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Regulation Act of Torture in Criminal Code: Opportunity and Challenge to Improve Human Rights Situation in Indonesia

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Abstract: This research aims to analyze the opportunities and challenges with regulating the criminal act of torture in Law No. 1 of 2023 concerning the Criminal Code (KUHP). The provisions regarding the criminal act of torture in the Criminal Code certainly open up opportunities in efforts to eliminate the practice of torture in Indonesia. The provisions of Article 530 of the current Criminal Code and the explanatory section stipulate that this article directly derives from the provisions in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. On the other hand, all efforts and mechanisms to eliminate the practice of torture in Indonesia still require many steps to be taken. This research was conducted using a normative juridical method with a statutory approach. This research also provides an explanation of several gaps from previous similar studies by explaining several novel analyses, such as: (1) the application of sanctions to perpetrators must be adjusted to the provisions of international instruments, (2) revision of various articles in the Criminal Procedure Code which has the potential to perpetuate the practice of torture, and (3) the urgency to ratify the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The conclusion of this research is an explanation that the regulation of criminal acts of torture in the provisions of the new Criminal Code needs to be appreciated, but of course it is not enough. The state must have high commitment and political will to revise the Criminal Procedure Code openly and involve the community, ratify OPCAT, implement national legal provisions, and ensure law enforcement against perpetrators.

Keywords : Criminal Act of Torture; Criminal Code; Human Rights.

Abstrak: *Penelitian ini bertujuan untuk menganalisa kesempatan serta tantangan dengan diaturnya tindak pidana penyiksaan pada Undang – Undang No. 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana (KUHP). Ketentuan mengenai tindak pidana penyiksaan dalam KUHP tersebut tentunya membuka kesempatan dalam upayanya menghapus praktik penyiksaan di Indonesia. Hal tersebut bagaimana dalam ketentuan Pasal 530 KUHP dan bagian penjelasan yang mengatur bahwa pasal tersebut merupakan turunan langsung dari ketentuan dalam Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Di sisi lainnya, upaya dan mekanisme penghapusan praktik penyiksaan di Indonesia sendiri masih membutuhkan banyak sekali langkah yang harus dilakukan. Penelitian ini dilakukan dengan menggunakan metode normatif yuridis dengan pendekatan peraturan perundang – undangan (statute approach). Penelitian ini juga memberikan pemaparan atas beberapa gap dari beberapa ilmiah serupa sebelumnya dengan memaparkan*

beberapa kebaruan analisis, seperti: (1) penerapan sanksi kepada pelaku harus disesuaikan ketentuan instrumen internasional, (2) revisi berbagai pasal dalam Kitab Undang – Undang Hukum Acara Pidana yang justru berpotensi melanggengkan praktik penyiksaan, dan (3) urgensi untuk meratifikasi Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). Kesimpulan dalam penelitian ini adalah penjelasan bahwa pengaturan tindak pidana penyiksaan dalam ketentuan KUHP baru perlu diapresiasi, namun tentunya tidaklah cukup. Negara perlu memiliki komitmen dan kemauan politik yang tinggi untuk melakukan revisi KUHAP secara terbuka dan melibatkan masyarakat, meratifikasi OPCAT serta mengimplementasikan dalam ketentuan hukum nasional dan memastikan penegakan hukum kepada pelaku.

***Kata Kunci** : Tindak Pidana Penyiksaan; Kitab Undang–Undang Hukum Pidana; Hak Asasi Manusia.*

INTRODUCTION

The right to be free from all forms of torture and acts that degrade human dignity is an inalienable right that applies to everyone without exception. This principle is widely acknowledged in international human rights instruments as well as in national legal frameworks. all of which recognize torture as a violation of human rights. In Indonesia, this right is enshrined in the country's constitution and cannot be diminished under any circumstances, addressed explicitly in Article 28I of the 1945 Constitution of the Republic of Indonesia. Recognition of human rights, particularly the right to be free from torture, in the country's constitution is of utmost importance. The 1945 Indonesian Constitution holds the highest authority, meaning that all laws and regulations must align with its principles. This constitution serves as the primary source for governing and defining the interactions between the state and society, as well as among community members.[1]

Human rights are divided into two types: rights that can be reduced in certain circumstances (derogable rights) and rights that cannot be reduced under any circumstances (non-derogable rights)[2], one of them is protection from any torture act. Protection from various forms of torture is a fundamental human right. Apart from its constitutional recognition, human rights are inherent to every individual from the moment of birth, spanning the right to life, freedom of expression, a dignified existence, personal comfort, and freedom from any form of torture. Human rights constitute a set of standards that regulate how individuals and groups are treated by both state and non-state entities, based on ethical principles concerning what society deems essential for a dignified existence. These standards are integrated into domestic and international legal frameworks, which outline procedures

[1] Nikodemus Thomas Martoredjo, "UUD 1945 Sebagai Hukum Dasar NKRI," Binus University, 2023, https://binus.ac.id/character-building/2023/09/uud-1945-sebagai-hukum-dasar-nkri/#:~:text=UUD 1945 merupakan hukum dan,kelompok masyarakat satu sama lain.

[2] M Rizki Yudha Prawira, "Urgensi Pembentukan Peraturan Daerah Penyelenggaraan Bantuan Hukum Di DKI Jakarta Sebagai Implementasi Konsep Negara Kesejahteraan," in *National Conference on Law Studies (NCOLS)*, vol. 5, 2023, 119–38.

and mechanisms to hold the duty-bearers accountable and provide redress for alleged victims of human rights violations.[3]

It is important to note that protection from all forms of torture is not only upheld in the 1945 Indonesian Constitution but also in various laws and regulations below it. For example, Law No. 39 of 1999 regarding Human Rights recognizes that the right not to be tortured is a non derogable right. Because of that situation, the protection of rights not to be tortured cannot be diminished under any circumstances, including emergencies. The state is prohibited from interfering with or diminishing this right under any circumstances, and no justifications can be used to impose restrictions regarding protection against torture. Among the kinds of the rights that cannot be limited under any circumstances, it is regulated either in Indonesian Constitution 1945, People's Consultative Assembly (MPR) Decree Number XVII/MPR/1988 on Human Rights or in Law Number 39 of 1999 on Human Rights.[4]

In addition to being protected by national laws and regulations, the right to protection from all forms of torture is also safeguarded by international human rights instruments. According to Article 3 of the Universal Declaration of Human Rights (UDHR), everyone has the right to life, liberty, and security as an individual. This affirms the right to live with dignity, be free from oppression or arbitrary detention, and feel safe and protected from threats or violence. The specific prohibition on torture is outlined in Article 5, which states that no one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment. Moreover, the provisions of the International Covenant on Civil and Political Rights (ICCPR) provide more precise regulations regarding the prohibition of torture and inhuman or degrading treatment. This is stipulated in Article 7, which shares similarities with Article 5 of the UDHR. Article 7 of the ICCPR extends the scope of prohibited forms of torture to include a prohibition of medical or scientific on subjecting individuals to experimental practices without their consent.

The ICCPR emphasizes that the right not to be tortured is a fundamental human right that cannot be compromised under any circumstances. Article 4 paragraph 2 specifically prohibits any derogation of rights against torture that is regulated in Article 7. It lists rights from which no derogation is possible, either because they reflect peremptory norms or because derogation can never be justified even in an emergency situation. This provision aligns with the statutory regulations and extends the implementation of the ICCPR as ratified in Indonesian Law no. 12 of 2005.

The regulations concerning torture are defined in an international human rights treaties, particularly the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This convention mandates that state parties must take effective measures to prevent the occurrence of torture within their jurisdiction and also

[3] Stephen P Marks, *Human Rights: A Brief Introduction* (Cambridge: Harvard University, 2014).
[4] Setiawan Noerdajasakti, "Capital Punishment in the Perpective of Non Derogable Rights," *Brawijaya Law Journal* 3, no. 1 (2016): 1–16, https://doi.org/https://doi.org/10.21776/ub.blj.2016.00301.01.

prohibits the forced extradition or return of individuals to a state where they are at risk of torture. As previously stated, in order for an act to be classified as torture under the CAT, it must involve three essential elements: deliberate infliction of severe mental or physical suffering by a public official, either directly or indirectly, for a specific purpose. In such instances, prohibiting other forms of cruel, inhuman, or degrading treatment or punishment may be applicable. Similar to torture, this prohibition is absolute and cannot be derogated under any circumstances.[5] This provision also adopted by the UN General Assembly via resolution 39/46 on December 10, 1984, the convention came into force on June 26, 1987. Indonesia ratified this convention through Law No. 5 of 1998 on September 28, 1998, and also issued a declaration concerning the provisions of Article 20, paragraphs (1), (2), and (3), along with reservations regarding Article 30, paragraph (1) of the convention. CAT Article 1 explain the whole definition of the torture specifically. If we analyze the components of the definition of torture, it becomes apparent that it encompasses at least three criteria:[6]

1. The presence of severe mental or physical anguish;
2. Carried out or condoned by authorized government officials;
3. With a specific intention, such as extracting information, punishment, or coercion.

The provisions related to the torture act in the CAT highlight fundamental distinctions from other criminal acts such as physical abuse, beatings, or homicide. The key distinction lies in the identity of the perpetrator. The definition section clarifies that torture is specifically intended to extract a confession or information from an individual. Moreover, it explains that the perpetrator is typically a person with the power to punish and may be acting with the approval or acquiescence of a public official or another individual in an official capacity. It is also noted that the inflicted pain is a result of an authorized legal sanction. Therefore, the primary disparity is that the perpetrator is typically an individual officer/official/apparatus with authority and became the representation of the state in terms of human rights violations.

Prior to the enactment of Law No. 1 of 2023 Concerning Indonesian Criminal Code in Indonesia, there were no specific provisions regarding the enforcement of torture as a criminal act. The punishment for perpetrators and protection mechanisms were not fully regulated and were dispersed across various laws. For example, according to Article 189 paragraph (4) of Law no. 8 of 1981 concerning Criminal Procedure Law (KUHAP), a confession alone is insufficient for Judges to give a guilty verdict. There must be at least two pieces of evidence. This provision aims to ensure that defendants or the accused receive fair treatment, as their confessions may have been made under pressure or duress. However, there is still a need for more specific provisions regarding protection elements, enforcement, and regulations.

Law No. 1 Year 2023 on The Criminal Code addresses the crime of torture, particularly

[5] Asia Pacific Forum of National Human Rights Institutions, Association for the Prevention of Torture, and United Nations High Commissioner for Human Rights, *Preventing Torture: An Operational Guide for National Human Rights Institutions* (Sydney: Asia Pacific Forum of National Human Rights Institutions, 2010).

[6] Institute for Criminal Justice Reform, "Konvensi Anti Penyiksaan," Institute for Criminal Justice Reform, 2012, https://icjr.or.id/konvensi-anti-penyiksaan/.

in Article 529, which deals with torture to extract a confession as a purpose. Additionally, Article 530 addresses the criminal act of torture to obtain information, confession, or punishment. These articles explicitly reflect the provisions of the Convention against Torture (CAT), which is a positive development, given the concerning prevalence of torture in law enforcement in Indonesia. There have been cases of alleged torture by law enforcement officials, with sentences that many people feel did not serve true justice. These articles offer hope for strengthening and upholding human rights, particularly the right against torture. This research aims to examine law enforcement practices related to the torture act before the passage of Law No. 1 Year 2023 on The Criminal Code and to critically evaluate the future situation of torture in Indonesia based on an analysis of related and available data.

METHOD

The research adopts a normative juridical method, which involves the examination of library materials and secondary data. The secondary data utilized in this study encompasses primary legal materials such as statutory regulations, secondary legal materials including books and scientific papers, and tertiary legal materials in the form of news media sites, both online and in print. The research employs a statutory approach, which entails the examination and comparison of several pieces of legislation.[7] The statutory regulations referred to in this research include Law No. 1 of 2023 concerning the Criminal Code, Law No. 39 of 1999 concerning Human Rights, Criminal Code, Law No. 5 of 1998 concerning Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The research employs qualitative data analysis techniques to address the research questions, with the results being presented in a descriptive-prescriptive manner.

DISCUSSION

Regulation of Torture as a Criminal Act Before and After the Revision of the Indonesian Criminal Code

In the context of national human rights protection, it is crucial to address the right to be free from torture as an obligation that all countries, including Indonesia, must uphold. Indonesia has enacted several laws and regulations aimed at ensuring protection of this fundamental right.[8] The specific crime of torture was only regulated after the enactment of Law No. 1 of 2023 concerning the Criminal Code as a revision of previous regulation. Previously, offenses related to this criminal act were not specifically addressed in the revised Criminal Code. Before the establishment of Law No. 1 of 2023, provisions related to this issue were spread across several articles. However, they were not as clear and specific as those in

[7] Josef Myslin and Jiri Kaiser, "State Approach - Index - Based Measurement," *TEM Journal* 11, no. 2 (2022): 513–20, https://doi.org/10.18421/TEM112-03, May 2022.
[8] Rommy Patra, "Perlindungan Hak Konstitusional Untuk Bebas Dari Penyiksaan Di Indonesia," *Jurnal Konstitusi* 15, no. 3 (2018): 565–91, https://doi.org/https://doi.org/10.31078/jk1536.

the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The CAT provisions specifically define torture and regulate its forms as (1) causing extraordinary pain and suffering, (2) being perpetrated by or with the consent of an authorized state official, and (3) being carried out with the aim of obtaining information, punishment, or intimidation. The old Indonesian Criminal Code did not include specific regulations referring to the provisions in the CAT.

The provision in the old Criminal Code that is most closely related to the elements of torture is the criminal act of maltreatment/persecution (penganiayaan), which is regulated in Article 351. This article covers criminal acts of abuse resulting in serious injuries, abuse resulting in death, abuse that can cause health damage, as well as attempts to commit abuse. Additionally, Article 353 addresses abuse that is preceded by planning, whether it leads to serious injuries or death. Similarly, Article 354 addresses the criminal act of seriously injuring another person, which is equivalent to committing a criminal act of abuse, leading to death or not. Furthermore, Article 355 regulates serious abuse carried out with prior planning and imposes additional criminal sanctions if the act results in death. All criminal acts outlined in Articles 351, 353, 354, and 355 may be subject to an additional third of imprisonment if the perpetrator provides materials dangerous to life or health to eat or drink. In addition to addressing maltreatment/persecution as a criminal act, the regulation about torture also encompasses regulations regarding the act of premeditated murder if the victim dies due to the act. Article 340 outlines the legal consequences for individuals who intentionally and with premeditation cause the death of another person, with the penalties including capital punishment, life imprisonment, or a specific prison term of up to twenty years. The articles in question focus exclusively on the procedural aspects of criminal offenses without addressing the particular intentions and purpose of the criminal act and the individuals involved as perpetrators, such as government officials or law enforcement officers.

The previous version of the Indonesian Criminal Code contains provisions that were closest to the torture act is regulated in Article 421 and Article 422. Those provisions regulate in terms of perpetrators, particularly state officials. Article 421 deals with criminal acts committed by an official who abuses their power to coerce someone into doing or not doing something, with a maximum penalty of two years and eight months of imprisonment. Additionally, Article 422 addresses criminal acts committed by an official who uses coercive means in a criminal case to extort a confession or obtain information, punishable by a maximum imprisonment of four years. However, these provisions do not specifically address torture, and the degradation of human dignity as outlined in the CAT.

The Criminal Code contains several articles outlining criminal acts that involve elements of torture as defined in Article 1, paragraph (1) of the UN Convention against Torture (UNCAT). However, there are significant differences between Articles 351 to 357 of the Criminal Code and the UNCAT definition. These differences relate to the perpetrator, intent or motive, and form of the crime. Unlike the CAT definition, these articles do not require the involvement of

a public official as the perpetrator. Additionally, they do not include the specific intent to obtain a confession or information, to punish for a committed act, or for reasons based on discrimination. Furthermore, the forms of psychological torture are not explicitly covered. As a result, the elements of torture outlined in these articles do not fully align with the definition of torture under Article 1, paragraph (1) of the CAT, and the scope of their regulation is quite narrow.[9]

Meanwhile, Article 422 of the Criminal Code addresses the use of torture to extract a confession or information, also known as extortion of a confession, which is considered a crime in the Criminal Procedure Code. This article involves public officials, intent or motive, and the form of the crime, as outlined in Article 1, paragraph (1) of the CAT. However, it only applies to torture in criminal cases, excluding torture not related to criminal case examinations or carried out by a third party with the involvement of public officials. The article also lacks a clear description of coercion, making it too abstract. In practice, it is challenging to apply the provisions of this Criminal Code to acts constituting torture as defined in Article 1, paragraph (1) of the CAT, allowing many perpetrators potentially to evade punishment.[10] In Article 421 of the previous Criminal Code, there is the phrase 'allowing something', but this is not enough to define that an act of omission by a public official when the torture act is ongoing or after it happened can be processed trial. Related to the perpetrator's intention or purpose for carrying out an act of torture, which must be clear. That act has to be qualified as an act of torture, there must be at least a certain purpose, including (i) extorting a confession, (ii) obtaining information from victims or third parties, (iii) as a form of punishment *(untuk penghukuman)*, (iv) as a means of intimidation and coercion; and (v) committing acts of discrimination. Article 422 of the Criminal Code only opens up space for punishment for public officials who use coercion to obtain confessions and information, but there is no clause regarding the purpose of torture as a punitive or discriminatory act.

The previous Criminal Code contained problematic provisions related to the criminal act of torture, particularly in cases involving law enforcement officials as perpetrators. There were example cases of police officers being accused of unlawfully carrying out, ordering, or participating in pre-planned abuse that resulted in the death of a victim in custody. Additionally, there were cases of alleged mistreatment by police officers, resulting in the death and serious injuries of victims in detention. In the first case, the defendant was charged under Article 351 paragraph (3) in conjunction with Article 55 paragraph (1) 1st of the Criminal Code (primary), Article 351 paragraph (2) in conjunction with Article 55 paragraph (1) 1st of the Criminal Code (subsidiary), and Article 351 paragraph (1) in conjunction with Article 55 paragraph (1) of the Criminal Code (more subsidiary). This construction of charges focuses on proving: (i) whoever (barang siapa); (ii) committing persecution; (iii) the resulting death; (iv) the causing of serious injury; and (v) those who carried out, ordered, or participated in the

[9] Nurkholis Hidayat and Restaria F. Hutabarat, *Mengukur Realitas Dan Persepsi Penyiksaan Di Indonesia: Melalui Indeks Penyiksaan Serta Indeks Persepsi Penyiksaan* (Jakarta: The Partnership for Governance Reform, 2012).
[10] *Ibid.*

act.[11]

Suppose we refer to these two cases when the alleged criminal act of torture is constructed using the article about maltreatment or persecution, whether it causes serious injury or causes death, which is deemed not quite appropriate when viewed from the act of torture. Elements related to causing serious injury and death, at first glance, meet the criteria for acts that cause 'extraordinary pain and suffering' as defined in the CAT. However, there are other elements that are not covered, namely the element of intent or purpose of the perpetrators carrying out the torture, for example, to obtain information or carry out acts of discrimination and the element of the status of the perpetrators who are officials or acting in the capacity of public officials. As a result, the court also failed to treat this act as a crime of torture, and the judicial process only identified them as perpetrators like ordinary citizens. The court was unable to give more weight to the position of the defendants and explain the possible involvement of other parties, such as their superiors, thereby closing the possibility of further explaining the actions of 'omission' by the perpetrators' superiors.[12] The consequence of this process is the sentence in a verdict that does not feel justiceable enough or feels "too soft" for the perpetrators. Looking again at the two cases before, the verdict itself wrote that the perpetrator was only proven to have 'participated in committing the abuse' and was sentenced to 1 year in prison through the judge's verdict decision Number: 135/Pid.B/2012/PN.MR. Meanwhile, in the second case, the defendant was proven to have committed a 'criminal act of abuse and was only sentenced to 2 years in prison based on the judge's verdict decision Number: 134/Pid.B/2011/PN.PL.

The prevalence of torture cases in Indonesia serves to underscore the impact of existing legal provisions that are not really able to protect from the torture act. According to data from the National Human Rights Commission (Komnas HAM) and the Commission for Missing Persons and Victims of Violence (KontraS), there were a total of 282 reported cases of torture between January 1, 2020, and June 24, 2024. The reports indicate that the majority of alleged perpetrators were affiliated with the police, accounting for 176 cases during this period. Additionally, there were 15 reported cases allegedly involving individuals *(oknum)* of the Indonesian Army and 10 cases involving individuals of the prison officers and/or state detention centres.[13]

According to the Indonesian Legal Aid Foundation - Jakarta Legal Aid Institute findings, from year 2013 to 2022, there were 58 documented alleged cases of individuals being subjected to torture by individual of the police officers. Among these cases, 25 individuals were wrongfully arrested or convicted, and 6 were minors in conflict with the law. Additionally,

[11] Zainal Abidin, *Tindak Pidana Penyiksaan Dalam R KUHP* (Jakarta: Institute for Criminal Justice Reform, 2017).
[12] *Ibid*.
[13] Erwina Rachmi Puspapertiwi and Ahmad Naufal Dzulfaroh, "Data Komnas HAM-KontraS, Polisi Paling Banyak Dilaporkan Lakukan Penyiksaan," Kompas.com, 2024, https://www.kompas.com/tren/read/2024/06/28/070000065/data-komnas-ham-kontras-polisi-paling-banyak-dilaporkan-lakukan-penyiksaan?page=all.

all perpetrators identified in these cases allegedly were members of the police force. Furthermore, based on the Community Legal Aid Institute's documentation in three detention canters in the DKI Jakarta area from January to May 2024, 35 prisoners (3 women and 32 men) out of a total of 204 claimed to have been subjected to torture. Of the 35 prisoners, 15 were suspenal offenses as outlined in the Indonesian Criminal Code. It was reported that these incidents of torture allegedly took place during the investigation stage.[14]

Amnesty International Indonesia reported that between year 2021 to 2022, there were a minimum of 15 incidents torture cases, resulting in 25 victims. This number then increased to at least 16 incidents and 26 victims between the years 2022 and 2023. Subsequently, between 2023 and 2024, the number of incidents surged to 30, with 49 victims.[15] After examining the data, a discernible pattern emerges regarding the use of torture, particularly in relation to its underlying purpose. Amnesty International Indonesia notes that reports of torture often occur within legal proceedings with the objective of extracting confessions from suspects by force.[16] KontraS shares a similar perspective, asserting that torture is employed to compel victims to confess as a means of punishment.[17]

It is important to note that in cases of torture, impunity for the perpetrators continues to be a significant issue. According to KontraS monitoring, there are four main reasons for the impunity happened: (1) The police often hesitate to investigate reports of torture, (2) there are unjustifiable delays in investigating cases, (3) the law enforcement process fails to hold high-level individuals accountable and typically stops at lower-level actors, and (4) the punishment for perpetrators is often not severe enough but still must according the law. These findings suggest that the limited regulations concerning torture also contribute to the high number of cases and the prevalence of impunity for perpetrators.

Promulgation of Law no. 1 of 2023 concerning the Indonesian Criminal Code, which specifically regulates the criminal act of torture, where there are visible differences with the criminal act of abuse, persecution or other physical abuse. When compared to the provisions on torture, which are often the basis for ensnaring perpetrators of torture, the provisions in Article 530 focus on the perpetrator. Based on these two articles, the perpetrator of the crime of torture is an official or other person acting in a state official capacity. Regulations regarding torture, as in Article 530 of the current Criminal Code, are also in line with the definition of torture in the CAT. Referring to the explanatory part of Article 530, which emphasizes the aim

[14] Koalisi Masyarakat Sipil untuk Reformasi Kepolisian, "Perkuat Pengawasan Dan Batasi Kepolisian Pasca Tragedi Penyiksaan Dan Pembunuhan Anak Alm. AM (13), Bukannya Menambah Kekuasaan Dalam RUU Polri," Lembaga Bantuan Hukum Jakarta, 2024, https://bantuanhukum.or.id/siaran-pers-koalisi-masyarakat-sipil-untuk-reformasi-kepolisian-perkuat-pengawasan-dan-batasi-kepolisian-pasca-tragedi-penyiksaan-dan-pembunuhan-anak-alm-am-13-bukannya-menambah-kekuasaan/.

[15] Amnesty International Indonesia, "Penyiksaan Oleh Aparat Penegak Hukum Kian Mengkhawatirkan," 2024, https://www.amnesty.id/kabar-terbaru/siaran-pers/penyiksaan-oleh-aparat-penegak-hukum-kian-mengkhawatirkan/06/2024/.

[16] *Ibid*.

[17] Erwina Rachmi Puspapertiwi and Ahmad Naufal Dzulfaroh, *Ibid.*

of regulating offences in the provisions of the current Criminal Code, it is also to be in line with the elements of criminal provisions regarding acts of torture and other treatment or punishment that is cruel, inhuman or degrading to human dignity. This means that there is new hope, especially for efforts to eliminate the practice of torture in Indonesia.

The inclusion of provisions for the criminal act of torture in the current Criminal Code represents a significant step forward in addressing and eradicating torture in Indonesia. This provision demonstrates a clear commitment to strengthening the legal framework for combatting torture. Prior to this development, regulations specifically targeting the practice of torture were limited to the provisions of the 1945 Constitution of the Republic of Indonesia, Law No. 39 of 1999 concerning Human Rights, and Law No. 5 of 1998 concerning the Ratification of the Convention against Torture. It is important to note that the aforementioned provisions only pertain to the state's role as a guarantor for eradicating the practice of torture in Indonesia. Those provisions do not encompass specific regulations regarding the imposition of sanctions as outlined in the current Criminal Code. The addition of Article 530 to the current Criminal Code fills a crucial gap by explicitly outlining rules derived from the provisions of CAT.

Currently, the practice of torture is addressed in law enforcement using provisions on acts of abuse in the Criminal Code. Concrete efforts are underway to implement policies criminalizing torture in the existing Indonesian Criminal Code by 2023, and these measures are expected to be effective by 2026.[18] Prior to the inclusion of provisions for the crime of torture in the Criminal Code, most cases of torture were prosecuted using the persecution article. This situation becomes the reason why the provisions in Article 6 paragraph (1) of Law No. 31 of 2014 concerning the Protection of Witnesses and Victims, specifically victims of torture, in a way may not be directly applicable. However, victims of severe abuse are included as one of the parties covered in this provision and therefore, have the right to all forms of redress. With the current criminal act of torture addressed in Article 530 of the Criminal Code, there is now an opportunity for torture victims to be acknowledged based on court decisions using this article as the legal basis. This provision pertains to the entitlement of the victim to receive reparations. The terms reparations are frequently used interchangeably with compensation, restitution, indemnification, and damages. In practice, reparations may differ depending on the relevant legal framework, such as between individuals, nations, or a combination of both.[19] These provisions are similar to the spirit of the statutory provisions regarding the protection of witnesses and victims.

One solution to restore torture victims is compensation. There are at least three ways to request compensation that victims of torture can submit. First, apply for restitution. Article 7 paragraph (3) Law no. 31 of 2014 concerning Amendments to Law no. 13 of 2006 concerning Witness and Victim Protection states that submitting a request for restitution can be made

[18] Lembaga Perlindungan Saksi dan Korban, *Laporan Tahunan 2023 Perlindungan Saksi Dan Korban Dalam Pusaran Kejahatan Digital* (Jakarta: Lembaga Perlindungan Saksi dan Korban, 2024).
[19] Supriyadi W. Eddyono and Zainal Abidin, *Memastikan Pemenuhan Hak Atas Reparasi Korban Pelanggaran HAM Yang Berat* (Jakarta: Institute for Criminal Justice Reform, 2016).

before or after a court decision that has permanent legal force through the Witness and Victim Protection Agency (LPSK). The second route is recovery based on a civil lawsuit, either on the basis of an ordinary lawsuit based on Article 1365 of the Civil Code or a civil lawsuit for unlawful acts by the authorities (onrechtmatige overheidsdaad). One example of a successful lawsuit seeking compensation in a torture case is the Supreme Court decision no. 367 PK/Pdt/2017. The third route that can be used is Article 95 of the Criminal Procedure Code regarding compensation for losses in conjunction with Government Regulation *(Peraturan Pemerintah)* No. 92 of 2015 concerning Second Amendment to PP no. 27 of 1983 concerning Implementation of the Criminal Procedure Code. Article 95 paragraph (1) of the Criminal Procedure Code states that suspects, defendants, or convicts have the right to claim compensation for being arrested, detained, prosecuted, and tried or subjected to other actions without reasons based on law or because of a mistake regarding the person or the law being applied. PP No. 92 of 2015 regulates, among other things, the requirements, mechanisms, and amount of compensation that can be submitted based on Article 95 of the Criminal Procedure Code. For example, claims for compensation can only be submitted no later than three months from the date the extract or copy of the court decision obtains permanent legal force.[20]

Regulation of the Torture as a Criminal Act in the Criminal Code: What is Next?

The provisions on specific criminal acts related to torture as regulated in the current Indonesian Criminal Code are not yet completely sufficient. Of course, this is a breakthrough and something that needs to be appreciated, considering that its elements and provisions are direct derivatives of the CAT itself. However, the provisions on the crime of torture cannot stand alone without specific provisions in other laws and regulations. As is known, the Criminal Code contains the types and actions that are categorized as crimes and what the consequences are. However, before reaching the punishment as regulated in the Criminal Code, of course the trial process in court continues to seek facts and the basis for whether the defendant or alleged perpetrator is guilty or not, and also if found guilty, what and how long they must serve the sanctions as punishment. All of these provisions are regulated in the Indonesian Criminal Procedure Code so the provisions therein should also regulate the provisions of the criminal procedure mechanism to prevent authorized officers such as investigators from carrying out torture practice.

As of now, the Indonesian Criminal Procedure Code still makes reference to Law No. 8 of 1981. It is worth noting that on December 17, 2019, the Draft Law on Amendments to Law Number 8 of 1981 concerning Criminal Procedure Law currently included in the Priority National Legislation Program of the People's Representative Council of the Republic of Indonesia.[21] Nevertheless, the deliberation process for the draft law is still ongoing, and it is

[20] Muhammad Yasin, "KUHAP Ikut Melanggengkan Praktik Penyiksaan," Hukumonline.com, 2020, https://www.hukumonline.com/berita/a/kuhap-ikut-melanggengkan-praktik-penyiksaan-lt5f548ddc80da3/.

[21] Dewan Perwakilan Rakyat RI, "Program Legislasi Nasional RI," DPR RI, 2019,

anticipated to take a considerable amount of time. The enforcement of the provisions related to the crime of torture in the current Criminal Code is slated for 2026. Therefore, until that time, the previous version of the Criminal Code will remain in force. When it comes to the provisions in the Criminal Procedure Code aimed at preventing the practice of torture, it has been revealed that certain articles inadvertently create opportunities for the practice of torture.

The provisions in the Indonesian Criminal Procedural Law appear to create the potential for the practice of torture in relation to the purpose itself to obtaining a defendant's confession. For example, Article 184 paragraph (1) of the Criminal Procedure Code regulates what is the definition of the term that is considered valid evidence, including the defendant's confession. Additionally, Article 189 paragraph (1) defines the defendant's statement as something said by the defendant in court about their actions or personal knowledge. This provision creates concern that individuals in custody may confess to crimes that they possibly did not even commit due to the use of torture to obtain information. Furthermore, Article 189, paragraph (2) allows the defendant's statement given outside the court to be used to help find evidence at trial, as long as it is supported by valid evidence regarding the matter related to an alleged criminal offense that is charged to them.

It is argued that relying solely on the evidence of statements or confessions from defendants, as limited by the provisions of Article 189 paragraph (2) and paragraph (4), is insufficient to guarantee the absence of torture. According to Totok Yulianto, Chairman of the National Management Board of the Legal Aid and Human Rights Association (PBHI), the provisions of the Criminal Procedure Code may inadvertently perpetuate the practice of torture. This provision is partly due to the possible extended detention period, which is also regulated in the Criminal Procedure Code, during which torture victims may not be able to report their experiences as the evidence of torture may have healed. Totok also highlights the inadequate oversight within the criminal justice system, where procedural matters are often overlooked in favor of finding material truth. Moreover, there appears to be a tendency for judges to prioritize the Minutes of Examination over conducting thorough examinations during the trial, undermining the use of the defendant's statement as evidence. Overall, Totok emphasizes that the information in the case file is often favored over the defendant's statement at trial.[22]

In addition to the rules and regulations concerning the burden to provide proof is a defendant's obligation, which can be from their confession or statement, the Criminal Procedure Code faces a challenge regarding the potential for torture in the various investigation processes. According to the provisions of the Criminal Procedure Code, it is important to note that the determination of a suspect's status is entirely in the hands of the investigator, and there is practically no mechanism for the suspect to object to the investigator's decision. However, there is a justice mechanism called pretrial hearing which the

https://www.dpr.go.id/uu/detail/id/373.

[22] Muhammad Yasin, *Ibid.*

scope was expanded after the Constitutional Court (MK) decision Number 21/PUU-XII/2014. However, it is crucial to understand that the pretrial hearing mechanism itself has limitations. Unlike the concept of magistrate or justice of the peace, pretrial institutions are not habeas corpus institutions widely recognized in legal literature. Although the pretrial judge can declare the legality of arrest, detention, termination of investigation, or prosecution, this authority is limited after coercive measures have been taken. This limitation arises because pretrial authority only comes into play after coercive measures have been applied, thereby making it ineffective in providing protection against the investigator's extensive authority. This provision stands in contrast to the supervision of coercive measures in the concept of "magistrate" or "justice of the peace", where consent is not only sought at the beginning of the investigation but also involves community participation as a check and balances mechanism.[23]

The issue of torture within the investigation process also becomes a specific significant concern. In many cases related to allegations of the crime of torture happens just before the interrogation process or during the period of detention. That situation makes it more challenging for the torture victims as a suspect or defendants to raise any objections or report any violations in a timely manner. This power imbalance between the officers and the suspect/defendant may lead to the latter feeling pressured to comply with instructions due to fear or threats rather than conveying the truth. The judicial process is a lengthy one that does not end at the pretrial hearing. It is important to understand that the suspect or defendant often feels personally invested in the outcome, as the process takes time to determine whether the alleged criminal act is proven or not. There is a possibility that the suspect or defendant may feel compelled to follow any instructions from the individual officer due to fear and threats, which could influence the final decision in the case. Furthermore, the lack of understanding of legal provisions among a large portion of the population in Indonesia exacerbates this issue, with 80% of Indonesian people reportedly being legally blind. This lack of legal understanding makes so many people vulnerable to becoming victims and increases the potential for the fabrication of cases by perpetrators. Overall, this highlights the potential for the Criminal Procedure Code to enable the perpetuation of the practice of torture.

It is imperative to acknowledge that simply ratifying the Convention Against Torture and including those provisions in the state constitution is not sufficient to prevent and eradicate torture in Indonesia effectively. To further enhance human rights protection against torture, Indonesia must take proactive measures by ratifying the Optional Protocol to the Convention Against Torture (OPCAT[24], an international treaty aimed at preventing torture and other cruel, inhuman, or degrading treatment. OPCAT focuses on prevention through various innovative monitoring mechanisms, including proactive visiting activities to identify risks,

[23] Supriyadi W. Eddyono et al., *Praperadilan Di Indonesia: Teori, Sejarah Dan Praktiknya* (Jakarta: Institute for Criminal Justice Reform, 2014).

[24] Yesaya Rampen, "Ratifikasi Perjanjian Internasional Melalui Peraturan Perundang-Undangan Nasional Di Bidang Hak Asasi Manusia," *Lex Privatum* 10, no. 4 (2022).

analyze shortcomings, provide recommendations, and address the root causes of torture and ill-treatment. OPCAT serves as a complementary treaty to CAT, emphasizing not only a set standard but also functioning as an implementation agreement in the global fight against torture.[25]

On October 23, 1985, Indonesia signed the Convention against Torture, which was subsequently ratified through Law Number 5 of 1998. After the ratification, the state government also established an institution with a proactive program to improve human rights protection mechanisms under Presidential Decree Number 40 of 2004 concerning Action Plans for the National Human Rights Period 2004-2009. In Indonesia's second report to UNCAT, it was mentioned that RANHAM (National Human Rights Action Plan) had intended to ratify the OPCAT. However, despite this intention, the Optional Protocol on the OPCAT ratification has not been carried out to date. The provisions for the crime of torture in the current Criminal Code, while directly related to the CAT, are considered inadequate. Since Indonesia has not ratified OPCAT, it seems the state is not obligated to uphold its provisions.

It is essential for a state that ratifies OPCAT to adhere to several key obligations regulated by those provisions as an international human rights instrument. Firstly, the state must provide regular accountability reports to the United Nations Human Rights Committee, detailing the progress made in eliminating the crime of torture and safeguarding human rights.[26] Secondly, the state must integrate the provisions of international agreements into national law. This integration must be enacted as binding law, requiring careful study, design, and alignment with existing regional regulations. For example, the implementation of qanun in Aceh considered does not align with human rights principles and contravenes with the anti-torture convention.[27] Ratifying OPCAT into national law necessitates the harmonization and consolidation of various customary laws and regional regulations. This implementation mandates that all legislative institutions across all regions must consider the OPCAT as a reference, particularly with regard to punishment provisions. Thirdly, there is a need for a universal understanding of human rights among Indonesian government officials, law enforcement, and the general populace.[28] Lastly, there should be a concerted effort to socialize and engage in proactive activities that directly impact the community, ensuring the provision of services and the protection of human rights.

The OPCAT requires ratifying states to establish a national preventive mechanism. This Protocol applies only to states that have ratified the CAT and have opted to ratify or accede to the Protocol. It introduces an innovative provision allowing a State to be visited by an

[25] Naura Ardya, "Akibat Hukum Ratifikasi Optional Protocol on the Convention Against Torture (Opcat) Dan Pengaruhnya Pada Perlindungan Hak Atas Rasa Aman Dari Penyiksaan Di Indonesia," *Jurnal Hukum To-Ra: Hukum Untuk Mengatur Dan Melindungi Masyarakat* 9, no. 1 (2023): 10–23.
[26] Ilham Aji Pangestu and Irma Sri Rejeki, "Monitoring Kepatuhan Negara Peserta Konvensi Pengungsi Melalui Sistem Monitoring HAM Internasional," *Supremasi Hukum* 18, no. 01 (2022): 53–62, https://doi.org/https://doi.org/10.33592/jsh.v18i01.2161.
[27] Naura Ardya. *Ibid.*
[28] *Ibid*.

international body, the Subcommittee on Prevention, with unrestricted access to places of detention. It also permits a state to establish an independent mechanism similar to the subcommittee at the national level. If a State ratifies the Protocol, it is required to ensure the independence of the national preventive mechanism and that each of its members has expertise in human rights law, which stated on article 3 OPCAT. Among other things, States parties must empower their national preventive mechanisms to conduct regular monitoring to enhance protection against torture and other ill-treatment and to make recommendations to the Government for improvements to existing legislation which stated on article 1 OPCAT.

The OPCAT provisions also regulate the state's obligations to ensure that the national preventive mechanism has the necessary authority to carry out its mandate effectively. In particular, in order to enable the prevention of torture to run appropriately and effectively, the national preventive mechanism must be given the following powers:

1. unrestricted access to information regarding persons whose liberty has been seized and the where they are detained;
2. access to all places of detention and their facilities;
3. the right to conduct interviews with detainees or other people deemed necessary confidentially and without other parties;
4. freedom to choose the places to visit and the people to interview;
5. the right to exchange information and meet with the Prevention Sub-committee.

After making updates and adjustments to various laws on some legislation levels, including changes to national regulations and the urgent ratification of international agreements, the next critical step is to improve the implementation process. As previously discussed, there are instances of alleged torture where the perpetrators are not processed by the justice mechanism, and there are even suspicions that they have evaded punishment. One contributing factor to the impunity surrounding torture is the reluctance of law enforcement officials to investigate reported cases of alleged torture.

The Police, as a law enforcement institution, are authorized to investigate criminal activities and also play a key role in the integrated criminal justice system in Indonesia. According to the 1945 Indonesia Constitution, the Police are responsible for upholding the law, as well as safeguarding and nurturing the community. Furthermore, Law Number 2 of 2002 on the Indonesian National Police (Law 2/2002) outlines the constitutional mandate for 'law enforcement' in Article 14 paragraph (1) letter g in conjunction with Article 15 paragraph (1) letter a. This provision mandates the Police to conduct a preliminary and full investigation process, as well as receive reports and/or public complaints. The Police are also granted the authority to carry out coercive measures such as arrests, suspect determination, searches, and confiscation, as regulated in Article 16 of Law 2/2002 to facilitate law enforcement.

For example, in the case of alleged torture against Oki, his death was allegedly due to torture by investigators. Initially, Oki's death raised suspicions due to his arrest process performed without sufficient preliminary evidence, his family being denied visiting access, and

the police concealing his death. It was later revealed that Oki allegedly had been brutally tortured by the police to coerce a confession for the motorcycle theft act. According to KontraS and YLBHI-LBH Yogyakarta perceived that the police institution seemed hesitant to pursue legal processes to uncover the truth about Oki's death, as evidenced by the delayed police action in conducting preliminary and full investigations, despite suspicious circumstances and signs of torture-related injuries.[29] After that, Oki's family had to struggle on their own to file a type B Police Report addressed to the One-Stop Integrated Service (PTSP) of Polresta Banyumas.[30]

Second, in several cases, the investigation into alleged torture cases involving law enforcement officers was deemed and considered to be delayed, and the process took too much time. The allegation of undue delay is apparent in the report regarding the alleged torture of M. Fikry and others in Tambelang, Bekasi, In 2022. The Anti-Torture Advocacy Team, consisting of KontraS, LBH Jakarta, and Imparsial, raised allegations of torture against investigators. M. Fikry and others were reportedly subjected to torture and coerced into confessing to a theft act. The police report was filed under Police Report Number: STTLP/LP/B/2164/IV/2022/SPKT/POLDA METRO JAYA dated April 28, 2022, and was handled by investigators from Unit 4 Sub-Directorate for Crimes of Violence (Jatanras) Police's Criminal Investigation Directorate (Ditreskrimum) The Greater Jakarta Metropolitan Region of the Indonesian National Police **(**Polda Metro Jaya). Despite almost two years since the report was filed, the legal process remains stagnant at the investigation stage, and there has been no update on the progress from Polda Metro Jaya regarding this allegation of the torture report.[31]

When it comes to implementing sanctions, there have been some concerns about the penalties imposed in court cases involving torture. Despite successful prosecution, there are lingering doubts and questions about the severity of the sanctions given in the verdicts. In the case of the allegation of torture of late OK, the judge at the first-instance court confirmed that the death of OK while in custody was caused by the actions of four active police officers. The sentences given to each defendant were longer than the Prosecutor's demands because the judges included aggravating factors as outlined in Article 52 of KUHP, resulting in 7 and 8 year sentences for the four officers. However, it is unfortunate that at the appellate level in Case Number 134/PID/2024/PT SMG and Number 52/PID/2024/PT SMG, on February 21, 2024, and January 25, 2024, respectively, the sentences were reduced to 5 years of imprisonment. Regarding to that verdict, KontraS as one of the legal teams, regrets that the panel of appellate judges examining case number 134/PID/2024/PT SMG in its considerations gave leniency because the sentences given to the three police officers were too heavy, using arguments that

[29] Komisi Orang Hilang dan Tindak Kekerasan, "Peluncuran Laporan Investigasi Penyiksaan Terhadap Tahanan Polrestas Banyumas OK: Kaburnya Keadilan Bagi Korban," KontraS, 2023, https://www.youtube.com/live/5CcPnze4Aik.

[30] Andrie Yunus et al., *Situations of Torture Practices and Other Cruel, Inhuman, or Degrading Treatment or Punishment in Indonesia for the June 2023 - May 2024 Period* (Jakarta, 2024).

[31] *Ibid*

had been rejected by the previous panel of district court judges.[32]

After conducting various analyses, it is evident that the eradication of torture practices in Indonesia will require a substantial amount of time and how far the political will of the state. The issue is deeply concerning, and mere constitutional recognition, ratification of the CAT convention, and specific regulations in the current Criminal Code are insufficient. The state must undertake and accomplish numerous additional processes to eliminate torture practices in Indonesia. The solution is discernible and lies within the state's will. For instance, ratifying the OPCAT is entirely feasible, but the decision rests with the state and its government, depending on their political will. Furthermore, steps such as openly revising the Criminal Procedure Code should involve various experts and civil society. The involvement of the civil society is crucial in ensuring that the government carries out its control function effectively. As the governing body with the power to influence public policy, the government must be held accountable to prevent any misuse of authority.[33]

CONCLUSION

The right to be free from all forms of torture is an essential human right that must be upheld without exception. It is the responsibility of the state to establish preventive measures, provide protection, enact appropriate laws, and enforce them to hold perpetrators of torture accountable. The inclusion of provisions addressing torture in Law No. 1 of 2023, which is directly in line with the CAT, marks a positive development in enforcing human rights in Indonesia. However, more work remains to be done. One urgent task is to revise and align the Criminal Procedure Code (KUHAP), ratify the Optional Protocol to the Convention against Torture (OPCAT), and ensure effective law enforcement for the perpetrator.

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[33] M. Rizki Yudha Prawira and Agil Masyhur Akbar, "Legal Analysis Regarding Alleged Violations During Demonstration Against Strategic Project Development Nagari Air Bangis, West Sumatra," *Progressive Law Review* 6, no. 1 (2024): 11–25, https://doi.org/https://doi.org/10.36448/plr.v6i01.139.

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