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## *CRIMINAL JUSTICE REFORM*

**The Absence of Initial Investigation Process in the Draft of Indonesian Criminal Procedure Law (RUU KUHAP)**  
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**Unravel the Wiretapping Regulation in the Draft of Indonesian Criminal Procedure Law (RKUHAP)**  
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# ***THE ABSENCE OF INITIAL INVESTIGATION PROCESS IN THE DRAFT OF INDONESIAN CRIMINAL PROCEDURE LAW (RUU KUHAP)***

**Chandra M Hamzah\***

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## **Abstract**

*In 2013, the Government and the House of Representatives (DPR RI) began to discuss RUU KUHAP which has been developed since 1999. One of the discussion materials which caused pros and cons was the abolishment of initial investigation process in the RUU KUHAP. Pros and cons were not present only in the DPR's discussion session but it also took place beyond it, including the objection of a number of agencies, including KPK.*

*KPK believed that the removal of initial investigation process will impede the law enforcement process on corruption crime and other extraordinary crimes and it also "weakens" KPK's authorities. On the other hand the government believed that RUU KUHAP is *lex generalis* so it does not weaken KPK's authorities to conduct initial investigation, investigation and prosecution. This writing will discuss what is meant by initial investigation existing the Criminal Procedure Law (KUHAP), KPK Law, or the RUU KUHAP as well as the recommendation to resolve the issues related to initial investigation.*

**Keywords:** Intial invesetigation, RUU KUHAP, KPK

## **A. Introduction**

President of the Republic of Indonesia, Susilo Bambang Yudhoyono, through letter Number R-87/Pres/12/2012 dated December 11, 2012, has addressed RUU KUHAP to the Chairman of DPR-RI. Then, DPR-RI with their Decision No.04/DPRRI/11/2012-2013 dated December 13, 2012 concerning National Legislation Program on 2013 Priority Bill, has included RUU KUHAP as the prioritized discussion<sup>1</sup>. And in assembly II, an RUU KUHAP Working Committee was

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\* Head of the Corruption Eradication Commission (KPK) for the Period 2007-2011

<sup>1</sup> RUU KUHAP is on number 56 in the 2013 national legislation program, as stated in Appendix I of the decision letter. Read at <http://www.dpr.go.id/complorgans/baleg/prolegnas-Daftar-Prolegnas-RUU-Prioritas-Tahun-2013.pdf>

established to discuss materials in RUU KUHAP together with the Government Team.

Disagreement on RUU KUHAP then spread onto the surface, involving practitioners, academicians, civilians, and even law enforcement agencies and other governmental agencies. Among them are **KPK**, the Indonesian National Police (**POLRI**) and the **Supreme Court**<sup>2</sup>. Objections expressed were related to the authorities in their respective agencies.

KPK's objection is reflected in the Letter of the Head of KPK Number B-346/01-55/02/2014 dated 17 February 2004 sent to the President, Chairman of DPR, Head of Commission III in DPR, Minister of Law and Human Rights, RUU KUHAP Working Committee ("**Letter of the Head of KPK**"). In the executive summary as part of Appendix I from the Letter of the Head of KPK, especially regarding RUU KUHAP, the Head of KPK conveyed this opinion as follows:

*"Several provisions in RUU KUHAP which will impede the law enforcement process on corruption crime and other extraordinary crimes and also "weakens" KPK's authorities are:*

- a. *The abolition of authorities to conduct initial investigation wherein RUU KUHAP does not include initial investigation as part of the investigation due the lack of significant difference between the definition of investigation in RUU KUHAP and in KUHAP;*
- b. *Shortened detention period at the level of investigation;*
- c. *Very broad authority of the Preliminary Examination Judge in which they can even suspend detention at the level of investigation, halt investigation and prosecution, not based on the principle of opportunity and they can determine the appropriateness of case to be proposed to the court;*
- d. *Complicated provisions on detention process;*
- e. *Provisions on crown witness are different with the concept of justice collaborator (a witness perpetrator who cooperates) and whistle blower.*
- f. *Reversal of the verification burden is not regulated and this will make it difficult in the verification process for corruption offence and money laundering offence as extraordinary crime;*
- g. *Procedural law for corporate crime perpetrator is not regulated;*
- h. *The authorities to conduct wiretapping in Article 84 which makes it difficult in the corruption investigation process, even in Article 84*

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<sup>2</sup> The writer does not have the presumption that RUU KUHAP was intentionally made to weaken a certain institution, say the KPK. The drafting of the RUU KUHAP has been going on for quite some time, even before KPK was established.

*which regulates wiretapping in urgent circumstance, it is only aimed at criminal agreement, it cannot be applied in corruption investigation or other crimes as completed offense, this will make it more difficult in the corruption, terrorism or other extraordinary crimes investigation process;*

- i. *The verdict on the cassation legal effort cannot be higher than the first level's verdict.*
- j. *The authorities to conduct seizure shall be approved by the court.*

*Additionally, RUU KUHAP has negated KPK's authority to conduct prosecution on corruption, this can be seen from the definition of Prosecution, Public Prosecutor, authorities to transfer court, the reading of conclusion in the effort of legal appeal and cassation (Article 234 and Article 254 of RUU KUHAP), only addressed to the AGO. KPK is also not authorized to carry out extended detention. " <sup>3</sup>:*

Related to the view and attitude of KPK, the Minister of Law and Human Rights, Amir Syamsuddin, provided a letter of response. Regarding the objection of the Head of KPK, the minister provided the following responses:

- a. RUU KUHP is an effort of criminal law re-codification, so all principles of criminal law apply to all criminal act, whether regulated by KUHP or beyond KUHP. With the enactment of the new KUHP, Law beyond KUHP is not necessarily applicable because Law beyond the KUHP is *lex specialis*. This is clearly regulated in Article 757 and Article 758 of the RUU KUHP. Hence, RUU KUHP does not eliminate the existence of Law beyond KUHP and does not de-legitimize the existence of law enforcement agencies (including KPK).
- b. RUU KUHP and RUU KUHAP is *lex generalis* so it cannot eliminate KPK's authorities to conduct initial investigation, investigation and prosecution as regulated in Law No. 30 Year 2002 and criminal procedure law regulated in Law No. 30 Year 2001 jo Law No. 31 Year 1999 which is *lex specialis*.
- c. The application of restorative justice approach in RUU KUHP and RUU KUHAP, in line with the ECOSOC resolution on July 2000 concerning "basic principles on the use of restorative justice programs on criminal matters" adopted by ECOSOC as guideline for the implementation in the national penal system. This approach is basically addressed to criminal act which is not serious whose maximum sentence is five (5) years if the

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<sup>3</sup> Copy of the letter of the Head of KPK can be accessed at <http://www.tribunnews.com/nasional/2014/02/19/surat-kpk-ke-presiden-dan-dpr-soal-ruu-kuhp-dan-ruu-kuhap>

perpetrator is 70 years old or older or compensation has been given. Hence, Article 702 RUU KUHP is not included as part of *restorative justice* and is not against Article 42 paragraph (3) RUU KUHP.

- d. Related to the removal of initial investigation in RUU KUHP, it is up to each institution which has been determined in their respective laws, for example in Article 43 and Article 44 Law No. 30 Year 2002. Additionally, initial investigation action carried out discreetly (intelligence action) that is undercover in nature is sufficiently regulated in their respective SOPs.
- e. Related to detention period, starting from the level of investigation, prosecution, examination at the court up to cassation, it only has 41 days difference between RUU KUHP and KUHP (Law No. 8 Year 1981). Detention period in RUU KUHP is 360 days, while in KUHP it is 401 days. Limitation on the number of detention days is adjusted with Law No. 12 Year 2005 concerning Validation of ICCPR which applies universally.
- f. Regarding justice collaborator and whistle blower, they are basically the same with crown witness (Article 200 RUU KUHP). In order to compliment the stipulation, in RUU concerning Amendment to Law No. 13 Year 2007 concerning Protection for Witness and Victim has been referred to as justice collaborator and whistle blower.
- g. Regarding the procedural law for corporation, in RUU KUHP it is regulated generally in Book I Chapter II concerning Crime and Criminal Liability (Article 48, Article 50, Article 51 and Article 52).
- h. Regarding wiretapping, it can be defined that Article 3 paragraph (2) of the RUU KUHP provides discretion to the Law outside of KUHP regulating their respective criminal procedures. With this stipulation, KPK can conduct wiretapping without asking the permission from the court. This is in line with the stipulation in Article 39 paragraph (1) Law No. 30 Year 2002.
- i. Regarding the decision of Supreme Court which cannot exceed the decision of the court under it, this is based on the authorities of the Supreme Court itself which only examines the implementation of law from *judex jurist* (see Article 250 paragraph (3) of the RUU KUHP).<sup>4</sup>

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<sup>4</sup> The government's response on the letter of the Head of KPK, addressed in a press release accessible at <http://www.kemenkumham.go.id/berita/headline/2200-press-release-tanggapan-pemerintah-atas-surat-ketua-komisi-pemberantasan-korupsi-ri>



## B. Problem

One of the materials being debated is the abolishment of initial investigation in RUU KUHAP. KPK opined that the removal of authority to conduct initial investigation will impede the law enforcement process on corruption crimes and other extraordinary crimes and it will also “weaken” KPK’s authorities. In the meantime, the Minister of Law and Human Rights opined that RUU KUHAP is *lex generalis* so it does not remove KPK’s authorities in conducting initial investigation, investigation, and prosecution as regulated in Law No. 30 Year 2002 concerning Corruption Eradication Commission (“**KPK Law**”) and criminal procedure law regulated in Law No. 20 Year 2001 jo Law No. 31 Year 1999 (“**Tipikor Law**”) which is *lex specialis*. Additionally, according to the Minister of Law and Human Rights, initial investigation action carried out secretly (intelligence action) that is undercover in nature is sufficiently regulated in its respective SOPs.

To assess the above matter, it would be better to understand what is meant by initial investigation, whether in KUHAP, KPK Law, or in RUU KUHAP, and recommendation to solve the issues regarding initial investigation.

## C. Discussion

### 1. Definition of Initial Investigation

Based on Article 1 point 4 of KUHAP, initial investigation is defined as “a series of actions by initial investigators to seek and find an event suspected as a crime in order to determine whether to conduct investigation or not in line with the procedures regulated in this Law.” Based on this definition, then the result of the initial investigation is: the finding of an event suspected to be a crime.

There is no definition of initial investigation in KPK Law. This is why, based on article 38 of KPK Law: : All authorities related to initial investigation, investigation, and prosecution regulated in Law No. 8 Year 1981 concerning Criminal Procedure Law also applies for initial investigators, investigators and prosecutors in the Corruption Eradication Commission”<sup>5</sup>. So the definition referred to by KPK is the definition of initial investigation as stated in KUHAP <sup>6</sup>.

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<sup>5</sup> Article 38 Paragraph (1) Law No. 30 of 2002:

<sup>6</sup> The same thing also exists in other laws which provide investigation authorities to a government agency without defining investigation. For example in Article 71 of the Law of the Republic of Indonesia Number 35 of 2009 concerning Narcotics (“**Narcotics Law**”), it is stated that in conducting the task of eradicating the misuse and circulation of Narcotics and Narcotics Precursor, BNN is authorized to conduct initial investigation and investigation on the misuse

And now in RUU KUHAP initial investigation is abolished. With the abolishment of initial investigation process, then there is certainly no definition about initial investigation. With the removal of initial investigation in RUU KUHAP, can it be considered that initial investigation has been absorbed in investigation?

Based on Article 1 point 1 of the RUU KUHAP: "investigation is a series of actions by the investigators to seek and collect evidence by which can shed light on the crime and can find the suspect." This definition is similar to the definition of investigation in KUHAO: "Investigation is a series of actions by the investigators and in accordance to the procedure regulated in this law, to seek and collect evidence by which can shed light on the crime and can find the suspect." Hence, based on the definition in KUHAO or in RUU KUHAP, the expected results from an investigation are:

- (1) shed light on the crime, and
- (2) find the suspect

From two definitions above, it is clear that initial investigation in KUHAO is not absorbed into investigation based on the RUU KUHAP. Or, with a more straightforward statement, initial investigation, **whether as a definition or as an activity phase**, has been abolished in the RUU KUHAP.<sup>7</sup>

The definition of initial investigation as defined in KUHAO is to seek and find an event suspected to be a crime, this is one of the most fundamental things, and the earliest thing to be carried out, in a criminal justice system. This is reinforced by legal experts. For example, Mr. R. Tresna quoted the opinion of de Pinto, saying the following:

*"What is meant by "investigating" a case? According to de Pinto, investigating is the initial examination by officials, thereby appointed by the Law immediately after, with any way, heard reasonable news that there has been a violation of law.*

*Examination covers matters of whether a crime was actually committed and who is the suspected perpetrator."*<sup>8</sup> (words are bolded by the writer)

Regarding criminal procedure code, Prof. Dr. Andi Hamzah, S.H., said that:

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and circulation of Narcotics and Narcotics Precursor. This Law does not mention the definition of initial investigation.

<sup>7</sup> With the definition as stated in RUU KUHAP, then the investigator can arbitrarily, without a process, determine an event as a crime.

<sup>8</sup> Mr. R. Tresna, *Komentar HIR*, Pradnya Paramita, Jakarta, 1986, page 77.

“Criminal procedure code is run when a crime has occurred.”<sup>9</sup> Regarding this, R. Soesilo also said the following:

*“The way how to take action if there is a suspicion that a crime has occurred, how to seek the truth about what crime has been perpetrated.*

*When in fact a crime occurred what and how to seek by investigating the people suspected to be guilty of the said crime, how to arrest, detain and examine the person.”*<sup>10</sup>(words are bolded by the writer)

If we take a look at article 183 of KUHAP and article 174 of RUU KUHAP as follows:

#### Article 183 KUHAP

Judge shall not convict an individual unless he obtained confidence with at least two valid evidence that **a crime actually happened** and **the defendant is the perpetrator**. (words are bolded by the writer)

#### Article 174 RUU KUHAP

Judge shall not convict a defendant, unless the judge obtained confidence with at least two (2) valid evidence that **a crime actually happened** and **the suspect is the perpetrator**. (words are bolded by the writer)

Hence, the first thing to be carried out in criminal procedure law is to search and find an unexpected crime, which in KUHAP is referred to as initial investigation.

With the absence of initial investigation in RUU KUHAP, then the term initial investigation in KPK Law loses its meaning. What does initial investigation mean in KPK Law.

Next, in relation to the principles of *lex specialis derogat lex generalis*<sup>11</sup> in matters of initial investigation, it is clearly inapplicable. How could we apply the principles of *lex specialis derogat lex generalis* while the *lex generalis* itself is not present in the RUU KUHAP. The same thing goes with the Standard Operating Procedure (“SOP”) in initial investigation activity, it is now a way out which can justified. Based on Chapter I.C point 2 Appendix of the Regulation of the Minister of

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<sup>9</sup> Dr. Andi Hamzah, S.H., *Pengantar Hukum Acara Pidana Indonesia*, Ghalia Indonesia, Jakarta, 1983, page 16.

<sup>10</sup> Bismar Siregar, *Hukum Acara Pidana*, Bina Cipta, 1983, page 46.

<sup>11</sup> Prof.Purnadi Purbacaraka, S.H. and Prof.Dr.Soerjono Soekanto, S.H., M.A., *Perundang-undangan Dan Yurisprudensi*, PT. Citra Aditya Bakti, Bandung, 1993, page 8-9.

Administrative and Bureaucratic Reform of the Republic of Indonesia Number 35 of 2012 concerning Guidelines for Developing Government Administration Standard Operating Procedure, it is stated that the Government Administration Standard Operating Procedure is the standard operating procedure from various processes of government administration implementations **“in line with the existing law and regulations”**.

That is why, if RUU KUHAP is signed into Law, it would be very difficult for KPK to develop an SOP on initial investigation activities by still complying to the regulation of PAN Minister and RB, *-in line with the existing rule of law -*, because RUU KUHAP (and also KPK Law) does not define what is meant by initial investigation.

## 2. Scope of Initial Investigation Authorities

Once we have assessed the definition of initial investigation, we can then review the scope of initial investigation authorities to assess whether KPK is weakened or not in the RUU KUHAP. Based on Article 5 paragraph 1 letter a of the KUHAP, the scope of initial investigator in conducting initial investigation activity is as follows:

- a. Accepting report or complaint from a person regarding a crime;
- b. Searching statement and evidence;
- c. Telling a suspicious person to stop and check their ID;
- d. Take other actions responsibly in accordance with the law

Based on article 12 of the Law on KPK, the initial investigator's authority in conducting initial investigation is expanded, covering:

- a. carrying out wiretapping and recording conversation;
- b. ordering relevant agencies to prohibit a person from travelling overseas;
- c. requesting statement to bank or other financial institutions regarding the financial position of a suspect or convict being examined;
- d. ordering bank or other financial institutions to block the account suspected to be the result of corruption owned by suspect, convict, or other relevant parties;
- e. ordering the leadership or supervisor of the suspect to temporarily halt a suspect's position;
- f. Requesting the data on wealth and taxes of a suspect or convict to the relevant agencies;
- g. Halting temporarily a particular financial transaction, trade transaction and other agreements or temporary revocation of license concession carried out/owned by a suspect or convict suspected to come from

- sufficient initial evidence related to corruption crime being examined;
- h. Requesting assistance from Interpol Indonesia or other law enforcement agencies from other countries to conduct searching, arrest and seizure of evidence in overseas;
  - i. Requesting assistance from the police or other relevant agencies to conduct arrest, detention, search and seizure in the corruption crime being handled.

The expansion of the initial investigator's authorities in conducting initial investigation activity in Law of KPK is the consequence of the following:

- KPK is not authorized to issue letter of order to hold the investigation and prosecution<sup>12</sup>;
- The requirement of sufficient initial evidence to conduct investigation that is tougher than what is regulated in the KUHAP<sup>13</sup>.

With the absence of initial investigation in RUU KUHAP, and in the meantime there is strict prerequisite to conduct investigation and the absence of authority to halt investigation, then it can be predicted that KPK will find it very difficult to start an investigation.

This is different with the INP investigator because as based on article 7 paragraph (1) letter h of the RUU KUHAP, INP investigators still have the authority to halt the investigation if later in the future it is found that the incident being investigated by the INP investigators is actually not a crime<sup>14</sup>.

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<sup>12</sup> See article 40 of Law on KPK: "Corruption Eradication Commission is not authorized to issue letter of order to halt investigation and prosecution in a corruption crime case."

Compare with article 7 paragraph (1) letter i of the KUHAP: "Investigator as stated in Article 6 paragraph (1) letter a due to their responsibility have the authority to halt the ongoing investigation."

<sup>13</sup> See article 44 paragraph (2) Law of KPK: "Sufficient initial evidence is considered present if there are at least two (2) evidences, including and not limited to information or data expressed, submitted, accepted, or stored, conventionally, electronically or optically."

Compare with the Explanation on article 17 of KUHAP: "What is meant by "sufficient initial evidence" is initial evidence to suspect that the presence of a crime, as stated in Article 1 point 14." KUHAP does not require the number of evidences to meet the criteria of "sufficient initial evidence", but it rather requires evidences which can be used to suspect the presence of a crime.

<sup>14</sup> See Article 7 paragraph (1) letter h of the RUU KUHAP: "Investigator as stated in Article 6 letter a has the task and authority: conducting investigation."

## **D. Closing**

In regards to the existing complication due to the abolishment of initial investigation in RUU KUHAP, the writer believed that one of these two alternatives can be chosen:

1. Reinstate initial investigation in RUU KUHAP, or
2. Combine the definition of initial investigation with the definition of investigation stated in KUHAP.

By following through one of the two alternatives, then the legal process for the criminal procedure law can run as it should be and the potential complication can be avoided.

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# UNRAVEL THE WIRE TAPPING REGULATION IN THE DRAFT OF INDONESIAN CRIMINAL PROCEDURE LAW (RKUHAP)\*

Supriyadi Widodo Eddyono

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## I. Introduction

The regulation regarding wiretapping has become one of the hottest topics discussed in the legal community. No surprise, since wiretapping in addition is seen as an effective instrument for uncovering crimes, but at the same time is also seen as an invasion of the State to the privacy rights of its citizens. Since it has a great potential to violate human rights, wiretapping must be properly and strictly regulated. At least wiretapping regulations shall contain five basic points : (1) the existence of clear statutory authority under the Act which permits the wiretapping (including clear goals and objectives) (2) guarantee a definitive period of wiretapping (3) restrictions on the handling of the wiretapping materials (4) restrictions on who can access the wiretapping and other restrictions, and (5) the availability of an effective complaint mechanism for citizens who feel that their freedoms have been violated by the State.

In the context of Indonesia, wiretapping is regulated through a variety of laws. The regulations are spread from the level of Law to Ministerial Regulation. Not only there is a diversity of governing rules, but also the mechanisms are varied as well. Other than that issue, the time periods of the wiretapping also vary to a great deal, depending on the rules which govern it. The disunity of the wiretapping law regulations in Indonesia brings a very serious impact including that the wiretapping target can not question the validity of the wiretapping procedures imposed on him. In addition, the existence of the wiretapping materials used as evidence in the court can not be sued at all, because there is no unified mechanism that regulates clearly and decisively.

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\* This article is a summary version of the updated position paper material on Criminal Justice Institute reform in 2014 on the Draft of Indonesian Criminal Procedure Law (RKUHAP)

The issue of this clutter has been tried to be answered by the Constitutional Court through Decision No 5/PUU-VIII/2010 on the judicial review of Law No.11 Year 2008 on ITE against the 1945 Constitution which mandates to form a single rule of wiretapping mechanisms and procedures containing the terms; (i) the existence of the official authority designated in the Act to grant permission to tap, (ii) guarantee a definitive period of wiretapping, (iii) the restriction of wiretapping material handling, and (iv) restrictions on who can access the wiretaps.

The Draft of Indonesian Criminal Procedure Law (RKUHAP) being discussed in the House of Representatives (DPR) also sought to answer the question of clutter on the procedures and mechanisms of the wiretapping. Together with the components of civil society, ICJR strives actively to oversee the deliberations of the RKUHAP in DPR, especially the discussion on the wiretapping in RKUHAP. However, in RKUHAP, it is found that in fact the Draft of Indonesian Criminal Procedure Law fails to fulfill the mandate that has been ordered by the Constitutional Court in Decision No 5/PUU-VIII/2010. Therefore, RKUHAP should only focus to regulate the principles, the institutions which are given the authority to tap, the permit as well as the regulation on the verification strength of the wiretapping materials. However, further elaboration of the provisions in RKUHAP should be regulated in more detail and strictly in the Wiretapping Act or the Anti-Wiretapping Act.

The Government through the Ministry of Law and Human Rights in the working meeting with DPR on March 6, 2013 has submitted the Draft of Indonesian Criminal Procedure Law (RKUHAP) and the Draft of Indonesian Criminal Code (RKUHP) to DPR. DPR itself has responded at the same time by approving the government's proposal to discuss RKUHAP and RKUHP. One of the changes that was considered important enough in RKUHAP is the sole regulation regarding the procedures and setting of wiretapping. The wiretapping regulations in the development, become a hot discussion whether among legal practitioners, academics, and law enforcers.

Wiretapping in practice can not be denied is very useful as one method in the disclosure of crime. Wiretapping is an accurate alternative in the criminal investigation against the development modes of crime, including the development of a very serious crime. In this case, wiretapping can be seen as a means of prevention and detection of crime. In Indonesia there has been quite a lot of cases of perpetrators of serious crimes who can be brought to justice thanks to the wiretapping.<sup>1</sup> But on the other side, wiretapping without procedures and

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<sup>1</sup> Supriyadi W. Eddyono, taken from <http://icjr.or.id/mengatur-ulang-hukum-penyada->

done by law enforcement agencies or state official institutions continues to be controversial because it is considered as an invasion of privacy rights of citizens which include the privacy of personal life, family life and correspondence. Wiretapping as prevention and detection of crime also has a tendency that is harmful to the human rights and susceptible to be abused, when positioned on the improper law (because of weak regulation), and the wrong hands (because there is no control), and moreover, if the underlying rule of law is incompatible with the principle of human rights.<sup>2</sup>

Previously the government's plan to regulate the wiretapping law was initiated on January 6, 2009, when the Government was known in the midst of preparing the Government Regulation Draft (RPP) on Procedures for Interception, the RPP is mandated by Article 31 paragraph (4) of Law No.11 Year 2008 on Information and Electronic Transactions, favoring the derivative rules governing wiretapping. However, on February 24, 2011, the Constitutional Court through Decision No 5/PUU-VIII/2010 has canceled the Article 31 paragraph (4) of the ITE Law. In its decision, the Constitutional Court also inserts an order that the wiretapping material must be regulated in the Act.

While the inclusion of Wiretapping in RKUHAP has actually been initiated since 2006-2008, this formulation is similar to the intercept regulations in the US which is polished and adjusted to the structure of the Indonesian Criminal Procedure Law. Further modest improvements done to the 2013 RKUHAP.

## II. The need of Wiretapping in the enforcement of Law

The development of time is something that can not be avoided, the development of technology and human civilization bring a new dimension to life, no exception in the development of crimes. Currently the conventional crimes shift patterns and shapes to follow the development of technology too. Crimes such as corruption, terrorism, narcotics and other serious crimes can no longer be tracked by conventional methods that were used by law enforcement officials.

To compensate for the ability of the perpetrators of the crime, the law enforcers are required to have other methods which are more effective in carrying out the law enforcement functions, one way is by using wiretap method for the benefit of law enforcement. Wiretapping is very useful as a method of investigation, which is one surefire alternative to the criminal investigation against the development

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pan-indonesia/

<sup>2</sup> Supriyadi W. Eddyono and Wahyudi Djafar, taken from [http://icjrid.files.wordpress.com/2012/01/briefing-paper-1-2012\\_cetak.pdf](http://icjrid.files.wordpress.com/2012/01/briefing-paper-1-2012_cetak.pdf)

mode of crime. Quite a lot of cases of serious crime perpetrators can be brought to justice thanks to the wiretaps.

Wiretapping within the framework of criminal law must be done with Lawful interception, which means interception and monitoring of communications activities must be done legally, on behalf of the law, by a government agency that has the authority determined by specific rules, to individuals and groups. In order for an interception to be legitimate in the eyes of the law, it must be based on the governing rules or regulations and adequate technics as well as procedures. These aspects can be linked to the aspects of security on the wiretapping materials as digital evidence forensic when presented at the trial. If the law enforcers conduct intercept not based on the rule of law and on clear procedure, there will be unlawful interception. The logical implication is the entire evidence and digital evidence from the interception materials null and void and has no force of proof in the eyes of the law.<sup>3</sup> The general principles associated with Lawful Interception have been set forth in the Convention on Cybercrime in Budapest, on 23 November 2001.

Some countries that have long used the interception authority have limited the use of wiretapping that are only used on a limited basis to prevent and detect in the case of very serious offenses with the following requirements: (1) is used as other methods of criminal investigation have failed, or (2) no other ways that can be used except wiretapping to get the required information, and (3) there must be a strong enough reason and belief that by wiretapping then the new evidence will be found and also can be used to punish the targeted criminal offenders.<sup>4</sup> In addition, in some countries, wiretapping can also be used on the basis of special importance to the security of the state (interest of national security), law enforcement and economic stability in a country. The trends of restrictions on wiretapping provisions for contry apparatus in various countries also have developed as such. Wiretappings can only be used under specific conditions and prerequisites, for example: (1) the existence of clear statutory

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<sup>3</sup> In comparison, in The federal Wiretap Act unlawful wiretapping is subject to reimbursement of compensation including civil remedies, include liquidated damages of \$ 10,000, punitive damages, and attorney's fees, see also Tex. Penal Code § 16:02, and a civil cause of action for interception of communication states that Unlawful interception of communications is a felony and additional civil remedies can include statutory damages of \$ 10,000 for each occurrence, punitive damages, and attorney's fees. Also stated "Consequences for Attorneys An attorney's use or disclosure of intercepted communications violates the wiretap laws, even if the attorney did not direct a client to the make the recording. This means that attorneys can face criminal and civil penalties for using evidence that a client Obtained in violation of the wiretap laws. If an attorney has reason to believe that recordings were illegally Obtained, the attorney should Immediately cease reviewing recordings and should not use or disclose the communications in any way "

<sup>4</sup> Eddyono, *Op.Cit.*

authority under the Act which permits the wiretapping (including clear goals and objectives) (2) the guarantee of a definitive period of wiretapping (3) the restrictions of the wiretapping material handling (4) the restrictions on who can access the wiretapping and other restrictions.<sup>5</sup> The most important thing is the availability of the complaint mechanism for citizens who felt that he has been tapped unlawfully by the official authorities, allegedly carried out without the proper procedures and by abusing the authority or power. Britain, for example, has a special agency to file a complaint against the unlawful wiretapping.<sup>6</sup> Such restrictions are required because of wiretapping dealing directly with the protection of individual privacy rights.

And under what paradigm is this wiretapping law should be put on? In fact the International Covenant on Civil and Political Rights has given the right of every person to be protected from arbitrary or illegal interference in personal, family, home or correspondence matters, as well as unauthorized attack on his honor and reputation. Therefore, this right should be guaranteed from all interference and attacks originating from the state authorities as well as ordinary people or the law. And the state has the obligations to adopt legislative measures and others to give effect to the prohibition against the interference and attacks as well as the protection of this right.

There are things that should be the base point to regulate wiretapping, which is to ensure the interest of the wiretapping done because in general the use of wiretapping conducted on two matters of interest, ie. the enforcement of law (obtaining evidence) or intelligence/surveillance. The clarity of position of the wiretapping benefit will lead to consequences and impact on a few things. If the wiretapping is for law enforcement then the use the wiretapping materials should be used as a basis or as evidence in court so the wiretapping permit (authorization agency) is generally the justice.

### III. Wiretapping Restriction and Privacy Protection

In the Human Rights law, it has repeatedly stated that the rights which are fundamental (fundamental rights) is for any person not to be subjected to arbitrary actions or unauthorized attacks, against his private life or personal property, including also the communication, by the state officials who conduct the investigation and/or enquiry of a crime. This assertion, as also stated in the

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<sup>5</sup> Ibid

<sup>6</sup> Thomas Wong, Regulation of Interception of Communications in Selected Jurisdictions, Legislative Council Secretariat, 2005, Hongkong, page 64.

Universal Declaration of Human Rights in 1948<sup>7</sup> and in particular, in Article 17 of International Covenant on Civil and Political Rights of 1976, as ratified by Indonesia through Law No. 12 Year 2005<sup>8</sup>

In the General Comment No.16 on Article 17 of the ICCPR as agreed by the Human Rights Committee of the United Nations (UN) on the twenty-third trial, in 1988, providing commentary on the substance of Article 17 of the International Covenant on Civil and Political Rights, in point 8 stated, “ ... *that the integrity and confidentiality of correspondence should be guaranteed by de jure and de facto. Correspondence should be delivered to the addressee without hindrance and without being opened or read first. Observations (surveillance), both electronically and other, tapping the telephone, telegraph, and other forms of communication, as well as the recording of conversations should be prohibited*”;

The European human rights court in fact has provided valuable input on the unlawful wiretapping carried out in two important decisions. Two such important decisions, one if them is related to a wiretapping in Germany, and the other for a wiretapping case in the UK. The telephone-tapping case in the case of *Klass vs Federal Republic of Germany* is related to the notification of the wiretapping materials done without a comprehensive legislative framework. And in the case of *Malone vs the United Kingdom*, related to wiretaps that do not obey the law. Although both cases related to analog telephone tapping, but the principles used in general can also be applied to digital telephone as the interception of the correspondence, and perhaps also to other forms of surveillance.

The German law is considered strict in limiting interceptions including in meeting the requirements, ie. the application for wiretapping conducted in writing, there should be also a basic fact that a person has been suspected to plan, carry out, or after conducting a particular criminal or subversive act, and that the wiretapping is only conducted on specific suspects or suspected to be the contact person concerned, exploratory or surveillance in general must be with permit, the law also requires that other investigative methods are not effective or difficult that the wiretapping is necessary.

Wiretapping in Germany must also be supervised by a judicial official in charge of separating wiretapping materials/information relevant to the investigation; and this official has to destroy the rest of the irrelevant wiretapping materials. The

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<sup>7</sup> Article 12 stipulates that, “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks”

<sup>8</sup> States that, “Nobody to be arbitrarily or unlawfully interfered about his privacy, home, family, or correspondence, nor attacked upon his honor and reputation unlawfully”;

wiretapping must itself have completed or terminated when no longer needed, or indeed if other method has been used. The law requires that the wiretapping should be stopped when this requirement has ended, and the tapped subject is to be notified as soon as possible without jeopardizing the purpose of wiretapping. The person tapped might test the wiretapping authority in an administrative court, claiming losses suffered because he has been tapped, in a civilian court, if the loss in the wiretapping proven. Because the Constitution of Germany also protects the confidentiality of mails, post and telecommunications, the Court must therefore determine whether the interference can be justified under Article 8 (2) of the European Convention as in accordance with the law and the needs in democratic society in terms of national security or for the prevention of disorder or crime.

The court recognized that the needs of law is not to protect the interests of the wiretapping operation but more for protection against the abuse of power in wiretapping. In this case Klass argues that the wiretapping law violates Article 8 of the European Convention because the Act does not have a requirement that the subject of interception must be notified after the end of the wiretapping. The Court states that it is not in accordance with Article 8 of the Convention, where the subject of wiretapping should be informed after the termination of surveillance carried out as soon as possible without jeopardizing the main objectives of the use of wiretapping.

In the case of *Malone vs UK*, Malone who learns that his telephone conversations has been tapped, and issues a test against the police. Malone argues that, first, that wiretapping is unlawful and violates the rights of privacy, property, and confidentiality; second, that it is contrary to Article 8 of the European Convention on Human Rights; and, third, that the police has no legal authority to tap his phone because there is no authority given by the law. Malone brings his application to the European Court of Human Rights, and he succeeds. The court unanimously finds indeed that the Convention has been violated. As a result, the British government acknowledges that the wiretapping law is needed, and as the result the 1985 Communications Act later enacted. This approach is essential to ensure that the wiretapping materials which have been obtained in an inappropriate manner or against conscience would seriously undermine the public confidence in the justice system and the information obtained can not be accepted as evidence in court.

Another example in the case of historic wiretapping law in the US Supreme Court ruling in the case of *Katz vs United States of America*<sup>9</sup>. In the case of *Katz*,

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<sup>9</sup> ABA, *The History and Law of Wiretapping*, ABA Section of Litigation 2012 Section An-

the tappers from the police have planted a device on a public payphone to record telephone conversations of the suspect in the operation of an illegal gambling arrest. The conversations have been wiretapped and led to his arrest. Because it is known that the device has been planted without a permit, and the Defenders of Katz then examines the allegations based on the Amendment 4 of the US Constitution that his rights have been violated. The Supreme Court decision then states that the wiretap device has violated the Fourth Amendment since the conversations become the subject or subject to changes in the Fourth Amendment, regardless of where they occur, as long as they are made with “reasonable expectation of privacy” that the listening device placed outside the public phone booth is unlawful. The government argues that because the wiretapping device is not inserted in the phone booth, then there is no violation of privacy. Rejecting this view the court holds that the Fourth Amendment protects people, not places, and the same protection should apply to communications on the Internet<sup>10</sup>.

While in Indonesia, the protection of privacy rights recently widely known after the 1945 Constitution amendments, but prior to that the provision that could be referred to as a form of privacy protection in Indonesia was Article 551 of the Indonesian Criminal Code<sup>11</sup>. After the reform, the protection of the Right to Privacy in Indonesia is explicitly guaranteed under a variety of laws and also in Article 28 G paragraph (1) of the 1945 of the Constitution<sup>12</sup>. For example, Article 32 of Law No.39 Year 1999 on Human Rights<sup>13</sup>, Article 40 of Law No.36 Year 1999 on Telecommunications<sup>14</sup>, Article 31 paragraph (1) of Law No.11 Year 2008 on Information and Electronic Transactions<sup>15</sup> So on one side the privacy

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nual Conference April 18-20, 2012: The Lessons of the Raj Rajaratnam Trial: Be Careful Who’s Listening

<sup>10</sup> Raymond Wacks, *Privacy, A Very Short Introduction*, Oxford, 2010

<sup>11</sup> Article 551 of the Indonesian Criminal Code states that “Whoever without authority walking or driving on land which is prohibited from entering by the owner in a clear manner, punishable by a maximum fine of two hundred twenty five rupiah”

<sup>12</sup> States that, “Everyone has the right to protection of self, family, honor, dignity, and property under his control, and has the right to feel secured and protected from the threat of fear to do or not to do something that is a human right

<sup>13</sup> States that: “Freedom and secrecy in correspondence relation including communications relation through electronic means shall not be disturbed except on the orders of the judge or other legitimate authority in accordance with the provisions of laws and regulations”

<sup>14</sup> States that: “Every person is prohibited from conducting tapping on information transmitted over telecommunications networks in any form; as the explanation of Article 40 of Telecommunications states that, “what meant by tapping in this article is the activities to put device or enhancements to the telecommunications network for the purpose of obtaining information by illegal means. Basically the information owned by a person is a personal right that must be protected so that wiretapping should be banned”.

<sup>15</sup> States that “Any person who is intentionally and without right or unlawfully conduct-



protection has been held in high esteem not only by the Constitution but also in the various laws. Therefore, the intrusion of this right must be regulated by law which does not deny the right to privacy. The protection of privacy rights is also found in the criminal law, see Chapter XXVII of the Criminal Code on Malversation governing the **prohibition** to the authorized officials to conduct wiretaps, surveillance, rob, obtain information contained in the objects that can store telecommunications data such as letters, telegraph or content of telephone conversations.

#### IV. Variety of Wiretapping regulations in Indonesia today

In various references, it is said that <sup>16</sup> *Intercept is to covertly receive or listen to a communication, refers to covert reception by a law enforcement agency.* <sup>18</sup> while wiretapping as part of the interception is defined as *“Electronic or mechanical eavesdropping, Done by law enforcement officers under court order, to listen to private conversations. Wiretapping is regulated by federal and State Law.”* In the Oxford dictionary, interception is defined as to cut off from access or communication. In Indonesia this understanding and term of interception, whether as wiretapping or eavesdropping in the interception is not always consistently used. In the laws and regulations in Indonesia, a few of those regulations that provide a definition of wiretapping. Of all the existing regulations, only some of the Acts which define wiretapping, some of which are the Narcotics Act and the ITE Law, Article 1 point 19 of Law No.35 Year 2009 on Narcotics stipulates that Wiretapping is an activity or series of activities of inquiry or investigation by way of intercepting conversations, messages, information, and/or communication network made by phone and/or other electronic communication devices.

As a comparison, the ITE Act gives a sharper definition related to Wiretapping, the elucidation of Article 31 paragraph (1) of Law No.11 of 2008 on ITE stipulates that the definition of “interception or wiretap” is an activity to listen, record, divert, alter, inhibit, and/or record transmission of Electronic Information and/or Electronic Document which is not public in nature, either using a wired communication network as well as wireless networks, such as the emission

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ing interception or tapping on Electronic Information and/or Electronic Documents in a computer and/or a certain Electronic System belong to another person”. Article 31 paragraph (2) of the Law on Information and Electronic Transactions stipulates, “Every person who is intentionally and without right or unlawfully conducting interception on the transmission of Electronic Information and/or Electronic Document which is not public in nature, from, to, and within a computer and/or a certain Electronic System belong to another person, both of which do not cause any changes or cause changes, removal, and/or termination of the Electronic Information and/or Electronic Document which is being transmitted”

<sup>16</sup> Black’s Law Dictionary, 7th Edition.

of electromagnetic or radio frequency. The Menkominfo Regulation No.11/PER/M.KOMINFO/02/2006 on Wiretapping Technic on Information which contains the guidelines in conducting lawful wiretaps defines that Information Wiretapping is listening, noting, or recording **a conversation** conducted by the law enforcement authorities by installing instruments or enhancements to the telecommunications network without the knowledge of the person doing the talks or communication. While the definition of wiretapping in RKUHAP provided for in Article 83 paragraph (1) which states that: *“tapping a telephone conversation or other telecommunication equipment is prohibited, unless carried on talks relating to serious crime or alleged serious criminal offense, which could not be disclosed if the wiretapping is not carried out.”*

Restrictions on the right to privacy in a lawful wiretapping or tapping as an authority of the law enforcers (criminal wiretap) in the history of law in Indonesia, actually has had a long history. In the Colonial period in the Dutch East Indies (Based on the decision of the King of Holland Dated July 25, 1893 No.36) which can be regarded as the oldest in the Indonesian regulations regarding information tapping limitedly applied on the traffic of letters in the post offices throughout Indonesia (mail interception). After the establishment of the King Netherlands' decision Dated July 25, 1893 No.36, in the course of wiretapping regulation journey in Indonesia, there have been all kinds of regulation governing wiretapping.<sup>1719</sup>

At this time, there are at least 18 sets of regulations governing wiretapping and several regulations giving authority to a number of state institutions to conduct wiretapping, with boundaries which are often different, between one provision and the others. A number of regulations containing wiretapping regulation can be found in the regulations below:

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<sup>17</sup> *Ibid.*

No	Regulation	Description of Regulation Content
1	Law No. 5 Year 1997 on Psychotropic <sup>18</sup>	Giving authority to the police investigators to conduct wiretaps related to psychotropic criminal offenses. The permission addressed to the Chief of State Police of the Republic of Indonesia for a wiretapping period of 30 (thirty) days, but it does not set the extension period.
2	Law No. 31 Year 1999 on Corruption Eradication <sup>19</sup>	Regulating just the authority of investigators to specifically aim to accelerate the process of investigation
3	Law No. 36 Year 1999 on Telecommunication	Regulating the obligation of telecommunication service providers to store communication data as well as the recording of communication data made by the users, as the evidence of the use of telecommunication facilities and/or for the purpose of criminal justice.
4	Law No. 30 Year 2002 on Corruption Eradication Commission <sup>21</sup>	Only regulating the granting of authority to the Corruption Eradication Commission (KPK) to conduct wiretaps, more specific regulation governed in the SOP (Standard Operational Procedure) of KPK which is confidential
5	Law No. 18 Year 2003 on Advocates	Regulating the protection against wiretapping on electronic communication and the right of confidential relationship between advocates and the Clients.
6	Law No. 21 Year 2007 on the Eradication of Human Trafficking	Regulating about the authority of investigators to conduct wiretaps related to the crime of human trafficking based on sufficient preliminary evidence with a written permit to the Chief of the Court for a maximum period of 1 (one) year.
7	Law No. 11 Year 2008 on Information and Electronic Transactions	Regulating the prohibition of wiretapping, except wiretapping in the interest of law enforcement at the request of police, prosecutors, and/or other law enforcement institutions.

<sup>18</sup> See Article 55 letter c and explanation of Law No.5 Year 1997 on Psychotropic

<sup>19</sup> See Article 26 and Article 30 and explanation of Law No.31 Year 1999 on Corruption Eradication

<sup>20</sup> See Article 40 of Law No.36 Year 1999 on Telecommunications

8	Law No. 35 Year 2009 on Narcotics	Regulating the granting of authority to the investigators (BNN (National Narcotics Agency) investigators and Police Investigators) related to illicit trafficking of narcotics after there is sufficient preliminary evidence in several ways of wiretapping. The wiretapping period is maximum 3 (three) months and may be extended for 1 (one) time for the same period, the wiretapping can only be done upon the written permission of the Chief of the Court. This Law also regulates the wiretapping in urgent circumstances, and in no later than 1 X 24 (one time twenty four) hours the investigators shall request permission to the Chief of the Court.
9	Law No.17 Year 2011 on State Intelligence	Regulating the authority to conduct wiretaps by the NIA (National Intelligent Agency/BIN), with the aim of extracting information against targets associated with activities that threaten the national interest and security. The wiretapping is on the orders of the head of BIN and the resolution of the Chief of the Court, within a period of 6 (six) months and may be extended as needed.
10	Law No.18 Year 2011 on Amendment of Law No.18 Year 2004 concerning Judicial Commission <sup>21</sup>	Regulating the provision that the Judicial Commission may request assistance to the law enforcement agencies to conduct wiretaps and record conversations in the alleged violation of the Code of Conduct and/or the Judicial Code of Conduct of Judges
11	G o v e r n m e n t Regulation No. 19 Year 2000 on the Eradication of Corruption Joint Team	Regulating the relevant provisions of the authority of investigators to conduct wiretapping. No other regulation as well as explanation regarding the authority.
12	Law No.15 Year 2003 on the determination of Government Regulation in Lieu of Law No. 1 Year 2002 on Combating Terrorism, into Law	Regulating the authority of investigators, based on sufficient preliminary evidence, to conduct wiretaps related to terrorism. Wiretapping is done on the behest of the Chief of the District Court for a period of 1 (one) year, and should be reported or accounted for to the superior of the investigators.

<sup>21</sup> See Article 20 Paragraph (3) of Law No.18 Year 2011 on Amendment of Law No.18 Year 2004 concerning Judicial Commission

13	G o v e r n m e n t Regulation No. 52 Year 2000 on Provision of Telecommunication Services <sup>22</sup>	Regulating the requests for information and the recording of the telecommunication service providers by the Attorney General and or the State Police for certain criminal offenses with a copy to the Minister of Information and Communication. This Government Regulation also stipulates that a written request shall contain the object recorded, the recording time and the report period of the recording materials. The recording materials must be submitted confidentially to the Attorney General and or the Chief of State Police and or the Investigator. The Telecommunication Services providers are required to meet the demand of the information recording at the latest within 24 hours since the request is received. If not possible then the notice must be made no later than 6 (six) hours after receipt of the request.
14	Regulation of the Minister of Information and Communication No. 11 Year 2006 on Information Tapping Techniques	Regulating the Wiretapping carried out by law enforcers through the instrument and/or information wiretapping devices. The instruments and/or wiretapping devices and the target identification process are controlled by the law enforcement authorities. Wiretapping can be done with the aim for the interest of law enforcement, but the intended offense is not specifically mentioned. The wiretapping material is confidential. The oversight of the wiretapping conducted by the Monitoring Team established by the Director General to verify the legal and technical aspects of the implementation of a lawful information wiretapping.
15	Regulation of the Minister of Information and Communication No. 1 Year 2008 on Information Recording for the State Defense and Security	Regulating the recording information in the interest of national defense and security, carried out at the request of the State Intelligence to the Telecommunication Provider with a copy to the Minister. The procedure for Wiretapping set based on the SOP (Standard Operating Procedure) established by the BIN according to the appropriate characteristics. All information is confidential and only used by the BIN for the State defense and security.
16	The Chief of State Police of Republic of Indonesia Regulation No. 5 Year 2010 on Wiretapping Procedure in the Monitoring Center of Republic of Indonesia Police	Regulating the procedure guidelines for wiretapping requests, implementation and monitoring of the wiretapping operation, handling the wiretapping and overseeing and control of the wiretapping process.

<sup>22</sup> See Article 87 up to Article 89 of Government Regulation No.52 Year 2000 on Provision of Telecommunication Services

17	S t a n d a r d O p e r a t i o n a l P r o c e d u r e            o f t h e            C o r r u p t i o n E r a d i c a t i o n C o m m i s s i o n (K P K)	Confidential, inaccessible.
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The above description is a picture of how much variety of wiretapping rules in Indonesia, which consist of 12 Acts, 2 of Government Regulations, 2 Minister Regulations, 1 State Police Chief Regulation, and 1 Rule in the form of SOP (Standard Operational Procedures). The majority of the regulations issued to authorize wiretapping for each state agency, and the rest is set internally for the needs of each of the state institutions.

From the table above there are only four laws that specifically authorize wiretapping to some institutions in the interests of the criminal law enforcement, i.e only to the Police (terrorism, TPPO, narcotics and psychotropic substances) and KPK (corruption). As for the intelligence purposes only granted to BIN limitedly with the aim of extracting information against the targets associated with activities that threaten the national interests and security. Whereas the other regulations are more to the request of communication recording material submitted by the law enforcement officers to the telecommunications service providers.

The authority granting permission for wiretapping is also not uniform depending on the regulations that govern them. For example if the police will tap then the rules are based on the State Police rules, as well as if the KPK will conduct wiretaps then it is also set based on the rules of the KPK. Similarly, the demand for recordings of communication which are dealt with separately.

Besides, the scope of wiretapping only regulates the wiretapping aimed at some specific criminal offenses too, following the intended state institutions. Not more than the offenses like Narcotic Drugs and Psychotropic Substances, Corruption, Terrorism and Human Trafficking explicitly allowed for wiretapping, while for other crimes, especially in the Criminal Code is not allowed to be tapped unless for the demand of communications recording. For example the police is authorized to conduct wiretaps for criminal offenses of narcotics, psychotropic substances, human trafficking, and terorisme. While the KPK is confined in the crime of corruption.

Apart from that, the crucial point of the clash of these regulations is the different periods in each regulation, either the principal period of wiretapping or the extension of wiretapping period requested later. The duration is very important given the importance of controlling the length of wiretapping which potentially violates human rights. There are several rules which refer explicitly to the period and the extension of wiretapping such as Law No.35 Year 2009 on Narcotics which gives 30 days and 1 time extension with the same period of time, but on the other hand there are other rules that even completely do not stipulate the period of wiretapping as Law No. 18 of 2011 on the Judicial Commission and some other Laws.

The differences between these rules increasingly felt strong when the regulation that should be the heart of the main wiretapping regulation i.e the wiretapping procedures or mechanism which vary depending on which rules to follow. The difference in the procedure is of course a major problem, at least there are more than five procedures applied to wiretapping in Indonesia. If compared internationally the wiretapping procedure difference is usually only related to the wiretapping for the benefit of law enforcement and intelligence needs, in Indonesia there are even regulations that do not provide the rules on wiretapping procedures.

Even more messed up is that wiretapping which is done unclearly whether for the sake of obtaining evidence (law enforcement) or intelligence and surveillance, in order to observe for extracting information on the Target (subject) associated with illegal activities or which threatens the national interests and security. The wiretapping rules in each regulation do not precisely stipulate this position.

What is the impact of the difference regulations? Directly, the one which is first affected is the target of the wiretapping. Under the procedural law, the person who becomes the target can not question the validity of wiretapping procedural imposed on him, this is because there is no obvious touchstone for testing at once and impossible to get evidence for comparison. In the greater potential, even the existence of the wiretapping materials that now ordinarily used as evidence in court can not be sued because there is no unified regulatory mechanism or even no mechanism set out clearly and unequivocally. In this condition then RKUHAP tries to reset the tapping authority.

## **V. The rule of Wiretapping Law in the Draft of Indonesian Criminal Procedure Law (RKUHAP)**

Viewing the wiretapping regulations, then the relevant comparison of the

issue of the regulation can not be separated from the Constitutional Court Decision Number 5/PUU-VIII/2010 on judicial review of Law No. 11 Year 2008 on Information and Electronic Transactions against the 1945 Constitution. In such case, the Constitutional Court issued a decision, which later the consideration taken based on the expert opinions of Ifdhal Khasim and Fajrul Falaakh, which basically explains that the Constitutional Court mandates the wiretapping requirements that need to be seen in shaping the rules regarding the wiretapping mechanism, namely;

- (i) the official authority designated in the Act to grant wiretapping permission,
- (ii) the guarantee of a definitive period in wiretapping,
- (iii) restrictions on the handling of wiretapping material,
- (iv) restrictions regarding who can access wiretapping.

As well as the elements that must exist in the regulation of wiretapping, namely:

- (i) authority to perform, instruct or request wiretapping,
- (ii) the specific purpose of wiretapping,
- (iii) categories of legal subjects that are authorized to conduct wiretapping,
- (iv) permit from the superior or judge prior to conducting wiretapping,
- (v) procedures for wiretapping,
- (vi) supervision of wiretapping,
- (vii) use of wiretapping materials, and other things that are considered important, ie.
- (viii) complaint mechanism in the event of losses arising from third parties for the wiretapping action, as well as other arrangements in the form of sanctions of violations, and internal mechanisms to ensure Human Rights.

Indeed, after the ruling of the Constitutional Court which has the direct influence on the future wiretapping regulation, it is important to see whether the rules that will be or have been established by the government are in accordance with the principles of privacy protection including the consideration of the Constitutional Court decision related to the regulation of wiretapping mechanism which should be prepared in the form of the Act. Because RKUHAP constitutes the closest bill which contains wiretapping material. Then with its binding force as the Act, the inclusion of the wiretapping material in the Draft of Indonesian Criminal Procedure Law becomes one way to meet the order of the Constitutional Court Number 5/PUU-VIII/2010.



The procedures for wiretapping in RKUHAP are only regulated in Part Five regarding Wiretapping under Article 83 and 84, In principle RKUHAP prohibits the communication wiretapping of a person. The wiretapping action can only be justified if the communication is associated with a serious criminal offense or alleged to be the case of a serious criminal offense.<sup>23</sup>

The principle that wiretapping is basically a violation of human rights is a general principle that should be imprinted, therefore the wiretapping conducted in terms of law enforcement efforts should be viewed as the last resort. This first principle should be the main touchstone of wiretapping regulation. The same principle is actually already written in the Law No.11 of 2008 on Information and Electronic Transactions (ITE Law) which states that wiretapping is prohibited except in the interest of law enforcement.

In addition to the regulation that wiretapping is prohibited, there should be some basic wiretapping principles that need to be included in RKUHAP, namely; (a) Conducted only for offenses that can not be disclosed if wiretapping is not done, (b) The process of wiretapping on a conversation with the involvement of other parties who is not an object of the wiretapping, as well as wiretapping on the conversation material which is not the object of the investigation should be minimized, and (c) the wiretapping materials are confidential and limited. Can only be used in the proceedings with minimal usage.

The principle that *“Conducted only for offense that can not be disclosed if wiretapping is not done”*, is the embodiment of understanding that wiretapping as part of forceful measures is the last resort of an effort of case demolition, in addition to minimize the potential of human rights violations, it is also to encourage professionalism of investigators to work more effectively. The principles of letter (b) and (c) are a manifestation of the principle of the minimum procedures that must be upheld in RKUHAP. The Minimal procedure guarantees the right of suspects/defendants or other parties whom directly involved in the wiretapping conversations, this guarantee starts from the protection of human rights.

The Minimum Procedures is one instrument that can not be discharged in the regulation of wiretapping, as a comparison, in the United States, the principle of *“minimizing wiretapping to a subject that does not need to be tapped,”*<sup>24</sup> or *“not related to the case or communication with other subject that is not a target”*<sup>25</sup> becomes

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<sup>23</sup> See Article 83 paragraph (1) of the Draft of Indonesian Criminal Procedure Law

<sup>24</sup> Kerr, Donald M. Congressional Statement presented before the Committee on the Judiciary Subcommittee on the Constitution, 2000, the United States House of Representatives: <http://www.house.gov/> and Article 2518 paragraph (5) book III USC.

<sup>25</sup> *Ibid.*

a crucial issue for the judge to grant a permission to the applicant wiretapping investigator. Without the belief that the provider of telecommunications services or the authorized investigator conducting the tapping will comply with this procedure, the tapping permit will not be issued by the judge.

**a. The limited scope of wiretapping**

In RKUHAP, the scope of wiretapping is limited to tapping conversations through telephone or telecommunications equipment. So tapping in RKUHAP is only the tapping of communications that is generally called “wire communication” and Electronic Communication. Thus communications via “wire” telephone cable or electronic communication device like mobile phones, fax, two-way radio. And yet include the wiretapping of oral communications or generally called “oral communication”.<sup>26</sup>

**b. Wiretapping on particular crimes**

In particular, RKUHAP gives the classification of the type of crimes for which wiretaps can be conducted. At least 20 types of offenses categorized as serious criminal offenses, in which wiretapping is legally used, namely: *a. crimes against the security of the state; b. deprivation of liberty/Abduction; c. theft with violence; d. extortion; e. threatening; f. human trafficking; g. smuggling; h. corruption; i. money laundering; j. counterfeiting; k. immigration matters; l. about explosives and firearms; m. terrorism; n. gross violations of human rights; o. psychotropic and narcotics; p. rape; q. murder; r. mining without permit; s. fishing in the waters without permit; and t. illegal logging.*<sup>27</sup> The important thing that needs to be remembered that the lawful wiretapping regulated in RKUHAP only with regard to law enforcement alone, the efforts of foreign intelligence and espionage does not need to be regulated.

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<sup>26</sup> See Emily Miskel, *Illegal Evidence, wiretapping, hacking and data Interception laws State Bar of Texas , SEX, DRUGS & SURVEILLANCE, 2014* stated “... Wire Communication. “Wire communication” means “any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection... .”...“wire” communication must be “aural,” or spoken by a human. It must also be transmitted at least in part by a wire. Wire communications are protected against interception regardless of the speaker’s expectation of privacy Electronic Communication. “Electronic communication” means “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system...but does not include any wire or oral communication....” Oral Communication. “Oral communication” means “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication.” Typically, oral communications include face-to-face communications where the participants have a reasonable expectation of noninterception. The statute requires a court to determine whether a person had a subjective expectation that her conversations were free from interception, and whether that expectation was objectively reasonable. It is not a violation to record oral communications where there is no reasonable expectation of privacy.

<sup>27</sup> See Article 83 paragraph (2) of RKUHAP

The designation of specific offenses basically is appropriate to ensure legal certainty, but the election of criminal offense is also a matter that must be considered so not to let wiretapping become a sale item for all types of crime. For example in the concept of wiretapping in the US, wiretap by court order can only be issued to investigate a serious crime. The crimes in question is murder, kidnapping robbery, extortion, bribery, child abuse, narcotics, crimes against national security, and any crimes of which the penalty is death or imprisonment for over one year.<sup>28</sup>

Meanwhile in Australia, wiretapping can be done for investigating “Class 1” and “Class 2” crimes. “Class 1” crime such as murder, kidnapping, narcotics, and terrorism, as well as including assistance, inclusion, and conspiracy and other “Class 1” crimes as stipulated in Article 5 (1) of TIA Act. For the “Class 2” crimes such as crimes involving the loss of life of others, torture, serious arson, drug trafficking, fraud, bribery, corruption, money laundering, cyber crimes, and other crimes of which the penalty is death or 7 years in prison, and other offenses stipulated in the article 5D of TIA Act.

However, it should be noted whether the grouping of the offenses can be adjusted with the overall rules of criminal offenses that currently exist, both stipulated in the Criminal Code and spread outside the Criminal Code, because Indonesia is not familiar with the kind of serious crimes, as in RKUHAP, or serious offenses, the most severe, mild by default. Therefore the category of criminal offenses that may be the basis for tapping should be reviewed to include other types of crimes that are considered types of serious crimes.

The principle of wiretapping does not depend on the type of crime alone, but if there are special circumstances where commonly used efforts or methods of investigation are powerless, so without doing the wiretapping the case settlement would be doomed to fail. So that the basis other than the “type of crime” is the “special situation”. And these are not reflected in RKUHAP.

### c. **Official authority issuing the wiretapping permits**

Another fundamental thing to be regulated in RKUHAP is the official authority appointed by the Constitution to authorize wiretapping. The new provision is regulated under Article 83 paragraph (3) RKUHAP reads “*Wiretapping referred to in paragraph (1) may only be made by the investigator on the written order of the local investigator’s superior after obtaining permit from the Preliminary Examination*

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<sup>28</sup> Article 2516 paragraph (1) letter (a) - (r) III book USC. See also *The History and Law of Wiretapping*, ABA Section of Litigation 2012 Section Annual Conference April 18 to 20, 2012: The Lessons of the Raj Rajaratnam Trial: Be Careful Who’s Listening

*Judge*". This article is a regulation which introduces a new mechanism of authorization and supervision of wiretapping by the judicial body within the scope of Preliminary Examination Judge (HPP). As the permit issuer, the HPP directly takes over the supervision related to wiretapping procedure from the outset.

So far, the criminal justice system in Indonesia has not been regulating the Grand Design supervision regarding wiretapping authority owned by the state apparatus. Of the various rules governing wiretapping in Indonesia, none provide concept related to wiretapping supervision. Indonesia indeed does not regulate authorization of wiretapping from one source, although some legislations refer to authorization from the court. On the other hand, there is legislation that does not give authority to the court, hence as a result, there is no clear concept of supervision.

Comparing to another country, United Kingdom for instance, has been implementing layered supervision in wiretapping mechanism and procedure, where supervision is applied starting from supervision by the Judicial institution to direct complaint by the public.<sup>29</sup> Supervision by Judiciary is done by The Interception of Communications Commissioner who is responsible for reviewing the role of Domestic Minister in wiretapping order, the mechanism for obtaining data and in ensuring that the wiretapping materials are properly handled. This institution has the authority directly derived from the Regulation of Investigatory Powers Act 2000 (RIPA) a specific legislation which became the basis of wiretapping regulation in the United Kingdom. The UK also has a tribunal which is called the Investigatory Powers Tribunal (the Tribunal) established under RIPA. This court has the power to hear and determine complaints and justice, provide compensation, cancel warrant and consent letter, and execute cessation of wiretapping materials.

And what about wiretapping in countries that also use the authorization mechanism by the judge? Wiretapping in the United States relies on the judicial body as the monitoring center of wiretapping process, each wiretapping process must be reported to the Administrative Department of United States Court within 30 days after the expiration of wiretapping permit or refusal from a court order or at the expiration of a time extension application, the judge issuing or rejecting

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<sup>29</sup> Thomas Wong, ... Op.Cit page 10-13

the request of wiretapping must make a report to the court administration.<sup>30</sup> In addition to reporting by the competent judge, in January every year, the Public Prosecutor of the wiretapping-petitioned case, must also report to the administration office in the previous year.<sup>31</sup>

Furthermore, the Attorney General must also submit annual reports to the parliament, though more on the intelligence issues, the Parliament set up two committees responsible for ensuring that intelligent resources are not misused and intelligence activities are legally conducted.<sup>32</sup> This is done solely in ensuring implementation of the most important principle of wiretapping namely wiretapping is only used in law enforcement effort.

The most important thing in the supervision scheme is that it should guarantee the privacy rights and of course the overall control in the viewpoint of law enforcement to strengthen the validity and strength of wiretapping evidence in the criminal justice system. Wiretapping authorization must put emphasis on wiretapping supervision scheme, hence in this case the authorization issue does not lie absolutely on the Preliminary Examination Judge, the Court issue will then focus more on the validity of evidence which is indeed under the court's authority. The point is there must be wiretapping mechanism supervision, there should be institution that is able to supervise and there should be institution that can be held accountable in case of unlawful wiretapping.

#### d. Wiretapping Procedure

In terms of permits, RKUHAP tries to briefly describe wiretapping permit application process conducted by investigators and prosecutors. Wiretapping in the Draft of Indonesian Criminal Procedure Law requires permission from the Preliminary Examination Judge with the condition that the Investigator together with the Public Prosecutor submit a written application stating reasons for

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<sup>30</sup> Article 2519 (1) book III USC, for comparison see also Micah Sherr†, Eric Cronin, Sandy Clark‡, and Matt Blaze Signaling vulnerabilities in wiretapping systems, University of Pennsylvania, 2005 page 2 stated : "The first category, called a Dialed Number Recorder (DNR) or Pen Register, records the digits dialed and other outgoing signaling information, but not the call's audio. DNR taps, which provide "traffic analysis" information but not the call contents or speaker identity, must pass only relatively modest judicial scrutiny to be authorized. A related investigative technique, called a "trap and trace," provides analogous information about incoming calls. The second category, the Full Audio Interception (sometimes called a Title III or FISA wiretap depending on its legal context), records not only the dialed digits and signaling but also the actual call contents. Legal authorization for full audio interception taps entails a higher standard of proof and greater judicial scrutiny. These taps are also more expensive (and labor intensive) for the law enforcement agency than DNR taps because they generally require continuous real time monitoring by investigators"

<sup>31</sup> Article 2519 (2) book III USC

<sup>32</sup> Can be accessed through <http://intelligence.house.gov/AboutTheCommittee.aspx> and <http://intelligence.senate.gov/juris.htm>

conducting wiretapping to the Preliminary Examination Judge.<sup>33</sup> After obtaining permission, the Investigators' supervisor issued a Wiretapping warrant.<sup>34</sup> In detail, the paragraph reads as follows;

Article 83 paragraph (3) of RKUHAP

*"Wiretapping referred to in paragraph (1) may only be made by the investigator on the written order of local investigator' superior after obtaining a permit from the Preliminary Examining Judge."*

Article 83 paragraph (4) of RKUHAP;

*"The public prosecutor comes before the Preliminary Examination Judge along with investigator and submit a written request to the Preliminary Examination Judge to conduct wiretapping, by attaching a written statement fom the investigator regarding reasons for the wiretapping"*

In RKUHAP, "Wiretapping ... can only be done by the investigator ... after obtaining a permit from the Preliminary Examination Judge". Being a new task of HPP in determining the criteria whether a wiretapping request can be granted, at least HPP can stand on the basic principles that must be met under any circumstances. Still associated with the formulation above, in RKUHAP the investigator in forceful measure wiretapping is not expressly designated , why is this necessary? Given the fact that the regulation related to wiretapping is spread in 18 rules in Indonesia, it is necessary to carry out unification in the attempt to curb wiretapping regulation in Indonesia, hence as the legal protection the investigator given the authority to tap should have been explicitly mentioned.

In the UK for instance, the application for wiretapping may only be submitted by investigation institutions / investigators such as the police, customs agency as well as security agencies and the state intelligence services such as the Security Service (Security Service (MI5)), the State Intelligence Agency (Secret Intelligence Service (MI6)), the State Communications Headquarters (Government Communications Headquarters (GCHQ)), National Criminal Intelligence Service (NCIS), and the Defense Intelligence Agency (Defence Intelligence Staff (DIS)).<sup>35</sup> With this designation, the purpose and intention of wiretapping can be clearly carried out without causing any conflict of interests among the state institutions, because wiretapping for criminal law enforcement is different from wiretapping for State security interest.

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<sup>33</sup> Refer to Article 83 paragraph (4) of RKUHAP

<sup>34</sup> Refer to Article 83 paragraph (3) of RKUHAP

<sup>35</sup> Thomas Wong... Op. Cit

Closely related to the regulation of Article 83 paragraph (3) and (4), Article 83 paragraph (5) of RKUHAP contains a mechanism that must be considered, Article 83 paragraph (5) of RKUHP is formulated as follows:

*“Preliminary Examination Judge issued a permission to conduct wiretapping after examining the written application referred to in paragraph (4).”*

Things to consider in the formulation is that the Draft of Indonesian Criminal Procedure Law does not provide explanation regarding the contents of the request in detail, whereas, a request is an initial gate in determining wiretapping permit.

The United States has strict regulation related to this mechanism, Each application request must be made in writing by oath or pledge before the judge.<sup>36</sup> Or, if necessary, can be equipped with judge's statement or evidence and other documents supporting the application letter. As comparative information, the application must contain<sup>37</sup> : (a) identity of the investigator making the request and the

officer having the request authority , (b) convincing facts and circumstances for the order to be issued. The fact in question must include the details of offense which has been, is being or will soon be conducted; description of the nature/ circumstances and location of the facility or where such communication will be tapped and type of communication that will be in the wiretapping, and the identity conducting offenses who should be tapped. (c) a notice that other investigative procedures have been attempted and failed or if it is believed that other methods will not succeed if tried and are too dangerous. (d) the time or period of wiretapping (e) and must contain all the information from the previous application.

The strict regulation does not merely stop at procedural issues which are already very detailed, in addition, the applicant must also be able to explain and demonstrate things that could convince the court that the target is committing, has or will commit a particular offense regulated in applicable law and it is reinforced by the possibility that there will be special communication regarding the crime that would be obtained from wiretapping it, as well as the facility that will be used by the target is the communication connections commonly used by the target.

In the wiretapping permit mechanism, HPP may refuse to grant permission to

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<sup>36</sup> Article 25 18 Book III USC.

<sup>37</sup> Ibid.

conduct wiretapping,<sup>38</sup> this provision is stipulated in Article 83 paragraph (7) of RKUHAP, which reads:

*“In the case of Preliminary Examination Judge grants or refuses to grant wiretapping permit, the Preliminary Examination Judge must state the grounds for granting or refusal of the permit.”*

The regulation is closely related to the regulation of Article 83 paragraph (8) of RKUHAP, which reads:

*“Implementation of wiretapping as referred to in paragraph (6) must be reported to the investigator’s superior and Preliminary Examination Judge.”*

So far this wiretapping permit is one of the highlighted instruments. The pros and cons of Preliminary Examination Judge as the sole issuer of wiretapping permit are **firstly** due to the potentially adding new bureaucracy in wiretapping, indeed when reviewing RKUHAP, there are two layered authorizations, that are *on written order* of the local investigator’s superior, *after obtaining a permit from the Preliminary Examination Judge*. Hence first there must be the judge permit and then the superior’s order.

With the mechanism of administrative and bureaucratic practices, such formulation requires quite long procedure, RKUHAP should provide the most appropriate, fast and confidential manner that can be accounted for in terms of wiretapping permit procedure.

**Secondly**, the potential for leakage of information that may threaten the main purpose of wiretapping. One of the most important things in wiretapping is that its operation must be confidential, if it is not then the wiretapping would not result in a significant material for the judicial process. This should also be improved in RKUHAP.

To demonstrate the transparency of wiretapping process, it must be closely linked to its monitoring mechanism. Provisions regarding regular reporting are commonly used in many countries. With this provision, the public could directly see how many wiretapping applications are submitted, rejected and granted in some of the countries concerned. All of these rules can be traced easily in the documents provided by the state, the United States provides a wiretap annual reports by the Administrative Office of the US Courts, Australia can be found on the Interception Act annual reports by the Australian Government Attorney-General’s Department and the United Kingdom in the annual reports by the Interception of Communications Commissioner of the UK.<sup>39</sup> In addition to ensure

<sup>38</sup> Refer to Article 83 paragraph (7) of RKUHAP

<sup>39</sup> Thomas Wong, .. Op. Cit.



the transparency of the process of wiretapping, Report from the Judge or permit authorization agency is a preventive form of the possibility of corruption or leaking of information related to wiretapping, Unfortunately RKUHAP does not specify the period of reporting and the transparency of mechanism to the public, hence as long as as the access to transparency and wiretapping process supervision are closed, then the potential of wiretapping in threatening the privacy rights of citizens will remain large and it is worsened by the very minimum concept of supervision.

#### **e. Period of wiretapping**

RKUHAP also governs the period of wiretapping, the wiretapping permit is granted for a maximum period of 30 (thirty) days and can be extended 1 (one) time for a maximum period of 30 (thirty) days.<sup>40</sup> This regulation is an improvement compared to some rules in Indonesia which do not express specific wiretapping period, some gives 3 months, 6 months up to 1 year and some laws even do not specify the limitation of wiretapping period.

The period of wiretapping is closely related with the application of minimal procedure as one of the principles in wiretapping. In some countries like the United States, basically the court order must aim to “minimize wiretapping”, which means wiretapping should not be continued for a period longer than determined by the court for the benefit of the applicant and in any case over a period of 30 days.<sup>41</sup> By the rules, extension of wiretapping period can be done, but the time given is not more than 30 days and should terminate when the purpose of wiretapping has been achieved. It is necessary to clarify that the 30-day period is a maximum time of conducting wiretapping as long as the purpose of wiretapping has not been achieved, in the sense that if the purpose of wiretapping are met, then the wiretapping must be terminated.

#### **f. Wiretapping in urgent circumstances**

RKUHAP also governs wiretapping without first applying for a permit to the HPP, this mechanism is called the “wiretapping in urgent circumstances”. Investigator could conduct the wiretapping beforehand but with an obligation to inform the wiretapping to Preliminary Examination Judge through the public prosecutor.<sup>42</sup>

RKUHAP itself defines the urgency in 3 categories that can be found in Article 83 paragraph (2) of the Draft of Indonesian Criminal Procedure Law, namely:

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<sup>40</sup> Refer to Article 83 paragraph (6) of RKUHAP

<sup>41</sup> Article 2518 paragraph (5) USC

<sup>42</sup> Refer to Article 84 paragraph (1) of RKUHAP

- “ Urgent circumstances referred to in paragraph (1) shall include:*
- a. danger of death or urgent serious bodily injury threat;*
  - b. conspiracy to commit offenses against the security of the state; and/*  
*or*
  - c. conspiracy which is the characteristic of organized offenses.”*

Conceptually, wiretapping is the last resort in the attempt to disclose a case, meaning that there is an event of criminal law which consequences are predictable but its disclosure is difficult to be executed. For that precise reason wiretapping is conducted as the ultimate effort, if it deems investigation is hindered because of lack of evidence to reveal a case.

Wiretapping in urgent circumstances as stated in RKUHAP gives authority to the tapper without first asking permission from HPP. This regulation is formed to anticipate if in “certain conditions” evidence of a crime will be lost or momentum to get the evidence will be lost if wiretapping is not done. In general it can be seen that the requirements of wiretapping in urgent circumstances stated in RKUHAP is fairly identical to the regulation of wiretapping in urgent circumstances in the United States.<sup>43</sup> But the imitation is done by RKUHAP without regulating in detail the requirement, supervision and implication towards the validity of evidence in urgent wiretapping condition.

In practical terms the urgent wiretapping is as actually a solution to cut through the red tape related to wiretapping permit procedures by HPP which is considered cumbersome by some parties. But if the regulation related to the wiretapping in urgent circumstances is only simply described as in RKUHAP, then it needs to be improved, particularly in terms of requirement and mechanism as well as procedure which have not been fully elaborated.

#### **g. Wiretapping materials as evidence**

As part of the forceful measures, wiretapping is intended to strengthen the verification in the courtroom, hence the wiretapping materials used as part of the evidence in the courtroom must also meet the conditions stipulated by the applicable procedural law.

Based on Article 31 paragraph (1) of the ITE Act, “interception or wiretapping” is the activity to listen, record, divert, alter, inhibit, and/or record the transmission of electronic information and/or electronic documents that is not public in nature, either using communication cable network or wireless network, such as the

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<sup>43</sup> Schott, Richard G. (2003) Warrantless Interception of Communications: When, Where, and Why It Can be Done. : <http://www.fbi.gov/publications/leb/2003/jan2003/jan03leb.htm/> and article 2518 paragraph (7) letter (b).

<sup>44</sup> Refer to Article 1 number 1 of the ITE Act

<sup>45</sup> Refer to Article 1 number 4 of the ITE Act

electromagnetic emission or radio frequency. While the definition of electronic information is *one or a set of electronic data, including but not limited to text, sound, pictures, maps, plans, photographs, electronic data interchange (EDI), electronic mail, telegram, telex, telecopy or the like, letters, signs, numbers, access codes, symbols or perforation that have been processed which has meaning or can be comprehended by people who are able to understand it.*<sup>44</sup>

Electronic Document is *any electronic information created, forwarded, sent, received, or stored in the form of analog, digital, electromagnetic, optical, or the like, which can be viewed, displayed, and/or heard via Computers or Electronic Systems, including but not limited to text, sound, pictures, maps, plans, photographs or the like, letters, signs, numbers, access codes, symbols or perforation that have meaning or significance or can be comprehended by people who are able to understand it.*<sup>45</sup>

The wiretapping materials may take the form of electronic information and/or electronic document, although the definition of both are interrelated and inseparable. Referring to Article 5, paragraph (1) of the ITE Act, which expressly states that Electronic Information and/or Electronic Document and/or its printouts are valid legal evidence. Article 5, paragraph (1) of the ITE Act becomes a basic understanding that the wiretapping is valid legal evidence, such provision is reinforced in Article 5, paragraph (2) of the ITE Act stipulating that the Electronic Information and/or Electronic Document and/or its printouts are the extension of legal evidence constituted under the applicable procedural law in Indonesia.

The extension of legal evidence constituted under the applicable procedural law in Indonesia as stipulated in Article 5, paragraph (2) of the ITE Act can be interpreted as adding evidence that has been regulated in the criminal procedural law in Indonesia and or broaden the scope of evidence that has been regulated in the criminal procedural law in Indonesia, for example in the Indonesian Criminal Procedure Law.<sup>46</sup> However, systematically, the ITE Act gives requirements that in order for Information and Electronic Document can be used as legal evidence, meaning it can stand alone as an additional evidence as regulated by Article 184 paragraph (1) of the Indonesian Criminal Procedure Law, formally regulated in the Article 5 paragraph (4) of the ITE Act, namely that information or Electronic Document is not a document or letter that according to the law must be in written form. And materially, the authenticity, integrity, and availability of Information and Electronic Document must be guaranteed, which can be viewed in Article 6,

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<sup>44</sup> Refer to Article 1 number 1 of the ITE Act

<sup>45</sup> Refer to Article 1 number 4 of the ITE Act

<sup>46</sup> Refer to Josua Sitompul, *Cyberspace, Cybercrimes, Cyberlaw : Tinjauan Aspek Hukum Pidana*, Tatanusa, 2012, Jakarta.

Article 15 and Article 16 of ITE Act.<sup>47</sup>

Adopting the viewpoint that the Electronic Information and/or Electronic Document are the extension of legal evidence constituted under the applicable procedural law in Indonesia implies broadening the scope of the evidence that has been regulated in the criminal procedural law in Indonesia, hence the position of the wiretapping as Electronic Information and/or Electronic Document must refer to the existing regulation in the Indonesian Criminal Procedure Law.

Pursuant to Article 184 paragraph (1) of the Indonesian Criminal Procedure Law legal evidence is: witness testimony, expert testimony, letters, instructions and information from the defendant. In the verification system of criminal procedure law in Indonesia that embraces Verification System According to the Law On the Negative, only evidence authorized by law that can be used for verification.<sup>48</sup> This means the wiretapping materials as the Electronic Information and/or Electronic Document must be attached to one of legal evidence in the Indonesian Criminal Procedure Law. The wiretapping material could become evidence if it is attached with the Expert Testimony which guarantees the validity of the wiretapping materials, or in the form of a letter issued by agencies, officials or institutions having the authority to guarantee the validity of the wiretapping materials as the Electronic Information and/or Electronic Document.

In RKUHAP, there is other evidence in addition to the one currently regulated in the Indonesian Criminal Procedure Law, namely electronic evidence and evidence.<sup>49</sup> Problems arise when RKUHAP includes both types of evidences however is still using the continental European verification system, because instrument evidence included as evidence is generally recognized in the verification system of common law system, where Real evidence is the most valuable evidence. Under Article 178 of RKUHAP, electronic evidence is all evidences of offenses done using electronic means. Based on this the electronic evidence is actually a part of the evidence, however its form is different from conventional evidence. Mixing the offense verification concept with fault element verification will result in unclear concept of evidence and electronic evidence as the evidence.<sup>50</sup>

In the presence of electronic evidence as evidence, then the wiretapping materials can certainly become evidence that can stand alone in the court, no

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<sup>47</sup> Ibid.

<sup>48</sup> Refer to Martiman Prodjohamidjojo, *Sistem Pembuktian dan Alat-alat Bukti*, Ghalia Indonesia, 1983, Jakarta. page. 19

<sup>49</sup> Refer to Article 175 of RKUHAP

<sup>50</sup> Refer to Comments of the Indonesian Criminal Procedure Law Committee on RKUHAP in DIM of RKUHAP civil society version

longer as an evidence which function only to support the real evidence so that it must be attached to the real evidence itself. Based on the norms contained in the ITE Act, then the wiretapping materials must pass through material requirements also stipulated in the ITE Act, the electronic system operator is the institution most responsible for securing material requirements of Electronic Information and Document as valid legal evidence.

Problems arise when the ITE Act provides so extensive coverage on the subject who can do the wiretapping/Electronic System Operator who is also responsible for the wiretapping materials. The ITE Act only gives the definition of “Implementation of Electronic System” as the utilization of Electronic System by state officials, People, Enterprises, and/or community. This unclear responsibility holder for the wiretapping has direct impact on the differences in acquisition and accountability of wiretapping material obtained from third party such as provider and obtained directly from state agencies who are given wiretapping authority by the Act. This is the main problem of the validation of wiretapping material because institution who conduct wiretaps and is responsible for the wiretapping material is not regulated in detail, as a result the validity of evidence from the wiretapping material becomes a problem in itself.

Almost the same as ITE Act, RKUHAP does not completely regulate the validation mechanism of the interception. RKUHAP should ideally regulate validation which must ensure that the electronic information/document used is the data related to the alleged criminal offense being processed and not in a way that is against the law and ensure data to be shown in court as evidence is the same data that has been taken at investigation stage.<sup>51</sup> RKUHAP must be able to ensure that there is the same level of validity of evidence from the wiretapping, whether it is derived from the wiretapping method used by electronic system organizers or direct wiretapping method used by agencies authorized by the Act. This is the weakness of the regulation related to validation of evidence in the current Indonesian Criminal Procedure Law and RKUHAP.

#### **h. Complaint mechanism**

The most important thing which is not sufficiently regulated by RKUHAP is the complaint mechanism for those who want to test the wiretapping conducted by law enforcers. Wiretapping is a part of forceful measures in RKUHAP since in addition to being in the same chapter with other forceful measures such as arrest, detention and so forth, wiretapping is also the authority possessed by the law enforcement officers to assist the criminal justice process, as previously mentioned, then the use the wiretapping method has been inevitable.

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<sup>51</sup> Ibid

The legal consequence of the authority or power possessed by the law enforcers is the presence of mechanism of control, supervision and even complaint, since the greater the authority owned by the state, the greater the rights of citizens derogated. The need of a complaint mechanism from the state authority is clearly illustrated with the presence of pretrial mechanism in the current Indonesian Criminal Procedure Law, pretrial presents as part of strengthening of human rights awareness in the Indonesian Criminal Procedure Law, especially protection of the rights of the suspect/defendant. Pretrial presents as a form of control over the arrest and detention, because the assumption is, in addition to arrest and detention, other forceful measures have obtained permission from the Judge.<sup>52</sup>

In its development, this is the primary problem, since other forceful measures such as confiscation, searches and letter inspection has no complaint mechanism and control over possible violation in such forceful measures.<sup>53</sup> Until now, the problem of forceful measures which are untouched by the hand of law is exacerbated by the presence of another form of forceful measure, namely wiretapping. For the record, with its own level of complexity, control of wiretapping has different characteristics with other forceful measures, in particular that can be tested with pretrial mechanisms.

Wiretapping is done basically by methods which majority use is not known by the the targeted wiretapping subject. Typical characteristic of wiretapping is confidentiality, so the person who is being tapped does not know whether he is tapped or not, in contrast with other forceful measures, people who does not know whether he is tapped or not then automatically does not have the proposition to file a complaint, or in other words, the complaint can only be done if already known by the subject, and it can only happen if the whole judicial process has ended, or at least if the tapping is opened in the courtroom.

The availability of complaint mechanism like pretrial that is only found in the pretrial phase becomes serious obstacles, not to mention that explicitly pretrial is limited to govern arrest and detention for forceful measure complaints. This directly means that none of the institutions in the criminal justice system that is able to accommodate complaints against wiretapping authority.<sup>54</sup> If filing compensation or direct objection against wiretapping may be submitted during the proceedings, but this provision can only be the case if the applicant it is the defendant, which means filing compensation or objection directly against

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<sup>52</sup> Refer to Supriyadi W. Eddyono, dkk., *Praperadilan : Sejarah, Teori dan Praktik*, ICJR, Jakarta, 2013.

<sup>53</sup> Refer to Loebby loqman, *Praperadilan di Indonesia*, Ghalia Indonesia, Jakarta, 1987, page. 41.

<sup>54</sup> *Ibid.*

wiretapping can not be done by if the person who is the target of wiretapping is not the defendant, meaning that there is a violation of the rights of citizens neglected by the state.

Of such exposure, outline can be taken that for wiretapping forceful measures, there is no firm complaint mechanism. Similar to regulation in the Indonesian Criminal Procedure Law, RKUHAP also does not comprehensively regulate these issues, it's just that, in RKUHAP there is more stringent process of inspection and supervision of wiretapping authority because there is no judge permit requirement. With the permission of the judge then there is an official document that can be accessed at least to ascertain of any use of wiretaps forceful measures, and like other forceful measures, wiretapping dossier and history documents must be attached and opened in proceeding with the note that it would not jeopardize the criminal justice process.

**i. No regulation of post-wiretapping procedures in RKUHAP**

Although the global mention of wiretapping in RKUHAP deserves to be appreciated, but basically there are some other things which are precisely important that should also be regulated in RKUHAP, one of which is related to post-wiretapping procedure. Post-wiretapping procedure is very important taking into account that the essence wiretapping is its verification in the courtroom. Theoretically wiretapping is evidence of a forceful measure, a method of investigation, so the wiretapping can not stand alone as evidence in court. In the courtroom, for the verification requirements, based on RKUHAP, wiretapping may be presented in conjunction with documentary evidence, expert testimony evidence or observations of judges.

For these reasons, to unite the perspectives related to the interception in the criminal justice system it is necessary to add a regulation related to the wiretapping, namely, first, the wiretapping material is confidential and limited, that is the use of the wiretapping material can only be opened to the public during the proceedings with judges' determination, apart from the proceedings, the access to the wiretapping material is limited. Second, the use of wiretapping material by the investigator must be done professionally, proportionally; and relevant, which means the wiretapping material is used only for the purpose of investigation and verification in the courtroom, the use of wiretapping material must be in accordance with the scope of the offense used as a basis for the request to conduct wiretapping and usage of such information must be in relevancy with the offense used as a basis for the request to do conduct wiretapping. Last, RKUHAP should also regulate the editing, destruction and storage of wiretapping materials.

For instance in the United States, shortly after conducting wiretapping, the wiretapping material should be sealed under the court order and other than the court order to destroy, these records should be kept for 10 years.<sup>55</sup> The issue of handling wiretapping materials is very important, because all materials that are considered unrelated with investigation purposes are potential to violate human rights.

The important principle in Court judgment of European Human Rights in the case of the telephone-wiretapping in the case of *Klass vs Federal Republic of Germany* relating to notification that the wiretapping material is done without a comprehensive legislative framework, which is also important to include in the post-wiretap regulation.

In such case, the wiretapping must itself be completed or terminated when no longer needed, or if other methods indeed have been used. The law requires that the wiretapping should be stopped when this requirement has ended, and the **subject who is tapped to be notified as soon as possible without jeopardizing the purpose of wiretapping**. People who is tapped may test the wiretapping authority in an administrative court, claiming losses suffered because it has been tapped in a civilian court if the loss on the wiretapping is proven. In this case *Klass* argues that the wiretapping law violates Article 8 of the European Convention because the Act does not have a requirement that the subject of interception must be notified after the end of the wiretapping. The Court stated that it is not in accordance with Article 8 of the Convention, where the subject of wiretapping should be informed after the termination of surveillance carried out as soon as possible without jeopardizing the main objectives of wiretapping

## VI. Conclusion

Regulation of wiretapping in RKUHAP currently available is not sufficient to accommodate the mandate of the Constitutional Court's decision in Case Number 5/PUU-VIII/2010, which contains nine key issues that should be regulated in detail and firmly as well as other regulation that must be considered. Noting the potential of arbitrariness of the state and the threat of human rights violations as a result of the wiretapping, referring to the mandate given by the Constitutional Court then Wiretapping should be regulated better and more stringent.

In detail, the new Indonesian Criminal Procedure Law should regulate the forms of wiretapping, more broadly and is not fixated on wiretapping, but all forms of interception of information and communication, both in the form of

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<sup>55</sup> Article 2518 paragraph (8) letter (a) and (b) book III. USC.



recording, wiretapping and other technical interception generally and universally applicable.

Basically the Indonesian Criminal Procedure Law can contain regulation regarding wiretapping, but referring to the mandate of the Constitutional Court, thorough regulation in the Indonesian Criminal Procedure Law is difficult to be realized, so it would be more appropriate if the Indonesian Criminal Procedure Law focus more on regulating the principles, institutions that are given the authority to tap, permit and regulation regarding verification strength of the wiretapping materials. While the supervision of wiretapping is not possible to be adopted in the Indonesian Criminal Procedure Law, it is better in the law that specifically regulates wiretapping or anti-wiretapping law.

If the Indonesian Criminal Procedure Law as the basis of criminal procedural law in Indonesia has regulated the wiretapping principles, it would be more appropriate if the basic principles are further elaborated in the constitutional level that must contain the entire mandate decided by the Constitutional Court and other important regulations. The law is needed to ensure the achievement of wiretapping regulation in accordance with respect towards human rights and is subject to the Constitution of the Republic of Indonesia.

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# ***PRELIMINARY EXAMINATION JUDGE IN INDONESIAN JUSTICE SYSTEM DESIGN***

**Luhut M. P. Pangaribuan\***

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## **Abstract**

*The legislation process for the Draft of Indonesian Criminal Procedure Law (RKUHAP) currently being discussed by the Indonesian House of Representatives (DPR-RI) has created pros and cons, especially in relation to law enforcement authorities. Conceptually, the criminal justice system is related to power limitation because every use of power related to fundamental rights shall comply with the principles of judicial scrutiny.*

*This short essay will try to elaborate one part from RKUHAP, which is the Preliminary Examination Judge (HPP). In the previous RKUHAP, HPP was called "Commissioner Judge". HPP became very important realizing fair, impartial and objective Criminal Justice System to prevent power monopoly, interpretation and even arrogance. HPP can also prevent the possibility of corruptive behaviors of the law enforcement authorities who are in power. This essay will analyze and recommend how HPP in RKUHAP presents judicial scrutiny.*

**Keywords:** Preliminary Examination Judge (HPP), Pre Trial, Criminal Justice System, Principles of Judicial Scrutiny

## **A. Introduction.**

Nowadays the Indonesian Criminal Justice System is in the change process. This change is through a draft, i.e., the Draft of Indonesian Criminal Procedure Law (RKUHAP) which has been prepared by the government. This RKUHAP is expected to replace KUHAP that was signed into Law in 1981. This change happened very quickly in the midst of the community nowadays, especially in Information & Technology which bring consequences to various areas of life, including in criminal justice.

It is called Criminal Justice System (SPP) change because RKUHAP will not only replace the Law but also build a Criminal Justice System which is able to respond every existing justice system and at the same time can anticipate the

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\* Advocate

criminal procedure law in line with the future demands.

KUHAP is the Law to replace the colonial criminal procedure product, which is HIR. Aside from the issue of human rights, the issue of the law enforcement authorities systems became a hot issue during its design and discussion. This process then produced the concept followed by the existing KUHAP, which is the concept of apparatus "functional differentiation". This means that every law enforcement officers (investigator, prosecutor, and judge) is recognized to have their own function in accordance to their respective Laws, without coordination but rather through a "bridge", such a pre-prosecution, transition process between investigation and prosecution by the Attorney General Office (AGO) to connect them.

Lack of coordination in its implementation resulted in extra-legal forum such as (MAHKEJAPOL)<sup>1</sup>, a mix between executive and legislative. This forum became very important, even more important than KUHAP itself. This forum produced agreements on criminal offense handling. For example, unfinalized acquittal, even though Article 67 and 244 of KUHAP states that judicial review may be proposed by the prosecutor on matters of the rights of the "convict or their heir". During the reform era, this kind of form was ended and institutionalized. One of the most prominent institutionalization concepts today, such as the investigation unit and prosecutor in a commission like KPK, including its court. However, the court was taken out of the concept of "institution unity" based on the Constitutional Court because it was considered negating the judicial power independency. The concept of "institution unity" is applied based on the principle of *lex specialis legi generali*.

RKUHAP legislation process which is currently being discussed at the House of Representatives caused pros and cons, especially related to the KPK's authority. This kind of pros and cons are common, as it would occur for everything related to change. Moreover, conceptually, Criminal Justice System (SPP) is always related to limitation of power so that it will not be excessive. The limitation is applied with the purpose of having a balanced, objective, accountable and fair SPP that is not in monopoly. The existence of monopoly is very dangerous because it can be the source of demoralization of the personnel in the system. This kind of discourse was started in 1215 when Magna Charta Charter was signed in England. This charter was in line with the "agreement" between the ruling and the controlled, in a legal process to avoid violation of due process of right.

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<sup>1</sup> See Supreme Court Joint Decision, Justice Minister, Attorney General, and Kapolri No. 08/KMA/1984, No. M.02-KP.10.06 of 1984, No. KEP-076/J.A/3/1984, No. Pol KEP/04/III/1984 concerning Improvement of Coordination in Crime Case Handling (Mahkejapol)

If RKUHAP later on becomes Law, it is expected that eventually the norm inside of it which regulates SPP will be better than KUHAP in such a way that it will become the criminal justice system of Indonesia. As a state justice system whose basic concept was laid out in the Constitution of the Republic of Indonesia and the Law concerning the power of judge, this system will be truly for *pro-justitia* and/or *sans-prejudice* based on Pancasila as Indonesia's ideals and it can be eventually as a decision with the following *irah* "For Justice Based on One Almighty God" by court; not how to try and punish as severe as possible.

This new law will not facilitate the purpose of punishing every person brought before it with the most severe punishment where the orientation is solely about punishment and in literature, this model is called crime control model or administrative model. On the contrary, the new law is directed to fair, objective and accountable process in every law violation as the main goal and in literature, this model is called due process model. In other words, every use of power related to fundamental matters shall adhere to judicial scrutiny. A decision is not sufficient if it is based solely on discretionary such as the determination of status as suspect and or arrest/detention. The implementation is not sufficient if it is only through announcement, but it should rather be a court order where decency shall also be considered. The model through announcement will be potential to be the source of moral hazard from the law enforcement authorities because it provides the impression that they are the holy inquisition like in the medieval age.

This short essay will try to elaborate one part from RKUHAP that is the Preliminary Examination Judge (HPP). In the old concept of KUHAP, this preliminary examination judge was used to be called "commissioner judge". But due to loud controversy, then it was re-formulated and it is now called preliminary examiner judge. HPP in short is important in fair, impartial and objective SPP in order to prevent monopoly of power, interpretation and even arrogance. HPP can also prevent the possibility of corruptive behavior from law enforcement authorities who are in power.

Both commissioner judge and preliminary examination judge are developed to improve the function of pre-trial existing in KUHAP. Hence, Dr. Adnan Buyung Nasution once proposed to maintain the term pre-trial but accompanied with improvement in substance, mechanism, and procedure of the pre-trial. The term commissioner judge indeed can connote old because it was practiced way in the past, especially in continental Europe such as France and Dutch.

Regardless the controversy of the term, in reality pre-trial institution existing in KUHAP has failed to control the implementation of forced effort. As known,

the determination of forced effort is done easily towards a person's status as a suspect and then followed by arrest and detention. I think this failure is due to: first the view towards the pre-trial institution itself. Second, there is no effective mechanism to control excessive forced effort, especially in the preliminary examination stage (pre-adjudication) or investigation process because the basis to determine the status of a person as a suspect is due to "the existence of initial evidence" and "sufficient evidence" to arrest is not transparent nor accountable, but rather based on internal process and discretionary. On this stage, it should also follow due process of law. Unfortunately, the implementation is oftentimes only through announcement in the media, without any information about how the process goes and it has never been audited. This is why in RKUHAP, HPP is designed to be authorized to control the implementation of forced effort.

## **B. Pre-trial**

Prior to discussing Preliminary Examination Judge, the writer will first elaborate in more detail about pre-trial which has been considered failed in its mission. KUHAP regulates that pre-trial is authorized to examine: (i) the validity of the arrest, detention, termination of investigation, or termination of prosecution; (ii) compensation and/or rehabilitation for a person whose criminal case is terminated at the investigation or prosecution level. Pre-trial is the authority of the district court prior to examining the principal case. If the principal case has been examined, then the authority is no longer there. In practice, the examination is submitted to the judge assigned for that on a certain period in each district court called "pre-trial judge". The term "pre-trial judge" is officially not stated in KUHAP unlike Preliminary Examination Judge in RKUHAP. It is rather a judge assigned to examine the case requested by the pre-trial in that district court.

When the pre-trial institution surfaced, it was initially welcomed with euphoria and considered as masterpiece because it was suspected to be the equivalent of habeas corpus, as laid out in Magna Charta charter. Pre-trial function is expected to be the "horizontal supervision" in forced effort implementation but the authority is still post factum. More than that, the institution and its mechanism are not really habeas corpus, so implementation was disappointing. In fact, pre-trial institution does not function as horizontal supervision between law enforcement authorities, especially from the perspective of a person facing forced effort. In practice, the justification for what has been done by let's say an investigator is not able to be controlled by the judge in the pre-trial examination. The judge is vulnerable to the power of investigator such as a big police, even though theoretically the judge is independent.



As mentioned above, this concept of forced effort itself such as arrest and detention is determined only through discretionary. The existing requirements such as objective, juridical, subjective, and necessity requirements in arrest for example are merely pro-forma. The clause stating "the existence of concerning situation" from the investigator regulated as requirement in KUHAP is part of the stipulation and cannot be tested without pre-trial judge. Indeed, this is where the problem lies because the clause exists but it cannot be tested whether it has been met or not.

Hence, based on evaluation from the experience in pre-trial, there is a need to improve the SPP. The research carried out by the State Legal Commission (*Penelitian Komisi Hukum Negara*) (KHN)<sup>2</sup> concluded that, "in relations to integrated criminal justice system, KUHAP needs to be revised, especially related to the mechanism of mutual control such as the authority of a commissioner judge existing in RKUHAP which was changed into preliminary examination judge. Then the research also concludes that, "Pre-trial as a control effort needs to be expanded in terms of scope, for example, towards an indication that there is an effort to buy time in a completion of a case, then pre-trial can be proposed". Additionally, it is also recorded that historically, pre-trial institution in the draft was intended as habeas corpus that is related to human rights. In the process of KUHAP enactment, pre-trial from the concept of habeas corpus shifted towards more administrative matters. This means that if there is a decision letter and notification from investigator, then it is almost automatic that the implementation of forced effort is considered valid.

In addition to forced effort, the implication from the system mechanism which does not run smoothly in KUHAP is investigator who is "reluctant" to accept "profitable statements" to be included in the police investigation report, which is the rights of the suspect.<sup>3</sup> If the police investigator define matters that are not regulated in KUHAP such as what is actually "sufficient initial evidence"?<sup>4</sup> but not with the what and the how on the "profitable statement"? As part of the police investigation report. Probably the clause of "sufficient initial evidence" becomes the basis for the investigator to arrest and detain a person, so it is very

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<sup>2</sup> KHN, *Uncovering KHN's Mission and Its Performance, A Reflection on 6 years of KHN of the Republic of Indonesia*, Jakarta 2006, page 37

<sup>3</sup> Even LPK Investigator in practice interpretes that the defendant's right for "profitable information" is allowed in front of judge, hence they reject it at investigation level.

<sup>4</sup> Kapolri Decision Letter No Pol: Skep/1205/IX/2000 concerning Revision on Compilation of Crime Investigation Implementation Guidelines and Technical Guidelines dated September 11, 2000.

necessary. "Profitable statement" is to abolish suspicion, so it is avoided. In practice, due to the absence of rules in KUHAP – let alone the sanction – then it becomes a reason for the investigator to not include "profitable statement" in the police investigation report. The "best" thing the investigator can do is to suggest conveying the "profitable statement" in case examination in the court. This is why it becomes relevant if it can be included in the authorities of the Preliminary Examination Judge.

Investigators in crime case examination can do arrest. Even though lately some interpret this similar to KPK where every suspect "shall" be detained. So the work "can" is changed to "shall" be detained. In the evaluation of arrest at the investigation level by KHN, it was concluded that the existence of facts of arrest as follows:

The authority of the investigator to arrest or not arrest a suspect is sometimes not used with consideration for the interest of case examination and in line with what was required by KUHAP that is feared to escape, eliminate the evidence, repeat criminal acts. This use of authority is sometimes used by the investigator to obtain rewards from the suspect/family. The position of suspect/family in this case becomes the party who really needs "help" from the investigator and the investigator become the only "rescuing god", so it is very possible a transaction occurs. For most of suspects, arrest is sometimes related to the image in the surrounding, someone who has been arrested is as if stigmatized by the community as a guilty person, so with various ways the suspect and/or family will try to not be arrested, in this kind of condition, the investigator sometimes take advantage by asking for certain rewards for not doing the arrest.<sup>5</sup>

Then why is arrest by investigator is done as elaborated above? The research indicated several factors, one of them is "Enactment of Law (KUHAP and Technical Regulations on Investigation and Prosecution)."

KUHAP or its Implementation Rules are considered by many as giving too many "discretionary" authorities to law enforcement personnel. The use of such authority is very dependent on subjective assessment of the law enforcement personnel, coupled with stipulations which provides rooms for interpretations. In the end, it seems that law enforcement personnel are legitimate to interpret the stipulations of KUHAP, other interpretations are considered "discourse" which only applies in college, not in practice.

The potential for misuse of authority also exists in the stipulations of KUHAP regarding "sufficient initial evidence", KUHAP never

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<sup>5</sup> KHN, *Misuse of Authority in Investigation by Police and Prosecution by Prosecutor in the Criminal Justice Process*, Research Executive Summary, Research Report, Jakarta 2007: 6

explains adequately about the definition and limitation of sufficient initial evidence. The explanation on Article 17 of KUHAP says that "sufficient initial evidence" is initial evidence to suspect that there is a crime as stated in Article 1 paragraph 14. This article shows that the order to arrest cannot be carried out indiscriminately, but it is aimed at those who have actually committed a crime ... The unclarity regarding "sufficient initial evidence" eventually is interpreted by the law enforcement personnel and this can cause legal uncertainty, and additionally, it will affect the work method of the investigator who still holds on to past practices, that is arresting first, proving later. KUHAP should reverse this procedure into careful investigation with scientific crime detection.<sup>6</sup>

Based on this research, KHN suggests "considering the high level of complaints regarding issues in arrest, the judge's authorities need to be reviewed in terms of forced effort. The judge should have more roles in determining the need for arrest, ... and not just determining the validity of arrest in pre-trial process".<sup>7</sup>

In SPP, the judge indeed becomes the knot when it comes to certain action towards somebody's rights –especially for fundamental things – which have been regulated by law. Stipulations which do not provide authorities to judges in carrying out forced-effort are actually in contrary to KUHAP which makes human rights as values in its implementation. Consistent with the recognition of Human Rights, then every arrest shall be based on judicial scrutiny based on the court determination, not based on "announcement" through the media or investigator.

The latest Law No. 11 Year 2008 on Electronic Information and Transaction has been amended. In conducting arrest and detention, investigator through the public prosecutor "shall request for determination from the head of the local public court in 24 hours".<sup>8</sup> This concept should have been followed in the upcoming SPP. Hence, testing is done prior to taking action, not afterwards.

In KUHAP, what needs to be discussed is the pre-adjudication change or preliminary examination, including the role of judge *in casu* HPP. Just like the concept of criminal justice, since the very beginning the examination of criminal case should already take its role. Even in other countries' system to lead the investigation. That is why RKUHAP includes commissioner judge institution-then turned into HPP – but not to lead the investigation. In its initial concept,

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<sup>6</sup> Ibid page 10

<sup>7</sup> Ibid page 40-1

<sup>8</sup> Article 43 paragraph (6) Law No. 11 Year 2008: 11 on Electronic Information and Transaction

the commissioner judge is authorized to assess the ongoing investigation and prosecution and other authorities regulated by the Law<sup>9</sup>, including the application of means of coercion. At the investigation phase, the investigator coordinates with public prosecutor.<sup>10</sup> When they are arrested, in a period of one day after the arrest, examination should be started.<sup>11</sup> Next, public prosecutor can propose for a case to the commissioner judge to decide the appropriateness for prosecution at the court.<sup>12</sup> Related to verification, it was designed that evidence is included as evidence. Evidence is “goods or tools that are directly or indirectly to commit a crime or proceeds of a crime (real evidence or physical evidence)”.<sup>13</sup> Valid evidence should be obtained in accordance with the law and to only evidence obtained according to the law which can be used to prove the guilt of the accused.<sup>14</sup>

### C. Preliminary Examination Judge (“HPP”) in RKUHAP.

HPP which is called commissioner judge in initial RKUHAP has the authorities to determine and decide:

- (i) The validity of arrest, detention, search, confiscation, or wiretapping,
- (ii) Cancellation or postponement of arrest,
- (iii) That the statement made by the suspect or convict has violated the rights to not incriminate oneself,
- (iv) Evidence or statement obtained illegally cannot be used as evidence,
- (v) Compensation and/or rehabilitation for a person arrested or detained illegally or compensation for any property seized illegally,
- (vi) Suspect or convict is entitled/shall be assisted by an advocate,
- (vii) That investigation or prosecution has been carried out for unauthorized purposes,
- (viii) Termination of investigation or prosecution that is not based on the principle of opportunity,
- (ix) The appropriateness of a case to proceed with prosecution at the court,
- (x) Violation of suspect’s right which occur during the investigation stage as elaborated above is basically the judge assigned at the district court.<sup>15</sup>

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<sup>9</sup> Article 1 paragraph 6 RKUHAP

<sup>10</sup> Article 8 paragraph (1) RKUHAP

<sup>11</sup> Article 27 RKUHAP

<sup>12</sup> Article 44 RKUHAP

<sup>13</sup> Article 179 RKUHAP

<sup>14</sup> *ibid*

<sup>15</sup> RKUHAP Article

To be appointed as HPP, a judge shall have at least 10 years of experience. HPP has a work period of two years and can be extended for one more period. So in total 4 years of work. During their assignment as HPP, a judge shall be exempted temporarily from their task as the public court judge and they will return back to their initial assignment once their position as HPP is completed. There is no external source such as ad hoc judge in special courts lately.

Hence, HPP is not similar to magistrates or justice of the piece which are practiced in most countries. Additionally, HPP is not authorized to assess whether the status determination of a person is valid or not. Nevertheless, there are many technical matters in which magistrates and justice of the piece principally have similar task. But there is a difference in concept where magistrates or justice of the piece are the "community's participation in court" so conceptually they are the "mediator" between the big power the investigators have and Human Rights protection for a person who is also the sufferer. At the same time, the community's participation is a symbol of credibility to SPP because it is considered neutral if it involved the community.

But the most important thing is that there are probably cause and reasonableness as reasons to determine the status and arrest of a person and this is not explicitly included in HPP authorities. So, if let's say HPP in RKUHAP is approved into law, there will still be no shift in the determination of suspect. It will still be through "announcement" in the media by the investigators like what is being practiced lately. That is why this kind of concept needs to be changed, the authority to determine the presence of probably cause and reasonableness should be added to HPP. Additionally, HPP's authorities is not post factum like in pre-trial.

The fact that it is post factum, legally there are many issues regarding means of coercion, especially in arrest and detention. Pre-trial failure is because of its largely post factum mechanism. If this is maintained, then the concept of RKUHAP for determining a suspect is still based on the consideration of the investigators (*discretionary*). Hence there is a concern that HPP will have the same fate like the existing pre-trial institution in the current KUHAP. RKUHAP will then be short-lived considering its weaknesses which are not improved.

In addition, HPP is also expected to be able to provide inputs to investigators. BAP in investigation is only description of evidence with the standard of indicated "preliminary evidence" not *prima facie evidence* let alone material truth itself as described in the "resume" as BAP. The misunderstanding about BAP's position has encouraged judges at the court who is presiding a trial of a case turn into semi prosecutor. This is shown by question on each description provider "have you read the BAP?"; "Have you initialed each sheet?"; "Have you signed it?";

“Was there any pressure?” etc. These questions are logical but they are incorrect when it was asked by a judge who should have been objective in their position between the interests of two parties. This is all due to BAP’s central position in SPP.

#### **D. Closing**

As closing is how HPP presents judicial scrutiny when the investigator carries out means of coercion, from the determination of status as suspect up to the application of means of coercion. The determination of a person as a suspect is not sufficient if it is only through announcement which was taken internally and closed because it would still be misused. With this kind of method, investigators become super power, monopolizing law and its interpretations. This method caused the absence of due process law in determining a person as a suspect and their arrest become imperative.

Important notes from HPP discussion are as follows:

- a. HPP’s authorities should not be *post factum* like in pre-trial. If HPP’s authorities is still post factum, then the determination of suspect and arrest is still based on the consideration of the investigators themselves (discretionary). Hence, there is a concern that HPP will have the same fate like the pre-trial institutions existing in the KUHAP.
- b. HPP is authorized to provide BAP input to the investigator, as a description of the evidence with the indicated standard of the existence of “preliminary evidence”.

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# ***LIMITATION OF THE SUPREME COURT'S AUTHORITY IN THE CRIMINAL VERDICT IMPOSITION IN THE DRAFT OF INDONESIAN CRIMINAL PROCEDURE LAW (RKUHAP)***

**Harifin A. Tumpa\***

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## **Abstract**

*The Draft of Criminal Procedure Law (RKUHAP) has raised a lot of comments, both pros and cons. The counter parties assess that the RKUHAP exercises a lot of restrictions on authority so it is deemed to amputate the authority or weaken the authority of the law enforcers. Among them is a prohibition for the Supreme Court Judge to impose a more severe criminal penalty than the decision that has been handed down by the High Court (PT).*

*The draft cannot be separated from the fact that many of the Supreme Court decisions, which overturn the verdicts of PT without going through the corridor function of the Supreme Court as *judex juris*. The Cassation Judge as if acting as level III justice. On the other hand, the drafters of RKUHAP do not see what if the cassation judges find an error in the application of the procedural law. This paper will discuss the restrictions of the Supreme Court's authority in imposing criminal verdict in the Criminal Procedure Law Draft, by giving an overview of practices and case studies of the Supreme Court's decisions which convict higher than the previous decision. So further, the restriction in question is understood and the formulation of recommendations for improvements in RKUHAP.*

**Keywords:** Criminal Procedure Law Draft (RKUHAP), the Cassation, the Supreme Court (MA), *Judex facti*, *Judex juris*

## **A. Introduction**

After the Indonesian Criminal Procedure Law (Law No.8 Year 1981) has been applying for more than 30 years, now the Government and the House of Representatives (DPR) are discussing the Criminal Procedure Law Draft (RUU KUHAP) to replace the old law. The draft raises many comments, both pros and cons. The counter parties assess that the draft exercises a lot of restrictions on the

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\* Chairman of the Supreme Court of the Republic of Indonesia Period 2009-2012

authority so that it is deemed to amputate or weaken the authority of the law enforcers.

The removal of the investigation concept for example, protested by the KPK, the Attorney General Office (AGO) and Indonesian Financial Transaction Report and Analysis (INTRAC), because it is considered cutting back their authority. The reason is that, they cannot trace by requesting for information as well as collecting two items of evidence that can be upgraded to an investigation. The Police objects to the Preliminary Examination Judge (HPP), with the reasons for cases occur in remote areas where HPP do not exist, it will make it difficult for the Police to work in the field. And the Supreme Court (MA) also objects to the prohibition of the Supreme Court judges to impose more severe criminal penalties than the decision that has been handed down by the High Court.

The author's tentative conclusion, is that the counter parties to the renewal of the criminal procedural law, - regardless of the reasons they pointed out- , that with the new rules, their authority is limited, which has been deemed quite lose all this time. In the opinion of the author, the criminal procedure law has to be strict, because it will regulate the authority of high level rulers, dealing with the rights of the accused or weaker suspects. Many examples of how the actions of the law enforcers have been mistaken, for example, false arrest, false raids, and others. However, it is just the current social condition is not possible to apply the strict rules of one hundred percent, so that the transition rules are necessary. In general, the author argues that for any action taken by the law enforcement officials, whether the Police, KPK, AGO, INTRAC, the Court or Judge, there must be rules that can control the actions. Without the restriction rules, there will always be the potential for abuse of authority.

Restrictions should not be regarded as an attempt to weaken an institution upon violation of an independency, unless we really want a state of power, not a state of laws. The State of laws mainly lies in how far the state is able to protect and uphold human rights, and to avoid arbitrary actions of the authorities. Therefore it is necessary for the rules that limit the authority of the rulers. This paper will discuss the restrictions on the authority of the Supreme Court in the criminal verdict imposition in the Draft of Indonesian Criminal Procedure Law (RKUHAP).

## B. **Judicial Power**

Article 24 paragraph (2) of the 1945 Constitution states that: “the Judicial Authority is carried out by a Supreme Court and the judicial bodies underneath it in the general courts, religious courts, military courts, administrative courts, and by a Constitutional Court”. In the previous paragraph it is stated that “The judicial power is an independent power to organize judicial administration to uphold law and justice”.

From these provisions it is clear that the Supreme Court as the organizer of the judiciary to uphold the law and justice. What this means is that although the judicial power is an independent power, it remains bound and obedient to the existing legal provisions. So the Supreme Court also must obey and submit to the rules that limit it, including in reviewing and deciding a case. Similarly, if the future Article 250 of the Criminal Procedure Law Draft becomes law, then it will become binding provisions. Of course that such provisions are general in nature, as casuistry of course it is open to the judges to find the law (*rechtsvinding*) or create law (*rechtsschipping*).

As such, Article 244 of the Criminal Procedure Law which states that “the criminal case verdict given in the last level by other courts other than the Supreme Court, the defendant or the prosecutor can file a request for examination of cassation to the Supreme Court, except against the acquittal”. Along the way, the jurisprudence accepts the opinion that what meant by acquittal in that article is a pure acquittal (*vrijspraak*), with consequences if the prosecutor can prove that the decision is a veiled acquittal (*verkapte vrijspraak*), not a pure acquittal, then the cassation can be accepted. As a result, cassation submitted to the Supreme Court for almost all the court judgments. And strangely, the Supreme Court judges accepted it, which sometimes regardless of whether the decision was a pure acquittal or not. The issue of pure acquittal and not pure acquittal also raises the problems, because proving that the decision was not a pure acquittal, the entrance is a matter of proof. And the issue of proof lies in the jurisdiction of *judex facti*. Even this phenomenon is allowed by the legislators (DPR and Government), because if they see this awkwardness, it should have been corrected at the time of revising the Law No. 3 Year 2009 on the Supreme Court. Article 45 A of the Supreme Court Law stipulates the three types of cases that cannot be appealed, namely: (a) Decision on pretrial; (b) Case of criminal punishable with imprisonment of 1 year and/or a fine; and (c) Case of State administration which the object of the lawsuit is in the form of the local authority’s decision which is applicable in the local territory concerned. If the lawmakers are consistent with the provisions of article 244 of the Criminal Procedure Law, then they should also include “acquittal” as the type of case that cannot be appealed.

However, in the opinion of the author, there is no strong legal logic, stating acquittal may not be appealed or cassation. In the age of HIR (*het Herziene Inlands Reglement*), all of the judge's decisions may be appealed or cassation. This is understandable, because in each case there is a benefit of another party that must also be protected. This system actually reflects the principle of *accusatoir* wherein the interests of the accused equated with the rights of the interest of the public or the state. Which actually should be considered by the lawmakers is the limitation of appeal according to the type and value of the case, not the form of the verdict.

The authority of the Supreme Court in carrying out the judicial functions in the field of cases, is set forth in Article 28 of the Supreme Court Act, which specifies that the Supreme Court is authorized to examine and decide: (a) A request for an appeal; (b) a dispute about jurisdiction to judge; (c) Application for a review of the court judgment that has permanent legal power.

### C. The authority of the Supreme Court in Appeal (Cassation)

When viewed from the juridical historical aspect, the cassation was initially a legal institution that was born, grown and developed in France that uses the term "*Cassation*", which the verb is "*casser*" which means "cancel" or "break". This means, that the cassation is "an authority possessed by the Supreme Court as the highest supervisor on court judgments that exist below it, so that the "appeal" is not "the third justice level". Below we will see how the judges of cassation are very limited in the scope of authority.

The authority of the Supreme Court in an appeal if they would **annul** a court ruling or court order of all justices, in accordance with article 30 of the Supreme Court Law, only possible if: (a) not authorized or overreaching; (b) Misapply or violate the applicable law; and (c) Negligent to meet the conditions required by the legislation that threatens the negligence with the cancellation of the decision in question.

The formulation of the article is a little different from the formulation of Article 253 paragraph (1) of the Criminal Procedure Law, but according to the author the point is the same. In Article 253 of the Criminal Procedure Law, it is formulated that "The examination of the appeal made by the Supreme Court upon the request of the parties, as referred to in Article 244 and Article 248 of the Criminal Procedure Law in order to determine: (a) whether or not a rule of law is not applied or not applied as it should; (b) whether the correct way to adjudicate not executed according to the provisions of law; and (c) whether the court has exceeded its authority.

Let us try to analyze the reasons mentioned above, but the author will discuss specifically the reason of “misapplied or violation of the applicable law”. For this reason relates to the restrictions on the authority of the Supreme Court in criminal verdict imposition. Described as follows:

1. Not authorized or exceed the limits of its powers

A court is not competent to adjudicate a case, if the case has expressly mentioned the authorized institution to adjudicate it. For example in the absolute competence. The jurisdiction of the religious court (PA) has been expressly referred to in the Article 49 of Law No.7 Year 1989 as amended by Law No. 51 Year 2009. When then the PA prosecutes a case, example a case of property dispute that is beyond its authority, then it may be the reason the case is overturned by the Supreme Court. Vice versa, if the District Court (PN) hears the case of inheritance which is included in the scope of the PA, then the decision of the District Court can be canceled by the Supreme Court. If a case in which there is still a dispute over ownership, but submitted to the State Administrative Court (PTUN), then the administrative court ruling that is in favor of the claimant may be canceled by the Supreme Court. So as if in an agreement contains a clause that authorizes the arbitration, in the event of a dispute over the agreement (article 3 of Law No. 30 Year 1999). If there is such a clause, then the general courts are not competent in the absolute terms.

The Supreme Court has ever cancelled a decision that is voluntary in nature, because the District Court granted a petition stating “a lawful community organization”, whereas the authority to determine the validity of a social organization, lies with the Department of Human Rights.

2. Negligent to meet the conditions required by the legislation that threatens the cancellation of the negligence with the cancellation of the decision in question. For example, in article 197, paragraph 1 of the Criminal Procedure Law determined a number of conditions, namely:

- a. The head of the ruling which says “FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD”;
- b. Full name, place of birth, age or date of birth, sex, nationality, place of residence, religion and work of the accused;
- c. Charges, as contained in the indictment;

- d. Consideration arranged briefly about the deed and the circumstances as well as verification tools derived from the examination before the court on which the determination basis of guilt of the accused;
- e. Criminal charges as contained in the warrant;
- f. The article of the legislation that becomes the basis of punishment or action and the article of the legislation that is the legal basis of the decision, accompanied by the aggravating and mitigating circumstances of the defendant;
- g. Day and date of the holding of the judges deliberation except for cases examined by a single judge;
- h. Statement of guilt of the accused, the statement of the fulfillment of all of the elements in the formulation of offenses accompanied by the qualifications and punishment or imposed actions;
- i. Provisions to whom the court fees charged by mentioning the exact amount and the provision of evidence;
- j. Remarks that the entire letter turned out to be false or description of where the falsity is located, if there is an authentic letter which is considered false;
- k. Orders that the accused be detained or kept in custody or released;
- l. Day and date of the judgment, the name of the prosecutor, the name of the judge who decides and the name of the clerk;

Then in paragraph 2 of Article 197 of the Criminal Procedure Law it is stated that the non-compliance with the provisions of paragraph (1) letter a, b, c, d, e, f, g, h, i, k, and l of this article causing the decision null and void.

These requirements have been a heated debate, i.e. at the time the criminal verdict to be executed (SD Case). It turned out the decision to be executed, did not fulfill the conditions mentioned in Article 197 paragraph (1) letter k, then the defendant/legal advisors, believed the decision was null and void.

Although paragraph 2 of Article 197 of the Criminal Procedure Law threatens the cancellation of the decision by law, but such article does not apply absolutely to all cases, but it applies in casuistry. Article 197 paragraph (1) letter k is not required, if:

- a. At the time of the decision the defendant is not in custody, and the judge considers it is not necessary to hold him in custody. Detention of an accused can be done because of the objective requirements i.e. having sufficient evidence and subjective requirement that there are concerns that the accused will flee, or the accused will damage or destroy evidence, or the defendant would repeat the crime.

- b. The article imposed on the defendant does not allow him to be detained based on the provisions of article 21 of the Criminal Procedure Law. For example light maltreatment, minor theft, contempt.
  - c. Decision of Cassation or decision of a judicial review, since the decision is final and binding which must be executed.
3. Misapplied the law or violation of the applicable law. Here the Supreme Court is called *judex juris*, meaning the Supreme Court Judges are only in charge of examining the legal issues of a case. This is different from the function of the first-level court or appeal which acts to examine the case which is commonly referred to as *judex facti*. The authority of the Supreme Court is only in charge of checking whether the *judex facti* has applied the material law appropriately and correctly, or whether the first-level court judge and the appeal judge do not violate the existing procedural law. The Supreme Court as the *judex juris* is no longer allowed to assess the results of verification, should no longer judge things that mitigate and aggravate the position of an accused, except of course if the *judex juris* finds violations of the material law or procedural law committed by the *judex facti*, so then the decision of the *judex facti* should be canceled and the Supreme Court should adjudicate the case back. Apart from the reason on applying the fault grounds of the procedural law or the material law that can be the reason for the *judex juris* cancelling the decision of the *judex facti*, another reason is also known, that is “insufficient consideration (*onvoldoende gemoiveerd*)”.

#### D. Practices of Decisions of Cassation Judges

It is undeniable that there is a pretty much of the Supreme Court decisions, which overturn the verdict of the High Court without going through the corridor/entrance of the Supreme Court function as the *judex juris*. The cassation judges overturn the verdict of the *judex facti*, but do not indicate a faulty implementation of the law. Which considered is only the evidence presented at the trial court. So here the Supreme Court Judges do not through the “cassation” door, but as if acting as the level III justice. Other things can also be seen in terms of the cassation judges do not annul the decision of High Court (PT) or District Court (PN) but consider that the decision of the High Court is too low, not comparable with the guilt of the accused so that increase the sentence imposed by the *judex facti*.

Those facts that may be used as the main reason for the drafters of the RKUHAP, thus prohibiting the Supreme Court to impose a higher sentence than the decision

of the High Court. But on the other hand, the drafters of the RKUHAP do not see what if the cassation judges find an error in the application of the procedural law, for example, so that later the cassation judges conclude that the proven charges are more severe charges. As an illustrative example, in the case of murder. The defendant is primarily charged with murder (Article 340 of the Criminal Code), subsidiary charge of intentional killing (Article 338 of the Criminal Code). In the verdict of the District Court which is reinforced by the High Court, the judges neglect to consider the primary charge, but immediately consider the subsidiary charge, and conclude that Article 338 of the Criminal Code proven and sentenced to 10 years. So here there is a misapplication of the procedural law, because in the subsidiary indictment then the first matter to be considered by the judges is the primary charge. The Cassation judges see this as an error in the application of the procedural law and this is the entrance to cancel the High Court judgment. Based on the examination of the cassation judges, the primary charge is judged proven. Whether in these circumstances the cassation judges should not give a more severe punishment than the high court judgment?. According to the author, in this case the cassation judges do not make mistakes.

If we see that there are some restrictions that must be treated for the cassation judges, then the draft of Article 250 of the RKUHAP, is not new. For example in the Corruption Law there is a limit of the minimum penalty and the maximum penalty that restricts judges in imposing sentences. In my view, the formulation of Article 250 of the Criminal Procedure Law Draft can be assessed:

1. Is positive, if it is intended to prevent the Supreme Court acting as *judex facti* or level III justice. The Supreme Court should be kept and retained as the *judex juris*.
2. Is negative, when it is unlikely to increase the punishment of an accused, although the article applied is different from the article applied by the *judex facti*, and the article is in fact more severe. But if the penalty imposed by the High Court is the same or lower than what would be applied by the cassation judges, then the punishment should not be higher than the penalty that has been imposed by the High Court judges. In such case, the *judex juris* can only give different considerations, to be a guide for the judges under the Supreme Court. It is certainly important to maintain the unity of the law (unified legal opinion).

Maybe it would be better if the article is formulated, that, "The Supreme Court is forbidden to make a criminal verdict which is heavier than the ruling of the High Court, unless the Court can prove that there are errors/mistakes in the decision of the *judex facti* in applying the law in applying the indicted article



which penalty is more severe”,

#### **E. Cassation Decision of the Supreme Court Case Study**

In the following case the author will present two cases, describing the state of the Supreme Court in deciding the case which adds penalty, more severe than the penalty imposed by the High Court (PT), while at the same time revealing its conjunction with Article 250 of the Criminal Procedure Law Draft.

##### **1. Case I: A**

Case I: A

A defendant (say A) was brought to justice. He was charged with a criminal offense with the subsidiarity cumulative indictment, that is:

First Indictment

Primary, the defendant was charged with violating Article 2 paragraph (1) in conjunction with Article 18 of Law No. 31 Year 1999 on Corruption Eradication in conjunction with Law No. 20 Year 2001 on amendment to the Law No. 31 Year 1999 on the Corruption Eradication in conjunction with Article 55 of the Criminal Code.

Subsidiary, the defendant was charged with violating Article 3 in conjunction with Article 18 of Law No. 31 Year 1999 on Corruption Eradication

Second indictment

Primary, the defendant was charged with violating Article 5 paragraph (1) letter a of Law No. 31 Year 1999 on Corruption Eradication.

Subsidiary, the defendant was charged with violating Article 13 of Law No. 31 Year 1999 on Corruption Eradication.

Third Indictment,

The defendant was charged with violating Article 6, paragraph (1) letter a of Law No. 31 Year 1999 on Corruption Eradication

Fourth indictment,

The defendant was charged with violating Article 22 in conjunction with Article 28 of Law No.31 Year 1999 on Corruption Eradication.

In the *requisitoir* of the Public Prosecutor (PP), the defendant A was deemed convicted of criminal offense which is stated in:

- Article 3 in conjunction with Article 18 of Law No. 31 Year 1999 (first indictment Subsidiary)
- Article 5 Paragraph (1) letter a of Law No. 31 Year 1999 (second indictment primary).
- Article 6 Paragraph (1) of Law No. 31 Year 1999 (third indictment)
- Article 22 in conjunction with Article 28 of Law No. 31 Year 1999 (fourth indictment). And the Public Prosecutor demanded that defendant A was sentenced to imprisonment for 20 (twenty) years and a fine of Rp 500,000,000, - (Five Hundred Million rupiah) subsidiary six (6) months in prison.

Furthermore, the District Court had rendered the verdict as follows:

1. Declared that the defendant A had been proven legally and convincingly guilty of corruption offense jointly committed as referred to in the First indictment subsidiary, the Second indictment primary and corruption offense as referred to in the Third indictment as well as giving false information regarding property suspected of having ties with corruption as referred to in the Fourth indictment .
2. Handed down a verdict to defendant A of imprisonment for 7 (seven) years and a fine of Rp. 300,000,000,- (Three Hundred Million Rupiah) subsidiary 3 (three) months in prison.

The defendant and the Public Prosecutor appealed against the verdict. Furthermore, the High Court judge upheld the ruling with improvements of criminal injunction and evidence which reads as follows:

1. Declared that defendant A had been proven legally and convincingly guilty of corruption offense jointly committed as referred to in the First indictment subsidiary and the Second indictment primary and the Corruption offense as referred to in the Third Indictment and the Fourth indictment.
2. Sentenced to imprisonment for ten (10) years and a fine of

Rp.500,000,000,- (Five Hundred Million rupiah) subsidiary four (4) months in prison.

Both the defendant and public prosecutor did not accept the High Court's verdict (PT) and filed an appeal. The Supreme Court rejected the appeal filed by the defendant, but the panel of appeal accepted the appeal of the Public Prosecutor. The judges of cassation cancelled the High Court's verdict that improved the District Court's verdict (PN). In the verdict of the panel of appeal what deemed proven was the First indictment primary, the Second indictment primary, the Third and the Fourth indictment

Now let us try to review the consideration of the cassation judge. The Supreme Court as the *judex juris*, if it is going to cancel (kasser) the decision of the *judex facti*, there must be first an error of law enforcement made by the *judex facti*. The cassation assembly gave the following consideration:

*“That in spite of the reasons of the appeal mentioned above and no necessity to consider the reasons for the appeal filed by the Cassation Applicant I/the Prosecutor, in the opinion of the Supreme Court, the judex facti (High Court) has misapplied the law and therefore was sentenced to imprisonment for 12 years and a fine of Rp.500.000.000.- provided that if the fine is not paid it is to be replaced by a confinement for 6 months. The considerations of the panel are as follows:*

- *That the indictment prepared in subsidiarity, hence the juridical consequences of the primary charges should be considered first.*
- *That the defendant actually admitted to act unlawfully by enriching other person or corporation amounting to Rp.570.000.000, - namely by granting the tax objection letter from PT SAT which is not in accordance with the mechanism and legal provision against the tax appeal that should be followed.”*

The author's notes concerning the consideration of the cassation judges are as follows:

*First*, it is a pity that the cassation assembly did not consider any further the error in law application done by the *judex facti* Judge, whereas the prosecutor as well as the District Court and the High Court agreed that the item proven was the first indictment subsidiary. If we look at the defendant cassation, the District Court considered among others:

*That the first indictment of the Attorney/Public Prosecutor was arranged in subsidiarity, however since the indictment arranged in subsidiarity should contain similar basic elements, while article 2, paragraph 1, and Article 3 of Law No. 31 Year 1999 amended by Law No. 20 Year 2001 containing basic elements which are not similar, then the composition of the indictment which should be used by the Attorney / Prosecutor is the alternative indictment. ... Therefore the Prosecutor's indictment should be alternatively read and arranged.*

*.... Based on the above legal facts, the judex facti (District Court) will immediately consider charges having close relationship with the legal facts during the trial that is the First indictment subsidiary which violated the provision of Article 3 of Law No. 31 Year 1999.*

Therefore the judex facti had actually taken into consideration why they did not consider the first indictment primary, hence awaited in the consideration of cassation decision are: (1) May the judge interpret a form of the indictment made by the Prosecutor, apart from the form that we have known so far, for example, the charges prepared in subsidiarity, but the judge interpreted them as alternative charges. That means the judge changed the form of charges from subsidiarity charges to alternative charges. And (2) Should the subsidiarity charges, primary charges and subsidiary charges contain similar basic elements. If the theory is correct, what are the legal consequences for the prosecutors making such charges. The aforementioned Supreme Court's consideration seemed very simple, in the opinion of the author it gives the impression that the cassation assembly acting as a third level judicial or as judex facti.

**Second**, the Supreme Court's consideration very simply declared that the first indictment primary was legally and convincingly proven. There is no adequate consideration of the elements contained in the article, as is usual in a criminal verdict. In the first charge primary (article 2, paragraph (1) of Law No. 31 Year 1999). This article has the following elements: (1) Against the law (2) Enriching oneself or other person or corporation; (3) that can be detrimental to state finance or economy. I think the description of these elements is very important, as this article has never been described in the decision of the judex facti.

**Third**, the injunction of *judex juris* stated that the defendant was legally and convincingly guilty of "jointly committed corruption," as the first

indictment primary, the Second primary, the Third and the Fourth. The cassation assembly had absolutely no consideration of the Second charges primary, the Third and the Fourth. The question is how the assembly came into conclusion that those charges had been proven.

**Fourth**, in the consideration of the cassation judge about the aggravating and alleviating factors, it was stated that the alleviating factors were “none”. In the judicial practice, if the judge considered that there are no factors alleviating the defendant, the judge will lead to impose the maximum penalty threatened in the Article proven.

## 2. Case 2

Another case that is no less interesting is the Supreme Court’s decision that cancelled the verdict of the High Court (PT) which upheld the ruling of the District Court (PN). Unfortunately, the author obtained the material not from the verdict of the case, because at the time of this writing, the decision has not been published. The decision of this case 2, the author obtained from the book “Annual Report of the Supreme Court” year 2013, pages 251-253. The author quotes in their entirety, as follows:

Case No.: 1616 K / Pidsus / 2013.

Defendant: A

Types of case: Special Crime (corruption).

Panel of Judges: AA, MA, MS....

Rule of Law: maximum penalty feasible to be imposed against the defendant who actively initiated meetings and asked for compensation (*fee*), met the element of corruption crime.

The following is the position of this case:

Defendant A in the prosecutors’ indictment which was alternatively prepared was charged as follows:

**First** violated Article 12 letter a in conjunction with Article 18 of Law no.31 of 1999 on corruption eradication, as amended by Law No.20 Year 2001 in conjunction with article 64 paragraph (1) of the Criminal Code,

or **Second** violated article paragraph (2) in conjunction with Article 5, paragraph (1) letter a in conjunction with Article 18 Law No.31 Year 1999 on corruption eradication, as amended by Law no.20 of 2001 in conjunction with Article 64 paragraph (1) of the Criminal Code, or **Third** violated Article 11 in conjunction with Article 18 of Law No. 31 Year 1999 on Corruption Eradication, as amended by Law No. 20 Year 2001 in conjunction with article 64 paragraph (1) of the Criminal Code.

The Corruption Court in Central Jakarta in considering the alternative charges had opted for the Third charges to be proved and it was proven to be violated by the defendant so that the defendant was sentenced to prison for 4 years and 6 months and fined for Rp. 250,000,000., If the fine is not paid it will be replaced with imprisonment for 6 months. The verdict upheld in the appellate level by the Jakarta High Court. The Public Prosecutor and the defendant did not accept the decision and filed an appeal. The Cassation Assembly in its decision stated rejecting appeal of the defendant and granted the appeal of the public prosecutor to the Corruption Eradication Commission, stating that the defendant A had been legally and convincingly proven guilty of continuing corruption crime, convicted the defendant to imprisonment for 12 years and a criminal fine of Rp.500,000,000. provided that if the fine is not paid it is to be replaced with imprisonment for 8 months and also sentenced to pay compensation amounting to Rp.12,580,000,000.- and US \$ 2,350,000 subsidiary 5 years in prison.

Consideration of the Assembly:

1. That in accordance with the legal facts and evidence in the form of witness statements, letters and guidance as a member of Commission X Budget Committee of the House of Representative, had received money from PG amounting to Rp.12,580,000,000.- and US \$ 2,350,000.- gradually based on evidence of PG cash expense as a fee to the defendant related to his efforts in leading the Budget of Kemenpora Athletes Guesthouse Project and Kemendiknas State University Project.
2. That despite the approval of the budget in the case a quo is the authority of Budget Committee of the House of Representatives and the Government, but as shown by the facts which were supported by valid evidence, then the defendant's acts as a member Budget Committee of the House of Representatives were one of the modes

operandi in committing corruption which have been examined and decided upon by the Court.

3. That in accordance with the above consideration, the judgment of the first level Court in choosing the third alternative charges to prove, was considered appropriate and correct by the High Court, therefore foreclosed and taken into consideration is not right and wrong.
4. That the defendant is actively asking for fees to MR of 50% during the discussion of the House of Representative's Budget and the remaining 50% after DIPA down or approved
5. That the defendant actively initiated meetings to introduce MR to HI, the Secretary of Kemendikbud Director General.
6. That the defendant participated to propose activity programs for a number of universities that were not initially proposed by the Directorate General of Higher Education but was later proposed as a proposal from the Commission X.
7. That the defendant several times calling HI and DS (Head of Planning and Budgeting Directorate General of Higher Education) to the House of Representatives' Office to discuss the allocation of the budget to be proposed to the Ministry of National Education and asked HI and DS to prioritize the provision of budget allocations to several universities.
8. That the defendant actively made several telephone communication or Blackberry Messenger (BBM) messages with MR regarding the follow-up and progress of budget driving effort and delivery of money (fee) with MR.
9. That the defendant actively conducting meetings in the House of Representative's building, NBSS' home, FX Senayan Plaza , Grand Lucky and Belezza Apartment

However, a member of the assembly gave a dissenting opinion basically as follows:

1. That based on the results of verification and appreciation for the fact that sum of money received by the defendant was found only amounting to Rp.2,500,000.000.- and US \$ 1,200,000 .
2. That the imposition of additional penalties in the form of payment of compensation as requested by the Public Prosecutor cannot be justified since the *judex facti* was not wrong in considering the sentence

imposed.

The author made some notes regarding the decision as follows:

1. In the decision it is not mentioned the reason why the *judex facti*'s decision was considered to be improper and wrong by the assembly. The first level court which was confirmed by the High Court chose the Third Alternative charges, but it was deemed wrong by the cassation assembly, but unfortunately there was no explanation of the location of the error.
2. That consideration no.1 to 9 all illustrated facts that are beyond the reach of the *judex juris*, since facts are the *judex facti*'s authority.
3. This decision was considered by the Supreme Court as a "Landmark Decision". Did the Supreme Court conclude that verdict as a Landmark Decision by reviewing "maximum penalty imposed on defendants who are actively initiated meetings and requested for remuneration (fees) met the elements of corruption crime"? As a rule of law, so it is worth viewing it as "landmark decision"? Whether it is a rule of law or just a proposition to determine the size of the punishment (*straf Maat*).

Both of the above decisions can be viewed from two sides: First: The imposition of high penalties by the Supreme Court is in the expectation of reducing the level of corruption. Second: The defendants would think deeper in using legal efforts, since they have "fear" to exercise their rights (legal efforts). It is actually harmful for a state of law, because the court is the place to seek justice. If there is fear to use the appeal or cassation, the right to justice has been reduced.

## G. Closing

From the description above, the restrictions on the authority of the Supreme Court in a verdict of punishment in the formulation of Article 250 Criminal Procedure Law draft can be assessed as: Positive, if intended to prevent the Supreme Court acting as *judex facti* or level III justice. The Supreme Court should be kept and retained as a *judex juris*. And negative, if making it impossible to increase a defendant's sentence, although the article applied is different from the article applied by the *judex facti*, and the article contains more severe penalties.



But if the penalty imposed by the High Court is the same or lower than what to be applied by the cassation judge, then the punishment should not be higher than the penalty that has been imposed by the high court judge. In such case, the *judex juris* can only give different considerations, as a guide for judges under the Supreme Court. It is important to maintain the unity of the law (unified legal opinion).

Hence based on these considerations, the author recommends Article 250 of the Criminal Procedure Law to be reformulated as: “the Supreme Court is forbidden to rule punishment more severe than the High Court’s decision, unless the Court can prove that in the *judex facti*’s decision there are errors / mistakes in applying the article indicted, of which the threat is more severe”.



# **RELATIONSHIP BETWEEN INVESTIGATOR AND PROSECUTOR IN DRAFT OF INDONESIAN CRIMINAL PROCEDURAL LAW (RKUHAP)**

**Andi Hamzah\***

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## **Abstract**

*After 10 years being formulated, draft of Indonesian Criminal Procedural Law (RKUHAP) is finally submitted and discussed in DPR. However, there are some rejections in the discussions, such as the elimination of "investigation" as well as the establishment of Preliminary Examination Judge (HPP) RKUHAP.*

*Relationship between Investigator and Public Prosecutor is formulated in the form of "initial investigation" combined under the "investigation" chapter. In addition, to facilitate the relationship, notification for the commencement of investigation may be conducted through various communication means with local prosecutor (jaksa zona). Therefore, there won't be any case goes "back and forth" again, and cooperation between investigator and public prosecutor will still continue until court trial. One of the objectives for establishing HPP is to meet the mandate of International Covenant on Civil and Political Rights (ICCPR). This article explains the relationship between investigator and public prosecutor as well as the background for establishing HPP in RKUHAP.*

**Keywords:** Investigator, Public Prosecutor, Preliminary Examination Judge

## **A. Introduction**

Globally, there are two stages of criminal justice process, i.e. preliminary examination and trial examination stage. Preliminary examination stage consists of investigation and prosecution stage. A red line cannot be made between investigation and prosecution, it can be differentiated, yet still inseparable. There is also an intermediate form between preliminary examination and trial examination stage, namely pretrial justice.

Pretrial justice comes in many forms in various modern countries. In Netherland, it is called *Rechter Commissaris* and *juged'instruction* in France. Pretrial

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justice used to be called *Unschuhungsrichter* in Germany and *Giudice Istruttore* in Italy, which both are already eliminated. In Spain, pretrial justice is called *Juez de instruccion* that still has the same authority. Some parties wanted to reduce the authority and transferred it to prosecutor, however there are still parties who disagree with this concept. Meanwhile, the authority of *Juged'instruction* in France is already reduced and transferred to prosecutor. In Germany, the authority of *Unschuhungsrichter* is already eliminated and also transferred to prosecutor.

For detention, *Giudiceperle Indagini Preliminari* (preliminary examination judge) is established. In France, the authority for detention is used to be in the hand of *juged'instruction*. However, a special judge called *jugedeliberteet de la detention* (release and detention judge) is now established. The word release is put in front, which means that detention is an *ultimum remedium*.

Unlike in Indonesia, detention is made as *premium remedium*, since detention is somewhat seen as "sentence advance" ("*panjar hukuman*"). While detention is actually for the effectiveness of examination. Hence, contradictory in Indonesia (specifically KPK), only when examination is finished, then the suspect shall be arrested (e.g. Andi Mallarangeng and Anas Urbaningrum case). When preliminary evidence is obtained, it should actually be enough to make arrest. After examination is finished, the suspect may stay out of detention as long as the suspect does not show any sign of escape, reiterating his/her action, or eliminating evidence.

Initially, there were only few modifications being made in RKUHAP compared to the existing KUHAP. However, with the ratification of *International Covenant on Civil and Political Rights (ICCPR)* in which full with provisions related to human rights (HAM), specifically forcible effort for detention, some fundamental changes were made in the formulation of RKUHAP. According to ICCPR, principally, judge is the one authorized for detention, prior to briefly examining the suspect who is physically presented with the prosecutor as well as the police (investigator). Hence, in RKUHAP, a special judge was established, called "**Preliminary Examination Judge (HPP)**" that coincidentally has similar meaning with *Giudiceperle Indagini Preliminari* in Italy, which just recently established.

After all the hard work, RKUHP was finally submitted and discussed in DPR. However, some objections were made in the discussions. Although, prior to being sent to DPR, in order to avoid different opinions among governmental elements (Minister of Law and Human Rights, Attorney General and Head of National Police/*Kapolri*), the Minister of Law and Human Rights by order of the President, has asked officials to give their signatures on every page of RKUHAP. The Minister of Law and Human Rights, Attorney General and *Kapolri* also have

given their signatures on RKUHAP, page by page, as their form of approval to the draft. Unfortunately, during the discussions in DPR, POLRI official protested the elimination of “initial investigation” in the draft, including the establishment of HPP in RKUHAP. Hence, this article will explain the relationship between investigator and public prosecutor as well as the background for establishing HPP.

## **B. Relationship between Public Prosecutor and Investigator**

In general, the relationship between public prosecutor and investigator is regulated under Article 108 and 110 of KUHAP. Immediately after the commencement of investigation, investigator informed prosecutor through notification letter for the commencement of investigation. Yet, in practice, without any information of *delict* in which should be informed to prosecutor through this letter, it is very difficult for investigator. Moreover, prosecutor gave the lead/instruction only after filling is finished. With the system called as “P19” (lead to investigator), before prosecutor stated that an examination is done and issued P21, case dossier shall go back and forth between investigator and prosecutor. When prosecutor issued “P21” it means that the case has been properly accepted by prosecutor. After “P21”, automatically the relationship between investigator and prosecutor is then finished.

This stage of “back and forth” is called by KUHAP drafting team as “pre-prosecution”. Due to this “back and forth” process between investigator and prosecutor, based on the research done by attorney in the last 10 years, there were 550,000 cases missing. In other words, 50,000 cases missing in a year or 5,000 cases missing in a month. This condition is very upsetting for the justice seekers (victims). This is not the investigator or prosecutor’s fault, it is the system. Based on the system established by KUHAP, the authority for investigation is fully within the hands of investigator (police). Hence, investigation sovereignty is only in the hands of police in which cannot be argued. Therefore, Civil Servant Investigator (PPNS), *Penyidik Pegawai Negeri Sipil* (PPNS), which amounted to around 70 (seventy) agencies, should go to POLRI first before handing over cases to prosecutor. This provision is very unnecessary, time consuming, and a lot of this provision is being ignored.

In other countries, all cases from civil servant (civilian) is sent directly to attorney. Attorney becomes the coordinator for investigation. In Indonesia, there is deviation against provision in which regulated globally, namely administrative law with heavy criminal sanction. As a comparison, in other country such as

Netherland, the highest sanction of administrative law is 1 year in prison or penalty fee because the purpose of criminal sanction in administrative law is not to punish people, but only to have the law obeyed. Therefore, in Netherland, criminal sanction for environmental *delict* is included under WED (*Wetopde Economische Delicten*) to “contain” or “cover” it with criminal law. Hence, the authority of civil servant investigator (civilian) is **not major** and **unimportant**. Thus, Indonesia has deviated far from global system, sanction of administrative law is relatively heavy, way heavier than sanction in KUHP.

In addition to sanction of administrative law that impose a heavy criminal sanction, there is also special minimum criminal. Furthermore complicated, there is also *delict* formulation and sanction of administrative law in which overlapped. Example: provision on the prohibition to clear land through burning mechanism as stated in Article 69 paragraph (1) letter h in conjunction to Article 108 of Law No. 32 Year 2009 on Environmental Protection and Management, which is overlapping with Article 48 paragraph (2) of Law No. 18 Year 2004 on Plantation that also gives criminal sanction for intentional action in clearing and/or processing land through burning. Hence, Law on Environmental should not be applied as *legi generali*, since Law on Plantation as *lex specialis* is also related to environment in micro manner. Oddly enough, Law on Environmental was more recent (2009) compared to Law on Plantation (2004). Legislator should have known that land burning is already regulated in Law on Plantation. This type of instruction should have been given by prosecutor who should know about criminal law, like in Netherland where they have special prosecutor for environmental issues.

To facilitate the relationship between investigator and prosecutor, in RKUHAP and implementation Government Regulation Draft (RPP), it is regulated that notification for the commencement of investigation does not necessarily require a letter. It can be done via telephone, sms, e-mail, or verbally during the commencement of investigation in which instruction is given at the same time. To furthermore facilitate the communication between investigator and prosecutor, RPP also regulates about “special prosecutor”, namely “local prosecutor” (“*jaksa zona*”), who directly receives phone call, sms, e-mail, etc. and gives instruction. “*Jaksa zona*” exists in every attorney, such as in Attorney of South Jakarta (*jaksa zona* of Kebayoran Baru). Thus, all cases occur in Kebayoran Baru shall be notified to the local prosecutor of the area. In order to prevent collusion between investigator and *jaksa zona*, the position shall be rotated every year.

All of these processes happen prior to filing. Hence, there won't be any case goes “back and forth”, no more “P19” as well as “P21”. Cooperation between

investigator and attorney/public prosecutor shall continue until court trial since RKUHAP refers to *semi adversial* system. In this system, both public prosecutor and legal advisor/defendant may add witness or new evidence during court trial. Therefore, public prosecutor may ask investigator to add investigation in the form of new witness to counter new witness proposed by legal advisor/defendant. In France, there is no local prosecutor, yet there is duty prosecutor who awaits at the office for phone call to start investigation and to give direct instruction.

In order to have this cooperation, prosecutor with perfect knowledge of criminal law is required, specifically for *jaksa zona*. To anticipate the application of new KUHAP, since Attorney General Hendarman Supanji, admission of new attorney/prosecutor has been tightened in which education requirement has also been escalated. Furthermore, for *jaksa zona* position, education requirement should be at least Master's Degree in Criminal Law. The result shows that based on the assessment conducted by Department of Justice, United States of America, education for Indonesian prosecutors 2010-2011 is the best in Asia Pacific, so that Jakarta ends up chosen as the meeting venue for Asia Pacific's Attorney Generals.

In regards to investigation authority of attorney, there are four groups of arrangement, as described in the following:

1. First group, prosecutor is authorized to investigate and supervise investigation. This arrangement is followed by almost every country in European Union, except Malta. For example in Netherland, based on Article 141 Sv (Netherland's KUHAP), the first party **burdened** with investigation is *Officier van Justitie* (Prosecutor), second party is state police, etc. Since Netherland's KUHAP describes about "burden" not "authority", then generally prosecutor does not conduct daily investigation, because he/she has already supervised the investigation. Included in the first group are Japan and South Korea. Japan actually conducts investigation. Japan's prosecutor investigates 1% of cases, while police handles 99%. Subject to be investigated by Japan's prosecutor usually relates to state official, chairman and secretary general of political party. Chile's prosecutor also conducts investigation, including report of *delict*/crime to prosecutor in which then forwarded to the police.
2. Second group, prosecutor investigates specific *delict* or subject. Included in this group is Russian Federation (KUHAP 2004), Georgia (KUHAP 2013), and PRC. In Russia, there are several articles in KUHAP that regulate prosecutor to be able to investigate, including crime against public order, *delict* conducted by military civilian, *delict* occurred in military area, people

in military training, etc. Similarly in Georgia, if president or governor of central bank performs *delict*, then prosecutor is the investigator. In PRC, for *delict* related to misuse of power (corruption), torture during interrogation, prosecutor is also the investigator.

3. Third group, prosecutor does not investigate, but supervise investigation, i.e. England and Wales.
4. Forth group, prosecutor does not investigate as well as supervise investigation, i.e. Malta.

This RKUHAP is created based on two mottos, shall not be dragged from **sectoral interest** and all state officials are **considered honest**. Honesty and integrity issue of state officials go back to respective institutions, starting from recruitment to career path. RKUHAP is created for the future, not present. It is created for the people and country, not for the interest of specific groups. This is a codification not regular law in which applied for every person in Indonesia, including foreigner. It even applied in the world for specific *delict*, such as money forgery, terrorism, or Human Rights violation.

There is a bad practice in Indonesia, which is when someone is “established” as suspect in which clearly conflicted with the principle of *presumption of innocent* (UK), *presumptive van on schuldig* (Netherland), *presumption des innocence* (France). People examined as suspect without giving “label” by “establishing” them as suspect. Other bad practice is when investigators (attorney, police and KPK) often give comments or even hold press conference concerning the investigation progress in which also conflicted with the *presumption of innocence* and provides opportunity for suspect to eliminate evidence and means of proof.

“Initial investigation” is said to be eliminated in RKUHAP, while actually combined under “investigation” chapter. The purpose of this is to eliminate “bridge” between initial investigation and investigation. Violation of criminal justice practice is actually happened in Indonesia, such as “bridge” between initial investigation and investigation, causing the practice for announcing that investigation is completed and escalated into investigation and “establishing” suspect. This practice violates the presumption of innocence. There should be no “establishment” of someone as suspect, even more through press conference.

France *Code Penal* (KUHP) provides criminal sanction against people who inform investigation progress. Thus, initial investigation and investigation are combined in one chapter. It will certainly difficult is RKUHAP is read using existing KUHP “glasses”. In all KUHPs in the world, there is no separation between initial investigation and investigation, all are combined under “investigation”



chapter.

### C. Preliminary Examination Judge (HPP)

Other issue that is continuously debated is the establishment of an institution called “**Preliminary Examination Judge (HPP)**”, which called *pretrial justice* in other countries. In the existing KUHAP, there is already an institution called pretrial judge. The differences are: *first*, HPP is separated from the district court, independently established under the control of the high court; *second*, HPP is authorized for detention as well as physical examination of the suspect before signing warrant of detention. This authority is in line with Article 9 of *International Covenant on Civil and Political Rights* that has been ratified by Indonesia.

If there is no institution such as HPP, then duty judge must be available for 24 hours shift in a week to sign the warrant of detention. This mechanism is applied by Thailand. A reason stating that there is no district court judge willing to be preliminary judge may be eliminated when the requirement to be head of district court should go through or has been HPP in which trained to physically examine suspect and create verbal consideration on the validity and necessity of detention.

In terms of budget, there is a grace period of two years for establishing HPP after KUHAP is applied. Prior to the establishment of HPP, deputy head of district court shall carry out the responsibility as HPP. There should be no issue on office, since there will only be two rooms required, one for HPP to examine and sign the warrant of detention, and one other room for the court clerk and staff. HPP system is actually a proactive system.

Other reason is that commissioner judge (*rechtercommissaris*) has been eliminated in some countries, such as Germany and Italy. Therefore, it was not commissioner judge (like in Netherland, France, and Spain) established, which is in English called as investigation judge, but “Preliminary Examination Judge”, which coincidentally is similar with *Giudice perleindagini preliminari* in Italy. In this RKUHAP, HPP cannot be called as *Investigation Judge* like in Netherland, France and Spain, because he/she does not lead the investigation. The main job of HPP is to sign the warrant of detention in accordance with Article 9 of ICCPR in which similar with France that established a new institution called *juge de libertet de la detention* (Release and Detention Judge).

#### **D. Closing**

Drafting Team of RKUHAP has been working hard for 10 years (1999-2009) based on empirical experiences of law enforcement in Indonesia as well as comparative study to other countries. In RKUHAP, the relationship between investigator and prosecutor is strongly related to the issue on the elimination of initial investigation and the establishment of preliminary examination judge.

In reality, "initial investigation" was not eliminated in RKUHAP, but combined under the chapter for "investigation". The purpose is to eliminate "bridge" between initial investigation and investigation so that the practice of announcing the escalation from initial investigation to investigation and "establishing" suspect through press conference can be stopped. Also, in order to facilitate the relationship between investigator and prosecutor, in RKUHAP, the notification for the commencement of investigation may be conducted through various communications means with local prosecutor (*jaksa zona*). Thus, there won't be any case goes "back and forth", "P19" and "P21" will no longer exist. Partnership between investigator and prosecutor/public prosecutor will still continue until court trial.

In addition, one of the objectives for establishing HPP in RKUHAP is to align Indonesian Criminal Procedural Law with the *International Covenant on Civil and Political Rights* that has been ratified in terms of detention that should be based on court decision and suspect who should immediately go to trial.

# **JUSTICE EFFICIENCY IMPROVEMENT THROUGH SPECIAL LINE MECHANISM IN THE DRAFT OF INDONESIAN CRIMINAL PROCEDURE LAW (RUU KUHAP)**

**Choky R. Ramadhan\***

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## **Abstract**

*Simple, fast and low cost principle is the most fundamental principle of justice for the implementation and administration that leads to effective and efficient principles. Drafting Team of the Draft of Indonesian Criminal Procedure Law (RUU KUHAP) has offered some procedures that aim to streamline and expedite the judicial procedure, including the special line mechanism for the defendant who pleads guilty.*

*Special line in the RUU KUHAP is inspired by plea bargaining in criminal justice system of the United States, which is considered would make judicial procedure becomes more efficient. This paper will discuss the special line in RUU KUHAP as a new mechanism offered. The paper will firstly present the reasons of the importance of case handling efficiency, by outlining the cases burden in our criminal justice system as well as the law enforcement apparatus ability in settle it. Furthermore, it will discuss the comparison between plea bargaining and special line, and finally recommendation on special line mechanism improvement in RUU KUHAP.*

**Keywords:** RUU KUHAP, Special Line, Plea Bargaining

## **A. Introduction**

High load of the case requires the law enforcement apparatus to work extra in conducting their tasks. Unfortunately, limited state budget cannot support all of their needs in carrying out the tasks. For example, settlement offer, with additional number of burden the state budget in the long term. And if the recruiting is still not with reasonable compensation, then the law enforcement apparatus will always complain on the lack of income as the justification of corruption prac-

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tice.<sup>1</sup> In addition to the offering of additional APH personnel, another important matters is the discussion on more efficient judicial procedure in order to realize “fast, simple and low cost” judicial principle.

Drafting Team of RUU KUHAP has incorporated some procedures aiming to streamline and expedite judicial procedure, i.e. termination of prosecution for public interests and/ or specific reasons<sup>2</sup>, in which the Attorney may terminate the light lawsuit<sup>3</sup> and prioritize the prosecution of cases that are difficult on evidence. In addition to the prosecution termination procedure, another procedure offered is special line, which is a procedure to expedite and streamline the judicial procedure for the defendant to admit his guilt.

Special line in RUU KUHAP is inspired by plea bargaining in the United States, which is considered to drive judicial procedure more efficient. Efficiency will be achieved as the special line gives authority to the law enforcer to streamline judicial procedure at court. In addition, the special line is put on trial by a single judge, therefore other judges can resolve other cases.

This paper will specifically discuss the special line mechanism in RUU KUHAP. In the first part, it will be discussed the needs of efficiency in criminal justice system based on backlog lawsuits at first instance court and the lack of criminal case handling budget in the Attorney. Afterwards, it compares between the special line in RUU KUHAP and plea bargaining in the United States, as well as discussion on the special line ambiguity in RUU KUHAP. Then at the end part, this paper will provide some recommendations to refine the special line mechanism in the discussion of RUU KUHAP at the parliament.

## B. Judicial Efficiency Requirement

Law on Judicial Power mandates, that the justice in Indonesia shall be conducted in simple, fast and low cost manner.<sup>4</sup> In the description, “simple” means “the investigation settlement of the case shall be conducted effectively and efficiently”.<sup>5</sup> Therefore, the requirement, intention and objective of judicial ef-

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<sup>1</sup> Amril Rigo, representing State Attorney of Riau, shared the complaint in discussion forum conducted by Riau Corruption Trial, see <http://rct.or.id/index.php/berita/115-amril-kejati-riau-bantu-kami-berantas-korupsi-di-riau>, accessed on 28 May 2014

<sup>2</sup> Article 42 paragraph (2) RUU KUHAP

<sup>3</sup> In addition, Attorney may terminate the prosecution to a case with punishable under 4 years imprisonment or fined, the suspect age is more than 70 years old, or the losses has been compensated. See Article 42 paragraph (3) RUU KUHAP.

<sup>4</sup> Article 2 paragraph (4) Law No. 48 Year 2009 concerning Judicial Power

<sup>5</sup> Explanation of Article 2 paragraph (4) Law No. 48 Year 2009 concerning Judicial Power

efficiency has actually been implied factually within the laws.

The judicial efficiency requirement is also supported by the increasing cases backlog at the Court of First Instance and limited budget for general criminal resolution at Attorney. For the past three years 2011-2013, it can be identified as follows:

First, criminal case backlogs brought to court with the regular investigation (regular crime) at the Court of First Instance across Indonesia have been increasing every year. In 2011, the Court of First Instance across Indonesia could not settle 30,697 cases of regular crime.<sup>6</sup> The number was increased drastically in 2012, reaching 51,874 cases. And in 2013, the increasing of cases backlog could no longer be avoided and reached 67,196 cases.<sup>7</sup> This is shown in the following table:

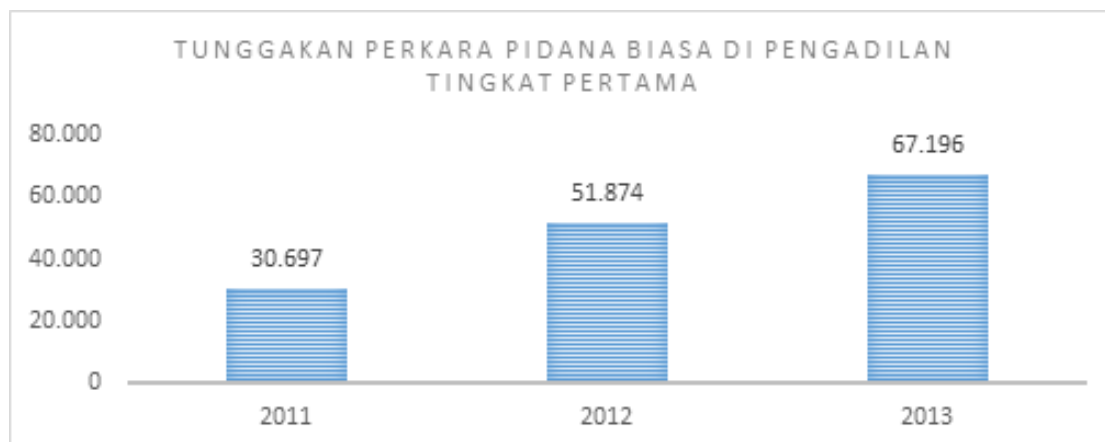


Table 1: Criminal Cases Backlog at the Court of First Instance

The option to settle cases backlog by adding the number of judges is often considered as ultimate option, while actually it will increase state budget burden. Another option is by improving the managerial side, i.e. assigning judge based on the case load. Currently the distribution or assignment of judge is often not tailored to the needs of court. Therefore, there are some courts with very high settlement rate but there are only few judges handle the cases.<sup>8</sup>

<sup>6</sup> General Court of Supreme Court of Indonesia. Criminal Cases Data of the Entire District Courts within Legal Area of High Court in Indonesia Year of 2011, [http://www.badilum.info/index.php?option=com\\_content&view=article&id=524:data-perkara-pidana-seluruh-pengadilan-negeri-dalam-daerah-hukum-pengadilan-tinggi-di-indonesia-tahun-2010&catid=23:statistik-perkara-pidana&Itemid=156](http://www.badilum.info/index.php?option=com_content&view=article&id=524:data-perkara-pidana-seluruh-pengadilan-negeri-dalam-daerah-hukum-pengadilan-tinggi-di-indonesia-tahun-2010&catid=23:statistik-perkara-pidana&Itemid=156), accessed on February 13, 2014

<sup>7</sup> Supreme Court of RI, Annual Report of Supreme Court of RI Year 2013, <https://www.mahkamahagung.go.id/images/LTMARI-2013.pdf>, accessed on March 24, 2014, page 60-61

<sup>8</sup> Interview of Dian Rosita with the assistance of Anugerah Rizky Akbari, MaPPI FHUI

Second, budget constraints on case settlement at Attorney made the prosecution become less optimum. Attorney budgeting system is based on targeted cases to be prosecuted each year. In the 2011 Annual Report of Indonesian Attorney, Attorney budgeted 10,100 cases of general crimes (*pidum*) to be prosecuted.<sup>9</sup> Uniquely, Attorney can prosecute 96,488 cases or 955.32% from available budget.<sup>10</sup> This fact needs to be criticized in order to clarify the source of funding for 86,388 cases that are not budgeted. This funding method is not ideal because it is difficult to predict criminal cases to be handled. However, if the budgeting is conducted based on the number of cases, it will also burden the State budget.

To overcome it, Attorney increased the number of budgeted based. This can be viewed in 2012 Annual Report of Indonesian Attorney, in which it increased the number of cases handled to be 112,422 cases, 102,322 higher than the budgeted cases in 2011. (See table 2). However, increasing prosecution budget shall also definitely add burden to the state budget. Due to the limitation of state budget, Attorney mitigated it by decreasing the amount of budget per case. If in 2011 it was allocated Rp29.5 million per case, then in 2012 it was decreased to be Rp5.8 million per case<sup>11</sup> then again decreased in 2013 to be Rp3.3 million (table 3)<sup>12</sup>. As a result, some prosecutors complained on insufficient amount of budget to settle a case,<sup>13</sup> especially in remote areas requiring high transportation costs.<sup>14</sup>



Table 2: Case Prosecution Allocation

researcher.

<sup>9</sup> Supreme Court of RI, Annual Report of Supreme Court of RI Year 2011, <http://www.kejaksaan.go.id/upldoc/laptah/2011-Laporan%20Tahunan%20Kejaksaan%20RI-id.pdf>, accessed on February 18, 2014

<sup>10</sup> Supreme Court of RI, Annual Report of Supreme Court of RI Year 2012), <http://kejaksaan.go.id/upldoc/laptah/laptah2012.pdf>, accessed on February 18, 2014

<sup>11</sup> Attorney Commission, *Research Report on General Crime Handling Costs*, Unpublished Report, 2013, page 10

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> As illustration, the prosecutor in remot areas sometimes need air and sea transportation with a very high cost due to geographical factor.



Table 3: Case Prosecution Cost

Due to limited budget and other resources, the law enforcement apparatus are then less likely to adhere procedural law, aiming to settle the cases faster. For example, theft case that was tried on court for 10 minutes, starting from reading the indictment until the verdict, even though the prosecutor demanded it to go through regular investigation.<sup>15</sup> In addition, exploitation by the law enforcement apparatus shall also become one of the problems that people complain about.<sup>16</sup> The restlessness can be seen from the Global Corruption Barometer 2013, which places Attorney and the Courts as the second most corrupt institution after *Polri* (Indonesian Police).<sup>17</sup> Attorney itself admitted that minimum case handling budget becomes one of the trigger of corruption practice.<sup>18</sup>

Based on the above description, it is not surprising to have piles of cases in the Supreme Court (MA). And the limited budget causes judges and prosecutors cannot perform their duties optimally and professionally. The issues are not

<sup>15</sup> Anton Setiawan, MaPPI Reported 307 Judge Violation to KY (Judicial Committee), December 15, 2011, <http://www.jurnas.com/news/47979>, accessed on February 18, 2012

<sup>16</sup> The case of prosecutor exploitation can be seen in Muhammad Nur Abdurrahman, Reported to Exploit the Defendant, 10 Prosecutors of Kejati Sulsel Examined by Jamwas, February 24, 2010, <http://news.detik.com/read/2010/02/24/154342/1306066/10/dilaporkan-memeras-terdakwa-10-jaksa-kejati-sulsel-diperiksa-jamwas>, JPNN, Kejagung Investigates Rp. 10 Billion Blackmail by the Prosecutor, February 11, 2014 <http://www.jpnn.com/read/2014/02/11/215895/Kejagung-Periksa-Jaksa-Pemeras-Rp-10-Miliar->, Hukum Online, After Sentenced, Blackmail Prosecutor "Singing", February 12, 2013, <http://www.hukumonline.com/berita/baca/lt511a0cb289db6/usai-divonis-jaksa-pemeras-bernyanyi>, accessed on March 24, 2014

<sup>17</sup> Rahmat Fiansyah, KPK Boosted Up Corruption Perception Index of Indonesia, December 3rd 2013 <http://nasional.kompas.com/read/2013/12/03/1934297/KPK.Dongkrak.Indeks.Persepsi.Korupsi.Indonesia>, accessed on March 24, 2014 and Transparency International, Global Corruption Barometer 2013, [http://issuu.com/transparencyinternational/docs/2013\\_globalcorruptionbarometer\\_en?e=2496456/3903358#search](http://issuu.com/transparencyinternational/docs/2013_globalcorruptionbarometer_en?e=2496456/3903358#search), accessed on March 24, 2014

<sup>18</sup> Muhammad Agung Riyadi, Mental Korup, Jaksa Belum Reformis, <http://www.gresnews.com/berita/hukum/10282012-mental-korup-jaksa-belum-reformis/> accessed May 28, 2014

necessarily caused by the complexity of procedures, but also other factors such as budget management in Attorney or human resources in MA. Therefore, it needs to conduct managerial transformation at each of institution that become the scope of bureaucratic reform, in addition to the amendment within the procedural law.

Options of streamlining and expediting the judicial procedure needs to be discussed and formulated by the stakeholders of criminal justice system. Developing an efficient procedural law is still rarely discussed in Indonesia. Discussion on procedural law is still related human rights protection or anti-corruption. Discussing human rights issue and efficient justice becomes highly important and urgent, as the efficiency and human rights issues have potential to be conflicting each other. The experience occurred in Taiwan that is too focused on efficiency and caused unbalance “battle” between the prosecutor and the defendant or his attorney.<sup>19</sup> This imbalance results in adversarial system that is driven more to protect human rights of the defendant cannot be achieved maximum.<sup>20</sup> By initiating the discussion on both matters (efficiency and human rights), Indonesia may find the best solution to formulate KUHAP, by not only focusing on one of the issues.

### C. Special Line in RUU KUHAP

Drafting Team of RUU KUHAP has conducted benchmarking study on criminal procedure law in several countries such as Italy, Russia, Netherland, France and United States.<sup>21</sup> However, it is undeniable that US plea bargaining inspired the drafting team in formulating special line in RUU KUHAP. Drafting Team describes special line with sub-title of “plea bargaining” in the academic script of RUU KUHAP.<sup>22</sup> According to Robert Strang, the plea bargaining setup in RUU KUHAP was added after the drafting team conducted benchmarking study to the United States.<sup>23</sup> Drafting Team conducted seven formulation sessions in Indonesia and one benchmarking study to the United States with the support of U.S. Department of Justice’s Office for Overseas Prosecutorial Development, Assistance and Training (“DOJ/OPDAT”)<sup>24</sup> as part of their mission to empower the

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<sup>19</sup> Margaret K. Lewis, *Taiwan’s New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 *Va. J. Intl. L.* 651 (2009)

<sup>20</sup> *Ibid.*

<sup>21</sup> RUU KUHAP Academic Script, November 19, 2011

<sup>22</sup> *Ibid.*

<sup>23</sup> Robert R. Strang, “More Adversarial, but Not Completely Adversarial”: Reformi of the Indonesian Criminal Procedure Code, 32 *Fordham Intl. L.J.* 188 (2008), page 210-211

<sup>24</sup> *Ibid.* page 2010



criminal justice system outside the United States.<sup>25</sup>

Plea bargaining setup in US is different with the special line in RUU KUHAP. The most significant distinction is there is no bargaining of charges and penalties between the prosecutor and the defendant or his lawyer. This distinction makes the special line in RUU KUHAP is less appropriate to be called as pleas bargaining. As the terms of Graham Hughes, the special line in RUU KUHAP shall be more appropriate to be referred as “pleas without bargains”<sup>26</sup> or “admission of guilt without negotiation”.

### 1. Plea Bargaining Characteristics

Plea Bargaining has had the historical root since the 18<sup>th</sup> century in England<sup>27</sup> and 19<sup>th</sup> century in the United States (US).<sup>28</sup> However, it was not plea bargaining that was developed, but the guilty plea or admission.<sup>29</sup> Even the judge reminded the defendant that he should have the right to defend himself and proof not to be guilty at the court. During the period. The defendant who admits his guilt is not guaranteed to get deduction or commutation.

In United States, plea bargaining has been regularly performed by the prosecutor and defendant since the end of 19<sup>th</sup> century and the beginning of 20<sup>th</sup> century, even though there was not any regulation that ruled it in details. The practice was conducted due to the increasing number of cases handled by the law enforcer, as well as longer trial process if the defendant filed a legal action.<sup>30</sup> Plea Bargaining finally received acknowledgement in 1970, when the court convicted on Brady v.s United States case.<sup>31</sup>

Plea Bargaining in the Black’s Law Dictionary is defined as “A negotiated agreement between a prosecutors and a criminal defendant whereby the defendant pleads guilty and get a lesser sentence or is charged on a more lenient criminal offense”.<sup>32</sup> In the practice, the prosecutor and the defendant conduct negotia-

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<sup>25</sup> <http://www.justice.gov/criminal/opdat/about/mission.html>, accessed on March 3rd, 2014

<sup>26</sup> Graham Hughes, *Pleas Without Bargains*, 33 *Rutgers L. Rev.* 753 (1980-1981)

<sup>27</sup> Albert W. Alschuler, *Plea Bargaining and Its History*, 79 *Colum. L. Rev.* 1 (1979), page 9

<sup>28</sup> Wayne R. LaFavea, et.al, *Criminal Procedure*, 5 *Crim. Proc.* § 21.1(b) (3d ed.)

<sup>29</sup> Alschuler, *Op.Cit.*

<sup>30</sup> George Fisher, *Plea Bargaining’s Triumph*, 109 *Yale L.J.* 857 (2000), page 1041

<sup>31</sup> Jenia I. Turner, *Plea Bargaining Across Borders*, (New York: Aspen, 2009), page 10

<sup>32</sup> Black’s Law Dictionary (9th ed. 2009), accessed through [www.westlaw.com](http://www.westlaw.com) on March 2nd 2014, literal translation by the writer.

tion or bargaining at least in three formats as follows<sup>33</sup>:

- 1) Charge bargaining (negotiating the article charged), in which the prosecutor offers to reduce the type of criminal offense charged;
- 2) Fact bargaining (negotiating the legal facts), in which the prosecutor will only provide the facts for defense of the defendant; and
- 3) Sentencing bargaining (negotiating the sentence), which is the negotiation between prosecutor and the defendant regarding the sentence to be charged to the defendant. The sentence is generally lower.

The negotiation may be conducted by phone, at the Attorney Office, or the court room.<sup>34</sup> However, the negotiation may also be conducted without the involvement of judge.<sup>35</sup> Agreement between the two parties may result on the prosecutor 1.) not to charge or charge the lighter criminal offence to the defendant; 2) recommend the sentence to be imposed to the judge; 3.) agree with the defendant to impose specific sentence.<sup>36</sup> However, the judge shall not be bound to take the court judgment in accordance with the agreement between prosecutor and the defendant or his lawyer.<sup>37</sup>

In United States, plea bargaining may settle more cases. This procedure encourages the enforcement apparatus to settle 97% of central government criminal case and 94% of state government criminal case.<sup>38</sup> The efficiency resulted from plea bargaining shall inspire law experts and parliament members in many countries.<sup>39</sup> Countries with civil law such as Italy,<sup>40</sup> Russia,<sup>41</sup> or Asian countries such as Taiwan<sup>42</sup> has regulated provisions on please bargaining within their criminal

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<sup>33</sup> Regina Rauxloh, *Plea Bargaining in National and International Law*, (London: Routledge, 2012), page 25-26

<sup>34</sup> *Ibid.* page 22

<sup>35</sup> Fed. R. Crim. Proc. 11 (c) (1) (C)

<sup>36</sup> Fed. R. Crim. Proc 11 (c) (1) (A) (B) (C)

<sup>37</sup> Fed. R. Crim. Proc 11 (c) (3) (A)

<sup>38</sup> *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (Citing Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, <http://www.albany.edu/sourcebook/pdf/t5222009.pdf>)

<sup>39</sup> Cynthia Alkon, *Plea Bargaining As A Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?*, 19 *Transnatl. L. & Contemp. Probs.* 355 (2010)

<sup>40</sup> William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 *Mich. J. Intl. L.* 429 (2004), page 438

<sup>41</sup> Inga Markovits, *Exporting Law Reform-but Will It Travel?*, 37 *Cornell Intl. L.J.* 95 (2004), page 109

<sup>42</sup> Margaret K. Lewis, *Taiwan's New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 *Va. J. Intl. L.* 651 (2009), page 672

procedure law. Moreover, the Government of the United States “exports” their criminal procedure law to be the catalyst of plea bargaining concept deployment to other countries.<sup>43</sup>

## 2. Special Line Characteristics

Special Line in RUU KUHAP is only regulated with one article, i.e. Article 199 RUU KUHAP, which is mentioned as follows:

### Section Six

### Special Line

### Article 199

- (1) When the public prosecutor read out the indictment, the defendant pleads to all acts indicted and pleads guilty to have conducted the criminal offense sentenced of penalty not more than 7 (seven) years, the public prosecutor may delegate the case to the trial with short examination procedure.
- (2) Plea of the defendant shall be set forth in the minutes signed by the defendant and public prosecutor.
- (3) The judge is obliged to:
  - a. inform the defendant on the rights released by pleading as referred to in paragraph (2);
  - b. inform the defendant on the length of criminal sentence that may be applied; and
  - c. question whether the plea as referred to in paragraph (2) provided voluntarily.
- (4) The judge may refuse the plea as referred to in paragraph (2) if the judge doubts on the truth of the plea of the defendant
- (5) Excluded from Article 198 paragraph (5), criminal impose to the defendant as referred to in paragraph (1) shall not exceed 2/3 from maximum criminal offence charged.

Similar to plea bargaining, the special line is given to the defendant confessing the criminal offense charged. As the impact of the confession, the defendant will

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<sup>43</sup> Lihat Hiram E. Chodosh, *Reforming Judicial Reform Inspired by U.S. Models*, 52 *DePaul L. Rev.* 351 (2002) and Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 *Yale L. & Policy Rev.* 83 (2010)

be adjudicated using “short examination procedure”.<sup>44</sup> The shifting from regular examination procedure is expected to expedite the trial process.

On the short examination procedure, RUU KUHAP regulates that the trial shall be led by 1 (one) judge<sup>45</sup> This arrangement is considered to be appropriate to review the result of MaPPI FHUI monitoring, that found the judge members tend to just sit down, or even fall asleep during the trial therefore the proof is considered to be easy by the judge and the prosecutor.<sup>46</sup> With such arrangements, the time and energy of the judge can be allocated to major cases that are difficult to prove or to settle other cases backlog.

Different with plea bargaining, the drafting team closes the opportunity of agreement on sentences between prosecutor and the defendant, due to the concern on potential corruption on the attorney.<sup>47</sup> The drafting team prefers open court, which is lead and decided by the judge in imposing sentence to the defendant.<sup>48</sup> This setting is the sign that the drafting team does not want RUU KUHAP to fully become adversarial system. The drafting team still regulates one of the inquisitorial Systems, which is the major role of the judge in leading the trial, particularly in the proving proses and sentences.<sup>49</sup>

Confession of the defendant is performed in front of the judge on the trial after the public prosecutor read the indictment.<sup>50</sup> The judge will then decide whether the confession if appropriate or not. If the judge is doubtful on the truth of the defendant’s confession, the judge may reject the confession.<sup>51</sup> This is different with the plea bargaining in US, in which the confession of the defendant is not performed in front of the judge.

RUU KUHAP also limitedly regulates the criminal offenses that can be prosecuted through the special line. It is unlike the plea bargaining in the United States that can be applied to all type of criminal acts, including those with punishable

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<sup>44</sup> *Ibid.*

<sup>45</sup> Article 198(6) RUUKUHAP of 2012 version, <http://icjrid.files.wordpress.com/2012/12/r-kuhap.pdf>, accessed on March 24, 2014, <http://icjrid.files.wordpress.com/2012/12/naskah-akademik-r-kuhap.pdf>, accessed on March 24, 2014

<sup>46</sup> Judge Fell Asleep During Trial will be Sentenced, 11 Juni 2011, <http://www.jpnn.com/read/2011/06/11/94724/Hakim-Tidur-Saat-Sidang-Akan-Dihukum->, accessed on March 24, 2014

<sup>47</sup> Strang, *Op. Cit.*, Hlm. 229

<sup>48</sup> *Ibid.*

<sup>49</sup> See Franklin Strier, What Can the American Adversary System Learn from an Inquisitorial System of Justice?, 76 *Judicature* 109 (1992)

<sup>50</sup> Article 199 paragraph 1 RUU KUHAP

<sup>51</sup> Article 199 paragraph 4 RUU KUHAP

death penalty.<sup>52</sup> The drafting team refers to plea bargaining concept in Russia which is closed for serious crime.<sup>53</sup> Special line can only be applied to the criminal offence which is accused for no more than 7 (seven) years.<sup>54</sup>

The defendant who confessed cannot make a deal with the prosecutor regarding the duration of sentence charged. They also cannot negotiate on the type of charges to be applied to the defendant as the chance of guilty pleas exists after the prosecutor create and read out the charges. RUU KUHAP regulates that the judge still plays important role in sentencing. However, the judge is restricted to exceed 2/3 of the maximum criminal offence charged.<sup>55</sup> Reduction of sentence is in aligned with the objective of plea bargaining, which is to impose more lenient sentence to the defendant who pleads guilty.

Drafting Team actually does not develop certain examination procedure for the implementation of special line. The team only regulates that the short examination procedure shall be applied in adjudicating the defendant pleads guilty. In the special line mechanism, the prosecutor is authorized to reduce the proving stage that is considered to be unnecessary.<sup>56</sup> Confession of the defendant shall definitely be considered as a strong evidence to judge the case. Thus, the prosecutor does not have difficulty to add another evidence. Therefore, the case handling can be settled immediately. The quick settlement of the case shall provide opportunity to the judge for checking other cases backlog and saving case handling cost of the prosecutor which is very limited.

### 3. Special Line Refinement

Special line arrangement in RUU KUHAP is currently still not perfect, there are still some unclear or ambiguous provisions. One of the root causes is that the drafting team did not develop a certain examination procedure for the defendant to plain to be guilty and only refers to the short investigation procedure. DPR and the policy stakeholders need to revise and discuss some provisions that require to be clarified. Among others are the transitional examination procedure from regular examination procedure to the short examination proce-

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<sup>52</sup> In United States, prosecutor sometimes “threats” the defendant by death penalty in order to obtain confession easily and quickly so that the case can be settled through plea bargaining. See: Sarah Breslow, *Pleading Guilty to Death: Protecting the Capital Defendant’s Sixth Amendment Right to A Jury Sentencing After Entering A Guilty Plea*, 98 *Cornell L. Rev.* 1245 (2013)

<sup>53</sup> Strang, *Op.Cit.*, page 211-212

<sup>54</sup> Article 199 paragraph 1

<sup>55</sup> Article 199 paragraph (5) RUU KUHAP

<sup>56</sup> Article 198 paragraph (2) RUU KUHAP

cedure, provisions on the sentences and evidence. This shall be based on the followings:

First, the ambiguity within special line occurs in the examination procedure applied to prosecute defendant who plaids to be guilty. The drafting team arranges that the transfer to the short examination procedure can be done after the prosecutor read out the indictment and hear the confession of the defendant.<sup>57</sup>The existence of the word “transfer” indicates that the case is adjudicated with regular examination procedure before it is adjudicated with the short examination procedure.<sup>58</sup>

Transferring from regular examination procedure that is adjudicated by three judges to the short examination procedure that is also adjudicated by three judges to the short examination procedure which may lead to inefficient at judicial procedure. This shall also complicate administration at the Court, that after assigning three judges, but then it was adjudicated and imposed by one judge in the short examination procedure, We are saving the time, energy and thought of two judges who do not continue to execute the trial, and the time is consumed for reading, learning and prosecute the case until the implementation of the first trial.

Second, provision on sentence stipulated in the special line and the short examination procedure part have different arrangement. Special line may be applied by the law enforcer to the defendant with criminal charges not more than 7 (seven) years<sup>59</sup> has maximum sentences limit of 2/3 (two thirds).<sup>60</sup> For example, a defendant is accused by a criminal act with maximum sentence of 7 (seven) years in prison, then the judge may impose the imprisonment for him at maximum 4 (four) years and 8 (eight) months, 2/3 (two thirds) of the 7 (seven) years imprisonment. Meanwhile, the defendant tried through a short examination procedure shall not be sentenced to more than 3 (three) years in prison.<sup>61</sup>

Third, the short examination procedure in the special line does not enforce provisions on evidence.<sup>62</sup> Provision of evidence in the RUU KUHAP is considered as

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<sup>57</sup> Article 199 paragraph (1) RUU KUHAP

<sup>58</sup> It is not possible to adjucate it with short examination procedure (lenient criminal act examination procedure) as in the short examination procedure the investigator with the authority from the public prosecutor does not read the indictment.

<sup>59</sup> Article 199 paragraph (1) RUU KUHAP

<sup>60</sup> Article 199 paragraph (5) RUU KUHAP

<sup>61</sup> Article 198 paragraph (5) RUU KUHAP.

<sup>62</sup> Article 198 paragraph (2) RUU KUHAP.

one step forward by some parties<sup>63</sup> as it requires the law enforcer to obtain evidence with the procedure that is not against the law.<sup>64</sup> Therefore, the judge may refuse the evidence presented by the prosecutor when obtained unlawfully, such as torturing.

The invalidity of the evidence provision shall stimulate and sustain torturing practices in order to obtain confessions. As we know, in 2008, LBH Jakarta found 81.1 % of 639 respondents in Jakarta stated to be subjected to torture during the examination by the investigator.<sup>65</sup> This torture, according to Edy Halomoan, lawyer at LBH Jakarta. Is commonly performed in order to obtain confessions from the suspect.<sup>66</sup> Edy also found torturing practices occurred in other cities such as Banda Aceh and Surabaya.<sup>67</sup>

Based on the above description, then DPR and policy stakeholders should reformulate the provisions of special line in RUU KUHAP by establishing separate procedure for the defendant who pleads guilty, among others by :

1. Reinforce the sentence limit, either 2/3 (two thirds) from the maximum penalty or 3 (three) years of imprisonment. The incentives in the form of more lenient sentence shall encourage the defendant who are completely guilty to confess so that the case can be immediately settled.
2. Provision concerning the validity of evidence is absolute to be applied. Indonesia as a country that ratifies various international convention, particularly the International Convention Against Torture (CAT) and International Covenant on Civil and Political Rights (ICCPR) shall not ignore provisions on the evidence. The provision may prevent and stop torture practice by the law enforcer to obtain confession. This provision also may encourage ideal special line implementation, which is plea of guilty by the defendant voluntarily.

The writer believes that the measure can reduce the procedural complexity,

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<sup>63</sup> Strang, Op. Cit., page 218-221.

<sup>64</sup> Article 175 paragraph (2) RUU KUHAP.

<sup>65</sup> LBH Jakarta, Rights to be Freed from Torture and Treatment or other Sentences that are Cruel, Inhuman and Degrading Human Dignity, <http://www.bantuanhukum.or.id/web/blog/hak-bebas-dari-penyiksaan-dan-perlakuan-atau-penghukuman-lain-yang-kejam-tidak-manusiawi-dan-merendahkan-martabat-manusia/> accessed on May 28, 2014

<sup>66</sup> Ariehta Eleison Sembiring, LBH Jakarta: Investigators of Polda Metro Jaya Tortures U, <http://megapolitan.kompas.com/read/2013/01/28/13481563/LBH.Jakarta.Penyidik.Polda.Metro.Jaya.Lakukan.Penyiksaan> accessed on May 28, 2014

<sup>67</sup> Edy Halomoan Gurning, Index of Perception and Torture as the Public Monitoring Mechanism, <http://www.elsam.or.id/mobileweb/article.php?act=content&m=6&id=1589&cid=14&lang=en>, accessed on May 28, 2014

therefore it shall facilitate the law enforcement apparatus in performing their duties. This ease shall definitely drive the justice efficiency.

#### **D. Conclusion**

Efficient justice is highly required, besides due to the law mandate, there is also the fact that the criminal justice system is currently resulting to a stacking of cases and on the other hand the state budget is not sufficient to fund all indictments of the prosecutor. Special line offers an efficient procedure, as the defendant plaid to be guilty shall be prosecuted and put on trial in a short examination procedure. Short examination with one of the judges will maximize other judges to settle other cases. By elimination some evidentiary process, special line is considered to accelerate case handling, so that it can realize a fast, low cost and simple justice.

However, special line setup using short investigation procedure still needs to (1) eliminate ambiguity of procedures, (2) maximum threshold of punishment, and (3) re-apply the provisions on evidence. Therefore criminal procedure law going forward may provide human rights protection as well as building justice efficiency.



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