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COMPARISON OF THE CONSTITUTIONALITY OF LEGAL POLITICS IN THE 1981 KUHAP AND THE 2026 KUHAP

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Abstract

The reform of criminal procedural law through Law Number 20 of 2025 which came into effect on January 2, 2026, marked a change in the direction of national legal policy in responding to developments in the state system, guarantees of human rights, and the need for law enforcement. These changes raise questions regarding the continuity and differences in the constitutional basis for the formation of the 1981 Criminal Procedure Code (KUHAP) and the 2025 KUHAP, especially after the amendment to the 1945 Constitution of the Republic of Indonesia. This study aims to analyze and compare the constitutionality of the legal policy of the formation of both laws based on legislative authority, legal policy orientation, and the principle of constitutional rights protection. The study uses a normative juridical method with a statutory, historical, and comparative approach. Primary, secondary, and tertiary legal materials are examined through literature studies and analyzed qualitatively using systematic interpretation and legal comparison. The results of the study indicate that the formation of both Criminal Procedure Codes has a continuity of constitutional orientation in realizing legal certainty, justice, and protection of citizens' rights, but shows fundamental differences in the basis of legislative authority and strengthening the guarantee of constitutional rights. The 1981 Criminal Procedure Code was formed within the framework of the constitution before the amendment, while the 2025 Criminal Procedure Code is based on the post-amendment constitutional system of the 1945 Constitution which emphasizes the strengthening of the legislative function of the DPR and the protection of the right to legal certainty and equality before the law. This finding confirms that the constitutionality of the legal policy of the formation of laws is not only determined by the suitability of legislative procedures, but also by the alignment of the substance of the regulations with the principles of the rule of law and the protection of constitutional rights in each period of the state administration.

Keywords: Criminal Procedure Law; Constitutionality; Legal Politics; Formation of Laws; Comparative Law.

INTRODUCTION

Since January 2, 2026, Law Number 20 of 2025 concerning the Criminal Procedure Code (KUHAP 2025) has been enacted. The enactment of the new law was carried out because Law Number 8 of 1981 concerning Criminal Procedure Code (KUHAP 1981) was no longer in accordance with changes in the state system, legal developments in society, and advances in information technology. The enactment of the new KUHAP this time certainly feels different from when *Het Herziene Inlandsch Reglement/HIR* (*Staatsblad* 1941 Number 44) was replaced with Law Number 8 of 1981 concerning Criminal Procedure Code because *HIR* was indeed not in accordance with the ideals of national law.

The enactment of the 2025 Criminal Procedure Code to replace the 1981 Criminal Procedure Code in January 2026 coincided with the enactment of the new Criminal Code (Law Number 1 of 2023 concerning the Criminal Code/KUHP). The simultaneous enactment of two new laws means there will be a new chapter in criminal law in Indonesia, criminal law and criminal procedure law. The public certainly hopes that the enactment of these two new laws will eliminate or at least reduce existing problems. In the context of the ideal of social welfare based on the principles of deliberation and consensus in accordance with the 1945 Constitution, the normative legal procedure of criminal law must be based on the principle of balance between human rights and human obligations, balance the

interests of suspects/defendants and the interests of law enforcement and be adjusted to the values of customary law that have grown and are in line with the development of Indonesian society today.(Gunarto, 2013, hlm. 25)

Indonesia's criminal procedure system still faces significant challenges in ensuring a balance between legal certainty and the protection of suspects' human rights. Detention, which should be the final step in the judicial process, is often used as a repressive tool that prioritizes the interests of law enforcement officers over the principle of justice. (Noor dkk., 2025, hlm. 18)The provisions regarding *restorative justice* in the New Criminal Procedure Code (KUHAP) demonstrate a paradigm shift from a retributive criminal justice system to a more humanistic and recovery-oriented approach. This concept broadens the objectives of criminal punishment beyond punishment to include victim rehabilitation, perpetrator accountability, and social reconciliation. While *restorative justice* provides flexibility in case resolution, it creates normative tension between the principle of legal certainty, which demands clear, firm, and limitative rules, and the discretion of law enforcement officers, which requires discretion in handling concrete cases.(Pulungan & Situmorang, 2026, hlm. 57)

Legal experts have long agreed that law must be dynamic, not static, and must be able to protect society. Law must be able to serve as a guardian of order, peace, and a guide to behavior in community life. Law must be able to be a reformer in the life of the nation and state. It must be formed with a future-oriented (*for the world looking*), not a law that is oriented to the past (*looking back*). Therefore, law must be able to be a driver and pioneer to change the life of society for the better and benefit all parties.(Manan, 2005, hlm. 6)

Newly independent nations, including Indonesia, inherited much from their colonial predecessors, as even revolutions accompanied by total destruction, a rarity in new states, could not erase the traces of the past. (Lev, 2014, hlm. 404)This legacy included laws and regulations that could not be readily replaced, thus maintaining the old laws and regulations that actually contradicted the revolution itself. If the law is to avoid being considered lagging behind societal developments, it must respond to all the intricacies of the social life surrounding it.(Lamintang & Lamintang, 2010, hlm. 11)

The implementation of laws, especially statutes, cannot be separated from legal politics. The Criminal Procedure Code is essentially a decision of the will of the legislators who have been constitutionally authorized to do so by the 1945 Constitution of the Republic of Indonesia. (Lamintang & Lamintang, 2010, hlm. 11)Constitutional means related to, in accordance with, or regulated by the constitution or basic law of a country. Legal politics describes the attitude of the legislators in order to provide direction for the implementation of the legislation to the public.

In its formation process, legal politics can be observed from the basis of the thinking used. (Shidarta, 2024, hlm. 178)In this regard, we are interested in conducting research on the constitutionality of the legal politics of the formation of laws on criminal procedure. Legal politics is part of Constitutional Law, so this research is a study of Constitutional Law. The problem to be studied can be formulated as how does the constitutionality of the legal politics of the formation of Law Number 8 of 1981 concerning Criminal Procedure Law compare with Law Number 20 of 2025 concerning the Criminal Procedure Code?

The purpose of this study is to understand the constitutionality of legal politics in the formation of the Law on Criminal Procedure. "Understanding" is different from "knowing." The word implies the ability to feel something that others experience. People can have a lot of knowledge but little understanding. Understanding refers to the ability to reach someone's personal level. (Hardiman, 2022, hlm. 9)Therefore, the researcher will strive to understand the public's feelings, thus necessitating the formation of the Law on Criminal Procedure. This research can be considered novel because it examines the Law on Criminal Procedure, which has only been enacted for a few months. Theoretically , this research is expected to enrich legal science, specifically legal politics. Furthermore, in practice, the results of this study are expected to help understand various issues surrounding legal politics in criminal procedure law as material for future improvements.

METHOD

This type of research is a normative or library legal research (Soekanto Soerjono & Sri, 1990, p. 15) because it examines the history of law and comparative law on Criminal Procedure Law. Therefore, the appropriate research approach is the statute approach , historical *approach* , and comparative *approach* . (Marzuki, 2014, p. 133) The types and sources of legal materials used include primary legal materials (the 1945 Constitution, the Law on the Criminal Procedure Code), secondary (books, journals) and tertiary in the form of draft legislation on Criminal Procedure Law and other library materials on legal politics related to Criminal Procedure Law. The technique for

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collecting legal materials is through library studies. These materials are then analyzed qualitatively to produce coherent and consistent findings. (Puspitasari, 2024, p. 358)

As previously stated, the research used a statutory approach , a historical approach , and a comparative *approach* . The statutory approach is an approach that uses legislation and regulations. In the statutory approach method, researchers need to understand the hierarchy and principles in statutory regulations. (Marzuki, 2014, p. 137) The historical approach is carried out within the framework of tracing the history of legal institutions over time. This approach greatly helps researchers to understand the philosophy of legal rules over time. In addition, through this approach, researchers can also understand the changes and developments in the philosophy that underlies these legal rules. (Marzuki, 2014, p. 166) Meanwhile, the comparative approach is carried out by conducting a comparative legal study. (Marzuki, 2014, p. 172) A legal comparison is an activity to compare the laws of one country with the laws of another country or the laws of a certain time with the laws of another law. (Marzuki, 2014, p. 173) In this research, a comparison will be made specifically of the constitutionality of legal politics **.**

RESULTS AND DISCUSSION

Legal Politics

Every organized society can establish consistent patterns of relationships between its members to achieve its desired goals. (Green Mind Community, 2009, hlm. 232)Likewise, law confronts the need to make choices regarding both goals and the means to achieve them. This falls within the field of legal politics. (Green Mind Community, 2009, p. 232)

Legal policy is the basic policy of state administrators in the legal field that will, is currently, and has been in effect, derived from prevailing values in society to achieve the desired state goals. (Manan, 2005, hlm. 103)Generally, state goals are stated in the Basic Law or constitution. Therefore, it can be said that legal policy is essentially a policy aimed at achieving state goals. Legal policy that is in accordance with the constitution is constitutional legal policy. Conversely, legal policy that is not in accordance with the constitution is unconstitutional legal policy.

The legal policies of one country differ from those of another. This difference is due to the historical background, worldview, socio-cultural context, and *political will* of each government. In other words, legal policies are local and particular (applicable only to and for a particular country), not universal (applicable worldwide). (Green Mind Community, 2009, hlm. 240)Therefore, each country needs to develop its own legal policies appropriate to its own circumstances. Studying the legal policies of other countries is certainly beneficial, but they cannot be immediately applied in one's own country and require further adjustments.

According to Hardiman, there are several key ideas that can serve as clues to identifying the figure of Indonesian philosophical thought in the fields of politics and law. *First,* Indonesian thought on politics and law is capable of adapting concepts and models of modern Western thought, such as nationalism, democracy, constitutionalism, secularism, and human rights. However, this adaptation is not accompanied by dialectics and synthesis, but rather provides space for these concepts to live alongside the Indonesian mentality. *Second* , this "half-baked rationalization"—if we may call it that—not only gives rise to conceptual hybrids but also allows for moderation and tolerance, so that Indonesian thought in the fields of politics and law avoids extreme attitudes and favors ambiguity. Pancasila is the conceptual crystallization of this moderate attitude. *Third* , political and legal thought in Indonesia prioritizes communal values, making it more communitarian than liberal. This is evident, among other things, in the concepts of rights, justice, politics, and power.(Hardiman, 2019, hlm. 8)

In a democratic country, political parties are crucial to the administration of the state because it is through them that the people determine policy. The existence of political parties is so important in a country that the saying has emerged that "a modern country without political parties is like a pond without fish." (Manan, 2005, hlm. 111)Legislation, including laws, is essentially the policy of political parties, as all members of the House of Representatives involved in the formation of laws are members of political parties, although it must remain scientific as outlined in the academic text of each law.

The vision of scientific activity is indeed aimed at obtaining the final truth, the ultimate truth, from the essence of reality. However, the essence of truth or ultimate truth may never be achieved. As proof, the scientific truths that have been achieved so far and those that will come are temporary truths that will always change and be refined continuously over time. The scientific truths achieved so far are temporary answers to the questions posed. The scientific theories that have accumulated so far in each scientific discipline are nothing more than the result of agreement or consensus among scientists in their respective fields, through discoveries, a process of dialogue and dialectics, based on certain criteria, and influenced by space and time.(Dwi Putro, 2024, hlm. 46) When a law is enacted, it can be said to be correct at that time. However, over time, something that was correct can change and

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require further refinement. Therefore, changes to a law cannot be interpreted as a mistake by past lawmakers, but rather as a result of current circumstances that necessitate change.

In the field of criminal law, according to Sudarto as quoted by Barda Nawawi Arief (Arief, 2011, hlm. 3)there are 3 (three) meanings of criminal policy/politics, namely: a. In a narrow sense, it is the entire principle and method that is the basis of the reaction to violations of the law in the form of crime; b. In a broad sense, it is the entire function of the law enforcement apparatus, including the working methods of the courts and the police; c. In the broadest sense (which he took from Jorgen Jepsen), it is the entire policy, carried out through legislation and official bodies, which aims to uphold the central norms of society. On another occasion Sudarto put forward a brief definition that criminal policy is "a rational effort by society in overcoming crime."(Arief, 2011, hlm. 3)

Procedural Law

According to R Soeroro(Sofyan & Asis, 2014, hlm. 3) procedural law is a collection of provisions with the aim of providing guidelines in the effort to seek truth and justice if there is a violation of a legal provision in material law, which means giving procedural law a relationship that is subservient to material law.

In relation to criminal law, it can be said that the existence of provisions of Criminal Procedure Law is very necessary and essential in the framework of enforcing substantive criminal law. Criminal Procedure Law is the process of enforcing criminal law. (Adamson, 2026, hlm. iv)In other words, it can be said at a macro level that provisions of substantive criminal law cannot be *a priori* enforceable (*dwingen recht*) without the support of criminal procedure law. (Mulyadi, 1996, hlm. 1)In this regard, there are three main functions of procedural law: seeking and discovering the truth, making decisions by judges, and implementing the decisions that have been made.(Sofyan & Asis, 2014, hlm. 7)

The statement above is in line with the opinion that law is not only the totality of principles and rules that regulate human life in society but also includes institutions and processes that make these rules apply in reality.(Otje, 2002, hlm. 30)

Criminal Procedure Law

There are two types of law commonly distinguished: material (substantive) law and formal (procedural) law. In addition to material (substantive) criminal law, there is formal criminal procedural law, as well as civil law and administrative law (state administrative law). Of course, procedural law also includes norms that shape law enforcement bodies.(Hans Kelsen, 2016, hlm. 185)

Criminal Procedure Law according to Yan Pramadya Puspa is the legal provisions that regulate how the order of criminal law must be enforced or implemented properly if a violation occurs and how the state must fulfill its criminal rights or the right to punish the violator of the law (defendant) if a violation of criminal law occurs. The state is represented by the public prosecutor or prosecutor. Where the prosecutor must demand (submit) the demands of the case in court.(Sofyan & Asis, 2014, hlm. 5) The function of Criminal Procedure Law is to seek and discover the truth, the decision-making process by the judge, and the implementation of the decision that has been taken.(Sofyan & Asis, 2014, hlm. 7)

Criminal procedure law in Indonesia developed from the customary law system, then was influenced by Dutch law through various colonial regulations. After independence, Indonesia developed its own criminal procedure law, which was finally embodied in Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP), as the national criminal procedure law system. Law enforcement uses the KUHAP to prove and examine criminal acts committed by suspects through the stages of the criminal process. The KUHAP serves as a reference and guide in resolving criminal cases. Regarding the upholding of justice, the existence of criminal procedure law in Indonesia is crucial in upholding justice.(Hakim Prasojo dkk., 2025, hlm. 224)

Comparison of Legal Politics in Criminal Procedure Law

The following section will examine and compare the constitutionality of the legal policies in Law Number 8 of 1981 concerning the Criminal Procedure Code and Law Number 20 of 2025 concerning the Criminal Procedure Code. This time, the "Considering" and "Recalling" sections of both laws will be examined and compared.

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LAW NUMBER 8 OF 1981 CONCERNING THE CRIMINAL PROCEDURE CODE		
Weigh	:	1. that the Republic of Indonesia is a state based on law based on Pancasila and the 1945 Constitution which upholds human rights and guarantees that all citizens have equal standing before the law and government and are obliged to uphold the law and government without exception; 2. that for the sake of development in the legal field as stated in the General Guidelines of State Policy (Decree of the People's Consultative Assembly of the Republic of Indonesia Number IV/MPR/1978) it is necessary to make efforts to improve and perfect the development of national law by carrying out legal codification and unification reforms in the summary of the real implementation of the Archipelago Outlook; 3. that the development of such national law in the field of criminal procedural law is so that the community can internalize its rights and obligations and to improve the development of the attitudes of law enforcement officers in accordance with their respective functions and authorities towards upholding the law, justice and protection of human dignity and honor, order and legal certainty for the sake of implementing a state based on law in accordance with the 1945 Constitution; 4. that the criminal procedural law as contained in Het Herziene Inlandsch Reglement (Staatsblad 1941 Number 44) in connection with and Law Number 1 Drt. of 1951 (State Gazette 1951 Number 9, Supplement to State Gazette Number 81) as well as all implementing regulations and provisions regulated in other legislation insofar as they concern criminal procedural law, need to be revoked, because they are no longer in accordance with the ideals of national law; 5. that therefore it is necessary to enact a law on criminal procedure to implement justice for courts in the general court environment and the Supreme Court by regulating the rights and obligations of those involved in criminal proceedings, so that the main basis of the rule of law can be upheld.
Remember	:	1. Article 5 paragraph (1), Article 20 paragraph (1) and Article 27 paragraph (1) of the 1945 Constitution; 2. Decree of the People's Consultative Assembly of the Republic of Indonesia Number IV/MPR/1978; 3. Law Number 14 of 1970 concerning the Main Provisions of Judicial Power (State Gazette of 1970 Number 74, Supplement to the State Gazette Number 2951).
LAW NUMBER 20 OF 2025 CONCERNING THE CRIMINAL PROCEDURE CODE		
Weigh	:	1. that Indonesia is a state based on the rule of law based on Pancasila and the 1945 Constitution of the Republic of Indonesia which upholds human rights and guarantees equal status for its citizens before the law and government, and upholds the law and government without exception in order to realize legal certainty, justice and benefits; 2. that in order to realize legal certainty, justice and benefits, it is necessary to update criminal procedural law which reflects the

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		values that live and develop in society and takes into account developments in international law; 3. that the renewal of criminal procedural law is intended to create the supremacy of law, guarantee the rights of suspects, defendants, convicts, witnesses and victims of criminal acts, and create an integrated criminal justice system that strengthens the functions, duties and authority of law enforcement officers in line with developments in state administration and advances in information technology; 4. that Law Number 8 of 1981 concerning Criminal Procedure Law is no longer in accordance with changes in the state system, legal developments in society, and advances in information technology, so it needs to be replaced; 5. that based on the considerations as referred to in letter a, letter b, letter c, and letter d, it is necessary to form a Law concerning the Criminal Procedure Code;
Remember	:	Article 20, Article 21, Article 27 paragraph (1), and Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia;

In letter a, considering that both laws contain the same thing, namely that the Republic of Indonesia is a state of law based on Pancasila and the 1945 Constitution which upholds human rights and guarantees that all citizens have equal standing before the law and government and are obliged to uphold the law and government without exception. In the 2025 Criminal Procedure Code, the statement "to realize legal certainty, justice, and benefits" is added or ends with the statement so that the purpose of this law becomes clearer as the purpose of law in general.

Based on the comparative analysis of the Considerations in Table 1, three main points of legal transformation are visible: First, the Considerations Considering letter c of the 2025 Criminal Procedure Code explicitly includes the phrase 'victim of a crime' as a legal subject whose rights must be guaranteed. This is in contrast to the 1981 Criminal Procedure Code which tends to ignore victims and positions criminal justice solely as an arena for battle between the state/investigator and the suspect. Second, the constitutional basis of the Considerations Considering the 2025 Criminal Procedure Code includes Article 28D paragraph (1) of the 1945 Constitution which guarantees 'the right to recognition, guarantee, protection, and fair legal certainty as well as equal treatment before the law' as a philosophical pillar of *due process of law* . Third, the 2025 Criminal Procedure Code expressly mentions the integration of developments in international law and advances in information technology as the main drivers of the overhaul of national criminal procedure law.

From the section on remembering, it can be seen that the formation of the two Laws on the Criminal Procedure Code is based on the same Basic Law, namely the 1945 Constitution. However, in the formation of the second Criminal Procedure Code, the 1945 Constitution has undergone changes so that similarities and differences can be found. The 1981 Criminal Procedure Code is based on Article 5 paragraph (1), Article 20 paragraph (1) and Article 27 paragraph (1) of the 1945 Constitution. Meanwhile, the 2025 Criminal Procedure Code is based on Article 20, Article 21, Article 27 paragraph (1), and Article 28D paragraph (1) of the 1945 Constitution. The text of the articles of the Basic Law or constitution can be compared as follows:

Criminal Procedure Code 1981	**Criminal Procedure Code 2025**
Article 5 paragraph (1): The President holds the power to form laws with the approval of the House of Representatives.	Article 20: (1) The People's Representative Council holds the power to form laws. (2) Every draft law is discussed by the People's Representative Council and the President to obtain joint approval. (3) If the draft law does not receive collective approval, the draft law may not be submitted again in the session of the House of Representatives at that time. (4) The President ratifies draft laws that have been jointly agreed to become laws. (5) If the draft law that has been jointly agreed

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	upon is not ratified by the President within thirty days of the draft law being approved, the draft law shall become law and must be promulgated.
Article 20 paragraph (1): Every law requires approval from the House of Representatives.	Article 21: Members of the House of Representatives have the right to submit draft proposals Constitution.
Article 27 paragraph (1): All citizens have equal status before the law and government and are obliged to uphold the law and government without exception.	Article 27 paragraph (1): All citizens have equal status before the law and government and are obliged to uphold the law and government without exception.
	Article 28D paragraph (1): Everyone has the right to recognition, guarantees, protection and fair legal certainty as well as equal treatment before the law.

In the 1981 Criminal Procedure Code, the power to form laws was held by the President, while in the 2025 Criminal Procedure Code, changes have been made, shifting the power to form laws to the House of Representatives. Coincidentally, the Draft Criminal Procedure Code was initiated by the House of Representatives. (*Rapat Paripurna Setujui RUU KUHAP Jadi RUU Inisiatif DPR RI - DPR RI*, t.t.)Therefore, the new Criminal Procedure Code contains many provisions that favor the people, such as those concerning pretrial proceedings. The 2025 Criminal Procedure Code has strengthened pretrial proceedings as legal protection against abuse of authority in coercive measures carried out by law enforcement officers. The changes to the Criminal Procedure Code have also resulted in a shift in legal policy (*penal policy*) from the paradigm of retributive justice based on the accusatory system in the 1981 Criminal Procedure Code to restorative, corrective, and rehabilitative justice in the 2025 Criminal Procedure Code.(Susatyo dkk., 2026, hlm. 374)

The guilty plea mechanism in the 2025 Criminal Procedure Code (KUHAP) is a form of criminal case resolution that is similar to *plea bargaining* , but not entirely the same because it does not contain an element of plea bargaining. Normatively, this mechanism places the judge in an active role to ensure that the guilty plea is given voluntarily and supported by valid evidence, thus maintaining the principle *of due process of law* . However, the 2025 Criminal Procedure Code is an instrument that has both potential and risks, so its application must be normatively limited and monitored through a strong oversight mechanism. Therefore, it is recommended that the application of guilty pleas in the 2025 Criminal Procedure Code be strictly limited by clarifying the conditions, types of cases, and legal consequences of guilty pleas, as well as strengthening the role of the judge as the main controller in assessing the voluntariness of guilty pleas, the sufficiency of evidence, and ensuring that the interests of the victim are still considered in the process and decision.

Furthermore, detailed implementing regulations, effective legal assistance from the initial stages of the investigation, and strict oversight of law enforcement officials are required to prevent this mechanism from developing into a transactional practice and to ensure its proportional implementation. (Henin Dyah Syafrina dkk., 2026, hlm. 377)As the saying goes, no ivory is perfect, and no legislation can be considered perfect; it can only approach perfection. In light of this, the possibility of further amendments to the Criminal Procedure Code (KUHAP) in the future remains open to reflect the current constitution and the legal needs of the community.

CONCLUSION

Based on the research that has been conducted, it can be concluded that the constitutionality of the legal policy of each statutory regulation, in this case in the form of a law, has similarities and differences. The differences are caused by the state objectives to be achieved differing in accordance with the objectives stated in the constitution that underlies the formation of each law. Likewise, the formation of laws on Criminal Procedure Law in order to achieve the state objectives stated in the constitution. The formation of the 1981 Criminal Procedure Code and the 2025 Criminal Procedure Code is based on the same constitution, namely the 1945 Constitution. However, when the 2025 Criminal Procedure Code was formed, the 1945 Constitution was amended so that there are several differences in articles and verses that underlie the formation of the 1981 Criminal Procedure Code and the 2025 Criminal Procedure Code. Nevertheless, the formation of both laws on the Criminal Procedure Code can be said to be both in order to realize the state objectives contained in the constitution. In other words, it can be said that the legal politics

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in the 1981 Criminal Procedure Code and the 2025 Criminal Procedure Code are in accordance with the constitution or have constitutionality.

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