

Prospective Suspect Examination as a Constitutional Requirement for Suspect Designation Post-KUHAP 2025

Pemeriksaan Calon Tersangka sebagai Syarat Konstitusional Penetapan Tersangka Pasca KUHAP 2025

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Abstract

Constitutional Court Decision No. 21/PUU-XII/2014 construed the phrase “sufficient preliminary evidence” as requiring at least two items of evidence accompanied by an examination of the prospective suspect. Law No. 20 of 2025 on the Criminal Procedure Code, effective 2 January 2026, retains the two-evidence standard in Article 90(1) but omits the examination requirement. This study analyses the constitutional position of that requirement and the extent of its accommodation in the new Code. Employing normative legal research with statutory, case, and conceptual approaches, the study finds that the Code adopts the evidentiary component of the constitutional standard while abandoning its procedural component, and that pretrial courts have already treated the examination as non-constitutive. The omission weakens the right to be heard and narrows pretrial review to a formal evidentiary count. The study recommends conditional constitutional review of Article 90 and revision of Supreme Court Regulation No. 4 of 2016.

Abstrak

Putusan Mahkamah Konstitusi Nomor 21/PUU-XII/2014 memaknai frasa “bukti permulaan yang cukup” sebagai minimal dua alat bukti yang disertai pemeriksaan calon tersangka. Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana, yang berlaku sejak 2 Januari 2026, mempertahankan standar dua alat bukti dalam Pasal 90 ayat (1) tetapi tidak mencantumkan syarat pemeriksaan tersebut. Penelitian ini menganalisis kedudukan konstitusional syarat dimaksud dan sejauh mana ia terakomodasi dalam KUHAP baru. Dengan penelitian hukum normatif melalui pendekatan perundang-undangan, kasus, dan konseptual, penelitian ini menemukan bahwa KUHAP baru mengadopsi komponen pembuktian dari standar konstitusional tetapi meninggalkan komponen proseduralnya, dan praperadilan telah memperlakukan pemeriksaan tersebut sebagai bukan syarat konstitutif. Kekosongan itu melemahkan hak untuk didengar dan mempersempit pengujian praperadilan menjadi penghitungan alat bukti secara formal. Penelitian ini merekomendasikan pengujian konstitusional bersyarat atas Pasal 90 dan revisi Peraturan Mahkamah Agung Nomor 4 Tahun 2016.



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A. INTRODUCTION

1. Background

The designation of a person as a suspect marks the point at which the coercive authority of the state first attaches, in a concrete and individualised manner, to a citizen within the criminal justice process. From that moment a person may lawfully be summoned, arrested, detained, searched, and deprived of a substantial portion of the rights that are otherwise guaranteed to every citizen.¹ Precisely because of that consequence, the standard governing the designation of a suspect cannot be surrendered to the subjective assessment of the investigating officer alone. Prior to Constitutional Court Decision No. 21/PUU-XII/2014, however, the Criminal Procedure Code contained in Law No. 8 of 1981 furnished no uniform benchmark concerning the requirements and the procedure for designating a suspect, with the result that the practice developed in a manner that was subjective and unilateral.² The absence of a legislative benchmark was compounded by the absence of any external control, since the designation itself was not listed among the objects of pretrial review.³

That normative vacuum was never a merely theoretical concern. It surfaced most visibly in the bioremediation case involving PT Chevron Pacific Indonesia, in which the single judge of the South Jakarta District Court declared in 2012 that the act of the investigator in designating Bachtiar Abdul Fatah as a suspect was unlawful, and ordered his release.⁴ The Attorney General's Office rejected that ruling on the ground that the validity of a suspect designation fell outside the scope of pretrial review as delimited by Article 77 of the Criminal Procedure Code, and reported the presiding judge to the Judicial Commission for having exceeded his authority.⁵ The episode exposed a structural anomaly: the single act carrying the gravest consequences for individual liberty was, at

¹ Bahran, "Penetapan Tersangka Menurut Hukum Acara Pidana dalam Perspektif Hak Asasi Manusia," *Syariah: Jurnal Hukum dan Pemikiran* 17, no. 2 (2017): 221, <https://doi.org/10.18592/sy.v17i2.1972>.

² Law No. 8 of 1981 concerning the Criminal Procedure Code, State Gazette of the Republic of Indonesia of 1981 No. 76, arts. 1(14), 17, 21(1), and 77.

³ M. Yasir, Gunarto, and Bambang Tri Bawono, "Legal Reconstruction of Suspect Investigation Based on Pancasila Justice Values," *Scholars International Journal of Law, Crime and Justice* 7, no. 1 (2024): 3, <https://doi.org/10.36348/sijlci.2024.v07i01.002>.

⁴ Hukumonline, "Hakim Perintahkan Jaksa Bebaskan Karyawan Chevron," 27 November 2012, <https://www.hukumonline.com/berita/a/hakim-perintahkan-jaksa-bebaskan-karyawan-chevron-lt50b4e182d6856/>.

⁵ Hukumonline, "Hakim Praperadilan Chevron Dilaporkan ke KY," 8 February 2013, <https://www.hukumonline.com/berita/a/hakim-praperadilan-chevron-dilaporkan-ke-ky-lt511642f298b41/>.

that time, the only coercive measure that escaped judicial scrutiny altogether.

Constitutional Court Decision No. 21/PUU-XII/2014 responded to that anomaly on two fronts. First, the Court construed the expressions “preliminary evidence”, “sufficient preliminary evidence”, and “sufficient evidence” contained in Article 1 number 14, Article 17, and Article 21(1) of the Criminal Procedure Code as requiring no fewer than two items of evidence of the kinds enumerated in Article 184 of the same Code.⁶ Second, the Court extended the objects of pretrial review under Article 77(a) so as to encompass the validity of a suspect designation, of a search, and of a seizure.⁷ The decision has since been read as a turning point in the migration of Indonesian criminal procedure from a crime control orientation towards a due process orientation, and as an instrument for restoring horizontal supervision over the investigative function.⁸

Considerably less settled is the status of a third element articulated by the Court, namely the requirement that the two items of evidence be accompanied by an examination of the prospective suspect, save in respect of offences that may be adjudicated in the absence of the accused. Erdianto Effendi observes that the Criminal Procedure Code itself imposes no obligation upon the investigator to examine a prospective suspect before designating that person as a suspect, the designation being sufficiently grounded upon an examination of the items of evidence, and that divergent constructions emerged only in the wake of the 2014 decision.⁹ Rocky Marbun approaches the same difficulty from the opposite direction, treating the phrase “examination of the prospective suspect” as a testable standard within the pretrial mechanism and as an index of the relational structure between the investigator, the reporting party, and the reported party.¹⁰ The doctrinal dispute turns upon the location of the requirement: whether it forms part of the operative part of the decision or resides

⁶ Constitutional Court of the Republic of Indonesia, Decision No. 21/PUU-XII/2014, 28 April 2015.

⁷ Nyoman Serikat Putra Jaya, Sukinta, and Rahmad Riyan Choiruddin, “Tinjauan Yuridis Penetapan Status Tersangka sebagai Perluasan Objek Praperadilan Pasca Putusan Mahkamah Konstitusi Nomor 21/PUU-XII/2014,” *Diponegoro Law Journal* 5, no. 2 (2016): 3, <https://doi.org/10.14710/dlj.2016.10860>.

⁸ Lidia Christina Maria Teslatu, “Penetapan Tersangka sebagai Objek Praperadilan dalam Putusan MK No. 21/PUU-XII/2014 sebagai Pemenuhan HAM dan Tercapainya Sistem Peradilan Pidana Terpadu,” *Jurnal Ilmu Hukum: ALETHEA* 2, no. 2 (2019): 133, <https://doi.org/10.24246/alethea.vol2.no2.p131-144>.

⁹ Erdianto Effendi, “Relevansi Pemeriksaan Calon Tersangka sebelum Penetapan Tersangka,” *Undang: Jurnal Hukum* 3, no. 2 (2020): 268, <https://doi.org/10.22437/ujh.3.2.267-288>.

¹⁰ Rocky Marbun, “Trikotomi Relasi dalam Penetapan Tersangka: Menguji Frasa ‘Pemeriksaan Calon Tersangka’ Melalui Praperadilan,” *Undang: Jurnal Hukum* 4, no. 1 (2021): 161, <https://doi.org/10.22437/ujh.4.1.159-190>.

exclusively within its legal considerations.

The institutional response of the Supreme Court complicated the picture further. Article 2(2) of Supreme Court Regulation No. 4 of 2016 provides that a pretrial examination of an application concerning the invalidity of a suspect designation shall assess the formal aspect only, that is to say, whether at least two items of lawful evidence exist, and shall not enter into the substance of the case.¹¹ The Regulation therefore reproduced the evidentiary threshold established by the Constitutional Court while omitting the procedural safeguard that the Court had articulated alongside it. Scholarship on the ensuing practice has documented a marked disparity between pretrial rulings, attributable in no small measure to that very ambiguity.¹²

The unresolved question acquired renewed urgency upon the enactment of Law No. 20 of 2025 concerning the Criminal Procedure Code, which entered into force on 2 January 2026 and repealed the 1981 Code in its entirety.¹³ In several respects the new Code strengthens the position of the person under investigation. Article 1 number 14 classifies the designation of a suspect as a coercive measure alongside arrest, detention, search, seizure, interception, blocking, and the prohibition on leaving Indonesian territory, with the consequence that the designation is conceived as a coercive act of the state subject to the principles of legality, proportionality, and judicial control.¹⁴ Article 90(1) requires that a designation be made by the investigator against a person suspected of having committed a criminal offence on the basis of at least two items of evidence, while the same article obliges the investigator to embody the designation in a written instrument, to notify the suspect within one day at the latest, and to set out therein the rights of the suspect.¹⁵ What the Code does not contain is any requirement that the prospective suspect be examined beforehand.

The General Elucidation of Law No. 20 of 2025 asserts that the Code has been

¹¹ Supreme Court of the Republic of Indonesia, Regulation No. 4 of 2016 concerning the Prohibition of Judicial Review of Pretrial Decisions, art. 2(2).

¹² Alfitra, "Disparitas Putusan Praperadilan dalam Penetapan Tersangka Korupsi oleh KPK," *Jurnal Cita Hukum* 4, no. 1 (2016): 5, <https://doi.org/10.15408/jch.v4i1.3201>.

¹³ Law No. 20 of 2025 concerning the Criminal Procedure Code, State Gazette of the Republic of Indonesia of 2025.

¹⁴ Faculty of Law, Universitas Widya Mataram, "Pasal 1 UU No. 20 Tahun 2025 tentang KUHP: Kerangka Paradigmatik Hukum Acara Pidana Indonesia," accessed 28 September 2026, <https://hukum.widyamataram.ac.id/pasal-1-uu-no-20-tahun-2025-tentang-kuhapperangka-paradigmatik-hukum-acara-pidana-indonesia/>.

¹⁵ Ahdan Ramdani, "Pasal 90 KUHP: Syarat dan Prosedur Penetapan Tersangka," accessed 28 September 2026, <https://www.lawyer-ahdanramdani.com/pasal-90-kuhp-syarat-dan-prosedur-penetapan-tersangka/>.

adjusted to legal developments regulated in a number of statutes and in the decisions of the Constitutional Court. That assertion has been questioned. Fachrizal Afandi, a criminal law scholar at Universitas Brawijaya and chair of the Association of Criminal Law and Criminology Lecturers, contends that the decisions of the Constitutional Court were adopted selectively, observing by way of example that the Court's conception of pretrial review was accommodated only in part.¹⁶ Article 90 exhibits precisely the same pattern: the two-evidence standard was adopted, whereas the examination requirement was left behind.

The consequences of that omission have already materialised in judicial practice. In August 2026 the South Jakarta District Court rejected in their entirety two pretrial applications filed by the former Deputy Attorney General for Special Crimes, Febrie Adriansyah. The single judge held that the new Code does not stipulate the examination of a prospective suspect as a constitutive requirement, but demands only the existence of at least two items of lawful evidence, and reasoned that where an objective basis consisting of at least two items of lawful evidence existed prior to the designation, the absence of a prior summons and examination of the applicant did not of itself furnish a ground for annulling the designation.¹⁷ The court further observed that the applicant's case had not arisen abruptly, a series of preliminary inquiries and case conferences having preceded the coercive measures complained of.¹⁸

In parallel, the constitutional contest has migrated to the Constitutional Court itself. In Case No. 150/PUU-XXIV/2026 an application challenging provisions of the new Code was declared inadmissible for want of legal standing, and to date no decision has pronounced the relevant provisions unconstitutional on the ground that they do not require the examination of a prospective suspect.¹⁹ In Case No. 2/PUU-XXIV/2026 two citizens have sought a conditional declaration to the effect that the investigator must first clarify the position of the reported party before a case is elevated to the investigation

¹⁶ Hukumonline, "KUHP Baru Berlaku, Apa Kabar Putusan-Putusan MK yang Mereformasi KUHP Lama?," 16 April 2026, <https://www.hukumonline.com/stories/article/lt69e02b0410e96/kuhap-baru-berlaku-apa-kabar-putusan-putusan-mk-yang-mereformasi-kuhp-lama/>.

¹⁷ Detikcom, "Hakim Tolak Praperadilan Febrie Adriansyah, Penyitaan-Status Tersangka Sah!," 27 August 2026, <https://news.detik.com/berita/d-8637214/hakim-tolak-praperadilan-febrie-adriansyah-penyitaan-status-tersangka-sah>.

¹⁸ Tirto.id, "Hakim Tolak Praperadilan Eks Jampidsus Febrie Adriansyah," 27 August 2026, <https://tirto.id/hakim-tolak-praperadilan-eks-jampidsus-febrie-adriansyah-hBW0>.

¹⁹ Tribunnews, "Penetapan Tersangka Sebelum Pemeriksaan, Apakah Sah Secara Hukum?," 18 July 2026, <https://www.tribunnews.com/tribunners/7855996/penetapan-tersangka-sebelum-pemeriksaan-apakah-sah-secara-hukum>.

stage; experts presented by the House of Representatives countered that flexibility in determining whom to interview constitutes professional discretion necessary for the effectiveness of a preliminary inquiry rather than legal uncertainty.²⁰ A further application, Case No. 316/PUU-XXIV/2026, challenges the absence of a clear temporal limit upon the suspension of the examination of the principal case while pretrial proceedings remain pending.²¹

Existing scholarship supplies an indispensable foundation but does not answer the question posed here. Effendi and Marbun analysed the requirement within the framework of the 1981 Code.²² Suarda and Taufiqurrohman examined the limits upon the legality of suspect designation within the Indonesian pretrial system,²³ while Susilo and colleagues criticised the repeated designation of individuals as suspects as a threat to legal certainty and to the protection of human rights, concluding that the authority of pretrial judges remains confined to the review of formal aspects.²⁴ In a more recent study the same authors observe that neither the previous nor the newly enacted Criminal Procedure Code expressly requires detained suspects to be brought before a judge during pretrial procedures, a circumstance that weakens procedural fairness, restricts the suspect's opportunity to be heard directly, and diminishes the effectiveness of judicial supervision over detention.²⁵ None of these works, however, evaluates Article 90 of Law No. 20 of 2025 against the constitutional standard articulated in Decision No. 21/PUU-XII/2014, nor maps the early judicial practice that has emerged since the Code entered into force. That gap constitutes the novelty of the present article.

This study finds that the 2025 Code accommodates the evidentiary component of the constitutional standard while abandoning its procedural component; that the

²⁰ Constitutional Court of the Republic of Indonesia, "Risiko Memberikan Surat Tanda Terima Laporan kepada Terlapor," 21 May 2026, <https://www.mkri.id/berita/risiko-memberikan-surat-tanda-terima-laporan-kepada-terlapor-25090>.

²¹ ANTARA News, "MK Uji Materiil KUHAP Baru Menyoal Praperadilan," 2 September 2026, <https://www.antaranews.com/berita/5723413/mk-uji-materiil-kuhap-baru-menyoal-praperadilan>.

²² Effendi, "Relevansi Pemeriksaan Calon Tersangka," 275.

²³ I Gede Widhiana Suarda and Moch Taufiqurrohman, "Limiting the Legality of Determining Suspects in Indonesia Pre-Trial System," *Indonesia Law Review* 11, no. 2 (2021): 139, <https://doi.org/10.15742/ilrev.v11n2.2>.

²⁴ Erwin Susilo et al., "Justice Delayed, Justice Denied: A Critical Examination of Repeated Suspect Status in Indonesia," *Hasanuddin Law Review* 10, no. 3 (2024): 344, <https://doi.org/10.20956/halrev.v10i3.6088>.

²⁵ Erwin Susilo et al., "The Right to be Heard Prior to Judicial Proceedings: Human Rights and Fair Trial Deficiencies in Indonesian Pre-Trial Processes," *Yustisia* 15, no. 1 (2026): 48, <https://doi.org/10.20961/yustisia.v15i1.102131>.

omission has been treated by pretrial courts as a deliberate legislative choice rather than as a lacuna to be filled by judicial construction; and that the resulting configuration leaves the right to be heard without a normative anchor at either end of the pre-adjudication process.

2. Research Questions

Proceeding from the background set out above, this study addresses three questions. First, what is the position of the examination of a prospective suspect as a requirement for the designation of a suspect under Constitutional Court Decision No. 21/PUU-XII/2014? Second, to what extent has that requirement been accommodated within the norms of Law No. 20 of 2025 concerning the Criminal Procedure Code? Third, what are the legal implications of the resulting arrangement for the protection of the rights of suspects and for the pretrial mechanism within the Indonesian criminal justice system?

These three questions are sequential rather than parallel. The first establishes the constitutional benchmark; the second measures the positive law against that benchmark; and the third traces the consequences of any divergence between them. The line of reasoning thus moves from the identification of a constitutional standard, through an assessment of its legislative reception, to an evaluation of its practical effects.

3. Research Methods

This study employs normative legal research, which treats law as a system of norms and seeks prescriptions concerning what ought to be done in respect of a given legal issue rather than a description of social behaviour.²⁶ Three approaches are combined. The statutory approach is directed at Law No. 8 of 1981, Law No. 20 of 2025, Supreme Court Regulation No. 4 of 2016, and the 1945 Constitution of the Republic of Indonesia, in particular Article 1(3), Article 27(1), and Article 28D(1).²⁷ The case approach is directed at Constitutional Court Decision No. 21/PUU-XII/2014 and Decision No. 130/PUU-XIII/2015, together with the pretrial rulings of the South Jakarta District Court delivered in August 2026 and the constitutional applications currently pending. The conceptual approach draws upon the due process and crime control models, upon the principle of *audi et alteram partem*, and upon the doctrine of sufficient preliminary evidence.

²⁶ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media, 2008), 93–95.

²⁷ The 1945 Constitution of the Republic of Indonesia, arts. 1(3), 27(1), 28D(1), and 28G(1).

The legal materials are of three orders. Primary legal materials comprise the Constitution, the statutes and regulations identified above, and the judicial decisions enumerated. Secondary legal materials comprise scholarly monographs and peer-reviewed articles, supplemented, for events postdating the entry into force of the new Code, by reports from established news organisations and by the official releases of the Constitutional Court. Tertiary legal materials comprise legal dictionaries and encyclopaedias. The materials were collected through documentary study and analysed qualitatively by means of interpretation, systematisation, and argumentation, the conclusions being drawn deductively from the constitutional standard to the concrete provisions under examination.

B. DISCUSSION/ ANALYSIS

The discussion is organised in accordance with the sequence of the three research questions. The first section reconstructs the constitutional standard established in 2015; the second measures the provisions of the 2025 Code against that standard; and the third traces the consequences of the divergence identified for the protection of the rights of suspects and for the operation of the pretrial mechanism.

1. The Position of Prospective Suspect Examination in Constitutional Court Decision No. 21/PUU-XII/2014

a. The Normative Vacuum in the 1981 Criminal Procedure Code

The 1981 Criminal Procedure Code was drafted upon the assumption that the investigator, as an officer of the state bound by an oath of office, would exercise the power to designate a suspect in good faith and upon a rational appraisal of the materials before him. The Code accordingly defined a suspect, in Article 1 number 14, as a person who on account of his act or circumstances, on the basis of preliminary evidence, is reasonably suspected of having committed a criminal offence, without specifying either the quantity or the quality of the evidence required.²⁸ M. Yahya Harahap observed early on that the expression “preliminary evidence” was among the most elastic in the entire Code, and that its elasticity was systematically exploited in practice.²⁹

The elasticity of the phrase produced two distinct pathologies. The first was evidentiary: a designation could rest upon a single statement, or indeed upon the

²⁸ Law No. 8 of 1981 concerning the Criminal Procedure Code, art. 77.

²⁹ M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP: Penyidikan dan Penuntutan* (Jakarta: Sinar Grafika, 2002), 134.

unilateral account of a reporting party, without any corroborating material. The second was procedural: since the Code nowhere required the investigator to hear the person concerned, a citizen might learn of his own designation only upon receiving a summons for examination in the capacity of a suspect. Bahran argues that the combination of these two pathologies rendered the designation of a suspect the weakest link in the Indonesian criminal process from the standpoint of human rights protection.³⁰

The situation was aggravated by the closed enumeration of pretrial objects in Article 77. Muntaha notes that the pretrial mechanism was conceived by the framers of the 1981 Code as a limited instrument of horizontal supervision, confined to the legality of arrest, detention, the termination of investigation or prosecution, compensation, and rehabilitation.³¹ Because the designation of a suspect was not enumerated, the act which logically precedes and legitimates every subsequent coercive measure remained outside the reach of the courts. Wahyu Iswantoro characterises the response of a number of first-instance judges, who entertained such applications notwithstanding the text of Article 77, as an exercise in judicial law-finding necessitated by the inadequacy of the statute itself.³²

b. The Construction of “Sufficient Preliminary Evidence”

Decision No. 21/PUU-XII/2014 addressed the evidentiary pathology by supplying the quantitative benchmark that the legislature had withheld. The Court held that the expressions “preliminary evidence”, “sufficient preliminary evidence”, and “sufficient evidence” in Article 1 number 14, Article 17, and Article 21(1) of the Code are to be construed as at least two items of evidence of the kinds contained in Article 184.³³ The construction transposed to the investigative stage the minimum evidentiary rule that Article 183 imposes upon the trial judge, thereby establishing a coherent evidentiary architecture across the criminal process as a whole.

The significance of that transposition should not be underestimated. In a system of negative statutory proof, the minimum of two items of evidence operates as a guarantee against conviction upon the uncorroborated word of a single witness. Extending the

³⁰ Bahran, “Penetapan Tersangka Menurut Hukum Acara Pidana,” 222.

³¹ Muntaha, “Pengaturan Praperadilan dalam Sistem Peradilan Pidana di Indonesia,” *Mimbar Hukum* 29, no. 3 (2017): 465, <https://doi.org/10.22146/jmh.22318>.

³² Wahyu Iswantoro, “Penemuan Hukum oleh Hakim dan Implikasi terhadap Perkembangan Praperadilan,” *Majalah Hukum Nasional* 48, no. 1 (2018): 47, <https://doi.org/10.33331/mhn.v48i1.112>.

³³ Constitutional Court, Decision No. 21/PUU-XII/2014.

same minimum to the designation of a suspect converts the designation from an administrative assessment into an evidentiary conclusion, and renders it susceptible of objective verification by a court. Jerzy Skorupka, writing on continental European systems, observes that rules of admissibility perform precisely this function of subjecting the pre-trial gathering of material to standards that can later be tested judicially.³⁴

It must nevertheless be emphasised that the Court did not rest content with a numerical criterion. The literature is consistent in reading the decision as requiring not merely two items of evidence but two items that are lawful and that bear a relevant connection to the person designated. Putra Jaya, Sukinta, and Choiruddin note that the decision requires the two items to be accompanied by the objective conviction of the investigator, so that the quality of the connection between the evidence and the person, and not merely the arithmetic of the materials in the file, becomes the object of assessment.³⁵ A designation supported by two documents which establish only that an offence has occurred, without establishing the involvement of the person concerned, would not satisfy the standard so construed.

c. Operative Part or Legal Considerations: Locating the Examination Requirement

The second pathology, the absence of any obligation to hear the person concerned, was addressed by the Court in terms that have proved far more contentious. The requirement that the two items of evidence be accompanied by an examination of the prospective suspect, save in offences capable of adjudication in the absence of the accused, is central to the present study, and its precise normative status determines the entire analysis that follows.

Two readings compete. Upon the first, the requirement appears only in the legal considerations of the Court and not in the operative part of the decision, with the consequence that it lacks the erga omnes binding force attaching to the operative part itself.³⁶ Upon the second, advanced among others by Suparji Ahmad, the Court construed the three evidentiary expressions, in both the operative part and the legal considerations, as denoting at least two items of lawful evidence accompanied by an

³⁴ Jerzy Skorupka, "The Rule of Admissibility of Evidence in the Criminal Process of Continental Europe," *Revista Brasileira de Direito Processual Penal* 7, no. 1 (2021): 96, <https://doi.org/10.22197/RBDPP.V7I1.526>.

³⁵ Putra Jaya, Sukinta, and Choiruddin, "Tinjauan Yuridis Penetapan Status Tersangka," 5.

³⁶ Tribunnews, "Penetapan Tersangka Sebelum Pemeriksaan."

examination of the prospective suspect, so that the requirement forms an integral component of the constitutional construction of the phrase.³⁷

The present study adopts a qualified version of the second reading. It is a settled proposition of constitutional adjudication that those legal considerations which constitute the direct and indispensable ground of the operative part, that is to say the *ratio decidendi*, share the binding character of the operative part, whereas observations made *obiter* do not. Despan Heryansyah and Harry Setya Nugraha argue in this connection that the substantive authority of a constitutional ruling derives from the reasoning that sustains it, and that a legislature which reproduces the operative part while discarding its supporting reasoning has complied with the decision in form only.³⁸ Where, as here, the Court construed a statutory phrase by reference to the requirements of due process of law, the examination of the prospective suspect is not an incidental remark but the very mechanism by which the constitutional defect identified by the Court was to be remedied.

Two further considerations support that conclusion. The first is the express exception for offences capable of adjudication in the absence of the accused. An exception is drafted only in respect of a rule; the presence of a carefully delimited exception is therefore strong internal evidence that the Court intended to state a rule rather than to offer a recommendation. The second is the functional relationship between the requirement and the extension of pretrial review effected by the same decision. If the pretrial judge is to test the validity of a designation, there must be something capable of being tested; a designation reached without hearing the person concerned presents the judge with a file constructed entirely from one perspective. Rocky Marbun makes essentially this point in contending that the phrase acquires meaning only when it is operationalised through the pretrial mechanism.³⁹

It is nonetheless necessary to acknowledge the force of the contrary position. Erdianto Effendi is correct that the Criminal Procedure Code itself never imposed such an obligation, and that the term “prospective suspect” is unknown to the Code, the

³⁷ JawaPos.com, “Pakar Hukum Pidana Persoalkan Penetapan Tersangka Febrie Adriansyah Tanpa Pemeriksaan,” 18 July 2026, <https://www.jawapos.com/kasuistika/2607180125/pakar-hukum-pidana-persoalkan-penetapan-tersangka-febrie-adriansyah-tanpa-pemeriksaan>.

³⁸ Despan Heryansyah and Harry Setya Nugraha, “Relevansi Putusan Uji Materi oleh Mahkamah Konstitusi terhadap Sistem *Checks and Balances* dalam Pembentukan Undang-Undang,” *Undang: Jurnal Hukum* 2, no. 2 (2019): 356, <https://doi.org/10.22437/ujh.2.2.353-379>.

³⁹ Marbun, “Trikotomi Relasi dalam Penetapan Tersangka,” 175.

examination in practice being conducted in the capacity of a witness because the legal status of the person concerned has not yet crystallised.⁴⁰ A requirement whose textual anchorage is contested is, for that very reason, vulnerable; and its vulnerability is the precise problem that the enactment of a new Code has brought to the surface.

d. Institutional Narrowing through Supreme Court Regulation No. 4 of 2016

Whatever view is taken of the binding force of the requirement, its practical significance was substantially reduced by Supreme Court Regulation No. 4 of 2016. Article 2(2) of that Regulation confines the pretrial examination of an application concerning the invalidity of a suspect designation to the formal aspect, namely the existence of at least two items of lawful evidence, and prohibits the judge from entering into the substance of the case.⁴¹ The Regulation thus adopted one half of the constitutional standard and silently discarded the other.

The effect upon adjudication has been considerable. Alfitra documents a pronounced disparity among pretrial rulings concerning suspect designation in corruption cases, a disparity traceable in part to differing conceptions of the scope of the judge's inquiry.⁴² Nurbaedah, surveying the reform of pretrial institutions after the Constitutional Court's intervention, concludes that the formal limitation has produced an institution capable of counting evidence but incapable of evaluating the fairness of the process by which that evidence was assembled.⁴³ Susilo and colleagues reach a convergent conclusion, finding that pretrial judges assess the validity of designations by reference to procedural and formal principles and that their authority is confined to the review of formal aspects.⁴⁴ Table 1 summarises the resulting trajectory.

Table 1. Development of the Requirements for Suspect Designation

Aspect	Law No. 8 of 1981	Decision No. 21/PUU-XII/2014	Supreme Court Regulation No. 4 of 2016
Evidentiary standard	"Sufficient preliminary evidence", without any quantitative benchmark	At least two items of evidence under Article 184 of the Code	At least two items of lawful evidence

⁴⁰ Effendi, "Relevansi Pemeriksaan Calon Tersangka," 275.

⁴¹ Supreme Court Regulation No. 4 of 2016, art. 2(2).

⁴² Alfitra, "Disparitas Putusan Praperadilan," 11.

⁴³ Nurbaedah, "Juridical Study of Reforming the Criminal Procedural Law System regarding Pretrial Institutions after Constitutional Court Decision in Indonesia," *Jurnal Akta* 9, no. 2 (2022): 143, <https://doi.org/10.30659/akta.v9i2.21530>.

⁴⁴ Susilo et al., "Justice Delayed, Justice Denied," 350.

Aspect	Law No. 8 of 1981	Decision No. 21/PUU-XII/2014	Supreme Court Regulation No. 4 of 2016
Examination of the prospective suspect	Not regulated	Required, save in offences adjudicated in the absence of the accused	Not adopted as a criterion of review
Objects of pretrial review	Arrest, detention, termination of proceedings, compensation, rehabilitation	Extended to suspect designation, search, and seizure	Follows the extension, limited to the formal aspect
Nature of the examination	—	Review of the constitutionality of the norm	Restricts the judge from entering the substance of the case

Source: processed from Law No. 8 of 1981; Constitutional Court Decision No. 21/PUU-XII/2014; Supreme Court Regulation No. 4 of 2016.

Table 1 discloses a pattern of progressive attenuation. A requirement stated by the Constitutional Court in two cumulative components was received by the Supreme Court in one component only, and the component discarded was the procedural safeguard rather than the evidentiary threshold. That pattern, as the following section demonstrates, was subsequently replicated at the legislative level.

2. The Accommodation of the Requirement within the 2025 Criminal Procedure Code

a. Suspect Designation as a Coercive Measure

Law No. 20 of 2025 introduces a conceptual innovation of considerable importance. Article 1 number 14 defines coercive measures so as to include the designation of a suspect alongside arrest, detention, search, seizure, interception, blocking, and the prohibition on leaving Indonesian territory. The inclusion of the designation within that category is a significant normative development, since its consequence is that the designation must be understood as a coercive act of the state subject to the principles of legality, proportionality, and judicial control.⁴⁵

The innovation carries the reasoning of Decision No. 21/PUU-XII/2014 to its logical conclusion. The Constitutional Court had brought the designation within the reach of pretrial review by way of interpretation; the legislature has now done so by way of classification. Prasnada and colleagues argue that the classificatory question, namely whether a given act is characterised as administrative or as coercive, effectively

⁴⁵ Faculty of Law, Universitas Widya Mataram, "Pasal 1 UU No. 20 Tahun 2025 tentang KUHP."

determines the intensity of the judicial control to which the act is subject.⁴⁶ Upon that view Article 1 number 14 ought to have furnished the foundation for a more demanding procedural regime rather than a less demanding one.

b. Article 90 and the Retention of the Two-Evidence Standard

Article 90(1) provides that the designation of a suspect is effected by the investigator in respect of a person suspected of having committed a criminal offence on the basis of at least two items of evidence. The provision contains two cumulative components: a suspicion that an offence has been committed, and an evidentiary basis meeting the statutory minimum. The designation may accordingly not rest upon intuition, assumption, rumour, or the subjective conviction of an officer.⁴⁷ Commentators have welcomed the express statutory embodiment of a standard that previously existed only by way of judicial construction.⁴⁸

Article 90 supplements the evidentiary requirement with procedural guarantees that the 1981 Code did not contain. The designation must be embodied in a written instrument; it must be notified to the suspect within one day at the latest; and it must set out the rights of the suspect. These obligations render transparent a change in a person's legal status which was formerly capable of occurring without the person's knowledge.⁴⁹ They also extend the logic of Decision No. 130/PUU-XIII/2015, in which the Court held that the investigator must notify and deliver the notice of commencement of investigation to the public prosecutor, to the reported party, and to the victim or reporting party within seven days at the latest of the issuance of the investigation order.⁵⁰ The Court reasoned there that the absence of a firm and clear mechanism rendered the rights of the reported party uncertain and was inconsistent with the principle of a prompt, simple, and inexpensive process.⁵¹

To this extent the new Code represents a genuine advance. The difficulty lies not in

⁴⁶ Firman Edi Prasnada, Sunardi, and Muhibbin, "Status of Pretrial Institutions in Indonesian Criminal Law," *International Journal of Law, Environment, and Natural Resources* 3, no. 1 (2023): 6, <https://doi.org/10.51749/injurlens.v3i1.54>.

⁴⁷ Ramdani, "Pasal 90 KUHAP."

⁴⁸ VIVA, "Pakar Hukum Tata Negara: KUHAP Baru Tegaskan Penetapan Tersangka Berdasarkan Minimal Dua Alat Bukti Sah," 15 July 2026, <https://www.viva.co.id/berita/nasional/1913726-pakar-hukum-tata-negara-kuhap-baru-tegaskan-penetapan-tersangka-berdasarkan-minimal-dua-alat-bukti-sah>.

⁴⁹ Ramdani, "Pasal 90 KUHAP."

⁵⁰ Constitutional Court of the Republic of Indonesia, Decision No. 130/PUU-XIII/2015, 11 January 2017.

⁵¹ Hukumonline, "MK Tetapkan 7 Hari Penyerahan SPDP ke Penuntut Umum," 11 January 2017, <https://www.hukumonline.com/berita/a/mk-tetapkan-7-hari-penyerahan-spdp-ke-penuntut-umum-lt58763386dea5a/>.

what Article 90 contains but in what it omits.

c. The Omission of the Examination Requirement: Two Competing Readings

Article 90 regulates the requirements and the procedure for the designation of a suspect without stipulating the examination of a prospective suspect as a precondition.⁵² Two constructions of that silence have emerged, and the choice between them determines the constitutional assessment of the provision.

Upon the first construction, the silence is deliberate and decisive. Henry Yosodiningrat maintains that Decision No. 21/PUU-XII/2014 cannot be applied automatically to the provisions of the new Code, since the norms there examined have been repealed, and that neither investigators nor judges may add procedural requirements for which the statute makes no provision, the principles of legal certainty, *lex scripta*, and *lex stricta* forbidding any such addition.⁵³ Muhammad Rullyandi reasons along parallel lines, arguing that once the investigator has obtained the statutory minimum of two items of lawful evidence the designation may be made without a prior examination of the prospective suspect in the capacity of a witness, the requirement developed in practice under the 2014 decision having ceased to be absolute.⁵⁴

Upon the second construction, the constitutional principle survives the repeal of the statutory text. Suparji Ahmad contends that a designation effected without any examination is liable to contravene both Decision No. 21/PUU-XII/2014 and the principle of due process of law to which the new Code itself adheres, and that the investigator remains obliged to afford the person about to be designated an opportunity to be heard.⁵⁵ He accepts that the Code does not recognise the term “prospective suspect” and that in investigative practice the examination is conducted in the capacity of a witness, the legal status of the person not yet having crystallised, but treats that as a matter of nomenclature rather than of substance.⁵⁶

The position defended here occupies an intermediate ground and rests upon a

⁵² Media Indonesia, “Penetapan Tersangka Sah Tanpa Didahului Pemeriksaan sebagai Saksi,” 18 July 2026, <https://mediaindonesia.com/politik-dan-hukum/912251/penetapan-tersangka-sah-tanpa-didahului-pemeriksaan-sebagai-saksi>.

⁵³ Tribunnews, “Penetapan Tersangka Sebelum Pemeriksaan.”

⁵⁴ VIVA, “Pakar Hukum Tata Negara.”

⁵⁵ RMOL, “Jadi Tersangka Tanpa Diperiksa, Pakar: Bertentangan dengan Konstitusi,” 18 July 2026, <https://rmol.id/hukum/read/2026/07/18/715040/jadi-tersangka-tanpa-diperiksa-pakar-bertentangan-dengan-konstitusi>.

⁵⁶ JawaPos.com, “Pakar Hukum Pidana Persoalkan Penetapan Tersangka Febrie Adriansyah.”

distinction between the object of review and the standard of review. It is correct that Decision No. 21/PUU-XII/2014 examined the norms of the 1981 Code and that those norms have been repealed; the decision cannot therefore operate of its own force upon Article 90 of the new Code. The constitutional yardstick by reference to which the Court reached its conclusion has, however, not been repealed. Article 1(3), Article 27(1), and Article 28D(1) of the 1945 Constitution remain in force, and the guarantee of certainty of law that is just, together with the principle of equality before the law, continues to operate.⁵⁷ It follows that the *ratio* of the 2014 decision retains its authority as a constitutional standard against which Article 90 may be measured, even though it does not bind the new provision automatically. The appropriate route to the restoration of the safeguard is accordingly a fresh constitutional review of Article 90 rather than the assertion that the earlier decision continues to apply of its own motion.

That intermediate position also accommodates the legitimate concern voiced by the first construction. A judge who imports into a statute a procedural condition that the legislature has not enacted does indeed strain the principle of legality. The remedy for a constitutionally deficient statute lies with the Constitutional Court, whose function is precisely to supply a conditional construction where a norm would otherwise operate unconstitutionally. Aristo Pangaribuan observes in this connection that Indonesian criminal procedure scholarship has too readily treated judicial improvisation as a substitute for legislative and constitutional reform.⁵⁸

d. Article 22(1) as a Facultative Substitute

The new Code is not wholly silent upon the hearing of persons whose status remains undetermined. Article 22(1) provides that, for the purposes of investigation, the investigator may summon or approach a person in order to obtain information without first conferring upon that person the status of suspect or witness. Experts presented by the House of Representatives have argued that the provision operates in favour of the citizen: the phrase “without first” enables the investigator to map the facts with care so that a person is not immediately stigmatised as a suspect before the evidence is sufficient, and in complex matters such as corruption or cybercrime a person’s status is frequently unclear at the outset of an investigation, so that a space for preliminary

⁵⁷ The 1945 Constitution of the Republic of Indonesia, art. 28D(1).

⁵⁸ Aristo M. A. Pangaribuan, “Menyegarkan Pendekatan Studi Hukum Acara Pidana,” *Mimbar Hukum* 33, no. 2 (2021): 341, <https://doi.org/10.22146/mh.v33i2.3727>.

clarification protects reputation against premature legal labelling.⁵⁹

That argument has genuine force, and it would be a mistake to dismiss Article 22(1) as a mere evasion. Functionally the provision furnishes the very vehicle through which a prospective suspect might be heard. Its deficiency lies elsewhere, in its modality: the provision is cast in permissive terms. The investigator may summon; the investigator is not obliged to do so. A right that depends upon the discretion of the official against whose conduct it is designed to operate is not a right at all in any meaningful sense. The applicants in Case No. 2/PUU-XXIV/2026 have accordingly sought a conditional construction of Article 22(1) requiring the investigator to confer upon the person the status of suspect, prospective suspect, or witness before obtaining information.⁶⁰

The same objection of permissiveness attaches to Article 16(1), which enumerates the methods by which a preliminary inquiry may be conducted, interview among them, without specifying to whom an interview must be directed. The applicants contend that the provision does not identify, whether exhaustively or minimally, the persons to whom an interview at the preliminary inquiry stage must be directed, so that an inquiry may proceed upon unilateral information without any normative obligation to hear the other interested party, with a consequent risk to the principle of due process of law.⁶¹ Table 2 sets out the correspondence between the constitutional standard and the provisions of the new Code.

Table 2. Accommodation of the Constitutional Standard in Law No. 20 of 2025

Aspect	Standard in Decision No. 21/PUU-XII/2014	Provision of Law No. 20 of 2025	Status of accommodation
Evidentiary standard	At least two items of evidence	At least two items of evidence – Article 90(1)	Accommodated
Examination of the prospective suspect	Required, save in proceedings in the absence of the accused	Not stipulated in Article 90	Not accommodated
Judicial control of the designation	Object of pretrial review	Classified as a coercive measure – Article 1 number 14	Accommodated and reinforced
Notification to the suspect	Not regulated	Written instrument, notification within one day, statement of rights – Article 90	New norm beyond the standard

⁵⁹ Constitutional Court, “Risiko Memberikan Surat Tanda Terima Laporan kepada Terlapor.”

⁶⁰ Constitutional Court, “Risiko Memberikan Surat Tanda Terima Laporan kepada Terlapor.”

⁶¹ Constitutional Court of the Republic of Indonesia, “Dua Warga Uji Materiil KUHP dan KUHP Baru,” 9 January 2026, <https://www.mkri.id/berita/dua-warga-uji-materiil-kuhp-dan-kuhp-baru-24327>.

Aspect	Standard in Decision No. 21/PUU-XII/2014	Provision of Law No. 20 of 2025	Status of accommodation
Clarification prior to designation	Through examination of the prospective suspect	Summons without conferral of status, permissive – Article 22(1)	Partially accommodated, not obligatory

Source: processed from Constitutional Court Decision No. 21/PUU-XII/2014 and Law No. 20 of 2025.

Table 2 supports the finding that the accommodation has been selective. Of the components of the constitutional standard, the quantitative and the institutional were received while the procedural was not, and the substitute supplied in Article 22(1) is permissive rather than mandatory. The hypothesis of selective reception advanced in the introduction is therefore confirmed at the level of the text.

3. Implications for the Protection of Suspects' Rights and the Pretrial Mechanism

a. Early Judicial Practice: The Pretrial Rulings of August 2026

The textual analysis set out above is not merely predictive. The pretrial applications filed by Febrie Adriansyah before the South Jakarta District Court provide the first sustained judicial treatment of the question under the new Code, and the outcome confirms the analysis. In the first application the single judge rejected the application in its entirety, holding that the new Code does not stipulate the examination of a prospective suspect and reasoning that where an objective basis consisting of at least two items of lawful evidence existed prior to the designation, the absence of a prior summons and examination of the applicant did not of itself constitute a ground for annulling the designation.⁶²

The court supported that conclusion with a series of subsidiary propositions. It held that the case had not arisen abruptly, a series of preliminary inquiries and case conferences having preceded the search complained of; that the Code prescribes no minimum interval between the issuance of an investigation order and the execution of a search; and that the speed or slowness of a process cannot serve as the sole parameter of the validity of a designation.⁶³ It further rejected the contention that the absence of any request for information from the applicant demonstrated that no preliminary inquiry had taken place, observing that the law does not require the prior examination

⁶² Detikcom, "Hakim Tolak Praperadilan Febrie Adriansyah."

⁶³ Tirto.id, "Hakim Tolak Praperadilan Eks Jampidsus Febrie Adriansyah."

of a person subsequently designated as a suspect.⁶⁴ In the second application the court likewise upheld both the designation and the detention.⁶⁵ Reporting upon the rulings recorded the central proposition in terms that leave no room for doubt: the examination of a prospective suspect is not regulated in the Criminal Procedure Code, although it does not follow that a designation may be made arbitrarily.⁶⁶

Three observations follow. First, the courts have construed the silence of Article 90 as a deliberate legislative choice rather than as a gap to be filled by construction, which is a defensible reading of the principle of legality but which forecloses the route of judicial reinstatement. Second, the standard of review has in practice reverted to the formal criterion of Supreme Court Regulation No. 4 of 2016, with the consequence that the pretrial judge counts the items of evidence without examining the fairness of the process by which they were gathered. Third, and most significantly, the dimension of the right to be heard that Decision No. 21/PUU-XII/2014 sought to secure has disappeared from the adjudicative frame altogether.

b. The Structural Weakening of the Right to Be Heard

The difficulty is not confined to Article 90. Susilo and colleagues demonstrate that neither the previous nor the newly enacted Criminal Procedure Code expressly requires detained suspects to be brought before a judge during pretrial procedures, and argue that the absence of any obligation to present the detained suspect weakens procedural fairness, restricts the suspect's opportunity to be heard directly, and reduces the effectiveness of judicial supervision over detention.⁶⁷ Their comparative survey of habeas corpus and judicial oversight in England, the United States, India, the Philippines, Spain, Portugal, and the Netherlands underscores how unusual that omission is.

Placing the two findings side by side reveals a structural, and not merely a local, defect. If a prospective suspect need not be heard before designation, and a designated suspect need not be heard in the pretrial proceedings that follow, then the principle of

⁶⁴ Detikcom, "Pertimbangan Hakim Tolak Praperadilan Febrie Adriansyah," 27 August 2026, <https://news.detik.com/berita/d-8637271/pertimbangan-hakim-tolak-praperadilan-febrie-adriansyah>.

⁶⁵ Detikcom, "Pertimbangan Hakim Tolak Lagi Praperadilan Febrie Adriansyah," 28 August 2026, <https://news.detik.com/berita/d-8638562/pertimbangan-hakim-tolak-lagi-praperadilan-febrie-adriansyah>.

⁶⁶ Tribunnews, "Hakim Patahkan Dalil Kubu Febrie Adriansyah, Pemeriksaan Calon Tersangka Tak Diatur dalam KUHAP," 27 August 2026, <https://www.tribunnews.com/nasional/7874504/hakim-patahkan-dalil-kubu-febrie-adriansyah-pemeriksaan-calon-tersangka-tak-diatur-dalam-kuhap>.

⁶⁷ Susilo et al., "The Right to be Heard Prior to Judicial Proceedings," 60.

audi et alteram partem lacks a normative anchor at both ends of the pre-adjudication process. Pawana and Setyawan emphasise that the principle is not a procedural courtesy but a constitutive condition of the legitimacy of any adjudicative determination.⁶⁸ Its absence at both stages leaves the accusatorial character of the process, which Pura and Faridah identify as the axis upon which the protection of the rights of suspects turns, without practical content.⁶⁹

The consequences extend beyond the individual case. Herbert Packer's well-known opposition between the crime control and due process models is frequently invoked to justify the trade-off that Article 90 embodies, the former prizing efficiency and finality and the latter formal scrutiny and the rectification of error.⁷⁰ The invocation is, however, misconceived in the present context. A requirement to hear the person concerned before designation does not impede the gathering of evidence; it tests the evidence already gathered against the account of the person most directly affected by it. Susilo and colleagues show that the repeated designation of individuals as suspects, a phenomenon arising precisely where the initial designation was insufficiently tested, imposes substantial costs upon the system itself.⁷¹ Early clarification is an instrument of efficiency quite as much as of fairness. Yasir and colleagues reach a similar conclusion in arguing for a reconstruction of investigative practice grounded in the values of substantive justice.⁷²

A further consequence concerns the quality of judicial supervision. Where the pretrial judge is confined to counting items of evidence, the institution loses the capacity that justified its extension in 2015. Sumadi argues that pretrial review was conceived as an instrument for the protection of the human rights of suspects and not as an audit of the file,⁷³ while Kusuma, Sepud, and Karma observe that its effectiveness depends upon

⁶⁸ Sella Christy Pawana and Vincentius Patria Setyawan, "Principles *Audi Et Alteram Partem* Compatibility in Litigation Process at State and Religious Court: Impact of Pandemic," *Musamus Law Review* 4, no. 2 (2022): 60, <https://doi.org/10.35724/mularev.v4i2.4108>.

⁶⁹ Mohammad Hatta Pura and Hesti Faridah, "Asas Akusator dalam Perlindungan Hukum atas Hak Tersangka Berdasarkan Undang-Undang Nomor 8 Tahun 1981 tentang Kitab Undang-Undang Hukum Acara Pidana," *Jurnal Hukum Sasana* 7, no. 1 (2021): 81, <https://doi.org/10.31599/sasana.v7i1.536>.

⁷⁰ Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), 158–163.

⁷¹ Susilo et al., "Justice Delayed, Justice Denied," 350.

⁷² Yasir, Gunarto, and Bawono, "Legal Reconstruction of Suspect Investigation," 4.

⁷³ Rahmat Sumadi, "Praperadilan sebagai Sarana Kontrol dalam Melindungi Hak Asasi Manusia (HAM) Tersangka," *Jurnal Hukum Sasana* 7, no. 1 (2021): 151, <https://doi.org/10.31599/sasana.v7i1.597>.

the breadth of the matters that the judge is permitted to consider.⁷⁴ Faisal goes further, contending that the Indonesian pretrial mechanism requires structural reform if it is to discharge the supervisory function attributed to it.⁷⁵ The comparative literature points in the same direction: Kripsiaji and Minarno, comparing Indonesian and Dutch arrangements, note that in the Netherlands supervision over coercive measures is exercised by a judicial officer involved from an early stage rather than by way of subsequent review.⁷⁶ Tom Smith's study of pre-trial detention in England and Wales similarly emphasises that legal change unaccompanied by cultural change within the institutions concerned rarely produces the intended protective effect.⁷⁷

c. The Shift of the Contest to the Constitutional Court

Because the route of judicial reinstatement has been closed by the pretrial courts, the contest has moved to the Constitutional Court. The applications currently pending do not, however, uniformly target the provision that matters most for present purposes, and it is necessary to distinguish carefully between them.

In Case No. 2/PUU-XXIV/2026 the applicants challenge Article 16, Article 19(1), Article 22(1), and Article 23(5) of the new Code, seeking a conditional construction requiring the investigator to clarify the position of the reported party before a case is elevated to the investigation stage.⁷⁸ The experts presented by the House of Representatives resisted the application upon three grounds: that flexibility in determining whom to interview constitutes professional discretion necessary to the effectiveness of a preliminary inquiry rather than legal uncertainty; that to require the presence of the reported party at a case conference would transform an internal forum into an adversarial debate, jeopardising the confidentiality of the investigation and creating opportunities for the destruction of evidence or the flight of the perpetrator; and that the provisions taken together strike an appropriate balance between the

⁷⁴ I Made Wahyu Wiguna Kusuma, I Made Sepud, and Ni Made Sukaryati Karma, "Upaya Hukum Praperadilan dalam Sistem Peradilan Pidana di Indonesia," *Jurnal Interpretasi Hukum* 1, no. 2 (2020): 74, <https://doi.org/10.22225/juinhum.1.2.2438.73-77>.

⁷⁵ Faisal, "Pre-Trial in Indonesia: Why It Should Be Reformed," *Jurisprudentie* 10, no. 2 (2023): 72, <https://doi.org/10.24252/jurisprudentie.v10i2.43678>.

⁷⁶ Dinar Kripsiaji and Nur Basuki Minarno, "Perluasan Kewenangan dan Penegakan Hukum Praperadilan di Indonesia dan Belanda," *Al-Mazaahib: Jurnal Perbandingan Hukum* 10, no. 1 (2022): 22, <https://doi.org/10.14421/al-mazaahib.v10i1.2573>.

⁷⁷ Tom Smith, "The Practice of Pre-trial Detention in England & Wales: Changing Law and Changing Culture," *European Journal on Criminal Policy and Research* 28 (2022): 437, <https://doi.org/10.1007/s10610-022-09504-y>.

⁷⁸ Constitutional Court, "Risiko Memberikan Surat Tanda Terima Laporan kepada Terlapor."

effectiveness of law enforcement and the protection of human rights.⁷⁹ These objections are serious and any prescriptive proposal must accommodate them.

A caution entered by the Chief Justice at the preliminary hearing of the predecessor application is of particular importance. He observed that the matter in question does not belong to the preliminary inquiry but relates to the designation of a suspect, which is encountered either at the beginning or at the end of the investigation, and cautioned the applicants to be precise in formulating their grounds.⁸⁰ The caution goes to the heart of the present analysis. A challenge directed at Article 16, which governs the preliminary inquiry, is not the appropriate vehicle for restoring a safeguard that attaches to the moment of designation. The provision that requires review is Article 90.

The remaining applications illustrate the breadth of the dissatisfaction with the new Code without addressing the present question directly. In Case No. 150/PUU-XXIV/2026 an application was declared inadmissible for want of legal standing.⁸¹ In Case No. 54/PUU-XXIV/2026 eleven students and a legal consultant challenged a range of provisions, two of the applicants having been designated as suspects in connection with the May Day demonstrations of 2025.⁸² In Case No. 316/PUU-XXIV/2026 a reporting party challenges Article 163(1)(e) on the ground that it imperatively prohibits the examination of the principal case while pretrial proceedings remain incomplete, without any clear temporal limit, the delay in that case amounting to seven cumulative days.⁸³ The last application is instructive because it demonstrates that the design of pretrial review under the new Code is contested from the perspective of reporting parties as well as from that of suspects.⁸⁴ Table 3 summarises the position.

Table 3. Cases Relevant to Prospective Suspect Examination after the Entry into Force of the 2025 Code

Case number	Forum	Principal issue	Outcome or status
134/Pid.Pra/2026/PN Jkt.Sel and 135/Pid.Pra/2026	South Jakarta District Court	Validity of a suspect designation effected without prior examination	Rejected in their entirety, 27–28 August 2026; the Code held not to require the examination

⁷⁹ Constitutional Court, “Risiko Memberikan Surat Tanda Terima Laporan kepada Terlapor.”

⁸⁰ Constitutional Court, “Dua Warga Uji Materiil KUHP dan KUHP Baru.”

⁸¹ Tribunnews, “Penetapan Tersangka Sebelum Pemeriksaan.”

⁸² Constitutional Court of the Republic of Indonesia, “Tersangka Aksi May Day Uji KUHP Baru,” 11 February 2026, <https://www.mkri.id/berita/tersangka-aksi-may-day-uji-kuhp-baru-24599>.

⁸³ ANTARA News, “MK Uji Materiil KUHP Baru Menyoal Praperadilan.”

⁸⁴ Periskop.id, “MK Gelar Sidang Pendahuluan Uji Materiil Aturan Praperadilan KUHP Terbaru,” 3 September 2026, <https://periskop.id/hukum/20260903/mk-gelar-sidang-pendahuluan-uji-materiil-aturan-praperadilan-kuhp-terbaru>.

Case number	Forum	Principal issue	Outcome or status
150/PUU-XXIV/2026	Constitutional Court	Review of provisions of the new Code	Declared inadmissible for want of legal standing
2/PUU-XXIV/2026	Constitutional Court	Obligation to clarify the reported party before elevation to investigation – Articles 16, 19(1), 22(1), 23(5)	Expert hearing for the House of Representatives, 21 May 2026
54/PUU-XXIV/2026	Constitutional Court	Review of a range of provisions by applicants designated as suspects	Preliminary hearing, 11 February 2026
316/PUU-XXIV/2026	Constitutional Court	Absence of a temporal limit upon suspension of the principal case – Article 163(1)(e)	Preliminary hearing, 2 September 2026

Source: processed from the official releases of the Constitutional Court of the Republic of Indonesia and national media reports, 2026.

d. Prescriptive Implications

Three measures follow from the analysis. The first is a constitutional review of Article 90(1) of Law No. 20 of 2025, seeking a declaration that the provision is conditionally unconstitutional in so far as it is not construed as requiring that the designation of a suspect be preceded by an examination or clarification of the prospective suspect. Directing the challenge at Article 90 rather than at Article 16 accords with the caution entered by the Chief Justice and locates the safeguard at the point at which the change in legal status actually occurs.⁸⁵ The constitutional yardstick is the guarantee of certainty of law that is just contained in Article 28D(1) of the 1945 Constitution.⁸⁶

The second is that the requirement be formulated together with a set of calibrated exceptions, encompassing offences capable of adjudication in the absence of the accused, cases of apprehension in flagrante delicto, and situations in which there is a reasoned apprehension of flight, of the destruction of evidence, or of interference with witnesses, such apprehension to be recorded in writing and to be reviewable in pretrial proceedings. A requirement so framed answers the objections raised by the experts of the House of Representatives concerning confidentiality and operational effectiveness,⁸⁷ while preserving the safeguard in the ordinary case. Comparative experience indicates that procedural protections drafted with express and reviewable exceptions are more

⁸⁵ Constitutional Court, “Dua Warga Uji Materiil KUHP dan KUHAP Baru.”

⁸⁶ The 1945 Constitution of the Republic of Indonesia, art. 28D(1).

⁸⁷ Constitutional Court, “Risiko Memberikan Surat Tanda Terima Laporan kepada Terlapor.”

durable than those drafted in absolute terms.⁸⁸

The third is the revision of Supreme Court Regulation No. 4 of 2016 so as to permit the pretrial judge to determine whether the right of the prospective suspect to be heard was afforded, in addition to verifying the number of items of evidence. Nurbaedah and Faisal both argue that a purely formal review reduces the pretrial institution to an administrative audit.⁸⁹ Liliyana and Setyadi demonstrate, in their analysis of Decision No. 66/PUU-XVI/2018, that the Constitutional Court has previously intervened to correct procedural arrangements that deprived pretrial review of practical effect,⁹⁰ and Susilo and colleagues propose a reconfiguration of the evidentiary burden in pretrial proceedings to similar ends.⁹¹ A reform of this kind would restore the institution to the supervisory function envisaged in 2015 without displacing the prohibition upon entering the substance of the case.

Taken together, the three measures would reconstitute the constitutional standard in a form adapted to the architecture of the new Code. The classification of the designation as a coercive measure in Article 1 number 14 already supplies the conceptual foundation; what remains is to attach to that classification the procedural consequence that it entails.⁹² An open criminal justice system, as Adawiyah and Rozah observe, is one in which the person affected by a determination participates in the process by which it is reached rather than learning of it after the event.⁹³ The rights of the suspect recognised at the investigative stage, including the right to be informed and the right to respond, presuppose a moment at which those rights may meaningfully be exercised.⁹⁴ Article 90 in its present form does not supply that moment.

C. CONCLUSIONS

Constitutional Court Decision No. 21/PUU-XII/2014 established a cumulative

⁸⁸ Smith, "The Practice of Pre-trial Detention in England & Wales," 444.

⁸⁹ Nurbaedah, "Juridical Study of Reforming the Criminal Procedural Law System," 147.

⁹⁰ Dian Liliyana and Yudi Setyadi, "Legal Interpretation of the Constitutional Court on the Deadline Provisions for Imposing Pretrial Decisions Based on Decision Number 66/PUU-XVI/2018," *International Journal of Social Health* 1, no. 3 (2023): 131, <https://doi.org/10.58860/ijsh.v1i3.18>.

⁹¹ Erwin Susilo et al., "Reverse Evidence: A Beacon of Hope for Pretrial Reform," *Sriwijaya Law Review* 9, no. 2 (2025): 312, <https://doi.org/10.28946/slrev.v9i2.4642>.

⁹² Faculty of Law, Universitas Widya Mataram, "Pasal 1 UU No. 20 Tahun 2025 tentang KUHP."

⁹³ Robiatul Adawiyah and Umi Rozah, "Indonesia's Criminal Justice System with Pancasila Perspective as an Open Justice System," *Law Reform* 16, no. 2 (2020): 197, <https://doi.org/10.14710/lr.v16i2.33783>.

⁹⁴ Anak Agung Putu Surya Wiguna, I Made Sepud, and I Nyoman Sujana, "Hak-Hak Tersangka (*Miranda Rule*) pada Tahap Penyidikan dalam Kitab Undang-Undang Hukum Acara Pidana," *Jurnal Konstruksi Hukum* 1, no. 1 (2020): 53, <https://doi.org/10.22225/jkh.1.1.2128.51-56>.

standard for the designation of a suspect, comprising a minimum of two items of lawful evidence and an examination of the prospective suspect, the latter component residing in the *ratio decidendi* of the decision and constituting the mechanism by which the constitutional defect identified by the Court was to be remedied. Law No. 20 of 2025 accommodates the evidentiary and institutional components of that standard in Article 90(1) and Article 1 number 14 while omitting its procedural component, and the permissive summons provided for in Article 22(1) does not supply an equivalent safeguard. The omission has already produced concrete effects: the pretrial rulings of August 2026 treat the examination as non-constitutive, the standard of review has reverted to a formal count of the evidence, and the right to be heard is left without a normative anchor at either end of the pre-adjudication process. It is accordingly recommended that Article 90(1) be submitted to constitutional review with a view to a conditional construction incorporating the examination requirement together with calibrated and reviewable exceptions, and that Supreme Court Regulation No. 4 of 2016 be revised so as to permit the pretrial judge to determine whether that right was afforded.

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