

# THE DEADLINE FOR DEPARTURE PREVENTION FROM AN IMMIGRATION LAW PERSPECTIVE

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## ABSTRACT

This study aims to highlight the critical need to update the provisions on departure prevention in Indonesia's Immigration Law, specifically addressing the legal uncertainty arising from the phrase "at any time" in Article 97 Paragraph (1), which has the potential to cause prevention without an exact time limit. The study utilized a qualitative approach, employing a combination of legal analysis and empirical observation. The case approach allowed the author to analyze court decisions or concrete cases related to departure prevention, providing insights into how these regulations were implemented in practice and their implications for individual rights. The analysis focused on the implications of these legal frameworks for individuals' rights and the effectiveness of departure prevention measures, drawing connections between legal norms and their practical outcomes. The research provides a foundation for further discussions on enhancing legal certainty and protecting individual rights within the immigration framework, thereby contributing to the overall improvement of the legal system in Indonesia.

## INTRODUCTION

In the era of increasingly developing globalization, mobility between countries has become an unavoidable necessity. Amidst the increasing flow of human movement, countries, including Indonesia, have implemented various immigration regulations to maintain security and sovereignty, one of which is through the departure prevention mechanism (Arifin et al., 2024; Putri, 2022; Syahrin et al., 2024). This departure prevention aims to limit individuals who are considered to endanger the interests of the state or are related to the legal process so that they cannot leave the jurisdiction of Indonesia. However, the implementation of this departure prevention often raises debate, especially regarding the clarity of the time limit imposed. The uncertainty regarding the time limit not only affects individuals who are subject to prevention but also poses challenges in protecting human rights and legal certainty (Cafaggi & Iamiceli, 2021).

Immigration is one real manifestation of the enforcement of sovereignty over the territory of the Republic of Indonesia (Nwafor, 2024; Park & Heriyanto, 2022; Purnomo et al., 2021; Santoso et al., 2005; Wiharma et al., 2024; Wiratraman & Hanrahan, 2023). In this case, the role of immigration is to maintain national order and security, which is expected to support the creation of a just and prosperous society by the values of Pancasila and the 1945 Constitution of the Republic of Indonesia (UUD 1945) (Putro, 2020). Amid global dynamics, population mobility between countries is increasing due to economic, social, and political factors. It has had various impacts on Indonesia, both beneficial and detrimental. To face this challenge, the government has enacted Law Number 6 of 2011 concerning Immigration (Immigration Law), which provides legal certainty while upholding respect for human rights (Yasa et al., 2024).

However, in its implementation, the Immigration Law has not escaped legal challenges. It was noted that two judicial review applications were submitted to the Constitutional Court (MK) regarding

articles in the law, namely through Case Number 40/PUU-IX/2011 and Case Number 64/PUU-IX/2011. One of the prominent judicial review applications was submitted by six advocates in Case Number 40/PUU-IX/2011, which questioned the validity of Article 16 paragraph (1) letter b of the Immigration Law. This article stipulates that Immigration Officers can refuse a person to leave Indonesian territory if the person is needed for investigation and inquiry at the request of an authorized official (Zaki & Saidin, 2024).

The applicants in this case argued that the provisions, particularly those related to the words "investigation and," were contrary to human rights as stipulated in Article 28A and Article 28D paragraph (1) of the 1945 Constitution. They considered that preventing departure based solely on an investigation was a disproportionate action and violated the principle of legal certainty because an investigation would not necessarily lead to a definitive criminal process. The Constitutional Court decided to grant the applicants' petition after reviewing the petition. In the ruling on Case Number 40/PUU-IX/2011, the Constitutional Court stated that the words "investigation and" contained in Article 16 paragraph (1) letter b of the Immigration Law were contrary to the 1945 Constitution and, therefore, did not have binding legal force. The Constitutional Court emphasized that preventing departure can only be applied at the investigation stage, where there is a clearer and stronger legal basis to prevent someone from leaving the territory of Indonesia.

In Case Number 64/PUU-IX/2011, the petition for judicial review of the Immigration Law was filed by Prof. Dr. Yusril Ihza Mahendra. The article that is the object of the material test is Article 97 Paragraph (1) of Law Number 6 of 2011 concerning Immigration, which is considered to conflict with several articles in the 1945 Constitution, namely Article 1 paragraph (3), Article 28, Article 28D paragraph (1), and Article 28E paragraph (1). Article 97 Paragraph (1) of the Immigration Law regulates the period of departure prevention, where the regulation states that prevention is valid for a maximum of six months and can be extended each time for another six months. In his application, Yusril Ihza Mahendra highlighted the phrase "every time" in Article 97 paragraph (1), which he considered had the potential to cause legal uncertainty. With this phrase, the extension of prevention can be done repeatedly without a clear limit, so a person can be prevented from leaving the country without clarification on how long the prevention is valid. It is considered to be contrary to the principles of the rule of law as stipulated in Article 1 paragraph (3) of the 1945 Constitution, and threatens the basic rights of citizens to obtain legal certainty (Article 28D paragraph 1) and the right to move freely (Article 28E paragraph 1).

The Constitutional Court, after considering the arguments submitted, decided to grant the petition in part. The Constitutional Court stated that the phrase "every time" in Article 97 paragraph (1) is contrary to the Constitution 1945 because it allows for the extension of departure prevention without a clear time limit. As a result, the Constitutional Court ruled that the phrase "every time" does not have binding legal force. Thus, Article 97 paragraph (1) of the Immigration Law was changed to: "The period of prevention is valid for a maximum of 6 (six) months and can be extended for a maximum of 6 (six) months." It means that departure prevention can be extended only once, for a maximum of 12 months. This change aims to provide clearer legal certainty while protecting the rights of individuals subject to departure prevention so that they are not trapped in a protracted situation. However, not all of Yusril's requests were granted.

The Constitutional Court rejected the part of the request that the departure prevention be removed altogether or be implemented with stricter conditions. This decision only corrects the part considered inconsistent with the principles of justice and legal certainty, so other parts of Article 97 remain enforced as they should be. The decision was then ordered to be published in the State Gazette of the Republic of Indonesia to become an official guide in the implementation of the Immigration Law. The granting of the petition for judicial review of the Immigration Law, either in whole or in part, by the Constitutional Court carries significant legal implications and creates a new legal situation. This decision changes several provisions in the Immigration Law that are considered to conflict with the 1945 Constitution. Therefore, further evaluation and analysis are needed to understand the impact of the two Constitutional Court decisions, especially on the implementation of immigration law in Indonesia and the protection of citizens' rights.

This study emphasizes the need to update the provisions on the prevention of departure in the Immigration Law related to legal uncertainty due to the phrase "every time" in Article 97 Paragraph (1), which has the potential to cause prevention without an exact time limit. The research contributes to the discourse on immigration law by highlighting the critical need to update the provisions concerning

departure prevention in Indonesia's Immigration Law, specifically addressing the legal uncertainty arising from the ambiguous phrase "at any time" in Article 97 Paragraph (1). By identifying the risks associated with this lack of clarity, the study underscores the potential for abuse of authority and infringement on citizens' constitutional rights. This work informs policymakers and legal stakeholders about the implications of current legal ambiguities, advocating for reforms that would establish clear time limits for preventive measures. Ultimately, the research provides a foundation for further discussions on enhancing legal certainty and protecting individual rights within the immigration framework, thereby contributing to the overall improvement of the legal system in Indonesia.

## **METHODS**

The empirical juridical research method utilized an approach that combined legal analysis with empirical data gathered from social realities, facilitating a practical understanding of the application of law. In this research, a statutory approach was employed to examine the prevailing regulations, such as the Immigration Law, to understand the legal framework normatively. Meanwhile, a case approach was used to analyze court decisions or concrete cases related to departure prevention, providing insights into how these regulations were implemented in practice and their implications for individual rights.

The study utilized various data sources, including legal texts, government regulations, court decisions, and academic literature related to immigration law and departure prevention. Data generated from these sources comprised statutory provisions, judicial rulings, and case studies that illustrated the practical application of laws.

The author analyzed the data through a qualitative approach, employing a combination of legal analysis and empirical observation. This involved systematically reviewing the relevant legal regulations to identify key provisions and their intended effects. The case approach allowed the author to examine specific court decisions, analyzing how these rulings interpreted and applied the laws in real-world scenarios. The analysis focused on the implications of these legal frameworks for individual rights and the effectiveness of departure prevention measures, drawing connections between legal norms and their practical outcomes.

## **RESULTS**

### **Legal Implications of the Constitutional Court's Decision Regarding the Implementation of Departure Prevention and Human Rights Protection in Indonesia**

The Constitutional Court in Decision Number 40/PUU-IX/2011 began its analysis by examining the meaning of "investigation" to determine whether the term contradicted the provisions of the 1945 Constitution as claimed by the petitioners. According to Article 1 point 5 of Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP), an investigation is defined as a series of actions by an investigator to search for and discover events suspected of being a criminal act to determine whether an investigation can be conducted. According to this definition, an investigation does not always result in legal action, so there is no guarantee that someone will be investigated. However, immigration authorities can still take measures to prevent someone from leaving the country.

The Constitutional Court held that an investigation is an initial stage to determine whether there is a criminal act and to gather preliminary evidence, but there is no certainty that someone is a suspect in a criminal act. Preventing someone from leaving the country at this stage of the investigation could be misused to restrict freedom of movement without a clear legal basis, especially since a person may not be aware of their status in the investigation process and because there is no definite time limit for it. It was considered to violate constitutional rights enshrined in Article 28E of the 1945 Constitution, which guarantees the freedom to choose a residence and to leave it, as well as Article 28D paragraph (1), which guarantees legal certainty and equal treatment before the law.

The Constitutional Court agreed with the petitioner that departure prevention could be applied at the investigation stage, where the investigation is a further legal process involving the search for and collection of evidence to uncover a criminal act and identify the perpetrator. At this stage, the refusal to depart is more reasonable because there is a possibility that the perpetrator will carry evidence that could hinder the legal process. Therefore, the Constitutional Court decided that although only the word "investigation" was proposed for review, the phrase "investigation and investigation" in Article 16 paragraph (1) letter b of the Immigration Law must be removed to ensure that departure prevention can only be carried out in the context of a definite investigation. In Decision Number 40/PUU-IX/2011, there was no dissenting opinion or differing views from the Constitutional Court judges. This indicates

that the decision to remove the phrase "investigation and" in Article 16 paragraph (1) letter b of the Immigration Law was unanimously agreed upon by all the panel of judges, underscoring the consensus on the need for changes to protect constitutional rights and legal certainty.

In Case Number 40/PUU-IX/2011, the petitioners, who are lawyers, filed a lawsuit against the provisions of Article 16 paragraph (1) letter b of the Immigration Law, which states that immigration officers may refuse someone to leave Indonesian territory if necessary for the interests of "investigation and investigation" at the request of authorized officials. They claimed that the inclusion of the phrase "investigation" in the article harmed their constitutional rights. This provision could have a broad impact as it does not limit who can be subject to a departure ban, potentially including anyone, including the petitioners.

The petitioners argued that this provision could result in constitutional harm, particularly for those involved in an investigation without a clear legal basis. An investigation is an initial stage in the legal process to determine whether a criminal act exists and to gather preliminary evidence. However, during this stage, there is no certainty as to whether someone will become a suspect, and therefore, there is no guarantee that they are aware of their status in the investigation process. This could lead to unjustified departure prevention, which could be misused for purposes beyond law enforcement, reducing one's right to move freely and obtain fair legal certainty.

The Constitutional Court held that investigation, as an initial stage, should not serve as the basis for preventing someone from leaving the country. Instead, prevention should only be applied at the investigation stage, where investigators have gathered sufficient evidence and have a clear reason to prevent someone from leaving the country. Therefore, the Constitutional Court ruled that the phrase "investigation and" in Article 16 paragraph (1) letter b of the Immigration Law was inconsistent with the 1945 Constitution and lacked binding legal force. This ruling removed the phrase, so the article now only regulates departure prevention based on the interests of an investigation. This decision aims to ensure that citizens' constitutional rights are protected and that departure prevention is carried out with a clear and fair legal basis.

In Case Number 64/PUU-IX/2011, the Constitutional Court (MK) assessed that the provisions of Article 97 paragraph (1) of the Immigration Law had the potential to cause constitutional harm to the petitioner, giving them the right to file for judicial review. The article grants authority to several state officials to prevent someone from leaving Indonesian territory with preventive extensions every six months without a time limit. Several experts and witnesses who gave their testimony at the trial, such as Prof. Dr. Hafid Abas and Prof. Dr. H.M. Tahir Azhary, argued that this provision disregards citizens' basic rights to obtain legal certainty and fair protection. They consider that indefinite prevention tends to be authoritarian and contrary to the principles of justice and human rights as regulated in the 1945 Constitution.

Experts such as Ifdhal Kasim and Dr. Abdul Hakim Garuda Nusantara opined that the indefinite preventive extension in Article 97 paragraph (1) of the Immigration Law could be misused by law enforcement, resulting in legal uncertainty and potential human rights violations. They emphasized that restrictions on freedom of movement must be based on clear, proportionate laws and adhere to universal human rights principles. In this case, the authority granted by the Immigration Law has the potential to cause arbitrariness and injustice, particularly if prevention is carried out without a definite time limit, leading to individual lives becoming pressured and uncertain.

The Constitutional Court emphasized that although departure prevention could be justified for public interest, such as in the investigation process, the provisions of Article 97 paragraph (1) that allow for preventive extensions every six months without a time limit have the potential to violate constitutional rights. The Constitutional Court considered that restrictions on the right to leave the country must be carried out within a clear timeframe and based on legal certainty, as guaranteed by Article 28E paragraph (1) of the 1945 Constitution. Therefore, the Constitutional Court ruled that the phrase "each time" in Article 97 paragraph (1) of the Immigration Law was inconsistent with the 1945 Constitution, as it could lead to legal uncertainty and arbitrariness. This decision underscores the importance of a definite time limit for prevention to avoid violating constitutional rights and the principles of justice enshrined in the Constitution.

In Case Number 64/PUU-IX/2011, the Constitutional Court (MK) assessed that the phrase "each time" in Article 97 paragraph (1) of the Immigration Law could cause constitutional harm to the petitioner. The article stipulates that the period of prevention for leaving the country is valid for a maximum of six months and can be extended "each time" for another six months. The petitioners in this

case claimed that this provision resulted in significant legal uncertainty because there was no definite time limit for prevention that could be extended continuously. The petitioner was experiencing an extended prevention period of six months based on the Attorney General's decision and considered that the phrase "each time" could potentially prolong prevention without a clear time limit, thus violating their constitutional right to travel as stipulated in Article 28D paragraph (1) and Article 28E paragraph (1) of the 1945 Constitution.

In its decision, the Constitutional Court partially granted the petitioners' request. The Constitutional Court ruled that the phrase "each time" in Article 97 paragraph (1) of the Immigration Law was inconsistent with the 1945 Constitution and lacked binding legal force. Therefore, the provision that applies after the Constitutional Court's decision is that the period of prevention for leaving the country is valid for a maximum of six months and can be extended only once for the same period, i.e., six months. By removing the phrase "each time," the Constitutional Court aims to reduce the legal uncertainty that may arise from indefinite preventive extensions, as well as provide better legal certainty for citizens affected by prevention.

The Constitutional Court decision is significant because it emphasizes that prevention from leaving the country must have a clear time limit so as not to violate individual constitutional rights. Thus, this decision ensures that the right to travel and return to one's country of origin, as guaranteed by the constitution, is not disrupted by legal provisions that do not provide certainty. This decision implies that the legal system must ensure a balance between law enforcement interests and human rights protection, considering the aspects of legal certainty and justice.

### **The Urgency of Legal Reform Regarding the Deadline for Departure Prevention in the Immigration Law**

The testing of laws by the Constitutional Court (MK) often ends with a decision stating whether a provision or an entire law conflicts with the 1945 Constitution. (Abadi & Hajri, 2017) If the MK decides that an article, paragraph, or part of the law is unconstitutional, then the provision being tested becomes null and void and no longer applicable. Such decisions have extensive and significant legal implications, affecting not only the petitioners but also potentially creating issues such as legal vacuum and legal disorder (Bachtiar, 2015). Sometimes, lawmakers may face situations where they are "buying time" before addressing the annulment. Procedural mechanisms are needed to handle the annulment of such provisions. The final and binding nature of MK decisions requires procedural adjustments to ensure that the decisions are properly implemented. Some MK decisions are "self-executing" or directly effective without further regulatory changes, while others require additional regulations before implementation (Sidharta, 2020).

Immigration, as a regulation governing the movement of people in and out of Indonesia, must consider developments in human rights (HAM) and the constitution. (Fortunata et al., 2024) Every citizen has the right to enter and leave the country, but this right can be restricted in certain situations. Article 16 paragraph (1) of the Immigration Law allows immigration officials to deny someone from leaving the territory of Indonesia if they are listed on a prevention list. These prevention provisions are also regulated in Articles 91 through 97 of the Immigration Law and involve various agencies and officials.

While departure prevention is legally acceptable for law enforcement purposes, the constitution and human rights norms require that limitations be established by law to protect individual rights and freedoms. Based on MK Decisions in Case Number 40/PUU-IX/2011 and Number 64/PUU-IX/2011, there has been testing of the articles regulating departure prevention. The MK has stated that prevention during the investigation phase of a case is considered unconstitutional if it does not meet proper legal standards. This could lead to violations of constitutional rights, particularly the right to freedom of movement. Evaluation of these MK decisions is necessary to determine whether legal vacuums or other issues are arising from these decisions. It is important to adjust immigration regulations to comply with MK decisions and human rights principles while ensuring that there is no abuse of authority in implementing departure prevention.

The legal provisions in Article 97 paragraph (1) of the Immigration Law, which includes the phrase "every time," create significant legal uncertainty. This phrase allows for the indefinite extension of departure prevention from Indonesian territory without a clear time limit. This uncertainty results in individuals subject to prevention lacking certainty about when they can leave the country. It creates discomfort and instability for citizens who may rely on international mobility for various personal or

professional reasons. Such conditions disrupt the legal certainty that should be the foundation for justice and the protection of individual rights.

In addition to legal uncertainty, there is a significant potential for abuse of authority related to prevention provisions. If this article is applied without clear limitations, there is a risk that immigration officials or other agencies may misuse their authority for purposes beyond law enforcement. This abuse could include using prevention for political or personal purposes, ultimately harming human rights and principles of justice. Poorly managed prevention could lead to discrimination or unfair treatment of affected individuals, ignoring the principles of justice and human rights that must be protected.

The impact of these unlimited prevention provisions is also felt in the personal and professional lives of citizens. Individuals subject to prevention often face significant consequences, such as disruptions to their work, education, or family relationships. Uncertainty regarding the end of the prevention period can result in difficulties in planning their lives and careers, affecting their mental and social well-being. Furthermore, unclear provisions can create difficulties regarding the legal rights of citizens that should be protected, such as the right to leave the country and return under applicable laws and constitutions.

The urgency of reforming legal provisions related to departure prevention is crucial to ensure legal certainty and the protection of citizens' constitutional rights. Currently, the phrase "every time" in Article 97 paragraph (1) of the Immigration Law creates uncertainty regarding the time limit for prevention, which can negatively impact individual rights. By setting a clear and fixed time limit for the prevention period, the law can provide better assurance to citizens regarding when they can freely move again. It is crucial to uphold citizens' constitutional rights and prevent unnecessary or prolonged detention. Implementing legal reforms can enhance the overall judicial and law enforcement procedures. Establishing clear time limits and protocols for determining the pretrial detention period can promote transparency and accountability within the judicial system. This reduces the risk of delays in justice caused by unclear rules and potential abuses of authority. Thus, legal processes can proceed more efficiently and fairly, providing certainty for all parties involved, and ensuring that individual rights are respected and protected effectively.

Moreover, aligning legal provisions with international standards and best practices is an important step in ensuring that restrictions on freedom of movement adhere to globally recognized human rights principles. Many countries have adopted legal provisions that establish clear limits and strict procedures for departure prevention to ensure that such restrictions do not infringe on individual rights. By following international best practices, legal reform in Indonesia can strengthen the country's commitment to human rights, enhance public trust in the legal system, and ensure that restrictions on freedom of movement are applied lawfully and fairly.

Recommendations for legal reform related to departure prevention should focus on several key aspects to enhance justice and legal certainty. Establishing a clear time limit for the prevention period is essential. This proposal includes amending the provisions in the law to set a definite maximum time limit for prevention and clarifying the procedures for limited extensions. With clear provisions on the maximum duration of prevention and the conditions for extensions, legal uncertainty can be minimized and better protection can be provided for individual rights. This also ensures that prevention is not applied arbitrarily or extended indefinitely without certainty.

Enhancing oversight and accountability mechanisms is necessary to reduce the likelihood of abuse of authority in the prevention process. This recommendation includes strengthening oversight agencies responsible for monitoring and evaluating the implementation of prevention decisions. Stricter and more transparent oversight, along with clear accountability for the actions of immigration officials and other authorities, will help ensure that prevention is carried out under the law and not used for personal purposes or abuse of authority. Establishing reporting procedures and complaint mechanisms for individuals affected by prevention is also important to add a layer of effective oversight.

Steps need to be taken to ensure that restrictions applied in the prevention process align with human rights principles and do not violate the Constitution. This recommendation includes aligning policies with international standards on restrictions on freedom of movement, and ensuring that any prevention measures are based on strong and proportional legal grounds. It involves careful assessment of the impact of prevention on individual rights and ensuring that restrictions are no more than necessary to achieve legitimate goals. Protecting human rights must be a priority in any legal reform to ensure that prevention measures are conducted fairly and by constitutional and human rights norms.

## CONCLUSION

There is an urgent need to reform the provisions on departure prevention in Indonesia's Immigration Law due to legal uncertainty stemming from the phrase "at any time" in Article 97 paragraph (1), which can lead to indefinite prevention and potential abuse of authority, infringing on citizens' constitutional rights. Establishing clear and fixed time limits for preventive measures is essential to protect these rights and improve the judicial system by preventing delays in justice. Proposed reforms include setting specific maximum time limits, enhancing supervision and accountability to deter misuse, and ensuring alignment with international standards to protect the right to freedom of movement. Future research could focus on developing a comprehensive framework for these reforms, including comparative analyses with other jurisdictions, stakeholder perspectives, and alignment with global norms, ultimately aiming to create a more equitable and transparent immigration system that upholds human rights.

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