

POLEMIC OF THE CRIMINAL CODE BILL FROM THE PERSPECTIVE OF ADVOCATES

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Abstract

Indonesia's existing Criminal Code (KUHP), a remnant from the Dutch East Indies colonial era, is regarded as outdated and disconnected from current societal realities. This has spurred the Indonesian Government to initiate a comprehensive update of the criminal provisions via the Draft Criminal Code (RUU KUHP), which has been in the making for several decades. The RUU KUHP aims to accommodate the evolving needs of the nation's criminal law system. The result of research is endeavor has sparked controversy, particularly regarding Articles 282 and 515 of the RUU KUHP, which are viewed as discrediting Advocates as independent enforcers of the law. These articles are claimed to be at odds with the Advocate Act, the *lex specialis* of the RUU KUHP, raising concerns about the potential impact on the professional status of Advocates. Moreover, Article 281 of the RUU KUHP has raised alarms due to its potential as a 'rubber article', susceptible to multiple interpretations, which could undermine the principle of legal certainty. This normative-juridical study utilises a descriptive-analytical methodology to analyse these contentious aspects of the RUU KUHP. It concludes that the provisions regarding Advocates conflict with the Advocate Act, and the ambiguity in Article 281 raise the risk of misuse and legal uncertainty. While the RUU KUHP signifies a crucial effort towards modernising the nation's criminal law system, these issues must be addressed to ensure its credibility and effectiveness.

Keywords: *Criminal, Advocate, Contempt of Court*

INTRODUCTION

Criminal law is a crucial part of the fundamental law governing a nation. It spans various aspects of life, with its primary objective being establishing and maintaining peace, tranquillity, and order within society. A nation's criminal law is the central protection pillar, safeguarding public interests against disturbances that could impact communal, national, and state affairs. This body of law outlines the rules of conduct, stipulating actions that the public can and cannot perform, thus pivotal in maintaining societal norms and order (Bakti, 2003). As a coercive and binding system, the law inevitably bears consequences, both intended and unintended. Implementing these regulations can lead to various outcomes, including administrative, civil, or criminal sanctions, depending on the nature and severity of the infraction.

In the context of Indonesia, the current regulations pertaining to criminal law are deeply rooted in the country's colonial past. They are a legacy of the law of the Dutch East Indies, rigorously enforced during the extensive period of Dutch colonisation, which lasted for 350 years. Over time, these regulations have come under scrutiny and have been deemed increasingly irrelevant to contemporary Indonesian society's complexities and rapid developments. They have also been found lacking in satisfying the fundamental legal principles of certainty, justice, and the usefulness of the law.

These principles are vital for the proper functioning of any legal system. Recognising these shortcomings, the Indonesian Government initiated a national criminal law regulation to replace the existing Criminal Code (KUHP). This KUHP, a holdover from the Dutch East Indies colonial government, had served as the nation's foundational legal framework since 1958. This reform initiative aimed to create a more fitting and responsive legal structure that better reflects the evolving realities and needs of the Indonesian people. This reformative effort resulted in the Draft Criminal Code (RUU KUHP), a collaborative work of the government, legal experts, and other stakeholders.

The RUU KUHP represents a significant step towards aligning Indonesia's criminal law with the country's changing societal, national, and state conditions. Moreover, it aims to uphold human rights, grounded firmly on Pancasila, the ideological foundation of the Indonesian state. The content within this draft RUU KUHP has been proposed to achieve a balanced rule of law. It seeks to harmonise state interests with individual rights and freedoms, a delicate equilibrium integral to any democratic society. In its broadest sense, the RUU KUHP aims to ensure comprehensive protection, extending its scope to safeguard the rights and interests of both victims and perpetrators of criminal acts.

Despite being meticulously formulated over several decades, the RUU KUHP continues to provoke a mix of support and contention within the community. Among those voicing concerns are Advocates, crucial figures in the administration of justice, who argue that particular articles within the draft appear discriminatory and biased against their profession, traditionally held in high esteem as an 'Officium Nobile' (Noble Office).

A key focus of this concern is Article 282, which pertains to deceitful conduct by Advocates. An instance is found in Article 282 paragraph b, which deems any attempt by an Advocate to influence a case fraudulent, irrespective of whether there is any exchange of benefits. This provision contradicts the essential function of Advocates, who, through spoken and written words, strive to sway the perspectives of other law enforcers to defend their client's interests and attain justice. Moreover, the controversy extends to Article 515, which is also associated with the profession of Advocates. This article holds the Advocate and their client criminally responsible for any discrepancy in the address provided in divorce or bankruptcy proceedings. This perceived infringement on the Advocate's professional conduct and the client's rights adds to the sense of unease within the profession. Alongside these provisions, Article 281, concerning contempt of court, is seen as narrowly scoped, restricting its application and effectiveness in maintaining the respect and integrity of the judicial process. This study aims to scrutinise these contentious articles from the perspective of Advocates, a critical component of the legal enforcement system, and further assess their implications on this noble profession.

As Advocates serve as indispensable intermediaries between the individual and the court system, ensuring that their professional rights and obligations are balanced is crucial. It is paramount to provide a more nuanced examination of these articles in the RUU KUHP to clarify their current form's potential ambiguities and tensions. This comprehensive investigation will illuminate the broader ramifications these provisions may have on the Advocate profession and the administration of justice, which can then guide future policy considerations and legislative revisions to uphold the integrity of the legal profession.

RESEARCH METHOD

The research approach employed in this study is normative jurisprudence. This legal research methodology involves an examination of the principles and norms entrenched within the prevailing legal system, which includes legislation, jurisprudence, and customary laws relevant to the community in the context of the provisions in the RUU KUHP pertaining to the profession of Advocates (Nazir, 1983). The analytical method applied in this study is qualitative normative, meaning that this examination will be founded on an analysis juxtaposing actualities with legislative regulations.

The research specification has been conducted in an analytical-descriptive manner. This writing approach delineates the issues based on existing data which are subsequently analysed to derive conclusions (Nazir, 1983). The data was collected through a literature review using primary legal materials. These materials have binding legal force, such as legislative regulations and jurisprudence. Secondary legal materials were also employed, which provided explanation and context to the primary legal materials. These include books, articles, and journals pertinent to the topic of this study, specifically those associated with the provisions in the RUU KUHP that relate to the profession of Advocates (Soekanto, 2007).

RESULTS AND DISCUSSION

Examination of the Formulation of Penalisation of Advocates in the 2019 RUU KUHP

An Advocate is an individual who represents and advances their client's interests both inside and outside the courtroom, including the relevant legal rules and their interpretation in a given case. An Advocate conducts their profession not merely as an advisor but also operates within litigation and non-litigation processes to represent their clients dealing with the law. In this context, representing clients implies that the Advocate is assisting their client with all legal defences in order to secure their rights and obligations. Advocates, as upholders of the law, have a role in promoting the correct application and procedures of the law, ensuring that the enforcement of the law does not contradict public order, morality, and a sense of justice for individuals and the community at large, and encouraging judges to remain impartial when examining and ruling on a case. Morally, Advocates bear the responsibility to actualise a clean and authoritative judiciary. Therefore, Advocates should be accorded the same freedoms as other law enforcers.

Fundamentally, Article 282 of the RUU KUHP stipulates that an Advocate can be penalised with a maximum prison sentence of 5 years or a fine of up to category V, which is IDR 500,000,000 (five hundred million rupiahs), if they act deceitfully in their profession, i.e. by (a) reaching an agreement with the opponent of their client, knowing or reasonably suspecting that this action could disadvantage their client's interests; and (b) influencing the clerk, substitute clerk, bailiff, witness, interpreter, investigator, prosecutor, or judge in a case, with or without remuneration. Furthermore, the explanation of this article states that this provision is aimed at Advocates who deceitfully harm their clients or ask them to bribe parties involved in the judicial process.

The phrase "deceitful" in Article 282 of the RUU KUHP and its explanation are not clearly defined, leading to the potential for varied interpretations. Consequently, actions taken by Advocates inside and outside the courtroom can be interpreted differently by law enforcers or other parties. This provision is considered not to meet the Principle of Clarity of Article Formulation and the Principle of Legal Certainty, hence potentially violating Article 5 and Article 6 of Law Number 12 of 2011 concerning the Formation of Laws and Regulations (hereinafter referred to as the Law P3), which contain the principles and norms that must be included in the content of legal regulation and are open to multiple interpretations and thus not in line with the principle of *Lex Certa/Lex Stricta*, which stipulates that the law must be clear and not interpreted analogically. The clarity of this article is crucial because it needs to be explained to avoid multiple interpretations. The explanation of an article, which should function to understand the law as intended by the law-maker instead of providing clarity, can potentially lead to interpretation issues in the future (Kansil, 2002).

The deceitful act mentioned in Article 282 of the RUU KUHP can be interpreted as comprising two actions. Firstly, the action of "playing both sides" or reaching an agreement with the opponent of their client could disadvantage their client's interests. Secondly, influencing parties related to the case, with or without remuneration. These actions are associated with breaches of the ethical norms in the Code of Ethics for the Advocate Profession, with penalties imposed by the Honorary Council of the Advocate Organisation. This is also affirmed in Article 6 of Law Number 18 of 2003 on Advocates (hereinafter referred to as the Advocate Law), which states that advocates can face sanctions if they violate the Advocate's oath or the professional code of ethics. Thus, Article 282 of the RUU KUHP represents a shift in values from rules or norms because although regulated in the Advocate Law, violations of these norms are still considered professional ethics violations, with sanctions taking administrative measures. Meanwhile, the concept in Article 282 of the RUU KUHP will eventually

become a criminal law norm, which, if violated, will be threatened with a firm criminal punishment by the national criminal law.

Furthermore, the provision of Article 282 letter a of the RUU KUHP is perceived as overly intrusive into the realm between an Advocate and their client. The legal relationship between an Advocate and their client is based on agreement and trust, not just a simple business connection. Thus, any party should respect the agreed clauses according to the terms and principles of the agreement as stated in Article 1320 of the Civil Code (hereinafter KUHPperdata) jo. Article 1338 of the KUHPperdata. Moreover, it is highly implausible that an Advocate would wish to harm their client's interests. This is because once an Advocate has signed a power of attorney, they are legally and morally obliged to earnestly manage and defend their client's legal interests until all legal processes are completed.

In regard to criminal actions by members of the Advocate profession, in this case, engaging in gratification or bribery as outlined in the Explanation of Article 282 of the RUU KUHP, such behaviour has typically been associated with the realm of corruption offences. Indeed, several existing legal norms within the scope of corruption crimes are typically applied to Advocates who involve themselves in bribery or gratification in their profession. One such legal provision often charged against Advocates known to engage in such bribery or gratification is Article 6(1) of Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 on the Eradication of Corruption Crimes (hereinafter referred to as the Anti-Corruption Law), which provides for a minimum sentence of 3 years and a maximum of 15 years and a fine of at least Rp150,000,000 (one hundred and fifty million rupiahs) and at most Rp750,000,000 (seven hundred and fifty million rupiahs) for any person who: (a) gives or promises something to a judge with the intent to influence a case submitted to them for trial; or (b) gives or promises something to a person who, according to the regulation, is determined to be an Advocate attending a court hearing with the intent to influence the advice or opinion that will be given concerning the case submitted to the court for trial. Therefore, the provision in Article 282 of the RUU KUHP is a repetition of an article already stipulated in the Anti-Corruption Law and is thus considered unnecessary.

Furthermore, the provision of Article 282 of the RUU KUHP appears to diminish the credibility of Advocates as a respected profession (*Officium Nobile*), as Advocates should carry out their profession to "influence" law enforcement officials in lawful ways that do not contradict the law, are seemingly synonymous with dishonest actions, even if these Advocates do not provide rewards in the form of gratification or bribery. Referring to Article 5 and Article 6 of the Advocate Law, before someone is appointed as an Advocate, the prospective Advocate must meet the requirements set out in the Advocate regulatory provisions and must take the Advocate's Oath. Thus, the moral responsibility of an Advocate is not only to the clients they represent but also to God Almighty, as well as to the nation and the state. Moreover, this article seems subjectively discriminatory because it only aims at the Advocate profession. In contrast, the potential for dishonest behaviour is not exclusive to Advocates, other law enforcement officers could also carry it out, and the RUU KUHP does not stipulate sanctions for other parties who could be influenced as perpetrators of crimes.

Furthermore, Article 282 of the RUU KUHP is deemed to infringe upon the immunity rights possessed by Advocates. This is due to the understanding that the nature of an Advocate's work, which is often perceived as defending the interests of their client, suggests that the act of "influencing" parties in a trial process, as long as it does not contravene valid legal regulations, is considered part of an Advocate's work for which they cannot be held accountable. The right to immunity for Advocates is stipulated in Article 16 of the Advocate Law, which asserts that an Advocate cannot be prosecuted civilly or criminally when carrying out their professional duties in good faith for the defence of a client in a court hearing. This aligns with the Constitutional Court Decision No.26/PUU-XI/2013, which states that an Advocate cannot be prosecuted either civilly or criminally in the execution of their profession in good faith and for the interest of defending a client both in and outside the court. Furthermore, the provision of Article 282 of the RUU KUHP indirectly places considerable limitations on an Advocate's operational scope in executing their duties effectively, which could hinder an Advocate in upholding the law, particularly when seeking reconciliation between parties (restorative justice).

Subsequently, Article 515 of the RUU KUHP 2019 essentially asserts that an Advocate may be punished with a maximum imprisonment of 1 (one) year or a maximum fine of category III, that is, Rp50,000,000 (fifty million rupiahs) if they include or request the inclusion of misleading information about the domicile or residence of a client in a lawsuit, divorce petition, or bankruptcy application. Implicitly, this article gives the impression that Advocates are the sole initiators of a lawsuit or application to the court. In contrast, an Advocate cannot submit a lawsuit or application to the court without a power of attorney from the client preceding it. Therefore, it can be said that the provision in Article 515 of the RUU KUHP closely associates Advocates with their clients, which contradicts Article

18 of the Advocate Law stating that an Advocate cannot be equated with their client in defence of the client's case by the relevant party and/or the public.

The provisions of Article 282 and Article 515 of the RUU KUHP are closely related to how Advocates execute their profession to ensure legal certainty. Both articles excessively encroach upon the autonomy of the Advocate profession as upholders of the law in the execution of their duties (Sinaga, 2011), given that oversight of Advocates is explicitly regulated in the Advocate Law and the Code of Ethics of the Advocate Profession. The normative regulations in both articles of the RUU KUHP are considered to contradict the Advocate Law, which is of a specific regulatory nature (*lex specialis*).

Analysis of the Contempt of Court Offence in Article 281 of the RUU KUHP 2019

In Indonesia, the regulation concerning contempt of court is still separately arranged within the criminal legislation. Article 24 of the Constitution of the Republic of Indonesia 1945 forms the legal foundation for protecting the dignity and honour of the judiciary, which is part of the judicial authority. This act of contempt of court contradicts the objective of a clean and authoritative judiciary as stated in the considerations in letter b of Law Number 48 of 2009 on Judicial Power (hereinafter referred to as the Judicial Power Law). The concept of contempt of court is mentioned in the general explanation of Law Number 14 of 1985 on the Supreme Court (hereinafter referred to as the Supreme Court Law), precisely in point 4 of paragraph 4 which essentially states the need for a law regulating actions, attitudes, behaviour, and/or statements that can degrade the dignity and honour of the judiciary, referred to as contempt of court. The classification of contempt of court offences can be direct or indirect, and can occur within the courtroom or outside it (Abimayu, 2017).

Contempt of court in the RUU KUHP is contained in Article 281 of the RUU KUHP, which states that a maximum fine of category II, namely Rp10,000,000 (ten million rupiah), can be imposed on anyone who, during a court hearing: (a) does not comply with the court order issued for the benefit of the judicial process; (b) is disrespectful towards the judge or the proceedings or attacks the integrity of the judge in the court hearing; and (c) without court permission, records, directly publishes, or permits the publishing of court proceedings.

The regulation of the contempt of court offence, particularly targeted towards actions closely related to issues of judicial integrity, wherein prohibited actions in the context of contempt of court should be limited only to actions deemed obstructive and causing the trial process to run improperly. Such actions could include intimidation, threats of violence, or violent acts directed at the judge related to the judge's rulings, rather than issues of integrity. Moreover, the boundaries of what is meant by "disrespectful" and "attacking integrity" in Article 281 (b) are not clearly defined, as to whether or not critical opinions or comments are also included. In addition, the provisions in Article 281 (a) and (b) contain vague-outlined wording (vague outlining and standards), thus failing to provide legal certainty.

Then, in subparagraph c, there is also no elaboration on the boundaries of what is meant by "anything that can influence the impartiality of the judge" and who determines whether something can influence the judge or not. The lack of clarity in setting these boundaries to determine the extent of someone's actions in fulfilling the formulation of Article 281 of the RUU KUHP will render the contempt of court offence in this regulation a rubber article.

The provision in Article 281(c), which regulates the prohibition of publishing court hearings, can be interpreted as a double-edged sword, as on one hand, the element of recording, directly publishing, or permitting the publishing of court proceedings is almost identical to the criminal article in Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 on Information and Electronic Transactions (hereinafter referred to as the ITE Law) which is very unclear and obscure (*obscur libel*), thus contradicting the principle of *lex certa/lex stricta*, i.e., the rule of law must be precisely formulated and not ambiguous, and the formulation of criminal legislative provisions must be firm and not open to alternative interpretation. Furthermore, the existence of Article 281(c) can also trap judges in performing their duties and powers as stipulated in the Judicial Power Law, as the legal principle that should apply universally is that every trial is open to the public as referred to in Article 64 of the Code of Criminal Procedure (hereinafter referred to as the KUHP) in conjunction with Article 13(1) of the Judicial Power Law which states that all hearings in court are open to the public, trials are conducted closed only in cases of divorce, morality, children, or cases that are requested not to be public for certain reasons. Article 13(2) of the Judicial Power Law also states that a court decision is only valid and has legal force if pronounced in an open hearing for the public. If the provisions in Article 13(1) and (2) of the Judicial Power Law are not fulfilled, then the decision will be void by law.

Additionally, regarding the scope of contempt of court in the formulation of Article 281(c), it only mentions "during a court hearing". This could be interpreted to mean that reporting on cases at the

investigation and pre-prosecution stages cannot be qualified as contempt of court. Therefore, this contempt of court provision is considered to be contempt of court in the narrow sense, as it only focuses on actions that occur during the court proceedings.

However, there are several positive impacts with the arrangement of this contempt of court as it is considered to provide legal certainty of protection for judges and judicial officers, maintaining the behavioural norms and prestige of the court, and becoming the legal basis for the enforcement of the court's authority and the court's independence from trial by the press and social media (Nugroho, 2017). However, it is feared that the formulation of Article 281 of the RUU KUHP will be implemented rigidly, thus unable to accommodate other forms of contempt of court. Moreover, it can also become a multi-interpreted offence if linked to the protection of the Advocate profession guaranteed by the Advocate Law, threatening freedom of expression, and limiting the flow of information in a digital era that is de facto difficult to control (Nugroho, 2017).

Article 281(c) of the RUU KUHP also threatens journalists and mass media. Court permission could cause problems not only for journalists but also for the court. For journalists, there are issues of accountability that need to be synchronised between the RUU KUHP and Law Number 40 of 1999 concerning the Press (hereinafter referred to as the Press Law). In many media, journalists are not legally responsible for their writings because there is already an accountable party (usually the editor-in-chief). However, the meaning of "publication" as contained in the provision of Article 281(c) of the RUU KUHP is not yet clear, whether it includes only the press media or also social media. Furthermore, for the court, for example, it would be very troublesome if many parties (not only journalists) wanted to publish the trial process, either in the mass media or published on social media. This will relate to who will give permission and how the mechanism of such permission will work, whether orally or in writing.

The provisions of contempt of court must be based on existing laws in the Criminal Code, the Code of Criminal Procedure, and the Supreme Court Act to avoid overlapping rules. There are two significant aspects that become the object of contempt of court regulations: the internal aspect of the judiciary and the external aspect of the judiciary (Abimayu, et.al, 2017). The matters relating to the internal aspect of the judiciary include individuals who set the judicial institution in motion, the process of activities of the judiciary, and the outcome of the process of judiciary activities. This internal aspect governs the attitude of every person, individually or collectively, towards the authority, dignity, and independence of the judiciary. 'Every person' here is not limited to justice seekers, defendants, Advocates, witnesses, the press or people present in court, but also includes other law enforcement officers such as police, prosecutors, and judges. The external aspect of the judiciary is related to parties closely linked to the judiciary but not part of the institution, in this case, the community.

CONCLUSION

The draft Criminal Code is expected to become the foundation of Indonesian national criminal law, encompassing all rules related to criminal law. Nevertheless, it must still operate in conjunction with all pre-existing regulations. The author opines that, in relation to advocates, the provisions in Article 282 and Article 515 of the draft Criminal Code should be abolished as they are deemed too subjectively discriminatory against the Advocate profession, and the implications will significantly disadvantage Advocates in carrying out their duties. If they are to be retained, these articles should not only apply to the Advocate profession but also to other law enforcement officials, namely judges, prosecutors, investigators, registrars, including clients. Moreover, the meaning of the phrase "cheating" in these articles should be clearly stipulated to avoid multiple interpretations.

Furthermore, the provision in Article 281 of the draft Criminal Code related to the offence of contempt of court is deemed not to accommodate the purpose of contempt of court itself. Contempt of court in this article is also interpreted as contempt of court in the narrow sense because it only focuses on when a hearing is taking place in court while in reality, the legal process could have begun before entering the court. If it is to be retained, the formulation of this article should not only be limited to the duration of the court hearing but also outside the court, which encompasses all forms of court orders, including determinations or decisions in a case, be it civil or criminal matters.

REFERENCES

- Arnas, Y., Ahmad, A., & Fajarianto, O. (2023). The Effectiveness of Learning Management System in Higher Education: A Case Study of Social Sciences Course Content. *IJESS International Journal of Education and Social Science*, 4(2), 114-118.
- Barda Nawawi Arief. 2003. *Kapita Selektta Hukum Pidana*. Bandung: Citra Aditya Bakti.
- C.S.T Kansil. 2002. *Pengantar Ilmu Hukum*. Jakarta: Balai Pustaka.

- Dimas Abimayu, Erna Dewi, dan Eko Rahardjo. 2017. Analisis Kebijakan Formulasi Tentang Perbuatan yang Menghambat Proses Peradilan (*Contempt of Court*) Dalam Sistem Peradilan Indonesia. *Poenale: Jurnal Bagian Hukum Pidana*, Volume 5, Nomor 3.
- Kitab Undang-Undang Hukum Pidana
- Kitab Undang-Undang Hukum Perdata
- Mohammad Nazir. 1983. *Metode Penelitian*. Jakarta: Ghalia Indonesia.
- Sari, P. K., Arofatinajah, S., & Fajarianto, O. (2022). Development of Digital Comic on Thematic Learning to Improve Literature Skills of 5th Grade Students in Elementary School. *JTP-Jurnal Teknologi Pendidikan*, 24(1), 38-49.
- Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana 2019
- Soerjono Soekanto. 2007. *Pengantar Penelitian Hukum*. Jakarta: Universitas Indonesia (UI-Press).
- Sutanto Nugroho dan Budhi Wisaksono. 2017. Pengaturan Tindak Pidana Contempt of Court Berdasarkan Sistem Hukum Pidana Indonesia. *Diponegoro Law Journal*, Volume 6, Nomor 2.
- Undang-Undang Nomor 14 Tahun 1985 tentang Mahkamah Agung.
- Undang-Undang Tahun 40 Tahun 1999 tentang Pers.
- Undang-Undang Nomor 20 Tahun 2001 tentang Perubahan Atas Undang-Undang Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi.
- Undang-Undang Nomor 18 Tahun 2003 tentang Advokat.
- Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman.
- Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan.