

Constitutionality of Appeal in Pre-Trial Cases following constitutional court decision number 65/Puu-Ix/2011 and the 2025 Criminal Procedure Code based on substantive justice

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Abstract

Article 164, paragraph (2) of Law Number 20 of 2025 concerning the Criminal Procedure Code reintroduces the appeal mechanism for pretrial decisions that declare the invalidity of investigations or the termination of prosecutions. This provision is substantially similar to Article 83, paragraph (2) of the previous Criminal Procedure Code, which was deemed unconstitutional by Constitutional Court Decision Number 65/PUU-IX/2011. This research analyzes the constitutionality of Article 164, paragraph (2) of the 2025 Criminal Procedure Code and its relevance to the principle of substantive justice. The study employs normative research methods with statutory, case, conceptual, and philosophical approaches. The research findings indicate that this provision is constitutionally defective from inception, as it contradicts the ratio decidendi and operative part of Constitutional Court Decision 65/PUU-IX/2011, which affirms the principle of equality before the law as guaranteed by Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution. The reintroduction of the appeal mechanism creates structural inequalities that disadvantage suspects and undermines the pretrial process as an effective and final judicial control mechanism. From the perspective of substantive justice, Article 164, paragraph (2) of the 2025 Criminal Procedure Code may obstruct the achievement of true substantive justice.

Keywords: Pretrial, appeal, constitutional court decision, criminal procedure code, substantive justice

Introduction Backgrounds

On January 2, 2026, a significant change to Indonesia's criminal justice system was implemented with the enactment of Law Number 20 of 2025^[15], known as the Criminal Procedure Code (KUHAP 2025)^[15]. This new law replaces Law Number 8 of 1981 (KUHAP 1981). The purpose of this reform is to achieve legal certainty, justice, and benefits that reflect Pancasila's values while incorporating human rights principles into the criminal justice system. However, despite the reform's positive intentions, there are serious constitutional issues with its regulation of pretrial proceedings.

Pre-trial is a horizontal control institution that functions as a judicial oversight mechanism for the actions of investigators and public prosecutors (Wulandari, 2016)^[35]. Its existence is crucial to maintaining a balance between law enforcement's interests and the protection of human rights (Sebayang, S., 2020)^[24]. In the 1981 Criminal Procedure Code, Article 83 stipulates that pre-trial decisions cannot be appealed, except for decisions that determine the invalidity of the termination of investigation or prosecution. The provisions of Article 83 paragraph (2) were then tested at the Constitutional Court (hereinafter referred to as "CONSTITUTIONAL COURT") by Tjetje Iskandar, who felt aggrieved because there was discrimination in the submission of appeals, which were only given to investigators, while pre-trial applicants were not given similar rights.

On March 28, 2012, in Decision Number 65/PUU-IX/2011, the Constitutional Court declared that Article 83, paragraph (2), of the old Criminal Procedure Code was in conflict with the 1945 Constitution and therefore lacked binding legal force. The Court emphasized that this provision violated the principle of equality before the law, which is guaranteed by

Article 27, paragraph (1), and Article 28D, paragraph (1), of the 1945 Constitution. However, a paradoxical situation arose when the new Criminal Procedure Code, ratified on December 17, 2025^[15], contained provisions whose substance was identical to the norm revoked by the Constitutional Court. Article 164 paragraph (2) of the 2025 Criminal Procedure Code stated: "The provisions as referred to in paragraph (1) are excluded from pre-trial decisions which determine the invalidity of the termination of investigation or prosecution so that a final decision can be requested from the high court in the relevant jurisdiction." This provision raises fundamental questions about the supremacy of the Constitution and the binding force of Constitutional Court decisions. Can lawmakers ignore Constitutional Court decisions and revive norms that have been declared unconstitutional? How does the implication affect legal certainty and human rights protection? Moreover, most importantly, can the construction of norms that initially contradict Constitutional Court decisions deliver substantive justice?

Formulation of the Problem

1. How does the validity of Article 164 paragraph (2) of the 2025 Criminal Procedure Code relate to the Constitutional Court Decision Number 65/PUU-IX/2011?
2. What are the legal implications of Article 164 paragraph (2) of the 2025^[15] Criminal Procedure Code, which conflicts with the Constitutional Court Decision Number 65/PUU-IX/2011?
3. Does the construction of Article 164 paragraph (2) of the 2025 Criminal Procedure Code, which from the outset contradicts Constitutional Court Decision Number 65/PUU-IX/2011, capable of providing substantive justice?

Research Method

This research employs a normative legal research method, which involves identifying legal rules, principles, and doctrines to address the relevant legal issues (Marzuki, P., 2022) ^[18]. This research employs a statutory, case, conceptual, and philosophical approach. The primary legal materials used are (i) the 1945 Constitution of the Republic of Indonesia, (ii) Constitutional Court Decision Number 65/PUU-IX/2011 ^[21], (iii) Law Number 8 of 1981, (iv) Law Number 20 of 2025 ^[15], (v) Law Number 24 of 2003 concerning the Constitutional Court, (vi) Number 13 of 2022 ^[13] concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislation, and (vii) Supreme Court Regulation Number 4 of 2016 concerning the Prohibition of Review of Pretrial Decisions. The analysis technique uses grammatical, systematic, and teleological interpretation.

Discussion

a. The Validity of Article 164 Paragraph (2) of the 2025 Criminal Procedure Code in Confrontation with Constitutional Court Decision Number 65/PUU-IX/2011

Article 24C, paragraph (1), of the 1945 Constitution gives the Constitutional Court the authority to test laws against the Constitution, placing it as "the guardian of the constitution" (Triningsih, A., & Agustine, O., 2020) ^[27] and "the sole interpreter of the constitution" (Sujono, I., 2022) ^[26]. Article 10, paragraph (1), of Law Number 7 of 2020, concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court, confirms that the Constitutional Court has the authority to adjudicate at the first and final level, with its decisions being final. This final nature means that the Constitutional Court's decision immediately obtains Supreme Court Regulation legal force from the moment it is pronounced, and there are no other legal remedies (Suparto, 2019) ^[23].

The binding power of the Constitutional Court's decision is not only limited to the parties to the case, but applies to all legal subjects without exception (*erga omnes*) (Ru'ati, A., Nirahua, G., & Soplantila, R., 2022) ^[22] his This in line with the doctrine of *stare decisis* adopted in the Indonesian legal system. In the context of judicial review, a Constitutional Court ruling declaring a provision of a law inconsistent with the 1945 Constitution means the provision loses its constitutional legitimacy and is deemed "void ab initio" from the outset (Ali, M., Widjaja, A., & Hilipito, M., 2019). Consequently, provisions that are substantially the same may not be reintroduced into a new law without substantial changes that eliminate their constitutional defects

The Constitutional Court Decision Number 65/PUU-IX/2011 was pronounced on March 28, 2012, granting the applicant's request. The Constitutional Court annulled Article 83 paragraph (2) of the 1981 Criminal Procedure Code, which states: "Excluded from the provisions of paragraph (1) are pretrial decisions that determine the invalidity of the termination of investigation or prosecution, for which a final decision may be requested from the high court in the relevant jurisdiction." The Constitutional Court identified two alternative solutions: first, granting the suspect/defendant the right to appeal; or second, eliminating the right of investigators and public prosecutors to appeal. The Constitutional Court chose the second alternative,

arguing that pretrial was designed as a quick remedy against the actions of investigators and public prosecutors.

The ratio decidendi of the Constitutional Court decision 65/PUU-IX/2011 includes several crucial points:

- a. First, Article 83 paragraph (2) of the old Criminal Procedure Code violates the principle of equality before the law, which is guaranteed by Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution. (Vide Constitutional Court Decision 65/PUU-IX/2011, page 29)
- b. Second, granting investigators/prosecutors the exclusive right of appeal creates a structural imbalance in the criminal justice system, which should prioritize the principle of equality between the parties. (Vide Constitutional Court Decision 65/PUU-IX/2011, page 30)
- c. Third, the Constitutional Court considers that pretrial proceedings have special characteristics as legal remedies that must be resolved quickly. Granting the right to appeal would actually prolong the process and defeat the purpose of pretrial proceedings as a mechanism for immediate protection. (Vide Constitutional Court Decision 65/PUU-IX/2011, page 30)
- d. Fourth, from a philosophical perspective on state administration, the Constitutional Court emphasized that a democratic state based on the rule of law requires a mechanism of checks and balances while upholding the principles of fair trial and non-discriminatory due process of law. (Vide Constitutional Court Decision 65/PUU-IX/2011, page 28)

Textual comparisons show significant similarities. Article 83 paragraph (2) of the 1981 Criminal Procedure Code states: "Excluded from the provisions of paragraph (1) are pre-trial decisions that determine the invalidity of the termination of an investigation or prosecution, for which a final decision may be requested from the high court in the relevant jurisdiction." Meanwhile, Article 164 paragraph (2) of the 2025 Criminal Procedure Code states: "The provisions as referred to in paragraph (1) are excluded from pre-trial decisions which determine the invalidity of the termination of investigation or prosecution so that a final decision can be requested from the high court in the relevant jurisdiction."

Both of them: (a) provide exceptions to the prohibition on appeal against pretrial decisions; (b) limit exceptions only to decisions declaring the termination of investigation or prosecution invalid; (c) state that these exceptions allow for the submission of final decisions to the high court. This substantial identity shows that Article 164, paragraph (2), of the 2025 Criminal Procedure Code is essentially a reproduction of a norm declared unconstitutional by the Constitutional Court. Minor changes in diction, such as the use of capital letters, do not change the inherent constitutional flaw. From a teleological perspective (Manullang, F., (2019) ^[17], it shows that the legal objectives of both provisions are identical, namely to provide investigators or public prosecutors with the opportunity to file an appeal. The discriminatory structure that is at the heart of the problem in Constitutional Court Decision 65/PUU-IX/2011 should not be re-adopted by the 2025 Criminal Procedure Code to create new problems.

The existence of Article 164, paragraph (2), of the 2025 Criminal Procedure Code raises issues regarding the principle of *ne bis in idem* in the context of constitutional review. In fact, the Constitutional Court, in various decisions, has emphasized that a legal norm whose substance is the same as a norm that has been decided cannot be resubmitted for review as referred to in Article 60 of the Constitutional Court Law, unless there is a significant change in legal conditions or legal facts (Putra, A., 2022) [20].

In the context of Article 164 paragraph (2) of the 2025 Criminal Procedure Code, there are no significant changes in the legal conditions or legal facts compared to the situation when the Constitutional Court Decision 65/PUU-IX/2011 was issued. The constitutional principles that form the basis for the annulment of Article 83 paragraph (2) of the 1981 Criminal Procedure Code remain in effect. Reproducing norms with the same substance constitutes a denial of the Constitutional Court's decision, which is final, binding, and *erga omnes*.

The validity of Article 164, paragraph (2), of the 2025 Criminal Procedure Code must be questioned seriously, given its conflict with the Constitutional Court Decision Number 65/PUU-IX/2011. However, legally, Constitutional Court Decision Number 65/PUU-IX/2011 has greater legal value, as the Constitutional Court is the interpreter of the norms of the 1945 Constitution. In other words, Article 164 paragraph (2) of the 2025 Criminal Procedure Code remains legally binding, as long as no Constitutional Court decision revokes the article. According to Article 60 of the Constitutional Court, only the material content of paragraphs, articles, and/or sections in laws that have been tested cannot be requested for re-testing, unless the material content in the 1945 Constitution of the Republic of Indonesia, which is used as the basis for the test, is different. Whereas in fact, Law Number 8 of 1981 and Law Number 20 of 2025 [15] are 2 (two different laws. So that the cancellation of Article 83 paragraph (2) of Law 8 of 1981 by the Constitutional Court does not *mutatis mutandis* also apply to the cancellation of Article 164 paragraph (2) of the 2025 Criminal Procedure Code.

b. Legal Implications of Article 164 Paragraph (2) of the 2025 [15] Criminal Procedure Code

The existence of Article 164 paragraph (2) of the 2025 Criminal Procedure Code has serious implications. First, there is a violation of the fundamental hierarchy of legal norms. In the *stufenbau* theory (Hadi, S., & Michael, T., 2022) [12], Kelsen insisted that lower-level legal norms should not conflict with higher-level norms. Constitutional Court decisions are equivalent in value to the 1945 Constitution because they serve as the official and final interpreter of the constitution. As a negative legislator, the Constitutional Court has the authority to annul laws that conflict with the 1945 Constitution (Ahmad, A., & Nggilu, N., 2020) [28]. Thus, the Constitutional Court's decision declaring a norm unconstitutional has the same binding force as the 1945 Constitution itself (Fatmawaty, A., & Sutanto, C., 2025).

Provisions in the new law that substantially revive norms declared unconstitutional not only create horizontal antinomies (conflicts between laws), but also constitute a vertical violation of the constitution. Defying the Constitutional Court's ruling is tantamount to defying the

1945 Constitution. Such practices undermine constitutional supremacy and violate the principle of the rule of law (*rechtsstaat*), the foundation of Indonesia's constitutional system. They also constitute legal decadence when viewed from the perspective of the principle of non-regression.

The introduction of the 2025 Criminal Procedure Code (KUHAP) has brought enthusiasm for law enforcement that is more in line with the values of Pancasila and human rights. However, in the 2025 [25] Criminal Procedure Code, it turns out that there are still norms that are unfair and discriminatory, for example, Article 164 paragraph (2) of the 2025 Criminal Procedure Code. So, in addition to the 2025 [15] Criminal Procedure Code providing progress for law enforcement, on the other hand, there is a legal setback if we examine Article 164 paragraph (2) of the 2025 [15] Criminal Procedure Code, which opposes the existence of the Constitutional Court Decision Number 65/PUU-IX/2011.

Second, legal uncertainty in the application of norms (Lobach, D., 2025) [15]. Legal practitioners, judges, investigators, public prosecutors, and advocates are faced with a constitutional dilemma: follow the textual text of Article 164 paragraph (2) of the 2025 Criminal Procedure Code, which permits appeals, or follow the *ratio decidendi* of Constitutional Court Decision 65/PUU-IX/2011, which prohibits them? From a constitutional law perspective, the constitutional choice is to follow the Constitutional Court's decision, because the Constitutional Court's decision is binding on all state institutions, including judges (Article 10 paragraph (1) letter a of the Constitutional Court Law). However, the existence of conflicting articles in the newer law creates confusion and has the potential to lead to disparities in decisions and inconsistencies in judicial practice (Hidayat, T., Luthviati, R., & Jenvitchuwong, S., 2022) [13].

Third, the threat to the Constitutional Court's authority and effectiveness. If the Constitutional Court's decisions can be ignored through the reproduction of substantively identical norms, the Constitutional Court's function as guardian of the constitution will lose its effectiveness (Yadjitala, M., 2025) [36]. This creates a dangerous precedent: whenever the Constitutional Court annuls a provision of a law, lawmakers can reinstate it with minor editorial changes without altering its substance. This practice contradicts Article 10 of Law Number 13 of 2022 [7] concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislation, which requires that the content of regulations be in line with the Constitutional Court's ruling.

c. Construction of Article 164 Paragraph (2) of the 2025 Criminal Procedure Code and Substantive Justice

The construction of Article 164, paragraph (2), of the 2025 Criminal Procedure Code seems to give the impression that, in the criminal justice system, the state has greater rights than the suspect, so that all legal regulations must also emphasize this principle. This kind of thing cannot be justified by the principle of justice (Yasir, M., Gunarto, G., & Bawono, B., 2024) [37].

Substantive justice differs from procedural justice. Procedural justice emphasizes formal fairness through the proper fulfillment of procedures, while substantive justice emphasizes material fairness and fair outcomes in accordance with societal values (Efendi, J., 2024) [8].

Substantive justice has important elements that must be used as a starting point in measuring legal norms and decisions by judges. These elements include (i) the fulfillment of basic rights (Setiawan, A., Sunandar, F., & Fajar, A., 2025)^[25], (ii) moral-transcendental dimension (De Micco, F., & Scendoni, R., 2024)^[6], (iii) balanced distribution of rights (Dash, S., 2020)^[5], and (iv) protection of victims and vulnerable groups (Guo, S., at. al., 2019)^[10]. The actualization of substantive justice in viewing legal texts must start from the assumption of the principle of proportionality, which requires that restrictions on fundamental rights must fulfill four criteria: legitimate aim, suitability, necessity, and proportionality *stricto sensu* (Anđelković, L., 2017)^[4]. These four criteria are the parameters for viewing the tendencies of Article 164 paragraph (2) of the 2025 Criminal Procedure Code from a philosophical perspective.

First, the legitimate aim criterion. Article 164 paragraph (2) of the 2025 Criminal Procedure Code fails to meet the legitimate aim criterion, because the aim of Article 164 paragraph (2) of the 2025 Criminal Procedure Code is not a constitutional public interest, but rather the institutional interests of law enforcement officers alone. The Constitutional Court, in Decision Number 65/PUU-IX/2011, has emphasized that granting the right of appeal exclusively to investigators or public prosecutors is contrary to the principle of equality before the law, as guaranteed by Article 27, paragraph (1), and Article 28D, paragraph (1), of the 1945 Constitution. The state's interest in continuing the investigation cannot override the suspect's constitutional right to obtain protection from arbitrary action (AliConstitutional Courtulov, E., 2023)^[3].

On the other hand, the purpose of Article 164 paragraph (2) of the 2025 Criminal Procedure Code contains a contradiction in terms with the function of pretrial itself. Pretrial is designed as a horizontal control mechanism to protect suspects' human rights from potential abuse of authority by investigators and public prosecutors. Granting the right of appeal to the party that is the object of supervision is the same as giving the supervised party the authority to correct the results of supervision, which, under such a construction, undermines the essence of checks and balances in the criminal justice system. Therefore, the goal that has been declared unconstitutional by the Constitutional Court cannot be used as a legitimate aim in the formation of new laws.

Second, the suitability criteria. This stage aims to assess whether the selected instrument is rationally suited to the objectives to be achieved (Jiaqi, L., 2025)^[14]. Article 164 paragraph (2) of the 2025^[14] Criminal Procedure Code does not meet the suitability criteria, because if the goal is to ensure the accuracy of pretrial decisions, a more suitable mechanism is to strengthen the competence of pretrial judges through strict selection, regular education and training, and the issuance of technical guidelines by the Supreme Court. The appeal mechanism is actually counterproductive because it contradicts the characteristics of pretrial as a summary proceeding, which requires a quick and final resolution.

Third, the necessity criterion. This stage assesses whether the chosen rights restriction is truly necessary, meaning there are no other alternatives, yet it can still achieve the goal effectively (Dolzhikov, A., 2022)^[7]. Article 164, paragraph (2), of the 2025 Criminal Procedure Code does

not meet these criteria, because various alternative mechanisms are available that impose lighter restrictions on the rights of suspects while still achieving the claimed objectives. For example, the authority of the Supreme Court to issue a Supreme Court Regulation as a technical guideline for pretrial examinations, as has been done through Supreme Court Regulation Number 4 of 2016 concerning the Prohibition of Review of Pretrial Decisions.

Fourth, the proportionality criterion *stricto sensu*. This stage assesses whether the negative impact of restricting rights is proportional to the benefits obtained (Trykhlid, K., 2020)^[28]. Article 164 paragraph (2) of the 2025 Criminal Procedure Code does not meet the criteria of proportionality *stricto sensu*, on the grounds that its negative impact on the suspect's rights (procedural discrimination and prolongation of uncertainty) outweighs the benefits obtained. Suspects who are defeated by a pretrial court decision do not have access to an appeal, while investigators or public prosecutors do. This construction creates a situation where the appeal hearing in the High Court takes a long time, so that suspects who have obtained a favorable decision from the pretrial must again face legal uncertainty. For suspects who are still in detention, this has the potential to extend the detention period unnecessarily. Thus, it is clear that the restrictions on the suspect's rights are not commensurate with the benefits obtained.

Substantive justice requires equal accessibility to the justice system (access to justice) (Gutterman, A., 2022)^[11]. Article 164, paragraph (2) of the 2025^[16] Criminal Procedure Code creates accessibility barriers for suspects because: (1) it prolongs the legal process without providing a similar opportunity to defend their rights; (2) it increases the costs that suspects must bear; (3) it creates a heavier psychological burden due to prolonged uncertainty. So from the start, Article 164 paragraph (2) of the 2025^[15] Criminal Procedure Code, has the potential to also hinder judges from providing substantive justice, because on the one hand, the pretrial has not yet entered the main case examination, so that the use of substantive justice can still be doubted whether it can be applied or not, and on the other hand, substantive justice requires judges morally to take steps to go beyond unfair legal texts (including Article 164 paragraph (2) of the 2025^[15] Criminal Procedure Code).

In an unfair norm, such as Article 164 paragraph (2) of the 2025 Criminal Procedure Code, the judge is given a fairly heavy challenge, namely whether to continue to judge based on the unfair norm to provide a decision in accordance with the unfair norm, or to choose to explore the sense of justice in society and not be rigidly bound by the text of the law (Mahfud, T., & Borman, M., 2025)^[16], especially if the textual application actually gives rise to injustice (in this case following the CONSTITUTIONAL COURT's ratio decidendi in decision 65/PUU-IX/2011), so that the pretrial judge's decision ignores the appeal from the investigator or the public prosecutor? This is a challenge for the application of substantive justice, in which the judge must go beyond what is stated in the law to render a just and dignified decision. Therefore, here the judge has the potential to continue to apply substantive justice in facing the construction of the norm of Article 164 paragraph (2) of the 2025 Criminal Procedure Code.

Conclusion

Article 164 paragraph (2) of the 2025 Criminal Procedure Code is constitutionally flawed from its inception because it

reproduces the substance of Article 83 paragraph (2) of the 1981 Criminal Procedure Code, which the Constitutional Court annulled through Decision 65/PUU-IX/2011. This provision violates the principle of equality before the law (Articles 27, paragraph (1), and 28D, paragraph (1), of the 1945 Constitution) by granting investigators/public prosecutors the exclusive right of appeal without providing a similar opportunity to suspects, thereby creating structural inequality in the criminal justice system.

From a substantive justice perspective, this article fails to meet four criteria of proportionality: it lacks a legitimate constitutional aim, it does not conform to the characteristics of pretrial as a summary proceeding (suitability), it provides alternatives with less stringent restrictions (necessity), and its negative impacts outweigh its benefits (proportionality *stricto sensu*). The existence of this article threatens the supremacy of the constitution, the authority of the Constitutional Court, and creates serious legal uncertainty.

Suggestion

Submit a material review of Article 164, paragraph (2) of the 2025 Criminal Procedure Code to the Constitutional Court for cancellation, due to its conflict with a final and binding decision from the Constitutional Court. This review can also be initiated through a single judge's decision at the first level of the pre-trial hearing. The decision must state that "an appeal cannot be requested against this decision, in accordance with Constitutional Court Decision Number 65/PUU-IX/2011." This means that if it is explicitly stated in the decision, it cannot be appealed.

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