup> Kurniawan, M. Ali Said. "Tinjauan Yuridis Lembaga Penahanan Terhadap Pelaksanaan Perintah Penahanan Hakim Yang Terdapat Dalam Putusan Pengadilan." *Jurnal Pengakuan Hukum Indonesia* 2, no. 2 (2021): 226-246.

<sup>20</sup> Butt, Simon. "Indonesia's Criminal Justice System on Trial: the Jessica Wongso Case." *New Criminal Law Review* 24, no. 1 (2021): 3-58.

<sup>21</sup> Institute for Criminal Justice Reform. *Mengenal Kovenan Internasional Hak Sipil dan Politik*. May, 14 2012. Retrieved from <https://icjr.or.id/mengenal-kovenan-internasional-hak-sipil-dan-politik/>.

<sup>22</sup> Zhang, Jixi. "Fair Trial Rights in ICCPR." *Journal of Politics and Law* 2, no. 4 (2009): 39-43.



principles and conditions of detention in this Covenant are regulated in Articles 9 and 14 of the ICCPR. The principles contained in Article 9 and Article 14 of the ICCPR are the principle of legality, the principle of necessity, the principle of proportionality, the principle of equality before the law and the principle of presumption of innocence. The terms of detention in the ICCPR are not related to a person's subjectivity, but with these principles, which must be fulfilled in order to make a detention.

The principle of legality explains that a person cannot be detained or deprived of his liberty except on the basis of applicable law. This means that all suspects or defendants can be detained if the action has been regulated by law. This principle aims to protect against the potential for arbitrariness in the administration of criminal law and to limit its arbitrariness in determining whether or not an act is prohibited.<sup>23</sup>

A person can be detained if it is proven and strongly suspected of having committed a crime, and objective and subjective terms must be met. So if there is detention outside the applicable regulations and conditions, the detention is not valid in the eyes of the law. And this principle also implies that the rules of criminal law do not apply retroactively.<sup>24</sup> The principle of legality is known as *nullum delictum uulla poena sine praevia lege*. According to Wirjono Prodjodikoro, Latin which reads *nullum delictum, nulla puna sine praevia lege punali* means no crime, no criminal punishment without prior criminal law..<sup>25</sup> Usually this principle contains three meanings, namely (a) there is no action that is prohibited and punishable by criminal if it has not been previously stated in a rule of law; (b) to determine the presence of a criminal act, no analogy may be used; and, (c) rules of criminal law are not retroactive.<sup>26</sup>

The principle of necessity and the principle of proportionality are also contained in Article 9 of the ICCPR. These two principles are mutually sustainable. Where the principle of necessity is a prerequisite for the principle of proportionality.<sup>27</sup> This principle of necessity is the last resort for solving problems that cannot be avoided in the form of deprivation of the suspect's freedom. The

---

<sup>23</sup> Butt, Simon. "The Position of International Law Within the Indonesian Legal System." *Emory International Law Review* 28, no. 1 (2014): 1; Ariadno, Melda Kamil. "Kedudukan Hukum Internasional dalam Sistem Hukum Nasional." *Indonesian Journal of International Law* 5, no. 3 (2008): 6.

<sup>24</sup> Bedner, Adriaan. "Indonesian legal scholarship and jurisprudence as an obstacle for transplanting legal institutions." *Hague Journal on the Rule of Law* 5, no. 2 (2013): 253-273.

<sup>25</sup> Prodjodikoro, Wirjono, *Asas-asas Hukum Pidana di Indonesia*, Bandung: PT Eresco 1981.

<sup>26</sup> Timoera, Dwi Afrimeti. "Asas Legalitas Dalam Doktrin Hukum Indonesia: Prinsip Dan Penerapan." *Jurnal Ilmiah Mimbar Demokrasi* 10, no. 2 (2011): 67-79.

<sup>27</sup> Liefelaender, Thomas Reinhard. "Towards unity? The concepts of necessity and proportionality in exception clauses across international law." PhD diss., University of Oxford, 2017.



principle of necessity means a situation that requires a police officer to take an action, or to face an unavoidable event so that they are forced to take an action that limits the freedom of the suspect.<sup>28</sup> In other words, every activity of an applicable agency must be based on the need to uphold the right law, which requires members of the Police concerned to take actions that limit a person's freedom when an unwanted incident occurs.<sup>29</sup> The difference with the subjective terms of detention is that the subjective terms of detention are carried out on the basis of concern that the suspect or defendant will run away, destroy or destroy evidence and that the crime will be repeated. In terms of subjective concerns there are no clear boundaries so it depends on the point of view of each law enforcer. However, in this principle of necessity, restrictions on freedom or detention are carried out where there is a real urgency so that detention is forced. If there are other ways to resolve the issue or pursue legal proceedings, detention is not necessary. The basic element of this is the existence of a state of urgency.

The principle of proportionality, which has a close relationship with the principle of necessity, is a portion or measure in the implementation of law enforcement. Are the sanctions imposed appropriate and balanced with the actions taken? Or whether or not the detention period is reasonable until before the law. The principle of proportionality limits the power of the state to threaten criminal sanctions based on individual interests and political considerations.<sup>30</sup> The principle of proportionality requires that there be a value scale to weigh and assess the severity of the crime in relation to the crime.<sup>31</sup> Based on Article 9 paragraph 3 states that a person who is arrested or detained on a criminal charge must be immediately brought before a judge to be tried within a reasonable time. This confirms that when carrying out detention, the period of detention must be seen in terms of the necessity of detention as well as the type of crime must be considered. This is in accordance with the principle of proportionality that legal action must be in accordance with the reasonable limits of what is done by the suspect or defendant. This is also a limitation for law enforcers not to abuse their powers of detaining suspects or defendants for an extended period of time without regard to the principle of proportionality. In addition to the principle of necessity and the principle of proportionality contained in Article 9 of the ICCPR, Regulation of the

---

<sup>28</sup> Orakhelashvili, Alexander. "The interaction between human rights and Humanitarian Law: Fragmentation, conflict, parallelism, or convergence?" *European Journal of International Law* 19, no. 1 (2008): 161-182.

<sup>29</sup> Wright, Alan. "An introduction to human rights and policing." *The Police Journal* 73, no. 3 (2000): 193-209.

<sup>30</sup> Conte, Alex, and Richard Burchill. *Defining civil and political rights: The jurisprudence of the United Nations Human Rights Committee*. Routledge, 2016.

<sup>31</sup> Franck, Thomas M. "Proportionality in international law." *Law & Ethics of Human Rights* 4, no. 2 (2010): 231-242.

Head of the National Police of the Republic of Indonesia Number 8 of 2009 concerning the Implementation of the Principles and Standards of Human Rights in the Implementation of Duties of the Indonesian National Police also explains that the principle of proportionality, the principle of necessity and the principle of legality are principles that must be considered in carrying out the duties of a police officer. Thus law enforcers cannot detain a person for an unreasonable time and not in accordance with the principle of proportionality.

Article 14 of the ICCPR contains the principle of equality before the law and the principle of the presumption of innocence. The principle of Equality Before the Law or often referred to as the Principle of Equality before the Law is a principle which explains that every citizen has equal rights before the law in justice and protection without any privileges in the position.<sup>32</sup> With this principle, there will be no arbitrary treatment from law enforcers or justice seekers so as to create equality for all people without exception.<sup>33</sup> As explained in Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia explicitly guarantees that “all citizens have the same position before law and government and are obliged to uphold that law and government without exception.”<sup>34</sup> As well as constitutional derivatives in law for the certainty of the principle of equality before the law can be seen in Law Number 48 of 2009 concerning Judicial Powers Article 4 paragraph (1) which states “The court shall judge according to law without discriminating against people”.<sup>35</sup>

This means the meaning that all citizens have the same position before the law regardless of wealth, position, race, religion and so on. All the same without exception. However, from the two cases above, there is a clear difference that there is preferential treatment in the detention process. In the first case, only an ordinary citizen without power and wealth was treated with an element of arbitrariness in undergoing the legal process. In the second case, where the defendant was the son of the Coordinating Minister for the Economy Hatta Rajasa, he was not detained on the grounds of health. If that's the case, it can be concluded that law enforcement looks at the status of the suspect first. This is not in accordance with the principle of equality before the law which affirms that all are equal without exception. In Article 21 of the Criminal Procedure Code regarding subjective

---

<sup>32</sup> Weiwei, Lie. *Equality and non-discrimination under international human rights law*. SMR, 2004.

<sup>33</sup> Setiani, Syalis Mei. "The Role of Legal Aid Institutions in Providing Legal Aid for Suspects and Defendants." *The Indonesian Journal of International Clinical Legal Education* 3, no. 4 (2021): 425-444.

<sup>34</sup> Butt, Simon. "The position of international law ..."

<sup>35</sup> Saragih, Yasmirah Mandasari, and Berlian Berlian. "The Enforcement of the 2009 Law Number 46 on Corruption Court: The Role of Special Corruption Court." *Srinwijaya Law Review* 2, no. 2 (2018): 193-202.

requirements, there is a gap or weakness for the occurrence of a gap in legal treatment, or a gap for the arbitrariness of law enforcement.

The last principle is the presumption of innocence, which is contained in Article 14 paragraph (2) of the ICCPR. the principle of presumption of innocence which implies that humans must be presumed innocent before being proven guilty<sup>36</sup>. Thus a person cannot be detained unless there is strong evidence that he has committed a crime. This means that the principle of the presumption of innocence is the basis for the protection of human rights for a suspect or defendant from the arbitrary actions of investigators, public prosecutors and judges who try their cases.<sup>37</sup> A person who is detained must be seriously suspected of having committed an act against the law, as in the elements of Article 21 paragraph (1) of the Criminal Procedure Code which states that one must be strongly suspected of having committed a crime based on sufficient evidence. So if the pre-detention element is not fulfilled, detention cannot be carried out. As explained by the principle of the presumption of innocence. And M. Yahya Harahap also explained the purpose of this principle to provide guidelines for law enforcers to place the position of suspects or defendants that must be treated and seated in a human position that has dignity and dignity and distance law enforcers from treating suspects or defendants as objects that can be treated arbitrarily -arbitrary.<sup>38</sup> The consequence of applying the principle of the presumption of innocence in the criminal justice system is that a suspect or defendant who is accused of committing a criminal act may not be treated as a guilty person until a court decision has permanent force, including all law enforcement officials who must uphold the human rights of the suspect or defendant<sup>39</sup>

*The International Covenant on Civil and Political Rights (ICCPR) is an agreement regarding human rights which was later ratified by Indonesia. Therefore all the provisions listed must be fulfilled and carried out. The same is the case with the subjective and objective requirements of detention under Article 21 of the Criminal Procedure Code. All must be adjusted to the principles contained in the international agreement. However, the regulations that apply in practice are different and are not in accordance with the principles contained in the International Covenant on Civil and Political Rights (ICCPR). Thus the applicable regulations must be limited by principles and norms. This aims to maintain equal balance and justice for citizens and prevent abuse of authority and differences in legal treatment as well as violation of one another's human rights.*

---

<sup>36</sup> Tadros and Tierney. "The presumption of innocence...", p. 434.

<sup>37</sup> Juwana, Hikmahanto. "An Overview of Indonesia's Antimonopoly Law." *Washington University Global Studies Law Review* 1, no. 1 (2002): 185-199.

<sup>38</sup> Harahap. *Pembahasan Permasalahan...*, p. 165.

<sup>39</sup> Tadros and Tierney. "The presumption of innocence...", p. 434.

## 5. Conclusions and recommendations

Detention is a temporary restraint on the freedom of a suspect or defendant after there is sufficient evidence that he will commit an unlawful act. Detention is also carried out after fulfilling the requirements or elements contained in Article 21 of the Criminal Procedure Code, namely objective requirements and subjective requirements. In subjective terms there is an element of concern that creates legal uncertainty. So that there are often differences in carrying out forced detention of suspects or defendants. Not only contained in the Criminal Procedure Code, regulations regarding conditions of detention are also contained in the International Covenant on Civil and Political Rights (ICCPR). Namely contained the principles of legality, necessity, proportionality, the presumption of innocence and the principle of equality before the law. With all the requirements of the Criminal Procedure Code, it turns out that they are not in accordance with the provisions of the principles in the ICCPR. This happens because many principles are not applied in the terms of detention in Article 21 of the Criminal Procedure Code, specifically the subjective terms of detention.

To law enforcers and legislative institutions to make regulations or rules regarding subjective terms in terms of definite boundaries and clarity in their application. This aims to prevent situations that violate human rights against suspects or defendants. These regulations must be in accordance with the principles contained in international agreements on Civil Rights and Political Rights which have been ratified by the State of Indonesia. So that subjective terms that contain legal uncertainty in terms of concerns can be resolved. A more detailed explanation is needed for the elaboration of Article 21 of the Criminal Procedure Code, especially regarding detention conditions.

## References

- Ariadno, Melda Kamil. "Kedudukan Hukum Internasional dalam Sistem Hukum Nasional." *Indonesian Journal of International Law* 5, no. 3 (2008): 6.
- Bedner, Adriaan. "Indonesian legal scholarship and jurisprudence as an obstacle for transplanting legal institutions." *Hague Journal on the Rule of Law* 5, no. 2 (2013): 253-273.
- Butt, Simon, and Tim Lindsey. "The Criminal Procedure Code." In *Crime and Punishment in Indonesia*, pp. 44-69, Lindsey, Tim, and Helen Pausacker, eds. Routledge, 2020.
- Butt, Simon. "Indonesia's Criminal Justice System on Trial: the Jessica Wongso Case." *New Criminal Law Review* 24, no. 1 (2021): 3-58.
- Butt, Simon. "The Position of International Law Within the Indonesian Legal System." *Emory International Law Review* 28, no. 1 (2014): 1.
- Chandranegara, Ibnu Sina. "Defining Judicial Independence and Accountability Post Political Transition." *Constitutional Review* 5, no. 2 (2019): 294-329.
- Conte, Alex, and Richard Burchill. *Defining civil and political rights: The jurisprudence of the United Nations Human Rights Committee*. Routledge, 2016.
- Franck, Thomas M. "Proportionality in international law." *Law & Ethics of Human Rights* 4, no. 2 (2010): 231-242.
- Hamzah, Andi. *Hukum Acara Pidana Indonesia*. Jakarta: Sinar Grafika, 2017.
- Harahap, M. Yahya. *Pembahasan Permasalahan dan Penerapan KUHAP Penyidikan dan Penuntutan*. Jakarta: Sinar Grafika, 2017.
- Herbert, Jeff. "The legal framework of human rights in Indonesia." In *Indonesia: Law and society*, Timothy Lindsey (ed.), pp. 456-482. The Federation Press, 2008.
- Institute for Criminal Justice Reform. *Mengenal Kovenan Internasional Hak Sipil dan Politik*. May, 14 2012. Retrieved from <https://icjr.or.id/mengenal-kovenan-internasional-hak-sipil-dan-politik/>.
- Juwana, Hikmahanto. "An Overview of Indonesia's Antimonopoly Law." *Washington University Global Studies Law Review* 1, no. 1 (2002): 185-199.
- Kurniawan, M. Ali Said. "Tinjauan Yuridis Lembaga Penahanan Terhadap Pelaksanaan Perintah Penahanan Hakim Yang Terdapat Dalam Putusan Pengadilan." *Jurnal Penegakan Hukum Indonesia* 2, no. 2 (2021): 226-246.
- Lieflaender, Thomas Reinhard. "Towards unity? The concepts of necessity and proportionality in exception clauses across international law." PhD diss., University of Oxford, 2017.
- Lindsey, Tim, and Helen Pausacker, eds. *Crime and Punishment in Indonesia*. Routledge, 2020.
- Lindsey, Timothy, ed. *Indonesia, law and society*. The Federation Press, 2008.
- Moeljatno, M. *Asas-asas Hukum Pidana*. Jakarta: Rineka Cipta, 2002.
- Nasution, Krisnadi. "Indonesian Judicial Power Post Amendment." *Mimbar Keadilan* 13, no. 1 (2020): 85-95.
- Orakhelashvili, Alexander. "The interaction between human rights and Humanitarian Law: Fragmentation, conflict, parallelism, or convergence?." *European Journal of International Law* 19, no. 1 (2008): 161-182.
- Prodjodikoro, Wirjono, *Asas-asas Hukum Pidana di Indonesia*, Bandung: PT Eresco 1981.
- Renggong, Ruslan, *Hukum Acara Pidana: Memahami Perlindungan HAM dalam Proses Penahanan di Indonesia*. Jakarta: Prenadamedia Group, 2014.
- Saragih, Yasmirah Mandasari, and Berlian Berlian. "The Enforcement of the 2009 Law Number 46 on Corruption Court: The Role of Special Corruption Court." *Sriwijaya Law Review* 2, no. 2 (2018): 193-202.

- Setiani, Syalis Mei. "The Role of Legal Aid Institutions in Providing Legal Aid for Suspects and Defendants." *The Indonesian Journal of International Clinical Legal Education* 3, no. 4 (2021): 425-444.
- Subrata, Tedy. "Title" And "Judiciary Power Based On Law Number 48 Of 2009." *Legal Brief* 11, no. 5 (2022): 2875-2881
- Tadros, Victor, and Stephen Tierney. "The presumption of innocence and the human rights act." *The Modern Law Review* 67, no. 3 (2004): 402-434.
- Tadros, Victor. "Rethinking the presumption of innocence." *Criminal Law and Philosophy* 1, no. 2 (2007): 193-213.
- Timoera, Dwi Afrimeti. "Asas Legalitas Dalam Doktrin Hukum Indonesia: Prinsip Dan Penerapan." *Jurnal Ilmiah Mimbar Demokrasi* 10, no. 2 (2011): 67-79.
- Weiwei, Lie. *Equality and non-discrimination under international human rights law*. SMR, 2004.
- Wortley, Richard. *Situational prison control: Crime prevention in correctional institutions*. Cambridge university press, 2002.
- Wright, Alan. "An introduction to human rights and policing." *The Police Journal* 73, no. 3 (2000): 193-209.
- Zhang, Jixi. "Fair Trial Rights in ICCPR." *Journal of Politics and Law* 2, no. 4 (2009): 39-43.