

ANALYSIS OF CONTROVERSIAL ARTICLES IN THE DRAFT CRIMINAL PROCEDURE CODE (RUU KUHAP) AND THEIR IMPLICATIONS FOR CRIMINAL LAW POLICY

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Abstract

The Draft of the Indonesian Criminal Procedure Code (RUU KUHAP) is formulated as a reform of Indonesia's criminal procedure system to align with legal developments and societal needs. However, a critical review of several key articles within the draft reveals potential issues that may affect the effectiveness of law enforcement and the protection of human rights. These issues include imbalances in investigative authority, ambiguity in the concept of restorative justice, threats to privacy rights through wiretapping, and inconsistencies between witness protection and criminal sanctions. Additionally, limitations on pretrial rights, unclear provisions regarding electronic evidence, and uncertainty in the review (judicial reconsideration) mechanism are significant concerns. Using a normative juridical approach and qualitative analysis, this article recommends the refinement of problematic articles in the draft to ensure alignment with principles of justice, legal certainty, and human rights protection, while also addressing the needs of a modern and balanced criminal justice system.

Keywords: *RUU KUHAP, Criminal Procedure Law, Legal Reform, Restorative Justice, Human Rights.*

INTRODUCTION

The term "criminal law" is a translation of the Dutch term *Strafrecht*. The word *straf* means punishment, suffering, or penalty, while *recht* means law. The combination of these two words results in the term "criminal law" rather than "punishment law," to distinguish it from civil law (*Burgelijkrecht* or *Privaatrecht*) and other branches of law. This term has been in use since the Japanese occupation period and continues to be used today.¹ Soedarto defines criminal law as containing legal provisions that result in certain acts meeting specific conditions being subject to criminal sanctions.²

Meanwhile Moeljatno³ defines criminal law as a part of the overall legal system in force within a country, which regulates the principles and provisions for:

1. Determining which acts are prohibited and forbidden, along with the threat or imposition of specific criminal sanctions for anyone who violates such prohibitions.
2. Determining when and under what circumstances those who violate these prohibitions may be subject to the criminal penalties as previously stipulated.
3. Determining the procedures by which the imposition of criminal sanctions may be enforced when an individual is suspected of having violated the prohibitions.

Based on this definition, Moeljatno explains that the concept of criminal law consists of three parts. The first part is called a criminal act, which refers to actions that are prohibited and subject to criminal sanctions. The second part is criminal liability or criminal responsibility, which regulates who can be held accountable for such criminal acts. The third part is known as criminal procedure, which concerns the procedures or processes that must be followed in the enforcement of criminal law. Moeljatno emphasizes that the first and second parts fall under substantive criminal law, while the third part pertains to formal criminal law or criminal procedure.

¹ Wirjono Prodjodikoro, *Asas-asas Hukum Pidana di Indonesia* (Bandung: Eresco, 1969), hlm. 1.

² Soedarto, *Hukum dan Hukum Pidana* (Bandung: Alumni, 1977), hlm. 100.

³ Moeljatno, *Asas-asas Hukum Pidana* (Bandung: Alumni, 1978), hlm. 1.

Formal criminal law or criminal procedure is the state's authority to enforce substantive criminal law. Its purpose is to search for and obtain the truth, secure a decision from the judge, and implement or enforce the judge's decision.⁴ Law No. 8 of 1981 on the Indonesian Criminal Procedure Code (KUHAP), which is currently in force, has undergone various changes and developments since it was first enacted. However, with the dynamics of society and legal developments, KUHAP is considered no longer relevant and comprehensive enough to address the challenges and needs of criminal law in the modern era. Therefore, the formulation of the Draft Bill on the Criminal Procedure Code, hereinafter referred to as the Draft KUHAP, has become an urgent necessity. The Draft KUHAP is expected to serve as a stronger and more relevant legal foundation for the enforcement of criminal law in Indonesia.

The current KUHAP is still dominated by a retributive approach, which places more emphasis on punishing the offender. However, the paradigm of criminal law enforcement has shifted toward a restorative justice approach, which focuses more on the rehabilitation of both the victim and the offender. KUHAP has not yet comprehensively accommodated this restorative justice approach. Along with technological advancements and globalization, new forms of crime, such as cybercrime, transnational crime, and corporate crime, have emerged, which KUHAP has not anticipated. KUHAP lacks adequate mechanisms to address these types of crime.

KUHAP is also considered to have weaknesses in protecting human rights during criminal proceedings. Some cases of human rights violations, such as torture and inhumane treatment, still occur during the investigation and detention processes. Moreover, KUHAP does not have an effective mechanism to prevent and address these violations. Several articles in KUHAP are considered to be open to multiple interpretations and do not provide legal certainty. This can lead to differences in interpretation and application in the field, which may harm the parties involved in the criminal justice process.

Therefore, the Draft Bill on the KUHAP (RUU KUHAP) is an effort to replace the current KUHAP in order to align with and follow the provisions of Law No. 1 of 2023 on the Indonesian Penal Code (KUHP Nasional) that has been enacted. The RUU KUHAP is expected to accommodate the paradigm shift in criminal law enforcement. One of these changes is the emergence of the restorative justice approach. This approach emphasizes the rehabilitation of the victim and offender, rather than solely focusing on punishment. One of the main focuses of the RUU KUHAP is the protection of human rights. This draft law must ensure that human rights are protected throughout every stage of the criminal justice process, from investigation and prosecution to trial. Thus, the RUU KUHAP is expected to prevent human rights violations during the criminal law enforcement process.

Several provisions in the RUU KUHAP have the potential to cause future problems. Article 1 Number 7 grants investigative authority solely to the police, while investigators from other institutions, such as PPNS, also have the same authority, so the extension of investigative authority should be considered. Article 1 Number 18 Jo Article 74 could lead to an inconsistent understanding of the concept of Restorative Justice (RJ) among law enforcement officials, and it requires clarification regarding the boundaries and mechanisms of implementing RJ. Articles 124 and 125 on wiretapping could infringe on privacy rights and require strict oversight to prevent misuse. Articles 135 letter A and 211 show ambiguity regarding a witness's right not to be prosecuted for testimony provided, where Article 135 grants immunity, while Article 211 threatens the witness with criminal charges for giving false testimony. Article 152 paragraph (1) could lead to injustice by not including suspects involved in criminal acts within a separate file who could file a pretrial. Article 222 paragraph (1) letter f and Article 288 concerning electronic evidence do not provide detailed explanations on the scope of electronic evidence and need clearer regulation regarding the conditions and procedures for examining electronic evidence in court. Article 306 paragraph (3) letter c conflicts with Constitutional Court Decision No. 20/PUU-XXI/2023 regarding the authority of the Prosecutor's Office to file a review, which could cause legal uncertainty.

These issues in the RUU KUHAP are the main concerns and require further discussion. This discussion will address these articles and the future direction of criminal law, specifically the KUHAP.

RESULTS AND DISCUSSION

A. ARTICLES IN THE DRAFT BILL ON THE CRIMINAL PROCEDURE CODE (RUU KUHAP) THAT HAVE THE POTENTIAL TO CAUSE FUTURE ISSUES

Criminal law reform in Indonesia began after independence.⁵ This reform process not only covers substantive criminal law and formal criminal law but also the application of criminal law itself. As part of the reform efforts, Indonesia revised the regulations related to criminal procedural law by enacting Law No. 8 of 1981 on Criminal

⁴ HB. Tedjo Purnomo, *Teori-Teori Pembelaan Perkara Pidana dalam Praktek* (Jakarta: DPP Pos Terdepan Bantuan Hukum Indonesia, 1989), hlm. 13.

⁵ Yana Sylvana dkk., "History of Criminal Law In Indonesia," *Jurnal Indonesia Sosial Sains* 2, no. 4 (April 2021): hlm. 646.

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Procedure Law (KUHAP). KUHAP, which came into effect on December 31, 1981, is a national codification of criminal procedural law, replacing the *Het Herzine Inlandsch Reglement* (HIR), a legal product from the Dutch colonial era.⁶ When KUHAP was enacted, it was considered a monumental achievement for the Indonesian nation because it was a result of legal unification expected to provide protection for human rights while balancing public interests. With the creation of KUHAP, Indonesia for the first time conducted a comprehensive codification and unification of law, covering the entire criminal process, from investigation (seeking the truth) to cassation and review by the Supreme Court. The previous criminal procedural laws, such as *Het Herzine Inlandsch Reglement* (HIR) and related regulations, were formally declared void as national legal products. KUHAP was drafted based on the philosophy of the state, Pancasila, as the ideal foundation, and the 1945 Constitution of the Republic of Indonesia as the constitutional foundation.

Over the 44 years of KUHAP's implementation, this substantial period provided an opportunity to evaluate, understand, and delve deeper into its strengths and weaknesses. With the increasing complexity of criminal law issues and the influence of various international instruments on criminal law enforcement, KUHAP has started to be seen as no longer meeting the expectations and needs of society. Additionally, KUHAP still requires implementing regulations to be provided by each institution, such as the police, prosecutor's office, and courts. Technological advancements, particularly in terms of evidence, have also rendered the existing regulations within KUHAP insufficient to meet the challenges of the modern era.

Thus, in anticipation of the times and in response to the needs of society and challenges in criminal law enforcement, a more comprehensive renewal is necessary through the drafting of a new RUU KUHAP. However, several provisions in the RUU KUHAP are considered to have the potential to cause problems in the future, whether in terms of legal substance, implementation on the ground, or their impact on human rights. Therefore, the author will analyze these provisions in-depth to find appropriate solutions in regulating criminal procedural law that is more responsive to the changes of the times. The following are some of the articles in the RUU KUHAP that are identified as issues or potential controversies in the future:

Table 1.1 Analysis of Problematic Articles in the RUU KUHAP

NO	Article inn RUU KUHAP	ISSUE
1	Article 1 Number 7	a. Grants investigative authority only to the police, whereas certain PPNS and investigators also have this authority. b. Investigation is the initial stage before prosecution, so expanding the authority to investigate should be considered.
2	Article 1 Number 18 Jo Article 74	a. Inconsistent understanding of the concept of Restorative Justice (RJ) among law enforcement officers. b. Needs clarity on the boundaries and mechanisms for applying RJ to avoid different interpretations.
3	Article 124 and 125	a. Regulates wiretapping that may infringe on privacy rights. b. Strict supervision over wiretapping is necessary to prevent misuse.
4	Article 135 letter A vs Article 211	a. Ambiguity regarding the right of a witness not to be prosecuted for their testimony. b. Article 135 grants immunity to witnesses, whereas Article 211 threatens witnesses with criminal punishment if they provide false testimony..
5	Article 152 paragraph (1)	a. Does not include suspects who are accomplices in a separate case file (splitting) as parties who can file for a pretrial.

⁶ Umi Falasifah, Bambang Dwi Baskoro, dan Sukinta, "Tinjauan Tentang Pembaharuan KUHAP Sebagai Landasan Bekerjanya Sistem Peradilan Pidana di Indonesia," *Diponegoro Law Journal* 5, no. 3 (2016): hlm. 1-11, <http://www.ejournal-s1.undip.ac.id/index.php/dlr/>.

		b. This may lead to unfairness for the suspects.
6	Article 222 paragraph (1) letter f and Article 288 (Electronic Evidence)	a. No detailed explanation on the scope of electronic evidence. b. A clearer regulation on the requirements and procedures for examining electronic evidence in court is needed.
8	Article 306 paragraph (3) letter c (Judicial Review)	a. Contradicts the Constitutional Court Decision No. 20/PUU-XXI/2023 regarding the Prosecutor's authority to file for judicial review. b. This may cause legal uncertainty.

If the author conducts a deeper analysis of the articles deemed problematic in the RUU KUHP, it is expected to provide a more comprehensive understanding of the implications of each article, both in terms of legal substance and its implementation in practice. Based on the analysis of several problematic articles, the following recommendations should be considered in the context of the reform of criminal procedural law:

1. **Article 1 Number 7**

Recommendation: The lawmakers should establish a concept of investigation and prosecution as interconnected stages in the criminal justice system that cannot be separated. Both stages should be aligned. To avoid conflicting powers between investigation and prosecution, which could lead to ambiguity, lawmakers need to regulate that the authority held by any institution in both investigation and prosecution should be the same. In other words, if investigation powers are held by the Police, PPNS (Civil Servant Investigators), and certain investigators, the power to investigate should also be held by the Police, PPNS, and certain investigators.

2. **Article 1 Number 18 Jo Article 74**

Recommendation: There is a need for further clarity regarding the implementation of the concept of Restorative Justice (RJ), both in terms of its scope of application and its operational mechanisms. To avoid discrepancies in interpretation among law enforcement officials, the legislators must provide a clear definition as well as a well-defined standard operating procedure (SOP) concerning the implementation of RJ.

3. **Article 124 and 125**

Recommendation: Lawmakers should ensure that the regulation regarding wiretapping is carefully implemented to avoid violations of privacy rights. Strict supervision of wiretapping needs to be applied to ensure that it is used only in the proper context and not misused.

4. **Article 135 letter A vs Article 211**

Recommendation: Lawmakers should clarify the witness's right not to be prosecuted for their testimony, particularly concerning witness immunity. Meanwhile, Article 211, which threatens witnesses with criminal penalties for providing false testimony, should be revised to avoid conflicting with the principle of witness protection and justice in the judicial process.

5. **Article 152 paragraph (1)**

Recommendation: Lawmakers should include other suspects involved in the same case but with separate files (splitting) as subjects eligible to file for a pretrial. This will ensure that the role of the pretrial institution as horizontal oversight in criminal cases is fulfilled, and justice is achieved in criminal law enforcement.

6. **Article 222 paragraph (1) letter f and Article 288 (Electronic Evidence)**

Recommendation: There is a need for clearer regulations regarding the requirements and procedures for examining electronic evidence in court. The law should comprehensively include the existence of electronic evidence, detailing the methods of forensic processes necessary for proving criminal cases with electronic evidence.

7. **Article 222**

Recommendation: Lawmakers should continue to include guidance on the types of evidence, as circumstantial evidence is an important form of evidence in criminal cases, especially when direct proof is difficult. Additionally, lawmakers should reconsider the use of physical evidence as a type of evidence, as its use can make the process of proving the case more complicated and lengthier.

8. **Article 306 paragraph (3) letter c (Judicial Review)**

Recommendation: Lawmakers should reconsider the Prosecutor's authority to file for judicial review, in accordance with the Constitutional Court Decision No. 20/PUU-XXI/2023. Clearer regulations regarding judicial review authority should be made to avoid creating legal uncertainty in the future.

With the presence of these recommendations, it is hoped that the upcoming Draft Law on Criminal Procedure (RUU KUHAP) can be more responsive to the needs of society, improve the shortcomings of the criminal justice system, and continue to protect human rights while ensuring that the law enforcement process runs in accordance with **Gustav Radbruch's** theory, which emphasizes the values of justice (*Gerechtigkeit*), utility (*Zweckmäßigkeit*), and legal certainty (*Rechtssicherheit*).⁷ The author will now analyze these issues based on Radbruch's theory as follows:

1. Justice (*Gerechtigkeit*)

For Radbruch, justice is a value that cannot be separated from the prevailing legal system. Justice demands that the law be applied fairly, regardless of who is involved, and considers moral values and the fundamental principles of human rights.

- a. Granting equal rights to all parties in the judicial process, including suspects, witnesses, and victims, while ensuring the protection of human rights that must not be violated;
- b. Access to justice that allows the public to receive fair and transparent treatment during legal proceedings, including providing sufficient opportunities for suspects to defend themselves;
- c. Restorative justice (RJ), which is an important part of the reform of Indonesia's criminal law, is an approach aligned with the principle of justice. RJ emphasizes restoring the relationship between conflicting parties, by offering suspects and victims the opportunity to reach a fairer resolution beyond mere retributive punishment.

Going forward, the Draft Criminal Procedure Code (RUU KUHAP) must ensure that the value of justice is reflected in criminal procedural mechanisms that prioritize the protection of individual rights, transparency, and the prevention of abuse of power.

2. Utility (*Zweckmäßigkeit*)

Utility, from Radbruch's perspective, is more about achieving legal objectives that benefit society as a whole. These goals may include establishing a more orderly society, enhancing public safety, or restoring better social conditions.

- a. Efficiency in legal processes that facilitates quick and effective case resolution, avoiding prolonged delays that harm many parties. Therefore, case resolution mechanisms must be designed to speed up the legal process without reducing the quality of justice produced.
- b. Resolving cases with a more holistic approach, such as the application of restorative justice that not only prioritizes punishment but also offers opportunities for social rehabilitation and the restoration of relationships among the involved parties.
- c. Empowering the community to take a more active role in the legal system, such as in monitoring or even participating in mediation processes, which can bring utility in the context of legal reforms that respond to societal needs.

Reforming the RUU KUHAP needs to consider how criminal procedural law can bring greater benefit to all parties involved, not only in the context of law enforcement but also in building peace and social order.

3. Legal Certainty (*Rechtssicherheit*)

Legal certainty is a principle that states every individual has the right to clearly understand their rights and obligations within the legal system. Legal certainty ensures that the law is applied consistently and not arbitrarily, giving the public confidence that legal decisions are legitimate and reliable.

- a. Clear codification and unification of criminal procedure laws, to prevent dualism or overlapping of existing regulations, which can cause confusion in their application;
- b. Developing systematic and transparent procedures, from investigation, inquiry, to court examination, so that every party involved clearly understands the stages and their rights;
- c. Strict supervision of law enforcement officials to ensure that legal decisions do not contradict the principles of legal certainty and are not abused for personal or group interests.

In relation to legal certainty, the reform of RUU KUHAP must ensure that certainty arises not only from regulations but also from their implementation in practice, so that the law can truly be relied upon and guarantee individual rights throughout every stage of the criminal justice process.

⁷ Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Cintra Aditya, 2014), hlm. 19.

B. THE DIRECTION OF CRIMINAL LAW POLICY IN THE DRAFT CRIMINAL PROCEDURE CODE (RUU KUHAP): IS IT IN LINE WITH THE NEEDS AND DEVELOPMENTS OF INDONESIAN SOCIETY?

Before further discussing the direction of criminal law policy in the Draft Criminal Procedure Code (RUU KUHAP), it is essential to understand the context of the evolution of Indonesia's criminal justice system, which has undergone changes over time to meet the needs of a dynamic society. The previous legal system, especially as stipulated in Law No. 8 of 1981 (KUHP), emphasized retributive justice, focusing on punishment as a form of retaliation for crimes committed. However, as time progressed, society's need for a more just and humane justice system became more apparent especially one that considers the rights of victims and prioritizes crime prevention.

The current draft of the RUU KUHAP introduces a new paradigm in Indonesia's criminal law system. Through changes in various aspects, the bill aims to align the legal system with the evolving needs and social developments of the Indonesian people. Among the significant changes introduced are: a focus on the restoration of victims' rights through Restorative Justice, a shift from retributive to restorative justice, and the integration of penal and non-penal approaches in criminal law policy. These three elements form the core of a more holistic criminal law policy direction one that not only addresses perpetrators but also promotes preventative efforts to deter future crimes.

The following is a deeper look into the three main aspects promoted in the RUU KUHAP and their relevance to the needs and developments of Indonesian society:

1. Focus on the Restoration of Victims' Rights through Restorative Justice

One of the significant changes in the RUU KUHAP is the increased emphasis on restoring the rights of victims within the criminal justice system. Besides focusing on enforcing the law against perpetrators, the bill also provides greater space for victim recovery through Restorative Justice. This concept prioritizes resolving cases not merely through punishment but by providing victims with the opportunity for both material and immaterial recovery.

This concept is considered beneficial as it involves dialogue between victims and offenders to seek mutually beneficial solutions, which can aid the victim's recovery and give the offender a chance to take responsibility for their actions. This is highly relevant in the context of social progress that increasingly recognizes victims' rights and calls for a more humane approach to criminal justice.

The application of restorative justice in the RUU KUHAP is expected to reduce the negative effects of retributive processes and emphasize reconciliation. However, the main challenge lies in implementing this concept in various types of cases, especially serious crimes, where victims may feel that justice has not been adequately served in proportion to their suffering.

2. Shift from Retributive Justice to Restorative Justice

Compared to Law No. 8 of 1981 (the current KUHP), which predominantly adopts a retributive justice approach emphasizing proportionate punishment for offenders as a form of retaliation the new RUU KUHAP signifies a significant policy shift toward restorative justice. This new approach aims not only to punish the offender but also to focus on the victim's well-being and repair the harm caused. This shift aligns with the evolution of criminal law theory, which is now more focused on rehabilitation and the social reintegration of offenders, as well as minimizing the broader social impacts of crime on victims and the community. Thus, the RUU KUHAP attempts to balance justice for both victims and offenders.

3. A Holistic Approach in Criminal Law Policy: Penal and Non-Penal

One of the key reforms brought by the RUU KUHAP is the integration of both penal and non-penal approaches in criminal law policy. While the penal approach still involves imposing criminal sanctions proportional to the crime committed, it is no longer the sole focus. In this draft, non-penal approaches become equally important, emphasizing more holistic crime prevention efforts. The non-penal approach includes crime prevention strategies such as education, rehabilitation, and community development. This enables the creation of a justice system that not only reacts to crime but also proactively prevents it. For example, by raising public awareness about the dangers of crime and providing social rehabilitation and reintegration for less serious offenders. The integration of these two approaches illustrates that the criminal justice system proposed in the RUU KUHAP strives to be more comprehensive focusing not only on punishment but also on preventing crime through socially driven strategies. The bill aims to reduce crime through preventive and rehabilitative measures, rather than relying solely on retribution.

CONCLUSION

Based on the analysis of several articles in the Draft Criminal Procedure Code (RUU KUHAP), it can be concluded that although this reform aims to align the criminal justice system with the times and societal needs, there are a number of provisions that may potentially cause problems in the future—whether in terms of legal substance, practical implementation, or their impact on the protection of human rights. These issues include the imbalance of authority in investigation and inquiry (Article 1 point 7), lack of clarity regarding the concept of restorative justice (Article 1 point 18 in conjunction with Article 74), potential violations of privacy through wiretapping (Articles 124 and 125), inconsistencies between witness protection and criminal threats (Article 135 letter a and Article 211), limitations on the right to pretrial motions (Article 152 paragraph 1), unclear regulation of electronic evidence (Article 222 paragraph 1 letter f and Article 288), and legal uncertainty in judicial review procedures (Article 306 paragraph 3 letter c). Therefore, the RUU KUHAP needs to be refined not only to meet the aspects of justice, utility, and legal certainty as proposed by Gustav Radbruch, but also to be responsive to current challenges and to guarantee the rights of all parties involved in the criminal justice process.

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