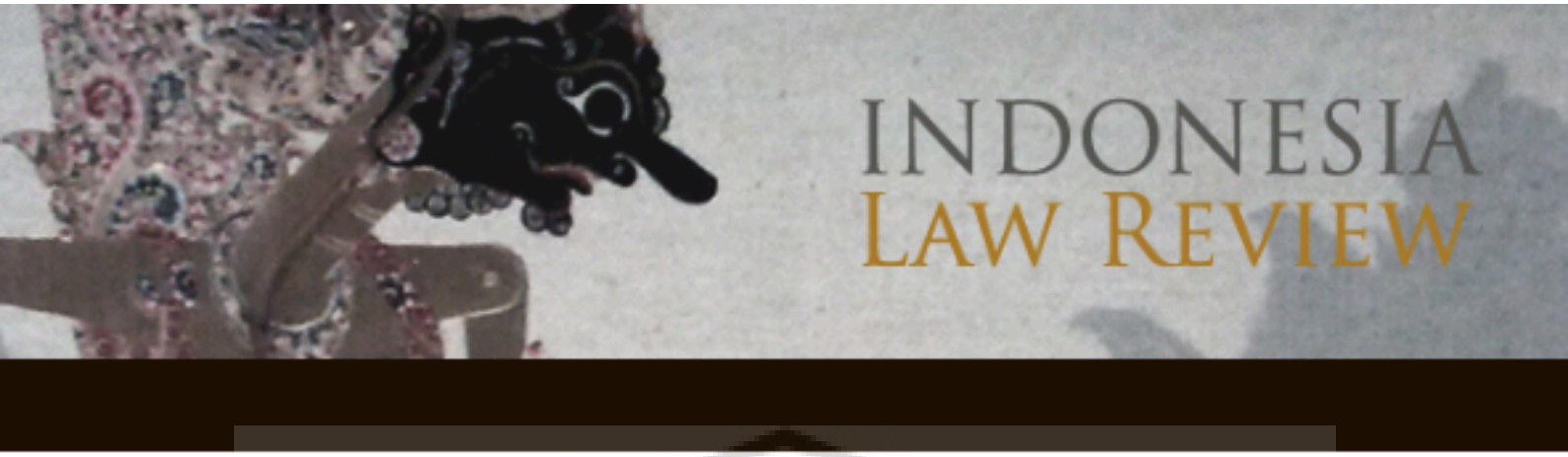

ARTICLES

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LIMITING THE LEGALITY OF DETERMINING SUSPECTS IN INDONESIA PRE-TRIAL SYSTEM

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Abstract

This article aims to examine what the pre-trial judges consider in determining whether a suspect's determination is legal. The basis of the reason "not based on the provisions and legal procedures in force" is a pre-trial petition. Including examining whether the Notification Letter for the Commencement of Investigation has not been submitted to the Reported Party and the Reporting Party, it can be used as a basis for the judge's consideration to judge the legality of the determination of the suspect. This article uses a legal research method through a statutory, conceptual, and case approach. This article finds that after the issuance of the Constitutional Court Decision Number 21 / PUU-XII / 2014 and the Supreme Court Regulation Number 4 of 2016, the fulfillment of preliminary evidence, namely that two valid tools of evidence constitute the absolute standard of determining the suspect. Besides, in terms of proof, pre-trial only assesses the validity of formal aspects, which incidentally do not touch the case's subject matter. An application for the cancellation of a suspect's status, for whatever reason, cannot be granted if the initial evidence is not fulfilled, namely the two tools of evidence listed in Article 184 paragraph (1) of the Law of Criminal Procedure (K.U.H.A.P.). Ultimately, this study recommends the need for affirmation in terms of determining suspects through changing the parameters for deciding suspects in Article 1 point 11 of the Draft of the Law of Criminal Procedure from what was originally only based on "...sufficient preliminary evidence" to "...the fulfillment of two tools of evidence contained in Article 175 paragraph (1) of the Law of Criminal Procedure" to achieve legal certainty and fulfill the suspect's human rights.

Keywords: *criminal law; criminal procedure law; pre-trial; investigation; determination of suspects*

Abstrak

Artikel ini bertujuan untuk mengkaji apa yang menjadi dasar pertimbangan hakim praperadilan dalam menentukan sah atau tidaknya penetapan tersangka, kemudian dasar alasan "tidak didasari oleh ketentuan dan prosedur hukum yang berlaku" sebagai permohonan praperadilan, dan apakah tidak diserahkannya Surat Pemberitahuan Dimulainya Penyidikan kepada Terlapor dan Pelapor dapat dijadikan dasar pertimbangan hakim menilai sah tidaknya penetapan tersangka. Artikel ini menggunakan metode penelitian hukum melalui pendekatan peraturan perundang-undangan, konseptual, dan kasus. Artikel ini menemukan bahwa setelah lahirnya Putusan Mahkamah Konstitusi Nomor 21/PUU-XII/2014 dan Peraturan Mahkamah Agung Nomor 4 Tahun 2016 tentang Larangan Peninjauan Kembali Putusan Praperadilan, terpenuhinya bukti permulaan yaitu dua alat bukti yang sah merupakan standar absolut dari penetapan tersangka. Selain itu, dalam hal pembuktian, praperadilan hanya menilai keabsahan aspek formil yang notabene tidak menyentuh pokok perkara. Permohonan pembatalan status tersangka, dengan alasan apapun, tidak dapat dikabulkan sepanjang tidak terpenuhinya bukti permulaan yaitu dua alat bukti yang tercantum dalam Pasal 184 ayat (1) Kitab Undang-Undang Hukum Acara Pidana (KUHAP). Puncaknya, penelitian ini merekomendasikan perlunya penegasan dalam hal penetapan tersangka melalui perubahan parameter penetapan tersangka pada Pasal 1 angka 11 Rancangan KUHAP dari yang semula hanya berdasar "...bukti permulaan yang cukup" menjadi "...terpenuhinya dua alat bukti yang termuat dalam Pasal 175 ayat (1) KUHAP" guna mencapai kepastian hukum dan pemenuhan hak asasi tersangka.

Kata kunci: *hukum pidana; hukum acara pidana; praperadilan; penyidikan; penetapan tersangka*

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I. INTRODUCTION

Since the Decision of the Constitutional Court (M.K.) Number 21/PUU-XII/2014 added that whether the determination of the suspect is legitimate as the scope of the pre-trial, the criminal justice regime in Indonesia has had several problems. Among them are related to the benchmarks that a person can be named a suspect in the investigation process. More broadly than that, the determination of a suspect also raises several problems among criminal practitioners. In practice, the validity of a suspect's determination is often related to the issue of "inconsistencies with applicable legal provisions and procedures."[1] This issue was then used as an excuse by justice seekers to be petitioned for pre-trial. The inconsistency of the legal procedure also spreads to the subject's problems receiving the Investigation Commencement Order (SPDP). After the Constitutional Court Decision, Number 130/PUU-XIII/2015 obliged investigators to submit SPDP to the reported and victim/whistle-blower. There was a perception that if the SPDP was not submitted to the reported party and the victim/whistle-blower, then this was deemed an "inconsistency with legal provisions and procedures applies. " It can be offered as an object of pre-trial, especially as a reason to cancel the determination of the suspect.

The Constitutional Court Decision Number 130/PUU-XIII/2014 is an answer to the existence of a legal vacuum that causes uncertainty because pre-trial institutions aim to protect suspect's and defendants' rights.[2] To prevent abuse of power by investigators, the suspect needs a control mechanism to ensure the legality of his determination as a suspect.[3] Therefore, notification of the commencement of the investigation to the suspect is an obligation. Then, bottom-up supervision is carried out by the suspect, and his attorney is chosen by adopting the concept of "*habeas corpus*,"[4] which is carried out under a pre-trial institution.[5] Because previously, pre-trial has not provided maximum protection for suspect's rights because the Law of Criminal Procedure limits pre-trial authority only to examine the administrative aspects of the arrest and detention of suspects.[6]

The basis for a pre-trial petition must be clear and objective because it only assesses the formal aspects and has not entered the case's substance.[7] In determining the validity of sufficient preliminary evidence by the investigator to be submitted to the prosecutor's office, there is a possibility of error or error. Therefore, close

[1] Maesa Plangiten, "Fungsi dan Wewenang Lembaga Praperadilan Dalam Sistem Peradilan di Indonesia," *Lex Crimen 2,* No. 6 (2013): 1.

[2] Salman Luthan, Andi Samsan Nganro, and Ifdhal Kasim, "The Effectiveness of Pretrial: Theoritical Studies and the Dynamics of Pre-trial against Detention in Indonesia," in Pretrial Hearing In Indonesia: Theory, History, and Practice in Indonesia (Jakarta: Institute for Criminal Justice Reform, 2014), 4.

[3] Luthan, Nganro, and Kasim, 41.

[4] *Habeas Corpus is a pretrial legal institution to balance law enforcers' authority, especially concerning actions that affect human rights protection, including forced efforts as explicitly stated in the criminal procedure law.* See: Ririn Setiawati, "Analisis Teoritik Pencerminan Konsep Habeas Corpus Act Dalam Regulasi Ketentuan-Ketentuan KUHAP sebagai Implementasi dari Prinsip Negara Hukum (State Law) Yang Bersifat Universal Dan Kaitannya dengan Upaya Mewujudkan Penegakan Hukum yang Berkeadilan dan Bermartabat (Due Process Of Law)" (PhD Thesis., Universitas Sebelas Maret, 2010), v.

[5] Luthan, Nganro, and Kasim, "The Effectiveness of Pretrial: Theoritical Studies and the Dynamics of Pretrial against Detention in Indonesia," 5.

[6] Supriyadi Widodo Eddyono and Muhammad Yasin, Potret Penahanan Pra-Persidangan di Indonesia: Studi tentang Kebijakan Penahanan Pra-Persidangan dalam Teori dan Praktek (Jakarta: Institute for Criminal Justice Reform, 2012), 249.

[7] Luthan, Nganro, and Kasim, "The Effectiveness of Pretrial: Theoritical Studies and the Dynamics of Pretrial against Detention in Indonesia," ii.

supervision is needed to guard it.[8] Then the mistake or mistake can be used as the object of a pre-trial petition. A pre-trial petition's object must be precise because an abstract object can make a pre-trial petition unclear, causing the pre-trial not to be granted.[9]

The discourse on the subject raises several questions which this article will answer. First, what is the basis for the consideration of pre-trial judges in determining whether or not a suspect's determination is legal? Second, is the reason "not based on applicable legal provisions and procedures" is a reason that can be used as the basis for deciding the suspect's determination in a pre-trial request? Third, whether the SPDP was not submitted to the reported party and the victim/whistle-blower could be used as a reason for the illegality of the suspect's determination?

Many studies have analyzed pre-trial problems in Indonesia, such as an analysis of the expansion of suspect's determination as new pre-trial objects,[10] pre-trial in general,[11] as well as analyzes of pre-trial decisions.[12] However, no research outlines substantively and in detail how adding a suspect's designation as a pre-trial authority can significantly impact the practice of criminal procedural law in Indonesia. In addition, there has been no research that discusses and analyzes how the benchmark for determining a suspect can become a severe problem if it is not limited or even interpreted broadly and freely.

This article uses legal research methods through the statutory, conceptual, and case approach to answering this question. This article is organized into several sections. After the introduction, the second part of this article will discuss the benchmarks a person can legitimately designate as a suspect. The third part will examine whether the reasons "not based on the provisions and legal procedures in force" can be the reason for the pre-trial judge to cancel the status of the determination of the suspect. The fourth part will discuss the issues related to the non-submission of the SPDP to the reported party and the victim/whistle-blower, which is the reason for the illegality of the suspect's determination. In the end, there are several sentences of conclusion and recommendations.

II. THE LIMITATION ON DETERMINATION OF SUSPECTS

Ad Recte docendum oportet primum inquirere nomina, quia rerum cognitio a nominibus rerum dependet.[13] To understand a legal concept, a classic legal postulate with a depth of meaning must begin with a definition.[14] On this basis, to understand the scope of pre-trial, it is necessary to understand the purpose of the pre-trial itself. Based on Article 1, point 10 of the Law of Criminal Procedure defines pre-trial as the district court's authority in examining and deciding whether or not an arrest

[8] Luthan, Nganro, and Kasim, 73.

[9] Luthan, Nganro, and Kasim, "The Effectiveness of Pretrial," 48.

[10] Ely Kusumastuti, "Penetapan Tersangka Sebagai Obyek Praperadilan," *Yuridika 33,* No. 1 (2018): 1–18.

[11] I Made Wisnu Wijaya Kusuma and Ni Made Sukaryati Karma, "Upaya Hukum Praperadilan Dalam Sistem Peradilan Pidana di Indonesia," *Jurnal Interpretasi Hukum 1,* No. 2 (2020): 73–77.

[12] Darwin, Dahlan, and Suhaimi, "Analisis Yuridis Putusan Praperadilan Dalam Perspektif Sistem Peradilan Pidana," *Jurnal Mercatoria 12,* No. 1 (2019): 68–79.

[13] Eddy O.S. Hiariej, *Prinsip Hukum Pidana: Edisi Revisi (Yogyakarta: Cahaya Atma Pustaka, 2016), 2.*

[14] Peter Jeremiah Setiawan, Xavier Nugraha, and Moch Marsa Taufiqurrohman, "Penggunaan Daluwarsa Sebagai Dasar Gugatan Praperadilan Di Indonesia: Antara Formil atau Materiil," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 3, No. 2 (2020): 2.

or detention is legal at the suspect's request or his family or another party on the suspect's power. The Law of Criminal Procedure also authorizes district courts to examine and decide whether stopping an investigation or prosecution is legal. That includes requests for compensation or rehabilitation by the suspect.

The establishment of the pre-trial mechanism is an attempt by the Indonesian government to improve the criminal procedural law inherited from the Netherlands, namely *Herzienne Inlands Reglement* (H.I.R.). Because law enforcement officials often make forced attempts without respecting human rights in the criminal procedural law, a pre-trial is formed to monitor the investigator's actions.[15] The pre-trial essence is to grant the same rights and obligations to the persons who examine and who are examined and place the suspect. Not as an object being discussed. The pre-trial also tries to guarantee the accusatory principle in the criminal procedure law, which sees a suspect being questioned not as an object but as a guarantee subject. Thus, it can be understood that there are legal protections and holistic human rights interests for the suspect.[16]

The state has broad powers in law enforcement efforts, including investigating, investigating, prosecuting, and punishing. The democratic society wants this authority to be exercised with respect for everyone's freedom and dignity—one of which is determining the suspect.[17] According to Article 1 paragraph 14 of the Law of Criminal Procedure (K.U.H.A.P.), a suspect is a person who, due to his actions or circumstances, based on preliminary evidence, is reasonably suspected of being the perpetrator of a criminal act. Therefore, for the sake of justice and legal certainty, citizens who have been named as suspects must be given space to fight back in the form of pre-trial filings.[18] Law enforcers work in the name of the public interest, have such broad powers, and go deep into reducing and eliminating citizen's fundamental rights. As a result, a suspect could lose part of his human rights as a citizen. Therefore, the state must have valid and rational arguments in determining the suspect.[19]

The law gives investigators or public prosecutors authority to carry out acts of force such as arrest, detention, confiscation, and others.[20] On this basis, the coercive attempts by an investigating official or public prosecutor against a suspect must be understood as a treatment justified by the law in the interest of investigating a criminal act.[21] Besides, this forced act is justified by statutes and regulations that can take away freedom and freedom and limit the suspect's human rights.[22] On this basis, in the case of testing for forced acts deemed contrary to the law, it is necessary to establish an

[15] Abdul Halim Barkatullah, *Praperadilan: Sarana Perlindungan Tersangka Dalam Sistem Peradilan Pidana Indonesia (Sesudah Diedit Editor)* (Bandung: Nusa Media, 2020), 76.

[16] Muhamad Solichin, "Politik Hukum Praperadilan dalam Penegakan Hukum" (PhD Thesis, Universitas Muhammadiyah Surakarta, 2018), 16.

[17] Andrew Ashworth, "Four Threats to the Presumption of Innocence," *The International Journal of Evidence & Proof 10,* No. 4 (2006): 280–84.

[18] Tristam P. Moeliono, "Asas Legalitas dalam Hukum Acara Pidana: Kritikan Terhadap Putusan MK Tentang Praperadilan," *Jurnal Hukum Ius Quia Iustum 22,* No. 4 (2015): 605.

[19] Lonneke Stevens, "Pre-Trial Detention: The Presumption of Innocence and Article 5 of the European Convention on Human Rights Cannot and Does Not Limit Its Increasing Use," *European Journal of Crime, Criminal Law and Criminal Justice 17,* No. 2 (2009): 168.

[20] Darwin, Dahlan, and Suhaimi, "Analisis Yuridis Putusan," 14.

[21] Asep Suherman, "Penangkapan Sebagai Bentuk Upaya Paksa Penegakan Hukum Dalam Sistem Peradilan Pidana Di Indonesia," *Supremasi Hukum: Jurnal Penelitian Hukum* 29, No. 1 (2020): 11.

[22] Komang Dara Trimarlina, I. Nyoman Sujana, and Ida Ayu Putu Widiati, "Implementasi Perlindungan Hak Asasi Manusia Terhadap Pemeriksaan dalam Proses Penyidikan," *Jurnal Analogi Hukum* 1, No. 3 (2019): 4.

institution that is authorized to determine whether or not a forced action carried out by an investigator or public prosecutor is legal. In this case, the authority is delegated to the pre-trial. Article 77 K.U.H.A.P. formulates the scope of authority of district courts more clearly to examine and decide pre-trial, which includes scrutinizing whether or not an arrest, detention, termination of investigation or prosecution is terminated, and compensation or rehabilitation person whose criminal case has been terminated.

The assessment of the legality of the arrest, detention, termination of the investigation, or prosecution termination can be judged by pre-trial if, in the arrest or detention process, the investigator violates Article 21 of the Law of Criminal Procedure and Article 24 of the Law of Criminal Procedure concerning suspect's detention beyond the specified time limit. In addition, the investigator and public prosecutor have the authority to stop the investigation or prosecution if the investigation or prosecution results are not sufficient evidence to be forwarded to the court or if what is suspected of being against the suspect is not a criminal act.[23]

Pre-trial in Indonesia is an imitation of the *Rechter Commisaris* (commissioner judge) in the Netherlands. The *Rechter Commisaris* in the Netherlands conducts a preliminary examination because, in addition to determining the legality of an arrest, detention, confiscation, it also conducts an initial case analysis. Thus, for example, the public prosecutor in the Netherlands can ask the judge's opinion on a case, whether, for example, the case deserves to be ruled out by a transaction (e.g., the case is not forwarded to court with compensation) or not.[24]

According to Oemar Seno Adji, the *Rechter Commisaris* emerged as a manifestation of the activeness of judges who in Central Europe had an important position with authority to handle coercion, detention, confiscation, body searches, houses, and examination of documents. In addition, the *Rechter Commisaris* supervises the execution of the prosecutor's duties. The prosecutor does the same thing with implementing the police duties, so pre-trial in Indonesia oversees the two agencies.[25]

The *Judge d'Instruction* (the pre-trial institution in France) in France has broad powers in the preliminary examination. First, it examined the defendant, witnesses, and other evidence. Then, the *Judge d'Instruction* can make reports, search houses and certain places, make arrests, confiscate, and close certain areas. After the preliminary examination is completed, it determines whether a case is a sufficient reason to be transferred to the court or not. If there are enough reasons, it will send the case a letter of delivery called an *ordonnance de Renvoi*. Otherwise, if there are not enough reasons, it will release the suspect with an *ordonnance de non-lieu*.[26]

In filing a pre-trial request regarding the legitimacy of action by law enforcement officials, one must have strong reasons.[27] Article 79 of the Law of Criminal Procedure has regulated the parties entitled to submit applications to the pre-trial. Those entitled to apply for pre-trial include suspects, their families, or their attorneys to the District Court's Chairman. In addition, article 79 of the Law of Criminal Procedure states that what can be submitted to pre-trial is only the matter of arrest and detention, while other efforts such as searches and confiscation are not directly stated.

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[23] M. Irfan Islami Rambe, "Upaya Hukum Terhadap Praperadilan," *Jurnal Pionir* 2, No. 3 (2017): 13.
[24] Andi Hamzah, *Hukum Acara Pidana Indonesia*, Third Edition (Jakarta: Sinar Grafika, 2019), 187.
[25] Oemar Seno Adji, *Hukum Pidana* (Jakarta: Erlangga, 1985), 88.
[26] Hamzah, *Hukum Acara Pidana Indonesia*, 188.
[27] Wahyu Iswantoro, "Penemuan Hukum Oleh Hakim dan Implikasi Terhadap Perkembangan Praperadilan," *Jurnal Hukum dan Bisnis (Selisik)* 4, No. 1 (2018): 17.

The Law of Criminal Procedure (K.U.H.A.P.) was designed with the intent and purpose of protecting citizens from arbitrary actions by law enforcement officials, particularly the determination of suspects. In determining a suspect, the Law of Criminal Procedure has provided parameters in assessing a person's suitability to become a suspect. That is found in the provisions of Article 1 point 14 of the Law of Criminal Procedure, namely that a person will be made a suspect if there is preliminary evidence that suspects a criminal act he has committed. However, these parameters still do not clearly define the definition of "preliminary evidence." The determination of a person should be clearly and thoroughly formulated in the Law of Criminal Procedure. The formulation of parameters for determining a suspect is unclear due to the lack of an adequate definition of "preliminary evidence" in the Law of Criminal Procedure. That creates legal uncertainty and unfair treatment in its implementation.

Through Decision Number 21/PUU-XII/2014, the Constitutional Court indirectly changed the pre-trial formulation scope in the Law of Criminal Procedure during its development. That also impacted the Indonesian criminal procedural law system.[28] The Constitutional Court Decision Number 21/PUU-XII/2014 has expanded the scope of the pre-trial. Which initially only examined the lawfulness of arrest, detention, investigation or prosecution termination, claims for compensation, and rehabilitation, adding a new scope, namely related to the determination of a suspect.

The issuance of the Constitutional Court Decision Number 21/PUU-XII/2014 answers this uncertainty. The Constitutional Court has expanded the domain of pre-trial objects, one of which is whether or not a suspect's determination is legal. There is a change in the terminology of Article 1, paragraph 14. Which previously read, "A suspect is a person who, because of his actions or circumstances, based on preliminary evidence is reasonably suspected of being the perpetrator of a criminal act." It changed to "Suspect is a person who because of his actions or circumstances, based on at least two tools of evidence contained in Article 184 of Law Number 8 of 1981 concerning the Law of Criminal Procedure (K.U.H.A.P.), it is reasonable to suspect that the perpetrator of a criminal act." Through this decision, the Constitutional Court defined the fulfillment of preliminary evidence if at least two tools of evidence contained in Article 184 of the Law of Criminal Procedure had been fulfilled.

The Constitutional Court believed that although it was limited in a limited way in Article 1 point 10 in conjunction with Article 77 letter [a] of the Law of Criminal Procedure, the investigator's determination is part of the investigation process arbitrary actions by the investigator.[29] On this basis, it can be seen that there is a need for affirmation regarding the determination of a suspect who incidentally is part of the investigation process that can be requested for protection through pre-trial. Ultimately, this led the court to delete Article 83, paragraph (2) of the Law of Criminal Procedure.

The Constitutional Court also believes that Article 77 letter [a] of the Law of Criminal Procedure contradicts Article 1 paragraph (3), Article 28D paragraph (1), and Article 28I paragraph (5) of the 1945 Constitution of the Republic of Indonesia. The court based the decision on several considerations.[30] First, Indonesia is a rule of law that prioritizes the principle of due process of law as an embodiment of

[28] Darwin, Dahlan, and Suhaimi, "Analisis Yuridis Putusan," 73.

[29] Jully Constantia Sambow, "Bukti Permulaan Menurut Kitab Undang-Undang Hukum Acara Pidana dalam Pengaruhnya Terhadap Perkapolri Nomor 14 Tahun 2012 Tentang Manajemen Penyidikan Tindak Pidana," *Lex Crimen 7,* No. 7 (2018): 12.

[30] Constitutional Court of the Republic of Indonesia. "Decision Number 21/PUU-XII/2014."

recognition of human rights (HAM). Therefore, the Law of Criminal Procedure as formal law in Indonesia's criminal justice process has formulated several rights of suspects/defendants as protection against possible human rights violations. Second, law enforcement must be following the provisions of criminal law enforcement based on Pancasila and the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), especially the opening of the 4th paragraph. Third, the Law of Criminal Procedure positions suspects/defendants as human subjects who have the same dignity and equality before the law.

The fourth consideration is regarding the freedom of a person from an investigator's actions in the International Covenant on Civil and Political Rights, which has been ratified in Law Number 12 of 2005 concerning civil and political rights. Fifth, the Law of Criminal Procedure does not have a check and balance system to determine suspects by investigators. That is because the Law of Criminal Procedure does not recognize a mechanism for testing the validity of obtaining evidence. After all, Indonesian criminal procedural law has not fully implemented the principle of due process of law. Sixth the essence of a pre-trial institution's existence is a form of supervision and a mechanism for objections to law enforcement processes related to guaranteeing human rights protection. However, the pre-trial role is only posting facto so that it does not reach the investigation, and the examination is merely formal, which puts forward the objective element. At the same time, the court cannot supervise the subjective element.

While the seventh consideration, the court believes that since the Law of Criminal Procedure came into effect in 1981, a suspect's determination has not become a crucial and problematic issue in the Indonesian people's lives. Eighth, the protection of the suspect's / defendant's human rights needs to be considered in investigations and prosecutions. Furthermore, anyone can ask pre-trial for protection from the actions of investigators who do not uphold the principle of prudence and are suspected of violating human rights. That is important because the suspect determination is part of the investigation process in which there is the possibility of arbitrary action by the investigator. As in it is included in the deprivation of someone's human rights. Ninth, pre-trial institutions are presented to realize the protection of human rights protected by the 1945 Constitution. The Constitutional Court believes that the objective is to include the validity of determining the suspect as an object of the pre-trial order. In the criminal process, a person's treatment pays attention to the suspect as a human having equal dignity, dignity, and equality before the law.

Then a question arises, namely when a person can be named a suspect. Because the Law of Criminal Procedure does not regulate when a person can be called a suspect, this article concludes that the suspect's determination must still be based on the fulfillment of preliminary evidence, namely two tools of evidence as confirmed by the Constitutional Court's decision.

That can be seen in several decisions. One of them is the Muara Enim District Court Decision Number 3/Pid.Pra/2016/PNMre. Hendri Saputra Bin Ahad Hasibuan, in this case, is asking for pre-trial. This case started when Iskandar bin Mu'in reported the Petitioner in a matter of alleged forgery and used Jo's fake letter—providing false information on the authentic deed as referred to in Article 263 paragraph (1) and Article 266 paragraph (1) of the Criminal Code in a land sale case located in Segayam Talang Taling village, Gelumbang District, Muara Enim Regency. The Petitioner, who was previously designated as a witness, was later named a suspect based on the

investigation results. The determination of the suspect was based on the fulfillment of two tools of evidence as preliminary evidence.

The Petitioner then asked the pre-trial to declare the Advanced Investigation Order Number: S.P.Dik/318/a/II/Reskrim, dated February 1, 2016, reported the Petitioner a suspect to have a disability. In their petition, the Petitioner argued that there were civil cases that had not yet been completed. The Petitioner based his plea on the Supreme Court Circular Letter Number 4 of 1980 concerning Article 16 of Law Number 14 of 1970 and "*Prejudicieel Geschil*," Supreme Court Decision Number 413K/Kr/1980, Supreme Court Decision Number 413K/Kr/1980, Supreme Court Decision Number 129K/Kr/1979, and Supreme Court Decision Number 628K/Pid/1984. These decisions state that criminal investigations must be postponed until a court decision is made in a civil case.

The judge decided to reject the petition in its entirety because the applicant was not a party in the Civil Case case. That makes the letter worth putting aside. The judge also decided that the suspect's determination had fulfilled the provisions in Article 1, number 14 of the Law of Criminal Procedure. The judge believed that the two tools of evidence in the provisions of Article 184 paragraph (1) of the Law of Criminal Procedure had been fulfilled so that the suspect's determination against the applicant is valid.

The judge's decision to reject the petition has also followed the Constitutional Court Decision Number 21/PUU-XII/2014. Moreover, the judge's decision is following the Supreme Court Regulation (PERMA) Number 4 of 2016 concerning the Prohibition of Reviewing Pre-Trial Decisions. That is because the Civil Petition argued by the Petitioner has touched the material realm, so it deserves to be put aside. Article 2 paragraph (2) of PERMA Number 4 of 2016 states, "The pre-trial examination of the request regarding the invalidity of the determination of the suspect only assesses the formal aspects, namely whether there is at least 2 (two) valid evidence and does not enter the material".

III. THE REASONS "NOT BASED ON APPLICABLE LEGAL PROVISIONS AND PROCEDURES" AS THE BASIS FOR PRE-TRIAL APPLICATIONS

K.U.H.A.P. contains several legal principles. The principle of legality, the principle of balance, the principle of presumption of innocence, the principle of restriction of detention, the principle of compensation and rehabilitation, the merger of criminal and compensation claims, the principle of unification, the principle of functional differentiation, the principle of mutual coordination, the principle of simple, fast, and low-cost justice, and the principle of open justice to the public is the most fundamental.[31] The principle of *nullum iudicium sine lege* (legality principle), summarized in Article 3 of the Law of Criminal Procedure, states that criminal law enforcement is carried out in a manner regulated by statutory regulations.[32] The legality principle's existence and importance in the administration of criminal procedural law are based on efforts

[31] Hardianto Djanggih and Yusuf Saefudin, "Pertimbangan Hakim Pada Putusan Praperadilan: Studi Putusan Nomor: 09/PID.PRA/2016/PN.Lwk Tentang Penghentian Penyidikan Tindak Pidana Politik Uang," *Jurnal Penelitian Hukum De Jure 17,* No. 3 (September 19, 2017): 414, https://doi.org/10.30641/dejure.2017.V17.413-425.

[32] Gerardus Josephus Maria Corstens and Matthias Johannes Borgers, *Het Nederlands Strafprocesrecht,* Vol. 5 (Kluwer, 2002), 13.

to prevent arbitrary actions by the authorities, especially law enforcement officials. [33]

Decisive reasons must support a pre-trial petition because it determines whether law enforcement officials' actions are legal or not.[34] Therefore, if there is a pre-trial petition filed because "it is not based on the applicable legal provisions and procedures," then that reason is still abstract and too broad so that these reasons cannot be used as the basis for an appropriate application.

If the meaning of "not based on the provisions and legal procedures in force" is that at least two tools of evidence are not fulfilled in the determination of a suspect, then that matter can be used as the basis for a pre-trial petition. The suspect's judgment has been normatively annulled through the Constitutional Court Decision Number 21/PUU-XII/2014. This decision reaffirms that whether a suspect's determination is legal or not is determined by the complete minimum of 2 tools of evidence from the types of evidence as confirmed in Article 184 paragraph (1) of the Law of Criminal Procedure.

Before the Constitutional Court Ruling was born, former Commissioner General Budi Gunawan had filed a pre-trial request for his determination as a suspect in a criminal act of corruption. In the pre-trial decision of the South Jakarta District Court Number 04 / Pid. Prap / 2015 / PN.Jkt.Sel, the judge, granted the applicant's request to cancel the applicant's determination as a suspect. However, there was a consideration from the judge who stated: "Considering, that from the formulation of the meaning of Article 1 the number 10 jo. Article 77 jo. Article 82 paragraph (1) and paragraph (2) can be clearly identified that the validity of the Petitioner's determination is not included as a pre-trial object, because it is not regulated". Furthermore, to continue with the consideration of the decision on page 223 which reads, "Considering, that this is the case with all the provisions of the special criminal legislation that is valid as positive law in Indonesia nor is there any rule that regulates whether the examination of the validity of the Petitioner's Determination is the object pre-trial." The judge should stop legal considerations up to that point and reject the pre-trial petition submitted by the Petitioner and not interpret anything more than what is stipulated in Article 77 of the Law of Criminal Procedure.[35] An interpretation of the law is prohibited when a provision in the law is unambiguous, especially for a judge.

Meanwhile, in this case, KPK. investigators had fulfilled two elements of evidence, but this was countered by the judge, stating that the KPK. was not authorized to handle the case. That case refers to the Certificate Number Sket/2/1/2015 of 2015 concerning the Position of Head of Career Development Bureau Chief of Staff Deputy of Human Resources of the Police of the Republic of Indonesia, which states that the status of the Petitioner is not a law enforcer. It would be naive to assume that a member of the Indonesian National Police (P.O.L.R.I.) can be anything but a law enforcer.[36] So this article finds that this pre-trial decision was wrong because it was not based on the main parameters in determining the suspect, namely the fulfillment of two tools of evidence as stipulated in Article 184 paragraph (1) of the Law of Criminal Procedure.

In other corruption cases, the basis for discrepancies in the determination of

[33] M. Irfan Islami Rambe, "Upaya Hukum Terhadap Praperadilan," *JURNAL PIONIR 2,* No. 3 (2017): 1.

[34] Dimas Tiga Saputra, "Ganti Kerugian dan Rehabilitasi dalam Perkara Pidana" (Skripsi, Universitas Muhammadiyah Magelang, 2017), 15.

[35] Komariah Emong Sapardjaja, "Kajian dan Catatan Hukum Atas Putusan Praperadilan Nomor 04/ Pid. Prad/2015/PN. Jkt. Sel Tertanggal 16 Februari 2015 Pada Kasus Budi Gunawan: Sebuah Analisis Kritis," *Padjadjaran Jurnal Ilmu Hukum* 2, No. 1 (2015): 16.

[36] Sapardjaja, "Kajian dan Catatan," 22.

suspects following the applicable legal procedures is common. One of them is the corruption case in the procurement of Electronic Identity Cards by Setya Novanto, the former chairman of the D.P.R. for the 2014-2019 period. In the Decision of the South Jakarta District Court Number 97 / Pid.Prap / 2017 / PN.Jkt. The judge granted Setya Novanto's pre-trial request. The judge questioned the use of evidence to develop the Irman and Sugiharto cases and the time interval for issuing Investigation Orders (hereinafter referred to as Sprindik). Judges should realize that there is a common thread between one case and another and stick to fulfilling two elements of evidence. If the logic of one evidence for one person is maintained, there will be no investigation of corruption cases based on the development of other cases.

In the decision of the Ternate District Court Number 2/Pid.Pra/2019/PNTte. Jasika Amelia Tamboto requested protection from the pre-trial because she had been named a suspect by the Respondent based on the Police Report Number: L.P./16/II/2019/Malut/ResTernate. He is suspected of committing embezzlement in office or common embezzlement. Additionally, he is suspected of having met the element of error in the provisions of Article 374 with Article 372 as subsidiary in conjunction with Article 64 paragraph (1) of the Criminal Code. The Petitioner argued that the suspect's determination against himself had to be declared invalid. That is because the suspect's determination against himself is not based and is not following applicable legal procedures and provisions.

In that case, the judge ultimately rejected the Petitioners' petition. The judge believed that the Petitioner was unable to prove the arguments of his plea. On the other hand, the Respondent has been able to prove his arguments against it. Furthermore, the suspect's determination against the applicant in the Crime of Embezzlement in Position follows the Law of Criminal Procedure rules. Resolution of the suspect has also fulfilled the provisions of Article 1 point 14 of the Law of Criminal Procedure, namely the existence of preliminary evidence - two valid tools of evidence as contained in the Constitutional Court Decision Number 21/PUU-XII/2014.

A similar case is seen in the Decision of the South Jakarta District Court Number 15 / Pid.Prap/2017/P.N.Jkt.Sel. Petitioner Drs. H. Taufiqurahman asked the pre-trial to cancel the status of the suspect's determination by the defendant, namely the Corruption Eradication Commission (KPK.). Previously, the Petitioner was deemed to have violated Article 12 letter [i] and Article 12B of Law No. 20/2001 on Corruption Eradication. In determining the suspect, the Respondent considered that he had fulfilled the preliminary evidence provisions as stipulated by the Constitutional Court Decision. However, the Petitioner considers that there has been duplication of examinations at the preliminary investigation and investigation levels — namely, between the Attorney General's Office and the KPK. Therefore, his status as a suspect must be canceled.

The presumption of duplication is because the Joint Agreement Number binds the KPK. and the Attorney General's Office: KEP-049/A/JA/03/2012 and Number B/23/III/2012 and Number Spj-39/01/03/2012, a mutual agreement between P.O.L.R.I., KPK. and Attorney General's Office, hereinafter referred to as the MoU. Article 8 of the MoU states that if the KPK., P.O.L.R.I., or the Attorney General's Office investigates the same case, then the institution with authority to conduct the investigation first is the Attorney General's Office. Then, the Petitioner also questioned the Investigation Order Number Sprin.Dik-87/01/11/2016. The Petitioner considers that the Respondent does not have at least two valid tools of evidence relating to the article suspected

of determining the suspect. All legal processes carried out by KPK. investigators are invalid because they are not based on applicable legal provisions and procedures.

The judge decided to grant the Petitioner's Suspect status cancellation and ordered the Respondent to submit all the files and cases to the Attorney General's Office. One of the judges' considerations is Article 8 paragraph (1) of the MoU, which determines that the agency that should follow up on investigations is the agency that previously issued the Investigation Order, namely the Attorney General's Office of the Republic of Indonesia.

This article assumes that there was an error in the judge's decision above. That is because the MoU is not in the hierarchy of statutory regulations. Moreover, Article 8 paragraph (1) of the MoU contradicts the KPK. Law articles, so that article does not apply. Besides, there is a provision in the MoU that is prohibited by statutory provisions. Therefore, an agreement that is contrary to the requirements of the statutory regulations must be declared invalid. Moreover, the Respondent had fulfilled the conditions for determining a suspect as stipulated in the Constitutional Court Decision—namely, the fulfillment of two valid tools of evidence.

Then, the Petitioner's argument regarding the Investigation Warrant makes the Petitioner a suspect who does not meet the elements of at least two tools of evidence listed in Article 44 of the KPK. Law. In that article, the acquisition of evidence is carried out at the investigation stage, not at the investigation stage. Where should be distinguished regarding "preliminary evidence" and "evidence." If the investigator has obtained preliminary evidence and then upgraded to the investigation stage, the KPK. investigator can immediately determine the suspect. That is because previously, the investigator has obtained insufficient evidence at the investigation stage.

That means that a suspect's determination depends not on the stage but the fulfillment of preliminary evidence. That is, the completion of at least two tools of evidence must be interpreted. In addition to the Constitutional Court Decision, this decision has also been reaffirmed by Article 2 paragraph (2) PERMA Number 4 of 2016. Therefore, in this regulation, the suspect's determination only assesses the formal aspects - whether there are at least two valid tools of evidence and do not touch the material case.

IV. SPDP NOT DELIVERED TO THE REPORTED PARTY AND VICTIMS/ WHISTLE-BLOWERS: DETERMINATION OF AN ILLEGAL SUSPECT?

The Notification Letter for the Commencement of Investigation (SPDP) is regulated in Article 109 paragraph (1) of the Law of Criminal Procedure.[37] In this provision, functional coordination between investigators and public prosecutors begins when the SPDP is issued.[38] The Constitutional Court issued Decision Number 130/PUU-XIII/2015 concerning the Notification Letter for the Commencement of Investigation (SPDP). The decision stated that Article 109 paragraph (1) of the Law of Criminal Procedure was conditionally contradicting the 1945 Constitution of the Republic of Indonesia. The Constitutional Court also considers that this provision

[37] Which reads: "*If an investigator has started investigating an event which is a criminal act, the investigator will notify the public prosecutor.*"

[38] Christy Paskahlis Sumelang, "Kedudukan SPDP dalam Prapenuntutan Berdasarkan KUHAP (Kajian Putusan MK Nomor 130/PUU-XIII/2015 Tentang Surat Pemberitahuan Dimulainya Penyidikan (SPDP)," *Lex Crimen 7,* No. 3 (2018): 176.

does not have binding legal force as long as the phrase "the investigator notifies the public prosecutor" does not mean "The investigator is obliged to notify and submit an order for the commencement of an investigation to the public prosecutor, reported party and victim/whistle-blower at the latest seven days after the issuance of the investigation warrant."

According to J.B.J.M. ten Berge, several aspects must be considered and considered in law enforcement.[39] First, a rule should leave as little room for differences in interpretation as possible. Second, the provisions governing exceptions must be minimally regulated. Third, the authorities must contain objective limits as much as possible. Fourth, regulations must be enforceable by those affected by these regulations and those who carry out law enforcement duties. The Constitutional Court has tried to make this happen through Decision Number 130/PUU-XIII/2015. It is hoped that the decision can accommodate parties interested in defending their human rights as citizens—especially the reported party and the victim/whistle-blower.

The SPDP is a form of orderly administration in the settlement of criminal cases as a form of supervision by the Public Prosecutor of Investigators. However, did the investigator not submit the SPDP to make the investigation null and void? Not offering the SPDP is a mistake in implementing the K.U.H.A.P. norms and is not a mistake in norming the K.U.H.A.P. Thus, it does not automatically invalidate the investigation because SPDP is a complement to the administrative order.[40] Besides, there are still other oversight mechanisms, namely pre-prosecution, the Public Prosecutor's authority.

In the Kalianda District Court Decision Number 04/Pid.Pra/2017/P.N.Kla. Elviana Binti Dja Alhak asked the pre-trial to cancel the suspect's determination. Previously, the Petitioner had been declared a suspect by the Respondent based on letter Number: Sp.Pgl/49/V/2017/Reskrim concerning the Crime of Defamation or Insult in Public, as referred to in article 310 paragraph (1) of the Criminal Code. The basis for pre-trial filing is that the applicant has never received an SPDP The Petitioner as suspect/reported party felt that the determination of his status as a suspect was illegal.

The judge rejected the Petitioners' petition entirely. The judge believed that not submitting the SPDP to the Petitioner could not cancel the suspect's status. That is because the purpose of submitting SPDP to the Public Prosecutor can be interpreted as an effort of coordination and supervision. On the other hand, the submission of the SPDP to the Suspect/Reported Party according to the Constitutional Court Decision Number 130/PUU-XIII/2015 is a momentum to prepare information or evidence in the development of investigations. In this case, the determination of the suspect has also fulfilled the provisions of Article 1 point 14 of the Law of Criminal Procedure, namely the existence of preliminary evidence—namely two valid tools of evidence as contained in the Constitutional Court Decision Number 21/PUU-XII/2014.

A similar case is also seen in the Gorontalo District Court Decision Number 4 / Pid. Prap / 2017 / PN.Gto. After Aprianto was named a suspect by the Respondent based on Police Report Number L.P./153/IV/2016/SIAGA-SPKT, he then asked the pre-trial to cancel the status of the suspect's determination. Previously, the applicant was suspected of committing the criminal act of fraud as referred to in Article 378 of the

[39] Marius Andreescu and Claudia Andreescu, "The Rule Of Law And Principle Of The Supremacy of Law," *Fiat Iustitia* 1, No. 1 (2019): 19.

[40] Kezia ZE Sanger, "Asas Hukum Penerbitan Surat Pemberitahuan Dimulainya Penyidikan (SPDP) dalam Proses Penyidikan," *Lex Crimen 8,* No. 11 (2020): 179.

Criminal Code Jo. Article 55 Paragraph (1) number 1 of the Criminal Code. The basis for filing the Petitioner petitioned that the SPDP was not submitted to the Respondent and the Public Prosecutor. The Respondent considered that his determination as a suspect had violated the provisions of the Constitutional Court Decision M.K. Decision Number 130/PUU-XIII/2015 so that the Petitioner felt that his determination as a suspect was invalid.

The judge rejected the Petitioners' petition entirely. The judge believed the issuance of the SPDP did not necessarily include the determination of a suspect against a person. That is because the essence of an investigation is the assignment of an appointed investigator to collect several shreds of evidence on the alleged occurrence of a criminal act. In other words, investigators attempt to gather evidence to find the suspect. Meanwhile, the suspect's determination is usually stipulated in another legal product, namely through a letter of decision as a suspect. Then the judge believed that the suspect's judgment was based on the fulfillment of preliminary evidence, namely two tools of evidence. The judge also believed that the Respondent had sufficient evidence to determine the Petitioner as a suspect.

From some of the decisions above, this research finds that not submitting SPDP to the suspect does not automatically cancel the determination of the suspect's status. There is no single imperative provision stating that if the SPDP is not submitted to the suspect, the suspect's determination would be invalid or canceled. That is because the submission to the suspect is an obligation of notification. Meanwhile, the recommendation to the public prosecutor is for filing and examining case files.

Not submitting the SPDP to the public prosecutor does not automatically cancel the suspect's determination. According to M. Yahya Harahap, if facts and circumstances based on reliable information explain a person as a perpetrator of a criminal act based on valid evidence, this indicates that the evidence that the investigator has found is under the circumstances to decide that person as a suspect.[41] The determination of a suspect is invalid if such determination is not based on the fulfillment of at least two valid tools of evidence as confirmed in the Constitutional Court Decision Number 21/PUU-XII/2014 and PERMA Number 4 of 2016 concerning Prohibition of Reviewing Pre-Trial Decisions.

V. CONCLUSION

This article finds several legal issues related to problems regarding the expansion of pre-trial in determining suspects. These legal issues need to be examined concretely as a first step towards realizing certainty, benefit, and justice in the criminal justice system in Indonesia.

First, the primary consideration of whether the determination of a suspect is legal or not depends on the fulfillment of preliminary evidence — namely, two tools of evidence as stated in Article 184 paragraph (1) of the Law of Criminal Procedure in line with the Constitutional Court Decision No. 21/PUU-XII/2014. Besides, this has been confirmed by PERMA No. 4 of 2016 concerning the Prohibition of Reviewing Pre-trial Decisions. This regulation states that the validity or invalidity of the determination of a suspect only assesses the formal aspects, namely whether there are at least two valid tools of evidence. Therefore, the fulfillment of at least two tools of evidence is an

[41] M. Yahya Harahap, *Pembahasan Permasalahan Dan Penerapan KUHAP: Penyidikan Dan Penuntutan* (Jakarta: Sinar Grafika, 2003), 131.

absolute standard in determining a suspect.

Second, the reason "not based on the provisions and legal procedures in force" as the basis for the request to cancel the status of a suspect in pre-trial cannot be used as a basis for granting pre-trial applications. These reasons are still abstract and too broad, causing possible uncertainty and injustice in its implementation. If the meaning of "not based on applicable legal provisions and procedures" is that there are no at least two tools of evidence used as a basis by an investigator, then that is what should immediately be used as a reason for a pre-trial petition.

Third, in a case that the SPDP is not submitted to the suspect, the victim, or whistle-blower, the status of the suspect cannot be canceled as long as the requirement for sufficient preliminary evidence is still fulfilled, namely two valid tools of evidence as provided in Article 184, paragraph (1) of the Law of Criminal Procedure. Because so far, there has been no imperative provision that if SPDP is not handed over to the suspect, the victim/whistle-blower can cancel the suspect's status. Apart from that, submission to the suspect, victim/whistle-blower is a notification, while submission to the public prosecutor is to examine case files and coordinate the police and public prosecutors.

Therefore, to ensure legal certainty and fulfillment of the suspect's human rights as well as to realize the ideal pre-trial goal, it is necessary to confirm the determination of the suspect through the revision of the Draft of the Law of Criminal Procedure, precisely in Article 1 point 11 of the Draft of the Law of Criminal Procedure which originally stated that "a suspect is someone who because of preliminary evidence that sufficiently strongly suspected of committing a crime" is changed to "a suspect is a person who because of his actions or circumstances, based on at least two tools of evidence contained in Article 175 paragraph (1) of the Law of Criminal Procedure, should be suspected of being the perpetrator of a crime".

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SIMPLE, SPEEDY, AND LOW-COST TRIAL: A PANACEA FOR CORRUPTION IN INDONESIA?

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Abstract

This article discusses whether simple, speedy and low-cost principles have been implemented in the criminal justice in Indonesia and the obstacles faced by the Indonesian criminal justice system, especially in terms of returning state losses due to corruption cases. The findings indicate that such principles are yet to be effectively implemented in the criminal justice system in Indonesia. Some obvious issues have emerged as an area for attention; first, that law enforcement in corruption cases takes a long time, remains complicated, and is also high-priced. Second, there are a number of obstacles confronted by the Indonesian criminal justice system, especially in terms of returning state losses due to corruption that should be able to follow the concept of justice in a simple, speedy manner and at low cost.

***Keywords**: speedy trial, law on criminal procedure, indonesia*

Abstrak

Artikel ini membahas apakah prinsip-prinsip sederhana, cepat dan biaya ringan telah diterapkan dalam peradilan pidana di Indonesia dan hambatan yang dihadapi oleh sistem peradilan pidana Indonesia, terutama dalam hal mengembalikan kerugian negara akibat kasus korupsi. Temuan menunjukkan bahwa prinsip-prinsip tersebut belum diterapkan secara efektif dalam sistem peradilan pidana di Indonesia. Beberapa masalah yang jelas telah muncul sebagai bidang perhatian; pertama, bahwa penegakan hukum dalam kasus korupsi membutuhkan waktu lama, tetap rumit, dan juga mahal. Kedua, ada sejumlah kendala yang dihadapi oleh sistem peradilan pidana Indonesia, terutama dalam hal mengembalikan kerugian negara akibat korupsi yang harus dapat mengikuti konsep peradilan sederhana, cepat, dan biaya ringan.

***Kata kunci**: persidangan cepat, hukum acara pidana, indonesia*

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I. INTRODUCTION

The concept of simple, speedy and low cost trial could be linked to what is commonly known as the economic requirements of the process. The term 'economic process' is used in a broad sense. The point is that the administrative process of the law should be speedy, simple and inexpensive. These requirements have received considerable attention for the benefit of the government and citizens. In the history of procedural law, the emphasis has been on the speed and effectiveness of procedures; however, in the past it was notably important that it involved simple procedures where citizens were able to go through the process without a lawyer and the active role of judges. Yet in the subsequent years, it became evident that legal processes developed into broader and more complicated ones. It has drawn broad attention and has raised the question whether it is still acceptable to carry out justice without seeking the help of professionals. Mandatory legal assistance, court fees, investigation, the presence of experts eventually results in more expensive litigation for any type of cases. From the government's viewpoint, everything is conducted to speed up the procedures and the speedy resolution of legal disputes intended for the benefit of the government and citizens.[1]

Speedy trial and due process are principles that apply universally in the world, whereas the term simple principle and low cost are both could be called as Indonesian style of justice. Various state parties in the world from numerous legal traditions have formulated speedy trial in different terms; however, they have a rather similar purpose, namely serving justice in a simple way and on a low cost basis. According to International Speedy Justice Standard (constant justice, speedy justice), since the accused person is arrested and detained in the trial stage until the court ruling is pronounced or until the judgment is final. The concept of speedy trial is also provided for in article 9 paragraph (2) of the ICCPR.

The problem of speedy trial has been reviewed in various writings, however, with an emphasis on the speedy aspect. At the same time, in Indonesia it is recognized as the concept of simple, speedy and low cost trial, rather than just speedy. Emily Rose, discusses the difficulty of implementing a speedy trial on an indigent-defence system. In her writings, Rose found that: Across the country (the US), under resourced indigent-defence systems create delays in taking cases to trial at both the state and federal levels. Attempts to increase funding for indigent defence by bringing ineffective assistance of counsel claims have been thwarted by high procedural and substantive hurdles, and consequently these attempts have failed to bring significant change.[2]

The right to a speedy trial has always been important in the American justice system. This effort results in adequate and uniform protection of prompt trial rights. As one of the most basic rights, a quick trial guarantee deserves this strict and consistent treatment.[3]

In Chadambuka's opinion, more serious violations require faster justice if the principles behind the right to be tried in a reasonable time must be protected. If someone is charged with a serious offense, dictation rights are to be tried within a

[1] K.A.W.M. de Jong, "Snel, eenvoudig en onkostbaar: Over continuïteit en verandering in de aard en de inrichting van het bestuursprocesrecht in de periode 1815 tot 2015", (Ph.D. Dissertation, University of Amsterdam, 2015), p. 10.

[2] Emily Rose, "Speedy Trial as a Viable Challenge to Cronic Underfunding in Indigent-Defense Systems", *Michigan Law Review* 113, No. 2 (November 2014) 279-314.

[3] Kristin Saetveit, "Beyond *Pollard*: Applying the Sixth Amendment's Speedy Trial Right to Sentencing", *Stanford Law Review* 68 (February 2016) 509.

reasonable time, and the right to a fair trial need to be protedted. This requires that an extraordinary obligation of perseverance be placed in the criminal justice system. This is a logical result from the fact that forms the nature and scope of the right to be tried in a reasonable time.[4]

The other writings about speedy trial could be found in Victoria Lynn Swigert and Ronald A.Farrell, [5] A.A. Anderson, [6] F.Chepiga,[7] S.R. Lohman. [8] The similar problems discussed in other countries such as India. For example the study of Abir Chattaraj[9] and S.N. Sharma.[10] Also, from Nigeria we can see the work of Samson Erhaze and Daud Momodu.[11] Other article was wrote by Derek Obadina rekated to speedy trial in Nabibia and South Africa.[12] In Australia, the discussion concerning speedy trial could be found on the study of Jason Payne.[13]

The current article has the objective of focusing comprehensive attention on the concept of simple, speedy and low cost trial in Indonesia's criminal justice system to examine at a glance whether it would be just a catchphrase or a fact. The present study discusses formulated questions concerning: (1) whether the simple, speedy and low cost principles have been implemented in the criminal justice in Indonesia; (2) the obstacles faced by the Indonesian criminal justice system, especially in terms of recovering state losses due to corruption cases which should be capable of following the concept of justice in a simple, speedy manner and at a low cost. We argue that the simple, speedy and low cost principle popularly known for a long time and regulated in the Law on Judicial Power has only been implemented in a few instances in the Indonesian criminal justice system, even though in the context of resolving the criminal acts of corruption aimed at recovering state losses, this principle is in fact particularly important.

II. SPEEDY TRIAL AND CONSTITUTION

As described above, the problem of great volume of criminal cases requires quick resolution. In the United States for example, every year the federal district courts of the United States must cope with tens of thousands of criminal cases which have become increasingly complex and time-consuming. The courts are procedurally constrained in terms of the amount of time they are permitted to devote to each new

[4] Z. Chadambuka, "Serious Offences and The Right to Trial within a Reasonable Time", *Essex Human Rights Review* 9, 2012 (1) 10.

[5] Victoria Lynn Swigert and Ronald A. Farrell, "Speedy Trial and the Legal Process", *Law and Human Behavior* 4, 1980 (3), 135- 145.

[6] A.A. Anderson, "Justice Delayed-Justice Denied? The Right to a Speedy Trial in Iowa", *Drake Law Review* 26, 1976, 159-69.

[7] Stephen F. Chepiga, "Speedy Trial: Recent Developments Concerning a Vital Right", *Fordham Urban Law Journal* 4, 1976, 351- 67.

[8] S.R Lohman, "The Speedy Trial Act of 1974. Defining the Sixt Amandement Right" *Catholic University Law Review* 25, 1975, 130- 147.

[9] Abir Chattaraj, "Justice Delayed-Justice Denied - The Right to Speedy Trial in India", *SSRN Electronic Journal*, 2011, September, 10.2139/ssrn.1919493, retrieved on 20 October 2019.

[10] S.N. Sharma, "Fundamental Right to Speedy Trial: Judicial Experimentation", *Journal of the Indian Law Institute* 38 (2), 1996, 236-242.

[11] Samson Erhaze and Daud Momodu, "Constrains in Efficient and Speedy Trial Process in Nigeria: The Case of Criminal Justice Administration", *International Journal Corner* 3. 2015 (9).

[12] Derek Obadina, "The Right to Speedy Trial in Namibia and South Africa", *Journal of African Law* 41, 2 (Autumn), 1997, 229-238.

[13] Jason Payne, "Criminal Trial Delays in Australia: Trial Listing Outcomes", *Australian Institute of Criminology, 2007.*

case. It subsequently resulted in the adoption of The Speedy Trial Act ('STA') which mandates dismissal of any federal criminal case in which an indictment is not issued within thirty days of indictment or arraignment.[14]

In fact, in the United States, speedy trial is guaranteed under the constitution.[15] The Sixth Amendment right to a speedy trial represents one of the most fundamental safeguards for criminal defendants secured by U.S. constitution, meaning that the right to speedy trial is a matter of significance. Although in practice it remains uncertain, as lower courts have split on whether the right applies to sentencing proceedings. According to Kristin Saetveit, almost no scholarship has touched on the application of the Sixth Amendment's speedy trial right to sentencing.[16] Another interesting discussion concerning the speedy trial could be found on writing of Anthony O'Rourke[17] which discusses the relation between the speedy trial right and national security detentions, Steven M.Wernikoff,[18] and Sanjay Chhablani.[19]

In contrast to the above articles, Auke Willems discusses the problem of a justice seeker society that is poor and requires access to justice but has difficulty due to expensive judicial costs. The U.N. General Assembly in December 2012 issued the Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. These Principles and Guidelines are indeed not legally binding because they are still required further legislative action to be implemented. According to Willems, there is a need for legal aid reform and raises realistic expectations about what the international instrument can achieve in this regard.[20]

The problem of limited acces to legal services is not only a problem of under developed and developing countries, even in the United States this kind of problem still existed. According to the World Justice Project, the United States ranks 94th of 113 countries in the accessibility and affordability of civil justice.[21]

The various writings above discuss speedy trials in the context of society in the United States and other countries. At the same time, While Willems' writing focuses on the principle of low cost and access to legal aid and in the context of society in Europe, especially in Belgium. In the United States the right to speedy trial is guaranteed under the constitution through the Sixth Amendment to the Constitution and there is also The Speedy Trial Act of 1974.[22]

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[14] Greg Ostfeld, "Speedy Justice and Timeless Delays: The Validity of Open-Ended 'Ends-of-Justice' Continuances under the Speedy Trial Act", *The University of Chicago Law Review* 64, 3 (Summer), 1997, 1037- 1066.

[15] The Speedy Trial Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy... trial."

[16] Kristin Satveit, "Beyond Pollard: Applying the Sixth Amendment's Speedy Trial Right to Sentencing", *Stanford Law Review* 68 (February), 2016, 481-509.

[17] Anthony O'Rourke, "The Speedy Trial Right and National Security Detention: Critical Comments on United States v. Ghailani", *Journal of International Criminal Justice*, 12 (4) 2014, 871- 885.

[18] Steven M. Wernikoff, "Sixth Amendment-Extending Sixth Amendment Speedy Trial Protection to Defendants Unaware of Their Indictments", *Journal of Criminall Law and Criminology*, 83, 4 (Winter), 1993, 804- 835.

[19] Sanjay Chhablani, "Disentangling The Sixth Amendment", *Journal of Constitutional Law*, 11 (3) 2008, 487-550.

[20] Auke Willem, "The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: A Step Toward Global Assurance of Legal Aid?", *New Criminal Law Review: An International and Interdisciplinary Journal* 17, 2 (Spring) 2014, 184-219.

[21] Deborah Rhode, Kevin Eaton and Anna Porto, "Access to Justice Through Limited Legal assistance", *Northwestern Journal of Human Rights* 16 (1) 2018, 1-21.

[22] The Speedy Trial Act of 1974, 88 Stat. 2080, as amended August 2, 1979, 93 Stat. 328, is set forth

How about Indonesia? In Indonesia, there is no written guarantee for speedy trial under the 1945 Constitution. Chapter IX on Judicial Power only regulates the position of the Supreme Court, the Judicial Commission and the Constitutional Court. Chapter XA on Human Rights, specifically Article 28D paragraph (1) provides for the right of everyone to the recognition, guarantee, protection, and certainty of law, just and equal treatment before the law. Article 28 I paragraph (1), among others, regulates the right not to be prosecuted on the basis of retroactive laws. There are no provisions regarding speedy trial, and neither are there particular provisions concerning simple and low cost trials. The right to speedy trial is set forth in article 2 of the Law on Judicial Power.[23] However, it is not only about speedy trial, it is also about a simple and low cost trial. It is therefore rather comprehensive: simple, speedy and low cost trial.

With regard to this issue, Andi Hamzah and HM Suratman try to examine whether in criminal justice carried out in a simple manner the trial can lead to wrong conviction, thus resulting in an innocent person being punished. Whereas if the criminal procedure is carried out at low cost, it is likely that a person will not receive ultimate justice. Seeking justice involves a high price which has to be paid. If the low cost principle is only related to the official cost of cases regulated by the Supreme Court Circular, it cannot be declared to be low cost for justice seekers.[24] Andi Hamzah argues that Indonesia should abide by international standards by adhering to the speedy judicial principle. Without the addition of 'simple and low cost', regardless of any other additions, it is more appropriate to have a speedy and due process of law.[25]

III. SIMPLE, SPEEDY, AND LOW COST PRINCIPLES IN INDONESIAN JUSTICE SYSTEM

Efforts to deal with criminal offenses cannot be handled by only one institution, such as the police, prosecutors or the court, but by several institutions that work together. Each institution has different roles in handling a criminal case. They all work in a system that aims to tackle crime to the extent that society can tolerate. "There has never been a civilized society that did not find itself continually coping with crime," said a statement from Alan Covey, Edward Eldefonso and Walter Hartinger.[26] The problem of tackling crime is indeed a universal interest and goes on continuously.

The system typically has three components: law enforcement (police, sheriffs, marshals), the judicial process (judges, prosecutors, defense lawyers), and corrections (prison officials, probation officers, and parole officers)."[27] In the Indonesian context, others institutions can be included in terms of law enforcement and thus become part of the criminal justice system, for example the Corruption Eradication Commission ("KPK") which has the authority to investigate and prosecute corruption in special corruption courts.

in 18 U.S.C. §§ 3161-3174. The Act establishes time limits for completing the various stages of a federal criminal prosecution.

[23] The Law Number 48 of 2009 on Judicial Power.

[24] Andi Hamzah, *Pre-Trial Justice Discretionary Justice Dalam KUHAP Berbagai Negara [Pre-Trial Justice Discretionary Justice in Code of Criminal Procedure from Various Countries]* (Jakarta: Sinar Grafika, 2015), pp. 56- 57.

[25] Ibid, p.58

[26] Alan Covey, Eldefonso and Hartinger, *An Introduction to The Criminal Justice System and Process* (New Jersey: Prentice-Hall, 1982), p. 81.

[27] Michael Cavadino and James Dignan, *The Penal Sistem an Introduction* (Thousand Oaks: SAGE Publication Ltd, 1997), p. 170.

As has been mentioned above, this system is known as the Criminal Justice System, that is "*The collective institutions through which an accused offender passes until the accusations have been disposed of or the assessed punishment concluded.*"[28] In other words: "*...The methods by which a society deals with those who are accused of having committed crimes.*"[29] Therefore, every country in the world has a criminal justice system which has its own character that is adapted to the social, cultural and political conditions.[30]

The principle of simple, speedy and low cost trial is particularly important in the context of the judicial process in Indonesia. This principle has been regulated in the Law on Judicial Power, starting with Law Number 19 of Year 1964 up to Law Number 48 of 2009.[31] The said principle has remained incorporated despite several amendments to the Law on Judicial Power. It is a principle considered to be notable and universal, which is why it has been maintained in the Law on Judicial Power. Up to the present time, the term used in Law No. 48 of 2009 is simple, speedy and low cost principle.

A simple, speedy and low cost trial principle is a principle regulated also in the United Nations Declaration on Civil and Political Rights, also known as the International Covenant On Civil and Political Rights. At this point, article 14 paragraph (2) subparagraphs c and d of the Convention set out the universal principle of speedy and low cost in the criminal justice system.

The Convention was ratified by the Indonesian government by Law No. 12 of 2006 concerning Ratification of the International Covenant on Civil and Political Rights.[32] Consequently, Indonesia is bound to implement the ratified articles.

We shall look at the principle of simple, speedy and low cost justice as set out in the Basic Law on Judicial Power and in various articles cited in the Criminal Procedural Code. Such drafted principle has been set out in Law Number 19 of 1964 concerning the Basic Provisions on Judicial Power, Article 2 paragraph (2) of the Law states as follows: 'Adjudication must be carried out in a speedy, simple manner and at a low cost.' The elucidation on Article 2 paragraph (2) of Law Number 19 of 1964 says that the court shall be uncomplicated.[33] There is no need for a complicated procedure, which does not satisfy justice seekers. The law is for them, that is why they should be able to understand it. Justice must be prompt, only with speed the sense of justice can be fulfilled. Law No. 19 of 1964[34] was first amended in 1970 with the issuance of Law No. 14 of 1970 concerning the Basic Provisions on Judicial Power[35] which in Article 4 paragraph (2) states that adjudication must be carried out in a speedy, simple manner and at a low cost.

Law No. 14 of 1970 was amended by Law Number 4 of 2004.[36] Although Article 4

[28] Bryan A. Garner (ed), *A handbook of Criminal Law Terms* (Minnesota: West Group, 2000), pp.169-170.

[29] Ibid., p. 169.

[30] Eddy O.S, Hiariej, "Criminal Justice System In Indonesia, Between Theory And Reality*", Asia Law Review*, 2, 2 (December 2005) 24.

[31] Law Number 19 of 1964, Law Number 4 of 2004, and Law Number 48 of 2009 on Judicial Power.

[32] Law Number 12 of 2006 concerning Ratification of the International Covenant on Civil and Political Rights.

[33] Law Number 19 of 1964 concerning the Basic Provisions on Judicial Power.

[34] Law No. 19 of 1964 concerning the Basic Provisions on Judicial Power.

[35] Law No. 14 of 1970 concerning the Basic Provisions on Judicial Power.

[36] Law Number 4 of 2004 concerning Judicial Power.

paragraph (2) in both laws are identical, the elucidation on Article 4 paragraph (2) of the Law No. 14 Year 1970 differs from Article 4 paragraph (2) of Law No. 4 Year 2004. In Article 4 paragraph (2) of Law No. 4 of 2004, the meaning of 'simple and low cost' is described, while the meaning of 'speedy' is not described in the elucidation on the same law.[37]

However, simple, speedy, and low cost principles in the examination and ajudication of cases in court do not exclude accuracy and precision in seeking truth and justice. Such principles could also be found in a scattered and explicit manner in the Criminal Procedure Code (*KUHAP*).[38] The following are articles in the *KUHAP* related to the speedy principle:[39] Article 24 paragraph (4), Article 25 paragraph (4), Article 26 paragraph (4), Article 28 paragraph (4). The provisions of the above quoted articles set forth that once the time of detention has passed as stated in the preceding paragraph, the investigator, public prosecutor, and judge must release an accused person or defendant from prison for the sake of law. Such provision prompts make law enforcers to speed up the judicial process in settling cases they handle.

IV. IMPLEMENTATION OF SIMPLE, SPEEDY AND LOW COST TRIAL

There are various regulations governing simple, speedy and low-cost principles. However, if we take a look at their implementation in law enforcement in Indonesia, it appears that they are yet to be implemented properly. The backlog of cases, inefficient and ineffective trial process that must be carried out by justice seekers and the considerable costs of trials for seeking justice raise some interesting issues for further investigation.[40]

Before discussing further problems and obstacles in implementing the principle of simple, speedy and low cost trial, the author will first discuss the importance of a principle for statutory regulation. Paton states that the law should be, as far as possible, reduced to a systematic order-hence the search for principle which can afford the ratio legis lying behind a particular rule can be explained, then it is remembered more easily and the teacher tries to discover broad principles that are only implicit in the law.[41]

Paton also argues that the legal principle is a way to make the law exist, grow and develop following the development of its community. A law principle will not disappear just as its existence from a legal rule, but a principle will give birth to further legal regulations.[42]

From the description of the meaning of the principle above, it is understandable why simple, speedy, and low cost principles are maintained in changes to the rules

[37] The elucidation on Article 4 paragraph (2) of Law No. 4 of 2004 states that the provisions are intended to meet the expectations of justice seekers. Referred to as 'simple' is examination and settlement of cases carried out in an efficient and effective manner. Referred to as low cost is the cost of cases borne by the people. However, examining and settling cases should not prejudice accuracy in seeking truth and justice.

[38] Law Number 8 of 1981 on the Criminal Procedure Code.

[39] Hamzah, *Pre-Trial Justice Discretionary Justice*, p. 13.

[40] Regarding the problem of backlog and judicial inefficiency in Indonesian court see Choky R.Ramadhan, "Justice Efficiency Improvement Through Special Line Mechanism in the Draft of Indonesian Criminal Procedure Law (RUU KUHAP)" (2014) *Teropong, Indonesian Journal of Judiciary*, 2, July-December, 87-104.

[41] G.W. Paton, *A Text-Book of Jurisprudence* (Oxford: The Claredon Press, 2nd ed 1955*),* p.204.

[42] Ibid.

of judicial power. However, if we try to address the implementation of this principle in criminal justice in Indonesia today, it seems that it has not yet been carried out properly, many cases have been terminated for quite a long time and some have been delayed for years, case management is complicated, and cost incurred by justice seekers cannot be considered as relatively inexpensive, all which contributes to creating case logs in each stage of criminal justice examination.[43]

M. Hatta Ali, former Indonesian Supreme Court Chief Justice, has declared that the current criminal justice system in Indonesia is a Dutch Colonial legacy. For instance, Article 50 of *KUHAP* states that the principle of simple, speedy, low cost, honest and impartial trial in the criminal justice process is applied (from investigations to judgment), while in fact it is still only based on determining the schedule of each stage and the efficiency of the investigation, prosecution and examination process.[44]

Hatta Ali reveals some issues in the implementation of simple, speedy and low cost principles. If we analyse those principles in the context of the current criminal justice process, linked to the determination of the schedule of each stage at the first and appeal levels, it becomes apparent that it has not yet been implemented properly. Judicial management related to the determination of the trial schedule is not yet well-organized, the number of judges handling cases at the first level is still rather lacking and inadequate courtrooms are among the crucial matters which prevent a trial from proceeding speedily.[45]

Many cases can be used as an example of the process of resolving cases in a court that is not speedy and not simple, which also results in the high cost case handling. One example of a related case is the dispute of two mango trees in Jayapura. It began with a lawsuit filed by Thalib versus Purba Tondang (two neighbours) because two mango trees owned by Purba were feared of collapsing under strong winds and knocking down Thalib's house because the branches, twigs and leaves had reached the roof of the house, apart from the root of the tree having entered the yard of Thalib's house. The lawsuit filed by Thalib against Purba did not end up in the District Court. The judgment of the Jayapura District Court granted Thalib's claim, yet the judgment of the Jayapura High Court granted the request for Purba's appeal. It led the case all the way to the Supreme Court, which affirmed the judgment of the Jayapura District Court.[46] Resolving the case took a long time and it became very expensive. It only received a permanent legal judgment after undergoing examination for approximately 6 years (from 2001 up to 2006).

Various efforts have been made by the Supreme Court to implement the principle of simple, speedy and low cost justice. To speed up the process of examining cases at the First Instance and Appellate Courts, the Supreme Court issued SEMA Number 2 of 2014 concerning Ajudication of Cases at the First Level Courts and at the level of Appeal Courts. The said SEMA provides a time limit for judges to examine cases at the court and appeal with a maximum of 5 (five) months and 3 (three) months respectively.[47] Furthermore the Supreme Court also issued a regulation that applies

[43] See Choky R. Ramadhan, "Justice Efficiency Improvement Through Special Line Mechanism in the Draft of Indonesian Criminal Procedure Law (RUU KUHAP)". *Teropong, Indonesian Journal of Judiciary*, 2, July-December, (2014), p.34.

[44] M.Hatta Ali, *Peradilan Sederhana, Cepat dan Biaya Ringan Menuju Keadilan Restoratif [Simple, Speedy and Low Cost Trial Toward Restorative Justice]* (Bandung: Alumni, 2012) p.60.

[45] *Ibid.*

[46] Supreme Court Decision No. 1022K/PDT/2006.

[47] Director General of General Court/ Badilum Circular Letter No. 3/DJU/HM.02.3/6/2014.

to all courts in Indonesia, to form a Case Search Information System (SIPP)[48] and E-Court.[49]

The Case Search Information System (SIPP) is a case application used by First Level Courts and Appeal Courts in case registration, which aims at ensuring an orderly, modern and accountable administration.[50] It is expected that with this orderly, modern and accountable administration, justice seekers will easily access information related to the cases they are currently undergoing in court. SIPP is a data source for data exchange in IT SPPT.

Coming back briefly to the main issue, the problems hindering the implementation of simple, speedy and low cost justice are not merely systemic problems related to information technology as discussed above, but also due to problems in the legal structure and culture of law enforcement in Indonesia. Such obvious issue occurs, for example, in the relationship between the police and prosecutors, which has been a classic problem in the criminal justice system in Indonesia.[51]

One of the fundamental factors that hampers its effectiveness is the disorder in the criminal justice system. The elements of the criminal justice system: the police, prosecutors, courts and correctional institutions, are seen working in their own boxes (since there is no conflict among them). Studies of the functioning of this system in various countries including developed countries reveal the weakness of efforts to solve crime problems if the administration of the criminal justice system is filled with inefficiency, delays due to time-consuming procedures, mostly burdened courts, and so forth.[52]

As already explained, the issue of legal structure is clearly related to the lack of the implementation of simple, speedy and low cost justice which are the ideals in our judiciary system, to the extent that they are formulated in the Law on Judicial Power. In this regard, we would simply like to draw the attention once again to the fact that the slow and protracted process of ajudication of cases is related to the design in KUHAP (Criminal Procedural Code),[53] namely the provisions on pre-prosecution. In view of the pre-prosecution mechanism, research has demonstrated that in a large number of cases the investigation of which is not notified to the public prosecutor, case files that go back and forth from the police to the public prosecutor, and from the public prosecutor to the police, and so on and so forth, and the number of files returned by the public prosecutor to the police to be completed are never returned. Such condition is definitely detrimental to the people, because many criminal offense cases remain un resolved, even though one of the objectives of the criminal justice system is to resolve criminal offenses.[54]

The foregoing confirms that there are still many problems in the criminal justice

[48] Every district court and high court in Indonesia jas operated the system, for example we can see at https://sipp.pn-jakartabarat.go.id. accesed on 13 January 2020. This system is operated by West Jakarta District Court.

[49] https://ecourt.mahkamahagung.go.id accesed on 14 January 2020. E-court is services for Registered Users to Register for Cases Online, Get Estimated Payment of Court Fee online, Pay online, Call conducted by electronic channel, and Trial conducted electronically.. It comprises e-filing, e-payment, e-summons, and e-litigation.

[50] Director General of General Court/ Badilum Circular Letter No. 3/DJU/HM.02.3/6/2014.

[51] Topo Santoso, *Polisi dan Jaksa: Keterpaduan atau Pergulatan?* [The Police and The Prosecutor: Integrity or Struggle?] (Depok: Pusat Studi Peradilan Pidana Indonesia, 2000),pp. 8-9.

[52] *Ibid.*

[53] Law Number 8 of 1981 on the Criminal Procedure Code.

[54] Article 11 in conjunction with 58 in conjunction with 60 *RUU KUHAP*.

system, such as the issue of the lack of implementation of a simple, speedy and low cost judicial basis, issues related to legal circumstances, such as provisions in criminal procedural law that regulates relationship among our law enforcement agencies (for example the conduct of investigation and prosecution, pre-prosecution, notification of commencement of investigation, pre-prosecution). This is also related to the legal culture of law enforcers, which still demonstrates sectoral egoism that can hamper the ajudication of criminal cases hence it can potentially harm justice seekers.

V. REVITALIZATION OF THE PRINCIPLE OF SIMPLE, SPEEDY AND LOW COST JUSTICE

In view of the various current developments, it is expected that the justice system in Indonesia will experience better development in the future. From the researchers' viewpoint, there are several important things that need to be accomplished for the criminal justice system related to changes in the criminal procedural law in Indonesia. One of them is amendment to the Criminal Procedural Code which seems unable to keep up with the current development and does not articulate human rights in its formulation, although several articles in the Criminal Procedural Code set out human rights as its underlying basis.

Our criminal justice system requires revitalization in view of the concepts of simple, speedy and low cost justice. Article 1 sub article 7 of the Draft Law on Criminal Procedural Code (*RUU KUHAP*) provides for Preliminary Examining Judge, whereby Preliminary Examining Judge is a substitute institution for the judicial process that has been regulated in the Criminal Procedural Code. The Preliminary Examining Judge is given the authority by *RUU KUHAP* to give permission for enforcement measures such as extension of detention, search, confiscation and also wiretapping.[55] Such transfer of authority can make the judicial process faster because it is likely to reduce the burden at the level of investigation and follow up on cases at the district court level faster.

In addition to the above, *RUU KUHAP* also provides for the length of detention period that can be carried out by both investigators and prosecutors. The duration of detention under *RUU KUHAP* tends to take into account human rights, as the period of detention given to investigators and prosecutors is rather short, namely a maximum of 5 (five) days.[56] Furthermore, the preliminary examining judge will determine whether the detention will be extended or if someone can continue their detention. Based on the provisions of this article, the process of examining criminal cases is accelerated.

In addition to the speedy judicial concept, we also recognize the simple concept of justice. It is stipulated in the Criminal Procedural Code prioritizing the ajudication of criminal cases, not in respect of defendants who are poor, uneducated, illiterate, lacking legal counsel, and so forth, but rather in the context that is not complicated, it is simple, there are not many impediments, and cases are capable of being easily resolved by law enforcement.

Similar is the case with handling cases of special crimes, such as the criminal act of corruption. Returning assets resulting from corruption should be facilitated, simplified, and expedited. The use of the mechanism should not be limited to conviction based asset forfeiture; it is also necessary to use a nonconviction based

[55] Article 11 in conjunction with 58 in conjunction with 60 *RUU KUHAP*.
[56] Article 60 RUU KUHAP.

asset forfeiture mechanism by applying the *in rem* conception.[57]

The Indonesian criminal justice system should also consider remedies beyond criminal justice, through a similar model as the Buiten process (Article 82 of the Criminal Code), diversion, suspended prosecution, out-of-court settlement as stipulated in the Customs Law[58] and Tax Law,[59] sentence relief according to the United Nations Convention against Corruption (UNCAC), or the like. There are several things in common in these various models, including defendants willing to cooperate with law enforcement officials, admit mistakes, and pay fines. As an illustration in the Netherlands, settlement through *transactie*. *Transactie* according to Peter J.P Tak could be described as follows:[60]

> *... a form of diversion in which the offender voluntarily pays a sum of money to the Treasury or fulfils one or more (financial) conditions laid down by the prosecution service in order to avoid further criminal prosecution and a public trial.*

According to J.P Tak, the *Transactie* mechanism is not something new in the Netherlands, it has been established since 1838 where it only applies to criminal acts threatened with fines as stipulated in Article 74a of the Dutch Criminal Code.[61] In 1921 there was a provision on Suspended Prosecution where criminal prosecution would be suspended with a number of conditions determined by the public prosecutor. Until 1983, this only applied to violations which were subject to criminal penalties. Since 1983 it has been extended thus it also applies to crimes of the type that are punishable by imprisonment of less than 6 (six) years.[62]

VI. RETURNING STATE LOSSES AND SIMPLE, SPEEDY AND LOW-COST JUSTICE

A. Handling Corruption in Indonesia

The crime of corruption has several characteristics. First, corruption is a form of white collar crime. Second, corruption is usually carried out in congregation, therefore it is a kind of organized crime.[63] Third, corruption is usually carried out with sophisticated modus operandi thus it is difficult to prove. In this regard it can be argued that the eradication of acute corruption seems to be insufficient just by the expansion of actions which are formulated as conventional corruption and methods. One way is to establish corruption as an extraordinary crime, thus the eradication can no longer be carried out as usual; rather than that, it requires extraordinary methods.

Investigations, prosecutions, and hearings in court proceedings against cases of corruption must take precedence over other cases for prompt resolution in accordance

[57] In rem is used in non conviction based asset forfeiture or confiscation without criminal conviction, or civil forfeiture. When no conviction is possible (perpetrator absconded, political opposition, weakened judicial system). Civil standard of proof is applied from the beginning. In this model, no need for dual criminality. The action is againts the property, not againts the person. https://www.unodc.org/documents/NGO/UNODC_UNCAC_Chapter_V_Asset_recovery.pdf accesed on 15 January 2020.

[58] Law No 10 of 1995 and Law No 17 of 2006.

[59] Law No 6 of 1983 and Law No 16 of 2009.

[60] J.P Tak, *The Dutch Criminal Justice* (Nijmegen: Wolf Legal Publishers, 2008), p. 87.

[61] Article 74a of the Dutch Criminal Code.

[62] Ellen S Podgor, *White Collar Crime* (Minnesota: West Publishing, 1993), p.1.

[63] *Ibid.*

with *KUHAP* unless otherwise stipulated in the law.[64] Investigation is carried out by the Corruption Eradication Commission (*KPK*) in accordance with the *KPK* Law;[65] it is also carried out by the police in accordance with the Police Law and by the prosecutor's office in accordance with the Prosecutor's Law respectively.[66]

Any physical evidence in corruption cases requires extraordinary methods. First, regarding *middelen bewijs* or evidence. Legitimate evidence in corruption cases is not only referred to in Article 184 of *KUHAP* but also evidence in the form of information that is uttered, sent, received or stored electronically with optical instruments or the like. In addition, other evidence includes documents in the form of data, records or information that can be seen, read and or heard, which can be issued with or without the help of a facility, whether written on paper, any physical object other than paper or electronically recorded but not limited in writing, sounds or images, maps, designs, photos or the like, letters, signs, symbol numbers or perforations that have meaning or can be understood by people who are able to read or understand it.[67]

B. Complicated, Slow, and Costly Trial of Corruption Cases

Handling corruption cases as well as other criminal cases takes a long time. The length of time for handling such case has been seen as a weakness in resolving criminal acts of corruption. As with other criminal acts in our country according to *KUHAP*, if prior to entering trial the suspect admits their guilt of committing corruption and returns state losses through repayment or returns the bribe received, the case will not be not be necessarily completed faster because it still has to go through the process of trial, proofing, and verdict. The length of time required is relatively the same as if the suspect did not admit his mistake and did not return the state's loss or the proceeds from the bribe he had received.

Ajudication of corruption cases takes a long time, ranging from investigations to judges' judgment at the courts of first instance, the process to the judgment at the appeals level, all the way through to the cassation and review judgment. The mechanism for checking corruption goes through many stages; it also requires a long time.[68]

In view of appeal examination, Article 30 of the Anti-Corruption Court Law states that corruption case appeals are to be examined and decided within 60 (sixty) working days as from the date on which the case file is received by the High Court. Meanwhile regarding cassation, the examination of the cassation cases involving the criminal act of corruption are examined and decided within 120 (one hundred and twenty) working days as from the date on which the case file is received by the Supreme Court.[69] If the case is submitted for review, the corruption case concerned is

[64] Article 26 Law No 31 of 1999 and Law No 20 of 2001

[65] Article 6 Law No 30 of 2002 and Law No 19 of 2019.

[66] Article No 13 and 14 Law No 2 of 2002 and Article 30 Law No 16 of 2004.

[67] Ramiyanto, "Bukti Elektronik sebagai Alat Bukti yang Sah dalam Hukum Acara Pidana [Electronic Evidence as an Admisible Evidence in Criminal Law", *Jurnal Hukum dan Peradilan*, Volume 3, November 2017, 463-486.

[68] Regarding the time limit for trial, the *KPK* (Anti-Corruption Court) Law provides for it in four articles, namely Article 29, Article 30, Article 31, and Article 32. The provisions of the said articles can be described briefly as follows. According to Article 29 of the *Corruption Court* Law, corruption cases are examined, tried and decided at the first instance of the Corruption Court for a maximum period of 120 (one hundred and twenty) working days as from the date on which the case is delegated to the Corruption Court.

[69] Article 31 Law No 31 of 1999 and Law No 20 of 2001.

examined and decided within 60 (sixty) working days as from the date on which the case file is received by the Supreme Court. [70]

It is evident that in terms of legal substance, the time frame for the court examination process has been arranged in clear and firm terms at each stage, namely 120 days at the first instance, 60 days for appeal, 120 days for cassation, and 60 days for a review, if any. Accordingly, if all stages up to review are completed in 360 days, the total time required is almost one year.

Based on the explanation above we can highlight that the ajudication of cases starting from the courts of first instance, appeal and cassation which takes about 11 months, can be more or less than that in practice. It does not include the investigation process by the investigator and the prosecutor's office. In brief, the process of handling criminal cases takes quite a long time.

The next weakness related to corruption law enforcement is the difficulty in executing criminal penalties and criminal return of state losses. The application of criminal substitute money and fines is one way of restoring state financial losses. If seen from the vantage of corruption law, all of it applies criminal substitute money.[71] The disadvantage is that the law does not explicitly determine when such replacement money must be paid, and what the sanctions are if payment is not made. Only the explanatory section of the law clarifies that if substitute money payments cannot be met, the provisions concerning payment of fines apply.

The weakness of Law No. 3 of 1971 was subsequently corrected in Law No. 31 of 1999. In both laws, provisions regarding substitute money have been more assertive, namely if not paid within 1 (one) month, the convicted person is immediately sentenced by putting them in prison. The prison sentence is determined based on the judge's judgment, with a duration which does not exceed the maximum threat of the principal punishment. Basically, 2 (two) models of imposition have been applied by judges have made judgments in corruption cases ordering to return corrupted state assets. The process of implementing the judgment on substitute money is implemented by the prosecutor through the court stage, the auction stage, the substitute payment stage and civil suit.[72]

Under the new law on eradicating corruption, in cases that have been decided, the limit set for payments has been one month; if not paying substitute money, property can be confiscated by prosecutors and confiscated property can be auctioned to cover replacement money in an amount in accordance with the court verdict which has obtained permanent legal force; if the convict does not have sufficient assets to pay substitute money, the sentence shall be in the form of imprisonment which is carried out for a duration which does not exceed the principal penalty.[73]

Subsidiary criminal punishment or substitute imprisonment to replace the criminal substitute money of the accused in a corruption case which has been proven and they have convincingly committed a criminal act of corruption is largely avoided,

[70] Article 32 Law No 31 of 1999 and Law No 20 of 2001.

[71] The provisions on criminal substitute money in Law No. 3 Year in 1971 set forth that the payment of substitute amount should be equivalent to the amount of corrupted money, to the greatest extent possible.

[72] Based on a court ruling that has obtained permanent legal force, criminal cases decided under Law No. 3 of 1971 with the criminal punishment of additional substitute money for the collection and payment stages is not limited by time.

[73] Article 18 paragraph (2) of Law No. 31 of 1999 stipulates a very brief period of time, namely 1 (one) month for convicts to pay off criminal substitute money. 'reserves' in the form of confiscation of assets of convicts which are subsequently auctioned to fulfil the substitute money.

because the defendant proven of committing corruption must return the money from corruption as a way to recover state losses. Subsidiary criminal penalties can close the opportunity for the State to recover losses caused by corruption. The Supreme Court of the Republic of Indonesia, for example, in many judgments only ruled out substitute money without subsidiary imprisonment as a way to force the defendant to return state money. Subsidiary criminal penalties can be imposed against corruption involving a small amount of state losses, or because due to certain circumstances the defendant is unlikely to pay. If the legal provisions provide for subsidiary imprisonment, the criminal imprisonment of the substitute must be increased.

One of the problems faced in resolving corruption is the length of time to settle corruption, starting from investigation, prosecution, court hearing and verdict; in addition to the length of time for the ajudication of cases at the first instance, appeal and cassation level. Accordingly, Therefore, one of the challenges is how to shorten the time required for handling criminal cases at each level without compromising the purpose of criminal procedural law in seeking material truth.

The *KUHAP* has regulated the manner in which investigations are carried out, as well as various conditions thereof. It extremely important to gather evidence in an in-depth and serious manner for success in the stages of prosecution and trial up to the verdict. Failure or weakness in the investigation will in turn weaken the subsequent stage, including the freedom of an accused person. At this stage of the investigation, the investigators have also been given a number of powers, including detention, and other enforcement measures.

To streamline the handling of cases, including cases of corruption, it is necessary to have time efficiency at the stages of pre-prosecution and prosecution. There are important stages in the process of resolving criminal cases, such as pre-prosecution which is a forum between investigators and public prosecutors in finalizing the results of investigations to be processed further hence prosecution can succeed. The classic matter at this stage is alternating cases between investigators and prosecutors that make the time protracted and detrimental to the suspect. Thus the process of criminal cases becomes lengthy and lacks certainty. It has been a long-standing problem. In Constitutional Court judgments, several things have been affirmed in order to create greater legal certainty.[74]

Identification of suspects at the stage of investigation should also be able to contribute to the speed at the subsequent stage. However, in reality it is not the case; even after having identified the suspect, investigators and prosecutors continue to look for other evidence. At the stage of prosecution, the required period and efficiency of time will also remain the same, regardless of whether or not the suspect submits a guilty plea. The question is, if the suspect has admitted guilty at the stage of investigation and then at the stage of prosecution, does it not facilitate the work of the prosecutor and save time in the criminal proceedings? This also needs to be studied in-depth. One of the problems faced in resolving corruption is the length of time required to settle corruption cases, starting from investigation, prosecution, court hearing and verdict, in addition to the length of time required for the ajudication of cases at the first instance, appeal and cassation level.

[74] For instance, the word 'promptly' in the submission of Notice of Commencement of Investigation (*SPDP*) under *KUHAP* has been changed to 7 (seven) working days, so as to provide certainty and prevent the process from dragging on.

C. Reform by the Supreme Court

On 13 March 2014, the Chief Justice of the Supreme Court of the Republic of Indonesia issued Circular of the Supreme Court of the Republic of Indonesia Number 2 of 2014 concerning ajudication of Cases at the Courts of First Instance and at the Appeal Courts. The main points of the Circular are as follows: (1) Ajudication of a case at the court of first instance shall be within 5 (five) months at the latest including the settlement of transfer.

In view of the nature and circumstances of certain cases the ajudication of which takes more than 5 months, the Panel of Judges handling the case must make a report to the Chairperson of the Court of First Instance with a copy addressed to the Chairperson of the Court of Appeal and the Chief Justice of the Supreme Court; (2) Ajudication of a case at the Court of Appeal within 3 (three) months at the latest including the completion of the transfer. Regarding the nature and circumstances of certain cases the ajudication of which requires more than 3 months, the Panel of Judges handling the case must make a report to the Chairperson of the Court of Appeal with a copy addressed to the Chief Justice of the Supreme Court; provisions for the grace period do not apply to specific cases that have been determined based on legislation. For the effectiveness of monitoring the compliance with case handling in accordance with the above specified time frames, case data must be included in an electronic-based case management information system in an up-to-date manner.[75]

The Supreme Court has introduced a revolutionary change in the system of examining cases of cassation and judicial review. Since 1 August 2013, the file inspection system has been carried out simultaneously, namely simultaneously replacing the rotating reading system that has been going on for a long time. To support the effectiveness of the new system, the Supreme Court also issued SEMA 1 of 2014, requiring the courts to include e-documents from a portion of Bundle B files in each request for cassation and review. Such e-documents sent to the Supreme Court will serve as material for Supreme Court Justices in reading the files.

Adjudication would lead to an e-document-based files investigation system. The new system implemented by the Supreme Court has turned out to have a positive impact on increasing productivity in deciding cases. Based on the data presented in the 2013 MA annual report, the Supreme Court decided as many as 16,034 cases in that year. Such number was an increase of 45.83% compared to the preceding year. Such an increase in the productivity of the Supreme Court was triggered, among other things, by the change in the system for examining files.

D. The Need for Other Approaches

The above description discusses the ongoing endeavours for the recovery state financial losses in our country, particularly by using the existing legal framework, specifically under the Criminal Code, *KUHAP,* and the *PTPK* Law relying on returning assets through criminal court judgment (conviction based recovery of assets). Such endeavours still encounter numerous obstacles and are yet to be adjusted to the principle of simple, speedy and low cost justice.

[75] The 'deadline' for handling cases was provided for in Decree of the Supreme Court Chief Number 119 / SK / KMA / VII / 2013 and Circular Letter of Supreme Court Number 2 of 2014. Based on such rules, the Supreme Court must decide within 3 months at the latest after the case is received by the Chairperson of the cassation / judicial review (*PK*). Whereas, appellate cases and case at the first instance must be settled by no later than 3 months and 5 months, respectively.

At the same time, the *Ius constituendum*, the Asset Forfeiture Bill that recognizes in-take forfeiture, is highly anticipated because it is expected to accelerate the return of assets resulting from corruption. Therefore, the various efforts in accelerating the criminal justice process and accelerating the return of assets resulting from corruption are becoming increasingly important. We have seen in the foregoing that the highest institution of our judiciary, the Supreme Court, has created a foundation for accelerating the process at the first instance, appeals, and cassation level. We also continue to strive to make various asset recovery endeavours by referring to cooperation through the StAR initiative within the UNCAC framework to which Indonesia has long been a party. All of these efforts are indeed important; nonetheless the search by the Indonesian criminal justice system for new alternatives, concepts, and new models is still important.

As discussed, the principle of speedy trial is a universal principle recognized in the world, but the term 'principle of simple trial' and 'principle of low cost trial' is a unique thing. Various countries in the world from various law families mention such principles in various terms, whose purpose is the same as that of the principles of simple and low cost justice. According to International Justice (speedy justice) standards these should include the time from which the suspect is arrested and detained at the trial stage until the court ruling is pronounced or becomes final and binding (*inkracht van gewijsde)*. This is indeed in line with the principles applied in various countries, namely 'speedy trial'; howevever, we need to revive it in the context of recovering state financial losses in accordance with a simple and low cost conception of the judiciary.

Almost all criminal justice systems (if not all) have incorporated mechanisms to avoid that each and every criminal case reaches the trial court. If all criminal cases would be concluded in court, most criminal justice systems would not be able to function properly, due to a massive overload of cases. There are many models or approaches in addressing such issue, such as plea bargaining in the US, and *transactie* in The Netherlands. In order to avoid delays in the (out of court) ajudication cases, since 2008 the Dutch Public Prosecution Service has the autonomous ability to offer an out of court settlement of different kind called 'a penalty order'. This is a unilateral decision by the public prosecutor that does not require consensus between prosecutor and defendant.[76] This kind of model, of course, needs to be studied further.

VII. CONCLUSION

Based on the above discussion, the following conclusions can be drawn: First, the principle of simple, speedy and low cost justice is yet to be effectively implemented in the Indonesian criminal justice. Although the principle of simple, speedy and low cost justice has been present in the Law on Judicial Power since the beginning of independence up to the present time, and there are also several articles in *KUHAP* reflecting such principles, speedy and low cost are yet to be implemented properly. *KUHAP* does not even connect directly to this principle ordinary, express and brief types of cases. In its implementation, there have been definite efforts to realize such judicial basis especially by utilizing information technology in various processes, stages and aspects in our criminal justice.

[76] Pauline Jacobs and Petra van Kampen, "Dutch 'ZSM Settlements' in the Face of Procedural Justice: The Sooner the Better", *Utrecht Law Review*, 10 (4) (November 2014), 73-85.

Second, there are a number of obstacles faced by the Indonesian criminal justice system, especially in terms of returning state losses caused by corruption with due observance of the concept of justice in a simple, speedy manner and at low cost. By way of conclusion, the process of handling criminal cases takes up a significant amount of time. Another weakness related to law enforcement in corruption is the difficulty in executing criminal penalties and criminal recovery of state losses.

Interestingly, Article 37 paragraph 2 of UNCAC stresses the obligation of the signatory country to consider the possibility, in certain cases, to reduce the sentence of the defendant who provides important cooperation in the investigation or prosecution of corruption crimes. In Indonesia itself, Article 37 paragraph 2 of UNCAC has been frequently linked to the Justice Collaborator (witnesses who collaborate with law enforcement). More stringent provisions relating to proceedings outside the court process are provided for in Article 37 paragraph 3 of UNCAC.

It is submitted that, the provisions of Article 37 paragraph 2 of UNCAC have become the basis for Justice Collaborator and Plea Bargaining in corruption cases. While the provisions of Article 37 paragraph 3 of UNCAC became the basis for the settlement of corruption cases before entering the court with substantial cooperation with the suspect / defendant or settlement out of court, including deferred prosecution agreement (DPA), non-prosecution agreement (NPA), *afdoening buiten* process, *transactie* (which applies in The Netherlands), and so on.

It means that, in fact, it is possible to have an out-of-trial settlement mechanism for the defendant in a corruption case if the defendant provides important cooperation in the investigation or prosecution of corruption, for example if the defendant returns the state's financial losses due to corruption added with a number of other costs that can be determined by law enforcement agencies authorized in accordance with applicable law. As Indonesia is a state party to UNCAC, such provision should also be considered for implementation in Indonesia.

The provisions of Section 37 of UNCAC that allow good cooperation of suspects who are willing to provide essential assistance in resolving corruption cases have not been fully utilized in the Indonesian criminal justice system. In fact, it could help speed up the ajudication of corruption cases while making it more straightforward and less expensive both in settling cases as well as in returning state losses.

Considering that the principle of simple, speedy and low cost justice is not only needed for court proceedings, but also in the investigation and prosecution stages, including out of court settlements, it needs to be explicitly referred to not only for trial, but for all stages in the criminal procedural law in Indonesia. In addition, such principle should also be followed by various laws governing the adjudicating criminal cases (including laws on the police, prosecutors, corruption eradication commission, and also the courts), which calls for a separate law which specifically sets out firm and detailed provisions on simple, speedy and low cost trial.

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