

Tiered Judicial Scrutiny of Coercive Measures in Indonesian Criminal Procedure

Adam Ilyas¹, Fachrizal Afandi², Indah Dwi Qurbani³

¹Constitutional Court, Jakarta, Indonesia

Faculty of Law, Universitas Brawijaya PSDKU Jakarta, Jakarta, Indonesia

²³Faculty of Law, Universitas Brawijaya PSDKU Jakarta, Jakarta, Indonesia

✉ Corresponding Author: adamilyas02@gmail.com

Abstract

Indonesia's newly enacted code of criminal procedure shifts oversight of coercive measures from an ex post corrective model centered on pre-trial proceedings to an ex ante regime of judicial authorization. This article examines a structural flaw in that redesign: an explanatory provision that removes court-authorized coercive measures from the reach of pre-trial review, even though the body of the statute expressly makes such measures reviewable. Using normative legal research with statutory, conceptual, and comparative approaches, this article argues that the new authorization regime lacks a review methodology robust enough to render judicial involvement meaningful. Where no effective post-authorization avenue survives, prior judicial approval risks operating as an administrative formality and, more seriously, as a safe harbor that immunizes coercive state action from further scrutiny. Drawing on remedial equilibration and procedural justice theory, this article shows that narrowing the remedy diminishes the practical content of the right itself. It therefore proposes a tiered model of judicial oversight in which the intensity of review, the state's justificatory burden, and the minimum procedural safeguards are calibrated to the intrusiveness of the measure and the gravity of its impact on fundamental rights, and it specifies eight benchmarks through which judges can operationalize that model. Implementation requires technical guidelines from the Supreme Court to discipline judicial reasoning, a piloted roster of dedicated front-end reviewing judges, and a reading of the contested explanatory provision that preserves meaningful remedial review, so that criminal procedure continues to function as a safeguard against arbitrary state power.

Keywords: Coercive Measures; Judicial Authorization; Judicial Oversight; Procedural Justice; Tiered Scrutiny

A. INTRODUCTION

Reducing criminal procedure law to mere *lex adjectiva*, a set of technical rules governing investigation, prosecution, and adjudication, is too narrow a view, because criminal procedure also functions as a framework for constraining the exercise of coercive state power (Utari et al., 2026). Its significance lies in regulating when and how public authority may interfere with individual liberty, and in guarding against arbitrary official action. The effectiveness of law enforcement cannot therefore be the sole benchmark for the criminal process; that process must also be disciplined by due process, fairness, and limits on discretion and coercion (Chiao, 2016; Packer, 1968; Pangaribuan, 2020). In the Indonesian context, a Pancasila-based conception of law likewise emphasizes the need to balance individual rights against broader collective or state objectives (Hidayat, 2017; Prasetyo, 2022).

The pre-adjudicative phase is the stage at which coercive state power most directly confronts the rights that allow a person to live in freedom, equality, and dignity (Nowak, 2003; Soetandyo, 2003). At this stage the state, acting through law-enforcement authorities, may take measures that immediately restrict liberty, privacy, and personal autonomy, and public treatment of a person as a suspect may generate stigma and premature social consequences (Blom, 2019; Pangaribuan, 2020). Arrest and detention deprive individuals of physical liberty, while searches, seizures, interception of communications, and the extraction of digital data intrude upon the core of private life (Bernardini & Sanvitale, 2023; Kremens, 2020). Coercive measures cannot therefore be understood merely as technical instruments of evidence-gathering; they are direct expressions of coercive state power, and must accordingly be justified

by strict legality, proportionality, fairness, and due process safeguards (Kremens, 2020; Vervaele, 2009).

Theoretically, that tension is captured by Herbert L. Packer's contrast between the due-process and crime-control models in *The Limits of the Criminal Sanction*. The due-process model treats the criminal process as an obstacle course in which each stage, from arrest and search to interrogation and trial, operates as a safeguard against error and abuse, so that procedural integrity outranks conviction rates. The crime-control model treats the same process as an assembly line built for speed and finality, in which elaborate safeguards read as impediments and successful screening by police and prosecutors generates a working presumption of guilt (Packer, 1968). The distinction matters here because a shift from *ex post* correction to *ex ante* authorization can serve either logic: it strengthens due process where authorization is genuinely tested, and serves crime control where authorization is granted as routine. The question this article pursues is therefore not where judicial involvement sits within the process, but how demanding that involvement is required to be.

Contemporary scholarship has moved beyond that abstract opposition toward a more critical inquiry into how legal process is actually constructed, negotiated, and justified in practice (Brodersen et al., 2023). Procedural compliance may appear flawless on paper and prove, on closer scrutiny, to be merely mechanical. Formal legality does not by itself produce procedural justice; where legal instruments function only as formalities, what results is a superficial justification for the exercise of coercive state power.

Indonesian criminal procedure has long provided a channel for judicial control through *praperadilan*, the pre-trial mechanism introduced by Law No. 8 of 1981 on

Criminal Procedure (the old KUHAP) to allow citizens to challenge the legality of coercive measures (Undang-Undang Nomor 8 Tahun 1981 Tentang Hukum Acara Pidana, 1981). That mechanism carried a structural limitation. It was reactive rather than preventive, depended entirely on the applicant's initiative, and became available only after the intervention had already occurred (Afandi, 2016; Situmeang, 2021; Yuliarta, 2010). Constitutional Court Decision No. 21/PUU-XII/2014 improved the design by expanding Article 77(a) so that suspect designation, searches, and seizures became reviewable (Putusan Mahkamah Konstitusi Republik Indonesia Nomor 21/PUU-XII/2014, 2015), a step widely regarded as progressive because coercive measures at the investigation stage had long operated with little meaningful oversight (Akbar, 2019). The expansion did not resolve the underlying problem. The central question ceased to be whether coercive measures may be reviewed at all, and became instead what standard of review should govern that process and how far judges should scrutinize the quality of the state's justification (Akbar, 2019; Irawati & Da Silva, 2025; Suarda et al., 2021). A formalistic review culture nonetheless persisted: even with a broader scope, courts often remained reluctant to apply genuinely exacting standards of scrutiny.

Law No. 20 of 2025 on the Criminal Procedure Code (the new KUHAP) addresses the *ex post* problem by shifting to an *ex ante* regime, under which certain coercive measures ordinarily require judicial authorization before execution. Progressive on its face, that redesign is also where the paradox examined here is located. Article 158(a) expressly places coercive measures within the scope of pre-trial proceedings, and Articles 159 and 160 establish the *praperadilan* mechanism and confer standing on suspects, their families, and their counsel to challenge the legality

of coercive intervention. The Explanation to Article 158(a), however, provides that coercive measures which have obtained judicial authorization may not be challenged through pre-trial proceedings (Undang-Undang Nomor 20 Tahun 2025 Tentang Kitab Undang-Undang Hukum Acara Pidana [Law No. 20 of 2025 on the Code of Criminal Procedure], 2025). The body of the statute thus expands the objects of judicial oversight while the Explanation to the very provision that broadens review then withdraws it. Prior judicial approval, rather than opening the way to rigorous control, may operate as a barrier to any further scrutiny. The question raised by an authorization system of this kind is consequently not which institution formally approves, but whether that approval is the product of substantive review or of procedural formality.

Two studies stand closest to this one, and marking the distance from them clarifies what is at stake here. Fachrizal Afandi's comparison of pre-trial practice with the institution of the preliminary examining judge shows that although Indonesian practice had broadened the objects of pre-trial review through judicial development, the mechanism remained inherently passive and institutionally limited, and was therefore often ineffective in protecting citizens against arbitrary law-enforcement action (Afandi, 2016). That study addresses the pre-trial regime under the old KUHAP. Adam Ilyas, Fachrizal Afandi, and Indah Dwi Qurbani, in *Closing the Injustice Gap*, argue that the system affords suspects comparatively stronger due process guarantees through pre-trial proceedings while leaving victims without an equivalent forum in which to contest the unilateral termination of proceedings, a vacuum they conceptualize as an injustice gap (Ilyas et al., 2025). That study addresses victims. The present article takes a third object, namely suspects whose coercive treatment rests on an administrative stamp of approval and who can no longer seek pre-trial review

precisely because judicial authorization has already been granted. Its concern is accordingly not the range of reviewable acts but the standard against which those acts are measured.

Against that background, this article poses two questions. First, what rights-protection problem is embedded in the normative design of the new KUHAP's authorization system for coercive measures, particularly where the Explanation to Article 158(a) excludes already-authorized measures from the scope of pre-trial proceedings? Second, how can a tiered oversight model be formulated to guide judges in assessing applications for coercive measures under the new Code? The central thesis is that the weakness of the new KUHAP lies not in the absence of judicial involvement at the initial stage but in a defect in its remedial structure, namely a legal architecture that combines weak *ex ante* authorization with a narrow space for *ex post* contestation. Tiered scrutiny is offered as the prescriptive framework capable of turning judicial authorization from formal approval into meaningful substantive oversight.

This article proceeds in four steps. It first sets out the research method. It then analyzes the rights-protection deficits produced by combining *ex parte* authorization with a narrowed avenue of pre-trial contestation. It next develops tiered judicial scrutiny as a prescriptive model, specifying three levels of review, the comparative material that supports their calibration, and eight benchmarks through which the model becomes operational. It closes by confronting the objections and institutional constraints the model must withstand, and by setting out a sequenced reform agenda.

B. RESEARCH METHOD

This study uses normative legal research, understood as a systematic process for identifying legal rules, principles, and doctrines in order to resolve legal problems (Muhaimin,

2020). The research proceeds through statutory, conceptual, and comparative approaches. Through the statutory approach, it examines Law No. 20 of 2025 on the Criminal Procedure Code in its entirety, with particular emphasis on the relationship between provisions authorizing coercive measures—such as searches and seizures—and the pre-trial regime in Articles 158–163, especially the Explanation to Article 158(a). The analysis also situates Constitutional Court Decision No. 21/PUU-XII/2014 within the broader constitutional development of judicial oversight over pre-adjudicative action in Indonesia.

Primary legal materials comprise Law No. 20 of 2025 on the Criminal Procedure Code, together with Law No. 8 of 1981 on the Criminal Procedure Code, Law No. 12 of 2011 on the Formation of Legislation, Constitutional Court Decision No. 21/PUU-XII/2014, and the judgments of the European Court of Human Rights and the United States Supreme Court discussed below. Secondary materials comprise peer-reviewed scholarship on judicial authorization, proportionality, remedies, and digital evidence, together with the general comments of the UN Human Rights Committee and comparative guidance on the treatment of electronic evidence.

The analysis is interpretive and systematic. Grammatical and systematic interpretation is used to establish the relationship between the body of Article 158(a) and its Explanation, and to test that relationship against the doctrinal position that an explanatory note may not narrow the norm it explains. Teleological interpretation is used to identify the rights-protective purpose the authorization regime is meant to serve, and the constitutional logic of Decision No. 21/PUU-XII/2014 is reconstructed in order to determine whether the new design departs from it. Court decisions are read not merely as authority to be cited but as reasoning to be analyzed: the *ratio decidendi* of each decision is reconstructed and then tested against the statutory architecture. The prescriptive model is built by transposing proportionality review, a technique already familiar to Indonesian constitutional adjudication, into the pre-adjudicative setting.

The comparative approach is functional rather than exhaustive. Jurisdictions were selected on a single criterion: that their courts have articulated explicit standards calibrating the intensity of review to the intrusiveness of a coercive measure. On that criterion the European Court of Human Rights supplies the material on detention and secret surveillance, and the United States Supreme Court supplies the material on digital searches. Comparative sources are used at the level of the standard of review and its accompanying procedural safeguards, not as templates for institutional transplantation, since Indonesia's institutional setting differs materially from both.

Two limitations follow from this design and should be stated plainly. First, because the research is normative, its claims about how Indonesian courts behave in authorization proceedings are inferential. They rest on the statutory architecture, on reported pre-trial jurisprudence, and on empirical findings drawn from other jurisdictions, rather than on direct observation of Indonesian practice. Second, the recency of Law No. 20 of 2025 means that no implementing practice yet exists against which the analysis could be tested. The argument advanced here is therefore prospective and structural, and it should be complemented by empirical work once the new regime is in operation, in particular docket analysis of authorization decisions and interviews with reviewing judges and investigators.

C. RESULT AND DISCUSSION

1. Rights-Protection Deficits in KUHAP 2025's Authorization Regime

From the standpoint of constitutional rights protection, requiring judicial authorization before investigators may undertake coercive measures (*ex ante*) is normatively preferable to relying solely on review after the fact (*ex post*) (Prasetio et al., 2025). However, merely transferring authority from investigators to judges is not enough. The presence of a judge must not be reduced to a procedural stamp. Courts must actively scrutinize the legality, urgency, and proportionality of every coercive act and must narrowly confine its scope. Without that

critical and substantive scrutiny, judicial involvement becomes a mere formality used to validate coercive state action without offering genuine protection for human rights.

For this reason, it is important to distinguish sharply between judicial authorization and substantive judicial oversight. Whereas authorization often collapses into little more than formal administrative approval, substantive oversight requires judges to apply a layered test. Judges must assess legal validity, factual sufficiency, genuine urgency, and the outer bounds of proportionality for every coercive measure. Protection does not lie in the piece of paper bearing judicial approval, but in the rigor of the judicial evaluation that precedes it. The need for judicial oversight of intrusive, coercive measures, and for review that is lawful, reasonable, and proportionate, is especially clear in relation to search powers and other measures that directly interfere with privacy and dignity (Kremens, 2020). Authorization proceedings of this kind are also typically *ex parte*, so the court is often asked to decide on the basis of the state's account alone (Donohue, 2021; Eijkman, 2018; Mordechai-Strongin, 2023). In that setting, the person whose fundamental rights may be restricted has no opportunity to rebut, explain, or test the allegations directed against him or her, creating a serious information asymmetry (Donohue, 2021; Mordechai-Strongin, 2023). The risk becomes even greater when applications are framed in highly general terms—for example, by invoking “investigative necessity”—especially where judges are not required to articulate disciplined reasons for their decisions (Mordechai-Strongin, 2023). At that point, the problem lies less in the personal character of individual judges than in the design of the procedure itself, which risks transforming the court from a forum of legal accountability into a mechanism of administrative legitimation.

A related weakness concerns the judicial duty to provide reasons. Substantive judicial review cannot be realized if judges are not required to explain the grounds for their decisions. Legal reasoning is the core of judicial accountability; it is not an ornamental feature of it. Once that duty is weakened, accountability and transparency necessarily suffer. This is especially

troubling in authorization procedures for coercive measures, where judges may fail to explain why a measure is necessary, why less intrusive alternatives are inadequate, where the limits of the permissible intervention should lie, or why the authorization should run for the period sought. Without disciplined reasoning of that sort, the court risks functioning merely as a rubber stamp that justifies coercive state action, rather than as a check and counterweight to the state's coercive power (Harbo, 2017; Kremens, 2020).

The danger that courts may operate as rubber stamps is not mere theoretical speculation. Empirical research by de Figueiredo and colleagues shows that judicial approval rates in warrant proceedings can be extraordinarily high, with more than 98% of applications ultimately approved, more than 93% approved on first submission, and median review times of only a few minutes (de Figueiredo et al., 2025). Their findings also suggest that many applications are not read carefully or in full before approval is granted. The warning is plain: authorization may decay from substantive scrutiny into bureaucratic routine. The solution, therefore, is not to remove courts from the process—which would mark a regression in judicial oversight—but to strengthen oversight even where authorization is required. Without those safeguards, judicial approval or orders may amount to nothing more than formal legality conferred upon the exercise of state power.

Indonesia's experience with pre-trial proceedings reflects a similar picture. Under the old KUHAP, pre-trial proceedings did provide a forum to contest the legality of coercive measures. However, that forum became available only after the state had already intervened in the exercise of liberty or other rights (Undang-Undang Nomor 8 Tahun 1981 Tentang Hukum Acara Pidana, 1981). The unresolved contemporary problem is the persistence of formalism in how courts exercise this authority. Whereas the old KUHAP relied predominantly on an *ex post* model, the new KUHAP moves significantly toward an *ex ante* design. However, on closer examination, it introduces a new problem: it shifts the point of legal review to an earlier stage without correspondingly tightening the applicable standards of review. It simultaneously

narrows the corrective mechanism by excluding coercive measures that have already obtained judicial authorization from the ambit of pre-trial proceedings. The new design, therefore, does not eliminate the old problem so much as displace it—from correction that comes too late to premature authorization without corrective review.

Read without reference to the Explanation, Articles 158–160 of the new KUHAP appear to promise a substantial expansion of judicial oversight at the post-investigative stage. The difficulty emerges once the Explanation to Article 158(a) is taken into account. The Explanation reads as follows (Undang-Undang Nomor 20 Tahun 2025 Tentang Kitab Undang-Undang Hukum Acara Pidana [Law No. 20 of 2025 on the Code of Criminal Procedure], 2025):

“Except in relation to the execution of a seizure where the seized object or goods are unrelated to the criminal offense alleged, coercive measures that have obtained the permission or approval of the chief judge of the district court are not objects of pre-trial proceedings. Coercive measures that have not obtained the permission or approval of the chief judge of the district court are objects of pre-trial proceedings.” (author’s translation)

The result of the Explanation to Article 158(a) is an anomaly: the body of the statute opens the way to broad judicial oversight, while the Explanation substantially narrows it. Under Indonesian legislative drafting doctrine, an explanatory note serves only as an official interpretive aid to the statutory text; it is not the place for creating binding norms, which belong in the operative articles of the statute. For that reason, an explanation should not narrow, expand, or alter the meaning of the body of the statute (Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-undangan, 2011).

Even so, viewed more broadly, the problem is not merely a technical defect in legislative drafting. The restriction may reflect an effort—or a compromise—by the lawmaker that functionally weakens the availability of remedies and hampers review of coercive state action that may violate human rights (Dicky Eko Prasetyo, Muh. Ali Masnun, Arinto Nugroho, Denial Ikram, 2024). From the standpoint of legality and legal certainty, it is difficult to justify restricting the objects of pre-trial proceedings through an explanatory note in so fundamental

a way (Dicky Eko Prasetyo, Muh Ali Masnun, 2024). More importantly, the move undermines the rationality of the oversight design itself. The real question is no longer simply whether the legality of coercive measures may be reviewed, but whether a loophole has been created that allows state officials to shield such measures from pre-trial review simply by obtaining prior judicial approval.

That concern becomes even more serious when the provisions on judicial authorization for searches and seizures are read together with the chapter on pre-trial proceedings. Articles 113 and 119–121 of the new KUHAP establish prior judicial authorization as the general rule, while also allowing such measures to be carried out before authorization is obtained in urgent circumstances. However, once that subsequent permission or approval is later granted, the Explanation to Article 158(a) effectively removes the measure from the scope of pre-trial proceedings, except in cases involving the seizure of property unrelated to the alleged offense.

As a matter of logic, then, the proposition that the new KUHAP has fully moved from *ex post* to *ex ante* control is not entirely accurate. Even under the new KUHAP, a form of *ex post* approval remains, but no corrective remedy accompanies it because review through pre-trial proceedings is no longer available. From that starting point, the Explanation to Article 158(a) of KUHAP 2025 raises a serious problem. By excluding searches and seizures from the scope of pre-trial proceedings simply because the measures later obtained subsequent judicial approval, the rule not only narrows access to judicial control but also obscures the constitutional function of criminal procedure law itself.

The basic weakness lies in equating two mechanisms that differ in both function and structure: subsequent judicial approval, which is *ex parte*, and legality review through pre-trial proceedings, which is adversarial. Subsequent approval is granted on the basis of a unilateral application by the investigator; the judge evaluates only the documents and reasons submitted by law enforcement authorities, in the absence of the affected party. In that forum, neither the suspect nor the person whose property rights have been impaired has an opportunity to contest

the claim of “urgent circumstances,” test the sufficiency of the factual basis, or show that the measure exceeded what was necessary. By contrast, pre-trial proceedings are designed precisely as an oversight forum that gives effect to the principle of *audi alteram partem*, so that the legality of coercive action can be tested openly and adversarially.

Accordingly, treating subsequent approval as grounds to foreclose access to pre-trial proceedings amounts to treating the authorization mechanism as a complete substitute for a judicial oversight forum, even though the two serve different rationales. *Ex parte* authorization is at most a limited form of initial control; it cannot replace adversarial review, which allows the affected party to be heard. The consequence is that citizens lose access to an effective remedy precisely when the state has undertaken its most concrete intrusions into privacy and property. At this point, the Explanation to Article 158(a) departs from the trajectory of Constitutional Court Decision No. 21/PUU-XII/2014, which expanded the objects of pre-trial proceedings—including searches and seizures—to ensure that coercive state intervention remains subject to transparent and contestable judicial control (*Putusan Mahkamah Konstitusi Republik Indonesia Nomor 21/PUU-XII/2014*, 2015; Suharizal & Arifin, 2019).

If that normative construction is maintained, judicial oversight risks being reduced to mere procedural formality. Judicial approval granted on a unilateral application, and in some cases only after the measure has already been carried out, will function as a shield legitimating investigators’ actions, while the space to test material legality, proportionality, and urgency will be precluded. In such a structure, the court no longer performs its constitutional role as a check on the state’s coercive power, but instead retroactively validates actions that have already been taken.

The result is a structural imbalance. KUHAP carefully regulates how authorization must be obtained. However, it weakens the review mechanism ordinarily used to assess whether claims of urgency, the factual basis, and the scope of execution were actually justified from the outset. This asymmetry is serious, especially because Article 163 still presupposes that pre-

trial proceedings remain a meaningful corrective forum, capable of suspending further proceedings and providing remedial consequences once unlawful state action is established (Undang-Undang Nomor 20 Tahun 2025 Tentang Kitab Undang-Undang Hukum Acara Pidana [Law No. 20 of 2025 on the Code of Criminal Procedure], 2025).

The problem becomes clearer when analyzed through the lenses of remedies and procedural justice. Levinson's theory of remedial equilibration is particularly helpful here because it shows that rights and remedies are functionally interconnected. When remedies are restricted, the practical content of the underlying right is likewise diminished (Levinson, 1999). From that perspective, the Explanation to Article 158(a) functions as a rule reallocating remedies. It shifts control over coercive measures from a post-action adversarial forum to a pre-action authorization process that is often unilateral (Mordechai-Strongin, 2023). The most likely result is not stronger oversight, but weaker rights protection. Once access to pre-trial review is eliminated after authorization has been granted, investigators may be institutionally encouraged to seek authorization strategically, because judicial approval begins to operate as a shield against further scrutiny (de Figueiredo et al., 2025). In that situation, judicial authorization risks drifting from an accountability function into a mechanism that effectively confers immunity from later review.

Tyler's theory of procedural justice captures another important dimension. The legitimacy of legal authority depends not only on substantive outcomes but also on whether the procedure affords a voice, displays neutrality, and conveys trustworthy motives toward affected parties (Tyler, 1991). Because reason-giving is central to trust and accountability, it also reinforces procedural justice (Harbo, 2017). In a system where authorization is granted unilaterally, and access to pre-trial proceedings is then closed off, those whose rights have been affected are left with little opportunity to challenge the state's arguments at the decisive moment (Mordechai-Strongin, 2023). Even if judges act in good faith, such a procedure affords only weak neutrality because the rights-holder cannot inspect the application, identify factual

omissions, or expose measures that are disproportionate or overly broad. From the standpoint of procedural justice, such an architecture threatens not only the protection of human rights but also the legitimacy of judicial control itself.

That risk is far from imaginary. Front-end authorization is often issued amid sharp information asymmetries and through procedures closed to the affected party (Donohue, 2021; Eijkman, 2018; Mordechai-Strongin, 2023). When the opportunity to revisit that order is closed off, the nature of judicial authorization itself becomes distorted. Rather than serving as an instrument of oversight, judicial approval begins to function as an immunity shield, protecting the investigative apparatus from future legal challenges. From a human-rights perspective, this anomaly is especially troubling because the harms caused by coercive state measures are often not fully reversible. Violations of privacy, destruction of reputation, and deprivation of physical liberty are not undone merely because the state later acknowledges an error or withdraws a suspect designation (Brooks & Greenberg, 2021; Burnett et al., 2017; Human Rights Committee, 1988, 2014). An ex ante oversight structure that closes off ex post correction therefore risks becoming a stamp of legitimacy for arbitrariness rather than a constraint on coercive state power.

The deficit is sharpest in the digital context, where a single authorization can open access to the whole of a person's recorded life; that dimension is taken up in detail in the following subsection.

The same critical paradigm must be applied to the discourse on detention and suspect designation. As the most severe form of deprivation of physical liberty before a judgment has become final and binding (*inkracht van gewijsde*), pre-trial detention stands in direct tension with the presumption of innocence and the right to liberty (Ambos, 2016; Human Rights Committee, 2014; Martufi & Peristeridou, 2020). Given its essence as a deprivation of fundamental rights, this intrusive measure must not be reduced to or normalized as an administrative routine that shelters behind formulaic justifications. Judges are duty-bound to

test every justification the state advances against concrete facts, rather than accepting it as an institutional given.

An equivalent problem appears in suspect designation, albeit in a different form. Although it does not immediately deprive a person of physical liberty, such a status inherently triggers a chain of destructive consequences, ranging from social stigma and reputational damage to serious procedural disadvantage (Brooks & Greenberg, 2021; Burnett et al., 2017; Ilyas & Sudirman, 2025; Suarda et al., 2021). It is, therefore, analytically mistaken to reduce suspect designation to a mere administrative label. In substance, the attribution of that status is itself a manifestation of coercive state power and serves as a gateway to further coercive escalation. Indonesian practice shows that this authority is especially vulnerable to abuse, as evidenced by the repeated re-designation of the same individual as a suspect. The threat it poses to legal certainty is thus an empirical reality, not merely a theoretical concern (Susilo et al., 2024).

More broadly, this discussion points to the importance of remedies and to their institutional implications. An ideal criminal justice system does not merely demarcate the boundaries of state authority; it must also prescribe clear legal consequences when state officials act arbitrarily, excessively, or beyond the limits of their lawful power (Turner & Weigend, 2019). In this respect, Indonesian criminal procedure law again reveals its structural fragility. The institutionalization of *exclusionary rules* remains partial and inconsistent. Rather than categorically excluding evidence obtained unlawfully, judicial practice often treats procedural defects in evidence-gathering only as variables affecting evidentiary weight (Ilyas, 2021; Latifah, 2021; Murtadho, 2025).

The absence of firm procedural sanctions—such as the exclusion of primary evidence and its derivatives under the *fruit of the poisonous tree* doctrine—directly lowers the argumentative standard imposed on state authorities. It produces a law-enforcement bureaucracy that is overly permissive in justifying its own coercive actions. However,

mandatory authorization must be balanced by the availability of remedial instruments at the end of the process. If those instruments are weak, the burden of legitimacy falls excessively on the initial investigative stage, even though that is the very phase most vulnerable to abuse of power (Ilyas, 2021; Latifah, 2021; Turner & Weigend, 2019). This structural imbalance poses a latent danger, especially in covert investigative operations. The issuance of a judicial order at the outset does not eliminate the continuing need for concrete remedial protection and post-action correction (*Roman Zakharov v. Russia [GC]*, 2015; *Szabó and Vissy v. Hungary*, 2016).

For all of these reasons, this subsection concludes that the central weakness of the KUHAP 2025 authorization regime does not lie in the absence of judicial involvement. It lies instead in the absence of a sufficiently robust review methodology to transform formal approval into genuine judicial oversight. Rather than curing that defect, the statute's normative architecture actually aggravates it. Law No. 20 of 2025 recognizes that coercive measures are subject to pre-trial proceedings. However, its Explanation simultaneously withdraws review for measures that have already received prior judicial approval (Undang-Undang Nomor 20 Tahun 2025 Tentang Kitab Undang-Undang Hukum Acara Pidana [Law No. 20 of 2025 on the Code of Criminal Procedure], 2025). The result is a system that increases judges' visibility while narrowing individuals' access to remedies. The judicial institution is formally present, but it lacks the tools necessary to compel the state to provide a strict justification for rights-infringing interventions. State authorities must indeed seek leave from the court, but they are not required to offer reasons commensurate with the gravity of the proposed intervention. So long as criminal procedure law does not require an intensity of scrutiny calibrated to the degree of rights deprivation involved, does not demand fully articulated reasoning, and does not provide systemic responses to procedural violations, the protection it affords will remain stronger in symbol than in substance.

2. Tiered Judicial Scrutiny as a Model of Review

As explained in the preceding subsection, the central problem in this authorization framework is methodological. The reform required, therefore, cannot be limited to creating a new review forum or merely expanding the list of measures that require judicial authorization. What is urgently needed—indeed, what may properly be called reform—is a framework that links the degree of intrusion inherent in a coercive measure to the justificatory burden the state must satisfy, while also calibrating the intensity of judicial review. The decisive question is not how many judicial authorizations for coercive measures are issued, but the quality of the legal reasoning offered to justify them and the stringency of the substantive parameters that govern them. It is precisely at this point that the model of tiered oversight proposed in this article acquires its normative force.

The core idea rests on the premise that different coercive acts produce different degrees of interference with individual rights, and it is therefore mistaken to evaluate them under a single rigid standard (Dixon, 2020; Fallon, 2007). The exercise of coercive power invariably requires both a legal basis and persuasive normative justification. Compliance with due process of law demands more than the state's bare assertion; it requires courts to conduct independent substantive review (Zedner & Stuckenberg, 2020). Through the lens of proportionality, judicial evaluation must weigh the legitimate objective against the manner of implementation, the actual urgency, and the degree of restriction imposed (Dixon, 2020; Harbo, 2017; Henckels, 2017). In pre-trial settings, this also supports a more evidence-based calibration of review intensity (Dhami & van den Brink, 2022). The concept of tiered oversight operationalizes that proportionality principle within criminal procedure law: the more intrusive the state intervention, the heavier the state's justificatory burden, and the more layered the judicial scrutiny that must follow.

On that basis, the model proposed here consists of three tiers of review. The first is *reasonableness review*. This tier is intended for measures directed at specifically identified targets, limited in scope, carried out overtly, and resulting in relatively modest interference.

Because the level of interference is comparatively light, the state needs to show only a lawful basis, a rational connection between the target and the offense under investigation, and the particularity of the application. The judge's principal task is to prevent arbitrary investigation or open-ended fishing expeditions. Even at this most deferential tier, however, the state must still act rationally, with restraint, and in accordance with the principle of proportionality.

The second tier is heightened review. This tier applies to measures that intrude upon private space, generate stigma, or produce serious socio-economic consequences, such as bodily and residential searches, large-scale seizures, asset freezing, and suspect designation (Birkett, 2020; Brooks & Greenberg, 2021; Burnett et al., 2017; Ilyas & Sudirman, 2025; Kremens, 2020). At this level, the state may not rely solely on formal compliance. It must show why the intervention is genuinely necessary, why less intrusive alternatives are inadequate, and how the measure has been confined to the minimum required. Necessity, subsidiarity, and careful delimitation of scope therefore become central criteria in judicial reasoning. At this tier, the judge must act not as a bureaucratic rubber stamp but as an independent assessor of the substantive rationality of the proposed intervention.

The third tier is strict scrutiny. This tier is reserved for the most intrusive forms of coercion—detention, communications interception, covert surveillance, and highly intrusive searches of digital data—each of which directly affects liberty, privacy, or both (*Carpenter v. United States*, 2018; *Riley v. California*, 2014; *Roman Zakharov v. Russia [GC]*, 2015; *Szabó and Vissy v. Hungary*, 2016; Human Rights Committee, 2014). At this level, the state's burden reaches its apex. It is not enough for the state to assert necessity in the abstract. State authorities must demonstrate, based on concrete facts, that the measure is the least intrusive means reasonably available, that it is being used only as a last resort (*ultimum remedium*), and that its target, method, and duration are narrowly framed. Generic or formulaic applications are plainly insufficient. What courts require is a specific factual foundation, structured legal justification, and a credible system of post-authorization oversight. Comparative jurisprudence points in

precisely that direction (*Big Brother Watch and Others v. the United Kingdom [GC]*, 2021; *Roman Zakharov v. Russia [GC]*, 2015; *Szabó and Vissy v. Hungary*, 2016).

At this point, criminal procedure law most clearly reveals its constitutional function—not as a technique for deploying state power, but as a legal architecture designed to limit that power. The proposed model is summarized in Table 1.

Table 1.
Tiered Standards of *Judicial Scrutiny* by Degree of Intrusiveness of Coercive Measures

Tier of Scrutiny	Measures Covered	State's Justificatory Burden	Focus of Judicial Scrutiny	Minimum Procedural Safeguards
Reasonableness review	Measures directed at specifically identified targets, conducted overtly, limited in duration, and resulting in relatively modest interference.	A lawful basis, a clear nexus between the target and the offense under investigation, and the particularity of the application.	Whether the measure satisfies formal legality, bears a sufficient connection to the offense under investigation, and is framed with sufficient particularity to preclude a <i>fishing expedition</i> .	Brief written reasons; precise identification of the target; and clear temporal limits.
Heightened review	Residential and bodily searches; large-scale seizures; asset freezing; exit bans; and the designation of a person as a suspect.	Necessity; subsidiarity; careful delimitation of scope; and a reasoned account of the anticipated impact on fundamental rights.	Whether the measure is genuinely necessary, whether less intrusive alternatives would be inadequate, and whether its scope has been confined to avoid excess.	Comprehensive written reasons; strict delimitation of scope; notification; and access to <i>ex post</i> challenge.
Strict scrutiny	Detention; interception of communications; covert surveillance; and intrusive searches of digital data.	Strict necessity; least intrusive means; narrow tailoring; and a concrete	Whether the measure is demonstrably a last resort (<i>ultimum remedium</i>) and meets the most exacting	Data minimization; audit trails; renewed judicial authorization based on new facts;

factual foundation.	requirements of proportionality.	continuing judicial supervision; and robust remedial mechanisms.
------------------------	-------------------------------------	---

Source: Created by the authors (2026).

Placing suspect designation in the second tier requires independent justification. In Indonesian criminal procedure, this act is often reduced to a largely administrative threshold inquiry, treated as satisfied once the investigator asserts the existence of at least two items of evidence (Adawiyah & Wulan, 2024; Suarda et al., 2021). That view is too narrow. Although suspect designation does not automatically deprive a person of liberty, it triggers a series of procedural consequences and can cause serious reputational harm (Brooks & Greenberg, 2021; Hoyle et al., 2016; Ilyas & Sudirman, 2025; Susilo et al., 2024). The stigma attached to it can damage social standing, disrupt professional life, generate social alienation, and impose severe psychological pressure. It also places the individual in a structurally unequal position vis-à-vis the instruments of state power throughout the pre-adjudicative process (Cusack & Dehaghani, 2025).

For that reason, judicial review of suspect designation must not be confined to the mechanical verification that two items of evidence exist. Constitutional Court Decision No. 21/PUU-XII/2014 does establish a minimum threshold of two items of evidence. However, the decision’s constitutional logic should not be reduced to a merely numerical formula (*Putusan Mahkamah Konstitusi Republik Indonesia Nomor 21/PUU-XII/2014*, 2015). Courts must also examine the quality of the causal relationship between the evidence and the elements of the charged offense, test the accuracy of the legal qualification, and assess the substantive rationality of the state’s decision to designate a person as a suspect (Adawiyah & Wulan, 2024; Suarda et al., 2021; Susilo et al., 2024).

Detention is the clearest example of a measure that belongs in the highest tier of scrutiny. As a means of restricting physical liberty before the entry of a final and binding

judgment (*inkracht van gewijsde*), detention stands in direct tension with the presumption of innocence and the right to liberty (Ambos, 2016; Human Rights Committee, 2014; Martufi & Peristeridou, 2020). Every justification advanced by the state for detaining a person must therefore be subject to the most exacting judicial review. Boilerplate reasoning that merely repeats conventional grounds—such as risk of flight, destruction of evidence, or repetition of the offense—must not be accepted uncritically. Judges need specific, fact-sensitive reasons: whether there are real and measurable indications of flight risk; whether there is a genuine and unavoidable danger to evidence that cannot be prevented by other means; and whether less intrusive alternatives, such as town detention (*tahanan kota*), house arrest (*tahanan rumah*), or release on bail, have genuinely been considered and shown to be inadequate (*Buzadji v. the Republic of Moldova [GC]*, 2016; Dhami & van den Brink, 2022; Martufi & Peristeridou, 2020).

A judge's failure to articulate detention reasons that are specific and grounded in fact is a strong indicator of arbitrary deprivation of liberty (*Buzadji v. the Republic of Moldova [GC]*, 2016; Human Rights Committee, 2014). Without adequate control mechanisms, detention easily hardens into an administrative routine, often clothed in the language of precaution (*Letellier v. France*, 1991; Martufi & Peristeridou, 2020). Recent Indonesian scholarship points in the same direction: when liberty is at stake, judicial scrutiny must remain exacting (Susilo et al., 2025). The justificatory threshold for pre-trial detention should therefore be placed at the highest level precisely to prevent detention from degenerating into an empty procedural routine devoid of substantive review.

Similar concerns arise regarding the interception of communications and covert surveillance. These measures are carried out in secret, often for sustained periods of time, and by their nature effectively suspend the operation of the principle of *audi alteram partem* while they are being executed. Their capacity to penetrate the most intimate sphere of private life without the target's knowledge creates an acute risk of abuse, with consequences that may

extend beyond the individual case and affect the broader foundations of civil liberty (*Big Brother Watch and Others v. the United Kingdom [GC]*, 2021; *Roman Zakharov v. Russia [GC]*, 2015; Eijkman, 2018; Milanovic, 2015). Rights protection, therefore, cannot be concentrated solely at the initial authorization stage. Precisely because these measures operate under conditions of secrecy, the legal framework must provide layered and continuing safeguards capable of restraining abuse throughout the life of the intervention.

Meaningful judicial control accordingly requires more than the issuance of an initial judicial authorization. It must be supported by concrete procedural safeguards, including data-minimization requirements, reliable audit trails, periodic compliance review, and—once secrecy is no longer necessary—a duty to notify the affected party so that he or she retains a genuine opportunity to challenge the legality of the intervention (*Big Brother Watch and Others v. the United Kingdom [GC]*, 2021; *Klass and Others v. Germany*, 1978; Eijkman, 2018). Put differently, judicial control cannot end when the judge signs the authorization order. It must continue as active oversight for as long as the measure remains in force (*Big Brother Watch and Others v. the United Kingdom [GC]*, 2021; *Szabó and Vissy v. Hungary*, 2016; Donohue, 2021; Eijkman, 2018). Without that kind of integrated oversight from beginning to end, ex ante authorization risks becoming no more than a formal predicate for prolonged secret intervention without measurable limits.

The complexity of the problem peaks when the digital dimension is considered. Criminal procedure can no longer regard searches and seizures merely as breaches of physical spatial boundaries. Control over digital devices opens access to an exceptionally broad and intimate sphere of an individual's life, encompassing medical, financial, and personal records, metadata, and potentially large quantities of non-responsive information unrelated to the offense under investigation (*Carpenter v. United States*, 2018; *Riley v. California*, 2014; Kerr, 2015; Schaunig, 2025; Stoykova, 2023, 2024). The breadth, depth, and effectively boundless character of digital searches require legal treatment altogether different from that applied to

conventional searches. When the state seeks authority to access such a device—including through remote access or hacking—the court must insist on exceptionally strict safeguards. Comparative guidance on digital warrants and electronic evidence supports requiring applications to specify the categories of data sought, the relevant time frame, the technical search parameters, the evidentiary need for the request, and the protocol for handling irrelevant material (Commonwealth Secretariat, 2025; Du Toit, 2023; Kerr, 2015). Courts should also require audit trails and layered documentation for every act of access and use. Without such limits, digital searches can easily slide from measured investigative action into arbitrary invasions of privacy.

Comparative practice supplies the calibration this model requires, and it does so in a specific and limited way. Three reference points are useful. First, within the European Convention system the intensity of review rises with the gravity of the intrusion. For pre-trial detention the Court requires reasons that are individualized and fact-specific rather than formulaic, and treats the persistence of stereotyped reasoning as itself an indicator of arbitrariness (*Buzadji v. the Republic of Moldova [GC]*, 2016; *Letellier v. France*, 1991). For secret surveillance it does not treat prior authorization as sufficient in itself, insisting instead on minimum safeguards governing the duration, storage, use, and destruction of material, on supervision that continues while the measure remains in force, and on notification once secrecy is no longer necessary (*Big Brother Watch and Others v. the United Kingdom [GC]*, 2021; *Klass and Others v. Germany*, 1978; *Roman Zakharov v. Russia [GC]*, 2015). Second, United States jurisprudence on digital evidence has moved the analysis from the physical container to the informational scope of the search, requiring particularity as to the categories of data sought, the relevant time frame, and the handling of non-responsive material (*Carpenter v. United States*, 2018; Kerr, 2015; *Riley v. California*, 2014). Third, comparative scholarship on the authority to order searches shows that the allocation of that authority matters considerably less

than the standard the authorizing officer is required to apply and the reasons he or she is required to give (Kremens, 2020).

Two qualifications frame the use of this material. It is offered at the level of the standard of review rather than of institutional transplantation: neither the Strasbourg supervisory architecture nor the American exclusionary regime is proposed here for Indonesia. And the comparison is deliberately confined to jurisdictions that have generated explicit calibration standards, which is why it is European and American rather than regional. A comparison with Malaysia, Singapore, and the Philippines, whose codes distribute authorization powers differently and whose jurisprudence on digital searches is still developing, would be a worthwhile extension, but it belongs to a separate study rather than to the calibration exercise undertaken here.

For this tiered model not to remain merely a conceptual aspiration, it must be translated into concrete criteria of judicial review. At a minimum, eight benchmarks should be standardized. First, the evidentiary threshold: the quality and sufficiency of the preliminary evidence supporting the application. Second, the nexus between the object of the coercive measure and the offense under investigation. Third, necessity and subsidiarity: whether the state has shown that the measure is truly necessary and that less intrusive alternatives have proved inadequate. Fourth, proportionality *stricto sensu*: whether a fair balance has been maintained between the evidentiary benefit sought and the harm imposed upon the rights of the affected party. Fifth, narrow tailoring: strict limits on the object, scope, method, and duration of the measure. Sixth, reason-giving: judges must articulate a *ratio decidendi* that renders the ruling's logic reviewable. Seventh, safeguards during execution, including data minimization, audit trails, and layered documentation. Eighth, the availability of corrective review: post-execution review where the application rested on inaccurate facts, the measure was carried out beyond the limits of the authorization, or the proportionality conditions are no longer satisfied.

Operationalizing those benchmarks requires a fundamental reordering of the relationship between *ex ante* authorization and *ex post* correction. Judicial approval of a coercive measure must not create so strong a presumption of legality that the measure becomes immune from subsequent review. Because such orders are often issued *ex parte*—especially in the context of covert searches and secret surveillance—the law must preserve a meaningful opportunity for the affected party to challenge the factual sufficiency of the application, to test the accuracy and candor of the investigator’s account, and to determine whether the measure was carried out within the substantive and temporal limits of the authorization granted (Donohue, 2021). In the Indonesian context, this problem is particularly acute. The Explanation to Article 158(a) of Law No. 20 of 2025 is normatively troubling, and potentially unconstitutional, to the extent that it can be read as a basis for closing off citizens’ access to judicial redress, especially because Indonesian legislative drafting doctrine does not permit an explanatory note to narrow the body of the statute, and broader scholarship on constitutional complaint has long highlighted the risks posed by remedial gaps for legal certainty and constitutional rights protection (Undang-Undang Nomor 20 Tahun 2025 Tentang Kitab Undang-Undang Hukum Acara Pidana [Law No. 20 of 2025 on the Code of Criminal Procedure], 2025).

At a minimum, a meaningful post-authorization avenue of objection must remain available when the investigator’s application is tainted by factual manipulation, framed too broadly, or executed beyond the time limits of the authorization granted. It is precisely here that *exclusionary rules* acquire their greatest normative force. When procedural violations carry no real legal consequence, the state’s justificatory burden will inevitably weaken (Ilyas, 2021; Latifah, 2021). Tiered oversight, therefore, must not be confined to an *ex ante* screening device for applications; it must also operate at a later stage as a form of procedural sanction when the state fails to satisfy its justificatory burden in an accountable and legally defensible manner.

Once this model is taken seriously, its institutional implications become unavoidable. Courts can no longer be left to operate on inherited routines, individual intuition, or pro forma applications supported by minimal reasoning. To address this structural weakness, the Supreme Court should issue technical guidelines standardizing both the format of investigators' applications and the structure of judicial reasoning in authorization decisions. Every application should require the state to set out, clearly and verifiably, the preliminary evidence available, the legitimacy of the objective pursued, the urgency of the requested measure, the less restrictive alternatives that were considered or tried, and the exact scope and duration of the restriction sought. Judicial decisions, in turn, should follow a standardized analytical framework—not to predetermine outcomes, but to discipline legal reasoning so that it remains rational, transparent, and meaningfully reviewable.

Those technical guidelines should also ensure that post-authorization review is not defeated by an ambiguous reading of Article 158(a). In the medium term, the establishment of specialized reviewing judges—vested with authority to decide applications for coercive measures quickly but still substantively—deserves serious consideration. Indonesia's experience shows that the principal difficulty lies not merely in whether a review forum exists, but in the fragility of the institutional infrastructure needed for that forum to function consistently, independently, and effectively (Afandi, 2016; Ilyas et al., 2025; Undang-Undang Nomor 20 Tahun 2025 Tentang Kitab Undang-Undang Hukum Acara Pidana [Law No. 20 of 2025 on the Code of Criminal Procedure], 2025; Susilo et al., 2025).

Tiered scrutiny, then, is ultimately an effort to return criminal procedure law to its constitutional foundations. The state unquestionably has lawful authority to use coercive power for law-enforcement purposes, but that authority is not unlimited. In a rule-of-law state, every coercive measure must be justified in a manner commensurate with the degree of interference it produces. If tiered oversight can be institutionalized, the judiciary will no longer be reduced to an administrative body that merely validates state action. Instead, it will function

as a gatekeeper that requires law-enforcement officials to justify the use of their powers, confine their scope, and remain open to legal correction. Only within such a framework can formal authorization be transformed into genuinely meaningful judicial oversight.

3. Objections, Feasibility, and a Sequenced Implementation Agenda

A model that raises the state's justificatory burden invites an obvious objection: that it will slow investigations and impose unrealistic demands on judges. The objection deserves a direct answer rather than a rhetorical one. The model is deliberately asymmetric. Most applications, namely measures aimed at identified targets, executed overtly, and limited in scope, fall within the first tier, where the state must show only a lawful basis, a nexus to the offense, and particularity, and where brief written reasons suffice. The heavier burden attaches only to the smaller class of measures that deprive a person of liberty, penetrate private space, or operate covertly. Calibration is precisely what prevents the cost of scrutiny from being generalized across the entire caseload. Where delay would genuinely defeat the purpose of a measure, the statute's existing provision for urgent execution followed by subsequent approval remains available; what the model changes is not the availability of that route but the standard applied when approval is sought and the survival of a corrective remedy afterwards.

A second objection is more serious: the model assumes a judicial capacity that this article's own critique of formalism calls into question. The tension is real, but it argues for structuring judicial reasoning rather than for abandoning the attempt. Formalism in Indonesian pre-trial practice has flourished in the absence of articulated standards, which leaves each judge to improvise from intuition and inherited routine. A standardized application format and a standardized analytical framework for reasons address the problem at its source: they make the omission of a necessity or subsidiarity finding visible on the face of the decision, and therefore reviewable. Competence of this kind is built through standards, templates, and continuing judicial education; it is not presupposed.

A related objection concerns expertise. Applications that turn on digital evidence require a judge to assess matters, such as the informational scope of an extraction, the reliability of a forensic tool, or the handling of non-responsive data, that fall outside ordinary judicial training. The third tier therefore presupposes support rather than omniscience. Three measures are available and none requires legislative change: joint training for judges and digital forensic practitioners, reference to established forensic protocols within the Supreme Court guidelines proposed below, and provision for a court-appointed technical assessor in applications of unusual complexity. Without such support, strict scrutiny of digital measures would remain formally demanding and practically hollow.

A third objection concerns resources. The proposal for dedicated reviewing judges must be assessed against the actual distribution of Indonesia's judicial workload rather than in the abstract. Full specialization in every district court is not realistic in the short term. A staged approach is more defensible: begin with a duty-judge roster within existing district courts, concentrated first in the courts that handle the largest volume of authorization applications, and treat institutional specialization as a medium-term objective contingent on evaluation of that roster.

A fourth objection concerns the political economy of amending the Explanation to Article 158(a). Legislative amendment is the cleanest remedy but the least likely in the near term, since the restriction reduces the exposure of investigative agencies to post-hoc challenge and therefore has a constituency. Two routes are less costly. The first is interpretive: because Indonesian drafting doctrine denies an explanatory note the power to narrow the norm it explains, courts may read the Explanation as reaching only those measures whose execution remained within the terms of the authorization granted, leaving measures executed beyond those terms, or obtained on inaccurate facts, within the reach of pre-trial proceedings. The second is constitutional review, for which the tension between the Explanation and the constitutional logic of Decision No. 21/PUU-XII/2014 supplies the argument.

These considerations yield a sequenced agenda rather than an undifferentiated list of recommendations. In the immediate term, the Supreme Court should issue technical guidelines standardizing the format of investigators' applications and the analytical structure of authorization decisions, and should pair them with training for the judges who handle such applications; this ranks highest because it requires no legislative action. In the medium term, a duty-judge roster should be piloted in high-volume district courts, and the interpretive reading of the Explanation set out above should be advanced through litigation and, if necessary, through constitutional review. In the longer term, amendment of the Explanation and the institutionalization of specialized reviewing judges should be pursued. Progress should be evaluated against observable indicators rather than impressions: the proportion of authorization decisions containing an express necessity and subsidiarity finding, the proportion in which the scope or duration sought was narrowed by the court, the rates of refusal and of partial grant, and the availability in practice of post-authorization challenge. Without indicators of this kind the reform would risk reproducing, at a higher level of formality, the very problem it is meant to cure.

D. CONCLUSION

This study yields two principal conclusions. First, the weakness in the rights protection afforded by the new authorization regime lies not in the absence of judicial involvement but in a paradoxical design choice. The body of the statute opens pre-trial proceedings to challenges against coercive measures; the Explanation to Article 158(a) then withdraws that path for measures already authorized. Read through Levinson's theory of remedial equilibration, this is not a neutral drafting issue but a reallocation of remedies that diminishes the practical content of the rights those remedies are meant to protect. Read through Tyler's theory of procedural justice, it combines an entirely *ex parte* authorization process with the closure of any meaningful opportunity for voice

afterwards. The shift toward *ex ante* approval therefore creates a real risk of a safe-harbor effect wherever judges function only as administrative reviewers of formal compliance.

Second, this study proposes tiered scrutiny as the framework best suited to curing that methodological weakness. The model differentiates the state's justificatory burden, the focus of judicial scrutiny, and the minimum procedural safeguards across three levels: reasonableness review for measures of limited effect; heightened review for measures that enter personal space or generate stigma, including suspect designation; and strict scrutiny for detention, interception of communications, covert surveillance, and intrusive searches of digital data, each of which should be held to a last-resort (*ultimum remedium*) standard. Eight benchmarks render those levels operational. Implementation is sequenced rather than simultaneous: technical guidelines from the Supreme Court and judicial training first; a piloted duty-judge roster and a remedy-preserving reading of the Explanation to Article 158(a) next; amendment of that Explanation and institutional specialization thereafter.

The contribution of this article is methodological rather than institutional. Existing scholarship on pre-trial proceedings has concentrated on which acts may be reviewed and by which forum; the argument advanced here concerns the standard against which those acts are measured and the reasons the state must give. Two limitations should be acknowledged. Because the research is normative, its claims about judicial behavior under the new regime are inferential and await empirical testing once implementing practice develops. And a calibrated model necessarily leaves classification at the margins, such as exit bans, prolonged asset freezing, and sustained access to metadata, open to argument. Refining those margins, and testing the eight benchmarks against actual authorization decisions, is the natural next stage of this research agenda.

REFERENCES

- Adawiyah, R., & Wulan, E. R. (2024). Keabsahan Penetapan Tersangka dalam Peraturan Kapolri No. 6 Tahun 2019 tentang Penetapan Tersangka. *IBLAM Law Review*, 4(1), 478–495. <https://doi.org/10.52249/ilr.v4i1.317>
- Afandi, F. (2016). Perbandingan Praktik Praperadilan Dan Pembentukan Hakim Pemeriksa Pendahuluan Dalam Peradilan Pidana Indonesia. *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada*, 28(1), 93. <https://doi.org/10.22146/jmh.15868>
- Akbar, M. F. (2019). Pengaruh Putusan Mahkamah Konstitusi di Bidang Pengujian Undang-Undang terhadap Sistem Peradilan Pidana Indonesia dengan Perubahan KUHAP. *Jurnal Konstitusi*, 16(3), 466. <https://doi.org/10.31078/jk1632>
- Ambos, K. (2016). *Treatise on International Criminal Law*. In *Treatise on International Criminal Law*. Oxford University Press. <https://doi.org/10.1093/law/9780199665617.001.0001>
- Bernardini, L., & Sanvitale, F. (2023). Searches and Seizures of Electronic Devices in European Criminal Proceedings: a New Pattern for Independent Review? *Revista Italo-Espanola de Derecho Procesal*, 2023(1), 73–119. <https://doi.org/10.37417/rivitsproc/1475>
- Big Brother Watch and Others v. the United Kingdom [GC], Nos. 58170/13, 62322/14 and 24960/15 (European Court of Human Rights, 25 May 2021).
- Birkett, D. J. (2020). Asset Freezing at the European and Inter-American Courts of Human Rights: Lessons for the International Criminal Court, the United Nations Security Council, and States. *Human Rights Law Review*, 20(3), 502–525. <https://doi.org/10.1093/hrlr/ngaa022>
- Blom, R. (2019). Naming crime suspects in the news: ‘Seek truth and report it’ vs. ‘Minimizing Harm’. In *Media Controversy: Breakthroughs in Research and Practice* (pp. 354–372). IGI Global. <https://doi.org/10.4018/978-1-5225-9869-5.ch020>
- Brodersen, K. H., Capus, N., & Rosset, D. (2023). The politics of informality in criminal procedures. *International Journal of Law, Crime and Justice*, 74, 100612. <https://doi.org/10.1016/j.ijlcj.2023.100612>
- Brooks, S. K., & Greenberg, N. (2021). Psychological impact of being wrongfully accused of criminal offences: A systematic literature review. *Medicine, Science and the Law*, 61(1), 44–54. <https://doi.org/10.1177/0025802420949069>
- Burnett, R., Hoyle, C., & Speechley, N. E. (2017). The context and impact of being wrongly accused of abuse in occupations of trust. In *Howard Journal of Crime and Justice* (Vol. 56, Issue 2). <https://doi.org/10.1111/hojo.12199>

- Buzadji v. the Republic of Moldova [GC], No. 23755/07 (European Court of Human Rights, 5 July 2016).
- Carpenter v. United States, 585 U.S. 296 (2018).
- Chiao, V. (2016). Discretion and domination in criminal procedure. *Politics, Philosophy & Economics*, 15(1), 92–110. <https://doi.org/10.1177/1470594X15599104>
- Commonwealth Secretariat. (2025). Guidelines on the Treatment of Electronic Evidence in Criminal Proceedings. Commonwealth Secretariat.
- Cusack, A., & Dehaghani, R. (2025). Navigating the Right to a Fair Trial for Vulnerable Suspects Pretrial: A Legal and Psychological Critique of the Strasbourg Jurisprudence. *Human Rights Law Review*, 25(2), ngaf010. <https://doi.org/10.1093/hrlr/ngaf010>
- de Figueiredo, M. F. P., Hashimoto, B., & Thorley, D. (2025). Unwarranted Warrants? An Empirical Analysis of Judicial Review in Search and Seizure. *Harvard Law Review*, 138, 1959–2047.
- Dhami, M. K., & van den Brink, Y. N. (2022). A Multi-disciplinary and Comparative Approach to Evaluating Pre-trial Detention Decisions: Towards Evidence-Based Reform. *European Journal on Criminal Policy and Research*, 28(3), 381–395. <https://doi.org/10.1007/s10610-022-09510-0>
- Dicky Eko Prasetyo, Muh. Ali Masnun, Arinto Nugroho, Denial Ikram, N. (2024). Discrimination Related to Labour Age Limitation in Indonesia : A Human Rights and Comparative Law Perspective. *Suara Hukum*, 6(2), 228–254.
- Dicky Eko Prasetyo, Muh Ali Masnun, B. W. (2024). Legal Uncertainty of Golf Game as Sports and Entertainment Branch in Local Tax Imposition. *Wawasan Yuridika*, 4(1), 76–93. <https://doi.org/https://doi.org/10.25072/jwy.v8i1.4369>
- Dixon, R. (2020). Calibrated Proportionality. *Federal Law Review*, 48(1), 92–122. <https://doi.org/10.1177/0067205X19890439>
- Donohue, L. K. (2021). The Evolution and Jurisprudence of the Foreign Intelligence Surveillance Court and Foreign Intelligence Surveillance Court of Review. *Harvard National Security Journal*, 12(2), 198–287.
- Du Toit, P. G. (2023). The Search Warrant Provisions of the Cybercrimes Act and Their Relationship with the Criminal Procedure Act. *Obiter*, 43(4), 764–779. <https://doi.org/10.17159/obiter.v43i4.13191>
- Eijkman, Q. A. M. (2018). Access to justice for communications surveillance and interception: Scrutinising intelligence-gathering reform legislation. *Utrecht Law Review*, 14(1), 116–127. <https://doi.org/10.18352/ulr.419>

- Fallon, R. H. (2007). Strict judicial scrutiny. *UCLA Law Review*, 54(5), 1267–1337.
- Harbo, T. I. (2017). Introducing Procedural Proportionality Review in European Law. *Leiden Journal of International Law*, 30(1), 25–47. <https://doi.org/10.1017/S0922156516000662>
- Henckels, C. (2017). Proportionality and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference. *Federal Law Review*, 45(2), 181–197. <https://doi.org/10.1177/0067205x1704500202>
- Hidayat, A. (2017). Negara Hukum Berwatak Pancasila. Artikel Mahkamah Konstitusi Republik Indonesia. https://www.mkri.id/public/content/infoumum/artikel/pdf/artikel_15_03_arief_hidayat.pdf
- Hoyle, C., Speechley, N.-E., & Burnett, R. (2016). The Impact of Being Wrongly Accused of Abuse in Occupations of Trust: Victims' Voices. Centre for Criminology, University of Oxford.
- Human Rights Committee. (1988). General Comment No. 16: Article 17 (Right to Privacy), the Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (HRI/GEN/1/Rev.9, Vol. I). United Nations.
- Human Rights Committee. (2014). General Comment No. 35: Article 9 (Liberty and Security of Person) (CCPR/C/GC/35). United Nations. <https://docs.un.org/en/CCPR/C/GC/35>
- Ilyas, A. (2021). Praktik Penerapan Exclusionary Rules di Indonesia. *Masalah-Masalah Hukum*, 50(1), 49–59. <https://doi.org/10.14710/mmh.50.1.2021.49-59>
- Ilyas, A., Afandi, F., & Qurbani, I. D. (2025). Closing the Injustice Gap: Reconstructing Pre-trial Proceedings as an Effective Remedy for Victims of Terminated Preliminary Inquiries. *Jurnal Konstitusi*, 22(4), 736–776. <https://doi.org/10.31078/jk2247>
- Ilyas, A., & Sudirman, M. (2025). Regulating Suspect Display in Press Conferences: Safeguarding Human Rights and the Presumption of Innocence. *Al-Adl : Jurnal Hukum*, 17(2), 104. <https://doi.org/10.31602/al-adl.v17i2.19219>
- Putusan Mahkamah Konstitusi Republik Indonesia Nomor 21/PUU-XII/2014 tentang Pengujian Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (2015).
- Irawati, A. C., & Da Silva, E. B. (2025). Beyond Formality in Indonesian Pretrial Law: KUHAP Reform, Human Rights, and Islamic Law. *Al-Ahkam*, 35(2), 261–286. <https://doi.org/10.21580/ahkam.2025.35.2.28399>
- Kerr, O. S. (2015). Executing Warrants for Digital Evidence: The Case for Use

- Restrictions on Nonresponsive Data. *Texas Tech Law Review*, 48(1), 1–36.
- Klass and Others v. Germany, No. 5029/71 (European Court of Human Rights, 6 September 1978).
- Kremens, K. (2020). The authority to order search in a comparative perspective: A call for judicial oversight. *Revista Brasileira de Direito Processual Penal*, 6(3), 1585–1626. <https://doi.org/10.22197/RBDPP.V6I3.412>
- Latifah, M. (2021). Perlukah Mengatur Prinsip Exclusionary Rules of Evidence dalam RUU Hukum Acara Pidana? *Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan*, 12(1), 101–122. <https://doi.org/10.22212/jnh.v12i1.2123>
- Letellier v. France, No. 12369/86 (European Court of Human Rights, 26 June 1991).
- Levinson, D. J. (1999). Rights Essentialism and Remedial Equilibration. *Columbia Law Review*, 99(4), 857–940. <https://doi.org/10.2307/1123480>
- Martufi, A., & Peristeridou, C. (2020). The Purposes of Pre-Trial Detention and the Quest for Alternatives. *European Journal of Crime, Criminal Law and Criminal Justice*, 28(2), 153–174. <https://doi.org/10.1163/15718174-bja10002>
- Milanovic, M. (2015). Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age. *Harvard International Law Journal*, 56(1), 81–146.
- Mordechai-Strongin, B. (2023). Giving the Fourth Amendment Meaning: Creating an Adversarial Warrant Proceeding to Protect From Unreasonable Searches and Seizures. *University of Michigan Journal of Law Reform*, 56.3, 951. <https://doi.org/10.36646/mjlr.56.3.giving>
- Muhaimin. (2020). *Metode Penelitian Hukum*. Mataram University Press.
- Murtadho, N. A. (2025). Illegally Obtained Evidence in Indonesia's Draft Criminal Procedure Code (RUU KUHP): Exclusionary Rules and the Due Process of Law. *Jurnal Penelitian Hukum De Jure*, 25(3), 291–308. <https://doi.org/10.30641/dejure.2025.V25.291-308>
- Nowak, M. (2003). Introduction to the International Human Rights Regime. In Raoul Wallenberg Institute Human Rights Library (Vol. 14). Martinus Nijhoff Publishers. <https://doi.org/10.1163/9789004479074>
- Packer, H. L. (1968). The Limits of the Criminal Sanction. In Stanford University Press eBooks. <https://doi.org/10.1515/9780804780797>
- Pangaribuan, A. (2020). Innocent Until Presented. *Jurnal Hukum & Pembangunan*, 50(2), 344. <https://doi.org/10.21143/jhp.vol50.no2.2582>
- Prasetio, D. E., Masnun, M. A., & Noviyanti, N. (2025). Post-Election Reconciliation in 2024 as a Constitutional Convention in Indonesia: A Progressive Legal Culture

- Perspective. *Jambura Law Review*, 7(1), 176–196.
<https://doi.org/10.33756/jlr.v7i1.26999>.
- Prasetyo, Y. (2022). Indonesian Integral Law Based on Pancasila. *Pancasila and Law Review*, 3(1), 1–12. <https://doi.org/10.25041/plr.v3i1.2443>
- Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana [Law No. 20 of 2025 on the Code of Criminal Procedure], Lembaran Negara Republik Indonesia Tahun 2025 Nomor 188, Tambahan Lembaran Negara Republik Indonesia Nomor 7149 (2025). <https://peraturan.go.id/id/uu-no-20-tahun-2025>
- Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana, Lembaran Negara Republik Indonesia Tahun 1981 Nomor 76, Tambahan Lembaran Negara Republik Indonesia Nomor 3209 (1981).
- Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan, Lembaran Negara Republik Indonesia Tahun 2011 Nomor 82, Tambahan Lembaran Negara Republik Indonesia Nomor 5234 (2011).
- Riley v. California, 573 U.S. 373 (2014).
- Roman Zakharov v. Russia [GC], No. 47143/06 (European Court of Human Rights, 4 December 2015).
- Schaunig, G. (2025). House Searches and Seizures in Criminal Proceedings: The Perspective of an Effective Protection of Fundamental Rights with a Focus on Mobile Devices and Data. *University of Vienna Law Review*, 9(1), 20–54. <https://doi.org/10.25365/vlr-2025-9-1-20>
- Situmeang, S. M. T. (2021). Presence of Pretrial in the Perspective of the Pancasila State of Law. *Law Reform: Jurnal Pembaharuan Hukum*, 17(2), 183–193. <https://doi.org/10.14710/lr.v17i2.41746>
- Soetandyo. (2003). HAM: Konsep dasar dan pengertiannya Yang Klasik Pada Masa Awal Perkembangannya. In *Kumpulan Tulisan tentang HAM*. Pusat Studi Hak Asasi Manusia Universitas Surabaya and The Asia Foundation.
- Stoykova, R. (2023). The Right to a Fair Trial as a Conceptual Framework for Digital Evidence Rules in Criminal Investigations. *Computer Law & Security Review*, 49, 105801. <https://doi.org/10.1016/j.clsr.2023.105801>
- Stoykova, R. (2024). A New Right to Procedural Accuracy: A Governance Model for Digital Evidence in Criminal Proceedings. *Computer Law & Security Review*, 55, 106040. <https://doi.org/10.1016/j.clsr.2024.106040>
- Suarda, I. G. W., Taufiqurrohman, M. M., & Priambudi, Z. (2021). Limiting the Legality of Suspect Determination in Indonesia's Pre-Trial System. *Indonesia Law Review*, 11(2), 137–153. <https://doi.org/10.15742/ilrev.v11n2.2>

- Suharizal, S., & Arifin, F. (2019). Due to the Verdict of the Constitutional Court of the Republic of Indonesia Number 21 / PUU-XII / 2014 on the Extension of Pretrial Institutional Authority in Indonesia. *International Journal of Multicultural and Multireligious Understanding*, 6(4), 218–224. <https://doi.org/10.18415/ijmmu.v6i4.986>
- Susilo, E., Din, M., Suhaimi, & Mansur, T. M. (2024). Justice Delayed, Justice Denied: A Critical Examination of Repeated Suspect Status in Indonesia. *Hasanuddin Law Review*, 10(3), 342–357. <https://doi.org/10.20956/halrev.v10i3.6088>
- Susilo, E., Negara, D. S., & Niyobuhungiro, J. (2025). Legal Protection for Suspects Through the Integration of Judicial Supervision in Pre-Trial Detention in Indonesia. *Indonesian Journal of Criminal Law Studies*, 10(1), 179–216. <https://doi.org/10.15294/ijcls.v10i1.20605>
- Szabó and Vissy v. Hungary, No. 37138/14 (European Court of Human Rights, 12 January 2016).
- Turner, J. I., & Weigend, T. (2019). The Purposes and Functions of Exclusionary Rules: A Comparative Overview. In S. Gless & T. Richter (Eds.), *Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules* (pp. 255–282). Springer. https://doi.org/10.1007/978-3-030-12520-2_8
- Tyler, T. R. (1991). Why Do People Obey the Law? In *Journal of Public Administration Research and Theory*. Princeton University Press. <https://doi.org/10.1093/oxfordjournals.jpart.a037085>
- Utari, I. S., Kamal, U., Ramada, D. P., Sumardiana, B., & Nunna, B. P. (2026). Legal Protection for Child Sexual Violence Victims: Victimology Perspectives, Challenges, and Policy Solutions in Asia. *Jurnal Suara Hukum*, 8(1), 40–77. <https://doi.org/10.26740/jsh.v8n1.p40-77>.
- Vervaele, J. A. E. (2009). Special procedural measures and the protection of human rights General report. *Utrecht Law Review*, 5(2), 66. <https://doi.org/10.18352/ulr.103>
- Yuliartha, I. G. (2010). Lembaga Praperadilan Dalam Perspektif Kini Dan Masa Mendatang Dalam Hubungannya Dengan Hak Asasi Manusia. *Law Reform*, 5(1), 1–24. <https://doi.org/10.14710/lr.v5i1.667>
- Zedner, L., & Stuckenberg, C.-F. (2020). Due Process. In K. Ambos, A. Duff, J. Roberts, T. Weigend, & A. Heinze (Eds.), *Core Concepts in Criminal Law and Criminal Justice* (pp. 304–342). Cambridge University Press. <https://doi.org/10.1017/9781108649742.009>

