



# The Right to Be Heard Prior to Judicial Proceedings: Human Rights and Fair Trial Deficiencies in Indonesian Pre-Trial Processes

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## Abstract

*The Protection from arbitrary detention is an essential component of a democratic judicial system and a core element of the right to a fair trial. However, in Indonesia, the previous and the newly passed Criminal Procedure Code (KUHAP) do not expressly require detained suspects to be presented before a judge during the pre-trial procedures. This circumstance raises questions about the effectiveness of judicial oversight over coercive methods and the realisation of procedural rights protected under human rights standards. The problem is of particular relevance, as the Indonesian pre-trial process serves a similar purpose to habeas corpus in many countries, which necessitates the detainee's personal appearance before the court. This article employs normative legal research using statutory, conceptual, and comparative approaches. Comparative analysis is conducted by examining habeas corpus regulations and judicial oversight mechanisms in England, the United States, India, the Philippines, Spain, Portugal, and the Netherlands. The analysis demonstrates that the absence of an obligation to present detained suspects before a judge weakens procedural fairness, limits the suspect's opportunity to be heard directly, and reduces the effectiveness of judicial supervision over detention. To address these shortcomings, reform of the KUHAP should provide an explicit requirement for the presentation of detained suspects in pretrial hearings and strengthen the active supervisory role of judges as a safeguard against arbitrary deprivation of liberty.*

## I. Introduction

The Humans are thought to occupy a unique position in the order of life on account of their special qualities, including reason, independence and self-control. It is considered that these qualities give humans a distinct dignity that separates them from other beings (Etninson, 2020). Philosophical studies on human dignity are active and

contentious, yet there is a basic agreement on the significance of protecting persons against possible arbitrariness.

The relationship between law and human rights is quite close in the area of criminal law enforcement. Therefore, there must be a legal instrument that can be conditionally used to resist the restriction of freedom carried out by the law enforcement procedure (Herring, 2021). A fair criminal justice system is an essential to ensuring that the law is applied fairly and impartially – whether it's to suspects or those already convicted (Anwary, 2023).

One important instrument for upholding human dignity in the legal process is the availability of the *habeas corpus* forum (Addis, 2019), which aims to protect individuals from arbitrary detention (Dominguez, 2011). *Habeas corpus* is a constitutional right that guarantees individuals access to the courts to challenge the legality of their detention (Garrett, 2012). The term itself, which comes from the common law history, literally means to "hold the body," and has long been seen as a main stronghold of individual freedom. *Habeas corpus* was originally a command of the Crown to ensure that no individual was imprisoned without good cause, and it has become one of the major means of judicial oversight of the legitimacy of a detention. This privilege has become a hallmark of defence against excessive executive power in England and the United States (Tyler, 2021). The writ of *habeas corpus ad subjiciendum*, sometimes referred to as the Great Writ, is a principal form of *habeas corpus* that historically mandated the jailer to present the detained individual before a judge to evaluate the legitimacy of their custody. If the detention is deemed unlawful, the court will mandate the immediate release of the individual. (Curr, 2020).

Indonesia has amended its Criminal Procedure Code, referred to in Indonesian as "*Kitab Undang-Undang Hukum Acara Pidana (KUHAP)*," transitioning from Law Number 8 of 1981 (Old KUHAP) to Law Number 20 of 2025 (New KUHAP). Both statutes establish the pretrial process as a mechanism for evaluating, adjudicating, and resolving matters at the "pre-adjudication" phase. The pretrial process, upon examination, can be likened to *habeas corpus* (Susilo, 2020). Article 158 of the New KUHAP states that the authority of the pretrial process is to examine and decide "on the legality or illegality of coercive actions, termination of investigation or prosecution, requests for compensation and/or rehabilitation, seizure of goods, delay in handling cases without valid reasons, and suspension of detention".

The change of law will improve the legal regime. However, if this study examines the regulation of the pretrial process in Articles 158 to 164 of the New KUHAP is not regulated that the suspect must be detained in order to attend the "pretrial process hearing". This is contrary to the provisions of Article 163 paragraph (1) letter b of the New KUHAP that states that the judge in the pretrial proceedings also hears the "testimony of the suspect". This latent problem is made worse by the adversarial nature of the pretrial process in Indonesia when the judge is passive and the process follows the civil court processes (Susilo et al., 2024). The lack of regulations mandating that detention officials present the suspect during the pretrial process suggests that the

right to challenge detention becomes ineffective without a legal obligation to bring the detainee before a judge, in accordance with the fundamental principle of *habeas corpus*. This circumstance also signifies adverse implications for the execution of equitable trials, as the more powerful state possesses access to the judiciary. The suspect is not afforded a just opportunity to appear and provide their defence throughout the pretrial procedure.

The notion of *habeas corpus* guides the pretrial process in Indonesia. However, the model was not simply copied but was adapted to the features of the Indonesian legal system, which is based on the civil law heritage (Wardhani et al., 2022). This system is based on written law and the work of judges is limited to the normative requirements set. But, as it has developed, judges have started to play a more active part in legal discovery to uncover the values of justice that are embedded in society (Khasanah & Lumbanraja, 2022). In criminal procedural law, many argue that legal certainty should be paramount (Pangaribuan, 2021), acknowledging that it must facilitate the orderly execution of judicial processes and offer a quantifiable and dependable procedural framework. Nonetheless, the evolution of Indonesia's pretrial procedure should not simply replicate foreign legal systems, particularly those derived from common law nations. An essential examination of the social, cultural, and local institutional conditions that constitute the Indonesian legal framework is required. This encompasses the bureaucratic culture within law enforcement, the subservient status of judges relative to executive authority, and the restricted comprehension of human rights among law enforcement personnel concerning suspects. Consequently, the implementation of principles like judicial oversight or the inquisitorial model must consider the institutional and legal-cultural obstacles present in Indonesia..

Several previous studies have examined the importance of reforming Indonesia's pretrial process. Karindra emphasizes the importance of access to justice for poor suspects through free legal aid within the Pancasila rule-of-law framework (Karindra, 2024). Yasir et al. highlight the need to reconstruct suspect examinations in line with Pancasila's justice values by improving the legal substance, structure, and culture (Yasir et al., 2024). Samuda et al. assess the need for strict sanctions against false witnesses in the pretrial process (Samuda et al., 2023). Prasnada et al. view the pretrial process as an integral instrument in the criminal justice system to ensure justice at the initial stage (Prasnada et al., 2023). Liliyana and Setyadi emphasize the importance of judicial interpretation that guarantees legal certainty and the principle of swift and simple justice in post-pretrial proceedings (Liliyana & Setyadi, 2023). Nurbaedah emphasized that the expansion of pretrial authority must accommodate the examination of substantive aspects to guarantee citizens' rights (Nurbaedah, 2022). However, Ferdinan Manuel and Elmir criticize how corruption suspects actually use the expansion of the pretrial process object, while the protection of human rights from the investigation stage has not been substantively understood (Ferdinan Manuel & Elmir, 2022). Sutrisno voiced the urgency of establishing a pretrial process institution within the military justice system to prevent human rights violations against soldiers (Sutrisno, 2021). Firmansyah et al. reviewed the ineffectiveness of the pretrial process

in addressing the imbalance between victims and law enforcement in corruption cases (Firmansyah et al., 2020).

The aforementioned description indicates a legal void concerning the requirement to present the suspect throughout the pretrial process in Indonesia, notwithstanding the suspect's opposition to coercive tactics, which is his entitlement. This also highlights a deficiency in the existing literature, which has predominantly addressed facets of authority or the goal of the pretrial procedure, yet has not precisely scrutinised the suspect's right to be present and to offer their defence directly. This study is crucial for addressing that gap and enhancing the establishment of a more equitable criminal procedural law system. This study aims to examine and compare the regulation of habeas corpus across different countries, conduct a comprehensive analysis of the current pretrial process regulations in Indonesia, and devise normative and practical measures to ensure equitable access to the pretrial process for detained suspects, enabling them to appear and defend themselves directly before the judge. Additionally, it seeks to develop a model that is critically tailored to the unique characteristics of the Indonesian legal system, considering its legal structure, judicial institutions, and the socio-cultural context of Indonesian law.

The study method used in this article is a normative legal method that integrates statutory, conceptual, and comparative legal approaches (Marzuki, 2008). The statutory approach is used to study positive norms in the New *KUHAP* and international treaties such as the International Covenant on Civil and Political Rights (ICCPR) to assess the sufficiency of protection for suspects' rights during the pretrial process. The conceptual approach is used to examine essential principles such as *habeas corpus*, fair trial, and due process of law, which serve as normative underpinnings for necessitating the suspect's physical presence in the forum to determine the legitimacy of imprisonment. The comparative legal technique is used to examine the habeas corpus systems and practices, as well as judicial monitoring mechanisms for coercive measures, in seven countries: England, the United States, India, the Philippines, Spain, Portugal, and the Netherlands. These countries were chosen for two reasons: first, they represent common law systems (England, the United States, India, and the Philippines) as well as civil law systems (Spain, Portugal, and the Netherlands); second, they have strong guarantees in positive law and judicial practice regarding the obligation to present the suspect before a judge during the pre-adjudication process. In the Netherlands, the *Rechter-Commissaris*' inquisitorial system serves as the primary reference in developing the ideal model for revamping Indonesia's pretrial procedure, which requires judges to play an active part in determining the legitimacy of detention. All facts were analysed qualitatively by analysing primary, secondary, and tertiary legal literature to develop a contextual, fair, and character-appropriate model for altering Indonesia's pretrial procedure.

## II. Discussion

### A. *Habeas Corpus* Regulations in Various Countries

Indonesia The development of a fair criminal justice system has one of its main objectives: addressing the arbitrariness of law enforcement (Rucker & Richeson, 2021). The investigative step is very sensitive to arbitrariness. The investigators have wide and thorough powers to conduct various investigative actions for the purpose of collecting legal and relevant evidence in the investigation of crimes affecting the honour and dignity of a person. Such authorities include the inspection of the site of a crime, the performance of searches and seizures, interrogations and other required steps to obtain vital facts in criminal cases (Dobrianska & Filashkin, Vadym Barsuchenko, Ihor Nikitenko, Viktor Antoshchuk, 2024).

The powers of the investigators should be exercised in conformity with the relevant legal provisions and with regard for the human rights of the suspect and the victim. All actions must be performed in a professional and proportional manner to achieve justice and truth in the legal process. The implementation of this authority must also be supported by good coordination of law enforcement agencies and the application of investigative methodologies, so that the investigation process can function optimally and the outcomes are accountable in law (Dobrianska & Filashkin, Vadym Barsuchenko, Ihor Nikitenko, Viktor Antoshchuk, 2024).

An investigation conducted correctly and fairly is very important because mistakes at this stage can lead the judge to make an incorrect decision in the case. As a result, the guilty party could be acquitted, while the innocent one is punished. Such wrongful convictions create injustice for both the perpetrator and the victim, and negatively impact public trust in the criminal justice system (Norris et al., 2020). Thus, law enforcement personnel must take great care and evaluate multiple considerations while making decisions to avoid errors that are harmful to those involved. Many countries apply the procedure of *habeas corpus* as an effective legal protection for persons, as a preventive tool to avoid mistakes in the pre-adjudication stage.

This ability to petition the court to determine whether a person's imprisonment is lawful is called *habeas corpus*, which in Latin means "that you bring the body." This clause protects citizens against excessive involvement from the government in their lives and gives them the right to control the power of the government through the courts (Siegert, 2022).

*Habeas corpus* began in English royal practice when the writ was used to demand that a detained individual be brought before the monarch so that the king could assess if that person were being wrongly held. Initially, *habeas corpus* was a tool not just for safeguarding liberty but also for establishing the power of the royal court over local jurisdictions. During the 15th and 16th centuries, *habeas corpus ad subjiciendum* was more and more employed as a legal instrument to examine the legality of imprisonment, and its function changed to that of controlling administrative power. In a colonial context, such as British Columbia, *habeas corpus* was utilised by colonial

judges to demonstrate the application of English royal law. This means that habeas corpus was not a direct emblem of freedom but a product of the fight for legal power and ways to reinforce the state's grip on one's body (Unger, 2022).

*Habeas corpus* initially emerged as a form of the English royal prerogative, as recognized in the Assize of Clarendon in 1166, which ordered the sheriff to present a prisoner before a judge when there was no royal judge in the area (Munir, 2024). In subsequent developments in the 14th and 15th centuries, *habeas corpus* was used to order detention in civil cases, although this practice was abolished in 1869. An important transformation occurred in the 15th and 16th centuries, when this writ began to be associated with testing the legality of detention rather than merely serving as a tool of power to detain someone (Unger, 2022). In the context of colonial British Columbia, habeas corpus became a tool that not only guaranteed individual freedom but was also used to strengthen local legal authority in the name of sovereignty, including in cases such as *Regina v. McLean Brothers and Sproule*, where colonial judges sought to assert their jurisdiction over the central government in Ottawa (Unger, 2022).

Besides *habeas corpus ad subjiciendum*, there are several variants of the writ of *habeas corpus* that have developed in the Anglo-Saxon legal tradition. *Habeas corpus ad testificandum* is intended to present the detainee to provide testimony. *Habeas corpus ad prosequendum* is used to bring a detainee into the criminal process (Hughes, 2020). *Habeas corpus ad deliberandum et recipiendum* regulates the transfer of a detainee to the jurisdiction where the crime occurred (Weregwe, 2021). Furthermore, *Habeas corpus ad faciendum et recipiendum* or *ad respondendum* transfers the detainee to civil jurisdiction for further proceedings.

Meanwhile, *habeas corpus ad satisfaciendum* is intended to allow the detainee to serve the sentence imposed (Bryson, 2023). *Habeas corpus ad respondendum* is a court order requiring the detainee to appear in court so he can answer the criminal charges against him. So, simply put, this letter is used to bring the detained person to court so he can be tried for the alleged crime (Andrew, 2020). Essentially, various *habeas corpus* writs are orders to bring the detainee, because without such an order, there is no legal basis for a detainee to be released from detention.

In England, the *Habeas Corpus* Act of 1679 is a significant milestone in legal history because it formally established the obligation for the detaining party to present the individual before a judge to test the legality of their detention (Cui, 2020). Although often regarded as a symbol of civil liberties, the enactment of this law cannot be separated from the political dynamics of the time, particularly the conflict between King Charles I and Parliament. This tension culminated when the king ordered the detention of several citizens without due legal process. In response, the Petition of Right emerged in 1628 and, after lengthy debates, the *Habeas Corpus* Act was enacted in 1679. Although the term habeas corpus is not explicitly mentioned in the Magna Carta of 1215, its spirit is aligned with the principle that no one should be deprived of their liberty without clear legal grounds and a fair process (Lewis, 2022).

This law affirms that anyone detained has the right to petition the Court to challenge the legality of their detention, even when the Court is not in session. In addition, the law prohibits transferring detainees to another jurisdiction to avoid *habeas corpus* petitions, as well as re-detention on the same charges. Since then, *habeas corpus* has become the primary judicial remedy for protecting individuals from arbitrary detention. This is reflected in the important ruling *R v Secretary of State* for the Home Department, *ex parte Khawaja* (1983), which affirmed that the Court has full authority to assess the legality of administrative detention, particularly against "illegal immigrants." Similarly, in *R v Governor of Brockhill Prison, ex parte Evans* (2000), the Court stated that although the legal basis for detention was initially considered valid, the extension of detention beyond the sentence period remained unlawful and subject to challenge (Karr, 2020).

In the United States, the right to *habeas corpus* is guaranteed by the Constitution and further regulated by 28 U.S. Code § 2254, which allows state-level prisoners to petition federal courts for relief if their constitutional rights are violated. However, this procedure is limited, as it can be used only after all state-level legal remedies have been exhausted and if new evidence is factually or constitutionally relevant. The United States Supreme Court has affirmed the importance of *habeas corpus* as a judicial check on executive power, including in crises or national security threats (Siegert, 2022).

This was affirmed in *Hamdi v. Rumsfeld* (2004), when the Court stated that a U.S. citizen detained as an enemy combatant still has the right to access *habeas corpus* to challenge the legality of their detention without trial. Similarly, in *Rasul v. Bush* (2004), the Court affirmed that federal courts have jurisdiction to review the *habeas corpus* of foreign detainees at Guantanamo Bay, indicating that this protection applies even to non-citizens under the *de facto* control of the United States. These two rulings reinforce the position of *habeas corpus* as a fundamental safeguard against the abuse of state power (Seielstad, 2025).

In India, the right to *habeas corpus* is explicitly guaranteed by Articles 32 and 226 of the Indian Constitution, which grant the Supreme Court and High Courts the authority to examine the legality of a detention and order release if the detention is declared unlawful (Team, 2025). Although this legal framework is strong in theory, the reality on the ground presents serious challenges, particularly regarding efficiency. Recent studies note that the resolution of *habeas corpus* cases in the Supreme Court can take more than 200 days, raising concerns about the practical effectiveness of civil liberties protection (Bhardwaj, 2023)v.

Nevertheless, the Supreme Court continues to demonstrate its commitment to upholding personal liberty through several important rulings. In *Shafin Jahan v. Asokan K.M.* (2018), the Court affirmed the right of adult women to make their own life choices, including marriage, as part of an inviolable personal liberty. Meanwhile, in *Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari* (2019), the Court granted *habeas corpus* in the child's interest and in favor of legitimate custody. Similarly, in *Dhananjay Sharma v.*

*State of Haryana* (1995), the Court ordered release on the grounds of unlawful detention by state authorities. These rulings reflect the important role of habeas corpus in the Indian legal system as a primary constitutional tool for testing and correcting state actions that violate individual freedoms (Kanoon, n.d.).

In the Philippines, *habeas corpus* is regulated under Article III, Section 15, of the 1987 Constitution and can be suspended only in extraordinary circumstances, such as invasion or rebellion. The implementation rules are found in the Rules of Court, specifically Rule 102 (GOVPH, 1987). In *Secretary of National Defense v. Manalo* (2008), the Supreme Court of the Philippines affirmed that *habeas corpus* is relevant not only for physical release but also for protecting freedom of movement and communication, thereby expanding the scope of protection provided by this writ (Heceta, 2021).

Spain regulates *habeas corpus* in Article 17, paragraph (4) of the 1987 Constitution, which requires the enactment of specific laws to ensure its implementation (The Spanish Constitution, 1987). In the case of *Riera Blume and Others v. Spain* (1999), the European Court of Human Rights stated that the actions of the Spanish authorities in detaining the applicants outside of legal procedures under the pretext of "deprogramming" violated the right to liberty as guaranteed by Article 5(1) of the European Convention on Human Rights (Rights, 1999).

Portugal, through Article 31 of its Constitution, guarantees the right to file a *habeas corpus* against unlawful arrest or detention. The Court is required to examine the application within eight days in an open session (Botelho, 2020). In *Teixeira de Castro v. Portugal* (1998), the European Court of Human Rights found that police involvement as an agent provocateur violated the right to a fair trial. Meanwhile, in *Martins O'Neill Pedrosa v. Portugal* (2017), the Court found that Portugal violated Article 5 § 4 of the Convention because the appellate Court failed to review the pre-trial detention within a reasonable time (Right, 2017).

The general regulation of the habeas corpus in the different countries indicates that the main concept of this system is the guarantee that a person deprived of his liberty will be brought before a judge without delay to determine the legitimacy of his detention. This method involves not only physical release but also judicial control of executive acts and protection from infringement of individual rights. From England, United States, India, Philippines, Spain to Portugal, there is a consistent obligation for the state to ensure that suspects are not left in detention without a valid legal basis, and must be brought before a court promptly as a form of respect for fair trial and protection of human rights.

## **B. Challenges and Reform of Pretrial Proceedings in Indonesia: Balancing the Right to Contest and the Duty to Confront**

James Madison once stated, "If men were angels, no government would be necessary" (Guillery, 2020). This comment demonstrates that the possibility of power abuse persists, regardless of the robustness of the legal system. Consequently, within the framework of the criminal justice system, an equitable

trial procedure is vital. The right to a fair trial is a fundamental entitlement acknowledged in numerous international legal frameworks, both universal and regional, primarily aimed at safeguarding human rights and essential liberties. The Universal Declaration of Human Rights, one of the first universal texts, says in Article 8 that every individual is entitled to legal protection by a competent national court to maintain the fundamental rights granted by the constitution or laws. Despite this provision being classified as non-binding international law (soft law), it continues to serve as a significant foundation. Moreover, Article 10 of the Declaration stipulates that every individual is entitled to a fair and public hearing by an independent and impartial tribunal on the assessment of their rights and obligations, as well as any criminal charges against them (Balatska & Lotysh, 2024).

A fair trial is a procedural guarantee that allows an individual to exercise their rights during the judicial process, including the presumption of innocence. This principle protects a person from being treated unlawfully before being proven guilty (Stoykova, 2023). However, as John Rawls pointed out, the criminal justice system is imperfect because its outcomes are not always correct, especially if the process is not conducted fairly, which can actually worsen the situation (Lafont, 2003).

Instances of unjust arrests and abuses reported in Indonesia during 2023, as documented by the media site Tirto, exemplify the difficulties in maintaining equitable law enforcement. For instance, the lethal attack on Hasanuddin in North Jakarta by a security personnel who erroneously accused him of theft; the maltreatment of Widodo in Manokwari, West Papua, who was suspected of drug trafficking but ultimately exonerated; the physical abuse and psychological trauma endured by two adolescents in West Sumatra due to improper protocols in a motorbike theft allegation; the assault on Fiterson in Bengkulu, who was a victim of wrongful detention; and the demise of theft suspect These instances reveal significant deficiencies in law enforcement protocols, encompassing power misuse, human rights infringements, and insufficient legal safeguards for victims of illegal detention and maltreatment in Indonesia (Anwar, 2023). This is in stark contrast to the goals of the Indonesian state as stated in the Preamble of the 1945 Constitution, fourth paragraph, which is to "protect the entire Indonesian nation and all of its bloodshed." That goal can only be realized if law enforcement is carried out fairly and in accordance with legitimate procedures.

Furthermore, Article 28I paragraph (5) of the 1945 Constitution emphasizes that the state is obliged to provide "protection, promotion, enforcement, and fulfillment of human rights." In this context, an effective legal protection mechanism is required, and one institution expected to perform this function in Indonesia is the pretrial institution. As explained, the pretrial institution remains in the New *KUHAP*. To provide a sufficient overview of the regulation of the pretrial process in the Old and New *KUHAP*, it can be reviewed through the following table 1:

Aspect	Old Code of Criminal Procedure	New Code of Criminal Procedure
Definition	The pretrial process is the authority of the district court to examine and decide the legality of certain actions in the criminal process. The pretrial process is the district court's authority to examine and decide the legality of certain actions in the criminal process.	The pretrial process is the authority of the district court to examine and decide objections against the actions of investigators and public prosecutors in the investigation and prosecution process.
Object	Meli2. Includes: (1) the legality of arrest and/or detention; (2) the legality of the termination of investigation or prosecution; (3) requests for compensation or rehabilitation; and after the Constitutional Court Decision Number 21/PUU-XII/2014, it has been expanded to include Includes: (1) the legality of arrest and/or detention; (2) the legality of the termination of investigation or prosecution; (3) requests for compensation or rehabilitation; and after the Constitutional Court Decision Number 21/PUU-XII/2014, it has been expanded to include the determination of suspects, searches, and seizures as objects of the pretrial process.	Includes: (1) the legality of the execution of coercive measures; (2) the legality of the termination of investigation or prosecution; (3) requests for compensation and/or rehabilitation; (4) the seizure of items or goods unrelated to the crime; (5) the delay in handling cases without valid reasons; and (6) the suspension of detention.
Concept of Coercive Measures	Not explicitly formulated as a single concept, but rather scattered throughout the provisions on arrest, detention, search, and seizure. Not explicitly formulated as a single concept, but rather	3. Clearly formulated to include the determination of suspects, arrests, detentions, searches, seizures, document examinations, wiretapping, blocking, and prohibiting exit from the

	scattered in the provisions of arrest, detention, search, and seizure.	territory of Indonesia.
Parties Entitled to File	The suspect, the suspect's family, or other parties authorized by the suspect. The suspect, the suspect's family, or another party authorized by the suspect.	More broadly, it includes the suspect or the suspect's family, the victim or the victim's family, the reporter, the lawyer, or the legal aid provider who is authorized.
Protective Character	Mainly oriented toward protecting the rights of the suspect from arbitrary actions by law enforcement officers. Mainly oriented toward protecting the rights of suspects from arbitrary actions by law enforcement officers.	Protection is extended not only to the suspect but also to the victim and other parties with legal interests.
Presence of the Suspect in Pretrial Proceedings	There is no explicit regulation requiring detention officers to present detained suspects before a judge in a pretrial process. There is no explicit regulation requiring the detaining officer to present the detained suspect before the pretrial judge.	Although judges are required to hear the suspect's testimony, the New Criminal Procedure Code still does not regulate the obligation to present the detained suspect in the pretrial hearing process.
Model of Pretrial Proceedings	Tends to be adversarial with a passive judge and procedures that follow the pattern of civil procedural law. Tends to be adversarial with a passive judge and procedures that follow the pattern of civil procedural law.	Maintaining the adversarial character even though the object and scope of supervision are expanded.
Orientation	Emphasizes formal control over the actions of law enforcement officers. Emphasizing formal control over the actions of law enforcement officers.	Aiming at the expansion of judicial control and the strengthening of human rights protection in the pre-adjudication stage.

(Table 1: The Comparative Overview of the Regulation of Pretrial Proceedings under the Old and the New Criminal Procedure Codes (KUHP). Source: Author's Elaboration, 2026)

The table 1 indicates that despite the New *KUHAP* having a broader object and scope than the Old *KUHAP*, both rules have the same weakness, which is “the absence of a legal obligation for law enforcement officers to present detained suspects to a judge in the pretrial proceedings, especially for detained suspects,” even though the Old *KUHAP* (Article 82 paragraph (1) letter b) and the New *KUHAP* (Article 163 paragraph (1) letter b) state that suspects must be heard in the pretrial proceedings. Indeed, not all suspects are detained, but in practice this custody is commonly exercised (Asra Rahmad, 2019).

Concerning the conditions for detention, Article 100 of the New *KUHAP* stipulates that the detention of suspects or defendants may only occur pursuant to a detention order or a judicial decree for offences punishable by imprisonment of five years or more, or for specific crimes explicitly delineated by law. Moreover, detention must rely on a minimum of two valid pieces of evidence and specific subjective factors, including the suspect's disregard for the investigator's summons, provision of false testimony, obstruction of the investigation, attempts to evade capture, destruction or elimination of evidence, recidivism, witness *tampering*, or for the safeguarding of the suspect's own safety. The revised *KUHAP* stipulates that the detention order must specify the suspect's identity, the grounds for detention, a succinct account of the offence, and the location of detention, and it must be conveyed to the family or an appointed representative within one day following the execution of the detention.

Meanwhile, the Indonesian criminal justice system does not require authorities to present the suspect to a judge immediately after arrest. Indonesia has indeed ratified the International Covenant on Civil and Political Rights (ICCPR) through Law Number 12 of 2005. However, it has not been fully ratified (Hermanto, 2022), even though the provisions of Article 9 paragraph (3) of the ICCPR are very important, which stipulate that everyone who is detained on criminal charges must be promptly brought before a court or competent authority, and has the right to be tried without undue delay or to be released on bail.

The absence of the obligation to present the suspect affects the effectiveness of the *pretrial* examination proceedings, where, in the Old *KUHAP* (as well as the New *KUHAP*), it is stated that in the pretrial examination proceedings, the judge is obliged to hear statements from the applicant (the suspect) and the respondent (the investigator or public prosecutor) (Kusuma et al., 2020). However, the absence of regulations requiring the suspect to be presented in court may mean the judge hears only statements from law enforcement officials. This situation creates an imbalance in the process and could lead to an impartial examination.

The basic shortcomings of Indonesia's pretrial process cannot be separated from several structural and conceptual problems that are embedded in the system. One of the principal problems is the absence of legal rules establishing the obligation of investigators or public prosecutors to bring the suspect before a

court during the pretrial procedure. Thus, the trial typically goes on unilaterally, with only statements of law enforcement agents' hearing. At the same time, the voice of the suspect, as the injured party, is absent from the defence process.

This condition is exacerbated by the judges' passive role in the pretrial process. As explained by Faisal, judges in the pretrial process forum do not have the obligation to ensure the suspect's presence or to act proactively in gathering evidence (Faisal, 2023). This passivity stems from the procedural status of the pretrial process, which is equated with civil disputes (Anjeli & Badeng, 2024).

Therefore, the pretrial process is subject to the principles of civil procedural law, including the principle of *ne procedat iudex ex officio*, which prohibits judges from acting on their own initiative, and *facta alleganda probanda sunt ab actore*, which places the entire burden of proof on the parties without substantive intervention from the judge. Furthermore, the principle of *da mihi factum, dabo tibi ius* emphasizes that the judge will only apply the law to the facts presented. In contrast, the principle of *dispositionsgrundsatz* directs that the pretrial process is entirely controlled by the will of the parties, not the judge (Turroni, 2021).

By reducing the pretrial process to the passive, formalistic logic of civil procedure, it loses its corrective function as a mechanism for monitoring the state's use of coercive means. Individuals' constitutional right to protest arbitrary conduct becomes suboptimal and even diminished. This clearly violates the constitutional principles enshrined in Article 27 paragraph (1) of the 1945 Constitution, which emphasises all citizens' equality before the law, and Article 28D paragraph (1), which guarantees every person's right to recognition, protection, and fair legal certainty, as well as equal treatment under the law. Therefore, it is vital to modify the concept and structure of the pretrial process in order for it to properly function as an effective forum in balancing governmental power with the preservation of individual rights.

The current condition of the pretrial process in Indonesia shows an imbalance in access to justice that clearly results in procedural injustice. This inequality not only violates the constitutional principle that guarantees equality before the law but also contradicts the principle of *audi alteram partem*, which is a fundamental principle in due process of law that requires everyone to be allowed to be heard before a decision that may affect their rights or freedoms is made (Pawana & Setyawan, 2022). This principle is a fundamental mechanism in preventing biased decisions, in line with the principle of *nemo iudex in causa sua*, and serves as the main bulwark against all forms of abuse of power in the law enforcement process (Garg, 2022).

The application of this principle in the context of pretrial proceedings is important because, without the suspect's presence, the defense process cannot proceed fairly, and, as a result, the examination of the legality of the arrest or detention becomes merely ceremonial, without any real effectiveness in legal protection.

To fill the gap, it is necessary to amend the New *KUHAP* quickly by imposing a legal requirement on pretrial judges to order law enforcement agents to present the detained suspects in pretrial sessions. The presence of the suspect is a necessary condition for the examination to be carried out objectively and thoroughly, so that not only formal documents are checked, but also the legal substance which underpins the coercive operations of law enforcement. This idea is in accordance with the concepts of habeas corpus, a legal principle derived from the Anglo-Saxon system and long acknowledged as a kind of protection against arbitrary incarceration. Under that frame of reference, the principle of habeas corpus required that every person detained be produced physically before a judge. Therefore, the use of this principle in the pretrial process in Indonesia is very relevant, especially in efforts to overcome the existing practical deficiencies.

Furthermore, the reform of the New *KUHAP* should transform the pretrial process from adversarial to inquisitorial. In the adversarial system, the judge takes a passive role, relying solely on the arguments and evidence offered by the parties. Meanwhile, in the inquisitorial system, the judge actively pursues the material truth. In this paradigm, throughout the pretrial process, the judge can obtain information from a variety of sources, including the suspect, witnesses, and other associated parties. The judge can even unilaterally control the course of the questioning and ask questions to establish a thorough picture of the legitimacy of the investigator's or prosecutor's actions (Khan, 2024). This change will bring the pretrial process closer to its true function as a forum that ensures human rights are upheld from the earliest stages in the criminal justice system.

A concrete example of an effective inquisitorial approach can be seen in the Dutch legal system, where the *Rechter-Commissaris* (Examining Magistrate) plays an important role as the guardian of legality from the very beginning of the investigation. This judge has the primary authority to decide on the request for pretrial detention (*inbewaringstelling*), as regulated in Articles 63 and 64 of the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*). In practice, the *Rechter-Commissaris* assesses whether the prosecutor's request for detention meets legal requirements and is supported by sufficient evidence to restrict the suspect's freedom, with a maximum initial detention period of 14 days (Lindeman et al., 2023). Not only that, but the Commissioner Judge is also authorized to oversee other coercive actions, such as seizures and searches, and to examine the legality of law enforcement actions before a case enters the adjudication stage (Pivaty et al., 2021). Based on Article 59a paragraphs (1) and (2) of the *Sv*, this judge is required to assess whether the detention has been carried out in accordance with the law and is still relevant to continue (Suarda et al., 2021). Thus, the commissioner judge becomes a judicial actor who actively ensures that every action limiting rights by the state undergoes a fair and transparent validity test.

This strict judicial oversight model, based on an inquisitorial approach, can

be adopted in Indonesia's pretrial process institutions to strengthen legal protection for the rights of the accused. In that context, a new norm can be formulated in the New *KUHAP* stating:

*"In pretrial proceedings where the suspect is detained, the pretrial judge, in setting the hearing date, shall also include an order to the officer conducting the detention to present the suspect at the pretrial hearing."*

This formulation is in line with the provisions in Article 152 paragraph (2) of the Old *KUHAP* and Article 200 paragraph (3) of the New *KUHAP* regarding the main trial proceedings, where the judge orders the public prosecutor to summon the defendant and witnesses to attend the trial. By making the pretrial process a genuine forum for thoroughly testing the legality of coercive measures based on active participation, the Indonesian criminal justice system can move closer to a just criminal justice system and provide effective legal protection to the people against potential arbitrary legal violations.

The urgency of regulating the norm of the suspect's presence in the pretrial process hearings in the upcoming *KUHAP* is becoming more prominent in light of empirical findings from the Institute for Criminal Justice Reform (ICJR), which noted that out of 80 analyzed pretrial decisions, only two requests (about 3%) were granted. Meanwhile, 68 cases (85%) were rejected, 9 cases (11%) were dismissed, and 1 case was not accepted (Rahmawati et al., 2022) (Susilo et al., 2025). This data illustrates the limited effectiveness of the pretrial process as a judicial control mechanism against coercive actions, while also emphasizing the need to strengthen judges' roles, including through the direct presence of the suspect in the trial.

The low number of pretrial motions granted indicates serious obstacles in proving the case, especially for the applicants who must demonstrate the illegitimacy of law enforcement actions. This challenge becomes even more complex when the suspect is not present at trial and is represented only by legal counsel, as illustrated by several rulings, including the Dumai District Court Decision Number 1/Pid.Pra/2025/PN Dum, and Binjai District Court Decision Number 4/Pid.Pra/2025/PN Bnj (RI, 2025). In those cases, the suspect did not appear directly before the judge (only their legal representative was present), and the judge rejected the pretrial motion without adequately considering the impact of the suspect's absence on the evidentiary process. As a result, the applicant's position is weakened in challenging the legality of the coercive actions taken by law enforcement officers.

In such conditions, the balance of the evidentiary process is disrupted because only the respondent's (the detaining officer's) statement is heard, while the suspect's voice is not given space. The absence of legal provisions requiring judges to order the suspect's presence, as well as the lack of an obligation for detention officials to present the suspect automatically, has created an imbalance in the pretrial process. This imbalance not only undermines the minimalist adversarial principle upheld by the New *KUHAP* system but also undermines

the substance of Article 163, paragraph (1), letter b, which normatively guarantees the hearing of the suspect's statement.

These conditions have serious implications for the principle of procedural justice. Without the suspect's active participation and direct presence in the process, the pretrial hearing is at risk of producing an unjust decision. In this context, the presence of the suspect is not merely a formality but a substantive element to ensure a balanced and fair process. This aligns with the concept of the fair process effect, which holds that when individuals feel they are treated fairly during legal proceedings, they are more likely to accept the outcome, feel satisfied, and trust the legal authority (Ansems et al., 2023). On the contrary, the suspect's absence due to the lack of norms or practices that are not biased toward the suspect can undermine the judiciary's legitimacy, even if the judge's decision is substantively sound.

The idea developed in this study is that the presence of the suspect is an integral part of a fair pretrial process. Although the inquisitorial approach that emphasizes the active role of judges – such as that applied in the Netherlands – can serve as an inspiration, this model cannot be directly applied to the Indonesian legal system without considering the social and institutional complexities. The Indonesian legal system is shaped by hierarchical legal culture, an imbalance of power between authorities and citizens, and low public legal literacy (Najma Anwariyatushofa et al., 2025). The inquisitorial approach, which requires judges to be active and critical of authorities' actions, will face real challenges, ranging from institutional resistance and limited human resources to the rigidity of bureaucracy (I Gede Sujana & I Wayan Kandia, 2024).

Therefore, the reform of the pretrial process in Indonesia is not only enough to adapt foreign models, but it has to be based on universal concepts such as fair trial and due process of law, in accordance with the values of Pancasila and the demands of Indonesian society. This reform requires the full development of institutional capacity, such as intense training for judges, a complete redesign of the legal school curriculum, and the improvement of judicial infrastructure to support the active and autonomous function of judges.

The new paradigm of the pretrial process, the transition from an adversarial to an inquisitorial system, demands a fundamental change. “Judges have to be independent, but they have to have investigative skills and the courage to be critical of state power. But this shift has to be realistic about current constraints, especially in places that still lack resources and infrastructure (Daeng et al., 2024). Without a comprehensive, context-based reform strategy, systemic change will only lead to stagnation and resistance.

Ultimately, reinforcing the rules of the pretrial process, particularly regarding the appearance of suspects, is a strategic priority for restoring public confidence, safeguarding human rights and ensuring that the law is enforced fairly. The virtues of Pancasila philosophy are reflected in the values of humanity and justice in the Indonesian legal system (Adawiyah & Rozah, 2020).

Thus, the existence of the suspect in the preliminary hearing process is not just a question of legal procedure but also a reflection of human dignity and the concept of equality before the law.

### III. Conclusion

This study shows that Indonesia's judicial process, both under the Old *KUHAP* and the New *KUHAP*, still has a major problem: suspects who are being held do not have to be brought before a judge by law. This situation makes it impossible for the suspect to challenge the legality of the coercive measures. It may also lead to procedural imbalances, since judges hear more from police officers than from the person being held. However, the use of habeas corpus in different countries shows that prisoners having to be physically present in front of a judge is a key part of making sure that judges watch over actions that are forced and protect human rights. Because of this, any future changes to the *KUHAP* should focus on making the pre-trial process stronger as a way to protect people's rights, not just as an official administrative check.

The change can be carried out by making it clear that police officers must bring detained suspects to pre-trial hearings and by giving judges more power to look into the legality of actions that are forced upon people. Additionally, creating a more investigative oversight model that is still compatible with the Indonesian legal system is important to help make the criminal justice system more fair, balanced, and respectful of human rights. The *KUHAP* needs to make it clear that detained suspects must be brought before a judge in a pre-trial hearing when the legality of coercive measures is called into question. This is in line with the habeas corpus laws in England, the US, India, the Philippines, Spain, Portugal, and the *Rechter-Commissaris* system in the Netherlands. It is also important to strengthen judicial oversight of coercive measures by giving judges a bigger part in checking the legality of what the police do. This change is necessary to protect human rights, improve the right to a fair trial, and stop the Indonesian criminal justice system from doing unfair and coercive things.

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