Plead Guilty, Without Bargaining: Learning from China’s “Summary Procedure” before Enacting Indonesia’s “Special Procedure” in Criminal Procedure.
Plead Guilty, Without Bargaining: Learning from China’s “Summary Procedure” before Enacting Indonesia’s “Special Procedure” in Criminal Procedure.

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Abstract

Because Indonesian courts are increasingly overrun with criminal cases, Indonesian lawmakers recently introduced a criminal procedure bill to include “special procedure” (jalur khusus), a procedure that allows defendants to plead guilty in order to increase efficiency. Unlike plea-bargaining in the U.S., this procedure more resembles China’s “summary procedure,” which is solely conducted by a judge, not negotiated independently by prosecutors and defendants. Before enacting the provision of special procedure, however, Indonesian lawmakers should learn from China’s successes and failures implementing summary procedure. While this procedure resulted in increased efficiency in China, it did not provide for defense counsel, and it resulted in an increased risk of false confessions. The author begins by describing the overcrowding of Indonesian courts and the need for increased efficiency. Next he describes several lessons from China’s experience by identifying China’s successes and failures after enacting summary procedure. Finally he gives specific recommendations to Indonesian lawmakers for maximizing the special procedure in light of China’s experience.

Keyword: Plea Bargaining, Criminal Procedure Law, Criminal Justice Reform

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Introduction

Indonesia recently introduced a criminal procedure bill that includes a *jalur khusus* or “special procedure” to allow defendants who plead guilty exchange a shortened procedure for a lesser punishment. The drafters of the bill were inspired by the U.S. “plea bargaining”\(^1\) procedure. The drafters’ intention was not only to give a lesser punishment to a pleaded defendant\(^2\), but also to reach *peradilan cepat, sederhana, dan biaya ringan*, a “speedy, simple, and less costly trial,” by using a shortened criminal procedure.\(^3\) This special procedure was designed to alleviate great backlogs in Indonesian courts, where criminal procedure is normally cumbersome, and there are few court resources or supports for defendants. Special procedure will potentially increase efficiency because it is examined by a single judge in a short trial procedure; however, the vagueness of its provision under the bill will also potentially creates a “latent regulation” or hidden system\(^4\) that evades the law.

Notably, Indonesia’s special procedure closely resembles China’s “summary procedure,” which shortened criminal proceedings if a defendant confesses guilt. Unlike plea-bargaining in the U.S., a judge controls this procedure and decides the punishment. It is not negotiated independently by prosecutors and defendants. It is also different from the Italian Criminal Procedure\(^5\) where defendants and prosecutors agree before trial about

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1 Drafters use term “Plea Bargaining” *in* Academic Draft of Indonesia Criminal Procedure Bill *see* Academic Draft of Indonesia Criminal Procedure Bill 23 (December 19, 2012) [hereinafter Academic Draft].
2 *Id.*
3 *Id.* at 6.
4 This term is being used to explain informal or unregulated procedure that proceed by the court, *see* Chen Ruihua, *Initial Research on the Malfunctions of the Criminal Process*, 20 P. RIM L. & POLICY J. 359, 360 (Timothy Webster trans., 2011) (2011).
5 Drafters also conducted a study visit to Italy, *see* Academic Draft, *supra* note 1, at 4.
the punishment before the case is examined by the judge.\textsuperscript{6} Both Indonesian special procedure and Chinese summary procedure do not give the opportunity for defendants and prosecutors to agree on punishment. Therefore, neither Indonesia nor China have true “plea bargaining” procedures\textsuperscript{7}; instead, as Graham Hughes defines them, they are better described as: “pleas without bargains.”\textsuperscript{8}

Alvaro Santos has criticized the legal reformer who simply introduces an “univocal agenda for reform” without looking to local conditions in judicial reform and anti-corruption efforts.\textsuperscript{9} It is essential, then, for stakeholders and legal scholars to examine both Indonesia and China’s cultural values related to punishment, to determine whether a comparison is appropriate and instructive. Looking at the cultural histories of both countries, one finds a preference for leniency in criminal matters.\textsuperscript{10} Specifically, both Chinese Confucianism\textsuperscript{11} and Indonesian adat traditions\textsuperscript{12} highly emphasize harmony


\textsuperscript{10} Confucianism leniency started in the Han Dynasty, leniency that was available for juvenile and mentally disabled people, and later was broadened for pleaded defendant. See Yujun Feng, \textit{Legal Culture In China: A Comparison To Western Law} 3, available at http://www.victoria.ac.nz/law/nzac/pdf/Vol_15_2009/01%20Feng.pdf, (last visited May 17, 2014).

\textsuperscript{11} JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE TO FOREIGN-INVESTED ENTERPRISES (AMERICAN BAR ASSOCIATION, 2010) AVAILABLE AT HTTP://WWW.CHINALAWDESKBOOK.COM/PDF/CLD%20CH2.PDF, last visited 14th February, 2014.

Bo Yin and Peter Duff argued that Confucianism tradition has been attacked by communism value since 1920. And, Communism value has dominated China’s society after Communist Party of China (CCP) led the country in 1949. Communism value tends to give severe penalty to maintain social order. See Bo Yin and Peter Duff, \textit{Criminal Procedure In Contemporary China: Socialist, Civilian Or Traditional?}, 59 INT’L & COMP. L.Q. 1099 1108 (2010). However, the concept of “leniency for confessions; harshness for resistance” (tanbai congkuan; kangju congyan) remains strong in Chinese law. See MIKE McCONVILLE ET AL., CRIMINAL JUSTICE IN CHINA: AN EMPIRICAL INQUIRY 6 (Edward Elgar 2011). Chinese criminal law allows for leniency for defendants who voluntarily surrender and help law enforcement gather evidence.
within society. In both traditions, the main purpose of the criminal justice system is to recover the imbalance within society because of crime. In recovering the imbalance, both traditions consider punishment as the last resort, and they prefer lenient punishment for pleaded criminals. These similarities in cultural heritage seem to justify comparison.


12 Similar to Confucianism in China, adat arguably still exists within Indonesia society even though there were some effort to unify and nationalize Indonesian law. See Daniel S. Lev, Van Vollenhoven and Hukum Adat [Van Vollenhoven and Adat Law], in DANIEL S LEV, HUKUM DAN POLITIK DI INDONESIA: KESINAMBUNGAN DAN PERUBAHAN (LAW AND POLITIC IN INDONESIA: SUSTAINABILITY AND CHANGE) 400 (JAKARTA, 2013). The existence of adat implicitly mentioned in the Judge Authority Law. Under this law, the judge must understand and follow the values of law and justice, arguably adat tradition (unwritten law), that lives in society in concluding the case. See Indonesia. Undang-undang tentang Kekuasaan Kehakiman. UU Nomor 48 Tahun 2009, LN. 157, TLN. 5076. [Indonesia. Law regarding Judge’s Authority. Law Number 48 Year 2009, SG. 157-5076. Art 5 (1)]. In addition, the idea of looking on unwritten law or adat to conclude the case has been established since Dutch colonization while the Dutch established Landraad or indigenous court see Rikardo Simarmata, Merumuskan Peradilan Adat Dalam Sistem Peradilan Nasional [Establishing Adat Court in National Justice System] 8, available at http://humoid/wp-content/uploads/2013/10/MAKALAH-2.pdf (last visited Mar. 20, 2014).

13 In the adat tradition, the basic concept of society is communalism instead of individualism, emphasizing relations between individuals and society. See M.B. Hooker, ADAT LAW IN MODERN INDONESIA 33-34 (KUALA LUMPUR, 1978). This tradition acknowledges how actions of individuals affect the society where they live, establishing norms that should be followed by all. See Hilman HadiKusuma, HukumPidana Adat [ADAT CRIMINAL LAW] 20 (BANDUNG: ALUMNI, 1979). The adat society prefers harmony over disturbance, and wrongdoings are viewed as a disturbance to which society must respond. Adat views criminal offenders as creating a “...disturbance of the equilibrium.” Therefore, the punishment or sanction must be imposed on an offender to restore the equilibrium of society, also deterring future wrongdoing that could disrupt society. See B. Ter Haar, ADAT LAW IN INDONESIA 213 (NEW YORK, 1948). Notably, Peter Burns explains that punishment is not really the right term to explain a sanction that is given to an offender in adat. He suggests that “adjustment” is the proper term because “...the proper task of law was the restoration of social harmony and individual tranquility.” See, See Peter Burns, The Leiden Legacy: CONCEPTS OF LAW IN INDONESIA 115 (KITLV Press, 2004). In addition, there are several kinship and territory in adat tradition that have their own approach in responding the imbalance because of an offender’s wrongdoing. In giving the adjustment, adat judge or chief or kinship leader should consider the intention, confession, and mercy. See, HadiKusuma, supra note 13, at 36.

14 Harmien Hadiati Koeswadji, Aspek Budaya Dalam Pemidanaan Delik Adat [Tradition Aspect in Criminalizing Adat Crime], in BADAN PEMBINAAN HUKUM NASIONAL, SIMPOSIUM PENGARUH KEBUDAYAAN/AGAMA TERHADAP HUKUM PIDANA [SYMPOSIUM ON TRADITION/RELIGION INFLUENCE IN INDONESIA CRIMINAL LAW], (DENPASAR, 1975)), at 45.


16 Id.

17 Adat as practiced by the Gayo (one of ethnic group lives in Sumatra), for example, expects thieves to pay a fine for the restoration of society based on his or her social status. A rich thief would be required to
Because of these cultural similarities, as well as the similarities between Chinese summary procedure and Indonesian special procedure, Indonesian lawmakers should learn from China’s successes and failures before finalizing and implementing the new Indonesian law. While the Chinese law increased efficiency in China, it lacked sufficient protections for defendants, and resulted in increased risk of false confessions and reduced access to defense counsel.\textsuperscript{19}

The author begins by describing the overcrowding of Indonesian courts and the need for increased efficiency. Then he compares the features of both Indonesia’s special procedure and China’s summary procedure. Next he describes several lessons from China’s experience by identifying China’s success and failure after enacting summary procedure. Finally he recommends that Indonesian lawmakers prevent the problems China experienced when it implemented its special procedure by making lawyers available for the defendant in pre-trial investigations, allocating state funds to make this possible, and by clarifying and curing the vague language in the bill.

\textbf{I. The Need for Efficiency}

In Indonesia, the high crime rate and public will to prosecute criminal cases has resulted in increasing caseloads for police and prosecutors and backlogs in the courts.

\textsuperscript{18} Notably, the principle is unlike in U.S. where tends to give a severe punishment because of Utilitarianism that influenced by British scholars, Jeremy Bentham and John Stuart Mill. Utilitarian views that punishment have to “include concept of gross negligence and recklessness” and also “cover cases of strict and vicarious liability”. They believe in punishment with deterrence to stop following violation. See ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW: THE AMERICAN WAY OF LAW 35 (HARVARD UNIVERSITY PRESS, 2003). See BURNS, supra note 13, at 112. See also Aaron Xavier Fellmeth, \textit{Civil and Criminal Sanctions in the Constitution and Courts}, 94 GEO. L.J. 1, 26 (2005).

For instance in 2010, Indonesian district courts had 26,210 cases carried over from the previous year. In 2010, there were 131,936 new cases; however, the courts were able to handle only 130,817 cases. Backlogs rose to 27,329 at the end of 2010, and in 2011, the number of backlogs increased to 30,697. The number of backlogs rapidly rose in the next two years to 51,874 (2012) and 67,196 (2013).

Figure 1: Criminal cases backlogs at Indonesian district courts

This backlog is not necessarily related to low productivity among judges, but rather it signals a lack of judicial resources to handle the heavy and increasing burden of cases. Judges have grown anxious and concerned about these heavy caseloads. Before

21 Id.
22 Id.
2010, the average workload of a judge was 217 cases per year.\textsuperscript{25} Presumably, this number has increased since there have been no judicial positions added. Hiring new judges costs money that the Indonesian government does not have; therefore, another solution is needed to relieve the burden caused by backlogs.

Because Indonesian criminal procedure itself is lengthy, there is associated delay and cost. In addition, inadequate state funds prevent law enforcement efforts. In 2012, Indonesia’s Attorney General Office (AGO) Report of 2011 showed that the AGO only had sufficient funds to prosecute 10,100 general criminal\textsuperscript{26} cases.\textsuperscript{27} However, it reported that the AGO actually prosecuted 96,488, or 955.32\% from targeted budget in 2011. This suspicious statistic raises questions about where the money came from to prosecute these cases.

Figure 2: Prosecution quota

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Figure2.png}
\caption{Prosecution quota and prosecuted cases}
\end{figure}


\textsuperscript{26} General crime are all type of crimes exclude Corruption and Human Rights.

In 2012, the AGO revised its plan to set 112,422 cases to be heard in District Court. However, the total budget did not dramatically change. Therefore, the allocated budget to prosecute each case fell from Rp. 29.5 million ($ 3,000) per case in 2011 to Rp. 5.8 million ($ 600) per case in 2012.\(^2^9\) In 2013, the budget reduced again to Rp. 3.3 million ($ 330) per case in 2013.\(^3^0\) The decreasing budget made it difficult to prosecute criminal cases; therefore, many prosecutors complained that they have to do unlawful act (corruption) to find another funding sources to prosecute cases.\(^3^1\)

Figure 3: Prosecution budget for criminal cases in Indonesian Attorney General Office

To deal with this problem of backlogs and heavy case loads, law enforcement has begun to evade criminal procedure by creating a “latent regulation” or a “hidden system,”\(^3^3\) which rushes defendants though indictment, trial, and sentencing, skipping


\(^3^0\) Id.

\(^3^1\) Id. at 11.


\(^3^3\) Ruihua, *supra* note 4, at 383.
steps along the way and violating criminal procedure law. Under this system, for example, a thievery case under the “ordinary trial procedure,” might only proceed for 10 minutes from indictment to verdict in one trial. These cases have been rushed through the process even though the defendant is supposed to be given an opportunity to cross examination witnesses against him under the ordinary trial procedure.

This lengthy process and evasion of law harm defendant rights to get speedy and fair trial. According to MaPPI FHUI’s observation, the violations of Indonesian Criminal Procedure that usually happen are (1) lack access to defense counsel, and (2) failure by judges to give defendants fair trials under the law. The case described above are good example of how defendants do not have defense counsel, chance to read indictment first and prepare a defense, and also ability to present their own witnesses.

This latent regulation or hidden system has also affected law enforcements’ credibility and integrity. For instance in 2013, survey from Indonesia Circle Survey (LSI) reported that 56% of respondents were skeptical of with law enforcements. In addition, law enforcement officers are known to engage in bribery and extortion to get bribes to

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35 There are three types of trial procedure in current Indonesia Criminal Law Procedure. There are “quick trial procedure” to proceed traffic cases, “short trial procedure” to proceed cases that considered by prosecutor easy to prove, and “ordinary trial procedure” to proceed cases with an ordinary procedure such as reading indictment, cross examination, and verdict.


37 From 2011 to 2013, Indonesia Judicial Monitoring Society Faculty of Law University of Indonesia (MaPPI FHUI) has been monitoring trial process particularly in several district courts in Jakarta

cover the cost of solving crimes. In Indonesia, the public perceives the Police as the most corrupt institution, and the Judiciary as the second-most corrupt institution.\(^{39}\) Society bears this extra cost just to receive protection of its basic right to law enforcement.

### II. The Features of Shortened Procedure for Pledged Defendant

Several countries use shortened criminal procedures to increase efficiency of courts and criminal prosecutions. Many of these countries were originally inspired by the efficiency of U.S. approach to plea bargaining. In the U.S., plea bargaining has reduced law enforcement workloads, and it has also led to efficiency of courts. In *Missouri vs. Frye*, the U.S. Supreme Court observed that “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”\(^{40}\) As a result of this success in the U.S., legislators in countries like Russia, Italy\(^ {41}\), Taiwan\(^ {42}\), and China\(^ {43}\) have enacted similar provisions in their criminal procedure laws, provisions that allow defendants to plead guilty, avoid trial, and receive a lighter sentence.

In the U.S., plea bargaining gives an opportunity for the prosecutor and defendant or his or her counsel to negotiate over the facts, charges, and sentences that will be presented to the judge.\(^ {44}\) This negotiation can happen by phone or at prosecutor office\(^ {45}\)

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43 Lynch, *supra* note 19
without the involvement of the judge.\textsuperscript{46} Both parties could reach an agreement on the following: (1) dismissing charges; (2) recommending a particular sentence; or (3) deciding a specific sentence.\textsuperscript{47} However, the judge is not bound to the agreement that made by prosecutor and defendant or his or her counsel.\textsuperscript{48}

While China’s summary procedure also shortens criminal procedure and allows for pleas, it significantly departs from the U.S. approach because its procedure involves no bargaining between prosecutors and defendants. Similarly, Indonesia’s proposed special procedure will involve no bargaining; instead, the judge will decide the appropriate punishment for defendants.

This part begins explaining the legislative process of China’s Criminal Procedure Law (CPL) including the 1979 CPL, the 1996, and the 2012 CPL. Then, this part will compare summary procedure in the 2012 CPL with the 1996 CPL. Next, this part also describes the legislative history of Indonesia’s criminal procedure law and the historical process of Indonesia’s Criminal Procedure Bill (\textit{RUU KUHAP}). The drafters of this bill added shortened procedure for pleaded defendant called special procedure in 2007. Finally, this section reveals how the features of Indonesia special procedure are too vague and will need additional clarifications and protections for defendants.

A. \textbf{Summary Procedure in People Republic of China Criminal Procedure Law}

\textsuperscript{45} JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS 22 (NEW YORK: ASPEN, 2009).
\textsuperscript{46} Fed. R. Crim. Proc. 11 (c) (1) (C).
\textsuperscript{47} Fed. R. Crim. Proc 11 (c) (1) (A) (B) (C).
\textsuperscript{48} Fed. R. Crim. Proc. 11 (c) (1) (C).
China implemented summary procedure in 1996, but it made significant amendments to the law in 2012. In particular, a 2003 Joint Opinion regulated simplified procedure,\(^{49}\) and it was abolished to incorporate it into a new summary procedure in 2012.\(^{50}\) Unlike under the 1996 law, in which summary procedure was only available for crimes having sentences of less than 3 years imprisonment, the new version makes summary procedure available for all crimes. And unlike Indonesian Special Procedure, Chinese Summary Procedure does not have a cross examination process at the trial because the provision regarding cross examination does not apply; however, the defendant might defend and debate the bill of indictment.

a. **Legislative History of China’s Criminal Procedure Law (CPL)**

The first Chinese criminal procedure law was enacted in 1979 (1979 CPL) to regulate law enforcement’s authority in criminal procedure and the process of investigating, prosecuting, and examining criminal cases.\(^{51}\) Before the enactment of the 1979 CPL, China did not have a criminal procedure law; it was believed that introduction of the CPL would protect defendants from abuse by law enforcement after a lawlessness era of the Cultural Revolution.\(^{52}\) Hungduh Hiu observed that the 1979 CPL, followed by 1979 Arrest and Detention Regulations of the People's Republic of China, “set up proper

\(^{49}\) Simplified procedure applies to all crimes that are likely to be convicted more than 3 years imprisonment, see Elyabeth M. Lynch. *May Be a Plea, but is it a Bargain?: An Initial Study Of The Use Of Simplified Procedure In China*, HUMAN RIGHTS IN CHINA (Apr. 1, 2009), available at [http://www.hrchina.org/en/content/3703#f11](http://www.hrchina.org/en/content/3703#f11).

\(^{50}\) Joint Opinion was enacted by Supreme People’s Court, Supreme’s People’s Procuratorate and the Ministry of Justice in 2003, see McConville ET AL., supra note 11, at 208.


arrest procedures and strict time limits” which was meant to stop the abuse of law enforcement in arresting suspects.\textsuperscript{53}

Later, China revised its criminal procedure law in 1996 because, under the 1979 CPL, there continued to be many human rights violations, such as “torture prolonged incommunicado detention, secret trials, and denials of due process.”\textsuperscript{54} Despite these changes, human rights violations persisted, and law enforcements did not consistently apply the criminal procedure, creating interpretation and “latent regulation” or informal procedure because they “. . . devise convenient ways to dispose. . .” cases effectively.\textsuperscript{55} In response to the continued abuse, China’s lawmakers revised criminal procedure again in 2012.

In the 1996 CPL, Summary procedure was first regulated to address the increased caseloads.\textsuperscript{56} In 1998, Haidan People’s Procuratorate and the Haidan People’s Court created “latent regulation”, simplified procedure, because of high number of caseloads in Haidan.\textsuperscript{57} Later, the simplified procedure was recognized by the Supreme People’s Court (SPC), the Supreme People’s Procuratorate (SPP), and the Ministry of Justice (MOJ) in a Joint Opinion 2003.\textsuperscript{58} The new China CPL, the 2012 CPL, also revised and incorporated the simplified procedure into the summary procedure. The feature of China’s summary procedure will be explained in the following subsection, and it will be compared with the summary procedure in the previous CPL (1996) and the simplified procedure in the Joint Opinion.

\textsuperscript{54} LAWYERS COMMITTEE FOR HUMAN RIGHTS, supra note 52, at 10.
\textsuperscript{55} Ruihua, \textit{supra} note 4, at 360.
\textsuperscript{56} Lynch, \textit{supra} note 49.
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.}
b. **Features of China’s Summary Procedure**

In the 1996 CPL, summary procedure was restricted to defendants who were charged with crimes for which conviction would result in sentences of 3 years or less.\(^59\) Simplified procedure then was created to prosecute a criminal case which conviction would result in sentences more than 3 years. Later in 2012, the CPL was amended so that summary procedure could be used for all crimes. In addition, the new summary procedure cannot be used if the crime has a major social impact\(^60\) or “other situations” that law enforcement thinks the implementation of summary procedure is inappropriate.\(^61\) In addition, the summary procedure cannot be used if the defendant is “blind, deaf, or mentally ill.”\(^62\) Finally, in joint crimes, all defendants must be willing to confess their guilt and admit to being prosecuted under summary procedure; otherwise, the summary procedure cannot be used for the case.\(^63\)

The 1996 CPL had restricted the People’s procuratorate only could prosecute under the summary procedure for the case based on complaint.\(^64\) The procuratorate only assigns its procurator or prosecutor to prosecute if it had enough evidence and obvious facts to prove the defendant is guilty.\(^65\) Aside from these restrictions, the provision under the 1996 CPL had given law enforcement broad discretion to decide whether crimes should be prosecuted using the summary procedure mechanism. The procuratorate should recommend or agree to prosecute under summary procedure;\(^66\) therefore, its

\(^59\) 1996 CPL art. 174 (1).
\(^60\) 2012 CPL art. 209 (2).
\(^61\) Id. art. 209 (4).
\(^62\) Id. art. 2019 (1).
\(^63\) Id. art. 209 (3).
\(^64\) 1996 CPL art. 171 (2).
\(^65\) Id. art. 174 (1).
\(^66\) Id, art. 174 (1).
disagreement affects a pleaded defendant would not have been prosecuted under the summary procedure that would likely to give benefit by giving short trial and lesser punishment. In contrast, if the defendant does want to confess and asks not to be prosecuted under summary procedure, “. . . the procuratorate should not give its consent to application of summary procedure. . . ”67 Under 2012 CPL, the defendant must agree to be prosecuted under summary procedure68; therefore, the agreement to prosecute under the summary procedure is placed not only on the procuratorate, but also the defendant.

Notably, in the 1996 CPL there was no provision stating that the defendant should confess before trial; however, the 2012 CPL specifically expresses that the defendant should have admitted his or her crime, agreed to all criminal facts which are charged to defendant.69 Under both laws, the defendant and procurator are not invited to present agreement about appropriate punishment under the summary procedure under both laws.

Under the 1996 CPL, the procurator (or prosecutor) may not appear at the summary procedure trial70 and the indictment will be read by the judge71 who is likely not impartial because the judge represents procurator’s interest. In contrast, the procurator shall appear to read the indictment under the simplified procedure.72 Lawmakers revised the provision so the procurator must appear and read the indictment under the new summary procedure at the trial under the 2012 CPL.73

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67 McConville ET AL., supra note 11, at 205.
68 2012 CPL art. 208 (3).
69 Id., art. 208 (2).
70 1996 CPL art. 153 & 175.
71 McConville ET AL., supra note 11, at 206.
72 Lynch, supra note 49.
Similar to the 1996 CPL, a single judge will complete a trial within 20 days, for crimes likely to receive sentences of three years or less imprisonment. In addition, three judges will lead a trial which crime is likely to be sentenced for three years or more imprisonment within one and a half months. It is adopted from the simplified procedure that had required one judge and two people’s assessors to examine crime is likely to be sentenced for three years or more imprisonment. Under the new law, the judge is required to tell a defendant about summary procedure and confirm the defendant’s agreement to be prosecuted under this approach.

In both the 1996 and 2012 CPL, the provision regarding the cross examination, specifically about “. . . . interrogating the defendant, questioning the witnesses and expert witnesses, showing the evidence, and debating in court” are not used in summary procedure. However, the defendant may present statement, defend himself after hearing the indictment, and present his or her final statement before the verdict. The defendant also can debate with the procurator if the judge allows him or her. That is interesting that a defendant might have an opportunity to defend and debate from the indictment, but the procedure has not been regulated because the provision regarding cross-examination is not applied under the summary procedure. The contradictions of those provisions potentially create another “latent regulation” to be interpreted by the judge.

B. Special Procedure in Indonesia Criminal Procedure Bill

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74 Id. art. 210 & 214.
75 Id. art. 201.
76 Id. art. 211.
77 1996 CPL, art. 177 & 2012 CPL, art. 213.
78 1996 CPL, art. 176 & 2012 CPL, art. 212.
79 1996 CPL, art. 177 & 2012 CPL art. 213.
The bill drafters (the drafters) introduced special procedure to solve the backlog and high costs of the Indonesian criminal procedure system. The provision was added after the drafters conducted study visit in U.S. While inspired by U.S. plea bargaining, the feature and procedure is quite different. Instead, the features of Indonesian special procedure resemble China’s summary procedure.

Unfortunately, the Indonesian drafters and lawmakers did not research or learn much from China’s successes and failures with implementing summary procedure. As a result, Indonesia can anticipate incurring some of the same problems that China experienced, such as unfair trial because of lack of lawyer who represents a pleaded defendant. The provisions of special procedure also need to be reviewed and amended because of the vagueness. The drafters did not create a trial procedure for the special procedure, rather only created several standards for a pleaded defendant. The trial process for the special procedure is regulated under the short trial procedure that is also available for the easily proved crimes.

a. Legislative History of Indonesia’s Criminal Procedure Law

The current Indonesian criminal procedure law was enacted in 1981 (KUHAP). It replaced Herzeine Inlands Reglement (HIR) created by the Dutch in colonial period and law No. 1 Year 1951 created by Indonesian government in crisis era. The main purpose for enacting the 1981 KUHAP was to codify and unify Indonesian criminal procedure, which had been regulated through two separate laws. In addition, Indonesia

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80 The drafters cited China 1996 CPL in academic draft but they did not look at another sources (law review article or book) from legal scholar who comments and criticizes 1996 CPL.

81 ANDI HAMZAH, PENGANTAR HUKUM ACARA PIDANA INDONESIA [INTRODUCTION TO INDONESIA CRIMINAL PROCEDURE] 53-54 (GHALIA INDONESIA, 1983).

government had seen HIR as a colonial product that need to be replaced with more nationalist law.  

Similar to China, the effort to revise Indonesian criminal procedure law is because of the mass of human rights violations such as torture at the investigation stage and lengthy detentions. In 2006, Amnesty International argued that the current Indonesian procedure does not regulate punishment to law enforcement who does not apply the law, and admissibility of the evidence from torture or unlawful search and seizure. In an attempt to address concerns like these, the Indonesian government established a team of drafters to research and draft an Indonesian criminal procedure bill in 2000.

Human rights issues undoubtedly have been driving the revision of Indonesia criminal procedure law rather than efficiency issue. In the reformation (reformasi) era, after the fall of Soeharto’s regime in 1998, Indonesia ratified several human rights covenants such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

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84 In Jakarta, Jakarta Legal Aid Institute found 81.1% from 639 respondents were tortured by the Police in 2008, see Hak Bebas Dari Penyiksaan Dan Perlakuan Atau Penghukuman Lain Yang Kejam, Tidak Manusiawi Dan Merendahkan Martabat Manusia [Rights to Free From Torture and Cruel, Inhuman, and Degrading Treatment or Punishment] LBH JAKARTA [JAKARTA LEGAL AID INSTITUTE] (July 13, 2013), http://www.bantuanhukum.or.id/web/blog/2013/07/16/hak-bebas-dari-penyiksaan-dan-perlakuan-atau-penghukuman-lain-yang-kejam-tidak-manusiawi-dan-merendahkan-martabat-manusia/.


Punishment (CAT). Those ratification became the reason that explained by the drafters in academic draft.

The drafters finished the first draft of Indonesia criminal procedure bill in 2004; however, the special procedure had not been included in that bill. Then, the drafters revised their first draft with the April 2007 draft and the special procedure was also not available in Indonesia criminal procedure. In the finalization process of drafting, the drafters conducted seven drafting sessions and one study visit to the United States. This trip and sessions were funded by the U.S. Department of Justice's Office for Overseas Prosecutorial Development, Assistance and Training (DOJ/OPDAT) as part of its mission to “. . . assist prosecutors and judicial personnel in other countries develop and sustain effective criminal justice institutions.”

The drafters were inspired by U.S. plea bargaining and drafted special procedure in the December 2007 draft. It can be seen in the 2012 academic draft of Indonesian criminal procedure bill that the drafters included the subsection “[i]ntroducing plea bargaining” to explain special procedure. The drafters explained only the similarities that the pleaded defendant will get lesser punishment; however, they did not explain the differences between U.S. plea bargaining and special procedure.

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87 Academic draft, supra note 1, at 1.
88 Id.
94 Academic draft, supra note 1, at 23.
In 2009, the drafters finished drafting; however, the government did not send the bill to the parliament until 2012. This delayed process was because of the police’s disagreement about the provision regarding *hakim komisaris* (commissioner judge) who will authorize police interception, detention, arrest, search, and seizure.\(^{95}\) Afterward, the drafters amended the term and the scope of authority in order to get approval from all government institutions, including police, before they sent the bill to parliament. In the news and stakeholders meeting with law enforcement, the special procedure has not been struck as constant as the commissioner judge provision. While parliament has been discussing and reviewing the bill since 2013, as April 2014, it has still not been enacted.

b. **Features of Indonesia’s Special Procedure**

Special procedure is only available to a defendant for crimes associated with sentences of less than 7 (seven) years imprisonment.\(^{96}\) Originally, the drafters of this law made special procedure available for crimes associated with less than 10 years imprisonment.\(^{97}\) However, it has been since been revised to 7 years. There is no record or explanation of why the drafters made this change.

Indonesia’s special procedure allows defendants to plead guilty after hearing the indictment from the prosecutor at the first trial.\(^{98}\) The drafters intentionally limited the plea and the agreement between the defendant and the prosecutor before the trial. The widespread of law enforcement’s corrupt practice becomes a reason to close agreement

\(^{95}\) *Polri Bersikukuh Tolak Hakim Komisaris* [Indonesia Police Still Disagrees with Commissioner Judge], HUKUM ONLINE (Dec. 1, 2000), http://www.hukumonline.com/berita/baca/lt4cf5c1caba175/polri-bersikukuh-tolak-hakim-komisaris.

\(^{96}\) Indonesia Criminal Procedure Bill, art. 199 (1).


\(^{98}\) Indonesia Criminal Procedure Bill, art. 199 (1).
before the trial, and the drafters designed more transparent and open procedures for pleaded defendants at the trial.  

After the defendant pleads at the first trial, one of three judges must explain to the defendant what rights he or she will not get, and the possibility of punishment under special procedure. The judge also should confirm with the defendant whether he or she voluntarily confesses. The three judges also have authority to approve the defendant’s confession. The judges will not approve his or her confession if the judge questions with the truth of the confession.

In return for the plea, the defendant’s case will be transferred to a short trial (acara pemeriksaan singkat), which is a faster and simpler trial resulting in a lesser punishment. The prosecutor makes this switch to the short trial from the ordinary trial procedure (acara pemeriksaan biasa). A Short trial procedure is not only available to prosecute a pleaded defendant under special procedure, but also for all crimes that the prosecutor thinks may be easy and simple to prove. In addition to short trial procedures, there are ordinary trial procedures for all crimes and quick trial procedure for traffic case and small crimes (associated with less than 3 months imprisonment).

It could be argued that the drafters did not actually create a new designated procedure under special procedure; instead the drafters liken it to short trial procedure, which existed under the 1981 Indonesia criminal procedure law. The drafters only regulate some main principles of special procedure including the following: (1) voluntary

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99 Strang, supra note 98, at 221.
100 Indonesia Criminal Procedure Bill, art. 199 (3) (a) & (b).
101 Id. art. 199 (3) (c).
102 Id. art. 199 (4).
103 Id. art. 199 (1).
104 Id. art. 198 (1).
105 Id. art. 201.
confession at the first trial; (2) what crimes that can be prosecuted under special procedure; (3) the judge’s responsibility to explain the defendant rights and examine his or her confession; and (4) the lesser punishment that will likely to be given.¹⁰⁶

In the Indonesian criminal procedure bill, this short trial procedure is led by a single judge.¹⁰⁷ As such, special procedure arguably helps the court reduce backlogs because the rest of judges in one jurisdiction can focus on other cases instead of easier cases in which a defendant is willing to plead guilty. Consequently, there are more cases can be solved within a year.

However unlike China’s CPL, the provision does not state the time for the judge to conclude the pleaded defendant’s case. Therefore, it is hard to argue that the case must be quickly decided under the summary procedure or short trial procedure. The reason that the short trial procedure is arguably faster than ordinary trial procedure is that the prosecutor can eliminate some cross-examination at trial. Depending on the difficulty of the case, the prosecutor will decide whether the prosecutor should present witnesses, evidence, experts, or interpreters.¹⁰⁸

The provision allowing for the interrogation of the defendant still applies under the short trial procedure;¹⁰⁹ however, the provision regarding evidence does not apply.¹¹⁰ It is certainly a setback because the evidence provision is viewed as an essential component of the Indonesia criminal bill.¹¹¹ Even though it broadens the type of evidence available

¹⁰⁶ Id. art. 199.
¹⁰⁷ Id. art. 198 (6).
¹⁰⁸ Id. art. 198 (2).
¹⁰⁹ Id. art. 198 (2).
¹¹⁰ Id. art. 198 (3).
¹¹¹ Strang, supra note 91, at 218-221.
at trial, there is a provision making the use of torture to gather evidence inadmissible.

There are also several contradicting provisions between special procedure and the short trial procedure, creating confusion and ambiguity. First, under the short trial procedure, the prosecutor, on the one hand, does not have to prepare a bill of indictment. On the other hand, the prosecutor must prepare and read the bill of indictment before the defendant confesses and the judge grants special procedure.

Second, the punishment under short trial procedure should be less than three years imprisonment; however, under the provision of special procedure there is an exception provision, thus the defendant shall not be sentences to more than 2/3 of the usual sentence for the crime charged. When a defendant is charged with a crime associated with a seven-year imprisonment, a judge could designate a sentence of 2/3 of that time, or four years and eight months imprisonment. This punishment is longer than the restriction in the provision of short trial procedure which less than three years imprisonment. This longer or heavier punishment does not correspond with guilty pleas’ principle: giving lesser punishment to plead defendant.

III. China’s Successes and Failures in Implementing Summary Procedure

This part describes China’s successes and failures in implementing the summary procedure for seventeen years; therefore, there is substantial history from which to examine and identify advantages and disadvantages as a result of this procedure.

However, there is a lack of studies evaluating the effect of summary procedure under

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112 Indonesia Criminal Procedure Bill, art. 175 (1).
113 Id. art. 175 (2).
114 Id. art. 198 (4).
115 Id. art. 199 (1).
116 Id. art. 198 (4).
117 Id. art. 199 (5).
2012 CPL. It is reasonable because the law has just passed in 2012 and been effective in 2013. To date, no similar research has been published on this law.

It begins by describing the efficiency that is being argued as the positive result of this shortened criminal procedure. Law enforcement could save time and resources in prosecuting a pleaded defendant. Nevertheless, it also creates unfair trial for the defendant. This unfair trial can be categorized as a failure that resulted to lack of legal counsel by which could increase a risk of false confession.

A. Efficiency

China’s summary procedure provides efficiency for law enforcement because it offers a shortened procedure. The procedure includes no interrogation of defendants; questioning of witnesses or forensic examiners; presentation of evidence; or court arguments. For crimes that would likely incur sentences of less than three years imprisonment, a defendant must be processed within twenty days of filing; crimes associated with three years sentences should be processed within forty-five days (one half months).

Mike McConville has shown that summary procedure under the 1996 CPL was very timely and effective. Twenty-three cases out of 130 trials were prosecuted under summary procedure.\textsuperscript{118} Half of observed summary procedure trial, or 56.5%, were resolved in twenty minutes or less (see table 1).\textsuperscript{119} Overall, twenty-two of twenty-three cases under summary procedure were resolved in forty minutes or less.\textsuperscript{120} Another scholar, Rongjie Lan, found that cases prosecuted under summary procedure were

\begin{footnotesize}
\textsuperscript{118} McConville surveyed 130 Basic Court trial at the thirteen research basic courts see McConville ET AL, supra note 11, at 261.
\textsuperscript{119} Id. at 267.
\textsuperscript{120} Id. at 269.
\end{footnotesize}
concluded within eight to ten minutes in 2005.\textsuperscript{121} Similarly, Shiewi Xiao observed that more than 50\% of the cases that were prosecuted under summary procedure concluded within 15 minutes.\textsuperscript{122}

In contrast, McConville found that there were 67.7\% out of 102 cases that were prosecuted under the ordinary procedure were concluded in 2 hours or less (see table 2).\textsuperscript{123} In addition, Rongjie Lan explained that in 2005, cases prosecuted under the ordinary procedure were concluded within twenty nine minutes in the city district court and forty minute in the rural district court.\textsuperscript{124}

Table 1: Length of the trial under China’s Summary Procedure\textsuperscript{125}

<table>
<thead>
<tr>
<th>Time</th>
<th>No. of cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 20 minutes</td>
<td>13</td>
<td>56.5</td>
</tr>
<tr>
<td>21-30 minutes</td>
<td>6</td>
<td>26.1</td>
</tr>
<tr>
<td>31-40</td>
<td>2</td>
<td>8.7</td>
</tr>
<tr>
<td>41-50</td>
<td>1</td>
<td>4.3</td>
</tr>
<tr>
<td>51-60</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>More than 1 hour and less than 2 hours</td>
<td>1</td>
<td>4.3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>23</strong></td>
<td><strong>99.9</strong></td>
</tr>
</tbody>
</table>

Table 2 Length of trial under China’s Ordinary Procedure\textsuperscript{126}

\textsuperscript{121} Rongjie Lan, \textit{A False Promise Of Fair Trials: A Case Study Of China’s Malleable Criminal Procedure Law}, 27 UCLA PAC. BASIN L.J. 153, 171 (2010).
\textsuperscript{122} Shiwei Xiao, \textit{Criminal Procedure in Practice – Demonstrative Research on the sample of Two Grassroots Courts in McConville ET AL.}, supra note 11, at 351.
\textsuperscript{123} Id. at 278.
\textsuperscript{124} Lan, \textit{supra} note 121, at 171.
\textsuperscript{125} Id. at 268.
<table>
<thead>
<tr>
<th>Time</th>
<th>No. of cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 20 minutes</td>
<td>9</td>
<td>9.1</td>
</tr>
<tr>
<td>21-30 minutes</td>
<td>11</td>
<td>11.1</td>
</tr>
<tr>
<td>31-40</td>
<td>10</td>
<td>10.1</td>
</tr>
<tr>
<td>41-50</td>
<td>20</td>
<td>20.2</td>
</tr>
<tr>
<td>51-60</td>
<td>17</td>
<td>17.2</td>
</tr>
<tr>
<td>More than 1 hour and less than 2 hours</td>
<td>24</td>
<td>24.2</td>
</tr>
<tr>
<td>More than 2 hours and less than 3 hours</td>
<td>4</td>
<td>4.0</td>
</tr>
<tr>
<td>More than 3 hours and less than 4 hours</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>More than 4 hours</td>
<td>4</td>
<td>4.0</td>
</tr>
<tr>
<td>Not known</td>
<td>3</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>102</strong></td>
<td><strong>99.9</strong></td>
</tr>
</tbody>
</table>

McConville explains that a single judge in summary procedure is one of important factor of its efficiency.\(^{127}\) This single judge could decide cases faster than a panel of judges, who would need to discuss and agree on the sentence. Because of this effectiveness, the number of cases prosecuted under summary procedure increased. In 1998 there were 65,591 or 17\% of cases prosecuted under summary procedure.\(^{128}\) The number went up to 289,909 or 38.66\% in 2009.\(^{129}\) While the number of caseloads

\(^{126}\) *Id.* at 278.

\(^{127}\) *McConville et al.*, supra note 11, at 352.


\(^{129}\) The real number for cases prosecuted under summary procedure that prosecutor present in court. The number could be higher because under the 1996 CPL, the prosecutor should not appear at trial. *Id.*
increased,\textsuperscript{130} law enforcement benefitted from summary procedure because of saved time in prosecuting criminal cases.

**B. Unfair Trial**

Implementing summary procedure, there are several types of unfair trials that occurred in China, including: (1) lack of a defense lawyer; (2) false or forced confession; and (3) unequal standing between procurator and defendant. This subsection will describe each type of unfair trial in China.

**a. Lack of Defense Lawyer**

Studies have shown that only a few defendants have had defense lawyers in Chinese summary procedure cases.\textsuperscript{131} In his observation, McConville found that only four out of twenty-four defendants were represented by defense counsel.\textsuperscript{132} Citing to Shiwei Xiao’s research, McConville describes only “24.5 % of defendants in W Court and 11.9 % in P Court” had lawyer, and most of them were from urban rather than rural area.\textsuperscript{133} In addition, there were only 16.7 % from 60 observed summary procedure cases that lawyer appeared at basic court.\textsuperscript{134}

Unrepresented defendants are unlikely to defend themselves in the court. By way of example, McConville provided a court trial transcript under the summary procedure to show how defendants typically did not have any objections on the facts or charges.\textsuperscript{135}

\textsuperscript{131} McConville ET AL., supra note 11, at. 206.
\textsuperscript{132} Id. at 267.
\textsuperscript{133} Id. at 206 (citing Xiao Shiwei, *Criminal Summary Procedure in Practice-Demonstrative Research on the Sample of Two Grassroots Court*, Journal of Yibin University, 2; 21 (2008)).
\textsuperscript{134} Id. at 207 (citing Zuo Weimin ET AL., Zhongguo Xingshi Susong Yunxing Jizhi Shizeng Yanjiu (ER): Yi Shenqian Chengxu Wei Zhongxin [Empirical Study on the Operation Mechanism of Criminal Procedure in China], Beijing: Law Press (2009)).
\textsuperscript{135} McConville ET AL., supra note 11, at 269-270.
The defendant in his example showed that the defendant did not want to challenge his case.136

Generally, there are two factors that cause lack of defense counsel who represents a defendant in criminal cases. The first factor is, even though there are some development and protection on right to counsel,137 the 1996 CPL law discouraged lawyers to represent client in criminal case.138 That law was complicated and threatening thus made lawyer were difficult to represent a client in criminal cases. The lawyer rarely represented a client form investigatory stage because that was viewed as “unduly interfer[ing] with investigatory conduct.”139 In a case involving state secrets, the lawyer needed to obtain an approval from the investigatory organ to meet his or her client at the investigatory stage.140 In that meeting, the lawyer and his or her client would have no confidentiality because the investigatory organ needed to appear.141 In addition, the lawyer also passively pursued the pre-trial representation due to broaden his or her work.142

In addition, the law also threatened the lawyer with criminal prosecution;143 therefore, the lawyer took civil cases instead of criminal cases.144 The prominent case was Li Zhuang, Beijing defense lawyer, who “was convicted of falsifying evidence and

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136 Id. at 270.
139 Id.
140 Id. at 79.
141 Id. at 78.
143 China 1997 Criminal Law art. 306 & 1996 CPL art. 38, see CHEN, supra note 138, at 81.
144 Smith & Gompers, supra note 142, at 117.
subordination of perjury” after representing an organized crime defendant.\textsuperscript{145} The number of criminal cases in which defendants were represented by lawyers were very low. In Beijing, for instance, there were only 2.5\% of cases that defendants had lawyers who represented them.\textsuperscript{146} In addition, McConville found that 46\% of 227 trials that he observed had not been represented by a lawyer.\textsuperscript{147}

The second factor is the limited number lawyers in China. In China within January 1998 to September 2006, there were only 10\% of defendants who had defense counsel from legal aid institution.\textsuperscript{148} There were only 5,500 “legal aid staff[s]” who represented 87,011 cases of poor defendants.\textsuperscript{149} Smith and Gompers used the term of “legal aid staff[s]” because there are some legal aid institutions that do not have any lawyers; therefore, defendants would have to be represented by a paralegal.\textsuperscript{150} In general, there is an undeniable difference between lawyers and paralegals when it comes to legal training and skill, regardless of whether a paralegal has been trained and certified.\textsuperscript{151}

b. False Confession

The confessions are common in China. McConville reported that 92\% of 1007 interrogations in all observed sites resulted in full confessions.\textsuperscript{152} In China, the “confession is king.”\textsuperscript{153} The defendant’s obligation to confess was regulated in the 1979 CPL as “duty to confess faithfully.” That obligation was removed in the 1996 CPL;

\begin{itemize}
\item \textsuperscript{145} Lan Rongjie, \textit{Killing the Lawyer as the Last Resort the Li Zhuang Case and Its Effects on Criminal Defence in China} in Mike McConville & Eva Plis, Comparative Perspective on Criminal Justice in China 204 (Cheltenham: Edward Elgar, 2013).
\item \textsuperscript{146} Chen, supra note 138, at 81.
\item \textsuperscript{147} McConville et al., supra note 11, at 293.
\item \textsuperscript{148} Smith & Gompers, supra note 142, at 199.
\item \textsuperscript{149} Id. at 198.
\item \textsuperscript{150} Id. at 199-200.
\item \textsuperscript{151} In Guizhou Province where lack of lawyers, the province started to certify paralegal, Id. at 118.
\item \textsuperscript{152} McConville et al., supra note 11, at 74.
\item \textsuperscript{153} Ian Dobinson, \textit{The Guilty Plea: and Australian/Chinese Comparison}, in McConville & Plis, supra note 145, at 194.
\end{itemize}
however, the lawmakers did not recognize a defendant’s right to silence.\textsuperscript{154} In other words, a defendant still needs to confess. Later in the 2012 CPL, the stakeholders compromised by enacting the right to silence; however, there is still provision that requires a defendant to answer truthfully, and then the defendant can get lenient punishment.\textsuperscript{155}

Ideally, a defendant should confess voluntarily before the law enforcement; however, a pleaded defendant has a higher risk of false confession because of the lack of legal counsel.\textsuperscript{156} Some false confessions happen because of torture, even though the CPL prohibits it.\textsuperscript{157} More than fifty trial judges recognized the torture practice to get confession; however, defendants could not prove any evidence about the torture.\textsuperscript{158} That torture mostly occurred at investigatory process\textsuperscript{159} where lawyer was limited by the 1996 CPL law to represent the client at that stage.

A lawyer who was interviewed by McConville reported that a lawyer’s representation at investigatory process could prevent coerced confession.\textsuperscript{160} Ira Belkin also suggested that lawyers should appear and defend defendants from the start of the investigatory process.\textsuperscript{161} To address this concern, the 2012 CPL revised the lawyer’s limitation to represent at the investigatory process.\textsuperscript{162} The lawyer now could represent defendants

\begin{footnotes}
\item \textsuperscript{154} Id.
\item \textsuperscript{155} CHEN, supra note 138, at 74.
\item \textsuperscript{156} Id. at 85.
\item \textsuperscript{157} Ian Dobinson, in McCONVILLE & PLIS, supra note 145, at 192.
\item \textsuperscript{158} Lan, supra note 121, at 250.
\item \textsuperscript{159} Id. at 249.
\item \textsuperscript{160} McCONVILLE ET AL., supra note 11, at 187.
\item \textsuperscript{161} Another suggestion to eliminate torture from Ira Belkin are: (1) change the ideology and thinking of law enforcement; (2) adopt a presumption of innocence; (3) adopt a right to silence and a privilege against self-incrimination; (4) audiotape and videotape the entire process of police interrogation; and (5) provide additional investigative resources and technology to police enable them to use modern methods to gather evidence and avoid reliance upon oral confession see Ira Belkin, China’s Tortuous Path Toward Ending Torture in Criminal Investigation, in McCONVILLE & EVA PLIS, supra note 145, at 111-112.
\item \textsuperscript{162} CHEN, supra note 138.
\end{footnotes}
since the first investigation, and meet them privately without an investigatory officer’s appearance.\textsuperscript{163}

c. Unequal Standing

When China revised 1979 CPL to the 1996 CPL, lawmakers promoted a more adversarial system.\textsuperscript{164} This system emphasized equality between the parties (defendant and prosecutor) and designated a more passive judge;\textsuperscript{165} however, defendant and procurator are not as equal as they are in adversarial legal systems. This inequality is illustrated by the process of deciding whether a can be prosecuted under the summary procedure, and in how parties collect or access evidence.

Prosecutors are limited by an annual quota when prosecuting cases under summary procedure.\textsuperscript{166} Consequently, a pleaded defendant cannot be prosecuted under summary procedure if the procurator has already met the quota.\textsuperscript{167} The quota limitation emphasizes the procurator’s discretion and authority to decide whether a case will be prosecuted under summary procedure. Summary procedure cannot be seen as an agreement or consent between both procurator and defendant because the defendant’s authority to decide is not as strong as procurator.

Another inequality between the procurator and defendants is access to evidence. Under China 1996 CPL, a procurator should give only a sampling of the available evidence that will be used at the trial so the lawyer\textsuperscript{168} could examine and prepare the defense. However, a defense lawyer could not prepare a good defense because the

\begin{itemize}
  \item \textsuperscript{163} Id. at 82.
  \item \textsuperscript{165} Id. at 159-160.
  \item \textsuperscript{166} McCONVILLE ET AL., supra note 11, at 207.
  \item \textsuperscript{167} Id.
  \item \textsuperscript{168} 1996 CPL, art 96.
\end{itemize}
evidence will be given only ten days before the trial.\textsuperscript{169} In addition, this evidence is difficult to examine because it is only given as “... a list of evidence, a list of witnesses, and photocopies or photos of the main evidence”.\textsuperscript{170} The procurators also occasionally did not comprehensively provide the evidence to defense lawyers, and kept a significant evidence the first trial.\textsuperscript{171} Consequently, lawyers are not able to examine the validity of evidence.\textsuperscript{172} The China 2012 CPL addressed this concern. Under the new law, lawyers can demand and examine all evidence at the investigatory level, before it is submitted to the court.\textsuperscript{173}

Even though in the China 1996 CPL there is a provision that authorized lawyers to collect evidence, there were some limitations that made unequal standing in gathering evidence. Lawyers could conduct their own investigation and interrogate victims or witnesses to prepare their defense\textsuperscript{174} if they got authorization from the procurator.\textsuperscript{175} This authorization demonstrated that procurator have more power than defendants (or their lawyers). Another factor that discourage lawyers’ authority to gather evidence was the criminal sanction that threatened them.\textsuperscript{176} Lawyers occasionally were told to remove their testimony that they got from witness or victim if it conflicted with a procurator’s testimony.\textsuperscript{177} It is impossible to prevent lawyers from submitting conflicted testimony because of their responsibility to defend defendants by challenging the prosecutor’s theory, testimony, or evidence.

\textsuperscript{169} Smith and Gompers, supra note 142, at 130.
\textsuperscript{170} Huang Taiyun, in CHEN, supra note 138, at 80.
\textsuperscript{171} McCONVILLE ET AL., supra note 11 at 178.
\textsuperscript{172} Id.
\textsuperscript{173} CHEN, supra note 138, at 82.
\textsuperscript{174} Id. at 79.
\textsuperscript{175} Id. at 80.
\textsuperscript{176} McCONVILLE ET AL., supra note 11, at 180.
\textsuperscript{177} Id. at 181.
V. Suggestions for Maximizing the Benefits of Special Procedure in Light of the Chinese Experience

Learning from China’s experience, Indonesian lawmakers can prevent failure in implementing Indonesia’s special procedure. Unlike the original Chinese approach to summary procedure, which did not provide for defense counsel, Indonesia’s special procedure should continue to include this coverage for poor defendants—from the beginning of the investigation process. Because the right to legal counsel is a constitutional right, this is an important aspect of the existing bill, and it should be vigorously maintained. In the Indonesia’s criminal procedure bill, the provision regarding right to legal counsel since the investigation process has been drafted especially for defendant whose charge will likely to be sentence more than five years imprisonment. This provision should be broadened to be available for all defendants.

Lawmakers have addressed the state fund law for legal aid. In 2011, Indonesia enacted Legal Aid Law to allocate funding for legal aid institutions or law schools providing legal aid. Implementing this law, Indonesian government budgeted Rp. 43 billion ($ 4,300,000) to support three hundred and ten legal aid providers; however, the allocation was very ineffective. Only 30% of the budget was allocated to those legal aid providers because of the complicated bureaucratic process in reimbursing the legal aid

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178 INDONESIA. UNDANG-UNDANG DASAR 1945, PASAL 28 (D) [INDONESIA. 1945 INDONESIA CONSTITUTION, ART. 28 (D)].
179 Indonesia criminal procedure bill, art. 93-94.
182 Id.
cost. Indonesia’s vice president, Boediono, was disappointed in this failure, and he criticized Indonesia Ministry of Law and Human Rights for its in managing legal aid fund badly.

The state fund availability to provide defense counsel or legal aid is one of important factor in protecting defendant’s rights to counsel. The author recognizes that state funds are always limited, so not all of a defendant’s representation can be supported; therefore, another strategy or policy has to put in place. This strategy, for instance, could involve engaging the Indonesia Bar Association (PERADI) in a program that encourages pro bono legal services for defendant. In 2010, PERADI enacted its own rule to require lawyers providing pro bono service fifty hour per year. Lawyers who do not comply this rule cannot get their license renewed. There are some challenges to implement this rule such as socializing and monitoring fifteen thousand (15,000) lawyers in PERADI to oblige the rule.

Indonesia also can learn another approach in ensuring pro bono legal service from China. In Beijing, law firms should allocate at least two days per month for pro bono legal service. If the law firms only have expertise and experience in business transaction,


184 Muhammad Taufiqurahman, Boediono Kritik Anggaran Bantuan Hukum Orang Miskin yang Tak Terserap [Boediono Criticizes Legal Aid Fund for the Poor People that was not Distributed], DETIK (Dec. 16, 2013). http://news.detik.com/read/2013/12/16/173132/2443534/10/boediono-kritik-anggaran-bantuan-hukum-orang-miskin-yang-tak-terserap?nd771104bcj.


186 Id.

they could pay or donate to the state fund in legal aid so the money could be allocated to legal service provider.\textsuperscript{188} This approach also will affect to lawyers who cannot do pro bono service because they have too many workloads.\textsuperscript{189}

Lawmakers also should clarify special procedure provision by creating a designated procedure and setting time limitation. Under the current bill, there are some ambiguous provision about the trial procedure for the case that prosecuted under the special procedure that likely to create another “latent regulation.” There is no designated trial procedure under the special procedure provision; rather the law suggests that the first trial of the special procedure should be examined under the ordinary trial procedure, and the judge switches to short trial procedure after accepting defendant’s confession. In the current law, the short trial procedure is not effective for minor cases. The law enforcement rarely prosecuted a defendant in minor cases under the short trial procedure. In 2013, there were only 231 cases, or 0.01 \%, that prosecuted under the short trial procedure.

The shifting from ordinary to short trial procedure arguably will create inefficiency process.\textsuperscript{190} The main factor of the efficiency under China’s summary procedure is the single judge as we discussed at the previous section. The Indonesia’s special procedure provision is unclear about the number of judges who will decide the case. At the first trial, there are three judges who hear the defendants’ confession under the ordinary trial procedure. After the three judge panel grants a defendant’s confession case, the case can move to a single judge under the short trial procedure. In addition, the

\begin{footnotes}
\item[188] Deborah L. Rhode, Pro Bono in Principle and in Practice: Public Service and the Professions 17 (California, 2005).
\item[189] In the U.S., for instance, the “workload demands” became the most negative influence in limiting pro bono service, see id. at 132.
\item[190] Mahkamah Agung RI [Indonesia’s Supreme Court], supra note 24, at 60.
\end{footnotes}
lawmakers also should draft the time limitation like China did. The law enforcement will be required to conclude the case within the regulated time. It will ensure its time efficiency in prosecuting case under the special procedure and prevent law enforcement to procrastinate in concluding the case.

The other disadvantage of using short trial procedure to prosecute a case under special procedure is the absence of evidence provision. That provision will regulate the inadmissibility of evidence that is collected through means of torture. This absence of evidence provision will increase the risk of using torture to get defendant’s confession. Thus Indonesia should designate a specific procedure for making this evidence available; this change would discourage law enforcement from torturing defendants to collect confession and evidence.

Nevertheless, the punishment provision in short trial procedure, less than three years imprisonment, is the best standard in regulating a designated special procedure. This provision is more lenient than the provision that has been drafter under the special procedure that allows judge to impose a defendant with four years and eight months imprisonment.\textsuperscript{191} This more lenient punishment is an incentive that will encourage defendant to plead guilty.

VI. Conclusion

In Indonesia, backlogs and lack of state funding for prosecuting criminal cases has led to corruption and evasion of law. Specifically, law enforcement officials and courts do not have the resources or capacity to handle cases according to procedure, and

\textsuperscript{191} Special procedure is available for time crimes associated with sentences of less than 7 (seven) years imprisonment where a judge could designate a sentence of 2/3 of that time.
they end up disposing of cases quickly and accepting bribes to satisfy their costs. These problems could be helped through implementation of special procedure for pleaded defendants, a move that would increase efficiency and save costs.

However, before Indonesian implements this kind of law, a law that is already being reviewed in the legislature, it is sensible to learn from China’s failures in implementing similar legislation. These failures have stemmed from the following deficiencies: (1) lack of defense counsel, (2) risk of false confession, and (3) unequal standing between prosecutors and defendants. As such, Indonesian lawmakers should advocate for a budget that provides for defense counsel, especially for poor defendants. This budget should be distributed through legal aid institutions that can also provide legal services for poor defendants. Lawyer’s representation at the investigatory or pre-trial process also has to be available for all defendants. Right to lawyer at the pretrial process should be protected by the law, and law enforcement should inform this right to the defendant.

In addition, the provision of special procedure needs to be amended to clarify the role of law enforcement in criminal prosecutions. For example, lawmakers should design a procedure that provides for the following (1) strict time limitations that ensure increased efficiency for defendants; (2) a provision that makes the use of torture to gather evidence inadmissible; and (3) removal of legislative barriers to leniency.