



## Critical Analysis of the Controversial Articles of the New Criminal Procedure Code: Threats to Human Rights Principles and Law Enforcement Accountability

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### Abstract

**Background.** The revision of the Criminal Procedure Code (KUHAP) contained in Law Number 1 of 2023 has brought significant changes to the Indonesian criminal justice system. However, several articles in the new Criminal Code have attracted controversy because they are seen as potentially threatening human rights principles and weakening law enforcement accountability.

**Purpose.** This article critically analyzes the controversial articles in the new Criminal Code, particularly those related to the authority to arrest, detain, wiretap, and protect law enforcement.

**Method.** Through a normative and comparative juridical approach, this study finds that several provisions in the new Criminal Procedure Code have the potential to violate the principles of due process of law, presumption of innocence, and the right to fair trial guaranteed in the constitution and international legal instruments.

**Conclusion.** This article recommends the need for strict oversight in the implementation of the new Criminal Procedure Code, as well as revisions to problematic articles to ensure a balance between the effectiveness of law enforcement and the protection of human rights.

**Keywords:** New Criminal Procedure Code, Human Rights, Law Enforcement Accountability, Due Process of Law, Criminal Justice



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### INTRODUCTION

The Criminal Procedure Code (KUHAP) is a fundamental legal instrument in the Indonesian criminal justice system that governs the procedures for resolving criminal cases, from investigation through to the enforcement of court decisions. The old Criminal Procedure Code, Law No. 8 of 1981, has been in force for more than 4 decades and is no longer considered adequate to address the complexity of modern crimes and the growing demands for human rights protection. On December 31, 2022, the House of Representatives of the Republic of

Indonesia passed Law Number 1 of 2023 concerning the Criminal Procedure Code, which replaced the old Criminal Procedure Code. The new Criminal Procedure Code brings fundamental changes in various aspects of criminal procedure law, including regulations on arrest, detention, evidence, legal remedies, and protection of law enforcement. Although the revision of the Criminal Procedure Code is intended to improve the criminal justice system and adapt it to the times, some provisions in the new Criminal Procedure Code have drawn sharp criticism from various circles, including legal academics, practitioners, and civil society organizations. The criticism is mainly aimed at articles that are considered capable of threatening fundamental human rights principles and weakening law enforcement accountability mechanisms.

### **Problem Formulation**

Based on the above background, this article will analyze some of the following problems:

1. What are the controversial articles in the new Criminal Procedure Code that have the potential to threaten human rights principles?
2. What are the implications of these articles on the accountability of law enforcement in the Indonesian criminal justice system?
3. How do the provisions in the new Criminal Procedure Code compare with international legal standards and practices of other countries?
4. What recommendations can be given to minimize the risk of human rights violations in the implementation of the new Criminal Procedure Code?

## **LITERATURE REVIEW**

### **The Concept of Human Rights in the Criminal Justice System**

Human rights (HAM) are fundamental rights inherent in every human being from birth, universal and unalienable. In the context of the criminal justice system, the protection of human rights is crucial because the criminal justice process involves the authority of the state to limit individual freedom, even to the point of taking life in certain criminal cases in countries that still apply the death penalty.

Fundamental human rights principles in the criminal justice system include:

1. **Due Process of Law:** This principle requires that every legal process must be carried out in accordance with established procedures, be fair, and provide opportunities for the defendant to defend himself.

2. **Presumption of Innocence:** The principle of presumption of innocence states that every person who is suspected, arrested, detained, prosecuted, or brought before the court must be presumed innocent until there is a court decision declaring his guilt and obtaining permanent legal force.
3. **Right to Fair Trial:** The right to a fair trial includes the right to be tried by an independent and impartial court, the right to be accompanied by legal counsel, the right to present and examine witnesses, and the right not to be coerced into pleading guilty.

### **Prohibition of Torture and Cruel Treatment**

An absolute prohibition against torture and cruel, inhuman, or degrading treatment in any stage of the criminal justice process. **Right to Liberty and Security:** The right to liberty and personal security that guarantees that no one may be arbitrarily arrested or detained. The Indonesian Constitution guarantees the protection of human rights through Article 28 of the 1945 Constitution and its amendments, as well as through Law Number 39 of 1999 concerning Human Rights. In addition, Indonesia has ratified various international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), through Law Number 12 of 2005.

### **Principles of Law Enforcement Accountability**

Law enforcement accountability is a fundamental principle in a democratic state of law. Accountability refers to the obligation of law enforcement to be responsible for the actions taken in carrying out their duties and authority. This principle ensures that the power possessed by law enforcement officials is not abused and can be accounted for to the public.

Essential elements of law enforcement accountability include:

1. **Transparency - Openness** in the law enforcement process that allows the public to know and supervise the performance of law enforcement officials.
2. **Responsibility** - The obligation of law enforcement to carry out duties in accordance with laws and regulations and professional ethical standards.
3. **Oversight Mechanisms** - The availability of effective oversight agencies, both internal and external, to ensure that law enforcement is carrying out its duties properly.
4. **Sanctions** - There are legal and administrative consequences for law enforcement officers who commit violations or abuse of authority.
5. **Access to Justice** - The availability of mechanisms for people to file complaints and

obtain redress when their rights are violated by law enforcement.

In practice, law enforcement accountability often faces challenges, especially when attempts are made to grant immunity or excessive protection to law enforcement officials under the pretext of protecting them while they carry out their duties. The balance between reasonable protection for law enforcement and ensuring accountability is a crucial issue that must be considered in any regulation of the criminal justice system.

### **International Standards of Criminal Procedure Law**

International standards of criminal procedure law have been established in various international legal instruments, including:

1. The Universal Declaration of Human Rights (UDHR) 1948- Articles 9, 10, and 11 of the UDHR set out the basic principles of the prohibition of arbitrary arrest, the right to a fair trial, and the principle of presumption of innocence.
2. The International Covenant on Civil and Political Rights (ICCPR) 1966 - Articles 9 and 14 of the ICCPR provide detailed arrangements regarding the rights of suspects and defendants in criminal justice proceedings, including the right to be immediately informed of the reasons for arrest, the right to be immediately brought before the court, and the right to be tried without undue delay.
3. Convention Against Torture (CAT) 1984 - This Convention absolutely prohibits the practice of torture in any form, including in the context of criminal investigation and justice.
4. United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) 2015 - These minimum standards govern the treatment of detainees, including humane conditions of detention and prohibition of degrading treatment.

These international standards serve as an essential reference for evaluating the conformity of national laws, including the Criminal Code, with universally accepted human rights principles.

### **METHOD**

This study uses a normative juridical method with a statutory approach, a conceptual approach, and a comparative approach. The data used are secondary sources comprising primary legal materials (laws and regulations), secondary legal materials (journals, books, and scientific articles), and tertiary legal materials (legal dictionaries and encyclopedias). The analysis was conducted qualitatively, using descriptive-analytical techniques, to examine the substance of controversial articles in the new Criminal Code and their implications for the Amiarsa

protection of human rights and the accountability of law enforcement.

## **DISCUSSION**

### **Controversial Articles in the New Criminal Code**

One of the most controversial aspects of the new Criminal Code is the regulation on arrest and detention. Article 28 of the Criminal Code only authorizes the arrest of a person who is strongly suspected of committing a criminal act based on sufficient preliminary evidence. However, the criterion of "sufficient preliminary evidence" is not strictly defined, thereby creating a broad, potentially abusive scope of interpretation.

Furthermore, Article 32 of the Criminal Code only stipulates that detention may be imposed on suspects or defendants suspected of committing criminal acts with a criminal threat of 5 (five) years or more. This provision lowers the threshold from the old Criminal Procedure Code, which required a minimum of 5 years of criminal threats for all types of criminal acts. This lowering of the threshold could expand the use of detention and increase the risk of overcrowding in correctional institutions.

In addition, Article 35 of the Criminal Procedure Code only regulates the extension of the detention period, which is considered too long. At the investigation level, detention can be carried out for up to 40 days and extended for up to 40 days. Compared with international standards that recommend pre-trial detention to a minimum, this provision may constitute a violation of the right to liberty and personal security.

### **Implications for human rights**

This loose and vague arrangement of arrest and detention has the potential to violate the principles of the presumption of innocence and the right to personal liberty guaranteed in Article 28G of the 1945 Constitution and Article 9 of the ICCPR. Arrests and detentions carried out without strict standards can result in arbitrary deprivation of liberty.

### **Expanded Eavesdropping Authority**

Articles 69 and 70 of the Criminal Code only give broader wiretapping authority to investigators. Wiretapping can be carried out on suspects for specific criminal acts without court permission, but only with the internal permission of the investigating superior. This differs from the practice in many democratic countries, which require a warrant or permission from a judge to conduct wiretapping to ensure checks and balances.

Article 71 of the new Criminal Code also stipulates that wiretapping results may be used as evidence in court without adequate verification of the validity of the wiretapping procedure. This raises concerns about possible abuse of wiretapping authority and violations of the right to privacy.

### **Implications for human rights**

The authority to eavesdrop without adequate judicial oversight may violate the right to privacy guaranteed in Article 28G of the 1945 Constitution and Article 17 of the ICCPR. Privacy is a fundamental right that can only be limited by legitimate, proportionate reasons, and by strict procedures. Without oversight from independent institutions such as the courts, the risk of abuse of wiretapping authority becomes very high.

### **Excessive Protection of Law Enforcement**

Articles 80 and 81 of the new Criminal Code regulate legal protection for investigators, public prosecutors, and judges. This provision states that investigators, public prosecutors, and judges cannot be prosecuted, either civilly or criminally, in carrying out their duties in accordance with the provisions of laws and regulations, unless there is an element of intentionality that harms the suspect, the defendant, or other parties.

Article 82 further stipulates that legal proceedings against law enforcers suspected of committing criminal acts in the performance of their duties must obtain the approval of the institution where the law enforcement officer works. For example, to prosecute a policeman who violates the law while on duty, there must be the Indonesian Police's approval.

### **Implications for Accountability**

These excessive protection provisions have the potential to create impunity and undermine law enforcement accountability. The terms of internal approval before they can be legally processed create an apparent conflict of interest, as institutions tend to protect their own members. This is contrary to the principle of equality before the law, which states that all people, including law enforcers, must be subject to the same law without discrimination. The UN Human Rights Committee, in General Comment No. 32, emphasizes the importance of law enforcement accountability and rejects excessive immunity that can hinder victims' access to justice.

### **Restrictions on the Right of Suspects/Defendants to Be Accompanied by Legal Counsel**

Article 89 of the Criminal Code only stipulates that at the preliminary examination stage,

the suspect can be accompanied by legal counsel. Still, his presence is not mandatory for all types of criminal acts. New legal counsel is required for criminal acts that are threatened with the death penalty or imprisonment of 15 years or more. This provision differs from the old Criminal Code, which provided a broader right for suspects to be accompanied by legal counsel from the investigation stage onward for all types of criminal acts. These restrictions can weaken suspects' positions, especially those without adequate legal knowledge.

### **Implications for human rights**

The right to be accompanied by legal counsel is an essential element of the right to a fair trial as guaranteed in Article 14, paragraph (3), letter d of the ICCPR. This restriction on rights has the potential to create inequality in the legal process, especially for suspects from economically disadvantaged groups who cannot afford to hire a lawyer independently. Without adequate legal assistance, the risk of violations of suspects' rights, including possible torture or inhumane treatment, becomes higher.

### **Problematic Electronic Evidence Setup**

Articles 201 to 205 of the Criminal Procedure Code only regulate electronic evidence and electronic information. Although these arrangements are necessary to address cybercrime and technological developments, the provisions regarding the authentication and chain of custody of electronic evidence are considered inadequate. Article 203 states that electronic evidence obtained through wiretapping or access to electronic systems may be used as valid evidence, even if the method of obtaining it does not fully comply with strict procedures. This poses a risk of manipulating evidence and of violating the right to an effective defense.

### **Implications for human rights**

The use of electronic evidence obtained by unauthorized means or without strict procedures may violate the principles of due process and the right to an effective defense. The possibility of manipulating or fabricating undetected digital evidence can result in wrongful convictions and serious violations of the right to a fair trial.

### **Comparative Analysis with the Practices of Other Countries**

In the United States, Amendment IV of the U.S. Constitution provides that arrests may be made only with probable cause and generally require an arrest warrant issued by a judge.

[<sup>34</sup>] Pre-trial detention is also strictly restricted, and suspects are entitled to a bail hearing within 48 hours of arrest. In Germany, Article 104 of the German Constitution (Grundgesetz) requires that any arrest must be immediately followed by a judge's decision no later than the next day. Pre-trial detention is only allowed in certain circumstances, such as when there is a compelling reason, such as the risk of escape or the loss of evidence. Practice in the UK also shows that arrests require reasonable grounds and that suspects must be brought before a magistrates' court within 24 hours for a determination of further detention status. Compared with the practices of these countries, the arrest and detention arrangements in Indonesia's new Criminal Code provide investigators with broader discretion and relatively weak judicial oversight.

### **Wiretapping Authority**

In the United States, wiretapping is strictly regulated through Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and the Foreign Intelligence Surveillance Act (FISA). Wiretapping for criminal investigations requires a court order issued by a federal judge after probable cause is shown that a serious crime has been or will occur.

In Germany, wiretapping is regulated under Article 100a of the Strafprozessordnung (StPO), which requires judicial authorization and can be carried out only for certain serious criminal acts. A strict surveillance mechanism is in place to prevent wiretapping abuse.

The Council of Europe standards, as set out in the European Convention on Human Rights, also emphasize the need for independent oversight of eavesdropping authorities to prevent violations of the right to privacy.

The provisions in the new Criminal Code that allow wiretapping without judicial oversight clearly do not align with international best practices, which emphasize the importance of judicial oversight.

### **Law Enforcement Accountability**

In the United States, qualified immunity provides limited protection to law enforcement officials. Still, this protection is not absolute and can be revoked if it is proven that a constitutional right was clearly violated. In addition, there is a federal civil rights remedy under 42 U.S.C. Section 1983 that allows victims to sue law enforcement officers for violating their rights.

In the UK, the Police and Criminal Evidence Act (PACE) 1984 provides clear

arrangements for police powers and complaints mechanisms through the Independent Office for Police Conduct (IOPC), which is independent of the police.

Practice in democratic countries shows that although law enforcement is afforded certain protections, such protections should not impede access to justice and should be balanced with effective accountability mechanisms.

## **Implications for the Indonesian Criminal Justice System**

### **Risk of Systemic Violations of Human Rights**

Controversial articles in the new Criminal Code have the potential to create an environment conducive to systemic human rights violations in Indonesia's criminal justice system. Broad authority without adequate oversight, coupled with a lack of law enforcement accountability, can result in practices such as:

1. Arbitrary arrests and detentions in violation of the right to personal liberty
2. Abuse of eavesdropping authority that violates the right to privacy
3. Torture or inhumane treatment during the investigation process without adequate legal consequences
4. Unjust punishment due to a lack of protection of the right to defence

### **Weakening Public Trust in the Judicial System**

When the public sees that law enforcement has expansive authority but low accountability, public trust in the justice system will decrease. This can result in:

1. The public's unwillingness to participate in the legal process as a witness or reporter
2. Increasing efforts to resolve conflicts outside the formal legal system (vigilantism)
3. Perception that the justice system is unfair and in favor of power

### **Obstacles to Judicial Reform**

The new Criminal Procedure Code, which actually weakens human rights protection and accountability, can be a serious obstacle to criminal justice reform efforts in Indonesia. Instead of moving towards a fairer, more transparent, and more accountable justice system, the new Criminal Procedure Code could perpetuate problematic practices.

### **A Review from the Perspective of Constitutionality**

Several articles in the new Criminal Procedure Code have the potential to contradict

the 1945 Constitution, in particular:

1. Article 28D paragraph (1) of the 1945 Constitution - "Everyone has the right to fair legal recognition, guarantee, protection, and certainty and equal treatment before the law." The provisions on excessive protection for law enforcement in the new Criminal Procedure Code may violate the principle of equality before the law.
2. Article 28G paragraph (1) of the 1945 Constitution - "Everyone has the right to the protection of personal self, family, honor, dignity, and property under his or her power, as well as the right to a sense of security and protection from the threat of fear to do or not do something that is a human right." Wiretapping arrangements without adequate judicial oversight may violate the rights to privacy and security.
3. Article 28I paragraph (1) of the 1945 Constitution - "The right to life, the right not to be tortured, the right to freedom of mind and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted based on retroactive law are human rights that cannot be reduced under any circumstances." Provisions that weaken law enforcement accountability can increase the risk of torture without adequate legal consequences.

This potential unconstitutionality opens the way for judicial review of controversial articles in the new Criminal Procedure Code before the Constitutional Court.

Based on the above analysis, several recommendations can be made to minimize the risk of human rights violations and strengthen the accountability of law enforcement in the implementation of the new Criminal Procedure Code:

### **Short-Term Recommendations**

1. **Publication of Strict Implementation Regulations.** The government needs to issue implementing regulations (Government Regulations and related Ministerial Regulations) that impose stricter limits on investigators' authority to make arrests, detain, and wiretap. Implementing rules should specify the criteria for "sufficient evidence of a start" and for effective internal oversight procedures.
2. **Strengthening External Supervisory Institutions.** The Commission for Missing Persons and Victims of Violence (KontraS), the National Human Rights Commission (Komnas HAM), and the Ombudsman of the Republic of Indonesia need to be given stronger authority to oversee the implementation of the new Criminal Procedure Code and receive complaints from

people who feel their rights are being violated.

3. **Intensive Training for Law Enforcement.** All law enforcers, from investigators, public prosecutors, to judges, must receive comprehensive training on human rights principles in the criminal justice system and international standards that must be adhered to. This training should emphasize the importance of accountability and the absolute prohibition of torture.
4. **Adequate Provision of Free Legal Aid.** Given the restrictions on the right to legal counsel in the new Criminal Procedure Code, the government should strengthen free legal aid programs through the National Legal Development Agency (BPHN) and accredited legal aid institutions to ensure that all suspects, especially from poor and marginalized groups, can access adequate legal assistance.
5. **Transparent Documentation and Reporting System.** All arrests, detentions, and wiretapping must be well documented and reported to the public periodically (while maintaining the necessary confidentiality during the investigation). This transparency is vital to enabling public oversight and preventing the abuse of authority.

### **Medium-Term Recommendations**

1. **Establishment of an Independent Agency for Wiretapping Supervision.** It is necessary to establish an independent agency to oversee all wiretapping activities conducted by law enforcement officials, similar to the United States Foreign Intelligence Surveillance Court or the United Kingdom Investigatory Powers Commissioner's Office.
2. **Revision of the Consent Mechanism for Prosecuting Law Enforcement.** The internal approval mechanism required before prosecuting law enforcement must be revised. Instead, an independent body of academics, civil society leaders, and former law enforcement officials of integrity could be established to assess whether there are sufficient grounds to prosecute law enforcement officers suspected of committing violations.
3. **Strengthening the Pre-Trial/Pretrial Mechanism.** The pretrial mechanism should be strengthened by granting pretrial judges broader authority to test the validity of arrests, detentions, and seizures. The pretrial verdict must be binding and cannot be ignored by the investigator or public prosecutor.
4. **Development of Electronic Monitoring System.** To reduce reliance on pre-trial detention, it is necessary to develop an electronic monitoring system (ankle bracelet) that allows suspects to continue living normal lives while ensuring they remain present in the judicial process.

5. Standardization of Electronic Evidence Handling Procedures. It is necessary to develop strict standard operating procedures (SOPs) for the handling of electronic evidence, including digital forensic procedures, chain of custody, and authentication, that meet international standards such as ISO/IEC 27037 for digital evidence handling. [^57]

### **Long-Term Recommendations**

1. Revision of the Criminal Code Through Amendments or New Laws. In the long term, controversial articles in the new Criminal Procedure Code need to be revised through amendments or by drafting new laws that are more in line with human rights principles and international standards. This revision process should involve broad participation from civil society, academics, legal practitioners, and human rights organizations. Revisions in particular need to be made regarding: Article on arrest and detention to tighten terms and procedures, Article on wiretapping to require permission from a judge, Article on protection of law enforcement to eliminate the internal consent mechanism, Article on the right to be accompanied by legal counsel to extend bail to all suspects
2. Submission of Judicial Review to the Constitutional Court. Civil society organizations, academics, or community groups that have legal standing can submit a judicial review application to the Constitutional Court to test the constitutionality of problematic articles in the new Criminal Code. The Constitutional Court has the authority to annul or amend provisions in laws that are contrary to the 1945 Constitution.
3. Ratification of the Optional Protocol to the Convention Against Torture (OPCAT). Indonesia needs to ratify the Optional Protocol to the Convention Against Torture, which allows the establishment of a National Preventive Mechanism (NPM) to make surprise visits to places of detention and ensure there is no torture or inhuman treatment.
4. Systemic Reform of Law Enforcement Institutions. More fundamental reforms need to be made to law enforcement institutions, including: Improving the welfare of law enforcement to reduce corrupt practices, Strengthening merit-based recruitment and promotion systems, Establishing an organizational culture that respects human rights and accountability, and Strengthening independent and effective internal oversight mechanisms
5. Legal Education and Human Rights Awareness for the Community. In the long term, public awareness of their rights in the criminal justice system needs to be increased

through legal education in schools and community human rights awareness campaigns. People who are aware of their rights will be better able to exercise social control over law enforcement and demand accountability.

## **CONCLUSION**

The new Criminal Procedure Code, contained in Law Number 1 of 2023, brings significant changes to the Indonesian criminal justice system. However, some articles in the new Criminal Procedure Code raise serious concerns because they could threaten fundamental human rights principles and undermine law enforcement accountability. Controversial articles identified in this study include: (1) overly loose and unclear arrangements for arrest and detention; (2) expanded wiretapping authority without adequate judicial oversight; (3) excessive protection of law enforcement that creates potential impunity; (4) restriction of the right of the suspect/defendant to be accompanied by legal counsel; and (5) less stringent electronic evidence arrangements. These provisions may violate various human rights principles guaranteed in the Indonesian constitution and in international legal instruments ratified by Indonesia, including the principles of due process of law, presumption of innocence, the right to a fair trial, the right to privacy, and the right to personal liberty. A comparison with the practices of democratic countries shows that the provisions in the new Criminal Procedure Code are not in line with the best international standards in human rights protection and law enforcement accountability. The implications of these controversial articles are very serious, including the risk of systemic human rights violations, the weakening of public trust in the justice system, and the hampering of criminal justice reform efforts in Indonesia. Some provisions in the new Criminal Procedure Code are also potentially unconstitutional because they contradict Articles 28D, 28G, and 28I of the 1945 Constitution. To overcome this problem, comprehensive measures are needed in the short, medium, and long term. In the short term, there is a need to issue strict implementing regulations, strengthen external supervisory agencies, provide intensive training for law enforcement, provide adequate free legal aid, and implement a transparent documentation system. In the medium term, it is necessary to establish an independent agency for the supervision of wiretapping, revise the approval mechanism for law enforcement prosecutions, strengthen the pretrial mechanism, develop an electronic monitoring system, and standardize procedures for handling electronic evidence. In the long run, fundamental revision of problematic articles through amendments or new laws is urgently needed. In addition, it can be considered for the submission of a judicial review to the

Constitutional Court, the ratification of OPCAT, systemic reform of law enforcement institutions, and the improvement of legal education and public human rights awareness. A good criminal procedure law must balance the effectiveness of law enforcement with the protection of human rights. The new Criminal Code, in its current form, is still far from an ideal balance. Without serious corrective efforts, the Criminal Code can only become an instrument that perpetuates human rights violations and impunity in the Indonesian criminal justice system. Human rights protection and law enforcement accountability are not obstacles to effective law enforcement, but rather are the foundation for a fair, credible, and sustainable criminal justice system. A judicial system that respects human rights will result in fairer verdicts, increase public trust, and ultimately strengthen the rule of law and democracy in Indonesia.

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