

Plea Bargaining as a Solution for Criminal Case Backlog in Indonesia

Lukman Hakim and Sonny Zulhuda

Abstract--- *Criminal Justice System in Indonesia has not been able to overcome criminal case backlog in courts. Besides the report from the Supreme Court about the large backlog of criminal cases in judicial institution, there was also a research which showed that judges in Indonesia tend to arrive at guilty verdicts on criminal acts with minor criminal charges (sanction under 5 years). The concept of Plea Bargaining which has been known and applied in several countries will also be included in Article 198 paragraph (5) and 199 of the Draft of Criminal Procedure Code (RKUHAP) in Indonesia which will be made as law. Although non explicit verb is named as Plea Bargaining, the spirit of these articles are similar to the plea bargaining system which has been practiced in many countries and is considered successful in overcoming the criminal case backlog in courts, therefore the study uses comparative study of plea bargaining system in several countries and also uses normative research method and carried out by using the statutory approach through a review of laws and regulations as well as regulations relating to the issue discussed. Legal materials are obtained from the Criminal Procedure Code (KUHAP) and the Draft of Criminal Procedure Code (RKUHAP) which has been in the final discussion at the House of Representatives and Government, and in addition, the secondary legal materials are obtained from books, journals and other literature. Meanwhile, the data collection technique used is a library research by examining legal materials relevant to the research discussion.*

Keywords--- *Plea Bargaining, Criminal Case Backlog, Court.*

I. INTRODUCTION

The development of criminal law in global, especially after numbers of United Nation Congress which became the foundation of criminalization orientation changes, namely the 9th United Nation Congress in 1995, the supporting document related to the management of criminal justice stated that the needs of every country to consider “privatizing some law enforcement and justice functions” and “Alternative Dispute Resolution (ADR)” to overcome the problems of criminal case backlog in court (Arief, 2007).

In line with the above-mentioned, there is a system named as ‘Plea Bargaining System’. Plea Bargaining System is “A negotiated agreement between a prosecutors and a criminal defendant whereby the latter pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, more lenient sentence or dismissal of the other charges” (Black’s Law Dictionary With Pronunciation’s, 1990).

Plea Bargaining System has been known and practiced in many countries, both those adopt Common Law and Civil Law, because it is considered to bring benefit and to support criminal justice to be more efficient and effective, as well as to avoid case backlog in court. Referring to Gaby Del Vale, “97% of federal criminal convictions that

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result from guilty pleas instead of trials, in 2017” (Del Vale, 2017). According to Dylan Walsh, “In 2015, excluding cases that were dismissed, only 72% of criminal defendants in Philadelphia pleaded guilty, as opposed to 97% federally; 15% pursued a bench trial” (Walsh, 2019).

The Supreme Court in Indonesia has received strong criticism, one of which is related to the large amount of case backlogs. This highest judicial institution has not finished tens of thousands cases. In fact, justice seekers have been waiting for years, or even decades for justice. Investigation of criminal cases often needs a long time, convoluted and complicated, costly and not as simple as stated in normative/formal rules in the Code of Criminal Procedure (KUHAP). Therefore, it is no exaggeration to say that “when litigating in court, a cow will be lost to handle loss of a chicken”. It is certainly not expected by the people, especially for justice seekers in the settlement of criminal cases they experience.

Today’s case handling system applied in Indonesia consumes a lot of time and energy. The stages of handling criminal cases are carried out with a series of complicated processes. This system is called as Criminal Justice System, which consists of the process of Investigation, Prosecution, Courts, Implementation of Judge’s Verdicts, and Supervision and Observation of Court Adjudication (Effendi, 2015). Whereas, Article 4 paragraph (2) of Law Number 48 of 2009 concerning Judicial Power stated that the judiciary helps justice seekers and tries to overcome all obstacles to achieve a simple, fast and low cost trial (Waluyo, 2002).

Based on the mentioned problems, there must be a modification in the criminal justice system in Indonesia. The amendment is started from the Code of Criminal Procedure (KUHAP) as a formal procedure. Ramadhan stated, “there has been a plan for the procedural law amendment to shorten the stages” (Ramadhan, 2014). The Draft of Criminal Procedure Code (RKUHAP) which is currently under discussion seeks to make criminal justice system work effectively and efficiently.

Finally, RKUHAP has included a proposed regulation for “Plea Bargaining” institution or known as “Plea of guilt through ‘Special Path’” (The term of “Plea of guilt through ‘Special Path’” was used by the writers in term of simplifying the understanding of the concept that similar to “Plea Bargaining” which has been used by other countries, because RKUHAP itself has not given a title in the regulation written in Article 198 paragraph (5) and 199 RKUHAP) as regulated in Article 198 paragraph (5) and 199. This regulation provides the possibility for judges not to impose a crime with a maximum criminal charges against the defendant who has admitted committing crime. Although it does not explicitly state that there is a Plea Bargaining institution that has been known in many countries, the spirit of this concept has similarities with the Plea Bargaining System which has been practiced in many countries. Furthermore, it is expected that with the concept of Plea Bargaining or “Plea of guilt through ‘Special Path’”, can provide benefits in decreasing criminal case backlogs in Indonesian courts.

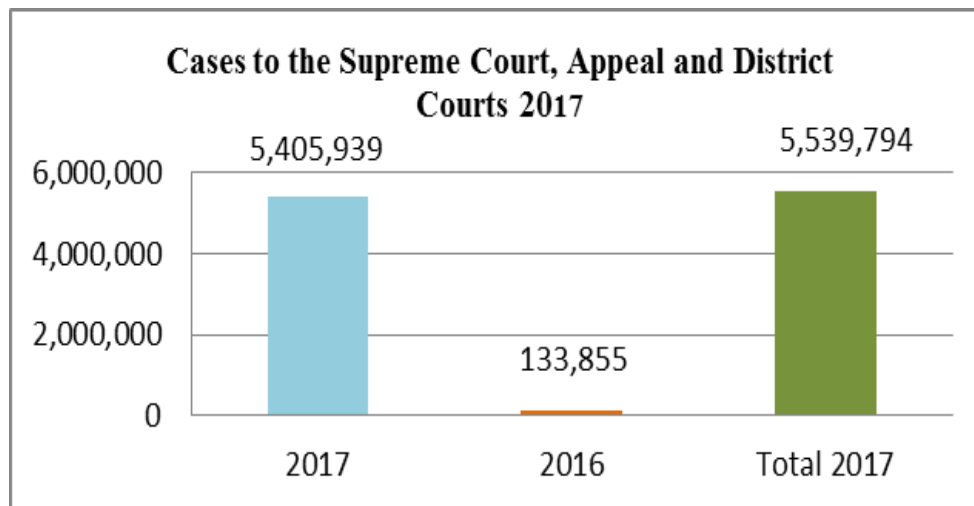
II. METHODOLOGY

This study uses comparative study of plea bargaining system in several countries and also uses normative research method which was conceptualized as a an observable phenomenon in real life. This study is carried out by using the statutory approach through a review of the laws and regulations as well as regulations relating to the issue discussed, and in this case, the various rules of law which are the focus of research. In addition, the legal conceptual

approach is also used. This research is started by describing the legal facts, then looking for a solution to a legal case with the aim to solve it. In this study, legal materials are obtained from the Criminal Procedure Code (KUHAP) and the Manuscript Academic of Draft of Criminal Procedure Code (RKUHAP) which has been in the final discussion at the House of Representatives (DPR) and Government. In addition, the secondary legal materials are obtained from books, journals and other literature related to the discussion of the criminal system in Indonesia. The data collection technique used is a library research by examining legal materials relevant to the research discussion.

III. RESULT

In the graph made by the writers below, there is an explanation on the total of criminal case in the Supreme Court in Indonesia, Appeal and District Courts during the period of January-December 2017:

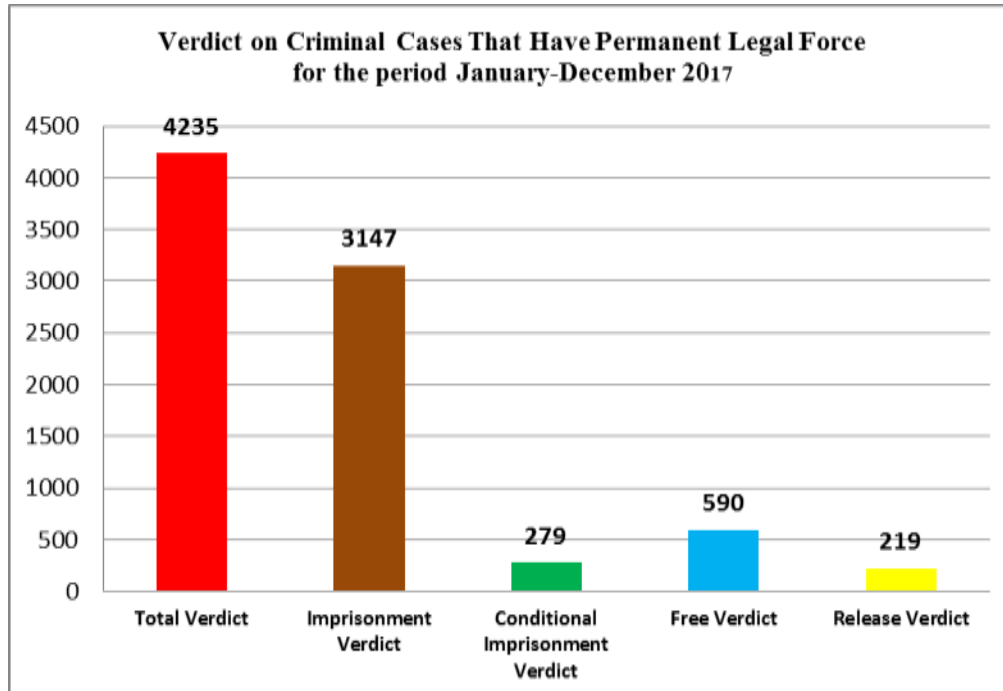


Graph 1

Source: Annual Report of The Supreme Court of Indonesia in 2017 in The Supreme Court Directory, 2 February 2020.

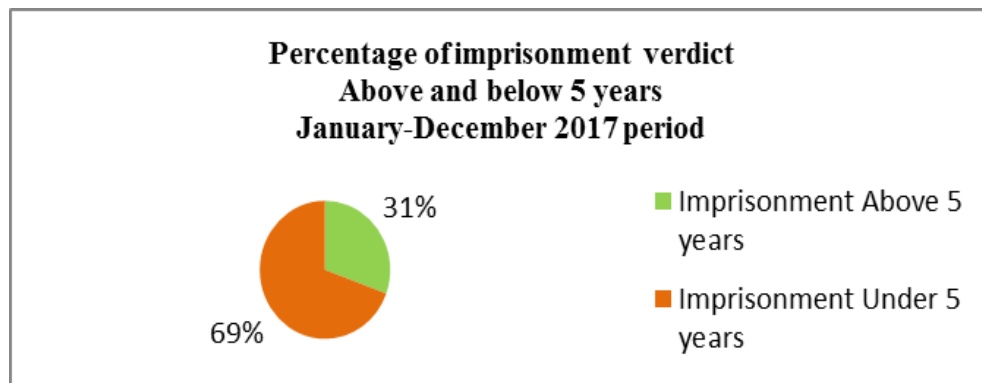
From Graphs 1 above, it can be seen that the total number of cases in the Supreme Court, Appeal and District Courts was 5,405,939 (five million four hundred five thousand nine hundred and thirty nine) cases, plus the remaining cases from 2016 for 133,855 (one hundred thirty three thousand eight hundred and fifty five) cases or 2.4%, so that the total court load for the whole judiciary in 2017 was 5,539,794 (five million five hundred thirty nine thousand seven hundred and ninety four) cases. It means, besides having to settle 5,405,939 cases (five million four hundred five thousand nine hundred and thirty nine), Supreme Court, Appeal and District Courts had a 2.4% of cases backlog. Thus, the judiciary work in Indonesia had enormous workload to settle the existing criminal cases. Moreover, it turns out that Supreme Court Judge in Supreme Court was only 52 (fifty two) judges.

Furthermore, the writers made a graph to illustrate 4245 (four thousand two hundred and forty five) adjudications in the Supreme Court which have had a permanent legal force during period January-December 2017 which shows the types of criminal sentences:



Graph 2

Source: Annual Report of The Supreme Court of Indonesia in 2017 in The Supreme Court Directory, 2 February 2020.



Graph 3

Source: Annual Report of The Supreme Court of Indonesia in 2017 in The Supreme Court Directory, 2 February 2020.

Based on Graphs 2 and 3 above, it can be concluded that the criminal justice system in Indonesia, from the Supreme Court, Appeal and District Courts, has a tendency to solve existing criminal cases by imposing imprisonment verdict. Even though in the imprisonment verdicts there are conditional imprisonment verdict decisions, but these types of decisions have a fairly small portion, which was only about 7% of the total types of criminal verdict existed.

By relating the guilty verdict itself, the majority of imprisonment verdict handed down were cases that trigger a criminal sanction of less than 5 (five) years (minor crimes) and not above 5 (five) years. In this context, the concept of “Plea of guilt through ‘Special Path’”, which will later be formulated in RKUHAP had a significant role in overcoming the criminal cases backlog in judicial institutions.

IV. DISCUSSION

Plea Bargaining System As An Alternative to Overcome Criminal Case Backlog in Court

As a comparison, the Plea Bargaining system is quite developed in criminal justice in Common Law countries, especially the United States (US). The Plea Bargaining System in the US is based on the orientation to make judge and court performance to be more effective to handle many cases. Referring to Alschuler, the Supreme Court then ignored this central facet of the criminal justice system during the period of its “due process revolution” (Alschuler, 1979). At the same time, many of its verdicts exacerbated the pressures for plea bargaining by increasing the complexity, length, and cost of criminal trials. Finally, in its 1970 adjudication in *Brady v. United States*, the court concluded that plea bargaining was “inherent in the criminal law and its administration”. Even the dissenters from the court's analysis took pains to distinguish the practice at issue in *Brady* from what they called “the venerable institution of plea bargaining”.

In the US, plea bargaining can settle large number of cases. This system can encourage law enforcement to settle up to 97% of criminal cases in the central government and resolve up to 94% of criminal cases in the federal government (Ramadhan, Manurung, Saputro, Reza & Pantouw, 2015).

There are many other things which are beneficial if this plea bargaining concept is applied. In support of negotiated pleas, some scholars argue that statutory penalties are often too harsh, and that tailoring punishment through charge and sentence “adjustments” makes the criminal justice system more responsive to the exigencies of individual cases (UTZ, 1978). Plea bargaining is also considered an efficient method of allocating justice system resources (Easterbrook, 1983). Prosecutors seek to maximize the deterrent or incapacitative value of their available resources, while defendants seek to minimize their individual costs of criminal activity (Smith, 1987). Plea bargaining also accommodates the interests of both defendants and the state. Prosecutors benefit from plea bargaining because it enables them to secure high conviction rates while avoiding the expense, uncertainty, and opportunity costs of trials. By obtaining guilty pleas, prosecutors can pursue more cases, potentially resulting in greater aggregate deterrent or incapacitative effects with a finite amount of resources (Easterbrook, 1983).

Defendants may also benefit from plea bargaining, especially if they are factually guilty. Indeed, it is the presumption of factual guilt in cases that are not quickly dismissed that drives the process of negotiation (Rhodes, 1978). For the defendant, the presumption of guilt focuses the negotiation on the type and severity of the sentence (Mather, 1974). A defendant's verdict to plead guilty may be rational if the sentence he receives by pleading guilty is implicitly based on both the probability that he would be convicted at trial and the likely sentence if convicted. For example, if the likely sentence following a trial conviction is ten years and the defendant estimates that his probability of conviction is. Then a plea to a sentence of seven years represents a rational choice. In this example a sentence reduction of 30% would be a rational compromise between the defendant and the state (Easterbrook, 1983).

To the extent that defendants, like prosecutors, face uncertainty in the justice system, pleading guilty may represent a rational means for resolving an uncertain situation (Smith, 1987).

Flynn and Fitz-Gibbon found another beneficial thing if plea bargaining is implemented, both on the reduction of cost of the court process and obstacles in the prosecution process. They said:

“Plea bargaining refers to the discussions that occur between the prosecution and defence counsel regarding an defendant person’s likely plea, and the possible negotiation of the charge(s), case facts, and/or the Crown’s sentencing submission. The primary aim of these discussions is to arrive at a consensual agreement, according to which the defendant pleads guilty. Plea deals are generally made for utilitarian and emotion-based reasons: they save resource and financial expenditure, reduce court backlogs and prosecutorial workloads, and spare defendant persons and victims from prolonged and often emotionally charged proceedings” (Flynn & Fitz-Gibbon, 2011).

The spread and transplantation of plea bargaining in the US model has taken place in several countries because of its success in solving inefficiencies, case arrears, and high litigation costs. Indonesia is currently in the process of discussing and determining whether similar concepts will be regulated in criminal procedural law or not. The method is called “Plea of guilt through ‘Special Path’” which can provide a faster trial process and a lighter sentence on the defendant (Ramadhan, 2014).

The practice of plea bargaining has become unavoidable when there are large criminal cases backlog which need to be settled, so that the the cases can be resolved by negotiation to obtain agreement of the defendant’s plea, which is needed to shorten the criminal justice which actually should be done in complete. It has been represented in Graph 1, in which the number of cases backlog in the courts in Indonesia, in the Supreme Court, Appeal and District Courts in 2017 which include the 2016 cases for 5.539.794 (five million five hundred thirty nine thousand seven hundred ninety four) criminal cases. A fantastic number compared to the limited number of judges available, even more so when compared to the number of the supreme judges at the Supreme Court, which was only 52 (fifty two) judges (The Supreme Court Directory, 2020). In addition to handling criminal cases, the supreme judges must also handle private cases, state administration cases, military cases and religious court cases.

Beside the above, the implementation of “Plea of guilt through ‘Special Path’” in RKUHAP is also appropriate and in an urgency to be applied. It is also based on research conducted by the writers in the criminal justice system in Indonesia as illustrated in Graph 2 and 3 that judges in the Supreme Court, Appeal and District Courts have a tendency to settle criminal cases, especially in minor criminal cases under 5 years (later minor crimes in RKUHAP enter Category 1 (one) with a threat of under 7 (seven) years imprisonment there is imprisonment verdict settlement). If Indonesian judges has tendency to impose this high imprisonment verdict, especially for the type of “minor crimes”, is associated with the application of the concept of “Plea of guilt through ‘Special Path’” in the RKUHAP, then it can be concluded that this concept is able to reduce the lengthy criminal justice process which in the end still state the defendant was subject to imprisonment verdict (guilty verdict).

The tendency for Indonesian judges who decide on imprisonment verdict (guilty verdict) for the defendants, especially in minor criminal cases as explained above, is quite relevant when compared to the criminal justice

system in the US and the United Kingdom (UK), even though Indonesia adopts a different Civil Law with the US and the UK which adopt Common Law. The reality is that 95% of all convictions in the US are secured with a guilty plea; guilty pleas are widely observed in the UK (more than 90%); but only 8% of all convictions in Italy are obtained by plea-bargaining. It seems to us that these figures confirm the importance of plea-bargaining in criminal procedures (Garoupa & Stephen, 2008). This means that the implementation of the Plea Bargaining System will be more effective if it is implemented in a country which tends to decide on imprisonment verdict (guilty verdict) of the defendant which has a high enough percentage in the context to avoid any cases backlog in court.

In sum, the implementation of Plea Bargaining System in RKUHAP in Indonesia or known as “Plea of guilt through ‘Special Path’”, even if it has some imperfection which needs further study, but this concept is expected to overcome the criminal case backlog which has happened in courts in Indonesia. Therefore, in many countries, this concept is proven to handle large numbers of criminal cases entered the court.

Plea Bargaining System and Its Implementation in Indonesia

The plea bargaining system was originally known in Common Law countries such as the US, the UK, and some other countries. Plea bargaining system emerged in the mid-19th century as a form of special treatment for the defendant because the person did good to the victim (Alschuler, 1978). In addition, the condition of criminal justice system at that time was ineffective because the overload cases which prolonged the time for the case settlement (Langbein, 1979). Criminal defendants today plead guilty in overwhelming numbers primarily because they perceive that this action is likely to lead to more lenient treatment than would follow conviction at trial (Alschuler, 1981). During its development, plea bargaining system has been practiced in Civil Law countries, such as Germany, France, Russia, Georgia, the Netherlands and other countries (Maulana, 2015).

The main reason for the Public Prosecutor to do plea bargaining is due to two things; First, because of the huge case backlog, which makes it difficult for the Public Prosecutor to work effectively and efficiently. Second, because the Public Prosecutor believes that the possibility of successful prosecution is very small either due to lack of evidence or the fact that the defendant is a person who is considered “respectable” among the jury (Atmasmita, 1996).

Plea Bargaining is interpreted as a process where the public prosecutor and the defendant in a criminal case make a negotiation which will be beneficial for both parties to be proposed for court approval. Usually, it includes a guilty plea from the defendant to obtain a waiver or several other benefits which make it possible to obtain a leniency (Karper, 1979). Plea Bargaining consists of an agreement between the public prosecutor and the defendant or his legal counsel which results in a guilty plea by the defendant. The public prosecutor agrees to give a lighter sentence compared to taking a trial mechanism that might harm the defendant because of the possibility of getting a heavier sentence (Zimring & Frase, 1980). Plea bargaining is defined as a negotiation process in which the public prosecutor offers the defendant some concessions to obtain a guilty plea (Harvard Law Review, 1970).

As a country which adopts a Civil Law system, plea bargaining system is basically not known in the criminal procedure system in Indonesia. According to Garoupa and Stephen, “However, plea-bargaining is rarely used

outside Common Law countries, where criminal procedure is adversarial in nature. Plea-bargaining is not frequently used in European Civil Law countries where criminal procedures are inquisitorial” (Garoupa & Stephen, 2008).

Basically, this “Plea of guilt through ‘Special Path’” rule has a similar spirit to the plea bargaining system. The application of the plea bargaining system is based on a comparative study of criminal procedural law conducted by the RKUHAP Drafting Team to several countries such as Italy, Russia, the Netherlands, France and the United States and is considered to have considerable benefits to overcome cases backlog in judicial institutions. However, it cannot be denied, plea bargaining in the US has inspired the Drafting Team as it did in some of the countries above which regulate plea bargaining in their countries (Ramadhan, 2013). According to Robert Strang, “Plea bargaining regulation was added in the process of the improvement of RKUHAP after the drafting team conducted a comparative study to the US” (Strang, 2008). The Drafting Team conducted seven drafting sessions in Indonesia and one comparative study to the US with the support of the US Department of Justice’s Office for Overseas Prosecutorial Development, Assistance and Training (“DOJ / OPDAT”) as a part of the mission to strengthen the criminal justice system outside the US (Strang, 2008). However, plea bargaining arrangements in the US is different from “Plea of guilt through ‘Special Path’” in RKUHAP. This difference caused “Plea of guilt through ‘Special Path’” could not be called as Plea Bargaining. Borrowing the term from Graham Hughes, “Plea of guilt through ‘Special Path’” in RKUHAP is more accurately called as “Pleas Without Bargains” (Hughes, 1980-1981).

The drafting “Plea Bargaining” institution or in Indonesian RKUHAP, in non explicit verbis know as “Plea of guilt through ‘Special Path’” as regulated in Article 198 paragraph (5) and Article 199.

Article 199 of RKUHAP reads:

When the prosecutor reads the indictment, the defendant recognizes all the actions committed and pleads guilty to committing criminal offenses for which the indictment is not more than 7 (seven) years, the prosecutor may submit a case to a short hearing examination session.

The defendant’s plea is stated in the official report signed by the defendant and the prosecutor.

The judge is obliged to:

Notify the defendant of the rights he/she has released by giving recognition as referred to in paragraph (2);

Notify the defendant of the length of the criminal sentence that may be imposed;

Asking if the recognition referred to in paragraph (2) is given voluntarily

The judge can reject the recognition referred to in paragraph (2) if the judge is in doubt about the truth of the defendant’s plea..

Excluded from Article 198 paragraph (5), the conviction for the defendant as referred to in paragraph (1) may not exceed 2/3 of the maximum criminal offense charged.

Article 198 paragraph (5) of RKUHAP reads: “Criminal imprisonment that can be handed down against the defendant shall not be later than 3 (three) years”.

The adoption of the plea bargaining system which was tried to be formulated in the RKUHAP above became the concept of “Plea of guilt through the ‘Special Path’”, practically has a similar goal, which is to resolve cases in court efficiently, which substantially provides an opportunity for the defendant to obtain faster, lighter and less costly judicial reprocess, and given the possibility of criminal remission when the person concerned wants to make a “guilty plea” before the Judge. This is somewhat different from the original plea bargaining system concept, the duration of the sentence, and the submission of evidence to the defendant and his legal counsel, even before the transfer of documents to the court.

Thus, in the plea bargaining mechanism, if an agreement has been reached between the prosecutor and the defendant, it will be able to waive the defendant’s right to the principle of “non self-incrimination” which has been adopted by Indonesia in its Article 175 junto Article 184 KUHAP and implies on the termination of the next judicial process. This is in line with Timothy Lynch who stated that, “Plea bargaining consists of an agreement (formal or informal) between the defendant and the prosecutor. The prosecutor typically agrees to a reduced prison sentence in return for the defendant’s waiver of his constitutional right against non self-incrimination and his right to trial” (Lynch, 2003).

Even though the implementation of “Plea of guilt through ‘Special Path’” concept regulated in RKUHAP is similar to the Plea Bargaining System that has been in force in several countries, especially the US, but there are fundamental differences between the two. In RKUHAP, “Plea of guilt through ‘Special Path’” concept can only be decided by the judge in the hearing after reading the indictment. The concept of “Plea of guilt through ‘Special Path’” does not give space to the prosecutor and legal counsel and/or defendant to negotiate and agree on the criminal threats in the indictment, then only in the trial is determined whether a short examination will be conducted or not. On the other hand in the plea bargaining system, the bargaining process is carried out before the trial takes place. There is a bargaining process between the prosecutor and the defendant and/or legal counsel regarding the article to be charged, negotiating legal facts, and negotiating about the sentence to be given.

Thus, “Plea” is the main requirement the concept of “Plea of guilt through ‘Special Path’” concept in RKUHAP. The plea before the judge at the hearing is a unilateral statement, both written and oral which are expressly stated by one of the parties in the trial case, which confirms either all or part of an event, right or legal correlation submitted by the opponent, which results in the absence of need of an examination by the judge (Mertokusumo, 2003). Plea before the judge at the hearing provides a perfect proof of the person who did it, both personally and specifically represented (Subekti, 1991). In this context, “Plea of guilt through ‘Special Path’” will be applied in The short examination trial.

The short examination trial in the concept of “Plea of guilt through ‘Special Path’” in the RKUHAP is carried out in cases where the proof and implementation of the law is easy and simple. In a short examination trial, the case does not use an indictment, the prosecutor only needed to list the articles that have been violated. The trial is only conducted by a single judge. In addition, the judge is also obliged to reaffirm the defendant’s plea, if the judge is in doubt, then the judge can refuse the defendant’s plea and the case is returned to the ordinary examination trial (Tristanto, 2018). Thus, it can be understood that the process in this short examination trial uses the enclosed system.

The enclosed system in the “Plea of guilt through ‘Special Path’” can be seen when the defendant who admits his/her actions cannot make an agreement with the prosecutor regarding the length of sentence received. They also cannot negotiate the indictment of what will be charged to the defendant, because the chance for a confession is only after the prosecutor reads the indictment before the trial. RKUHAP regulates that judges still has an important role in giving sentence. However, the judge cannot give a decision exceeding 2/3 of the maximum criminal threat from the criminal act charged (Subekti, 1991). This enclosed system is aimed for the absence of corruption possibility in the prosecutor which handles the case so that “Plea of guilt through ‘Special Path’” can be implemented when reading the indictment so that the judge and the public can know the process faced by the defendant (Tristanto, 2018).

The concept regulation of “Plea of guilt through ‘Special Path’” cannot be considered perfect because of there are some regulations that must be corrected. One of the reasons was that the Drafting Team of RKUHAP did not make a procedure or a separate examination for the defendant who admitted his mistake and only delegated the case to the short examination trial. In the short examination trial, RKUHAP regulates that the trial is led by 1 (one) judge.

In applying the concept of “Plea of guilt through ‘Special Path’”, it should also be noted about the giving of punishment which is based on the strength of evidence against the defendants and the need for the public to be protected from potential offenders in the future. Thus, in determining a punishment based on this concept there must be the ability of the officer to fulfill a sense of justice in public. The prosecutor must be able to submit fair claim in accordance with the actions carried out, and the judge also plays an important role in passing the verdict to ensure the enforcement of justice.

V. CONCLUSION

The regulation stated in Article 4 paragraph (2) of Law Number 48 of 2009 concerning Judicial Power mandates that the judiciary helps justice seekers and tries to overcome all obstacles in order to achieve a simple, speedy and low cost trial. However, based on the research conducted in this paper, the facts showed that apparently a simple, fast and low cost litigation cannot be achieved by the criminal justice system on the existing KUHAP. Meanwhile, the implementation of the Plea Bargaining System in many countries has succeeded in suppressing the cases backlog in court, so that it is quite appropriate that the RKUHAP in Article 198 paragraph (5) and Article 199 has included this concept known as “Plea of guilt through ‘Special Path’”. Even though there are indeed some shortcomings in the implementation of this concept that requires further study in the criminal justice system in Indonesia.

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