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ARTICLE

Authority, Rights, and Reform: Legislative Struggles over Indonesia's Criminal Procedure Code (1979–1981)

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Abstract

The dynamics surrounding the legislative process of the Indonesian *Criminal Procedure Code* (*Kitab Undang-Undang Hukum Acara Pidana*, KUHAP) from 1979 to 1981 were shaped by a clash between two opposing ideologies. On one side stood proponents of a rights-based approach, advocating for legal protections for the accused; on the other, supporters of an authoritarian approach emphasised the primacy of state authority in maintaining security and public order. In the end, Indonesian lawmakers were able to strike a balance by establishing several procedural safeguards that purported to protect the rights of the accused. This article offers a detailed account and analysis of this debate, illuminating how resistance and compromise emerged from the struggle. Drawing on these historical insights, the article explores the potential for reform in the contemporary Indonesian legal and political landscape, highlighting current challenges. The main dataset for this article was collected from official records of the meetings that took place during the legislative process of the KUHAP, as well as public opinion at the time. Although this debate took place more than four decades ago, revisiting the historical context of the KUHAP remains crucial to understanding its ongoing relevance and potential future for reform.

Introduction

> The military faction rejects alien values of individualism and liberalism [regarding the rights of the accused] being introduced into our Criminal Procedure Code.
>
> – Danny, spokesperson of the Armed Forces Parliamentary Faction (ABRI), 1979[1]

> What emerges [from this law] is not assistance for the accused, but assistance for the authorities!
>
> – Vincentius Bata da Costa, spokesperson of the Indonesian Democratic Party (PDI), 1979[2]

These quotes capture the ideological tensions that shaped the legislative debates on Indonesia's *Criminal Procedure Code* (*Kitab Undang-Undang Hukum Acara Pidana*, KUHAP) between

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[1]Minutes, First Joint Meeting (8 Nov 1979) 5 <https://web.archive.org/web/20240810014156/https://berkas.dpr.go.id/armus/file/Lampiran/leg_1-20200831-085127-9600.pdf> archived from the original 10 Aug 2024, accessed 14 Apr 2025.

[2]ibid 98.

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1979 and 1981. During discussions on the first draft, the Armed Forces Parliamentary Faction (*Angkatan Bersenjata Republik Indonesia*, ABRI) opposed what it saw as an individualist-liberalist logic of prioritising the rights of the accused. Instead, ABRI believed that the authorities needed more power, not less, to maintain order and control. In contrast, The Indonesian Democratic Party (*Partai Demokrasi Indonesia*, PDI) insisted that certain procedural safeguards for the accused were necessary to limit state power in the criminal justice system. The opposing views ultimately framed criminal justice as a struggle between two forces – the state, represented by law enforcement agencies, and the accused – and brought to the fore a fundamental question: Should the legal system favour state authority or individual rights in criminal proceedings?

This article aims to provide a detailed description and analysis of the debates surrounding the KUHAP legislative process. The article centres on the struggle between the two opposing ideologies – the rights-based approach, which emphasises legal protections for the accused, and the authoritarian approach, which prioritises state authority over individual rights. The article will show how this tension gave rise to both resistance and compromise throughout the legislative process. It will do so by focusing on the discretionary powers of the state in critical pre-trial actions, such as arrest, search, seizure, and detention, and the options for individuals to contest such authority. The pre-trial stage is particularly significant in inquisitorial criminal justice systems like Indonesia's, as it often determines the trajectory of criminal proceedings and substantially influences trial outcomes.[3]

The primary dataset for this article consists of official Indonesian parliamentary records from the time of the KUHAP legislative process, spanning the years 1979 to 1981.[4] In addition, the article examines contemporary public opinion in relation to the legislative process.[5] However, the author had access only to formal documents and not to informal communications between the various stakeholders involved in the legislative process.[6] As a consequence, at some points this article can only offer a reasonable inference to reconstruct certain dynamics and motivations that shaped the development of the law.

Although this debate took place more than four decades ago, this article argues that revisiting it offers several significant benefits. First, it allows us to understand the design of the KUHAP at a granular level. This is important because the same KUHAP remains in effect at the time of writing. To the best of the author's knowledge, no prior study has attempted such an analysis. Such an analysis alone may prove very helpful to practitioners and academics. Second, this research can be used to inform the legal reform currently underway in Indonesia. By understanding the history and context of the law, we can make better decisions about how to change it.[7] Lastly, this article can contribute

[3]In the Italian and Latin American inquisitorial models, for instance, case files produced at the pre-trial stage play a central role, as the trial phase is seen as a confirmation of the investigation's findings. As a result, the principle of orality in trial (as practised in the adversarial model) is of little utility. See Elisabetta Grande, 'Italian Criminal Justice: Borrowing and Resistance' (2000) 48 The American Journal of Comparative Law 227; Leonard L Cavise, 'The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate Essay' (2007) 53 Wayne Law Review 785, 793.

[4]Most of the documents can be accessed at the Online Library of the Indonesian Parliament <https://www.dpr.go.id/arsip/indexlg/id/10> accessed 18 Oct 2023. However, records from the final session of the KUHAP deliberations (23 Sep 1981) are not available online, but the author obtained a copy from the parliamentary library.

[5]Zain Badjeber & Imron Rosjadi, *RUU Kitab Undang-Undang Hukum Acara Pidana* [*The Draft of Indonesian Criminal Procedure Code*] (Bumi Restu 1979). This book compiles public opinion on the legislative process of KUHAP. Some parts of the minutes of the meetings are also documented in this book.

[6]Conducting interviews was not feasible, as the event took place over four decades ago and most of the individuals involved have since passed away. The author made efforts to establish contact but found no surviving sources available.

[7]Criminal justice reforms in Indonesia have failed since 2013 because criminal justice actors cannot agree on who should have more power at the pre-trial level. This is because the reforms are trying to change how the system works to make it more adversarial. This article shows how the logic of the current system has been built. For a discussion of the process of the reform and how it has failed, see Robert R Strang, '"More Adversarial, but Not Completely Adversarial": Reformasi of the Indonesian Criminal Procedure Code' (2008) 32 Fordham International Law Journal 188; Jayson Lamchek, 'Arresting a Due Process Revolution The Reform of Indonesia's Code of Criminal Procedure and the Persistence of History', in Pablo Ciocchini

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to the literature on criminal justice. By understanding how different ideologies played out in the debates over Indonesia's criminal justice system, we can better understand the different approaches to criminal justice that exist around the world. Put simply, this article can help us understand the present, inform the future, and contribute to our theoretical understanding of criminal justice.

This article begins with a brief literature review. Next, it discusses the first draft of the KUHAP and the debates surrounding it. Then, it discusses the final draft that emerged from the debates. Finally, the article provides a reflection on the implementation of the KUHAP after more than forty years and the possibilities and challenges of amending it in Indonesia's current legal and political landscape.

Literature review

This article offers a historical exploration of the diverse ideologies that shape the operation of criminal justice systems. While the field of criminal justice has been extensively studied, there remains a gap in research on the historical development and ideological underpinnings of criminal justice systems, particularly in the Asian context. Existing scholarship on the subject is predominantly written from a Western perspective and focuses primarily on Western countries and jurisdictions.

A comprehensive understanding of any criminal justice system requires an examination of its underlying ideology, as it serves as a crucial framework for interpreting the overall functioning of the system. Criminal justice ideology, in this context, can be seen as a microcosm of the broader state ideology, and the interplay between the two provides valuable insights into the foundational principles and objectives of criminal procedures.

Within this framework, two broad ideological orientations can be identified. In liberal systems, the presumption of potential abuse of power by the state leads to a prioritisation of suspects' rights, necessitating robust mechanisms to counterbalance state authority in criminal justice enforcement. Conversely, in systems with authoritarian tendencies, the state is often perceived as the guardian of society, resulting in the prioritisation of state power. This fundamental dichotomy has been explored by criminal justice scholars under various terminologies, highlighting the diverse ideological foundations that shape criminal justice systems worldwide.

Herbert Packer was an American law professor and criminologist who pioneered discussions on the ideological purpose of the criminal justice system. In particular, he examined the ideological values underlying the criminal justice system in the United States during the progressive Warren Court era.[8] In his seminal article, he introduced two opposing normative models that still have a strong influence in the literature today: the crime control model and the due process model. Packer conceptualised the criminal process as a bilateral dynamic between the accused and the state, with each side pursuing its own interests and goals. This framework laid the foundation for his two models. The due process model is closely associated with a rights-based approach influenced by Western democratic liberal nations. In this model, the rights of the accused individual take precedence over upholding security and order. Conversely, the crime control model tends to favour an authoritarian approach, as it places greater emphasis on state security and maintaining order by controlling crime in society. After Packer, several American scholars continued to examine the ideological purpose of the criminal justice system by developing different models, including Griffiths,[9] Damaska,[10] and

& George Radics (eds), *Criminal Legalities in the Global South* (Routledge 2019); Aristo Marisi Adiputra Pangaribuan, 'Cooperation and Non-Cooperation in Indonesian Criminal Case Processing: Ego Sektoral in Action' (PhD thesis, University of Washington 2022) <https://digital.lib.washington.edu/researchworks/handle/1773/49391> accessed 16 Mar 2023.

[8]Herbert L Packer, 'Two Models of the Criminal Process' (1964) 113 University of Pennsylvania Law Review 1.

[9]John Griffiths, 'A Third "Model" of the Criminal Process' (1970) 79 The Yale Law Journal 59.

[10]Mirjan R Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1991). State ideology shapes Damaska's model of criminal procedure. He contrasts two models: the interventionist 'activist state' with its tight control of citizens, and the 'reactive state' that minimises interference.

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Roach.[11] Some of them, such as Griffiths and Roach, made specific reference to Packer's article, and the ideological frameworks they laid out offer lenses through which to scrutinise the competing ideologies that shaped the legislative process of the KUHAP. Indeed, over time this debate has grown into a central and enduring theme in global criminal justice scholarship.

In the Asian context, several publications have examined the ideological values behind the criminal justice system using specific jurisdictions. Examples include McConville's[12] and Liu and Halliday's[13] theoretical and empirical examinations of the authoritarian logic underlying the Chinese criminal justice system and its implications for the role of defence lawyers, and Le et al's[14] exploration of how authoritarian tendencies remain intact in Vietnam despite due process reforms in 2015 (which took effect in 2018). In Singapore, Ho has investigated the relationship between the ideology of liberalism and the criminal trial,[15] while Chin has critiqued the evidence code for failing to reflect the values of modern democracy.[16] Collectively, these studies show that similar ideological tensions shape debates over criminal justice systems across Asia. This article adds to that body of scholarship by focusing on Indonesia, specifically through an examination of the legislative process behind its criminal procedure code, KUHAP.

Several publications also touch on the issue of the ideological values embedded within the KUHAP. Almost all of these publications agree that the KUHAP is authoritarian in nature. Fitzpatrick, for instance, observes that the Indonesian socio-political structure places limited emphasis on individual rights, a reality mirrored in the KUHAP's prioritisation of state authority over defendants' rights in the criminal justice process.[17] Moreover, Strang stresses that in the Indonesian criminal justice system, 'rights are routinely violated, but the code does not provide an avenue to redress it'.[18] Meanwhile, Lamchek even labels the KUHAP as a 'relic of the authoritarian regime'.[19] In a more recent publication, Butt analyses the Indonesian criminal justice system in action, focusing on the highly publicised murder trial of Jessica Wongso, who was accused of killing Wayan Mirna Salihin with cyanide-laced coffee. Butt's analysis highlights how the wide discretion granted to state authorities can contribute to a situation where securing a conviction appears easier than ensuring a fair trial.[20] In addition, Afandi and Bedner argue that the Indonesian government intentionally

[11]Griffiths and Roach offer an alternative model to Packer's. Meanwhile, Damaska examines the linkage between the criminal justice and state political systems. From this he devises a co-ordinated model and a hierarchical model. See Kent Roach, 'Four Models of the Criminal Process' (1999) 89 The Journal of Criminal Law and Criminology 671.

[12]Michael McConville, *Criminal Justice in China: An Empirical Inquiry* (Edward Elgar Publishing 2011). Expanding beyond the mechanics of procedure, McConville situates his analysis of criminal justice within the broader political landscape. He then employs this lens to illuminate the contrasting ideological underpinnings of the Chinese and Western systems.

[13]Sida Liu & Terence C Halliday, 'Political Liberalism and Political Embeddedness: Understanding Politics in the Work of Chinese Criminal Defense Lawyers: Politics of Chinese Criminal Defense Lawyers' (2011) 45 Law & Society Review 831; Hualing Fu, 'Book Review: Sida Liu and Terence C. Halliday, *Defense Lawyers in China: Criminal Defense in China: The Politics of Lawyers at Work* (New York, NY: Cambridge University Press, 2016) pp 220. Hardcover: $99.99′ (2017) 4 Asian Journal of Law and Society 277.

[14]Le Lan Chi, Nguyen Thi Lan & Nguyen Hoang Ngan, 'The Presence of the Defense Lawyer in Vietnam's Criminal Justice System: Substantive or Cosmetic?' (2023) 9 Hasanuddin Law Review 20.

[15]Ho Hock Lai, 'Liberalism and the Criminal Trial' (2010) Singapore Journal of Legal Studies 87.

[16]Tet Yung Chin, 'Remaking the Evidence Code: Search for Values' (2009) 21 Singapore Academy Law Journal 52.

[17]Daniel Fitzpatrick, 'Indonesian Criminal Procedure' (Criminal Lawyers' Association of the Northern Territory Conference, Jul 1993) <https://clant.org.au/wp-content/uploads/the-bali-conference/1993/Fitzpatrick-Daniel-Indonesian-Criminal-Procedure.pdf> accessed 16 Mar 2024; Daniel Fitzpatrick, 'Culture, Ideology and Human Rights: The Case of Indonesia's Code of Criminal Procedure', in Timothy Lindsey (ed), *Indonesia, Law and Society* (Federation Press 2008). Fitzpatrick's initial observations, dating back to his 1993 publication, focus on the KUHAP. He essentially argues that the weak emphasis on individual rights within Indonesian culture shapes the enforcement power wielded by the state.

[18]Strang (n 7) 197. Strang was a representative of the American government-based Office of Overseas Prosecutorial Development, Assistance, and Training (OPDAT), an organisation that assisted the team in drafting the KUHAP reform. He was the team's main external advisor.

[19]Lamchek (n 7).

[20]Simon Butt, 'Indonesia's Criminal Justice System on Trial' (2021) 24 New Criminal Law Review 3.

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designed the code to strengthen the military's control over criminal procedure.[21] The scholars arrive at this conclusion primarily by pointing out that the KUHAP was formulated during the Soeharto military dictatorship, known as the New Order regime, and is notable for prioritising state security and order over individual rights.

This article extends the existing scholarship by not only reaffirming that the KUHAP is authoritarian, but also offering a detailed analysis of how it came to be so by examining the dynamics of its legislative process, which took place between 1979 and 1981.

The first KUHAP draft

Prior to the development of the KUHAP, Indonesia's criminal justice system was based on a Dutch colonial-era criminal procedure code. Deliberations on the first draft of the KUHAP commenced in the early 1970s, following Indonesia's adoption of the principles outlined in the Universal Declaration of Human Rights (UDHR) and the *International Covenant on Civil and Political Rights* (ICCPR), which were codified in the 1970 judicial authority law.[22] The government claimed that the draft KUHAP was being drafted with a human rights perspective as its foundation.[23] The government also argued that the colonial code was no longer relevant because it was a draconian code that served the interests of the colonial rulers and not those of the Indonesian people.

This claim was made in an official statement by then-President Soeharto, read out by Minister of Justice Mudjono on 12 September 1979, arguing that the new code would be more humane and democratic than the colonial-based code it was replacing. However, the first draft of the KUHAP fell short of these ideals. From the outset, it gave the police broad powers to arrest individuals for up to seven days without any evidentiary threshold or court warrant.[24] Worse still, there were no procedural safeguards for individuals to challenge such decisions.

Under the draft KUHAP, the draconian power of the state does not end with arrest. An accused person can also be detained for more than 500 days while awaiting trial (up to the Supreme Court level) and, in special circumstances that are entirely subject to government interpretation, even indefinitely.[25] It is almost impossible for the accused to challenge such a decision. The only way to appeal is to offer bail to the police or the prosecutor themselves, not to the court. This gives authorities unchecked power, leaving no safeguards against potential abuse.

Similar logic applies to searches and seizures. Under the KUHAP, the police have wide discretionary powers with no threshold for exercising them. They do not need a court warrant to perform searches or seizures, a warrant issued by their own institution suffices.[26] In other words, the police

[21]Fachrizal Afandi & Adriaan Bedner, 'Between Upholding the Rule of Law and Maintaining Security: Criminal Justice Actors in Indonesia's Constitution', in Melissa Crouch (ed), *Constitutional Democracy in Indonesia* (1st edn, Oxford University Press 2022).

[22]The ICCPR and the UDHR were frequently mentioned in official statements by the lawmakers. Literature and public opinion at the time also pressed the government to recognise the human rights principle introduced by these two conventions. Prior to the establishment of KUHAP, Indonesia also recognised human rights and fair trial principles under the 1970 judicial authority law (*Law No 14/1970*).

[23]The minister responsible for drafting the KUHAP was the then-Minister of Justice, Oemar Seno Adji, who was replaced by Mudjono in 1973. Oemar Seno Adji went on to become Chief Justice of the Indonesian Supreme Court. See Oemar Seno Adji, *Hukum (Atjara) Pidana Dalam Prospeksi* [*Criminal Procedure Code in Prospective*] (Erlangga 1973) 239–278.

[24]See KUHAP, first draft, art 14. The file of this draft is with the author. It is not available online, but it can be consulted in Badjeber & Rosjadi (n 5).

[25]ibid arts 17–24.

[26]However, art 30(2) states that the police need a court warrant to seize written evidence. Only in an 'emergency' could they seize written evidence. Needless to say, the term 'emergency' is left to the police's own discretion, granting them significant leeway in practice.

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can search and seize anything they want at any time without any meaningful oversight. It should be noted that under Soeharto's New Order regime, the police were integrated into the military.[27]

Moreover, although Soeharto proudly claimed that the first draft of the KUHAP recognised the right of the accused to counsel, this proved effectively meaningless. There are two main reasons for this. First, the role of the defence lawyer was largely passive. With no available instruments to fight back against the state's arbitrary decisions, the defence lawyer could at best only play the role of a spectator in the criminal justice process. For instance, the draft KUHAP only granted the accused the right to be represented by a defence lawyer during the trial, but if a defence lawyer wished to question a witness, the trial judge retained full discretion to deny the request. Furthermore, the KUHAP was silent on the right to be represented by a defence lawyer at the pre-trial stage.[28] Second, the government was permitted to monitor communications between defence lawyers and their clients. Law enforcement authorities could listen in and record these conversations, a practice justified under what the government termed the 'within sight and earshot' principle.

In justifying its authoritarian approach, the government argued that the draft code reflected a balance between individual rights and state authority.[29] The government claimed that such a balance was a quintessential feature of '*Pancasila* democracy'. During Soeharto's rule, the term 'Pancasila democracy' was commonly employed to rationalise the authoritarian nature of his administration. *Pancasila*, in its literal sense, refers to a set of five general principles that underpin the values of the Indonesian government; *Pancasila democracy* emphasises social cohesion and the integration of state and society. In practice, this meant that individuals were expected to subordinate their personal interests to the collective good – as defined and enforced by the state.[30]

As the discussion unfolds, readers will see that this argument has been invoked time and time again to justify the logic of the KUHAP. The government also argued that the draft KUHAP was an improvement on the old colonial code, which did not recognise the rights of the accused at all. It also pointed out that, despite criticism, the new draft code at least introduced a number of rights for the accused, such as the right to counsel, the right to be informed of charges, and the right to be free from coerced confessions. In his concluding remarks to parliament, the Minister of Justice appealed to lawmakers to pass the draft as quickly as possible so that it could serve as a 'New Year gift' for the Indonesian people.[31]

Initial responses from Parliament and the public

Before delving into the responses to the draft, it is helpful to provide an overview of the political landscape in the Indonesian parliament during this period. Between 1977 and 1982, the national

[27] In response to the pressures of the *reformasi* (reform) movement in 1998, the Indonesian police force was formally separated from the military in 1999.

[28] KUHAP, first draft, art 102 only states that during the trial, the judge must ask the accused whether they wish to be represented by a defence lawyer or not.

[29] Minutes, First Joint Meeting (8 Nov 1979) (n 1) 7, after the minister's general statement. This argument is repeated over and over to justify the authoritarian approach of the code.

[30] For a more detailed discussion of Pancasila democracy, see Edward Aspinall, *Opposing Suharto: Compromise, Resistance, and Regime Change in Indonesia* (Stanford University Press 2005); David Bourchier, *Illiberal Democracy in Indonesia the Ideology of the Family State* (Routledge 2016).

[31] See Minutes, First Joint Meeting (8 Nov 1979) (n 1) 81. This document shows that the government was in a rush to pass the law. This is why the PDI faction filed an objection to the meeting; their faction had only received the draft a day prior. The PDI also reiterated its objection to the process at the final meeting on 23 September 1981. Its spokesperson, Gde Jaksa, criticised the speaker of the parliament for seeking to pass the law without proper deliberation – describing the process as a *process van hamerslagen*, or *ketuk palu saja* (passing laws with the strike of a gavel). See Minutes, Final Joint Meeting (23 Sep 1981) 94. These minutes are not publicly available online; however, the author obtained a copy from the parliamentary library and has made it accessible at <https://acrobat.adobe.com/id/urn:aaid:sc:AP:fcc4679e-7f8a-467b-8d25-2d57bcb871ba> accessed 5 May 2025.

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parliament comprised 460 seats.[32] The most influential faction within this legislative body was the functional group known as *Karya Pembangunan* (part of *Golongan Karya*, Golkar), which held more than 50% of the seats (232). Golkar was closely aligned with Soeharto and, in many ways, formed the backbone of his regime, amalgamating the powers of the military and civilian bureaucracy. The second strongest faction after Golkar was the ABRI faction, representing the armed forces, whose members were appointed directly by the president and accounted for 21% of the total members (100 seats). The Islamic-based United Development Party (*Partai Persatuan Pembangunan*, PPP) followed very closely with 99 seats. During the Soeharto era, the PPP played a multifaceted and sometimes contradictory role, acting as an opposition force at times and aligning itself with the government at others. The Indonesian Democratic Party (PDI) held just 29 seats (8%) and was generally regarded as the opposition force during Soeharto's era, as it was the only party willing to criticise the New Order regime openly. Initial deliberations of the draft KUHAP were conducted by the 81 members of parliament that were part of the Law and Defence Commission, before the proposal was brought before the full legislature for further debate.

After the first draft was presented in September, each faction submitted its responses (known as '*pemandangan umum*' or 'general observations') on 8 November 1979, less than a month after the draft was introduced. Although the New Order regime maintained a strong influence on the legislature at the time, the draft did not receive the smooth reception one might have expected. In fact, despite Soeharto's push for swift passage, the draft drew surprisingly strong criticism from Golkar, the strongest pro-government faction.[33] Through its spokesperson, Albert Hasibuan, Golkar raised serious concerns about the draft's striking imbalance of power between the state and the accused. Hasibuan contended that the protection of the rights of the accused fell far short of the standards set by the UDHR and the ICCPR.[34] He pointed out that the authorities possessed excessive discretionary authority, especially in terms of arrest and detention. Additionally, Golkar considered the pre-trial detention period to be excessively long, raising concerns about the potential for abuse of power by the authorities. Hasibuan went on to argue that the draft would grant the authorities a 'quota' of people they could detain without justification.[35] According to Hasibuan, this allocation of power could be dangerous, as it could be used to detain innocent individuals.[36]

Golkar also objected to the extremely passive role of the defence lawyer. First, Hasibuan rejected the 'within sight and earshot' principle, which would restrict communication between the accused and their defence lawyer. Hasibuan argued that the accused should be able to communicate freely with their defence lawyer, as this is a fundamental right of the accused. Hasibuan criticised the government's logic in proposing the principle, arguing that it showed a lack of trust in defence lawyers.[37] He further contended that the principle served as evidence that the government's commitment to

[32]See Presidential Decree No 103/M (19 Sep 1977) on the Inauguration of Members of the DPR/MPR Elected in the 1977 General Election.

[33]See Minutes, First Joint Meeting (8 Nov 1979) (n 1) 15–41. In the final meeting in 1981, however, Golkar toned down its objections. By this time, Hasibuan was no longer Golkar's spokesperson.

[34]In his exact words, 'the draft does not provide enough protection (*jaminan hukum yang mencukupi*) for the accused … It is still too easy for the government to arrest and detain individuals because everything is based on the discretion of the authorities (*penilaian subyektip*) as regulated by Article 16′. See Minutes, First Joint Meeting (8 Nov 1979) (n 1) 27–30. At that time, Indonesia had yet to ratify the ICCPR, which it would only do in 2005. Albert Hasibuan (1939–2022) was also a defence lawyer. His profession may have influenced his (and Golkar's) views on the passive role of the defence lawyer. In the final meeting, Hasibuan was replaced as spokesperson, though the reasons for this change remain unclear. This article briefly discusses his replacement later on.

[35]See Minutes, First Joint Meeting (8 Nov 1979) (n 1) 29.

[36]In his statement, Albert Hasibuan cited the then-recent case of Yan Bodong, an individual charged with theft who had spent a year in pre-trial detention, during which he was reportedly tortured by the police. Hasibuan also referred to another incident highlighting the abuse of power resulting from the unchecked authority of law enforcement. Additionally, he raised concern over the deaths of six juveniles who were found in a detention cell at a Jakarta police station.

[37]See Minutes, First Joint Meeting (8 Nov 1979) (n 1) 31.

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safeguarding the rights of the accused was not wholehearted.[38] Lastly, Hasibuan commented on the bail system described in the draft. He posited that the bail system would only benefit wealthy people who could afford to pay bail and avoid detention. This would put poor people at a disadvantage, as they would be more likely to be detained. In his concluding remarks, Hasibuan said that Golkar requested the draft KUHAP to be revised to include more procedural safeguards for the accused, as mandated by international conventions.

Unsurprisingly, the ABRI faction concurred with the draft. This may have been because ABRI had a vested interest in the KUHAP, as the police were under ABRI's control at the time.[39] As noted in the introduction, ABRI, represented by spokesperson Danny, rejected the inclusion of foreign ideological values such as individualism and liberalism.[40] Danny argued that individualism, which formed the ideological foundation of rights-based instruments like the UDHR and the ICCPR, was an import from Western-style liberalism and incompatible with Indonesia's Pancasila democracy.[41] ABRI further posited that the logic of Pancasila democracy prioritises the common good over individual rights. As crimes represent threats to the common good that outweigh considerations for the accused, ABRI argued, state authority must take precedence over the rights of the accused.

As a result, ABRI accepted the draft code as it stood. In defending the provisions on arrest and detention, ABRI argued that although pre-trial detention was still lengthy, the introduction of fixed time limits marked a step forward from the colonial code, which lacked such constraints.[42] The party employed similar reasoning when addressing the 'within sight and earshot' principle. ABRI maintained that the introduction of a right to legal counsel was an improvement on the previous code, which did not provide for the right to have a defence lawyer. ABRI further argued that the 'within sight and earshot' principle reflected a balanced approach between the rights of the accused and those of the state authorities. ABRI concluded that, ultimately, it was not feasible for the accused to have a position equal to that of the authorities. In its closing statements, ABRI reiterated its support for the draft and called on all factions to approve it promptly.[43]

Meanwhile, the PPP took a more subtle oppositional stance to the draft. In its initial statement, the PPP echoed the government's perspective that the new code should strike a balance between the rights of the accused and the state's authority to maintain order, as it is a foundation of the Indonesian constitution.[44] However, PPP spokespersons Hafizh Usman and Abdullah Syahrir indicated that they believed certain adjustments were necessary. First and foremost, the PPP raised concerns about the lack of safeguards for the accused. The party emphasised that the concept of human rights not only aligns with international conventions but also with Islamic doctrines.[45] Usman further stated

[38]See ibid 30–31. In his exact words, 'with the restriction of communication, it appears that the government was not fully committed (*tidak sepenuhnya*) to upholding the rights of the accused'.

[39]This means that ABRI held the enforcement power in the criminal justice system. As noted in fn 27, the police force was officially separated from ABRI in 2002 in response to pressure from the *reformasi* movement.

[40]See Minutes, First Joint Meeting (8 Nov 1979) (n 1) 7.

[41]For a more detailed discussion of Pancasila democracy, see fn 30. Moreover, Soeharto himself stated in his official autobiography that there was no room in Indonesia for Western-style democracy, and that Indonesian values are different from Western values. See Soeharto, G Dwipayana & Ramadhan KH, *My Thoughts, Words, and Deeds: An Autobiography* (Citra Lamtoro Gung Persada 1991); Aspinall (n 30); Bourchier (n 30).

[42]See Minutes, First Joint Meeting (8 Nov 1979) (n 1) 11. At this meeting, ABRI argued that the KUHAP was a step ahead of the colonial code. Under the colonial code, an accused could be detained indefinitely.

[43]See ibid 11–14.

[44]See ibid 61. In its official statement, the PPP claimed that the fundamental principle of the 1945 Constitution is a harmonious balance between individual rights and the power of the state (*asas berpadunya secara seimbang antara kepentingan, hak dan wewenang pemerintah serta hak-hak asasi manusiawi rakyat*), and that this balance must serve as the basis for the KUHAP.

[45]See ibid 50–52. In his statement, Usman said that the Islamic doctrine of Imam Al-Syatibi in *Al-Muwafaqat* also mandates the need to safeguard human rights. According to this doctrine, there are five principles of human protection: religious protection, protection of life, intellectual protection, property rights, and ancestry/familial protection.

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that the draft still granted the government overly broad powers in enforcement procedures, including arrest, detention, search, and seizure, and that the period of pre-trial detention was excessively lengthy.[46]

Second, the PPP contended that the new law introduced a dualistic element by blending two historical legal traditions: inquisitorial and adversarial. At the pre-trial stage, the draft KUHAP predominantly adopted an inquisitorial tradition, raising concerns about an overly authoritarian approach in which the accused is treated as a mere object of investigation.[47] It was only at the trial stage that the accused was treated as a subject, consistent with the adversarial tradition. The party ultimately concluded that the draft could not be passed without revisions. They recommended that the draft be circulated to the public so that lawmakers could receive input.[48]

The fiercest opposition to the draft came from the PDI faction. PDI spokesperson Vincentius Bata da Costa expressed strong dissatisfaction with the draft, arguing that it was even worse than the colonial code it sought to replace.[49] He gave two main reasons. First, he echoed the PPP's and Golkar's argument that the authorities had too much discretion when it came to arrest, detention, search, and seizure. Second, he argued that both the KUHAP and the colonial code employed the same logic: 'First arrest, then detain, then look for evidence'.[50] This, he said, showed that the authorities were more interested in locking people up than in actually proving that they were guilty of a crime.

To support his argument, da Costa pointed to the government's professed commitment to the presumption of innocence, which he said amounted to nothing more than empty words. Da Costa argued that instead of upholding the presumption of innocence, the draft effectively prioritised the 'presumption of the authorities'[51] – where decisions of the authorities are granted automatic validity, even if they are mistaken, as they possess broad discretionary power and there is no effective system of checks and balances in place.[52]

Da Costa also questioned the government's claim that it was guaranteeing the right of the accused to counsel. In his view, the draft did not actually provide legal assistance to the accused, but rather to the authorities. This was due to the 'within sight and earshot' concept, which allowed authorities to obtain information from interactions between defence lawyers and their clients. From the outset, the PDI had expected the government to establish the right to counsel as a crucial procedural safeguard for the accused, as this had been a topic of public discussion during the legislative process of the KUHAP. However, reality did not live up to these expectations.[53] The party concluded that the draft would need to be substantially revised before it could be approved by parliament.[54]

Then-Justice Minister Mudjono responded to the critics on 19 November 1979, ten days after all factions had given their feedback.[55] In the meeting, he defended the government's position on three key aspects: the incorporation of human rights principles, the authority of the state, and the right

[46]See ibid 68–69.

[47]See ibid 65.

[48]See ibid 80.

[49]See ibid 85–86. Da Costa said that 'both laws [referring to the colonial code and the KUHAP] are no different [in terms of the logic:] … *First arrest, then detain, then look for evidence*' (emphasis in the original).

[50]See ibid 85.

[51]See ibid 89.

[52]See ibid 86.

[53]See ibid 88–89. To illustrate his argument, da Costa quoted the Dutch version of a well-known allegory: '*De bergen baren, een belachelijk muisje wordt geboren*'. This proverb, often rendered in English as 'The mountain laboured and brought forth a mouse', originates from one of Aesop's fables and conveys the idea that something anticipated to be grand and consequential turns out to be small and insignificant.

[54]See ibid 90.

[55]Minutes, General Meeting (18 Nov 1979) <https://web.archive.org/web/20240809104621/https://berkas.dpr.go.id/armus/file/Lampiran/leg_1-20200831-085243-5509.pdf> archived from the original 9 Aug 2024, accessed 14 Apr 2025.

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to legal counsel. Concerning the inclusion of human rights principles in the draft, Mudjono argued that the code struck a fair balance between protecting the rights of the accused and empowering state authorities to maintain public order, a position that echoed ABRI's rationale.[56] He maintained that the government had made efforts to incorporate important human rights principles, such as equality before the law, the presumption of innocence, and avenues for the accused to seek redress and rehabilitation from the government in cases of abuse of power.[57]

Justifying the extensive powers given to the authorities, Mudjono asserted that they would be used exclusively for resolving criminal cases, without any ulterior motives. He emphasised that such powers were essential given the complexity of criminal investigations. Regarding the length of pre-trial detention, he highlighted that the introduction of a time limit in the draft marked an improvement over the old colonial code, repeating the government's previous argument when the draft was submitted to parliament. In practice, Mudjono added, he did not anticipate the authorities to routinely use the maximum of the permitted detention period.

In response to criticism of the 'within sight and earshot' principle, Mudjono argued that the government believed in the need to oversee communications because they could potentially obstruct the investigation process. He added that the government would decide on a case-by-case basis whether to exercise this power.[58]

Beyond parliamentary debate, the legislative process surrounding the KUHAP attracted public attention, much of it critical of the draft's authoritarian tendencies. One notable critique came from Soerjadi, a former Chief Justice of the Indonesian Supreme Court.[59] Soerjadi argued that the draft KUHAP, if passed, could lead to Indonesia adopting an authoritarian criminal justice system. He attributed this concern to the government's substantial control over the criminal justice enforcement process. Soerjadi also highlighted specific issues, such as the 'within sight and earshot' principle and the power of the trial judge to dismiss questions from defence lawyers during evidentiary hearings. He called upon the government to genuinely incorporate human rights principles set out in the UDHR and the ICCPR.[60] Another widely held view called for lawmakers to adopt, at the very least, the Dutch *Code of Criminal Procedure*, which places greater emphasis on individual rights. This proposal drew on Indonesia's colonial legacy, during which the Dutch colonial government applied the Dutch legal code to Europeans living in the archipelago.[61] Lastly, a group of legal aid organisations also commented on the draft. They reminded the lawmakers that, after all, the ultimate purpose of having a criminal justice system is to limit the power of the state against the individual. They felt that the draft gave the state too much power in the criminal justice system. In the end, one of their main recommendations to the lawmakers was to create a *habeas corpus* institution to counterforce the state's power in the criminal justice process.[62]

In the wake of sustained criticism, the government and parliament eventually agreed to a compromise by postponing the ratification of the KUHAP and setting up a joint team of 23 representatives drawn from all parliamentary factions and the Ministry of Justice to bridge their differences and

[56]See ibid 6–7. This may be attributed to the fact that Mudjono himself had a military background, having served in the naval military police.

[57]See KUHAP, first draft, arts 86–88.

[58]Minutes, General Meeting (18 Nov 1979) (n 55) 10.

[59]Soerjadi, who served as Chief Justice of the Supreme Court from 1966 to 1968, published an opinion piece in the *Sinar Harapan* newspaper on 19 November 1979. His views were later documented in Badjeber & Rosjadi (n 5) 309–311.

[60]Specifically, he cited articles 8, 10, and 11 of UDHR.

[61]Opinion from Mohammad Roem, a member of the NGO *Lembaga Keadilan Hukum*, originally published in the *Harian Pelita* newspaper on 10 November 1979. Cited from Badjeber & Rosjadi (n 5) 303–306.

[62]Opinion from legal aid institutions from various backgrounds: LBH DKI, University of Indonesia (UI), Christian University of Indonesia (UKI), Pusbadhi, Posbakum, LPPH, and LKH. Cited from ibid 320–321.

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deliberate on necessary revisions to the draft.[63] This team undertook a comprehensive review, examining the overall legal framework, the language of the draft, and the structural organisation of its chapters. One of the most pressing issues raised in these discussions was the need to strike a balance between the rights of the accused and the powers of the state.

Change, compromise, and the final draft

Between December 1979 and September 1981, the joint team convened numerous times, ultimately producing a revised draft that secured consensus among all stakeholders. By the time of the final meetings, Mudjono had stepped down as Justice Minister and was succeeded in February 1981 by Ali Said, who was also a member of the military.

The most critical addition that facilitated the approval of the draft was the introduction of a *habeas corpus* institution known as the pre-trial procedure *(pra-peradilan)*. This procedure allowed the accused to challenge the legality of state actions before the commencement of trial proceedings. Andi Muchtar of Golkar, who chaired the joint team, argued that this procedure would strengthen judicial oversight over the criminal justice system[64] by providing the accused a formal avenue to contest the state's power and safeguard their rights. All factions in parliament welcomed the inclusion of the pre-trial procedure.

At first glance, the inclusion of the pre-trial procedure in the revised draft may seem like an ideal compromise between the competing ideologies of the lawmakers. Indeed, all factions, even the PDI, which had been the fiercest opposition, praised its introduction.[65] However, a closer look reveals that the authoritarian logic remains intact, as the procedure cannot serve as an effective check on state power.[66] There are two main reasons for this. First, the procedure is a passive instrument, which means that judicial oversight only comes into play when the accused initiates the process by filing a motion to the court. This still allows criminal justice agencies to detain individuals for a period of time before any judicial scrutiny is applied. Furthermore, the motion can be halted abruptly if the prosecutor decides to bring the case to trial, even in the midst of pre-trial proceedings. Once the case advances to trial, the motion becomes irrelevant because the court's jurisdiction has already shifted from the pre-trial to the trial phase.[67] Moreover, in the rare instance that the pre-trial judge rules that a case should be dismissed due to unlawful conduct of law enforcement, the police and prosecution can easily circumvent this decision by launching a new investigation. This loophole effectively sidesteps the principle of double jeopardy and nullifies the protective value of the pre-trial procedure.

The second reason why the pre-trial procedure in the revised KUHAP draft does not serve as an effective check on state power lies in its narrowly defined jurisdiction. While it nominally permits judicial review of the legality of enforcement actions, its practical value is limited by the absence of an exclusionary principle. In effect, when defendants challenge enforcement methods, they are questioning the validity of the evidence underpinning their arrest, detention, search, and seizure. Yet, under this framework, they have little to no opportunity to contest arbitrary state actions. Pre-trial judges are thus restricted to evaluating whether the administrative paperwork for the enforcement is in order and whether all required forms have been filled in correctly, rather than

[63] See Minutes, Final Joint Meeting (23 Sep 1981) (n 31) 8–10.

[64] ibid.

[65] See ibid 101. In this meeting, the PDI, through its spokesperson Gde Jaksa, stated 'that with this procedure, any action that can drastically undermine human rights is subject to strict supervision'.

[66] Afandi & Bedner (n 21) 77–79. The authors highlight the limitations of the pre-trial mechanism as an effective safeguard for defendants, illustrating their argument with real-life case examples.

[67] See KUHAP, art 82. However, this article was revoked in by the Constitutional Court in 2015.

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examining the substance of the enforcement[68] – such as whether the police had probable cause for arrest.[69]

Beyond introducing the pre-trial procedure, the revised KUHAP draft strengthened the legal framework for detention. In particular, it limits detention without judicial oversight to a maximum of one day – a significant improvement on the first draft, which allowed up to seven days. In addition, arrests are not permissible in cases of misdemeanours. The drafters have also included a clause stipulating that an arrest can only be made if there is sufficient preliminary evidence (*bukti permulaan yang cukup*), the Indonesian equivalent of probable cause. All political factions agreed on this matter, emphasising that the police must possess sufficient preliminary evidence to make an arrest. Lawmakers considered this a significant step forward from the colonial-era code.[70]

The revised draft's requirement for preliminary evidence before an arrest may seem like a step forward for human rights, but its practical effect is undermined by a key flaw. The requirement that the police must have preliminary evidence before making an arrest is of little help to the accused because the police can still make an arrest without a court warrant. This is because the KUHAP does not provide specific definitions on what qualifies as 'preliminary evidence', granting the police broad discretion in interpreting this standard.[71] Compounding this issue is the pre-trial procedure's ineffectiveness in curbing such discretion, making it extremely difficult, if not impossible, for the accused to defend their rights.

The drafting team also made several changes to the pre-trial detention process. Firstly, they reduced the maximum permissible period of detention from the previous 540 to 460 days. They also removed an article that previously allowed authorities to detain the accused indefinitely if deemed necessary.[72] In relation to search and seizure, minor adjustments have been made. Now, criminal justice agencies must obtain a warrant from the court to conduct such actions, with warrantless search and seizure allowed only in cases of emergency. On closer inspection, however, these changes appear somewhat half-hearted in terms of protecting the rights of the accused. Firstly, the period of detention remains lengthy, and all decisions are still at the discretion of the authorities. Additionally, there are limited avenues for the accused to challenge these decisions, either through a pre-trial process or by offering bail to the police themselves. Secondly, in relation to search and seizure, while the law now requires a warrant, this requirement can be waived in emergency situations, but there is no clear definition of what constitutes an emergency. Furthermore, the law stipulates that the police only need to inform the court when they carry out warrantless search and seizure. This is to ensure that the police will always have leeway in the enforcement process.

As previously explained, the right to counsel is another crucial topic that was intensely debated during the legislative process of the KUHAP. The government was heavily criticised for proposing the 'within sight and earshot' concept, which would have allowed the authorities to eavesdrop on

[68]In March 2021, the author conducted an interview with a senior judge in Jakarta as part of a broader research project. Parts of the interview data have been repurposed for this article. Reflecting on his role in the pre-trial procedure, the judge remarked that 'it is like a gun without a bullet', a metaphor that highlights the lack of real power in the process. This observation aligns with Lev's (1999) argument that, in practice, judges often hesitate to hold their colleagues in the state apparatus accountable because of the inherent power disparity between the state and individuals. During the New Order era, judges were classified as civil servants, effectively subordinate to the executive. As part of institutional developments in the wake of *reformasi*, however, judges have, since 2004, operated under a framework that at least formally guarantees judicial independence from executive influence. See Daniel S Lev, 'The Criminal Regime: Criminal Process in Indonesia', in Rafael Vicente (ed), *Figures Of Criminality In Indonesia, The Philippines, And Colonial Vietnam* (Cornell University Press 1999); Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (SEAP Publications 2005); Dian Rositawati, 'Judicial Governance in Indonesia' (PhD thesis, Tilburg University 2019).

[69]Pangaribuan (n 7); Afandi & Bedner (n 21).

[70]See Minutes, Final Joint Meeting (23 Sep 1981) (n 31). The agreement of Golkar is on pp 35–47. The agreement of ABRI is on pp 57–77. The agreement of PPP on pp 83–91. Lastly, the agreement of PDI is on pp 98–106.

[71]In 2015, the Constitutional Court regulated the threshold for preliminary evidence: two pieces of evidence and the testimony of a potential suspect.

[72]See Minutes, Final Joint Meeting (23 Sep 1981) (n 31) 36–99.

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the communications between defence lawyers and their clients. In response to this criticism, the government agreed that, in the first instance, communications between defence lawyers and their clients would not be monitored. However, if there are indications that such communications are being used improperly (for example, to fabricate or obstruct evidence), the authorities will have the right to monitor them. And if the authorities find, on the basis of their monitoring, that communication is still being used improperly, they have the right to block all communication between defence lawyers and their clients.

Regarding the role of defence lawyers, the drafters now recognise the right of the accused to legal representation during the pre-trial investigation. The previous draft only granted the right to be represented by defence lawyers during the trial itself. However, the revised KUHAP still underscores that the role of defence lawyers during the pre-trial investigation is passive.[73] During a meeting, the PDI, which had been vocal about the right to counsel, clarified its stance on why it had agreed to this provision. Initially, the PDI had objected to the wording of the law, which stated that an accused 'can' be accompanied by a defence lawyer during the interrogation process. The PDI had been concerned that such wording would imply that a defence lawyer could only represent their client when granted permission by the authorities. However, upon considering the possibility that the absence of a defence lawyer could obstruct the investigation, the PDI agreed that such an absence could be used as an excuse by the accused to delay the law enforcement process.[74]

This already weak protection of the rights of the accused is further undermined by the absence of any meaningful consequences or sanctions for violations committed by law enforcement agencies, rendering the protection largely symbolic. This raises doubts about the real intentions behind the changes. It is therefore worth examining why all factions in the Indonesian parliament, including the PDI, which was the fiercest opposition at the time, ultimately supported the revised KUHAP without substantial objections, despite only minimal changes. Understanding this shift is valuable, particularly as similar debates may resurface in the context of future revisions to the KUHAP. Equally notable is that the democratic voices that had originally backed a rights-based approach in the KUHAP disappeared from later stages of the discussion.

Two plausible explanations can be put forward to account for what happened, but since this article does not have access to informal information, such as the political lobbying process between stakeholders, it can only offer reasoned inferences. One possible explanation is that Soeharto's regime deliberately permitted a degree of opposition to be expressed in order to lend the process an appearance of legitimacy.[75] Allowing lawmakers to engage in heated debates over the KUHAP may have been a strategic move to present the legislative process as democratic.[76] In the 1980s, Soeharto's regime was very powerful and controlled more than 80% of the seats in the legislature. This meant that they could have easily passed the KUHAP quickly without any debate. However, as public calls for democratisation gained momentum, the regime may have increasingly needed to demonstrate a semblance of participatory governance to maintain its legitimacy.[77]

Another possible explanation is that the lawmakers who supported the rights-based approach realised that, considering the political landscape at the time, this was the most favourable outcome

[73]See KUHAP, elucidation of art 115.

[74]Minutes, Final Joint Meeting (23 Sep 1981) (n 31) 100.

[75]Aspinall (n 30) 21; R William Liddle, 'Indonesia in 1987: The New Order at the Height of Its Power' (1988) 28 Asian Survey 180. In his book, Aspinall argues that the Soeharto regime was very good at suppressing dissent, in part by strategically permitting limited opposition to maintain a façade of democracy. He draws on Liddle's analysis (1988), which introduced the concept of 'limited pluralism' to describe this strongly controlled form of political diversity.

[76]It is interesting to note that before the final meetings of the KUHAP drafting committee, the spokespersons of two factions that had been critical of the government were changed. Albert Hasibuan, who had represented Golkar, was replaced by Taufik Hidayat, and Vincentius Bata da Costa was replaced by Gde Jaksa. It is unclear whether this change affected the stance of these factions on the KUHAP.

[77]In today's literature, this strategy is closely associated with so-called 'autocratic legalism'. In this method of authoritarianism, maintaining a façade of democracy is an important factor.

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they could realistically achieve. At least to some extent, their demands had been met. For instance, the KUHAP now included a *habeas corpus* institution that could oversee the government's use of power. It was far from ideal, but the opposition forces could have decided that it was better than nothing. In addition, post-arrest detention was now limited to just one day, down from the seven days previously. The authorities could no longer detain an accused indefinitely, and the law at least acknowledged the role of defence lawyers, albeit in a somewhat passive capacity. This analysis resonates with Lubis's observation on the integration of human rights principles into the KUHAP. While acknowledging the New Order regime's ambiguous stance on human rights, Lubis argues that the KUHAP, despite its shortcomings, represents a 'partial human rights success'. Lubis argues that this is evidenced by the introduction of pre-trial hearings and the rights of the accused.[78]

The revised draft KUHAP was finally passed on 23 September 1981 and remains in force as of 2025. Lawmakers claimed that it was the best possible draft they could produce. Taufik Hidayat, a Golkar lawmaker, even hailed its passage as a 'historic moment' for the Indonesian people, calling the KUHAP a 'masterpiece'.[79] ABRI also welcomed the law, characterising it as a 'good step' because Indonesia was finally able to replace the old colonial code.[80] The PPP was also happy with the final draft, saying that it was a step forward for Indonesia,[81] and the PDI likewise voiced contentment with its adoption.[82]

Forty-four years later: possibilities and challenges for reform

Forty-four years ago, Indonesia made pivotal political decisions that continue to shape the ideological foundation of its criminal justice system today. Echoing the arguments of the ABRI faction, some Asian countries – including Indonesia – have regarded the values underlying a rights-based approach as incompatible with local cultural traditions.[83] These traditions, proponents suggest, prioritise social harmony and respect for authority, in contrast to the focus on individual rights in Western liberal democracies.[84] Against this backdrop, and amid its drive for rapid economic development in the 1980s, Soeharto's New Order regime believed that a degree of authoritarianism was necessary. Similar models have been successfully employed elsewhere in Asia, notably in Singapore and China, where developmentalist goals have been pursued within authoritarian frameworks.[85] Scholars have argued that this developmentalist imperative gave rise to a form of 'autocratic legalism', a form of authoritarianism.[86] Autocratic legalism allows political elites to manipulate democratic processes, such as legislative debate, to establish authoritarian control while maintaining a façade of democracy as a tool for legitimacy. As noted above, such dynamics likely influenced the political choices surrounding the enactment of the KUHAP.

[78] T Mulya Lubis, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966–1990* (PT Gramedia Pustaka Utama/SPES Foundation 1993) 111.

[79] See Golkar's opinion in the Final Joint Meeting (23 Sep 1981) (n 31) 47. Hidayat remarked that '[the establishment of KUHAP] marked a milestone in the history of mankind and strengthened Indonesian democracy'.

[80] ibid 73.

[81] ibid 81.

[82] ibid 106.

[83] Daniel Bell, 'A Communitarian Critique of Authoritarianism: The Case of Singapore' (1997) 25 Political Theory 6.

[84] While the term 'Asian values' may be seen as encompassing a broad and multi-dimensional spectrum, certain values, such as the prioritisation of social harmony over individual freedoms, can potentially clash with democratic processes. This tension may, in turn, influence how a society structures its criminal justice system. See Daniel Ho, 'Asian vs. Liberal Democracy: Identifying the Locus of Conflict in the Asian Values Debate' (2023) 75 Political Science 165.

[85] Lawrence Sáez & Julia Gallagher, 'Authoritarianism and Development in the Third World' (2009) 15 Brown Journal of World Affairs 87; Bourchier (n 30) 240. Bourchier observes that Indonesia's authoritarian architecture, often described through the concept of 'organicism', served as an inspiration for other Southeast Asian countries, including Singapore and Malaysia.

[86] Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 The University of Chicago Law Review 545.

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It is crucial to acknowledge that while the concentration of power in Indonesia's criminal justice apparatus undoubtedly creates significant opportunities for abuse, similar concerns also arise in some Western liberal criminal justice systems. For example, the complexities of the adversarial legal system in the United States (US) have fostered the controversial practice of plea bargaining, which some scholars argue embodies authoritarian elements by essentially pressuring defendants to relinquish their right to a fair trial in exchange for a deal with the prosecution.[87] Ultimately, the US system prioritises efficiency and crime control at the expense of safeguarding the pre-trial rights of defendants. This underscores the importance of considering not just the theoretical models of political and legal systems, but also the real-world consequences of their design for a nation's well-being.

More than four decades after the ratification of the KUHAP, it is possible to reflect on the consequences of the political choices made by Indonesian lawmakers at the time. Existing literature on the implementation of KUHAP has predominantly highlighted its detrimental effects – particularly the unchecked power granted to law enforcement at the expense of defendants' rights. The lack of procedural safeguards, for instance, has perpetuated coercive interrogation tactics, including torture, to extract confessions.[88] Moreover, scholars have shown that concentration of power often leads to its exploitation for personal and institutional gain, giving rise to a culture of corruption within the bureaucracy of Indonesia's criminal justice institutions, such as the police, the prosecutor's office, and courts. Baker goes so far as to liken the Indonesian police bureaucracy to a'rhizome state' due to its decentralised and informal structure, which has developed over a long history of power abuse and corruption.[89] Meanwhile, in discussing the bureaucracy of the Indonesian prosecutorial office, Afandi critiques the office's military authoritarian organisational culture, which undermines professionalism in the handling of tasks and power.[90] Meanwhile, Pompe and Rositawati separately expose the practice of judicial corruption in the Indonesian Court during the New Order regime.[91] As noted above, the design of the KUHAP has a significant impact on the role of defence lawyers, who are supposed to represent individuals and act as a counterbalance to state authorities. By mandating a submissive role for defence lawyers, the KUHAP effectively encourages Indonesian defence lawyers to become mere case brokers.[92] These facts underscore that the design of the KUHAP has multifaceted consequences that could potentially obstruct the development of the legal system and ultimately impede Indonesia's developmental aspirations by hampering the nation's ability to achieve a robust and equitable legal system, which is crucial for sustained economic growth and progress. This analysis is consistent with Mudhoffir and A'yun's argument that illiberalism and a

[87]John H Langbein, 'Torture and Plea Bargaining' (1978) 46 The University of Chicago Law Review 3; Stephanos Bibas, 'Plea Bargaining Outside the Shadow of Trial' (2004) 117 Harvard Law Review 2463; Cynthia Alkon, 'The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of Lafler and Frye' (2014) 41 Hastings Constitutional Law Quarterly 561.

[88]Afandi & Bedner (n 21).

[89]Jacqui Baker, 'The Rhizome State: Democratizing Indonesia's Off-Budget Economy' (2015) 47 Critical Asian Studies 309. The term 'rhizome' is borrowed from botany and refers to a type of underground stem that grows horizontally and produces shoots in multiple directions.

[90]Fachrizal Afandi, 'Maintaining Order: Public Prosecutors in Post-Authoritarian Countries, the Case of Indonesia' (PhD thesis, Leiden University 2021).

[91]It is important to note that during the New Order regime, the Supreme Court was part of the executive government, under the control of the Minister of Justice. In the wake of *reformasi*, the Supreme Court was separated from the executive government in 2004. See Pompe (n 68); Rositawati (n 68).

[92]See, for instance, the chapter examining the role of defence lawyers in Indonesia in Binziad Kadafi et al, *Advokat Indonesia Mencari Legitimasi: Studi Tentang Tanggung Jawab Profesi Hukum Di Indonesia* [*Indonesian Advocates Searching for Legitimacy*] (Pusat Studi Hukum & Kebijakan Indonesia 2001); Santy Kouwagam, 'How Lawyers Win Land Conflicts for Corporations: Legal Strategy and its influence on the Rule of Law in Indonesia' (PhD thesis, Leiden University 2020); Pangaribuan (n 7); Institute for Criminal Justice Reform, '*Menerapkan Standarisasi, Memperkuat Akuntabilitas dan Nilai-Nilai Ideal Profesi Advokat: Studi Kelembagaan Organisasi Advokat di Indonesia* [Implementing Standardisation, Strengthening Accountability and Ideal Values of the Legal Profession: An Institutional Study of Advocate Organisations in Indonesia]' (Jul 2023) <https://icjr.or.id/menerapkan-standardisasi-memperkuat-akuntabilitas-dan-nilai-nilai-ideal-profesi-advokat-studi-kelembagaan-organisasi-advokat-di-indonesia/> accessed 24 Apr 2025.

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weak rule of law create fertile ground for rent-seeking economies, as they benefit a select few at the expense of broader development.[93]

On a comparative note, authoritarian states with authoritarian criminal justice systems often have similar effects on their overall legal system. In Russia, for example, police and prosecutors routinely use illegal methods to obtain confessions at the pre-trial stage, while defence lawyers are often forced to cooperate with the authorities. In Russian legal discourse, such defence lawyers are frequently referred to as 'pocket lawyers' (*карманные адвокаты/karmannyye advokaty*).[94] This phenomenon mirrors conditions in Indonesia, where defence lawyers likewise play a limited role and are often forced to compromise their clients' rights. Returning to Russia, Karklins argues that corruption in post-communist societies, including in the criminal justice sector, has become so entrenched and institutionalised that citizens can hardly avoid it. The system, she suggests, is structured in a way that not only encourages but often necessitates participation in corrupt practices, leading to what she describes as a 'the system made me do it' rationalisation.[95] China presents another parallel, granting police and prosecutors substantial discretion and flexibility in enforcing criminal law. China also similarly permits widespread corruption and abuse of power, leading many defence lawyers to act as 'pragmatic brokers' who pressure their clients into surrendering their rights to the authorities.[96]

In recent decades, Indonesia has made several attempts to reconsider the authoritarian logic of the KUHAP. The first major push for reform came during the *reformasi* era, a period in Indonesian political history that followed the successful ouster of Soeharto's authoritarian military regime by pro-democracy factions in May 1998. This marked the beginning of Indonesia's transition to democracy and triggered wholesale reforms in all aspects of governance, including the criminal justice system, with the KUHAP becoming a critical point for reform due to public perception that it was unfit for a democratic nation. Calls for reform of the KUHAP began in 1999, reflecting a desire to align the criminal justice system more closely with international human rights standards. Reformers sought to address systemic imbalances, particularly the disproportionate power wielded by authorities over individuals. A final draft was produced in 2013,[97] proposing the introduction of a preliminary investigation judge (*hakim pemeriksa pendahuluan)*. Modelled after the examining magistrate in inquisitorial systems, the judge was designed to strengthen pre-trial safeguards and curb abuses of authority.[98]

The draft envisaged the judge as playing a more active role in overseeing the criminal justice process, including reviewing the necessity of arrests, searches, and seizures. The judge would also be empowered to confirm charges before trial. In addition to strengthening judicial oversight, the reform also sought to strengthen the position of the prosecutor as the leader of the investigation process. However, the 2013 attempt at reform ultimately failed due to a lack of consensus among criminal justice stakeholders, particularly the police.[99] The primary reason for resistance was the potential

[93] Abdil Mughis Mudhoffir & Rafiqa Qurrata A'yun, 'Doing Business under the Framework of Disorder: Illiberal Legalism in Indonesia' (2021) 42 Third World Quarterly 2651. The article highlights how the erosion of pivotal institutions – such as the Corruption Eradication Commission (KPK) and the Constitutional Court – has profoundly impacted the evolution of Indonesia's criminal justice system.

[94] Stephen Thaman, *The Two Faces of Justice in the Post-Soviet Legal Sphere: Adversarial Procedure, Jury Trial, Plea-Bargaining and the Inquisitorial Legacy* (Hart Publishing 2008) 100–103.

[95] Rasma Karklins, *The System Made Me Do It: Corruption in Post-Communist Societies* (Routledge 2015).

[96] Sida Liu & Terence C Halliday, *Criminal Defense in China: The Politics of Lawyers at Work* (Cambridge University Press 2016).

[97] Choky R Ramadhan, 'Plead Guilty, Without Bargaining' (2014) 32 Pacific Basin Law Journal 29; Lamchek (n 7).

[98] Luhut MP Pangaribuan, '*Lay judges dan hakim ad hoc: suatu studi teoritis mengenai sistem peradilan pidana Indonesia* [Lay Judges and Ad Hoc Judges: A Theoretical Study On the Indonesian Criminal Justice System]' (PhD thesis, University of Indonesia 2009).

[99] The response from the police can be seen in RM Panggabean, '*Rancangan Undang-Undang Hukum Acara Pidana Dari Perspektif Polri Sebagai Penyidik* [The Draft of Indonesian Criminal Procedure Code Reform From the Police's Perspective as an Investigator]' (2010) 39 Masalah-Masalah Hukum Jurnal 12.

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the proposed changes to significantly curtail the police's long-held unchecked power. The Anti-Corruption Commission (*Komisi Pemberantasan Korupsi*, KPK) also raised concerns that the new law could impinge upon the special powers granted to the KPK under anti-corruption legislation.

The second attempt to reform the KUHAP came through a series of decisions by the Indonesian Constitutional Court. In 2014, 2015, and 2017, the Constitutional Court made adjustments to the KUHAP through its rulings. However, these revisions failed to provide significant safeguards for the rights of the accused, as the authoritarian structure of the KUHAP remained unchanged.

In 2014, the Indonesian Constitutional Court clarified the meaning of 'immediately' in the KUHAP concerning the timeframe for authorities to deliver a copy of the warrant to the accused.[100] The Court interpreted this requirement as allowing a period of up to seven days. While a positive development, this change had a limited impact on safeguarding the rights of the accused, as it primarily addressed an administrative procedure rather than the broader issue of power imbalances within the criminal justice system.

In 2015, the Constitutional Court issued a more substantial decision concerning the rights of the accused. This decision broadened the scope of pre-trial hearings to encompass the determination of suspect status. The Court emphasised this change as a crucial check in the Indonesian criminal justice system to minimise the risk of abuse of power. In addition, the Court required at least two pieces of evidence for authorities to designate someone as a suspect.[101]

While it marked a step in the right direction for the KUHAP, the 2015 decision failed to change the authoritarian logic of the code for two reasons. First, it did not address critical questions surrounding the regulation of evidence acquisition methods. Although the Court acknowledged that many Western liberal jurisdictions exclude illegally obtained evidence, it did not clarify whether pre-trial hearings in Indonesia could determine the admissibility of such evidence.[102] Furthermore, the Court emphasised that expanding jurisdiction does not equate to restricting the power of authorities to reopen investigations. Importantly, the decision also neglected to address potential consequences for authorities who abuse their power in the criminal justice enforcement process. This suggests that the Court aimed to preserve the broad discretionary powers of Indonesian criminal justice authorities. Secondly, the Court's threshold for designating a suspect remains relatively low. By focusing on the quantity rather than the quality of evidence, and requiring only two pieces of evidence, the threshold potentially allows authorities to designate suspects without demonstrating specific links to the crime. This situation is exacerbated by the fact that the Indonesian criminal justice apparatus can exercise enforcement powers such as arrest, search, and seizure without seeking approval from any other institution.

In 2017, the Constitutional Court once again adjusted the KUHAP, mandating that when the authorities decide to investigate a criminal case, the notification must be conveyed to the prosecutor, the victim, and the suspect.[103] Despite mandating that the relevant parties be notified by criminal justice authorities, the Court again left unaddressed the question of sanctions for non-compliance with this obligation.

[100]See Constitutional Court Decision No 3/PUU-XI/2013 <https://www.mkri.id/public/content/persidangan/putusan/putusan_sidang_1630_3%20PUU%202013-telahucap-30Jan2014.pdf> accessed 6 May 2025.

[101]See Constitutional Court Decision No 21/PUU-XII/2014 <https://www.mkri.id/public/content/persidangan/putusan/21_PUU-XII_2014.pdf> accessed 6 May 2025. Previously, to designate an individual as a suspect, the KUHAP only required authorities to possess 'sufficient preliminary evidence' (*bukti permulaan yang cukup; bukti yang cukup*). However, the KUHAP did not provide any sanction for defining such a term. The term 'preliminary sufficient evidence' is referenced in KUHAP, art 1 paras 14, 17, and 21.

[102]In its consideration in Decision No 21/2014 (n 101), the Court mentioned the case of Dominique Strauss-Kahn, the managing director of the International Monetary Fund. In this case, the inconsistency of witness testimony ultimately led to the dismissal of the case (pp 102–103).

[103]See Constitutional Court Decision No 130/PUU-XIII/2015 <https://www.mkri.id/public/content/persidangan/putusan/130_PUU-XIII_2015.pdf> accessed 6 May 2025.

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In 2022, the Indonesian parliament identified KUHAP reform as a key legislative agenda item. Lawmakers, academics, and civil society groups remain engaged in the debate to refine the design of Indonesia's criminal justice system. By 2025, the process of reforming the KUHAP has gained considerable momentum, driven by the impending implementation of the new *Indonesian Criminal Code* (KUHP), which is set to take effect in 2026. To ensure the effective enforcement of the new code, a revised KUHAP is essential to align procedural mechanisms with the substantive provisions of the KUHP.[104] The question now looms large: will the criminal justice system, after a series of small incremental steps, undergo dramatic changes? Answering this complex question demands a careful analysis of Indonesia's current legal, social, and political landscape.

For several reasons, a dramatic shift away from the KUHAP's authoritarian logic seems unlikely in Indonesia's near future. First, Indonesia's pursuit of ambitious development goals is likely to persist, and even intensify, under the leadership of President Prabowo Subianto, who assumed office in October 2024. A former military general and ex-son-in-law of authoritarian leader Soeharto, Subianto has openly declared his intention to carry forward the legacy of his predecessor, President Joko Widodo, whose tenure has been seen by many scholars as marked by democratic backsliding.[105] Some have even characterised Widodo's era as a period of 'neo-authoritarianism', driven by a massive focus on development, particularly infrastructure.[106] This emphasis on development goals often demands strong state control, which could hamper efforts to dismantle the KUHAP's authoritarian logic.

Evidence of this can be seen in Widodo's controversial revisions to the *Corruption Eradication Commission (KPK) Law* and the *Job Creation Law*, both of which were implemented despite significant public opposition.[107] Adding fuel to the fire is the recently enacted new *Indonesian Criminal Code* (*Kitab Undang-Undang Hukum Pidana*, KUHP). While the new Criminal Code offers some potential benefits, it also strengthens the grip of authoritarianism. The code revives oppressive colonial-era laws, embeds conservative religious values in the legal system, and restricts individual freedoms.[108] These elements have raised concerns that the Criminal Code could serve as a tool to consolidate state power and prioritise state authority over individual rights. Furthermore, Subianto's military background has led to concerns about the potential for a resurgence of military influence in the legal and political spheres, further complicating the prospects for significant KUHAP reform.

Second, the entrenched power dynamics within Indonesia's criminal justice institutions pose a major obstacle to reform. For over four decades, criminal justice enforcement authorities, particularly the police, have operated with a high degree of autonomy and impunity. Shifting away from the authoritarian logic would necessitate elevating the rights of the accused, striking a new balance between state power and individual freedoms. This, however, poses a significant challenge, as it could be perceived as diminishing the authority of the state apparatus.[109] For example, police officers accustomed to making arrests without warrant may resist reforms that require judicial oversight. Similarly,

[104]Ady Thea DA, '*Pembahasan RUU KUHAP Dimulai dari Nol* [Discussion of the Draft Criminal Procedure Code (RKUHAP) to Restart from Scratch]' (hukumonline.com, 23 Jan 2025) <https://www.hukumonline.com/berita/a/pembahasan-ruu-kuhap-dimulai-dari-nol-lt6791d2f618bd4/> accessed 6 May 2025.

[105]Eve Warburton, 'Jokowi and the New Developmentalism' (2016) 52 Bulletin of Indonesian Economic Studies 297; Sarah Nuraini Siregar, Riaty Raffiudin & Firman Noor, 'Democratic Regression in Indonesia: Police and Low-Capacity Democracy in Jokowi's Administration (2014–2020)' (2022) 26 Jurnal Ilmu Sosial dan Ilmu Politik 197.

[106]Herlambang P Wiratraman, 'Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics' (2022) 50 Federal Law Review 314.

[107]Mudhoffir & A'yun (n 93); Petra Mahy, 'Indonesia's Omnibus Law on Job Creation: Legal Hierarchy and Responses to Judicial Review in the Labour Cluster of Amendments' (2022) 17 Asian Journal of Comparative Law 51.

[108]Simon Butt, 'Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law?' (2023) 32 Griffith Law Review 190.

[109]In Indonesian criminal justice literature, the tendency to maintain the status quo is known as '*ego sektoral*', literally translated to 'sectoral ego' or 'institutional ego'. For more in-depth discussion of *ego sektoral*, see Pangaribuan (n 7).

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empowering defence lawyers could be seen as impeding police investigations. These institutional tensions create strong incentives to maintain the status quo and help explain why past reform efforts, such as the failed attempt to reform the KUHAP in 2013, ultimately collapsed under pressure from powerful vested interests within the legal system. Given this precedent and the current political climate, the likelihood of encountering similar resistance raises serious doubts about the feasibility of meaningful reform.

Third, against the backdrop of the systemic corruption within the Indonesian legal system, any reforms aimed at strengthening individual rights in the criminal justice system may also face resistance from civil society groups. These groups may suspect that such reforms are driven by hidden agendas that ultimately serve to protect perpetrators, especially in corruption cases. For instance, during the previous KUHAP reform in 2013, the KPK, along with the NGO Indonesian Corruption Watch (ICW), voiced significant objections to provisions that would require the KPK to obtain judicial warrants for wiretapping. While requiring a judicial warrant may appear to align with the concept of due process, the KPK and ICW argued that, given the systemic nature of corruption in Indonesia, the KPK needed extraordinary powers.[110] Similarly, when the Constitutional Court expanded the power of pre-trial jurisdiction to determine the validity of an accused's status in 2015, academics expressed concern that this would prolong the judicial process and ultimately obstruct the enforcement of criminal justice, especially in corruption cases.[111] These competing priorities create significant barriers to meaningful KUHAP reform. That is why this article paints a pessimistic picture of the likelihood of reform in the near future. Change itself is not the challenge, but the entrenched resistance to change is.

Conclusion

Given the complexity of the situation, there is no 'one size fits all' solution to address the challenges facing Indonesia's criminal justice system. Any changes to the KUHAP must be accompanied by a wholesale transformation in the mindset of the criminal justice authorities – a monumental undertaking requiring strong political commitment from all major political powers, who must first recognise that the concentration of excessive power in the hands of authorities comes at a greater cost than safeguarding the rights of the accused. It is naïve to assume that Indonesian criminal justice agencies would consistently exercise their power solely for the public good, without ulterior motives. Hence, it is imperative that the enforcement powers of these authorities be checked and limited to reduce the potential for abuse. Meanwhile, defence lawyers should be granted greater authority to act as a counterbalance to the authority of the state. This recalibration of the system aligns with core democratic principles that should be enshrined in the criminal justice system of any country that calls itself a democracy.

Whether Indonesia can successfully reform the KUHAP in line with democratic principles will serve as a litmus test for whether the country has truly achieved the democratic transition envisioned by the post-1998 *reformasi* movement. Again, this is a difficult task, and many countries attempting similar transitions have faced significant resistance.[112] Vietnam's 2015 criminal procedure code amendments, for example, left the authoritarian culture of its criminal justice agencies intact,[113] which has created a significant disconnect between the law and its implementation. Similar

[110] Lamchek (n 7) 171–173.

[111] Andri Faruqi, '*Peneliti Kritik Putusan MK Soal Praperadilan* [Academics Criticise Constitutional Court's Decision]' (Constitutional Court of the Republic of Indonesia/TEMPO, 5 Jun 2015) <https://www.mkri.id/index.php?page=web.Berita&id=10833&menu=2> accessed 15 Mar 2024.

[112] After the Cold War, donor institutions (mainly funded by the United States) began to sponsor law reform, including criminal justice reform, in many foreign countries. See Allegra M McLeod, 'Exporting U.S. Criminal Justice' (2010) 29 Yale Law & Policy Review 83.

[113] Le, Nguyen & Nguyen (n 14).

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gaps between reform aspirations and institutional realities have manifested in Russia,[114] China,[115] and across Latin America,[116] underscoring the formidable challenges Indonesia may encounter on its own path to change.

In conclusion, meaningful reform of Indonesia's criminal justice system demands a critical reassessment by lawmakers that transcends mere procedural adjustments. This process requires a nuanced examination of how individual rights and state authority are balanced within the framework of Pancasila democracy. The reform debate is inherently complex because it touches on the very foundations of Indonesia's political ideology. Ultimately, the criminal justice system is a mirror of the nation's values, acting as a bridge between the political identity of the state and the broader aspirations of society.

[114]Paul J De Muniz, 'Judicial Reform in Russia: Russia Looks to the Past to Create a New Adversarial System of Criminal Justice' (2004) 11 Willamette Journal of International Law and Dispute Resolution 81; Thaman (n 94); Ekaterina Moiseeva, 'Plea Bargaining in Russia: The Role of Defence Attorneys and the Problem of Asymmetry' (2017) 41 International Journal of Comparative and Applied Criminal Justice 163.

[115]Liu & Halliday, 'Political Liberalism and Political Embeddedness' (n 13); Liu & Halliday, *Criminal Defense in China* (n 96); James WC Lee, 'Anti-Corruption in a Party-State: Constitutional Implications of China's Supervisory Reform' (2023) 18 Asian Journal of Comparative Law 389.

[116]Cavise (n 3); Máximo Langer, 'Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery' (2007) 55 The American Journal of Comparative Law 617.

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