Police Violence and Criminal Procedure Law Issues

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The Institute for Criminal Justice Reform (ICJR) is an independent research institute established in 2007. ICJR focuses on criminal law and justice reform, and general law reform in Indonesia. ICJR takes initiative by providing support in the context of establishing respect for the Rule of Law and at the same time establishing a fervent human rights culture in criminal justice system.

Rumah Cemara is a Non-Governmental Organization that grows and develops independently of its own will and desire in the community and is founded on concern for eliminating stigma and discrimination in society so that all citizens have the same opportunity to advance and obtain guarantees for the protection of human rights. Rumah Cemara Provide free assistance to vulnerable and marginalized community groups, including when they have to deal with the law and advocate for public health and human rights-based policies.

A. Current Situation of Indonesia's Criminal Justice System

1. International human rights instrument and Indonesia Constitution (UUD 1945) have ensured the protection and respect of the right to justice, equality before the law, and freedom from torture, cruel, inhuman, and degrading treatment or punishment. This protection is guaranteed without exception, including for those tried in the criminal justice system. In ICCPR, every person in the process of determining the criminal charge against them is given procedural guarantees in accordance with Article 14. In correlation to fair trial right under Article 14, ICCPR ensures freedom from torture, cruel, inhuman, or degrading treatment or punishment under Article 7 and freedom from arbitrary arrest or detention under Article 9.

2. Article 14 ICCPR is a fundamental yet complex right to be applied in the criminal justice system. General Comment 32 emphasizes that the rights under Article 14 have to be respected regardless of State's legal tradition and domestic law. It becomes obligatory for the State to respect the requests even though the rights under Article 14 are not considered non-derogable. Derogations of Article 14 are allowed as long as it could ensure that such derogation does not exceed those strictly required by the exigencies of the actual situation. However, on the other hand, General Comment 32 also affirms that guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights, for instance, concerning Article 7.

3. Indonesia has supported at least 14 UPR cycle-3 recommendations regarding fair trial and police violence, among them: respect for fair trial rights (141.60), measures to stop torture and ill-treatment practices by police forces (141.7), ratification of OPCAT (139.2, 139.3, 139.4, 139.5, 141.6, 141.7), criminalization of torture under Criminal Code (139.22, 139.23, 139.53, 139.54), the establishment of an effective national preventive mechanism to prevent torture (139.54, 139.55), protection of women and children in criminal justice (139.35). Despite this gesture, entering the fourth cycle of UPR, the ratification of OPCAT has not been processed, and the Government of Indonesia has not seriously considered fundamental changes in the criminal procedural law to ensure the better fulfillment of fair trial rights and better protection from police violence.

4. The current criminal justice system in Indonesia still lacks accountability, is undemocratic, and has not fully aligned with fundamental human rights principles, particularly regarding the

respect for fair trial. The Criminal Procedure Law urgently needs to be reformed as the current one does not sufficiently comply with global changes, particularly regarding the principle of due process of law and human rights protection.

5. The concept of due process of law accentuates the importance of criminal procedural law as a fundamental ground in conducting duty of the authority so that every coercive act could be justified and the significance of proper protection during the conduct of duty. At the same time, the protection of human rights guarantees that every criminal justice process is executed with respect to humanity.

B. Police violence: Lack of accountability and control mechanism towards police's excessive authority

6. An investigator in a criminal case, who is generally part of the Police institution, has broad authority, ranging from opening criminal cases to conducting coercive measures such as arrest, detention, search, seizure, etc. This authority also includes using investigation methods set outside Criminal Procedure Law, especially for drug-related cases like undercover buying and controlled delivery. These methods are, in practice hard to be distinguished from the entrapment model that is prohibited from being used as an investigation method.

7. The compartment system in Criminal Procedure Law, which separates the function or authority of each law enforcement agency and the Court in accordance with stages of the criminal process (investigation, prosecution, trial), has created an unintegrated criminal justice system and the lack of check and balances between each of the institution.

8. In the context of arrest and detention, the lack of control mechanism is caused by the failure to adopt a mechanism for the suspect being brought to the judge within 48 hours after arrest. Additionally, in terrorism cases, an arrest may last for 21 days, while in drug-related cases, the maximum duration for arrest is six days. This type of arrest has been very likely turned into a situation of incommunicado detention.

9. Further, the power to issue a warrant for arrest and detention is solely under the investigator's discretion. No other authorities, such as prosecutors or judges, determine and review substantively the legality of the urgency and the ground of arrest and detention.

10. Detention in police stations is still found despite the requirement that only different authorities should be responsible for housing detainees. This practice is also against the Criminal Procedure Law's regulation, which only allows detention in Police stations when detention facilities are unavailable. Detention rooms in Police Station, Prosecutor's Office, and the Court should only be used for transit and not for a permanent place of detention.

11. The lack of control mechanism to oversee detention places has created room for torture, especially in Police Stations, and not often caused the detainee's death. The death of Joko Dodi Kurniawan, Rudi Efendi, and Hermanto were suspected to be caused by torture, resulting in three police officers being charged for their death.[1] In 2021, Legal Aid Institution (LBH) Masyarakat, in their studies, found that 22 out of 150 people who were part of the legal counseling in Jakarta were tortured during the investigation stage.[2] Additionally, National

[1] ICJR, "Penahanan di Kantor Kepolisian Harus Dihapuskan", https://icjr.or.id/penahanan-di-kantor-kantor-kepolisian-harus-dihapuskan/, accessed on 29 March 2022.
[2] Yosua Octavian dan Aisya Humaida, 2021, "Potret Penahanan: Minim Bantuan Hukum, Masih Terjadi Penyiksaan, dan Pemerasan", p. 8.

Commission on Human Rights from 2020 to 2021 has received a report on the death of 11 detainees in police stations which happened less than 24 hours after their arrest.[3]

12. Many cases of extrajudicial killing by police were also found in 2020. One of them includes the death of 6 people after being shot by the police in an attempt to arrest.[4] However, the police officer responsible for this action was not criminally punished. The judges in District Court South Jakarta deemed their actions self-defense, although the judges stated that their actions were not proportional.[5] The existing regulation on the use of force in duties, especially firearms, was never robust as it could only be found in a Head of Police Institution's Regulation Number 1/2009. Mandatory control mechanism by the judicial body for extrajudicial killing cases is unavailable in the current Criminal Procedure Law.

13. The existing judicial control mechanism for coercive acts is also limited in the form of the pretrial hearing, which merely has a narrow jurisdiction. Coercive action by the police, e.g., interception, could not be challenged by any judicial control mechanism in the current law. The exiting pretrial hearing is also limited to an administrative and post-factum assessment.[6]

C. Failure to protect, respect, and fulfill the right to fair trial

14. Cases of violation of fair trial rights such as the right to effective legal defense, the right to be free from torture, cruel, inhuman, or degrading treatment or punishment, the right to be free from arbitrary arrest, and the right to appeal have been confirmed by a variety of data and studies conducted by independent research institutions and NGOs.

15. ICJR found that in 2018, only 12 out of 304 juveniles were accompanied by a defense lawyer in the investigation stage. The legal aid status of 286 juveniles in this study was unknown. It is also found that in case number 36/Pid.Sus.Anak/2017/PN.Jkt.Sel, the juvenile, was given a defense lawyer only one day before the verdict.[7]

16. This situation got worse during the COVID-19 Pandemic, where physical interaction between defendants and their lawyers was limited by the physical distancing measure, hindering access for defense and the guarantee of equality of arms much further.[8]

17. ICJR has also found a breach of fair trial rights in death penalty cases.[9] These cases exhibit inadequate human rights protection under Criminal Procedure Law towards people facing the

[3] Komisi Nasional HAM, 2022, Catatan Kekerasan Negara 2020-2021
[4] Rizki Fachriansyah, "Six alleged Rizieq sympathizers shot dead following purported attack on Jakarta Police", The Jakarta Post, https://www.thejakartapost.com/news/2020/12/07/six-alleged-rizieq-sympathizers-shot-dead-following-attack-on-jakarta-police.html**,** accessed on 29 March 2022.
[5] Juli Hantoro (Editor), "Kontroversi Putusan Lepas Dua Penembak Laskar FPI", Tempo.co, https://metro.tempo.co/read/1572546/kontroversi-putusan-lepas-dua-penembak-laskar-fpi/full&view=ok, accessed on 29 March 2022
[6] Supriyadi W. Eddyono, *et.al.,* 2014, *Pretrial Hearing in Indonesia: Theory, History, and Practice in Indonesia*¸ Institute for Criminal Justice Reform, Jakarta, p. 69. Document can be accessed through: https://icjr.or.id/wp-content/uploads/2014/02/Pretrial-Hearing-in-Indonesia.pdf
[7] Genoveva Alicia, *et.al*, 2019, *Anak dalam Ancaman Penjara,* Institute for Criminal Justice Reform, Jakarta, p.18. Document can be accessed through: https://icjr.or.id/anak-dalam-ancaman-penjara-potret-pelaksanaan-uu-sppa-2018/
[8] Miko Susanto Ginting, 2021, *Laporan Penilaian Penerapan Prinsip Fair Trial di Indonesia pada Masa Pandemi Covid-19*, Institute for Criminal Justice Reform, Jakarta, p. 22. Document can be accessed through: https://icjr.or.id/wp-content/uploads/2021/04/Laporan-Penilaian-Penerapan-Fair-Trial-Indonesia-di-Masa-Pandemi-Covid-19.pdf
[9] Zainal Abidin, *et al.*, *Menyelisik Keadilan yang Rentan: Hukuman Mati dan Penerapan Fair Trial di Indonesia,* Institute for Criminal Justice Reform, Jakarta, 2019, p. 141-176. Document can be accessed through: https://icjr.or.id/wp-content/uploads/2019/01/Menyelisik-Keadilan-Yang-Rentan.pdf

death penalty.[10] Furthermore, according to Supreme Court Circular Letter 7/2014 and Supreme Court Circular Letter 10/2009, the application to appeal for case review is also limited to only once. This policy has prevented at least 2 (two) death row inmates from submitting their cases for review, violating their rights to appeal.[11]

18. The practice of torture has also been found in Correctional Facilities. National Commission on Human Rights reported their findings of torture, cruel, inhuman, and degrading treatment and punishment in Correctional Facility Class IIA Yogyakarta, where inhuman and degrading treatment towards inmates occurred during disciplinary to renew Correctional Facility's system.[12] This situation was first reported by a group of ex-inmates of Correctional Facility Class IIA Yogyakarta in November 2021.[13] The lack of a real-time independent monitoring mechanism is one of the causes of this practice of inhuman and degrading treatment in Correctional Facilities.

19. Aside from torture, poor living conditions that arguably could be categorized as inhuman treatment have also been found in several detention and correctional facilities. This was due to overcrowding, where the national occupancy rate of these facilities has reached 163% as of 31st March 2022.[14] ICJR in 2020 discovered that in 8 (eight) detention and correctional facilities, the living situation is incompatible with standards pronounced in the Standard Minimum Rules of the Treatment of Prisoners (Nelson Mandela Rules). 11 people have to live together in 3x4 meters square cells in one of the facilities. Twenty-three people have to fit in 7x8 meters square cells in other facilities. Aside from the narrow space to dwell, limited access to health care has also been a serious problem in these facilities. In Jakarta, roughly 1 (one) health worker has to handle and supervise the health condition of at least 361 inmates.

D. Criminalization of drug users

20. More than 60% of Indonesia's criminal justice system cases come from drug-related crimes.[15] The existing legislation causes this on drugs (Law Number 35/2009), which criminalizes drug users.

21. From 2014 through 2016, drug-related crimes were the only crime whose rates doubled.[16] Drug-related crimes rate showed a significant rise in 2015, the same period when President of Indonesia, Joko Widodo, declared war on drugs at the beginning of his term.[17]

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[10] *Ibid.,* p. 105.
[11] *Ibid.,* p. 136-138.
[12] National Commission on Human Rights, "Periksa 66 Saksi, Komnas HAM Temukan 5 Pelanggaran HAM dalam Kasus Lapas Narkotika Kelas II A Yogyakarta", https://www.komnasham.go.id/index.php/news/2022/3/8/2094/periksa-66-saksi-komnas-ham-temukan-5-pelanggaran-ham-dalam-kasus-lapas-narkotika-kelas-ii-a-yogyakarta.html, accessed on 29 March 2022
[13] ICJR, "Pentingnya Pemantauan Tempat Penahanan Hingga Dampak Buruk Kegagalan Kebijakan Narkotika", https://icjr.or.id/pentingnya-pemantauan-tempat-penahanan-hingga-dampak-buruk-kegagalan-kebijakan-narkotika/, accessed on 29 March 2022
[14] Directorate of Corrections Ministry of Law and Human Rights, "SDP Publik", http://sdppublik.ditjenpas.go.id/, accessed on 31st March 2022
[15] Directorate of Corrections Ministry of Law and Human Rights, "SDP Publik", http://sdppublik.ditjenpas.go.id/, accessed on 31st March 2022
[16] BPS: Badan Pusat Statistik, Statistik Kriminal 2012, 2013, 2014, 2015, 2016, 2017, 2018, (Jakarta: Badan Pusat Statistik: 2012, 2013, 2014, 2015, 2016, 2016, 2017, 2018, 2019, 2020)
[17] Sanny Cicilia (Editor), "Jokowi tegaskan perang terhadap narkoba", Kontan.co.id, https://nasional.kontan.co.id/news/jokowi-tegaskan-perang-terhadap-narkoba, accessed on 29 March 2022

22. This surge in drug-related offenses has brought approximately 100.906 people to the Correctional Facilities in March 2022[18], even though drug users and drug addicts should not be locked up in those facilities. Imprisonment would only exacerbate the breach of the right to health of people. Special Session of the United Nations General Assembly on the World Drug Problem (UNGASS 2016) emphasized that the appropriate response toward drug users should be rehabilitation, social reintegration, and other recovery and support programs. UNODC has also highlighted that in handling drug-related offenses, the Government's priority should be put on education, service, and support as measures that will effectively become the alternative approach to criminalization.

E. Inequality of arms between State and civilians during the criminal process and the limited room for contestation

23. This problem starts from the unclear arrangement in the Criminal Procedure Law regarding the definition and types of lawful evidence, and the lack of opportunity to challenge evidence obtained illegally, especially since the beginning of the investigation process.

24. The Criminal Procedure Law does not explicitly regulate the admissibility system of evidence, for example, by looking at the procedures, including the assessment and strength of evidence. The principle of the exclusionary rules is not recognized in the current Criminal Procedure Law.

25. At the same time, it was found that there were limited access/opportunities for the suspect/defendant/convict to examine the evidence used in the trial. In several death penalty cases, it was found that the key witnesses' statements made during the investigation stage (most likely including incriminating statements) were only read out in Court, and thus made it impossible for cross-examination.[19]

26. Then there is also a problem of judges who are too dependent on the suspects' written statements made by investigators. They tend to ignore the facts revealed at trial, such as claims of torture during the investigation process. In the ICJR study, it was found that when the defendant raised a declaration of torture, the judge in the trial then would only examine the investigator to ask for confirmation regarding how the investigation process was conducted.[20]

F. Inadequate victims' rights protection under the current Criminal Procedure Law

27. Currently, the Criminal Procedure Law does not comprehensively regulate the mechanism for fulfilling crime victims' rights, especially the right to receive compensation and restitution, hindering its fulfillment from being practical and effective. In the current Criminal Procedure Law, there is no specific regulation emphasizing the victim's central role and the fulfillment of compensation as not part of the criminal process (focusing on defendants); instead, a separate mechanism that focuses on the victim's remedy.

28. The Criminal Procedure Law also does not at all guarantee the fulfillment of other victims' rights, such as the right to obtain legal and non-legal assistance, the right to obtain

[18] Directorate of Corrections Ministry of Law and Human Rights, "SDP Publik", http://sdppublik.ditjenpas.go.id/, accessed on 31st March 2022
[19] Zainal Abidin, *et. al., Op.Cit.,* p. 164.
[20] *Ibid.,* p. 89-90.

information related to the development of the case, the right to give information freely and also being considered their gender sensitivity aspects, etc.

G. Recommendation

29. The various problems above are caused by factors from the level of regulation of the Criminal Procedure Law which fails to adopt adequate norms to formulate unclear provisions. In addition, there are also factors such as arbitrarily practices/implementation by the authority that is not in accordance with the law due to the lack of regulation regarding control mechanisms. For this reason, changes to the criminal procedural law in Indonesia through the revision of the Criminal Procedure Law (KUHAP) need to be encouraged to create a future criminal justice system that is more democratic, accountable, and in line with the principles of human rights protection and global developments namely the concept of restorative justice.

30. Firstly, through the revision of Criminal Procedure Law, we recommend bringing back the role of prosecutors as *dominus litis* (case controller) who can control the process of criminal cases from the investigation stage to the trial stage and execution to create an integrated system and better coordination and institutional relations between law enforcement agencies and courts in carrying out each function/authority.

31. The second recommendation in the revision of the Criminal Procedure Code relates to the importance of strengthening the judicial scrutiny mechanism under the authority of the Preliminary Examining Judge, which is not only intended to respond to post-factum events but also serves to prevent potential abuse of authority in the implementation of any coercive measures (including arrest, detention, search, seizure, interception, etc.) by law enforcement officials since the investigation process began. To prevent abuse by the apparatus, including preventing torture, the revision of the Criminal Procedure Code must also rule the prohibition of placing pretrial detainees in the police and prosecutor's offices.

32. The third recommendation in the revision of Criminal Procedure Law entails the need to accommodate arrangements related to the minimum standard of guaranteeing the fulfillment of the rights of suspects/defendants/convicted and victims of crime. Such agreements should be formulated in more precise rules. They can be reasonably expected to be practical by determining criteria/indicators of violations of fair trial rights and the consequences that can directly impact the criminal process.

33. The fourth recommendation in the revision of Criminal Procedure Law includes setting up the rule of evidence at trial (including the mechanisms to challenge unlawful proof) that can satisfy the equality of arms principle and provide sufficient room for contestation between the State (investigator/public prosecutor) and the suspect/defendant/convict.

34. The fifth recommendation, we urge the Government of Indonesia to immediately ratify the Optional Protocol to the Convention against Torture (OPCAT) to strengthen supervision and monitoring of detention places in which torture cases are commonly found, according to its commitment to the previous UPR.

35. The last recommendation regarding drug policy reform is that the Government needs to stop criminalizing drug users and start to introduce a decriminalization policy for drug users as the proposed changes in drug policy in Indonesia.