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# **PLEAD GUILTY, WITHOUT BARGAINING: Learning from China’s “Summary Procedure” before Enacting Indonesia’s “Special Procedure” in Criminal Procedure**

Choky R. Ramadhan\*

## 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 United States, this procedure 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.

*KEYWORDS: Plea Bargaining, Criminal Procedure Law, Criminal Justice Reform*

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## I. INTRODUCTION

Indonesia recently introduced a criminal procedure bill that includes a *jalur khusus* or “special procedure” to allow defendants who plead guilty to exchange a shortened case procedure for a lesser punishment. The drafters of the bill were inspired by the U.S. “plea bargaining”<sup>1</sup> procedure. The drafters’ intention was not only to give a lesser punishment to a pleading defendant,<sup>2</sup> but also to reach *peradilan cepat, sederhana, dan biaya ringan*, a “speedy, simple, and less costly trial,” by using a shortened criminal procedure.<sup>3</sup> This special procedure was designed to alleviate great backlogs in Indonesian courts, where criminal procedure is normally cumbersome, there are few court resources, and there is minimal support for defendants. This special procedure will potentially increase efficiency because it is conducted by a single judge in a short

1. Drafters use term “Plea Bargaining” in the 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.

trial procedure; however, the vagueness of its provision under the bill will also potentially create “latent regulations” or hidden systems<sup>4</sup> that evade the law.

Notably, Indonesia’s special procedure closely resembles China’s “summary procedure,” which shortens 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 Italy’s Criminal Procedure system,<sup>5</sup> where defendants and prosecutors agree before trial about the punishment, before the case is examined by the judge.<sup>6</sup> Both Indonesian special procedure and Chinese summary procedure systems do not give defendants and prosecutors the opportunity to agree on punishment. Therefore, neither Indonesia nor China has true “plea bargaining” procedures;<sup>7</sup> instead, as Graham Hughes defines them, they are better described as “pleas without bargains.”<sup>8</sup>

Alvaro Santos has criticized the legal reformer who simply introduces a “univocal agenda for reform” without looking to local conditions in judicial reform and anti-corruption efforts.<sup>9</sup> It is essential, then, for stakeholders and legal scholars to examine both Indonesian and Chinese 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.<sup>10</sup> Specifically, both Chinese Confucianism<sup>11</sup> and Indonesian *adat* tradi-

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4. This term is being used to explain informal or unregulated procedures that proceed by the court. See Chen Ruihua, *Initial Research on the Malfunctions of the Criminal Process*, 20 PAC. RIM L. & POL’Y J. 359, 360 (Timothy Webster trans., 2011).

5. Drafters also conducted a study visit to Italy. See Academic Draft, *supra* note 1, at 4.

6. William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT’L. L. 429, 438 (2004).

7. Choky Ramadhan, *Jalur Khusus dan Plea Bargaining: Serupa Tapi Tidak Sama* [*Special Procedure and Plea Bargaining: Similar but not Completely Similar*], KOMITE MASYARAKAT SIPIL UNTUK PEMBAHARUAN KUHAP [CIVIL SOCIETY COMMISSION FOR REFORMING CRIMINAL PROCEDURE LAW] (March 6, 2014), <http://kuhap.or.id/jalur-khusus-dan-plea-bargaining-serupa-tapi-tidak-sama/> (Indon.).

8. Graham Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753 (1980-1981).

9. See Alvaro Santos, *The World Bank’s Uses of The “Rule of Law Promise in Economic Development*, in *THE NEW LAW & ECONOMIC DEVELOPMENT MOVEMENT: A CRITICAL APPRAISAL* 253, 299 (David M. Trubek & Alvaro Santos eds., Cambridge Univ. Press 2006).

10. Confucianism leniency started in the Han Dynasty, as being available for juvenile and mentally disabled people, and later was broadened for pleaded defendant. See Yujun Feng, *Legal Culture in China: A Comparison to Western Law*, 15 N.Z. ASS’N FOR COMPARATIVE L. 1, 3 (2009), available at [http://www.victoria.ac.nz/law/nzacl/PDFS/Vol\\_15\\_2009/01\\_Feng.pdf](http://www.victoria.ac.nz/law/nzacl/PDFS/Vol_15_2009/01_Feng.pdf).

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>. Bo Yin and Peter Duff argued that Confucianism tradition has been attacked by communism value since 1920. And,

tions<sup>12</sup> highly emphasize harmony within society.<sup>13</sup> In both traditions, the main purpose of the criminal justice system is to recover the imbalance within society caused by crime.<sup>14</sup> In recovering the imbalance, both tradi-

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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 & Peter Duff, *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<sup>6</sup> (Edward Elgar 2011). Chinese criminal law allows for leniency for defendants who voluntarily surrender and help law enforcement gather evidence. See Xingfa (刑法) [Criminal Law] (promulgated by the Standing Comm. Nat'l People's Con., Mar. 14, 1997, effective Dec. 25, 1999), 67-68 (China); Yujun Feng, *Legal Culture In China: A Comparison To Western Law* 3, available at [http://www.victoria.ac.nz/law/nzacl/PDFS/Vol\\_15\\_2009/01%20Feng.pdf](http://www.victoria.ac.nz/law/nzacl/PDFS/Vol_15_2009/01%20Feng.pdf), (last visited May 17, 2014).

12. Similar to Confucianism in China, *adat* arguably still exists within Indonesia society even though there was some effort to unify and nationalize Indonesian law. See Daniel S. Lev, *Van Vollenhoven dan Hukum Adat [Van Vollenhoven and Adat Law]*, DANIEL S LEV, HUKUM DAN POLITIK DI INDONESIA: KESINAMBUNGAN DAN PERUBAHAN [LAW AND POLITIC IN INDONESIA: SUSTAINABILITY AND CHANGE] 400 (2013) (Indon.). The existence of *adat* is 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 live 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 to unwritten law or *adat* to conclude the case has been established since Dutch colonization, when 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://huma.or.id/wp-content/uploads/2013/10/MAKALAH-2.pdf>.

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 (Oxford Univ. Press 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, HUKUM PIDANA 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." See B. TER HAAR, ADAT LAW IN INDONESIA 213 (E. Adamson Hoebel et al. eds., Institute of Pacific Relations 1948). Therefore, the punishment or sanction must be imposed to an offender to restore the equilibrium of society, also deterring future wrongdoing that could disrupt society. See B. TER HAAR, *Id.* 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 PETER BURNS, THE LEIDEN LEGACY: CONCEPTS OF LAW IN INDONESIA 115 (KITLV Press 2004). In addition, there are several kinships and territories in *adat* tradition that have their own approach in responding to 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 Koeswadi, *Aspek Budaya Dalam Pemidanaan Delik Adat*

tions consider punishment as the last resort,<sup>15</sup> preferring lenient punishment for pleading criminals.<sup>16</sup> These similarities in cultural heritage seem to justify comparison.

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 it resulted in an increased risk of false confessions and a reduction in access to defense counsel.<sup>17</sup>

The article begins by describing the overcrowding of Indonesian courts and the need for increased efficiency. Then, the article compares the features of Indonesian special procedure and Chinese summary procedure. Next, the article describes several lessons that may be learned from China's experience, by identifying China's successes and failures after enacting summary procedure. Finally, the article recommends that Indonesian lawmakers prevent the problems that China encountered by making lawyers available for the defendant in pre-trial investigations, allocating state funds to make this possible, and clarifying and curing the vague language in the bill.

## II. THE NEED FOR EFFICIENCY

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

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[*Tradition Aspect in Criminalizing Adat Crime*], BADAN PEMBINAAN HUKUM NASIONAL, SIMPOSIUM PENGARUH KEBUDAYAAN/AGAMA TERHADAP HUKUM PIDANA [SYMPOSIUM ON TRADITION/RELIGION INFLUENCE IN INDONESIA CRIMINAL LAW] (Denpasar 1975) at 45. See Jianhong Liu et. al, *Chinese Legal Traditions: Punitiveness versus Mercy*, 9 ASIA PAC. J. OF POLICE AND CRIM. JUST. 22(2012).

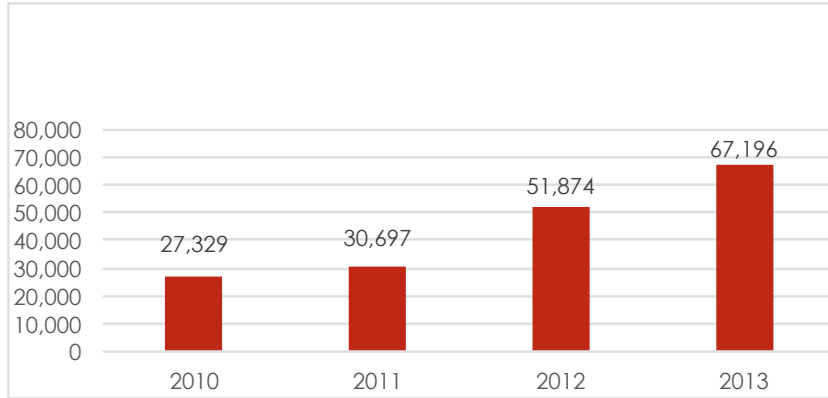
15. *Id.*

16. *Adat* as practiced by the Gayo (one of many ethnic groups that live in Sumatra), for example, expects thieves to pay a fine for the restoration of society based on his/her social status. A rich thief would be required to pay a higher fine than a slave or woman thief. Crimes committed by poor people, especially those who were hungry, would receive lesser punishments. See BURNS, *supra* note 13, at 120. In general, *adat* affords lesser punishment to defendants who confess their guilt and ask for forgiveness, a practice reminiscent of the leniency afforded in special procedure and summary procedure. See HADIKUSUMA, *supra* note 13, at 36. Notably, the principle is unlike the system used in the U.S., which tends to give a severe punishment because of Utilitarianism influenced by British scholars, Jeremy Bentham, and John Stuart Mill. Utilitarianism believes that punishment should "include concept of gross negligence and recklessness" and also "cover cases of strict and vicarious liability." It believes in punishment and deterrence to stop repeating violations. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW: THE AMERICAN WAY OF LAW* 35 (Harvard Univ. Press 2003). See BURNS, *supra* note 13, at 112. See also Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. I, 26 (2005-2006).

17. Elyzabeth M. Lynch, *Why Was There a Trial When Gu Kailai Confessed – China's "Plea Bargaining"*; CHINA LAW & POLICY (August 29, 2012), <http://chinalawandpolicy.com/tag/summary-procedure/>.

as well as backlogs in the courts. For instance, in 2010, Indonesian district courts had 26,210 cases carried over from the previous year.<sup>18</sup> In that same year, there were 131,936 new cases; however, the courts were able to handle only 130,817 cases.<sup>19</sup> Backlogs rose to 27,329 at the end of 2010,<sup>20</sup> and in 2011, the number of backlogs increased to 30,697.<sup>21</sup> The number of backlogs rapidly rose in the next two years to 51,874 (2012) and 67,196 (2013).<sup>22</sup>

**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 2010, the average judge handled 217 cases per year.<sup>23</sup> Presumably, this number has increased since

18. Badan Peradilan Umum Mahkamah Agung Indonesia [General Courts Body of Indonesia Supreme Court], *Data Perkara Pidana Seluruh Pengadilan Negeri Dalam Daerah Hukum Pengadilan Tinggi di Indonesia Tahun 2010* [Criminal Cases Data in Entire District Courts within Appellate/High Court in Indonesia in 2010], [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) (last visited Feb. 13, 2014).

19. *Id.*

20. *Id.*

21. Badan Peradilan Umum Mahkamah Agung Indonesia [General Courts Body of Indonesia Supreme Court], *Data Perkara Pidana Seluruh Pengadilan Negeri Dalam Daerah Hukum Pengadilan Tinggi di Indonesia Tahun 2011* [Criminal Cases Data in Entire District Courts within Appellate/High Court in Indonesia in 2011], [http://www.badilum.info/images/stories/stadok/Pidana\\_PN\\_2011\\_Tabel.pdf](http://www.badilum.info/images/stories/stadok/Pidana_PN_2011_Tabel.pdf) (last visited Feb 13, 2014).

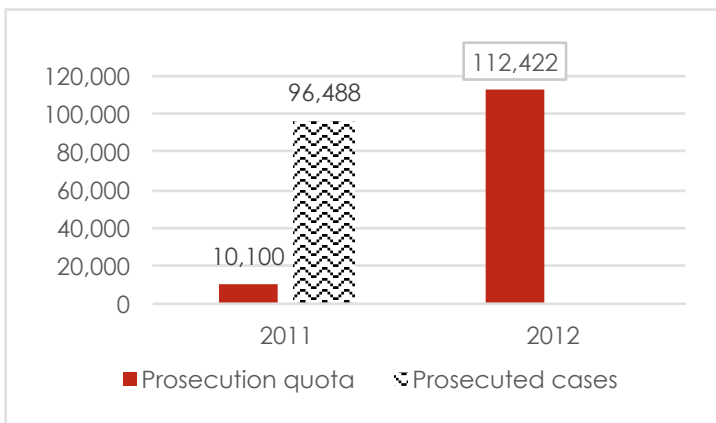
22. Mahkamah Agung Republik Indonesia [Indonesia Supreme Court], *Laporan Tahunan Mahkamah Agung Tahun 2013* [Indonesia Supreme Court Annual Report 2013] 60-61, available at <https://www.mahkamahagung.go.id/images/LTMARI-2013.pdf> (last visited, Mar. 17, 2014).

23. *Data Statistik Sebagai Alat Menghitung Beban Kerja, Kinerja, dan Kebutuhan Personil Hakim/Jaksa* [Data statistics as a Tool to Estimate Workload, Performance,

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 an associated delay and cost. In addition, inadequate state funds prevent law enforcement efforts to prosecute. 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 cases.<sup>24</sup> However, it reported that the AGO actually prosecuted 96,488, or 955.32% of the targeted budget in 2011. This suspicious statistic raises questions about where the money came from to prosecute these cases.

**Figure 2: Prosecution quota**



In 2012, the AGO revised its plan, setting 112,422 cases to be heard in District Court.<sup>25</sup> 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.<sup>26</sup> In 2013, the budget reduced again to Rp. 3.3 million (\$330)

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and Need of Judge/Prosecutor] in *Berita Peradilan* (Judicial News), ed. I, Aug. 2010, ditkumham.bappenas.go.id/ebook/Berita%20Peradilan%201.pdf (last visited Feb. 13, 2014).

24. General crimes are all types of crimes excluding Corruption and Human Rights. See *Kejaksaan Republik Indonesia* [Indonesia Attorney General Office], *Laporan Tahunan Kejaksaan 2011* [Attorney General Office 2011 Annual Report], available at <http://www.kejaksaan.go.id/upldoc/laptah/2011-Laporan%20Tahunan%20Kejaksaan%20RI-id.pdf> (last visited Feb. 18, 2014).

25. *Kejaksaan Republik Indonesia* [Indonesia Attorney General Office], *Laporan Tahunan Kejaksaan 2012* [Attorney General Office 2012 Annual Report], available at <http://kejaksaan.go.id/upldoc/laptah/laptah2012.pdf> (last visited Feb. 18, 2014).

26. *Komisi Kejaksaan* [Prosecutor Commission], *Laporan Penelitian Biaya Penanganan Perkara Pidana Umum Kejaksaan* [Research Report on General Cases Cost in Attorney General Office] 10, (Prosecutor Commission, Working Paper 2013).



per case.<sup>27</sup> The decreasing budget made it difficult to prosecute criminal cases; therefore, many prosecutors complained that they had to commit unlawful acts (corruption) to procure other funding sources to prosecute cases.<sup>28</sup>

**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,”<sup>29</sup> which rushes defendants through indictment, trial, and sentencing, skipping steps along the way and violating criminal procedure law.<sup>30</sup> Under this system, for example, a thievery case under the “ordinary trial procedure”<sup>31</sup> might only proceed for 10 minutes from indictment to verdict.<sup>32</sup> These cases are rushed through the process

27. *Id.*

28. *Id.* at 11; Indonesia Attorney General Office claimed that a corrupt prosecutor is because of the inadequate state fund to prosecute. See Muhammad Agung Riyadi, *Mental Korup, Jaksa Belum Reformis* [Corrupt Mentality, Prosecutor Has Not Reformed], GRES NEWS (Dec. 20, 2013), <http://www.gresnews.com/berita/hukum/10282012-mental-korup-jaksa-belum-reformis/>.

29. See Ruihua, *supra* note 4, at 383.

30. See Laporan Pemantauan Persidangan [Trial Monitoring Report], Masyarakat Pemantau Peradilan Indonesia Fakultas Hukum Universitas Indonesia [Indonesia Judicial Monitoring Society, Faculty of Law University of Indonesia] (Mar. 7, 2013), available at [http://pemantauperadilan.or.id/index.php?option=com\\_phocadownload&view=category&id=6:publikasi-mappi-1&Itemid=107](http://pemantauperadilan.or.id/index.php?option=com_phocadownload&view=category&id=6:publikasi-mappi-1&Itemid=107).

31. 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. Section III, IV, and V, Indonesia. Undang-undang tentang Hukum Acara Pidana. UU Nomor 8 Tahun 1981, LN. 76, TLN. 3258. [Indonesia. Law regarding Criminal Procedure. Law Number 8 Year 1981, SG. 76-3258.

32. Anton Setiawan, *MaPPI Laporkan 307 Pelanggaran Hakim ke KY* [MaPPI Reports 307 Judge Violations to Judicial Commission], JURNAS (Dec. 15, 2011), available

even though under the ordinary trial procedure the defendant is supposed to be provided an opportunity to cross-examine witnesses against him. Defendants do not have counsel even though Indonesia's criminal procedure law requires it.<sup>33</sup>

This process that evades the law harms the defendant's right to obtain a speedy and fair trial. According to MaPPI FHUI's observation, the violations of Indonesian Criminal Procedure that usually occur are: (1) lack of access to defense counsel, and (2) failure by judges to give defendants fair trials under the law.<sup>34</sup> The cases described above that are rushed through the process are some examples of how defendants do not have defense counsel, the chance to read the indictment and prepare a defense, nor the ability to present their own witnesses.

This latent regulation or hidden system has also affected law enforcement's credibility and integrity. For instance in 2013, a survey from Indonesia Circle Survey (*LSI*) reported that 56% of respondents were skeptical of law enforcement.<sup>35</sup> In addition, law enforcement officers are known to engage in bribery and extortion in order to cover the cost of solving crimes. In Indonesia, the public perceives the Police Department as the most corrupt institution and the Judiciary as the second-most corrupt institution.<sup>36</sup> In order to receive adequate protection from law enforcement, society must bear the extra cost of paying bribes. Furthermore, law enforcement's low credibility weakens Indonesia's rule of law.

### III. THE FEATURES OF SHORTENED PROCEDURE FOR PLEADED DEFENDANT

Several countries use shortened criminal procedures to increase the efficiency of the courts and criminal prosecutions. Many of these countries were originally inspired by the efficiency of the United States' approach to plea-bargaining. In the U.S., plea-bargaining has reduced law enforcement workload and led to more efficiency in the 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."<sup>37</sup> As a result of this success in the U.S., legislators in

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at <http://www.jurnas.com/news/47979>.

33. INDONESIA CRIMINAL PROCEDURE LAW art. 56.

34. 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.

35. Iwan Kurniawan & Nila Chrisna Yulika, *Survei: Kepuasan Terhadap Penegak Hukum di Titik Terendah* [Survey: Public Satisfaction to Law Enforcements in the Low Point], VIVA NEWS (Apr. 7, 2013), available at <http://us.nasional.news.viva.co.id/news/read/403215-survei--kepuasan-terhadap-penegak-hukum-di-titik-terendah>.

36. Transparency International, *Global Corruption Barometer 2013* 36, available at [http://issuu.com/transparencyinternational/docs/2013\\_globalcorruptionbarometer\\_en?e=2496456/3903358#search](http://issuu.com/transparencyinternational/docs/2013_globalcorruptionbarometer_en?e=2496456/3903358#search) (last visited Feb. 22, 2014).

37. *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, available at <http://www.albany.edu/sourcebook/pdf/t5222009.pdf>).

countries like Russia, Italy<sup>38</sup>, Taiwan<sup>39</sup>, and China<sup>40</sup> have enacted similar provisions in their criminal procedure laws. These provisions allow defendants to plead guilty, avoid trial, and receive a lighter sentence.

The U.S. plea bargaining process 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.<sup>41</sup> This negotiation can happen by phone or at prosecutor's office<sup>42</sup> without the involvement of the judge.<sup>43</sup> Both parties can reach an agreement to do any of the following: (1) dismiss charges; (2) recommend a particular sentence; or (3) decide upon a specific sentence.<sup>44</sup> However, the judge is not bound by the agreement made by the prosecutor and defendant.

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 of the article begins by explaining the legislative process of China's Criminal Procedure Law (CPL) including: the 1979 CPL, the 1996 CPL, and the 2012 CPL. Next, this part will compare summary procedure in the 2012 CPL with the 1996 CPL. This section also describes the legislative history of Indonesia's criminal procedure law and the historical process of Indonesia's Criminal Procedure Bill (*RUU KUHAP*). In 2007, the drafters of this bill added shortened procedures for a pleaded defendant called special procedure. Finally, this section demonstrates how these features of Indonesia's special procedure are too vague and will need additional clarifications and protections for defendants.

#### A. *Summary Procedure in the People's Republic of China*

China implemented summary procedure in 1996, but it made significant amendments to the law in 2012. In particular, a 2003 Joint Opinion promulgated simplified procedure,<sup>45</sup> and it was then abolished and

38. Inga Markovits, *Exporting Law Reform-but Will It Travel?*, 37 CORNELL INT'L L.J. 95, 109 (2004).

39. Margaret K. Lewis, *Taiwan's New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 VA. J. INT'L L. 651, 672 (2009).

40. Lynch, *supra* note 17.

41. REGINA RAUXLOH, *PLEA BARGAINING IN NATIONAL AND INTERNATIONAL LAW* 25-26 (London: Routledge, 2012).

42. JENIA I. TURNER, *PLEA BARGAINING ACROSS BORDERS* 22 (New York: Aspen, 2009).

43. FED. R. CRIM. P. 11(c)(1)(C).

44. FED. R. CRIM. P. 11(c)(1)(A)(B)(C).

45. Simplified procedure applies to all crimes that are likely to be convicted more than 3 years imprisonment. See Elyzabeth 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.hrichina.org/en/content/3703#ft11>.

re-incorporated into a new summary procedure in 2012.<sup>46</sup> Unlike the 1996 law, in which summary procedure was only available for crimes having sentences of no less than 3 years imprisonment, the new version makes summary procedure available for all crimes.

Chinese Summary Procedure may not have across-examination process at the trial because the provision regarding cross-examination does not apply. In both the 1996 and 2012 CPL, the provision regarding the cross examination, specifically “interrogating the defendant, questioning the witnesses and expert witnesses, showing the evidence, and debating in court” are not used in summary procedure.<sup>47</sup> However, the defendant might defend against and debate the bill of indictment if the judge gives the opportunity.

*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.<sup>48</sup> 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 the lawless era of the Cultural Revolution.<sup>49</sup> Hungduh Hiu observed that the 1979 CPL, followed by 1979 Arrest and Detention Regulations of the People’s Republic of China, “set up proper arrest procedures and strict time limits” that was meant to stop law enforcement from abusing suspects.<sup>50</sup>

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.”<sup>51</sup> Despite these changes in 1996, human rights violations persisted, and law enforcement did not consistently apply the criminal procedure. This inconsistency created “latent regulation” or informal procedure because law enforcement officials “. . . devise[d] conve-

46. 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.

47. Xing Shi Su Song Fa (刑事诉讼法) [Criminal Procedure Law of People’s Republic of China] (promulgated by Standing Comm. Nat’l People’s Cong., 1996, effective 1997) art. 177 (China) [hereinafter 1996 CPL]; Xing Shi Su Song Fa (刑事诉讼法) [Criminal Procedure Law of People’s Republic of China] (promulgated by Standing Comm. Nat’l People’s Cong., amended 2012, effective 2012) art. 213 (China) [hereinafter 2012 CPL].

48. JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 300 (Martinus Nijhoff 2008); *see also* Sida Liu & Terence C. Halliday, *Recursivity in Legal Change: Lawyers and Reforms of China’s Criminal Procedure Law*, 34 L. & SOC. INQUIRY 911, 925 (2009).

49. LAWYERS COMMITTEE FOR HUMAN RIGHTS, OPENING TO REFORM?: AN ANALYSIS OF CHINA’S REVISED CRIMINAL PROCEDURE LAW 3 (1996).

50. Hungdah Chiu, *China’s Criminal Justice System and the Trial of Pro-Democracy Dissidents*, 24 N.Y.U. J. INT’L L. & POL. 1181, 1184-85 (1992).

51. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 49, at 10.

nient ways to dispose. . .” cases effectively.<sup>52</sup> In response to the continued abuse, Chinese lawmakers revised criminal procedure again in 2012.

In the 1996 CPL, summary procedure was first regulated to address increased caseloads.<sup>53</sup> In 1998, Haidan People’s Procuratorate and the Haidan People’s Court created “latent regulation” or simplified procedure due to the high number of caseloads in Haidan.<sup>54</sup> 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.<sup>55</sup> 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.

*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.<sup>56</sup> Simplified procedure was created to prosecute criminal cases in which conviction would result in sentences of more than 3 years. Later, in 2012, the CPL was amended so that summary procedure could be used for all crimes. However, the new summary procedure cannot be used if the crime has a major social impact<sup>57</sup> or in “other situations” where law enforcement deems the implementation of summary procedure inappropriate.<sup>58</sup> In addition, the summary procedure cannot be used if the defendant is “blind, deaf, or mentally ill.”<sup>59</sup> Finally, in joint crimes, all defendants must be willing to confess his or her guilt and consent to being prosecuted under summary procedure; otherwise, the summary procedure cannot be used for that case.<sup>60</sup>

The 1996 CPL had restricted the People’s Procuratorate so it could only prosecute under the summary procedure for a case based on the complaint.<sup>61</sup> The summary procedure could be implemented if it had enough evidence and obvious facts to prove the defendant was guilty.<sup>62</sup> Aside from these restrictions, the provision under the 1996 CPL gave the procuratorate broad discretion to decide whether crimes should be prosecuted using the summary procedure mechanism. The procuratorate

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52. Ruihua, *supra* note 4, at 360.

53. Lynch, *supra* note 45.

54. *Id.*

55. *Id.*

56. 1996 CPL art. 174(1).

57. 2012 CPL art. 209(2).

58. *Id.* art. 209(4).

59. *Id.* art. 2019(1).

60. *Id.* art. 209(3).

61. 1996 CPL art. 171(2).

62. *Id.* art. 174(1).

should give approval to prosecute under summary procedure.<sup>63</sup> The procuratorate held the absolute power to prosecute under the summary procedure; therefore, a defendant could not refuse to be prosecuted under the summary procedure if the procuratorate decided to do so.

In contrast, under the 2012 CPL, if a defendant wants to confess and asks not to be prosecuted under summary procedure, then the procuratorate will not consent to its application.<sup>64</sup> The defendant must agree to be prosecuted under summary procedure<sup>65</sup>; therefore, the choice to prosecute under the summary procedure is placed not only on the procuratorate but also on the defendant. Under the 1996 CPL, the procuratorate could prosecute under summary procedure without the defendant's agreement.

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 must admit his or her crime and agree to all criminal facts that the defendant is charged with.<sup>66</sup> Under both laws, the defendant and procurator are not invited to present an agreement about appropriate punishment under the summary procedure.

Under the 1996 CPL, the procurator (or prosecutor) could not appear at the summary procedure trial<sup>67</sup> and the judge read the indictment.<sup>68</sup> The judge is likely not impartial because the judge represents the procurator's interest. Lawmakers revised the provision so the procurator must appear and read the indictment at trial under the new summary procedure of the 2012 CPL.<sup>69</sup>

Similar to the 1996 CPL, the 2012 CPL requires a single judge to complete a trial within 20 days for crimes likely to receive sentences of three years or less imprisonment.<sup>70</sup> In addition, three judges must complete trials for crimes that are likely to receive sentences for three years or more imprisonment, within one and a half months.<sup>71</sup> It is adopted from the simplified procedure that had required one judge and two people's assessors to examine a crime that was 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 prosecute under this approach.<sup>72</sup>

In both the 1996 and 2012 CPL, the provision regarding the cross examination, specifically "interrogating the defendant, questioning the witnesses and expert witnesses, showing the evidence, and debating in

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63. *Id.* art. 174(1).

64. McCONVILLE ET AL., *supra* note 11, at 205.

65. 2012 CPL art. 208(3).

66. *Id.*, art. 208(2).

67. 1996 CPL art. 153, 175.

68. McCONVILLE ET AL., *supra* note 11, at 206.

69. 2012 CPL art. 210.

70. *Id.* art. 210, 214.

71. *Id.* art. 201.

72. *Id.* art. 211.

court” are not applied in summary procedure.<sup>73</sup> For example, the defendant’s rights that may be waived are “right to request new witnesses to appear before the court, to obtain new material evidence, and apply for the evaluation or inquest to be done once again.”<sup>74</sup>

However, the defendant may present a statement, defend himself after hearing the indictment,<sup>75</sup> and present his or her final statement before the verdict.<sup>76</sup> A defendant may have an opportunity to defend himself and debate the indictment. The defendant also can debate with the procurator, if the judge allows him or her to do so.<sup>77</sup> A court proceeding observed by McConville provided a trial transcript showing that the judge gave defendant the opportunities to rebut and call new witnesses.<sup>78</sup> The contradictions of those provisions potentially create another “latent regulation” to be interpreted by the judge.

### B. *Special Procedure in the Indonesian Criminal Procedure Bill*

The bill drafters (“the drafters”) introduced a special procedure to solve the backlog and high costs of the Indonesian criminal procedure system. The provision was added after the drafters conducted a study while visiting the U.S. While inspired by U.S. plea-bargaining, the 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.<sup>79</sup> As a result, Indonesia can anticipate incurring some of the same problems that China experienced, such as unfair trials because of lack of counsel for pleaded defendants. The provisions of special procedure also need to be reviewed and amended to clarify vague provisions. The drafters did not create a trial procedure for the special procedure; rather, they only created several standards for a pleaded defendant. The trial process for the special procedure is regulated under the short trial procedure, which is also used for easily proved crimes.

#### a. *Legislative History of Indonesia’s Criminal Procedure Law*

The current Indonesian criminal procedure law (KUHAP) was enacted in 1981. It replaced the *Herzeine Inlands Reglement* (HIR), created by the Dutch during the colonial period, and law No. 1 Year 1951, created by the Indonesian government in a crisis era.<sup>80</sup> The main purpose for

73. 1996 CPL art. 177; 2012 CPL art. 213.

74. 1996 CPL art. 159.

75. *Id.* art. 176.; 2012 CPL art. 212.

76. 1996 CPL art. 177; 2012 CPL art. 213.

77. 1996 CPL art. 175.

78. McCONVILLE ET AL., *supra* note 11, at 269-70.

79. The drafters cited China’s 1996 CPL in academic draft, but they did not look at other sources (such as a law review article or book) from legal scholars who comment on and criticize the 1996 CPL.

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

enacting the 1981 KUHAP was to codify and unify Indonesian criminal procedure, which had been regulated through two separate laws.<sup>81</sup> In addition, the Indonesian government saw *HIR* as a colonial product that needed to be replaced with criminal procedure law drafted by and for Indonesians.<sup>82</sup>

Similar to China, the effort to revise Indonesian criminal procedure law is due to a mass of human rights violations, such as torture at the investigation stage<sup>83</sup> and lengthy detentions.<sup>84</sup> In 2006, Amnesty International argued that the current Indonesian procedure does not regulate punishment of law enforcement officials who fail to properly apply the law nor does it regulate punishment for the admissibility of evidence procured from torture or pursuant to unlawful search and seizures.<sup>85</sup> 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, rather than efficiency issues, undoubtedly have been driving the revision of Indonesian criminal procedure law. 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 (CAT).<sup>86</sup> Those ratifications became the reason for the revisions, explained by the drafters in the academic draft.<sup>87</sup>

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81. BAMBANG POERNOMO, *ORIENTASI HUKUM ACARA PIDANA INDONESIA [THE ORIENTATION OF INDONESIA CRIMINAL PROCEDURE LAW]* 21 (Amarta Buku., 1984).

82. Keterangan Pemerintah Dihadapan Rapat Paripurna DPR-RI Mengenai Rancangan Undang-Undang Tentang Hukum Acara Pidana Pada Hari Selasa Tanggal 9 Oktober 1979 [Government's Opinion in Parliament Meeting Regarding Criminal Procedure Bill on Tuesday, October 9, 1979]; DIREKTORAT JENDERAL HUKUM DAN PERUNDANG-UNDANGAN DEPARTEMEN KEHAKIMAN, *SEJARAH PEMBENTUKAN UNDANG-UNDANG REPUBLIK INDONESIA NO. 8 TAHUN 1981 TENTANG HUKUM ACARA PIDANA [LEGISLATIVE HISTORY OF INDONESIA'S CRIMINAL PROCEDURE LAW NUMBER 8, YEAR 1981]* 61 (Dirjen Hukum dan Perundang-undangan, 1982).

83. 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/>.

84. *Human Rights Under the Indonesian Criminal Procedure Code*, ASIAN HUMAN RIGHTS COMMISSION, <http://www.humanrights.asia/resources/special-reports/AHRC-SPR-013-2011/view> (last visited Mar. 24, 2014).

85. *Comments on the draft revised Criminal Procedure Code*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/library/asset/ASA21/005/2006/in/acc5f862-d420-11dd-8743-d305bea2b2c7/asa210052006en.html> (last visited Mar. 24, 2014).

86. Academic Draft, *supra* note 1, at 1.

87. *Id.*



The drafters finished the first draft of the Indonesian criminal procedure bill in 2004; however, the special procedure had not been included in that bill.<sup>88</sup> Then, the drafters switched their first draft with the April 2007 draft and the special procedure still was not included in the draft.<sup>89</sup> 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)<sup>90</sup> as part of its mission to "assist prosecutors and judicial personnel in other countries develop and sustain effective criminal justice institutions."<sup>91</sup>

The drafters were inspired by U.S. plea bargaining and drafted special procedure in the December 2007 draft.<sup>92</sup> The drafters of the 2012 academic draft of the Indonesian criminal procedure bill included the subsection "[i]ntroducing plea bargaining" to explain special procedure.<sup>93</sup> The drafters explained only that the pleaded defendant would get lesser punishment; however, they did not explain the differences between U.S. plea-bargaining and special procedure.

In 2009, the drafters finished the draft; however, the government did not send the bill to the parliament until 2012. The reason for this delay was the police's disagreement over the provision regarding *hakim komisaris* (commissioner judge), who would authorize police interception, detention, arrest, search, and seizure.<sup>94</sup> Afterward, the drafters amended the term and the scope of authority in order to get approval from all government institutions, including police, before sending the bill to parliament. In the stakeholders meetings with law enforcement, the special procedure has not been countered as frequently as the commissioner judge provision. Although 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 defendants accused of crimes punishable with sentences of less than 7 (seven) years of imprisonment.<sup>95</sup>

88. Indonesia Criminal Procedure Law (Draft 2004), <http://icjrid.files.wordpress.com/2011/07/rancangan-kuhap-2004.pdf> (last visited Apr. 7, 2014).

89. Indonesia Criminal Procedure Law (Draft April 2007), <http://icjrid.files.wordpress.com/2011/07/ruukuhap-3apr-2007.pdf> (last visited Apr. 7, 2014).

90. Robert R. Strang, "More Adversarial, but not Completely Adversarial": *Reformasi of the Indonesian Criminal Procedure Code*, 32 *FORDHAM INT'L L. J. VOL.* 188, 211 (2008).

91. *Office for Overseas Prosecutorial Development, Assistance and Training*, DEPARTMENT OF JUSTICE, U.S., <http://www.justice.gov/criminal/opdat/> (last visited Feb. 25, 2014).

92. Indonesia Criminal Procedure Law (Draft December 2007), <http://icjrid.files.wordpress.com/2011/07/ruu-kuhap-des-2007.pdf> (last visited Apr. 7, 2014).

93. Academic Draft, *supra* note 1, at 23.

94. *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>.

95. *INDONESIA CRIMINAL PROCEDURE LAW* art. 199(1).

Originally, the drafters of this law made the special procedure available for crimes associated with less than 10 years imprisonment.<sup>96</sup> However, it has 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.<sup>97</sup> The drafters intentionally limited the plea and the agreement between the defendant and the prosecutor to happen before the trial. The widespread corruption of law enforcement became a reason to close agreement before the trial, and the drafters designed more transparent and open procedures for pleaded defendants at the trial.<sup>98</sup>

After the defendant pleads at the first trial, one of the three judges must explain to the defendant his or her rights, as well as the possibility of punishment under special procedure.<sup>99</sup> The judge should confirm with the defendant whether he or she voluntarily confesses.<sup>100</sup> The three judges also have authority to approve the defendant's confession. The judges will not approve the defendant's confession if any of the judges questions the truth of the confession.<sup>101</sup>

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.<sup>102</sup> 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.<sup>103</sup> In addition to short trial procedures, there are ordinary trial procedures for all crimes and quick trial procedures for traffic case and small crimes (associated with less than 3 months imprisonment).<sup>104</sup>

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 regulated some basic principles of special procedure including the following: (1) voluntary confession at the first trial; (2) the crimes that can be prosecuted under special procedure; (3) the judge's responsibility to explain the defendant rights and examine

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96. Indonesia Criminal Procedure Law (Draft December 2007), <http://icjrid.files.wordpress.com/2011/07/ruu-kuhap-des-2007.pdf> (last visited Mar. 23, 2014).

97. INDONESIA CRIMINAL PROCEDURE LAW art. 199(1).

98. Strang, *supra* note 90, at 221.

99. INDONESIA CRIMINAL PROCEDURE LAW art. 199(3)(a)-(b).

100. *Id.* art. 199(3)(c).

101. *Id.* art. 199(4).

102. *Id.* art. 199(1).

103. *Id.* art. 198(1).

104. *Id.* art. 201.

his or her confession; and (4) the lesser punishment that will likely be given.<sup>105</sup>

In the Indonesian criminal procedure bill, the short trial procedure is led by a single judge.<sup>106</sup> As such, special procedure arguably helps the court reduce backlogs because the rest of judges in a jurisdiction can focus on other cases instead of easier cases in which a defendant is willing to plead guilty. Consequently, more cases can be solved within a year.

However unlike China's CPL, the provision does not state the time frame to conclude the pleaded defendant's case. Therefore, it is hard to argue that the case would be quickly decided under the summary procedure or the 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 to present witnesses, evidence, experts, or interpreters.<sup>107</sup>

The provision allowing for the interrogation of the defendant still applies under the short trial procedure;<sup>108</sup> however, the provision regarding evidence that broadens the type of evidence and makes inadmissible the use of torture does not apply.<sup>109</sup> It is certainly a setback because the evidence provision is viewed as an essential component of the Indonesia criminal bill.<sup>110</sup> Even though it broadens the type of evidence available at trial such as electronic evidence,<sup>111</sup> there is a provision that makes inadmissible the use of torture to gather evidence.<sup>112</sup>

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.<sup>113</sup> On the other hand, the prosecutor must prepare and read the bill of indictment before the defendant confesses and the judge grants special procedure.<sup>114</sup> Second, the punishment under short trial procedure should be less than three years imprisonment<sup>115</sup>; however, under the provision of special procedure there is an exception, thus the defendant shall not be sentenced to more than 2/3 of the usual sentence for the crime charged.<sup>116</sup> 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

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105. *Id.* art. 199.

106. *Id.* art. 198(6).

107. *Id.* art. 198(2).

108. *Id.* art. 198(2).

109. *Id.* art. 198(3).

110. Strang, *supra* note 90, at 218-21.

111. INDONESIA CRIMINAL PROCEDURE LAW art. 175(1).

112. *Id.* art. 175(2).

113. *Id.* art. 198(4).

114. *Id.* art. 199(1).

115. *Id.* art. 198(4).

116. *Id.* art. 199(5).

years and eight months imprisonment. This punishment is longer than the restriction in the provision of short trial procedure, which is less than three years imprisonment. This longer or heavier punishment does not correspond with the main goal of guilty pleas: giving lesser punishment to pleading defendants.

#### IV. 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. These seventeen years provide substantial history from which to examine and identify advantages and disadvantages of this procedure. However, there is limited study in evaluating the effect of summary procedure under the 2012 CPL because the law just came into effect in 2013.

This part begins by describing the efficiency that is argued to be the positive result of this shortened criminal procedure. Law enforcement could save time and resources in prosecuting a pleaded defendant. Nevertheless, it also poses a risk of unfair trials for defendants due to the lack of effective counsel. This condition also increases the risk of false confessions.

##### 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 and a half months).

Mike McConville has shown that the summary procedure under the 1996 CPL was very timely and effective. Twenty-three of 130 cases were prosecuted under summary procedure.<sup>117</sup> 56.5% of the observed summary procedure trials were resolved in twenty minutes or less (see table 1).<sup>118</sup> Overall, twenty-two of twenty-three cases under summary procedure were resolved in forty minutes or less.<sup>119</sup> Another scholar, Rongjie Lan, found that cases prosecuted under summary procedure were concluded within eight to ten minutes in 2005.<sup>120</sup> Similarly, Shiewi Xiao observed that more than 50% of the cases that were prosecuted under summary procedure concluded within 15 minutes.<sup>121</sup>

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117. McConville surveyed 130 Basic Court trial at the thirteen research basic courts. See McCONVILLE ET AL., *supra* note 11, at 261.

118. *Id.* at 267.

119. *Id.* at 269.

120. Rongjie Lan, *A False Promise Of Fair Trials: A Case Study Of China's Malleable Criminal Procedure Law*, 27 UCLA PAC. BASIN L.J. 155, 171 (2010).

121. McCONVILLE ET AL., *supra* note 11, at 351 (citing Shiwei Xiao, *Criminal*

In contrast, McConville found that 91 out of 102 cases that were prosecuted under the ordinary procedure were concluded in 2 hours or less (see table 2).<sup>122</sup> 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 minutes in the rural district court.<sup>123</sup>

**Table 1. Length of the trial under China's Summary Procedure<sup>124</sup>**

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

**Table 2. Length of trial under China's Ordinary Procedure<sup>125</sup>**

Time	No. of cases	Percentage
Less than 20 minutes	9	9.1
21-30 minutes	11	11.1
31-40	10	10.1
41-50	20	20.2
51-60	17	17.2
More than 1 hour and less than 2 hours	24	24.2
More than 2 hours and less than 3 hours	4	4.0
More than 3 hours and less than 4 hours	0	0
More than 4 hours	4	4.0
Not known	3	-
<b>Total</b>	<b>102</b>	<b>99.9</b>

McConville explains that having a single judge preside in summary procedure is an important factor of the efficiency of summary procedure.<sup>126</sup> A single judge could decide cases faster than a panel of judges, who would need to discuss and agree on a sentence. Because of this

*Procedure in Practice – Demonstrative Research on the Sample of Two Grassroots Courts*, JOURNAL OF YIBIN UNIVERSITY (2008).

122. *Id.* at 278.

123. Lan, *supra* note 120, at 171.

124. *Id.* at 268.

125. *Id.* at 278.

126. McCONVILLE ET AL., *supra* note 11, at 352.

effectiveness, the number of cases prosecuted under summary procedure increased. In 1998, 17 % of cases were prosecuted under summary procedure.<sup>127</sup> The number went up to 38.66 % in 2009.<sup>128</sup> While the number of caseloads increased,<sup>129</sup> law enforcement benefitted from summary procedure because of saved time in prosecuting criminal cases.

## B. *Unfair Trial*

There are several elements that created the unfair trials that occurred in China's summary procedure, 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.<sup>130</sup> In his observation, McConville found that defense counsel represented only four out of twenty-four defendants.<sup>131</sup> Citing to Shiwei Xiao's research, McConville describes only "24.5 % of defendants in W Court and 11.9 % in P Court"<sup>132</sup> had lawyers, and most of the defendants were from urban rather than rural areas.<sup>133</sup> In addition, there were only 16.7 % of observed summary procedure cases where a lawyer appeared at basic court.<sup>134</sup>

Unrepresented defendants are unlikely to defend themselves in the court. By way of example, McConville provided a court trial transcript that is typical of how proceedings under the summary procedure work.

127. Joshua Rosenzweig, Flora Sapio, Jiang Jue, Teng Biao & Eva Pils, *The 2012 Revision of the Chinese Criminal Procedure Law: (Mostly) Old Wine in New Bottles*, CRJ OCCASIONAL PAPER 18 n.72 (May 17, 2012), available at <http://www.law.cuhk.edu.hk/research/crj/download/papers/CRJ%20Occasional%20Paper%20on%20CPL%20revision%20120517.pdf>.

128. 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.*

129. Benjamin L. Liebman, *China's Court: Restricted Reform*, in DAVID KENNEDY & JOSEPH E. STIGLITZ, *LAW AND ECONOMICS WITH CHINESE CHARACTERISTIC: INSTITUTIONS FOR PROMOTING DEVELOPMENT IN THE TWENTY-FIRST CENTURY 569-70* (Oxford, 2013).

130. McCONVILLE ET AL., *supra* note 11, at 206.

131. *Id.* at 267.

132. W and P court are courts in China that were observed by Xiao Shiwei.

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)).

134. Basic Court is a court that handles all first instance ordinary criminal cases in counties or municipalities. *Seeld.* at 3, 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)).

Defendants rarely have objections on the facts or charges.<sup>135</sup> The defendant in McConville's example did not want to challenge his case.<sup>136</sup>

Generally, there are two factors that cause a lack of defense counsel in criminal cases. First, even though there are some developments and protections on the right to counsel,<sup>137</sup> the 1996 CPL law discouraged lawyers from representing clients in criminal cases.<sup>138</sup> That law was complicated and threatening, thus making it difficult for a lawyer to represent a client in criminal cases. The lawyer rarely represented a client from the investigatory stage because that was viewed as "unduly interfer[ing] with investigatory conduct."<sup>139</sup> For example, in a case involving state secrets, the lawyer needed to obtain approval from the investigatory agency in order to meet his or her client at the investigatory stage.<sup>140</sup> In that meeting, the lawyer and his or her client would have no confidentiality because the police needed to be present.<sup>141</sup>

In addition, the law also threatened lawyers with criminal prosecution;<sup>142</sup> therefore, lawyers took civil cases, with less controversy, instead of criminal cases.<sup>143</sup> In the Li Zhuang case which was remarkable, a Beijing defense lawyer was convicted of "falsifying evidence and subordination of perjury" after representing an organized crime defendant.<sup>144</sup> The number of criminal cases in which lawyers represented defendants was very low. In Beijing, for instance, only 2.5% of cases represented those that had defense counsel.<sup>145</sup> In addition, McConville found that 46% of the 227 trials that he observed had not been represented by a lawyer.<sup>146</sup>

The second factor that contributed to the lack of defense counsel is the limited number of lawyers in China. From January 1998 to September 2006, only 10% of defendants had defense counsel from legal aid

135. McCONVILLE ET AL., *supra* note 11, at 269-70.

136. *Id.* at 270.

137. Aurora E. Bewicke, *Asian Developments in Access to Counsel: A Comparative Study*, 10 NW. U. J. INT'L. HUM. RTS. 27 (2011).

138. JIANFU CHEN, CRIMINAL LAW AND PROCEDURE LAW IN THE PEOPLE'S REPUBLIC OF CHINA: COMMENTARY AND LEGISLATION 78 (Suiwa Ke trans., 2013).

139. *Id.*

140. *Id.* at 78-79.

141. *Id.* at 78.

142. Criminal Law of the People's Republic of China (promulgated by President of the People's Republic of China, Mar. 14, 1997, effective Oct. 1, 1997) art. 306, *available at* [http://www.procedurallaw.cn/english/law/200807/t20080724\\_40992.html](http://www.procedurallaw.cn/english/law/200807/t20080724_40992.html) (China); Xing Shi Su Song Fa (刑事诉讼法) [Criminal Procedure Law of People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., July 7, 1979, effective Jan. 1, 1980) art. 177, *available at* <http://www.china.org.cn/english/government/207332.htm> (China); *see* CHEN, *supra* note 138, at 81.

143. Jennifer Smith & Michael Gompers, *Realizing Justice: The Development of Fair Trial Rights in China*, 2 CHINESE L. & POL'Y REV. 108, 117 (2007).

144. Lan Rongjie, *Killing the Lawyer as the Last Resort the Li Zhuang Case and its Effects on Criminal Defence in Chinaitu*, in *COMPARATIVE PERSPECTIVE ON CRIMINAL JUSTICE IN CHINA* 304, 304 (Mike McConville & Eva Pils eds., 2013).

145. CHEN, *supra* note 138, at 81.

146. McCONVILLE ET AL., *supra* note 11, at 293.

institutions.<sup>147</sup> There were only 5,500 “legal aid [attorneys]” who represented 87,011 cases of poor defendants.<sup>148</sup> Smith and Gompers used the term of “legal aid [attorneys]” because there are some legal aid institutions that do not have any lawyers; therefore, defendants are represented by a paralegal.<sup>149</sup> 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.<sup>150</sup>

*b. False Confession*

Confessions are common in China. McConville reported that 92 % of 1007 interrogations in all sites he observed resulted in full confessions.<sup>151</sup> In China, the “confession is king.”<sup>152</sup> The defendant’s obligation to confess was regulated in the 1979 CPL as a “duty to confess faithfully.” That obligation was removed in the 1996 CPL; however, the lawmakers did not recognize the defendant’s right to silence.<sup>153</sup> In other words, a defendant is still required to confess. Later, in the 2012 CPL, the stakeholders compromised by enacting the right to silence; however, there is still a provision that requires a defendant to answer truthfully so that the defendant can get lenient punishment.<sup>154</sup>

Ideally, a defendant should confess voluntarily in front of law enforcement officials. Some false confessions happen because of torture, even though the CPL prohibits it.<sup>155</sup> More than fifty trial judges recognized the torture practice to get a confession; however, defendants could not provide any evidence of the torture.<sup>156</sup> Torture mostly occurred in the investigatory process,<sup>157</sup> the stage where lawyers were prohibited by the 1996 CPL law from representing clients.

A lawyer who was interviewed by McConville reported that a lawyer’s representation during the investigatory process could prevent coerced confession.<sup>158</sup> Ira Belkin also suggested that lawyers should appear and defend defendants from the start of the investigatory process.<sup>159</sup> To

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147. Smith & Gompers, *supra* note 143, at 119.

148. *Id.* at 118.

149. *Id.* at 199-200.

150. To combat Guizhou Province’s lack of lawyers, the province started to certify paralegals. *Id.* at 118.

151. McCONVILLE ET AL., *supra* note 11, at 74.

152. Ian Dobinson, *The Guilty Plea: An Australian/Chinese Comparison, in* COMPARATIVE PERSPECTIVE ON CRIMINAL JUSTICE IN CHINA 187, 192 (Mike McConville & Eva Pils eds., 2013).

153. *Id.* at 193.

154. CHEN, *supra* note 138, at 74.

155. Dobinson, *supra* note 152, at 192.

156. LAN, *supra* note 120, at 250.

157. *Id.* at 249.

158. McCONVILLE ET AL., *supra* note 11, at 187.

159. 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



address this concern, the 2012 CPL revised the lawyer's limitation on representation during the investigatory process.<sup>160</sup> A lawyer can now represent defendants from the first investigation and meet them privately without an investigatory officer present.<sup>161</sup>

*c. Unequal Standing*

When China revised 1979 CPL to the 1996 CPL, lawmakers promoted a more adversarial system.<sup>162</sup> This system emphasized equality between the parties (defendant and prosecutor) and designated a more passive judge;<sup>163</sup> 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 defendant can be prosecuted under the summary procedure and by the manner in which parties collect or access evidence.

Prosecutors are limited by an annual quota when prosecuting cases under summary procedure.<sup>164</sup> Consequently, a pleaded defendant cannot be prosecuted under summary procedure if the procurator has already met the quota.<sup>165</sup> 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 the procurator's.

Another inequality between the procurator and defendants is access to evidence. Under China's 1996 CPL, a procurator would give only a sampling of the available evidence that will be used at the trial, so the lawyer could examine and prepare the defense.<sup>166</sup> However, a defense lawyer could not prepare a good defense because the evidence was provided only ten days before the trial.<sup>167</sup> 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."<sup>168</sup> The procurators also occasionally did not comprehensively provide the evidence to defense

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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 *COMPARATIVE PERSPECTIVE ON CRIMINAL JUSTICE IN CHINA* 91, 111-112 (Mike McConville & Eva Pils eds., 2013).

160. CHEN, *supra* note 138, at 78.

161. *Id.* at 82.

162. Mike P. H. Chu, *Criminal Procedure Reform in the People's Republic of China: The Dilemma of Crime Control and Regime Legitimacy*, 18 *UCLA PAC. BASIN L.J.* 157, 182 (2000).

163. *Id.* at 159-160.

164. McCONVILLE ET AL., *supra* note 11, at 207.

165. *Id.*

166. Xing Shi Su Song Fa (刑事诉讼法) [Criminal Procedure Law of People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., July 7, 1979, effective Jan. 1, 1980) art. 96 (China).

167. Smith & Gompers, *supra* note 143, at 130.

168. CHEN, *supra* note 138, at 80.

lawyers, and kept a significant amount of evidence hidden at the first trial.<sup>169</sup> Consequently, lawyers were not able to examine the validity of evidence.<sup>170</sup> The China 2012 CPL addressed this concern. Under the new law, lawyers can demand and examine all evidence at the investigatory stage, before the evidence is submitted to the court.<sup>171</sup>

Even though China's 1996 CPL contains a provision that authorized lawyers to collect evidence, there were some limitations that created unequal standing in evidence gathering. Lawyers could conduct their own investigation and interrogate victims or witnesses to prepare their defense<sup>172</sup> if they got authorization from the procurator.<sup>173</sup> This authorization demonstrated that the procurator had more power than the defendants (or their lawyers). Another factor that discouraged lawyers from gathering evidence was the criminal sanction that threatened them.<sup>174</sup> Lawyers occasionally were told to remove testimony that they got from witnesses or victims if it conflicted with a procurator's testimony.<sup>175</sup> It is impossible to prevent lawyers from submitting conflicting testimony because of their responsibility to defend defendants by challenging the prosecutor's theory, testimony, or evidence. Therefore, lawyers could not effectively represent their client because they could not put on a defense.

## V. SUGGESTIONS FOR MAXIMIZING THE BENEFITS OF SPECIAL PROCEDURE IN LIGHT OF THE CHINESE EXPERIENCE

Learning from China's experience, Indonesian lawmakers can prevent certain failures when 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.<sup>176</sup> In the Indonesian criminal procedure bill, the provision regarding the right to legal counsel starting from the investigation stage has been drafted especially for defendants whose charge will likely to be sentenced more than five years imprisonment.<sup>177</sup> This provision should be broadened to be available for all defendants.

Lawmakers have addressed the state funding law for legal aid. In 2011, Indonesia enacted Legal Aid Law to allocate funding for legal aid

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169. McCONVILLE ET AL., *supra* note 11 at 178.

170. *Id.*

171. CHEN, *supra* note 138, at 82.

172. *Id.* at 79.

173. *Id.* at 80.

174. McCONVILLE ET AL., *supra* note 11, at 180.

175. *Id.* at 181.

176. INDONESIA. UNDANG-UNDANG DASAR 1945, PASAL 28 (D) [INDONESIA. 1945 INDONESIA CONSTITUTION, ART. 28 (D)].

177. INDONESIA CRIMINAL PROCEDURE LAWart. 93-94.

institutions or law schools providing legal aid.<sup>178</sup> Implementing this law, the Indonesian government budgeted Rp. 43 billion (\$4,300,000) to support 310 legal aid providers.<sup>179</sup> However, the allocation was very ineffective. Only 30% of the budget was allocated to those legal aid providers<sup>180</sup> because of the complicated bureaucratic process in reimbursing legal aid costs.<sup>181</sup> Indonesia's vice president, Boediono, was disappointed in this failure, and he criticized the Indonesia Ministry of Law and Human Rights for mismanaging legal aid funds.<sup>182</sup>

Having state funds to provide defense counsel or legal aid is an important factor in protecting the defendant's right to counsel. The author recognizes that state funds are always limited; therefore, another strategy or policy has to be 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 defendants. In 2010, PERADI enacted its own rule requiring lawyers to provide pro bono services for fifty hours per year.<sup>183</sup> Lawyers who do not comply with this rule cannot get their license renewed.<sup>184</sup> There are some challenges in implementing this rule, such as socializing and monitoring fifteen thousand (15,000) lawyers in PERADI.<sup>185</sup>

Indonesia also can adopt another approach from China to ensure pro bono legal service. In Beijing, law firms must allocate at least two days per month for pro bono legal service.<sup>186</sup> If the law firms only have expertise and experience in business transactions, they can pay or donate

178. Indonesia. Undang-undang tentang Bantuan Hukum. UU Nomor 16 Tahun 2011, LN. 104, TLN. 5248 [Indonesia. Law regarding Legal Aid. Law number 16 Year 2011, SG. 104-5248].

179. Jecky Tengens, *Bantuan Hukum di Atas Kertas? [Legal Aid in the Paper?]*, HUKUMONLINE (Jan. 16, 2014), <http://www.hukumonline.com/berita/baca/lt52d79764b2c90/bantuan-hukum-di-atas-kertas-broleh--jecky-tengens->.

180. *Id.*

181. Putri Artika, *Dana Bantuan Hukum Tidak Terserap, Kemenhukham Disentil Wapres [Legal Aid Fund Undistributed, Ministry of Law and Human Rights Criticized by the Vice President]*, MERDEKA (Dec. 16, 2013), <http://www.merdeka.com/peristiwa/wapres-sentil-kemenkum-ham-anggaran-bantuan-hukum-tak-terserap.html>.

182. Muhammad Taufiqqurahman, *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>.

183. *Penilaian Akses Terhadap Keadilan untuk Indonesia Propinsi Sulawesi Selatan [Assessment on Access to Justice for Indonesia in South Sulawesi]*, AMERICAN BAR ASSOCIATION (Washington D.C., 2012), [http://www.americanbar.org/content/dam/aba/directories/roli/indonesia/indonesia\\_access\\_to\\_justice\\_assessment\\_2012\\_bahasa-authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/roli/indonesia/indonesia_access_to_justice_assessment_2012_bahasa-authcheckdam.pdf).

184. *Id.*

185. *Organisasi Advokat dan Program Bantuan Hukum di Indonesia [Advocate Organization and Legal Aid Program in Indonesia]*, ANGGARA (April 12, 2011), <http://anggara.org/2011/04/12/organisasi-advokat-dan-program-bantuan-hukum-di-indonesia/>.

186. DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS* 117 (Stanford Univ. Press 2005).

to the state fund in legal aid so the money can be allocated to a legal service provider.<sup>187</sup> Lawyers who cannot provide pro bono services because they have too much work can also use this approach.<sup>188</sup>

Lawmakers also should clarify the special procedure provision by creating a designated procedure and setting a time limitation. Under the current bill, there are some ambiguous provisions regarding the trial procedure for cases prosecuted under the special procedure that likely 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 law suggests that the judge switch to short trial procedure after accepting the defendant’s confession. Under current law, the short trial procedure is not effective for minor cases. Law enforcement officials rarely prosecuted a defendant in minor cases under the short trial procedure. In 2013, only 231 cases, or 0.01 %, were prosecuted under the short trial procedure.

The shift from ordinary to short trial procedure arguably will create inefficiency in the process.<sup>189</sup> The main factor of the efficiency under China’s summary procedure is the single judge presiding over cases, as discussed in the previous section. 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 defendant’s 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 lawmakers also should draft a time limitation like China did. Law enforcement will be required to conclude the case within a regulated time frame. It will ensure time efficiency in prosecuting the case under the special procedure and prevent law enforcement from procrastinating.

The other disadvantage of using short trial procedures to prosecute a case under special procedure is the absence of the evidence provision. The 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 the defendant’s confession. Thus, Indonesia should designate a specific procedure for making this evidence unavailable. This change would discourage law enforcement from torturing defendants to collect confessions and evidence.

However, the punishment provision in the 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 drafted under the special procedure that allows a judge to

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187. *Id.*

188. In the U.S., for instance, the “workload demands” became one of the most negative influences in limiting pro bono service.*Id.* at 132.

189. Mahkamah Agung Republik Indonesia [Indonesia Supreme Court], *supra* note 22, at 60.

impose a defendant with four years and eight months imprisonment.<sup>190</sup> This more lenient punishment will encourage a 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 they end up disposing of cases quickly and accepting bribes to satisfy their costs. These problems could be improved through implementation of special procedure for pleaded defendants, a move that would increase efficiency and save costs.

However, before Indonesia 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 provide legal services to poor defendants. A lawyer's representation at the investigatory or pre-trial stage must also be available to all defendants. The law should protect the right to a lawyer at the pretrial stage and, law enforcement officials should inform the defendant of this right to counsel.

In addition, the special procedure provision 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 in punishment.

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190. 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.