



# Human Rights under the Indonesian Criminal Procedure Code

a special report by the

ASIAN HUMAN RIGHTS COMMISSION

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## 1. Introduction

The Criminal Procedure Code (KUHAP) in Indonesia was created in 1981 to substitute *Het Herzijene Inlandsch Reglement* (HIR), a law which was created by the Dutch government and used for conducting legal processes both in civil and criminal cases. Compared to HIR, KUHAP is considered an improvement on criminal procedure since it unified a dual colonial criminal court structure<sup>1</sup> and is more comprehensive through its inclusion of legal aid and compensation.<sup>2</sup>

With the fall of Suharto, the following Reformasi period and the requirements of international norms, KUHAP is no longer believed as adequate for a modern Indonesia. Indonesia has ratified several human rights covenants and conventions such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)<sup>3</sup>, according to which provisions under the KUHAP need to be brought in line with international human rights standards and principles. For this reason, a process of revising the current KUHAP has been initiated in 2001<sup>4</sup>, and is still to conclude.

As one of the purposes of the revision is to "... protect human rights either for suspects, accused persons, witnesses, or victims ..."<sup>5</sup>, it is essential to ensure that all provisions in the current KUHAP which obstruct human rights protections are eliminated in the bill whereas provisions supporting human rights protection need to be added. This writing tries to identify several problems under the KUHAP and the KUHAP bill which are related to human rights issues.

## 2. Strengthening torture prevention

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<sup>1</sup> During the Dutch colonization era, there are two different criminal courts which are applied to two different groups. For the 'original' Indonesians (*bumiputera*) the name of the criminal court was *Landraad*, whereas for the Europeans the name of the criminal court was *Raad van Justitie*. For Indonesians at that time *Raad van Justitie* was the court of appeal. See Yesmil Anwar and Adang, *Pembaruan Hukum Pidana, Reformasi Hukum Pidana* (Jakarta: Grasindo, 2008), p. 41.

<sup>2</sup> To understand more about the background of KUHAP was needed to substitute HIR please refer to the General Elucidation of KUHAP.

<sup>3</sup> See the January 2009 Draft of Criminal Procedure Code (KUHAP bill), General Elucidation Paragraph 2 and letter (d) of the consideration.

<sup>4</sup> See 'Sejumlah Pasal yang Dipermak', Tempo Online, 24 October 2004

<http://majalah.tempointeraktif.com/id/arsip/2004/10/25/HK/mbm.20041025.HK92699.id.html>

<sup>5</sup> Ibid, letter c of the draft's consideration.

Indonesia has ratified CAT in 1998 through Law No. 5/1998. Twelve years after the ratification, however, torture remains as practice commonly used by law enforcement officers. There are several factors why torture still widely takes place in Indonesia, including the absence of law which criminalises torture a lack of transparent accountability mechanisms within the Indonesian National Police (Polri). Several loop holes under the current KUHAP contribute to the prevalence of torture in Indonesia.

## 2.1 Reducing the unreasonable long period of detention

In current Indonesian criminal law system, generally there are three institutions which have authority to issue detention orders: the police, prosecutors, and the judges.<sup>6</sup> What differ the detention power among all of these three institutions is *when* or in what level they can exercise their authority. Police has the authority to detain someone only in investigation level, whereas prosecutor is allowed to exercise their detention power in prosecution level, and judges may do so only once a case has reached the trial process. Both police and prosecutor have authority to detain suspects lawfully for twenty days<sup>7</sup>, while judges in District Court and High Court are allowed to detain suspects up to thirty days.<sup>8</sup> The longest ‘original’ detention period is the one issued by Supreme Court, where suspects may be detained fifty days maximum.<sup>9</sup>

However, at any level of the criminal process –investigation, prosecution, or trial- the period of detention may be extended. How long the period is vary, depends on which level. For example, extension of detention period at investigation level is 40 days, whereas at prosecution level the detention period may be extended for more 30 days. The details of the period of detention and who have the authority to conduct or extend it in Indonesia criminal law system is as followed:

Level	Authority Issues Original Detention	Period of Original Detention	Authority Permits the Detention Extension	Period of Detention Extension
Investigation	Police	30 days	Prosecutor	40 days
Prosecution	Prosecutor	20 days	Chief of District Court	30 days
Trial (District Court)	Judges of District Court	30 days	Chief of District Court	60 days
First Appeal Trial (High Court)	Judges of High Court	30 days	Chief of High Court	60 days
Second Appeal Trial (Supreme Court)	Judges of Supreme Court	50 days	Chief of Justice	60 days
Sub Total		160 days	(+)	250 days
<b>TOTAL</b>				<b>410 days</b>

Based its’ Concluding Observation published in 2008 on the UN Special Rapporteur on Torture’s report, Committee against Torture highlights the long detention period in Indonesia, specifically the detention under police’s authority up to 61 days<sup>10</sup>, and named it as ‘insufficient legal safeguards for detainees’.<sup>11</sup> Thus, the Committee recommended Indonesia to ensure detainees’ fundamental legal safeguards during their detention including bringing them ‘... appear before a judge within a time limit in accordance with international standards’.<sup>12</sup> The Concluding Observation, however, does not give any clue on how long the time limit which in accordance

<sup>6</sup> Article 20 para (1), (2), and (3) of Indonesian Criminal Procedure Code (KUHAP).

<sup>7</sup> Article 24 para (1) and article 25 para (1) of KUHAP.

<sup>8</sup> Article 26 para (1) and article 27 para (1) of KUHAP.

<sup>9</sup> Article 28 para (1) of KUHAP.

<sup>10</sup> As previously mentioned, the period of police detention is only up to 60 days. Mr. Manfred Nowak, however, mentioned it as 61 days as he counted the 1 day of arrest period.

<sup>11</sup> Concluding Observations of the Committee against Torture INDONESIA; CAT/C/IDN/CO/2; 2 July 2008; Section C para 10.

<sup>12</sup> Ibid.

with international standard is; yet Manfred Nowak in its' report recommends that the length of police custody should be only 48 hours maximum.<sup>13</sup>

Under the latest draft of KUHAP bill, the recommendation of Nowak is 'partly' adopted for the general rule is suspects may be detained maximum for 48 hours but it may be extended up to 5 x 24 hours.<sup>14</sup> During that period, police as investigator together with prosecutor are obliged to bring the suspects before Judge who will decide whether extension period of detention is needed. If the Judge decides that extension is needed then police or prosecutor is allowed to detain the suspects for 25 days which can be extended again for more 30 days with permission of District Court judges who will examine the case.

Compared to the current KUHAP provisions on detention, the obligation under KUHAP bill for police and prosecutors to bring detainees before Judges within five days since the detention is should be appreciated for at least it shows government and parliament's will to follow the Special Rapporteur's recommendation. However, it is noteworthy that there are no significant changes on the detention period itself as may be seen in table below:

Level	Authority Issues Original Detention	Period of Original Detention	Authority Permits the Detention Extension	Period of Detention Extension	Authority Permits for More Extension	Period of More Extension
Investigation	Police or Prosecutor	2x24 hours + 3 x 24 hours	Judge	25 days	District Court Judge	30 days
Prosecution	District Court Judge, by request from Prosecutor	30 days	Unclear*	30 days	Unclear*	30 days
Trial (District Court)	District Court Judge	30 days	Head of District Court	30 days	Head of District Court	30 days
First Appeal Trial (High Court)	High Court Judge	30 days	Head of High Court	30 days	-	-
Second Appeal Trial (Supreme Court)	Supreme Court Judge	30 days	Chief Justice of Supreme Court	60 days	-	-
Sub Total		125 days	+	175 days	+	90 days
<b>TOTAL</b>						<b>390 days</b>

\*Unclear for it is only written that the extension can be done by request of Prosecutors but doesn't mention who has the right to grant the request.

The obligation for police and prosecutor to bring suspects before Judge within five days will not be effective to prevent torture as police will still be able to detain suspects for more 55 days after the Judge's decision. Seems it will be only effective to prevent police to torture the detainees *during five days* before they bring detainees to the Judge; yet will likely to fail in preventing torture *during the 55 days* police detention if Judge decided that suspects need to be detained.

## 2.2. Shifting the burden of proof

According to Article 66 of current KUHAP<sup>15</sup>, burden of proof shall not be imposed to suspects or accused persons. Such provision exist for reason that someone has to be presumed as

<sup>13</sup> See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Indonesia; A/HRC/7/3/Add.7; 10 March 2008; Section 3 para 59.

<sup>14</sup> See Article 58 para (2) and Article 60 para (1) of January 2009 draft of KUHAP bill.

<sup>15</sup> Article 66 of KUHAP.

innocent unless court decided in contrary as well as an implementation of non-self incrimination principle. For most cases which are not really difficult to prove (in sense that there are witnesses, evidences are available, etc), this provision is not problematic. Yet when it comes to cases which is difficult to prove such as torture, Article 66 of KUHAP become an obstacle to prove that such human right violation occurred.

Almost all torture cases, if not all of them, are conducted in places which are difficult to be accessed by common people such as police station and detention facilities. How is it possible for the victims, therefore, to find anyone to be his witness? Besides that, the torture victims are usually detainees, they are being detained. How is it possible for them to see doctor and get medical record immediately once they have been tortured if they are detained?

These facts show how unequal is the position of the torturer and the victims. The torturer –who are state agents- have the power to take any measures to prevent the victims to obtain any evidences or contact witnesses which will be in favour to them. Implementing Article 66 KUHAP in torture cases, thus, will just enlarge the inequality between torturers and the victims. It is not only unreasonable but also unfair if we expect the torture victims to prove that they have been tortured whereas they are not in position which enable them to do so.

Shifting the burden of proof in torture cases is another recommendation mentioned by Manfred Nowak in his report<sup>16</sup>. Unfortunately, such regulation has not been covered under the KUHAP bill.

### **2.3. Exclusion on *unus testis nullus testis* principle**

Under the current KUHAP, judges are allowed to name suspects are guilty only if there are at least two legal means of proof which lead them to the conviction that an offense has occurred and the accused person is responsible for such offense.<sup>17</sup> Under Article 184 paragraph (1) of KUHAP, there are only five legal means of proof which can be used before the court: testimony of witnesses, testimony of experts, document, indication, and the accused person's testimony.<sup>18</sup>

In regards to the testimony of witnesses in convicting a criminal case, Article 185 paragraph (2) KUHAP regulates that testimony of one witness alone shall not be considered as sufficient to prove that an accused person is guilty.<sup>19</sup> In other words, there should be at least two witnesses whose testimonies are in accordance with each other. In Indonesia criminal legal system, such principle is known as *unus testis nullus testis* (one witness is not a witness) principle.

As the principle of not imposing burden of proof to accused persons, the principle of *unus testis nullus testis* is surely important to prevent court and judges to exercise their authority against accused persons arbitrarily. However, it makes conviction on torture cases before the court become an extremely frustrating work. As previously mentioned, it is almost impossible that there are witnesses in torture cases for it usually is conducted not in public places. What happen for most of the time is that only the torturer and the victim who know exactly who did what. If *unus testis nullus testis* principle is implemented in torture cases – as the current KUHAP does – then torturers can torture anyone all they want without any fear that they will be punished, as long as they ensure that nobody witnesses the violation they conducted.

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<sup>16</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Indonesia; A/HRC/7/3/Add.7; 10 March 2008; Section 3 para 59, letter B (see table).

<sup>17</sup> Article 183 of KUHAP.

<sup>18</sup> Article 184 para (1) of KUHAP.

<sup>19</sup> Article 185 para (2) of KUHAP.

Excluding the *unus testis nullus testis* principle does not mean that torture victim's testimony alone is sufficient to convict that torture has taken place thus the torturer is guilty. Conviction rules under KUHAP saying that at least two legal means of proof are needed to name an accused as guilty. Therefore, the torture victim's testimony shall be completed by relevant legal means of proof such as expert's testimony or medical report.<sup>20</sup>

### 3. Some issues on detention

*"... It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."*

(Article 9 paragraph (3) ICCPR)

Right to liberty is one of the rights which are inherent in every human being. It, as mentioned by European Parliament member Monica Macovei, is a fundamental condition which everyone should generally enjoy for the deprivation of it will effect one's enjoyment of other rights –from right to family and private life into right to freedom of movement- and put someone into an extremely vulnerable position including into the risk of being subjected to torture.<sup>21</sup> For such reasons, depriving one's liberty or detention shall be done only for exception as also stated in the Article 9 paragraph (3) of ICCPR. Detention shall be reasonable and be understood as last resort<sup>22</sup>. It shall not be conducted arbitrarily.

#### 3.1. Grounds of detention

In order to prevent detention is conducted arbitrarily, there are several measures can be taken. One of them is setting the grounds of detention: what are conditions which can be used as reason to detain someone.

Under KUHAP, there are three conditions which can be used as ground for police, prosecutors, or judges to detain suspects or accused persons: the existence of circumstances which give rise to concern that the suspect or the accused will escape, damage or destroy physical evidence, and/or repeat the offense.<sup>23</sup>

During its' implementation, three grounds of detention under the current KUHAP are often criticised as they are considered as too subjective and often used arbitrarily by police. One best example is the detention of two Corruption Eradication Corruption (KPK) commissioners, Chandra Hamzah and Bibit Samad Riyanto, at the end of October 2009. They were both named as suspects in extortion case in September 2009 and since then never failed to appear before police for mandatory report every Monday and Thursday to guarantee that they had no intention to escape. However, a month later police decided to detain these commissioners that according to Deputy of Criminal Investigation Bureau of Indonesian National Police (Polri) at that time,

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<sup>20</sup> In Indonesia, the exclusion of *unus testis nullus testis* principle itself has been implemented for domestic violence cases. Article 55 of Indonesian Law No. 23/2004 on The Elimination of Domestic Violence states, " ... the testimony of [domestic violence] victim herself is sufficient to name the accused as guilty, as long as it strengthened by another valid legal mean of proof."

<sup>21</sup> Monica Macovei *Handbook No. 5: The right to liberty and security of the person. A guide to the implementation of Article 5 of the European Convention on Human Rights*, Council of Europe (2002), p. 6.

<sup>22</sup> Rule 6.1 of UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), GA Resolution 45/110, 14 December 1990.

<sup>23</sup> Article 21 para (1) of KUHAP.



General Inspector Dikdik Maulana, they “...conducted too many press conferences which may influence public opinion.”<sup>24</sup>

Problem of subjectivity in the recent KUHAP on deciding whether suspects or accused persons should be detained remains unsolved in the latest draft of KUHAP bill. Under the KUHAP bill, the authority to decide whether suspects or accused persons need to be detained is given to Judges; impartial judges who are hoped can solve the subjectivity problem. However, Judges only have such authority at the investigation level whereas at the prosecution and trial level the authority remains under the jurisdiction of prosecutor and court judges. So the problem of subjectivity on imposing detention has only partially solved under the recent KUHAP bill.

In the condition where subjectivity problem remains partly unsolved, KUHAP bill adds two other detention grounds. First, suspect or accused may be detained if she is likely to influence the witnesses, and second, if police, prosecutor, of judges believe that detention is needed for the suspects or accused persons’ sake and safety.<sup>25</sup> The additional detention grounds under KUHAP bill makes subjectivity is not the only problem related to detention but also leads question whether such additional detention grounds are needed.

It is true that we need to set the detention grounds as they can be used as indicators to identify whether arbitrary detention takes place or not. Yet what important to understand is the grounds set have to be reasonable and necessary besides lawful. Human Rights Committee has interpreted that detention in necessary is needed only under certain conditions, which are:

- a. To prevent flight, interference with evidence or the recurrence of crime; or
- b. Where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other matter.<sup>26</sup>

Human Rights Committee also added that seriousness of crime or the need for continued investigation alone can’t be used as justification to prolonged pre-trial detention.<sup>27</sup>

According to the definition of ‘necessity’ set by Human Rights Committee, additional detention grounds under KUHAP can’t be seen as necessary. The anxiety that suspects will influence witnesses is not really reasonable for at least two reasons: first, influencing witnesses is not something which can be done only by suspects. It can be done by his lawyers, families, etc that detaining the suspects will not be enough to prevent any witness manipulation. Second, if the concern is the suspects might cause any harmful against the witness, Indonesia has a special institution to deal with this problem, which is the Witnesses and Victims Protection Agency (LPSK).

The other additional ground –that suspects may be detained for their own safety- is even more unreasonable. When torture is widely practiced in detention facilities, how is it possible that being there will be safer for the suspects or accused persons instead of their home?

Related to the detention grounds, therefore, it can be fairly said that the current KUHAP is better than the KUHAP bill for the grounds it set are more strict and reasonable. What the problem related to the detention grounds in the current KUHAP which actually has to be

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<sup>24</sup> See *Bibit Chandra Ditahan Akibat Konferensi Pers* (Bibit and Chandra are detained due to press conference) published by Liputan 6 SCTV on <http://berita.liputan6.com/hukrim/200910/249284/Bibit.Chandra.Ditahan.Akibat.Konferensi.Pers>

<sup>25</sup> Article 59 para (5) of January 2009 draft of KUHAP bill.

<sup>26</sup> Human Rights and Pre-Trial Detention. A Handbook of International Standards relating to Pre-trial Detention, United Nations (1994), p. 15

<sup>27</sup> *Ibid.*

answered by KUHAP bill, therefore, is the subjectivity of law enforcement officers in determining whether detention is needed or not. What are the measures to say that there are ‘...existence of circumstances which give rise to concern that the suspect or the accused will escape, damage or destroy physical evidence, and/or repeat the offense?’

In order to prevent the detention grounds interpreted subjectively, therefore, decision to detain suspects or accused persons also have to be taken by considering these factors:

FACTORS	INDICATORS	CHECKLISTS
Criminal History	Crime charged in present arrest	How severe is the crime? How severe is the punishment? If the sentence is likely to be short or non custodial, better to release the detainee.
	Past criminal convictions	Have the suspects conducted crime before?
	Past failures to appear for trial	Have the suspects ever absconded before?
Community Ties	Family ties	Do the suspects have spouse, children, or other family members?
	Other social ties	Do the suspects have other particular important ties, i.e religious affiliations or close friendship?
	Employment	Do the suspects have job?
	Financial resources and fixed assets	Do the suspects have fixed assets?
	Conditions of residence	Will that be easy to contact the suspects if they are released? Do they have telephone, mail delivery, or other means of communication?
Person accused	Length of residence	How long have the suspects been living in their current residence?
	Character	How are others perceptions on the suspects? Do they think they are dangerous or likely to abscond?
	Physical and mental condition	How old are the suspects? Do they have any physical or mental illness?

*Source: Summarized from Annex 1 of Human Rights and Pre-Trial Detention. A Handbook of International Standards relating to Pre-trial Detention, United Nations (1994)*

### 3.2. Detention alternatives

Besides the grounds to detain suspects or accused persons should be reasonable, conducting detention as last resort also means that there should be some options between detention and release as these two are contradictory to each other. Rule 2.3 of UN Standards Minimum Rules for Non-custodial Measures (The Tokyo Rules) mentioned that,

*“In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way that consistent sentencing remains possible.”<sup>28</sup>*

<sup>28</sup> Rule 2.3 of UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), GA Resolution 45/110, 14 December 1990.

Under KUHAP, there are only few detention alternatives available. The most lenient one is mandatory report<sup>29</sup> (*wajib lapor*) to related authorities such as police or prosecutors; that usually offenders will be asked to report twice per week (Monday and Thursday). Other alternatives are house and city arrests<sup>30</sup>, which both actually are essentially deprivations of liberty like detention yet more lenient and convenient for the offenders.

Detention alternatives will be given only when offenders or their family file a request and - although it's not always necessary and obligatory- they will be asked to submit it with bail money or personal guarantee.<sup>31</sup>

In regards to bail provision, there are two differences between the current KUHAP and the latest draft of KUHAP bill. First, whereas current KUHAP allows offenders or family to submit bail request **with or without** money bail or personal guarantee, under KUHAP bill they **will have to** submit the request it either with bail money or personal guarantee.<sup>32</sup> Related to personal guarantee itself, however, it still remains unclear whether such guarantee is recognised or not for there are two contradictory statements in the KUHAP bill. Article 67 paragraph (1) states that offenders or their family can submit bail with bail money and/or personal guarantee, yet the general elucidation indicates that personal guarantee is eliminated<sup>33</sup>. If personal guarantee is not recognised anymore under the KUHAP bill then it will be the second difference between current KUHAP and the KUHAP bill.

Even though the general elucidation of KUHAP bill mentions that Indonesia ratification on ICCPR is one of the main reasons why current KUHAP is needed to be revised, we can see that -at least in regards to detention issue- KUHAP bill has not fully adopted the spirits of human rights protection as enshrined in ICCPR and other related international human rights documents. Despite the fact that ICCPR and other human rights documents oblige state parties to use detention as last resort, KUHAP bill -just like the current KUHAP- fails to provide wide range of non-custodial measures. In fact, in this sense, it is fairly enough to say that KUHAP bill is worse than the current KUHAP for it eliminates house and city arrest and eliminates bail submission with personal guarantee (as mentioned by the general elucidation of KUHAP bill).

As in the current KUHAP, the spirit to use detention as last resort is not reflected either in KUHAP bill for detention alternatives may be given only by request of offenders or their family. As long as the offender or family do not contest the authority's decision to detain him then the related authorities will keep detaining the offender. Such provision ignores the fact that in practice, not many people know that there is a mechanism to contest the authorities' decision to detain offenders. In their ignorance of such mechanism, therefore, it is unreasonable to impose the 'obligation' to them.

### 3.3. Detainable offenses

KUHAP regulates that not all offenses will result in detention. Article 21 paragraph (4) mentions that detention may only be applied to offender who has committed an offense or an attempt of offenses which the maximum punishment for such offense is five years or more -such as murder and theft- or some particular offenses determined by law even though the maximum punishment

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<sup>29</sup> See the elucidation of Article 31 of KUHAP.

<sup>30</sup> Article 22 para (1) letter b and c of KUHAP.

<sup>31</sup> Article 31 para (1) of KUHAP.

<sup>32</sup> Article 67 para (1) of KUHAP bill.

<sup>33</sup> See paragraph 11 of the general elucidation of KUHAP bill. It is written that "bail may only be guaranteed with money and the amount will be determined under the Government Regulation."



is less than five years imprisonment. Here is the list of offenses under KUHAP and KUHAP bill which the maximum punishment is less than five years imprisonment:

Current KUHAP <sup>34</sup>		KUHAP Bill <sup>35</sup>	
Article 282 (3) KUHP	Disseminating decency as habit or occupation	<b>Article 282 (3) KUHP</b>	Disseminating decency as habit or occupation
Article 296 KUHP	Facilitating obscene act as habit or occupation	<b>Article 284 KUHP</b>	Adultery
Article 335 (1) KUHP	Committing unlawful force	<b>Article 296 KUHP</b>	Facilitating obscene act as habit or occupation
Article 351 (1) KUHP	Assault	<b>Article 351 (1) KUHP</b>	Assault
Article 372 KUHP	Embezzlement	<b>Article 353 (1) KUHP</b>	Premeditated assault
Article 378 KUHP	Fraud	<b>Article 372 KUHP</b>	Embezzlement
Article 379a KUHP	Fraud	<b>Article 378 KUHP</b>	Fraud
Article 453 KUHP	Contract withdrawal by skipper of an Indonesian ship	<b>Article 379a KUHP</b>	Fraud
Article 454 KUHP	Desertion by crew member of a ship	<b>Article 453 KUHP</b>	Contract withdrawal by skipper of an Indonesian ship
Article 455 KUHP	Simple desertion by crew member of a ship	<b>Article 454 KUHP</b>	Desertion by crew member of a ship
Article 459 KUHP	Attack against a skipper of a crew member of a ship	<b>Article 455 KUHP</b>	Simple desertion by crew member of a ship
Article 480 KUHP	Receiving stolen goods	<b>Article 459 KUHP</b>	Attack against a skipper of a crew member of a ship
Article 506 KUHP	Pimping	<b>Article 480 KUHP</b>	Receiving stolen goods
		<b>Article 506 KUHP</b>	Pimping

One of the reasons why offenders need to be detained is that there is a concern that releasing them will cause serious threat to society. However, both in KUHAP and KUHAP bill we may find that there are several offenses which are not really ‘threatening’ yet the perpetrators of the offense still may be detained. In fact, in some of the offenses mentioned above there is a question raised whether they actually can be classified as criminal offense or basically it is just a private or civil matter which should not be criminalised?

For example, under KUHAP bill police are allowed to detain perpetrators of adultery. Considering that adultery is a voluntary act; how is it possible that the perpetrator of adultery is dangerous and will seriously threaten the society? It will also take us to another more basic question: is it necessary to criminalise adultery? Same questions should also be asked to the possibility to detain skipper or crew member of a national ship who withdraw their contract as regulated under Article 453, 454, and 455 of KUHP.

Related to this issue, we can see that more or less the issue on promoting human rights under KUHAP is also closely related to KUHP revision. It is necessary, therefore, not only to monitor the revision process of KUHAP but also other related regulations such as KUHP, Correctional Law, or other law on crimes who implement different criminal procedure such as Narcotics Law.

#### 4. Compensation

<sup>34</sup> Article 21 para (4) of KUHAP. Besides offenses regulated under those articles on KUHP, Article 21 para (4) KUHAP also mentions other articles from Custom Ordinance, Immigration Crime Law, and Narcotics Law which no longer valid now.

<sup>35</sup> Article 59 para (1) of KUHAP bill.

According to KUHAP, if the suspects or accused persons believe that any legal processes against them were conducted unlawfully or/and arbitrarily they have the rights to ask for compensation.<sup>36</sup> The term ‘unlawfully’ here has to be understood that the legal processes didn’t meet procedural requirement such as over period of detention and absence of warrant; whereas ‘arbitrarily’ is referred to any legal process which is conducted unreasonably, for example fabricated charges cases or arrest of mistaken suspect.

Whatever the reason is –whether the legal process was unlawful or arbitrary- suspects or accused persons shall submit their complaint to the Head of District Court to have it been processed before the pre-trial hearing (*pra peradilan*).<sup>37</sup> Three days after the Court received such complaint, appointed Judge has to have schedule the day of pre-trial hearing and has to name his decision seven days after.<sup>38</sup> However, if the case of the suspects is brought before the court and the examination process begins, pre-trial hearing will be automatically terminated.<sup>39</sup> This doesn’t mean that no more legal avenue available for suspects or accused persons for if the judges believe that legal process conducted previously against them were unlawful or arbitrary, judges can always decide that compensation, along with rehabilitation, may be given.<sup>40</sup>

If the Judges –either judge in pre-trial hearing or in the District Court- decides that compensation should be given to suspects or accused then they will receive some amount of money which, according to Government Rules No. 27/1983, range from IDR 5000 (approximately USD 0,5) up to IDR 100.000 (approximately 10 USD).<sup>41</sup> In cases where the unlawful legal process caused the suspect or accused injured that they can’t work anymore or if they die, the amount of compensation may be given to them is IDR 3.000.000 (USD 300) at the maximum.<sup>42</sup>

Several important points related to compensation under KUHAP:

- Complaint for compensation may be processed:
  - a. Through pre-trial hearing, or
  - b. ‘Normal’ trial, as long as there was no decision taken before in the pre-trial hearing (otherwise it will be counted as *ne bis in idem*);
- Complaint shall be submit 3 months after the pre-trial decision at the latest or 3 months after the court’s decision;
- Dissatisfied party on the pre-trial decision may file final appeal to High Court;

Compared to KUHAP, the regulation on compensation mechanism under KUHAP bill is different and can be named as clearer. The function of pre-trial hearing is eliminated and substituted by Commissaries Justice (*Hakim Komisaris*, for more explanation on Commissaries Justice please refer to the next section). Whereas in KUHAP and its’ implementation regulations are mentioned that money for compensation purposes will be taken from the national budget

<sup>36</sup> See Article 1 number 22, Article 30, Article 68, and Article 77 of KUHAP.

<sup>37</sup> Article 77 of KUHAP.

<sup>38</sup> Article 82 para (1) letter a and c of KUHAP.

<sup>39</sup> Article 82 para (1) letter d of KUHAP.

<sup>40</sup> See Article 7 of Government Regulation No. 27/1983 on The Implementation of Criminal Procedure Code. In paragraph (1) the Government Regulation mentions about the time limit to lodge compensation complaint to the Court whereas paragraph (2) mentions about time limit to lodge compensation complaint to pre-trial hearing.

<sup>41</sup> Article 9 para (1) of Government Regulation No. 27/1983 on The Implementation of Criminal Procedure Code.

<sup>42</sup> Article 9 para (2) of Government Regulation No. 27/1983 on The Implementation of Criminal Procedure Code.

and paid by the Minister of Finance<sup>43</sup>, KUHAP bill clearly states that only when the unlawful or arbitrary legal process was conducted not deliberately (in sense it was conducted in good faith) then State will pay for the compensation; whereas for unlawful or arbitrary legal process which were conducted deliberately by particular legal officers the compensation shall be paid by such legal officers<sup>44</sup>.

Another difference between KUHAP and KUHAP bill in regards to compensation is that KUHAP bill obliges Commissaries Justice to start trying the compensation complaint within five days since complaint is submitted and the Justice has to decide it within seven days at the latest.<sup>45</sup> This regulation is better than KUHAP for it will take maximum 12 days for Commissaries Justice to name his decision whereas under the current KUHAP there is no such time limit. KUHAP only mentions that pre-trial hearing judge has to schedule the first trial three days after complaint is submitted and that pre-trial process shall not be held more than seven days, yet it doesn't mention when the first trial shall be held.

For example, if Mr. A files complaint for pre-trial hearing on 16 July, the judge only has to schedule the date of the trial three days later at the latest. But on what date the first trial shall be held, it is totally the authority of the judge. He can name 20 July, 16 August, any date he likes for there is no such time limit. Considering the fact that pre-trial hearing will be terminated once the 'main case' is tried, time plays an essential role here. In this sense, KUHAP bill is better.

It should be noted, however, that once KUHAP bill is enacted there will be urgent need to enact its implementation regulations. The implementation regulation of current KUHAP is Government Regulation No. 27/1983 and most part of it are no longer suitable for the current situation, including the amount of compensation may be given which is only IDR 3.000.000 maximum.

## 5. Introducing the Commissaries Justice

One most notorious difference between KUHAP and KUHAP bill is the fact that KUHAP bill eliminates pre-trial hearing and adopts a new legal avenue named Commissaries Justice. Head of High Court shall recommend some District Court judges to President who has the authority to inaugurate and remove Commissaries Justice from her office.<sup>46</sup>

According to Article 111 paragraph (1) of KUHAP bill, Commissaries Justice has the authority to enact or decide:

- a. The lawfulness of arrest, detention, search, seizure, or surveillance;
- b. The cancellation of detention or grant bail;
- c. That non-self incrimination principle was violated when suspect or accused person delivered his/her testimony;
- d. Any evidence or testimony obtained unlawfully cannot be used as valid legal means of proof before the court;
- e. Compensation and/or rehabilitation shall be given to those were arrested or detained unlawfully or whose properties were unlawfully seized;
- f. Suspect or accused person has the right or is obliged to be assisted by legal counsel;
- g. That inquiry or prosecution has been conducted on unlawful ground;

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<sup>43</sup> Article 11 para (1) of Government Regulation No. 27/1983 on The Implementation of Criminal Procedure Code.

<sup>44</sup> See Article 128 para (4) and (5) of KUHAP bill.

<sup>45</sup> Article 130 para (1) letter a and c of KUHAP bill.

<sup>46</sup> Article 116 para (1) of KUHAP bill.

- h. That termination of inquiry or prosecution was not conducted on opportunity principle (*asas oportunitas*);
- i. Whether it's necessary to bring a case before a court;
- j. Violation on suspect's rights or anything happened during inquiry process.<sup>47</sup>

Commissaries Justice can exercise all of the authorities mentioned above either it is requested by related parties (suspects, legal counsel, or prosecutor) or by its' own initiative.<sup>48</sup>

Compared to pre-trial hearing under KUHAP, Commissaries Justice has more authorities that some people believe it will bring significant positive changes in Indonesia criminal legal system. The limitative authority of pre-trial hearing was one of problems in KUHAP thus extensive authority of Commissaries Justice might be one good solution. The limitative authority of pre-trial hearing given by KUHAP tend to leads it runs its function more to try procedural violations such as absence of warrant and makes pre-trial hearing often fail to find the more serious problem such as torture or violation of non-self incrimination principle. It is hoped that by giving more powers to Commissaries Justice, the process will not solely look at the procedural aspects; not only to see whether the legal process is lawful or not but also whether it was conducted not arbitrarily.

However, subjectivity in determining whether suspects need to be detained, or whether a criminal case shall be brought before a court still remain as unsolved problem. Therefore, it is necessary at least to set what are the indicators in order to minimise the subjectivity problem.

Another important but often forgotten issue related to Commissaries Justice is the fact that it's President who has the right to inaugurate or remove a Commissioner Justice from her office. It is true that it's not fully the prerogative right of President as it's Head of High Court who has the obligation to recommend some name, yet the intervention from President here is unnecessary and unreasonable. Instead, it is more risky.

In cases where the President has some conflict of interests, for example, he can easily influence the Commissaries Justice either directly or indirectly. Why it is not the Chief of Justice who is granted the power to inaugurate or remove Commissaries Justice? Why, all of sudden, President has an authority to interfere judiciary whilst the Law No. 4/2004 on Judiciary Law clearly states that judiciary should be independent and free of any other power branches<sup>49</sup>? In order to ensure that the existence of Commissaries Justice will be in favour of human rights protection, it is necessary to guarantee that Commissaries Justice is independent and free of any intervention from any other party besides it.

## 6. Right to refuse legal counsel

Generally, both KUHAP and KUHAP bill state that suspects and accused persons have the right to legal counsel. In certain circumstances they even regulate that suspects and accused have to be

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<sup>47</sup> Article 111 para (1) of KUHAP bill.

<sup>48</sup> Article 111 para (3) of KUHAP bill.

<sup>49</sup> Article 3 para (2) of Law No. 48/2009 states that, "Any kind of intervention in judiciary matters by other parties outside the judiciary power are prohibited unless for certain matters which are set under the 1945 Constitution." 'Certain matters set under the 1945 Constitution' refers to Article 14 paragraph (1) of the 1945 Constitution which mentions that President –with considering the judgment of Supreme Court- has the authority to grant pardon and rehabilitation as well as provision under Article 24C para (3) of the Constitution which mentions that President and House of Representatives (DPR) have the right to select three of 9 nine Constitutional Court Justices each.

assisted by legal counsel and State is obliged to provide it for free. Under KUHAP, the ‘certain circumstances’ are either when they have no financial means and charged for crime which maximum punishment is not less than five years imprisonment or when they are charged for crime which maximum punishment is 15 years imprisonment or death penalty.

Whereas in KUHAP bill, the State’s obligation to provide legal aid for suspects or accused emerge only when they have no financial means and charged for crime with punishment not less than five years imprisonment. Even in such condition, the State’s responsibility to provide legal aid for them is eliminated when the suspects or accused decide that they don’t want any legal assistance from any lawyer. It is possible for according to KUHAP bill, suspects and accused have the right to refuse legal counsel.

As a right, essentially suspect or accused right to legal counsel is equipped with the right not to exercise it. Suspects or accused persons surely have the freedom to choose whether they want to be assisted by legal counsel or not. However, it is necessary to ensure that the suspect or accused decision to refuse the legal counsel is taken consciously and with fully understanding on all of the consequences and not because of reprisal. How to ensure that the decision is not taken under pressure, that’s a question which has not been answered by the KUHAP bill.

	KUHAP	KUHAP Bill
General Rule	Suspects or accused persons have the right to legal counsel	Suspects or accused persons have the right to legal counsel
State’s Responsibility	State has to provide free legal service under these circumstances: <ul style="list-style-type: none"> <li>a. Suspects or accused persons have no financial means to hire a lawyer and are charged of crime which maximum punishment is five years imprisonment or more;</li> <li>b. Suspects of accused persons are charged for crime which maximum punishment is 15 years imprisonment or death penalty.</li> </ul>	State has to provide free legal service for suspects or accused persons who have no financial means to hire a lawyer and are charged for crime which maximum punishment is five years imprisonment or more.
Exclusion of State’s Responsibility	---	Suspects or accused persons have the right to refuse legal counsel which should be proved by brief signed by the suspects or accused and police or prosecutor.

## 7. Conclusion and Recommendation

Based on the explanation above, generally we can identify several types of problem under the KUHAP bills:

### 7.1. Conditional significant positive changes

*Positive changes, but the effectiveness will depend on other things.*

Compared to the current KUHAP, the KUHAP bills in some senses provides some positive changes which are closely related to human rights. The existence of Commissaries Justice is one thing needs to be appreciated as it may solve the problem of ineffectiveness of pre-trial hearing in protecting the rights of suspects or accused persons under KUHAP. However, in order to make it runs effectively, the independence of the Justices has to be guaranteed and there should be standard or guidelines set to minimise subjectivity problem.



Another change under KUHAP bill which is also good is the obligation for police and prosecutor to bring the suspects before Commissaries Justice within five days. Yet if we compare the total period of detention between KUHAP and KUHAP bill we can see that there is no really significant change that the detainees will still be vulnerable to become victims of torture. Again, the role of effective Commissaries Justice is very important here.

Some good provisions under KUHAP bill also depend on the quality of others' regulation. Provisions related on compensation in KUHAP bill, for example, are clearer than the provisions in the current KUHAP yet if the implementation regulation is not better than the previous one (Government Regulation No. 27/1983) then all changes under KUHAP bill will be non-sense. In regards to the detainable offenses, KUHAP bill also depends on the provisions under KUHP.

## 7.2. Failure to solve the existing problems

*KUHAP bill doesn't provide any solution to problems occurred under the current KUHAP*

Even though the revision of KUHAP is purposed to create a criminal legal system which is more human rights-friendly, KUHAP bill still has not answered some problems occurred under the current KUHAP. These problems are including the absence of wide range of detention alternatives, subjectivity on decision making whether detention is needed or not, the absence of shifting burden of proof on torture cases, and exclusion of *unus testis nullus testis* principle in torture cases. All of these unsolved problems are closely related to torture in sense that as long it is left unanswered then torture will remain. If KUHAP revision is purposed as one of government's follow up on CAT ratification –as mentioned in the KUHAP bill's general elucidation- then it is unavoidable obligation for them to solve these problems through KUHAP.

## 7.3. Worse regulations

*KUHAP bill provides worse regulation compared to current KUHA*

In some provisions, it is regrettable that even KUHAP bill even offer worse regulation than what the current KUHAP offers. The elimination of house and city arrest is an example of this as well as the provision related right to refuse legal counsel which is not equipped with any mechanism which can ensure that the decision of suspects or accused persons to refuse it was taken consciously and not under pressure.

Based on several problems mentioned previously, the Asian Human Rights Commission recommends that under the KUHAP bill:

1. Detention period should be reduced into more reasonable period. The background of why such long period is needed has to be explained.
2. Burden of proof should be shifted to the perpetrators in torture cases.
3. *Unus testis nullus testis* principle should be excluded for torture cases. Testimony of torture victim shall be sufficient to convict that torture has taken place as long as it is supported by at least one more legal means of proof.
4. Detention ground shall be more restricted. There should be indicators which can be use for police, prosecutor, or Commissaries Justice to identify whether detention is needed or not as well as to minimise subjectivity issue.
5. KUHAP bill shall provide wide range of detention alternatives. House and city arrest are not supposed to be eliminated and bail procedure should not be too difficult to access.

6. List of detainable offenses shall be reviewed. Only offenses which are seriously threat society shall be on the list.
7. Comprehensive and proper implementation regulation on compensation shall be prepared from now to avoid the vacuum of law once KUHAP is enacted.
8. The authority to inaugurate and remove Commissaries Justice from his/her office shall be given to Chief of Justice. President or any party outside the judiciary branch shall not be granted this authority.
9. Suspects or accused persons shall be given right to refuse legal counsel if and only if there is a mechanism which can ensure that such decision was not taken when the suspects or accused were under pressure or tortured.
10. Other related regulations (KUHP, Correctional Law, etc) shall be harmonised in order to create comprehensive criminal legal system which actively protects and promotes human rights.