

# Suspect Status Determination and the Principle of Onus Probandi: Comparative Lessons from Indonesia and France

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**Abstract :** This study examines the structural conflict in Indonesian criminal procedure law: the contradiction between the exclusive authority of the Investigator in Suspect Status Determination and the Onus Probandi obligation of the Public Prosecutor. The objective is to formulate an institutional mechanism to mitigate this disparity and the resulting procedural inefficiency. Employing a normative comparative analysis (focusing on France's Code de procédure pénale), the findings confirm that the public prosecutor's function is systematically compromised. The proposed solution is a dual reform: 1) the mandatory institutionalization of a Preliminary Examining Judge (HPP) to serve as a judicial gatekeeper for coercive measures and suspect status, and 2) the compulsory involvement of the Public Prosecutor (akin to the Procureur's réquisitoire) in the initial assessment before submission to the examining judge. This structural change is a *conditio sine qua non* to ensure ex-ante evidence quality, thereby empowering the Public Prosecutor to effectively fulfill the Onus Probandi.

**Keywords:** *Structural Disparity; Onus Probandi; Suspect Status Determination; Judicial Gatekeeper*

**Abstrak:** Penelitian ini mengkaji konflik struktural dalam hukum acara pidana Indonesia, yaitu pertentangan antara kewenangan eksklusif penyidik dalam penetapan status tersangka dan kewajiban Onus Probandi yang dibebankan kepada Jaksa Penuntut Umum. Tujuan penelitian ini adalah merumuskan mekanisme kelembagaan untuk mengurangi disparitas tersebut sekaligus mengatasi inefisiensi prosedural yang ditimbulkannya. Penelitian ini menggunakan analisis normatif komparatif dengan menitikberatkan pada Code de procédure pénale di Prancis. Hasil penelitian menegaskan bahwa fungsi Jaksa Penuntut Umum secara sistematis mengalami pelemahan. Solusi yang ditawarkan berupa reformasi ganda, yaitu: (1) pelembagaan wajib Hakim Pemeriksa Pendahuluan (HPP) sebagai penjaga gerbang yudisial terhadap tindakan paksa dan penetapan status tersangka; serta (2) keterlibatan wajib Jaksa Penuntut Umum, yang dianalogikan dengan réquisitoire milik Procureur di Prancis, dalam penilaian awal sebelum perkara diajukan kepada hakim pemeriksa. Perubahan struktural ini merupakan *conditio sine qua non* untuk menjamin kualitas alat bukti secara ex-ante, sehingga Jaksa Penuntut Umum dapat menjalankan kewajiban Onus Probandi secara efektif.

**Kata Kunci:** *Disparitas Struktural; Onus Probandi; Penetapan Status Tersangka; Penjaga Gerbang Yudisial*

## INTRODUCTION

Criminal Procedure Law fundamentally represents the perpetual constitutional struggle to maintain the balance between the State's power to prosecute crime (*ius puniendi*) and its fundamental obligation to protect individual human rights. This inherent tension necessitates a robust framework of constitutional oversight, given that the exercise of state authority especially within the criminal justice system must be perpetually constrained by human rights principles to forestall the potential for the abuse of discretion (Huda *et al.*, 2021). In the Continental European legal tradition, notably in France, this tension is governed by fundamental principles that ensure the integrity of the judicial process from the initial stages, particularly concerning the collection and evaluation of evidence. For instance, recent analyses highlight how the French system's judicial investigation structure transforms the familiar concept of 'investigative action' into 'judicial investigation, significantly impacting the rights and obligations of participants and offering a strong comparative counterpoint to models relying heavily on executive discretion (Belonosov, 2023).

This comparative perspective highlights a structural anomaly present in the Indonesian criminal justice system, where the central point of tension lies in the persistent structural conflict over jurisdiction and authority between the investigative agencies (executive branch) and the constitutional and judicial oversight bodies (Nuer *et al.*, 2021). The most crucial central point of tension lies in Suspect Status Determination a discretion structurally vested absolutely in the hands of the investigative authority, namely the Police Investigator or the Civil Servant Investigator. This is based on the provisions of Article 1, paragraph 14 of Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP), which only requires "sufficient initial evidence".

Although this minimalist standard has been tightened through Constitutional Court jurisprudence to a minimum of two valid pieces of evidence, it essentially preserves the determination's nature as a purely unilateral and closed administrative-executive action, rather than a decision subjected to judicial scrutiny. Yet, the status of Suspect is the most significant legal status, immediately activating a whole range of State coercive measures such as detention, seizure, and other restrictions on individual liberty, thus placing the individual concerned in a vulnerable, stigmatized, and psychologically and juridically burdened position, long before their guilt can be proven lawfully and conclusively by the court (Bahran, 2018). This clause of "sufficient initial evidence," through Constitutional Court Ruling No. 21/PUU-XII/2014, is explicitly interpreted as the requirement for a minimum of two valid pieces of evidence accompanied by the investigator's conviction.

This condition affirms that the basis for suspect status determination must rest on a minimal evidentiary standard, and not merely on suspicion. This normative weakness implies the emergence of legal uncertainty and injustice, as the process of determining legal status still contains the potential for abuse of authority and violations of human rights (Adawiyah & Wulan, 2024). This functional contradiction, where an agency primarily oriented toward guilt-finding holds absolute power to assess the sufficiency of the evidence they themselves collected, inherently creates the risk of institutional conflict of interest and investigative confirmation bias. This fundamentally erodes the essence of the Principle of Presumption of Innocence (*Présomption d'Innocence*) because a prejudicial legal status is imposed by a state apparatus before any independent validation. This structural vulnerability is exacerbated by an anomaly within the Criminal Procedure Code (KUHAP) itself, where coercive measures that are hierarchically consequences of, or derivatives from, the suspect status determination such as the extension of detention or seizure nonetheless require authorization or determination from the Public Prosecutor or the Judge.

This demonstrates a clear inconsistency in the application of the checks and balances mechanism, where the most defining discretionary power (Suspect Status Determination) escapes stringent judicial scrutiny. The insistence on judicial intervention for coercive measures is a cornerstone of civil law tradition; for example, recent French jurisprudence firmly establishes that extending pre-trial detention without a judge's decision violates the constitutional guarantee of liberty, emphasizing the non-negotiable role of the judiciary in controlling state coercion (Gaboriau, 2021). Although the Pre-trial institution has had its scope expanded post Constitutional

Court Ruling No. 21/PUU-XII/2014 to allow the review of the legality of suspect status determination, it remains an ex-post corrective measure applied after the constitutional injury has occurred and not a judicial gatekeeping mechanism designed to prevent the harm at the beginning of the process. Furthermore, its scope of review is often focused on the formal aspects of procedure, rendering it incapable of addressing the structural normative weakness that permits non-judicial authorities to exercise a judicial function.

Philosophically, this structural anomaly has a dangerously close correlation with the distortion of the Principle of Burden of Proof (*Onus Probandi*), a fundamental maxim in the Civil Law tradition that mandates the Public Prosecutor to bear the absolute burden of proving the defendant's guilt beyond a reasonable doubt. The *Onus Probandi* Principle requires that the entire criminal procedure system must be designed to minimize pressure on the Suspect to prove their innocence. However, in the Indonesian model, the suspect status determination, unilaterally performed by the Police Investigator who is not the bearer of the *Onus Probandi* in court functions as a *de facto* trigger that prematurely shifts the burden of proof. This administrative determination psychologically and practically compels the individual to immediately invest resources and time to defend themselves and refute the designation, thereby indirectly reducing the intensity of the Prosecutor's *Onus Probandi*. More dangerously, the unilateral determination by the Investigator directs the entire focus of subsequent investigation toward efforts to reinforce the designation already made, rather than objectively seeking the truth, including exculpatory evidence, which blatantly contradicts the spirit of impartiality that must accompany the due process of law.

Consequently, the absence of judicial scrutiny over the "sufficient initial evidence" standard at the suspect status determination stage represents the greatest risk to the integrity of the Prosecutor's *Onus Probandi*, who should only receive cases that have passed independent judicial authorization. This condition leads to an indirect shifting of the burden of proof, where although the maxim *Actori Incumbit Onus Probandi* is upheld, in practice the suspect is pressured to immediately prove their innocence to avoid greater harm (Hiariej, 2018). Therefore, as a comparative effort to find a structural solution, (Wahyudin, et. al 2026) this study directs its view toward the French Criminal Procedure Law System, as stipulated in the Code de Procédure Pénale, a system that successfully implements the functional separation of powers between police investigation and the determination of legal status. Within the French framework, the Police (*Police Judiciaire*) only possesses limited authority in the initial investigation (*enquête préliminaire* or *garde à vue*), but strictly lacks the authority to determine a formal legal status with serious impact. The formal legal status equivalent to 'suspect under investigation' is *Mis en Examen* (Formal Investigation), a concept entirely under judicial authority, led by the Investigative Judge (*Juge d'instruction*) or, in certain cases, the Public Prosecutor (*Procureur de la République*) who holds a strong judicial character (Qamar, 2016).

The central role of the *Juge d'instruction* in the French system functions as an independent instrument that supervises the investigation and guarantees individual human rights, assuming a more prominent role compared to that of the investigator in Indonesia. The central role of the Investigative Judge is to lead the investigation impartially, possessing the authority to investigate both inculpatory and exculpatory evidence, and serving as the sole authority capable of granting the *Mis en Examen* status, with a significantly higher standard of evidence than Indonesia, namely, serious or consistent evidence (*indices graves ou concordants*). This mechanism effectively creates a "Judicial Gatekeeping" at the forefront of the criminal process, ensuring that the determination of serious legal status is tested by an independent, judicially trained authority bound by the obligation to maintain justice, thereby structurally reinforcing the *Onus Probandi* Principle; because by involving the Judge or Prosecutor in status authorization, the integrity and quality of the initial evidence have been verified by the authority responsible for the oversight of justice, minimizing the risk of abuse of investigative authority by the Police and ensuring that individual defense rights are respected from the earliest stage.

The authority of the *Juge d'instruction* to lead the information (investigation) can only be conducted following a *réquisitoire* (request) from the *Procureur de la République* (Public Prosecutor) or a submission from the victim (*plainte avec constitution de partie civile*), in accordance with Article 51 of the French C.P.P (Kode Prosedur Pidana Prancis (Code de Procédure

Pénale), 2025). Based on this comparative analysis, this study finds that the fundamental weakness in Indonesian criminal procedure law does not lie in investigative inefficiency, but rather in the structural failure to link the authority for Suspect Status Determination with judicial responsibility and the philosophical *Onus Probandi*. Therefore, the novelty and primary objective of this research is to propose a prescriptive normative reconstruction through the proposal of Judicialization of Suspect Status Determination in Indonesia, utilizing the French *Mis en Examen* mechanism as the main comparative lesson, either through vesting the authorization authority for Suspect Status Determination in the Public Prosecutor (JPU) as the holder of the *Onus Probandi*, or through the mandatory reactivation of the role of a fully independent Preliminary Examining Judge (Hakim Pemeriksa Pendahuluan) for serious cases, so that the decision to assign a damaging legal status to an individual transforms from a unilateral administrative-executive action into an impartial judicial decision, which is a *conditio sine qua non* for substantially strengthening the *Onus Probandi* Principle and ensuring that the Presumption of Innocence Principle is fully respected in accordance with constitutional mandates and international human rights standards (Faisal & Saputra, 2021).

## RESEARCH METHODS

This research employs a Normative Juridical Research approach, supported by Comparative Analysis, (Wahyudin, 2023) to examine the structural weakness in the Indonesian criminal procedure system, particularly concerning the absolute authority of the Police Investigator in Suspect Status Determination, which is deemed to threaten human rights principles and the Presumption of Innocence doctrine. The study analyzes the *ius constitutum* (the positive law currently in force, namely the KUHAP and Constitutional Court jurisprudence) and the *ius constituendum* (the law aspired to or ideally applicable in the future) (Ningsih, 2018).

The primary legal materials for this study include relevant domestic legislation (such as the KUHAP) and the criminal procedure legal documents of the comparative country, namely the French Code de Procédure Pénale, particularly the provisions concerning the role of the Investigative Judge (*Juge d'instruction*) and the mechanism for *Mis en Examen* status determination. Meanwhile, secondary legal materials encompass scholarly works, academic journals, and research findings focusing on the critical analysis of police discretionary authority in Suspect Status Determination as well as the comparison of investigatory systems in Civil Law countries (Kode Prosedur Pidana Prancis (Code de Procédure Pénale): Titre III - Des Juridictions d'instruction, Chapitre Ier - Du Juge d'instruction, n.d.).

Qualitative data analysis was conducted by applying Systematic Interpretation techniques to ensure the consistency of the suspect designation norm with the overall criminal justice system; Teleological Interpretation to delve into the philosophical objectives behind the legal status determination in the context of human rights protection; and Comparative Interpretation to deeply contrast the Indonesian police-centric model with the French judicial-centric model, in order to identify structural weaknesses that can be overcome through the adoption of a judicial scrutiny mechanism (Mertokusumo, 2022). This study is limited to doctrinal analysis and aims to produce normative-prescriptive recommendations, proposing the Judicialization of Suspect Status Determination that serves as Judicial Gatekeeping at the commencement of the Indonesian criminal justice process, in order to realize a more just and proportional legal framework.

## RESULTS AND DISCUSSION

### Structural Failure of Judicial Scrutiny in Suspect Status Determination under the Indonesian Criminal Procedure Code

The structural failure of judicial scrutiny, or Judicial Gatekeeping, at the stage of Suspect Status Determination within the Indonesian criminal justice system is a clear manifestation of the power imbalance inherited from the Criminal Procedure Code (KUHAP). The KUHAP tends to adhere to a police-centric model and neglects the fundamental principle of due process of law which mandates that any restriction on constitutional rights must be validated by an independent judicial authority (Faturohman & Rahmawan, 2024). The core of this crisis lies in Article 1 Paragraph 14 of the Criminal Procedure Code, which normatively grants absolute authority to the

investigator (police/prosecutor) to determine the status of a Suspect based on "sufficient initial evidence". This phrase, though seemingly straightforward, in practice opens up an unlimited space for the investigator's internal and subjective discretion, a form of power residing within the domain of low-visibility decisions in criminal justice administration, where decisions made by the police are rarely exposed to the public and tend to be difficult to review transparently, thereby becoming a highly vulnerable starting point for abuse and arbitrary criminalization (Goldstein, 1960).

Comparatively, global criminal law literature consistently criticizes systems that place the activities of the police and prosecutors at the pre-trial stage as the primary determinant of the accuracy and reliability of case disposition, especially when the application of constitutional regulation in the pre-trial domain feels 'extremely light' or insistently light (Bibas, 2014). The Indonesian system, which relies fully on the investigator to establish such a crucial legal status, has created a structural deficiency in oversight. In this system, the party with a direct interest in proving the accusation namely the executive law enforcement apparatus itself becomes the assessor of the legality of that legal status determination. Although Constitutional Court Decision Number 21/PUU-XII/2014 attempted to remedy this gap by expanding the object of the Pre-trial Motion (Praperadilan/Prapid) to include the determination of the suspect, this judicial breakthrough remains unable to overcome the structural failure due to the repressive (ex-post facto) nature of the Pre-trial Motion. It can only examine the legality of the determination after the suspect's constitutional rights have been violated, rather than preventing the violation from occurring.

This systemic weakness is further aggravated and procedurally exploited by Article 82 Paragraph (1) letter d of the Criminal Procedure Code (KUHAP), which explicitly states that a Pre-trial Motion application is immediately null and void the moment the principal case begins to be examined in court. This provision effectively functions as a systemic failure valve, allowing law enforcement officials to nullify efforts to test the legality of their actions through an administrative maneuver namely, by immediately submitting the case file (vouching) to the court thereby eliminating the suspect's opportunity to obtain substantive judicial review (Tobing, 2016). This practice directly undermines the principle of checks and balances and creates severe procedural injustice, where the right to human rights protection, which was recently championed by the Constitutional Court, can be nullified merely by a clerical act from the Public Prosecutor, thereby implying a structural rejection by the executive function of independent and proactive judicial oversight.

The fundamental solution for addressing this structural failure lies in a total paradigm reform of the Criminal Procedure Code (KUHAP) through the adoption of the institution of the Preliminary Examining Judge or the Commissioner Judge. The examining judge is believed to be a far more effective and comprehensive substitute compared to the easily nullified Pre-trial Motion. The examining judge is designed to act as the true judicial gatekeeper, possessing pre-factum authorization authority, which means the judge is obliged to examine and vet the legality of the use of coercive measures before the action is executed by the investigator ((ICEL), 2020). The presence of the examining judge will compel the investigator to submit to judicial control from the initial stage, ensuring that the determination of the suspect status and all related invasive measures are not solely based on subjective police discretion, but must meet the standards of legality and necessity validated by an independent judicial authority, thereby preventing criminalization or abuse of authority, such as SLAPP (Strategic Lawsuit Against Public Participation), as early as possible.

Legal academics and anti-corruption activists have long advocated for this concept of the Commissioner/Preliminary Examining Judge, defining it as an institution situated between the investigators and prosecutors on the one hand and the judges on the other. It is equipped with much broader authority to assess the course of the investigation, conceptually designed to replace the Pre-trial Motion which has proven to be inadequate, and to provide more complete legal protection for the suspect's human rights (Hadjar, 2013). Thus, the transition toward a system that places the examining judge as a preventive judicial control is a *conditio sine qua non* (an absolutely essential condition) for reforming Indonesia's criminal procedure law to truly reflect the principle of *rechtsstaat* (rule of law) and end the dominance of executive power in the pre-adjudication stage, ensuring that the efficiency of law enforcement never sacrifices justice and the constitutional rights of citizens.

## The Authority of Police Investigators and the Principle of Onus Probandi for Public Prosecutors

Indonesia's criminal justice system, which rests upon the foundation of the Criminal Procedure Code, fundamentally harbors a crucial structural disparity between the functional authority of law enforcement officials at the pre-adjudication stage, and the constitutional principle of Onus Probandi (Burden of Proof) which rests absolutely upon the shoulders of the Public Prosecutor (S., 2024). The principle of Onus Probandi is a manifestation of the Principle of Presumption of Innocence (Asas Praduga Tak Bersalah), which demands that the state, through the Public Prosecutor, prove the Defendant's guilt in court with the highest standard of proof, namely beyond a reasonable doubt (Adawiyah & Wulan, 2024). This demanding requirement for proof should necessitate that the Prosecutor maintain full control over the quality and legality of the evidence from the very beginning of its collection. However, within the construction of the Criminal Procedure Code (KUHAP), the vital authority to independently determine a person's initial legal status the determination of a Suspect is held by the Police Investigator, who only requires 'sufficient initial evidence' based on Article 1 Paragraph 14 of the Criminal Procedure Code.

This absolute authority of the investigator, which operates almost without ex-ante (preventive) judicial oversight or effective functional control from the Prosecutor, has structurally transformed the investigator into a 'shadow judge' who sets the minimum standard of proof at the initial stage of the criminal process. This role is philosophically and procedurally contrary to the spirit of a criminal justice system that claims to be oriented towards due process of law. This disparity creates an acute functional disjunction: the Prosecutor is responsible for the outcome in court (the high burden of proof) but lacks substantial control over the evidence collection and validation process, which determines the quality of that outcome during the initial investigation stage (Goldstein, 1960).

The dominance of Police Investigators in determining this legal status operates within a domain known as 'low-visibility decisions' in criminal justice administration, a concept developed by Herman Goldstein to describe crucial decisions made by law enforcement officials in the field that are subject to minimal external and judicial oversight (A., 2009). The determination of a Suspect by the investigator is a perfect example of a low-intensity decision, as it is made based on the internal discretion and subjective belief of the investigator, which is difficult for external parties to measure and test transparently, despite having massive consequences for the restriction of human rights. Although Constitutional Court Decision Number 21/PUU-XII/2014 attempted to remedy this gap by expanding the object of the Pre-trial Motion to include the suspect determination and stipulated that 'sufficient initial evidence' must minimally consist of two valid pieces of evidence and the investigator's objective belief, the determination of this status remains within the independent authority of the Police. Ironically, the institution with a direct interest in the case's continuation and success (the Police) itself becomes the assessor of the legality of that initial evidence.

This structural conflict of interest is characteristic of a 'police-centric system' that neglects the principle of judicial gatekeeping which ought to be the first line of defense for the constitutional rights of citizens. This disparity in authority directly weakens the Public Prosecutor's principle of Dominus Litis. Normatively, the Prosecutor should be the master of the case (Dominus Litis) who controls the criminal law enforcement process from the outset. However, the overly rigid separation between the function of investigation (Police) and prosecution (Prosecutor) in the Criminal Procedure Code (KUHAP) has rendered the Prosecutor's role at the pre-adjudication stage partial and delayed (ex-post) (Kode Prosedur Pidana Prancis (Code de Procédure Pénale), 2025). The Authority of the Prosecutor at the Pre-Prosecution Stage

"The authority of the Prosecutor at the Pre-Prosecution stage (Articles 138-140 of the KUHAP) is limited merely to examining the case file that has been 'completed' by the investigator (P-18) and providing instructions (P-19) if the investigation results are deemed incomplete. The Prosecutor's limitation in actively and legally engaging from the very beginning of the investigation (since the Prosecutor gives instructions/P-19) to ensure the sufficiency of evidence creates a structural irony: the Prosecutor is responsible for the outcome in court but lacks full control over the evidence collection process that determines the quality of that outcome during the initial investigation stage.

The Prosecutor's failure to control the quality of evidence early on is the main reason for the chronic prevalence of the dossier shuttling phenomenon (the back-and-forth movement of case files) between the Police and the Prosecutor's Office. Dossier shuttling is the clearest indicator of the structural failure of the Criminal Procedure Code to align the authority for determining legal status with the principle of *onus probandi*.

The Prosecutor, who must ensure the sufficiency of evidence to be presented in court (*onus probandi*), often rejects the files (P-18 or P-19) because: the evidence collected is insufficient to meet the standard of beyond a reasonable doubt (although sufficient for the Police's version of 'sufficient initial evidence') or the investigative procedures (e.g., arrest or seizure) are illegal or legally flawed, which can lead to the evidence being deemed the fruit of the poisonous tree. This back-and-forth cycle not only causes inefficiency and significant economic costs to the justice system but also fundamentally harms the Suspect by prolonging the duration of legal uncertainty and worsening the psychological condition due to the hanging legal status. This shows that the Prosecutor is forced to perform quality control of evidence reactively and belatedly, instead of proactively and preventively, thereby practically impoverishing the function of the Prosecutor's *Dominus Litis* status.

To understand the depth of this problem, a philosophical comparison with the criminal justice models of other countries is necessary, particularly those rooted in the Civil Law tradition, like Indonesia, namely France. The French criminal procedure law system, regulated in the Code de procédure pénale, offers a much more effective and proactive mechanism for judicial gatekeeping and Prosecutor oversight, which structurally supports the fulfillment of the Prosecutor's (Procureur) burden of proof. In the French system, the role of investigation is strictly separated between the Prosecutor (Procureur de la République) and the Investigating Judge (Juge d'Instruction) or the Judge of Liberties and Detention (Juge des Libertés et de la Détention - JLD) (see the attached Code de procédure pénale document) (Comparative background can be seen in the references below) (D., 2023). Tentu, ini adalah terjemahan bagian akhir dari perbandingan komparatif dengan sistem hukum Prancis, dengan menggunakan padanan kata hukum yang sesuai:

"The Prosecutor (Procureur) is responsible for prosecution and is entitled to open investigations, but does not have the absolute authority to carry out invasive coercive measures. Conversely, the most serious coercive measures, such as detention (arrest) exceeding 24 hours (*garde à vue*) and temporary detention (*détention provisoire*), must be authorized by an independent judicial authority, namely the JLD, or in cases of complex investigations demanding intensive judicial vetting (*instruction*), the case will be handled by the Investigating Judge (Juge d'Instruction). The Investigating Judge (Juge d'Instruction) in France is a Judge responsible for directly leading and overseeing the investigation process in serious cases. Their main function is to guarantee the quality of evidence (*légalité de la preuve*) and protect the rights of the Suspect (*mise en examen*) and witnesses, thus acting as a genuine and preventive judicial gatekeeper. The Police and Gendarmerie in France (i.e., *police judiciaire*) only act as auxiliary organs under the direction of the Procureur or the Juge d'Instruction. If the Procureur (Prosecutor) decides to file charges, they can only do so after the file from the Juge d'Instruction has confirmed that the collected evidence has passed the test of legality and judicial sufficiency.

This system effectively enforces the quality of evidence early on, as the evidence must be validated by an independent Judge before the Prosecutor uses it to fulfill the *onus probandi* in court. Thus, in France, the Prosecutor (holder of the *onus probandi*) is positioned as an eager prosecuting party (*partie poursuivante*), but they are bound by evidence that has been vetted and validated by a judicial authority (HPP/JLD). Consequently, the burden of proof brought by the Prosecutor to court has a guaranteed structural legitimacy, which is vastly different from the Indonesian system where the Prosecutor is forced to 'try to prove' with evidence whose legality is unilaterally determined by the Police (D., 2023). This comparison exposes a fatal flaw in Indonesia's Criminal Procedure Code (KUHAP), which is a failed attempt to merge elements of Civil Law (executive-led investigation) and the Due Process Model (human rights protection). While modern Civil Law countries like Germany or the Netherlands also place the Prosecutor as the leader or at least in strong control of the investigation to ensure the quality of evidence that will support their *onus*

probandi, Indonesia instead creates a judicial void at the stage of determining legal status. This weakness places Indonesia at a high risk of procedural injustice and violates the essence of due process of law, which demands that every restriction of constitutional rights must undergo a fair legal process and be validated by an independent judicial authority. Therefore, realigning the pre-adjudication authority with the Prosecutor's *onus probandi* principle is a *conditio sine qua non* (absolute prerequisite) for reforming Indonesia's criminal procedure law.

The solution does not lie in eliminating the investigatory authority of the Police, but in restructuring the institutional relationship and adding a layer of preventive judicial gatekeeping through the adoption of the institution of the Preliminary Examining Judge (HPP) or Commissioner Judge, which is the functional equivalent of the *Juge d'Instruction* in France. The HPP would act as an independent judicial authority obliged to authorize every determination of Suspect status, by testing the sufficiency of the two valid pieces of evidence and the objective belief, as well as every coercive measure that restricts human rights (arrest, detention, seizure). With the HPP in place, the Prosecutor can ensure that all evidence has passed the test of legality and judicial review at the initial stage, which will dramatically reduce dossier shuttling and strengthen the Prosecutor's ability to fulfill the *onus probandi* in court, as the evidence brought to trial will possess judicial legitimacy from the outset. Overall, the conflict between the dominant authority of the Police investigator and the *onus probandi* principle of the Public Prosecutor is a reflection of the imbalance of executive power in the KUHAP; reform must be directed toward creating a balanced system, where the party bearing the burden of proof (the Prosecutor) genuinely has control over the quality of evidence collected to meet that burden.

#### **The Role of the *Juge d'Instruction* and the Procureur in Guaranteeing the Quality of the State's Burden of Proof**

The French criminal procedure law system, regulated in the *Code de procédure pénale*, is structurally designed to create a strict balance, where executive investigatory authority is completely subject to judicial oversight. This mechanism directly supports the ability of the Public Prosecutor (*Procureur de la République*) to fulfill the *Onus Probandi* (burden of proof) (Levasseur, n.d.). In the French system, the party that holds control over the outcome of the trial namely the Prosecutor, as the representative of the *Ministère Public* is the party that bears the burden of proof to prove the Defendant's guilt, a principle guaranteed by the *Presumption of Innocence* (H., 2019). However, unlike many other legal systems, evidence collection in France especially that which involves the restriction of liberty or fundamental rights is not dominated by the Prosecutor or the Police. Instead, it is intervened and overseen by two main judicial figures: the Investigating Judge (*Juge d'Instruction* - J.I.) and the Judge of Liberties and Detention (*Juge des Libertés et de la Détention* - JLD) (Justice, 2024).

The Investigating Judge (*Juge d'Instruction*) is the heart of this preventive judicial control. In cases of serious crimes (crime), the preliminary investigation (*instruction préparatoire*) is mandatory, and the Prosecutor (*Procureur*) must submit the case to the J.I. to be investigated (Simonnet, 2024). The Investigating Judge (*Juge d'Instruction*) is a Judge who acts as the impartial investigation leader, whose duty is to gather both inculpatory evidence (*à charge*) and exculpatory evidence (*à décharge*) concerning the Suspect (*mis en examen*), in the pursuit of objective material truth. With the J.I. leading, the Police (*Police Judiciaire*) function solely as an auxiliary organ under the J.I.'s instructions, ensuring that all investigative actions taken are lawful and judicially accountable. This role effectively eliminates executive dominance in determining legal status and collecting evidence, as the J.I. functions as a judicial gatekeeper that guarantees the quality of evidence from the initial stage.

While the *Juge d'Instruction* oversees the entire investigation process, the Judge of Liberties and Detention (*Juge des Libertés et de la Détention* - JLD) acts as the primary supervisor of individual liberty. The JLD is the Judge who is exclusively authorized to sanction the most serious coercive measures, especially those restricting fundamental rights, such as temporary detention (*détention provisoire*) or searches outside normal hours ([vie-publique.fr](http://vie-publique.fr), 2024). The JLD ensures that detention is only carried out on the basis of motivated and lawful reasons, and that every act of deprivation of liberty has undergone a process of judicial control. This structural strength provides the Prosecutor (*Procureur*) with the assurance that the evidence they use such as seizure

results or statements from the detained Suspect has been collected according to legal procedures (légale et régulière) and authorized by an independent judicial authority, and not solely by the police or prosecutor.

Therefore, in France, the Prosecutor (who bears the burden of proof) is supported by a system that enforces the quality and legality of evidence early on, which in turn facilitates the Prosecutor's ability to meet the highest standard of proof namely, intime conviction (the Judge's inner conviction) in court. This structure creates maximal accountability in the criminal process and effectively prevents the back-and-forth movement of cases (such as dossier shuttling) because the evidence is already judicially validated before the file is closed for submission to the court (Mertens, 2017).

## CONCLUSION AND RECOMMENDATIONS

The structural disparity between the absolute authority of the Police Investigator in determining the Suspect status and the Onus Probandi principle of the Public Prosecutor constitutes a significant procedural deficit in Indonesia's criminal procedure law system. This conflict, which leads to the inefficiency of dossier shuttling, demands systemic reform. The solution must involve strengthening judicial control and reaffirming the role of the Prosecutor as the bearer of the burden of proof. The main recommendation is the institutionalization of the Preliminary Examining Judge as a judicial gatekeeper. The Examining Judge must possess the exclusive authority to authorize coercive measures and the determination of legal status, including suspect status. Crucially, this legal status determination process must involve the Prosecutor, as the public prosecutor, from the outset, at least in the form of joint authorization or a formal request (réquisitoire) before being submitted to the Examining Judge, similar to the role of the Procureur in France who submits a réquisitoire to the Juge d'Instruction to initiate a formal investigation. Thus, the Prosecutor, as the holder of the Onus Probandi, will have substantive control over the judicially vetted 'raw material' of evidence, guaranteeing the legality and quality of evidence ex-ante. The HPP intervention is an absolute prerequisite (conditio sine qua non) for eliminating the executive power imbalance and simultaneously optimizing the Prosecutor's function to meet their burden of proof in court, thereby upholding due process of law.

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