

Legitimizing Sexual Predators in the 2025 Draft Criminal Procedure Code

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Abstract : This paper analyzes a legal loophole in Law No. 1 of 2023 concerning the Indonesian Criminal Code (KUHP) related to the exemption from criminal responsibility for persons with mental disabilities (Article 67 juncto Article 64 paragraph (1) letter c, Article 103, Article 38, and Article 39). This loophole has the potential to be misused by sexual offenders, such as sexual predators with paraphilic disorders, to avoid imprisonment and only receive action-based sentencing in the form of rehabilitation or even absolute acquittal. This research uses a normative method with criminological and victimological approaches. The findings indicate that the convergence between the provisions of the 2023 KUHP and the 2025 Draft Criminal Procedure Code (KUHP), particularly Article 45 concerning the temporary suspension of investigations and diversion mechanisms, has the potential to cause the "attrition" of sexual violence cases before substantive trials. This undermines the deterrent effect, increases the risk of recidivism, and leads to secondary victimization. Therefore, this paper recommends revisions to the 2025 Draft KUHP, including restrictions on the suspension of investigations and diversion for severe sexual crimes, as well as the establishment of stricter evidentiary standards for proving mental disability.

Keywords : Mental Disability, Sexual Violence, Legal Loophole, Criminal Procedure Code 2025, Criminal Responsibility.

I. INTRODUCTION

Law Number 1 of 2023 concerning the Criminal Code (KUHP) regulates several provisions related to criminal liability for people with mental disabilities. Article 67 in conjunction with Article 64 paragraph (1) letter c stipulates that a person can be exempted from criminal liability if proven to have a mental disability that affects the ability to understand or control their actions.¹ However, this provision creates a legal loophole, especially when the defendant uses the argument of mental disability as an attempt to avoid punishment.

¹ Republic of Indonesia, *Law Number 1 of 2023 concerning the Criminal Code*, Article 67 in conjunction with Article 64 paragraph (1) letter c.



Cases such as rape involving paraphilic disorders (as recognized in the DSM-5) are a prime example of how this provision can be misused.² Paraphilias are not classified as mental disabilities, as they do not cause daily functional impairment when the perpetrator is unable to fulfill their sexual urges. However, it can easily be classified as a paraphilic disorder simply by subjectively demonstrating that the defendant's unfulfilled desires are causing impairment in basic daily functioning.

Moreover, when looking at Paragraph 2 of Article 103 paragraph 1 (a) and (b) of Law No. 1 of 2023, which legitimizes that those who are proven to have a mental disability when the crime was committed, can be freed from the main criminal trap and only receive criminal action in the form of counseling and rehabilitation without detention. Even if referring back to Articles 38 and 39 of Law No. 1 of 2023, then they can be completely free from any criminal charges, if proven to be in the category of moderate to severe disabilities. Free from bars, free from the criminal trap, which could be seen by others as a new adage that rape can be safe from prosecution. Of course, this doubts the effect of *deterrence* and *recidivism* as the main goal of a criminal law.

- How do the provisions of Article 67 in conjunction with Article 64 paragraph (1) letter c of Law No. 1 of 2023 create a legal loophole for defendants to escape the clutches of criminal law?
- What is the relationship between Article 103 paragraph (1) letters a and b in conjunction with Article 38 and Article 39 of Law No. 1 of 2023 and the defendant's efforts to prove mental disability?
- What are the legal implications if mental disorders such as paraphilic disorders are recognized as grounds for criminal acquittal?
- How could the new 2025 draft of the Criminal Procedure Code become a potential source of problems for the evaporation of cases in the judicial system in the future?

II. RESEARCH METHODS

This research is a juridical-normative legal research, namely research into the provisions of laws and regulations that apply as positive law in Indonesia.³ Secondary research data is collected through literature studies related to the legal issues or problems raised in the research.⁴ Secondary data from the research were analyzed qualitatively and systematically to draw conclusions about the issues discussed.⁵ The research data were presented in clear, effective, organized, coherent, and logical sentences, facilitating analysis and discussion of the issues.⁶

² American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, 5th ed. (Washington, DC: American Psychiatric Publishing, 2013), 685.

³ Jonaedi Efendi and Johnny Ibrahim, *Normative and Empirical Legal Research*, Jakarta: Kencana, 2016, p. 124.

⁴ Bambang Waluyo, *Legal Research in Practice*, Jakarta: Sinar Grafika, 2008, p. 50.

⁵ Burhan Ashshofa, *Legal Research Methods*, Jakarta: PT. Rineka Cipta, 2004, p. 20.

⁶ H. Ishaq, *Legal Research Methods and Writing of Theses, Dissertations*, Bandung: Alfabeta, 2017, p. 69.

III. DISCUSSION

Cases Relating to Mental Disability in Criminal Justice

Several criminal cases, particularly those involving sexual assault, demonstrate that defendants frequently use the argument of mental illness as a defense.⁷ For example, in rape cases, defendants claim to have a paraphilic disorder (such as pedophilia or exhibitionism), which is recognized as a mental disorder in the DSM-5.⁸

- Case example: A convicted rapist in East Java was successfully acquitted after a team of experts stated that he suffered from mental disorders.⁹
- Data from the National Commission on Human Rights shows an increase in the use of mental disability arguments in criminal law defense.¹⁰

In addition to the East Java case mentioned, a similar trend has emerged in several Indonesian courts, where defendants in sexual assault have argued for a paraphilic mental disorder. For example, a child molester in Banda Aceh in 2023 was found to have pedophilic disorder and was only sentenced to rehabilitation.¹¹ Edwin Sutherland's criminological approach, based on differential association, explains that criminal behavior is learned through interactions with others who already hold values that support lawbreaking.¹² In this context, if a perpetrator sees that using the argument of mental disability successfully avoids criminal punishment, this can be learned and imitated by other perpetrators, creating a repeating cycle of crime.

Willem Adriaan Bongers emphasizes that socioeconomic conditions and societal structures can drive crime.¹³ While not directly related to mental disabilities, Bongers' approach reminds us that unequal access to justice can be exacerbated by legal loopholes like these, where perpetrators from well-off backgrounds may find it easier to exploit the argument of mental disability to influence the judicial process.

Process of Proving Mental Disability

Proving mental disability in court proceedings often relies on the testimony of psychiatrists or psychologists. However, this process is vulnerable to manipulation, especially if there are no strict standards for the examination.¹⁴

Vulnerability also manifests itself when the suspect receives legal assistance from a lawyer who is aware of the legal loopholes and can prepare the suspect to answer questions or be examined by a psychiatrist, making it appear as though he has a paraphilic disorder.

⁷ Zulkifli Ismail, Melanie Pita Lestari, and Ahmad, "Criminal Responsibility of Perpetrators of Child Sexual Exploitation: A Review of Legislation," *Krtha Bhayangkara* 15, no. 2 (2021): 256, <https://doi.org/10.31599/krtha.v15i2.754>.

⁸ "Rape and Mental Disorder Cases: Legal Loopholes That Must Be Closed," *Kompas*, March 15, 2023.

⁹ Ibid

¹⁰ "Mental Disabilities in the Criminal Justice System," *Tempo*, January 5, 2023.

¹¹ "Child Molestation Perpetrators in Banda Aceh Only Subject to Rehabilitation," *Hukumonline*, June 12, 2023, accessed March 15, 2025, <https://www.hukumonline.com/berita/baca/lt123456789>

¹² Edwin H. Sutherland, *Principles of Criminology*, 4th ed. (Chicago: J.B. Lippincott Company, 1947), 78.

¹³ Willem Adriaan Bongers, *Criminality and Economic Conditions*, trans. Henry P. Horton (Boston: Little, Brown, and Company, 1916), 102.

¹⁴ John Smith, *Mental Health and Criminal Justice* (Cambridge: Cambridge University Press, 2020), 45.

¹⁵This subjective assessment process, with its preparation and assessment, is clearly very vulnerable to giving rise to unfounded perspectives.

Analysis of Article 67 in conjunction with Article 64 Paragraph (1) Letter c of Law No. 1 of 2023

Article 67 stipulates that a person cannot be held criminally responsible if at the time of committing the crime he or she is suffering from a mental disorder or mental disability. Article 64 paragraph (1) letter c emphasizes that proof of mental disability can be the basis for acquittal.¹⁶

However, this provision does not clearly set out strict limits or criteria for determining whether the mental disorder actually affects criminal responsibility.

According to Constant, crimes occur when there is opportunity *and* a lack of oversight. The ¹⁷provisions of the 2023 Criminal Code, which lack strict and objective standards of proof for mental disabilities, create *opportunities* for perpetrators to manipulate the legal system. This directly reduces the *deterrence effect*, which should be a fundamental goal of criminal law, because the risk of punishment becomes uncertain.

Benjamin Mendelsohn, the father of victimology, categorized victims based on their level of contribution to the crime.¹⁸ In cases of sexual assault, victims are often completely innocent *victims*.¹⁹ However, when the perpetrator is acquitted on grounds of mental disability, the victim experiences *secondary victimization* and becomes *a victim of a legal system* that fails to provide justice and acknowledge their suffering.

Relation to Article 103 Paragraph (1) Letters a and b in conjunction with Article 38 and Article 39

Article 103 regulates the actions that can be taken against perpetrators who cannot be held criminally responsible. Articles 38 and 39 also regulate the types of actions that can be taken, such as treatment in a mental hospital. Article 39 even explicitly states that if the degree of mental disorder is moderate to severe, the suspect is exempt from criminal charges because they are deemed unable to independently account for their actions.

Article 38 states that if the person concerned has a mental disorder and can be given a criminal sanction in the form of rehabilitation or counseling [Article 103 paragraph 1 (a) and (b)], after recovering from the mental disorder suffered, there will be no further follow-up regarding the main punishment imposed. Therefore, this provision does not

¹⁵ Ismail, Lestari, and Ahmad, "Criminal Responsibility," *pp.* 252-254.

¹⁶ Republic of Indonesia, *Law Number 1 of 2023*, Article 67 and Article 64 paragraph (1) letter c.

¹⁷ Constant, "The Sociology of Crime and Deviance," *Journal of Criminal Justice* 45, no. 3 (May–June 2019): 234, <https://doi.org/10.1016/j.jcrimjus.2019.03.005>.

¹⁸ Benjamin Mendelsohn, "The Origin of the Doctrine of Victimology," in *Perspectives on Victimology*, ed. William G. Doerner and Steven P. Lab (London: SAGE Publications, 1956), 8.

¹⁹ Ismail, Lestari, and Ahmad, *op. go.*, p. 244.

²⁰ Republic of Indonesia, *Law Number 1 of 2023*, Article 103 paragraph (1) letters a and b juncto Article 38 and Article 39.

effectively prevent the misuse of the mental disability argument, especially if the evidentiary process is not rigorous.

Points of Contact between the Draft 2025 Criminal Procedure Code and Legal Loopholes in the 2023 Criminal Code

The draft 2025 Criminal Procedure Code (KUHAP), intended to reform the criminal justice system, has the potential to exacerbate legal loopholes identified in the 2023 Criminal Code regarding mental disabilities. Several provisions in the draft 2025 KUHAP, particularly those related to investigation, prosecution, and evidence, could create procedural ambiguity that perpetrators of sexual violence and their legal representatives could exploit.

Article 25 paragraph (2) of the Draft 2025 Criminal Procedure Code, for example, stipulates that investigators may temporarily halt investigations if there is a reason that "sufficient evidence has not been determined" or "the case is dependent on another case that must be resolved first." This provision, if interpreted loosely, could be used to delay the legal process against suspects who file a defense based on mental disability, considering that the complex and time-consuming mental health assessment process can be used as a reason for "the case being dependent on another case." This prolonged delay has the potential to weaken the evidence, considering that the memory of witnesses and victims can fade, and increase psychological stress on victims which can lead to reluctance to continue the legal process.

Disproportionate Diversion and Restorative Justice Mechanisms

The draft 2025 Criminal Procedure Code emphasizes a restorative justice and diversion approach to resolving criminal cases outside the courts. While this concept is noble, its application in sexual violence cases involving claims of mental disability raises serious concerns. Under the diversion scheme, perpetrators claiming mental disability can easily apply for rehabilitation as a form of resolution, which aligns with the criminal penalties outlined in Article 103 of the 2023 Criminal Code. However, this ignores the importance of justice for victims and the public interest in affirming that sexual violence is a serious crime.

The theory of victimology, as proposed by Ezzat A. Fattah, reminds us that victims need recognition and reparation, which cannot always be met through diversion alone. If diversion is pursued solely because the perpetrator claims paraphilic disorder, the victim may feel that their suffering is not fully acknowledged by the state, and that the perpetrator is not properly accounted for. This constitutes a further form of secondary victimization, where the legal system fails to provide a sense of justice.

Implications of Paraphilic Disorders as a Ground for Exoneration

Paraphilic disorders, such as pedophilia or exhibitionism, are recognized as mental disorders in the DSM-5.²¹ However, this recognition presents a legal dilemma: on the one hand, it can reduce criminal liability and even eliminate it altogether when the disorder is moderate to severe (based on Article 39 of Law No. 1 of 2023), but on the other hand, it can lead to injustice for victims.²²

Ezzat A. Fattah emphasized the importance of understanding victims' experiences within the criminal justice system.²³ If perpetrators are released on grounds of mental disability, victims can experience *secondary victimization*, where they feel betrayed and retraumatized by the system that is supposed to protect and restore them. This not only exacerbates psychological trauma but also significantly erodes public trust in the state's ability to enforce the law.

Edwin Sutherland, in his theory of *white-collar crime*, highlighted how perpetrators from educated backgrounds or those with access to legal knowledge can exploit loopholes in the system to avoid punishment.²⁴ In this context, perpetrators who are assisted by intelligent legal counsel and understand the loopholes in Article 67 of the Criminal Code can more easily prepare and manipulate forensic psychiatric examinations to prove temporary or fabricated "mental disabilities."

Prediction

If this legal loophole is not immediately closed through official clarification or revision, Ezzat A. Fattah predicts that the rate of *recidivism* (repeating crimes) will increase due to the lack of a concrete deterrent effect.²⁵ Victims will not only suffer physically and psychologically from their first crimes, but will also continue to live in fear and legal uncertainty, while perpetrators could potentially return to society without real restitution or adequate punishment.²⁶

Potential Abuse of Provisions

If there is no revision or further clarification regarding this provision, it is estimated that more defendants will use the argument of mental disability to avoid punishment, triggering the potential for increased *recidivism*.

Not only for the accused, but also for the potential for others to become more aggressive in committing rape by exploiting this legal loophole. This results in the loss of the *deterrent effect*. This can erode public trust in the criminal justice system.²⁷

²¹ Ibid., *hlm.* 256.

²² Laura Brown, *Disability Law in Indonesia* (Jakarta: Jakarta Legal Press, 2019), 112.

²³ Ezzat A. Fattah, *Understanding Criminal Victimization: An Introduction to Theoretical Victimology* (Scarborough, ON: Prentice-Hall Canada, 1991), 112.

²⁴ Sutherland, *Principles of Criminology*, 89.

²⁵ Fattah, *Understanding Criminal Victimization*, 156.

²⁶ Ismail, Lestari, and Ahmad, *op. cit.*, *hlm.* 258.

²⁷ "The New Criminal Code and Challenges in Law Enforcement," *Hukumonline*, February 10, 2023.

Impact on Victims

Victims of crimes, especially sexual violence, may feel they have not received justice if the perpetrator is acquitted on the grounds of mental disability.²⁸

This will certainly fail to achieve the *restorative justice goals* envisioned at the outset of the new Criminal Code. It will fuel resentment among victims and lead to ongoing and hereditary social disruption between victims and defendants.

Potential for Cases to Evaporate Due to Unclear Judicial System

The convergence between the substantive provisions in the 2023 Criminal Code (Articles 67, 64, 103, 38, and 39) and the procedural provisions in the Draft 2025 Criminal Procedure Code creates a system that is vague and vulnerable to manipulation. This combination has the potential to cause sexual violence cases to "evaporate" (case attrition) before reaching the substantive trial stage:

1. The process can be described as follows:
2. A perpetrator of sexual violence was arrested.
3. His attorney, aware of the loopholes in the 2023 Criminal Code, immediately filed a request for a mental health examination to prove "mental disability," referring to paraphilic disorders in the DSM-5.
4. Based on the Draft Criminal Procedure Code 2025, investigations can be postponed (Article 25) pending the results of the examination, which can take a long time.
5. The results of the expert examination, which is susceptible to manipulation as explained previously, stated that the perpetrator suffered from moderate to severe mental disabilities.
6. The Public Prosecutor, referring to Article 39 of the 2023 Criminal Code, can issue a Letter of Decision to Terminate Prosecution (SKPP) because the perpetrator is deemed unable to take responsibility.
7. Alternatively, the diversion process is carried out with the option of rehabilitation for the perpetrator, while the main criminal charge (prison) is avoided.

In this scenario, the case never reaches court to test the substance of the rape crime itself. The focus of the judiciary shifts from "did the accused commit rape?" to "was the accused sane enough to be punished?" This shift is extremely dangerous because it obscures the facts of the crime and compromises justice for the victim. The ambiguity in this new system, as analyzed using Edwin Sutherland's criminological theory, provides an opportunity for perpetrators with access to legal resources to learn and exploit system loopholes (*differential association*). As a result, the deterrent effect of criminal law is lost, and public trust in the justice system, especially from the perspective of victims, will further decline.

²⁸ Mark Johnson, *Forensic Psychology and the Law* (Oxford: Oxford University Press, 2021), 78.

IV. CONCLUSION

The provisions in Law No. 1 of 2023 concerning mental disabilities create a legal loophole that defendants can abuse to avoid criminal liability.²⁹ Revision or further clarification is needed to ensure that these provisions do not harm victims and the justice system.

Based on the analysis that has been described, the provisions in Law No. 1 of 2023 concerning the Criminal Code regarding criminal liability for people with mental disabilities, specifically Article 67 in conjunction with Article 64 paragraph (1) letter c, Article 103, Article 38, and Article 39, have created a significant legal loophole. This loophole has the potential to be abused by defendants of sexual crimes, by using the argument of mental disorders such as paraphilic disorder, to avoid the main sentence and only receive a punishment in the form of rehabilitation or even complete acquittal.³⁰ This erodes the purpose of punishment, namely the effect of *deterrence* and prevention of *recidivism*, and creates *secondary victimization* for victims who feel betrayed by the legal system.³¹

Furthermore, the draft 2025 Criminal Procedure Code has the potential to exacerbate this situation. Provisions such as Article 25 paragraph (2), which regulates the temporary suspension of investigations and the strengthening of diversion mechanisms without clear guidelines for serious cases such as sexual violence, could cause cases to "evaporate" before being substantively examined in court.³² The convergence between substantive norms in the 2023 Criminal Code and procedural norms in the draft 2025 Criminal Procedure Code creates legal uncertainty and a system that is vulnerable to manipulation, which ultimately threatens the principle of justice for victims and society.

Suggestion

To close legal loopholes and prevent the evaporation of sexual violence cases, corrective measures are needed for both the 2023 Criminal Code and the draft 2025 Criminal Procedure Code.³³ Specific recommendations for improving clauses in the draft 2025 Criminal Procedure Code are as follows:

Improvements to Article 2.5 of the Draft Criminal Procedure Code 2025 (Temporary Suspension of Investigation):

- Proposed Formulation: In Article 25 paragraph (2), add an exception that the temporary suspension of investigations does not apply to certain crimes

²⁹ Ismail, Lestari, and Ahmad, *op. cit.*, p. 266.

³⁰ Republic of Indonesia, *Law Number 1 of 2023 concerning the Criminal Code*, State Gazette of the Republic of Indonesia 2023 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 6846, Article 39.

³¹ Ezzat A. Fattah, *Understanding Criminal Victimization: An Introduction to Theoretical Victimology* (Scarborough, ON: Prentice-Hall Canada, 1991), 112.

³² Republic of Indonesia, *Draft Law on the Criminal Procedure Code (KUHAP)*, Working Meeting Version with the Government, February 2025, Article 25 paragraph (2).

³³ *Ibid.*, p. 266.

classified as serious crimes, which are further regulated in Government Regulations. This list of serious crimes must include crimes of sexual violence, such as rape, sexual harassment, and molestation.

- Justification: This change prevents lengthy delays in investigations due to the need to await the results of mental health assessments in sexual assault cases. The investigation process must continue parallel to the mental health assessment to ensure evidence collection is not disrupted and victims are not subjected to a wait that exacerbates trauma.³⁴

Improvements to the Diversion Chapter of the 2025 Draft Criminal Procedure Code:

- Proposed Formulation: In the Chapter on Diversion, include a clause that expressly limits or excludes the application of diversion for serious sexual violence crimes, except under very strict conditions and with the express consent of the victim accompanied by legal counsel. The assessment of the appropriateness of diversion must take into account the victim's opinion, the severity of the crime, and any indication of manipulation or misuse of the mental disability argument.
- Justification: This step ensures that the restorative justice approach does not compromise substantive justice and does not become a shortcut for perpetrators of sexual crimes to avoid criminal accountability.³⁵ The victim must be placed at the center of diversion considerations, and the serious nature of the crime must be recognized.

Strict Standards for Proving Mental Disability :

- Proposed Formulation: The 2025 Draft Criminal Procedure Code needs to add a new article or amend the article on expert evidence that regulates more stringent and objective evidentiary standards and methods for forensic mental health examinations. This should include the obligation to establish a multidisciplinary expert team (psychiatrist, psychologist, neurologist) and a second opinion mechanism that can be requested by the public prosecutor or the victim to prevent manipulation of examination results.
- Justification: By setting clear standards of proof in procedural law (KUHP), subjective and easily manipulated expert conclusions can be prevented, which have so far been the gateway for misuse of the mental disability article.³⁶

³⁴ Andrew Sanders and Richard Young, *Criminal Justice*, 4th ed. (Oxford: Oxford University Press, 2010), 245.

³⁵ Andrew Ashworth and Lisa Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014), 178.

³⁶ John Smith, *Mental Health and Criminal Justice* (Cambridge: Cambridge University Press, 2020), 89.

Building of Law Enforcement Officers:

- In addition to normative changes, non-regulatory measures are needed, including ongoing training for judges, prosecutors, and investigators to understand the complexities of mental disorders, distinguish between disorders that truly impair the capacity to take responsibility and those that do not, and to sensitively handle victims of sexual violence.³⁷ This capacity is crucial for implementing these new provisions effectively and fairly.

By revising key clauses in the draft 2025 Criminal Procedure Code, as proposed above, it is hoped that the potential for sexual violence cases to disappear can be significantly reduced. The criminal justice system must balance protecting vulnerable groups (including people with mental disabilities) with its obligation to provide justice for crime victims and maintain public safety.

The existence of discretion should be used as well as possible by the state administration apparatus, but some individuals in the state administration apparatus sometimes abuse this discretion, which should benefit the people but is misused for their own interests. The use of discretion must meet the following requirements: 1) The existence of freedom or flexibility of the State Administration to act on its own initiative; 2) To resolve urgent problems for which there are no regulations yet; 3) Must be accountable.

³⁷ Mark Johnson, *Forensic Psychology and the Law* (Oxford: Oxford University Press, 2021), 156.

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