"More Adversarial, but not Completely Adversarial": Reformasi of the Indonesian Criminal Procedure Code

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Abstract

This Article provides a perspective not normally available to U.S. legal scholars in the area of comparative law – it is a firsthand account of criminal procedure reform in the Republic of Indonesia. Indonesia, the world’s fourth largest country by population and the largest civil law jurisdiction, has embarked on sweeping legal, political, and institutional reform in the ten years since the collapse of authoritarian rule. Half way around the world from the U.S., Indonesia is virtually unknown to Western legal scholars, yet the changes being made in Indonesian criminal procedure are fundamental: establishing a suspect’s right to remain silent; limiting pretrial detention; requiring police/prosecutor cooperation; liberalizing the rules of evidence; introducing guilty pleas and cooperating defendants; and replacing inquisitorial trial and pretrial procedures with adversarial ones. This process illustrates the enormous potential for code-based criminal procedure reform and its capacity to introduce new concepts into a criminal justice system, but its success requires legal actors to accept and internalize an entirely new conceptualization of their roles. (P)This Article places the transformation of the Indonesian criminal procedure within the larger context of overall Indonesian legal reform as well as the widespread efforts to modernize criminal procedure codes throughout the civil law world. It is not limited to examining the final result, but also describes how and why particular results were reached – the sources the drafting team relied upon, the evolution of the code during the drafting process, and the motivations of drafting members in reaching particularly results. This Article pulls together a number of different important areas of current scholarship – comparative criminal procedure, international technical assistance, and post-authoritarian reform – in a reader-accessible case study format.
"MORE ADVERSARIAL, BUT NOT COMPLETELY ADVERSARIAL": REFORMASI OF THE INDONESIAN CRIMINAL PROCEDURE CODE

Robert R. Strang*

INTRODUCTION

The criminal procedure code is the backbone of any criminal justice system. This is particularly true in civil law countries where it is the code, rather than judicial precedent and court-drafted rules, that defines the legal rights of the accused and the relationship between different judicial participants. By setting down the rules, the code helps to establish the underlying legal culture and expectations of the participants and shapes the development of the legal institutions involved in the criminal justice system. The civil law tradition, however, has been seen as more rigid than the common law system because it deprives judges of the capacity to shape procedures in response to new facts and developments.

This perception is wrong. The very code-based systems that are less flexible in the short term have proven to be more capable than common law systems of adopting broad new legal paradigms over time. The reform process may take several years, but the results have been dramatic: a number of civil law countries have achieved remarkable transformations of their criminal justice system over the past few decades, including the adoption of many adversarial features.¹

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Different agents of change are responsible for this hybrid criminal justice system in code-based countries. First, there is genuine dissatisfaction with the formalistic procedures of the civil law tradition and a greater need for efficiency to confront rising crime rates. Second, the perceived need to combat organized crime, terrorism, corruption, and other crimes has led countries to adopt new specialized criminal procedures that subsequently migrated into the general criminal procedure code. Third, decreased tolerance for domestic historical abuses, such as coerced confessions and arbitrary detention, has motivated countries to alter procedures, giving defendants greater rights to challenge the government’s case. Fourth, international procedural norms embodied in human rights conventions, especially those contained in the International Convention of Civil and Political Rights ("ICCPR") and the Convention on Torture have spurred domestic procedural reforms. Fifth, internal institutional rivalries, particularly over the control of the investigation countries have introduced new and more adversarial criminal procedure codes over past fifteen years); Michael J. Spence, The Complexity of Success: The U.S. Role in Russian Criminal Procedure Reform, 60 CARNEGIE PAPERS 3, 3-4 (2005), available at http://carnegie endowment.org/pubs.


stage, are leading to procedural changes. Sixth, the experiences and assumptions of countries that are actively promoting criminal justice reform abroad are reflected in the codes adopted by countries receiving technical assistance. Finally, regional adoption of new procedures has developed further momentum toward reform in neighboring countries.

Code-based reform is not the only model for change. Common law systems are capable of criminal procedure reform through judicial decisionmaking; the Warren Court in the United States during the 1960s bears witness to this potential. There are benefits to the common law approach—changes are developed by judges based on the concrete experience of real cases over time, rather than untested legal theory. But there are also significant drawbacks to this approach. When a common law system effects such a criminal procedure transformation through constitutional interpretation by the courts, options are limited by the text of the constitution. Furthermore, constitutionally-grounded judicial decisions, once made, can limit further innovation.

By bringing about transformational changes to their legal ever, the decisions of these supranational bodies may serve to constrain future reforms by elevating particular procedures to the level of human rights.

6. See Carlos Rodrigo de la Barra Cousino, Chile: Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile, 5 Sw. J. L. & TRADE AM. 323, 329 (1998) (discussing high risks of conflict between prosecutors and judges); Lehmann, supra note 4, at 192 (shifting pretrial detention power from prosecutors to judges); Spence, supra note 1, at 4 (shifting supervisory authority over investigations from prosecutors to judges).


8. See Revolution, supra note 1, at 626 (describing how Latin American reform movement diffused within region).


systems through legislation, civil law countries enjoy a political advantage over common law nations. The consensus-building legislative process can make the procedural reforms more readily accepted by legal institutions and actors, particularly where they are represented in the drafting process, than changes brought about through the courts.11

Code reform enjoys the capacity to produce change in a freer and more holistic manner, rather than piecemeal by precedent. Significant procedural changes generate resistance. Institutions will perceive that their authority or independence is threatened or diminished by reform. The code-drafting process, however, offers the potential of something for everyone.12 Packaging all changes into a single new code can avoid intermediate forms of procedural rules that are not viable or are rejected by self-interested institutions because the benefits of a particular change to the institution are not apparent in isolation.13

Code-based change allows its proponents to seek to transform the legal culture. It can directly and systemically alter the mindset of the legal elites through the creation of new paradigms that require legal actors to accept and internalize a new conceptualization of their roles. By using a "total immersion" approach, it can challenge legal actors to do more than simply translate reforms back into their existing conceptual framework.

The result of this capacity for change is an emerging system of criminal justice in civil law countries—a code-based system of

11. See, e.g., Brown, supra note 9, at 1414-15, 1427 (attributing lack of societal acceptance of Warren Court decisions revolutionizing U.S. criminal procedure to their non-legislative origin); Transplants to Translations, supra note 2, at 49 (noting that Italy's adoption of plea bargaining was by statute and enjoyed more political support than the judicially-created plea bargaining system that arose in Germany). The U.S. legal system has been capable of adopting codes to replace common law development, such as the 1972 adoption of the Federal Rules of Evidence, but these codes have typically served primarily to codify existing common law rules rather than to transform the criminal justice system into something new. See Roger C. Park & Michael J. Saks, Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn, 46 B.C. L. Rev. 949, 954 (2006).

12. For example, during the Russian criminal procedure reform process in 2001, the Russian Procuracy surrendered its authority over the issuance of search and arrest warrants, but gained greater control over the investigation as part of the bargain. Recent changes, however, have stripped the Procuracy of its authority to investigate. See William Burnham & Thomas Firestone, Investigation of Criminal Cases Under the Russian Criminal Procedure Code 14-21 (Oct. 29, 2007) (unpublished manuscript, on file with author).

criminal procedure with adversarial features.\textsuperscript{14} Some observers may see criminal procedure reform as a process of moving toward a more adversarial model,\textsuperscript{15} others see the process more as one of convergence of common law and criminal law systems.\textsuperscript{16} Convergence suggests a coming together of two systems—although the United States will not likely consciously adopt significant new inquisitorial features into its criminal justice system any time soon due to its strong historical hostility to the inquisitorial system, other common law countries may be more willing to experiment.\textsuperscript{17}

This Article examines the efforts to transform the criminal procedure in the largest civil law country in the world—the Republic of Indonesia. Indonesia, the world's fourth largest country by population and the largest civil law jurisdiction, has embarked on program of reformasi—sweeping legal, political, and institutional reform during the ten years since the collapse of authoritarian rule in Indonesia in 1998.\textsuperscript{18} Half-way around the world, Indonesia is virtually unknown to Western legal scholars, yet the changes being made in Indonesian criminal procedure are fundamental: establishing a suspect's right to remain silent;\textsuperscript{19} limiting pretrial detention;\textsuperscript{20} requiring police/prosecutor

\begin{itemize}
\item \textsuperscript{14} See generally Amodio, supra note 1; Langer, supra note 1, Spence, supra note 1.
\item \textsuperscript{15} See, e.g., Cavise, supra note 4, at 1.
\item \textsuperscript{16} See, e.g., Amann, supra note 5, at 818-45.
\item \textsuperscript{17} See Stephen C. Thaman, A Comparative Approach to Teaching Criminal Procedure and its Application to the Post-Investigative Stage, 56 J. LEGAL EDUC. 459, 462 (2006) [hereinafter Comparative Approach] (describing rise of nativist sentiment toward comparative criminal procedure in the United States); Van Kessel, supra note 10, at 410, 504 (observing United States' "worship of the adversary structure [and] our reactionary distaste for anything characterized as inquisitory," and arguing that this strictly adversarial system relegates the American trial judge to simply "referee" a trial). This should hardly be surprising for a country that has successfully fought off the adoption of that other Napoleonic _uber_ system—the metric system. The United Kingdom, by comparison, faces pressure to harmonize its system with the civil law countries of the European Union ("E.U."), and it will most likely do so through a legislative, code-based solution. See Nancy Amoury Combs, Copping a Plea to Genocide: The Plea Bargaining of International Crimes, 151 U. PA. L. REV. 1, 46-49 (noting development of inquisitorial procedures within English criminal justice system).
\item \textsuperscript{18} See PETRA STOCKMANN, INDONESIAN REFORMASI AS REFLECTED IN LAW: CHANGE & CONTINUITY IN POST-SUHARTO ERA LEGISLATION ON THE POLITICAL SYSTEM AND HUMAN RIGHTS 1 (2004).
\item \textsuperscript{19} See Draft of Kitab Undang-Undang Hukum Acara Pidana [Draft Criminal Procedure Code], arts. 22(1), 90 (Sep. 8, 2008) [hereinafter DRAFT KUHAP] (on file with Fordham International Law Journal). The proposed Kitab Undang-Undang Hukum Acara Pidana ("KUHAP") has gone through several draft versions. Unless otherwise
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cooperation;\textsuperscript{21} liberalizing the rules of evidence;\textsuperscript{22} introducing guilty pleas and cooperating defendants;\textsuperscript{23} and replacing inquisitorial trial and pretrial procedures with adversarial ones.\textsuperscript{24}

This Article provides a perspective not normally available to U.S. legal scholars in the area of comparative law; it is a firsthand account of criminal procedure reform as it occurred. It focuses not only on examining the result, but also on how and why particular results were reached—the sources that the criminal procedure drafting team relied upon, the evolution of the code during the debating and drafting process, and the motivations of the team in reaching those results. It also places the transformation of Indonesian criminal procedure within the larger context of overall Indonesian reform and the widespread efforts to modernize criminal procedure code in civil law countries. The Indonesian criminal procedure reform process directly illustrates the enormous potential for code-based criminal procedure reform and its capacity to introduce new paradigms into a criminal justice system.

I. THE DUTCH CIVIL LAW INHERITANCE

One of the primary legal developments during the medieval period in Europe was the emergence of the civil law system. This system, first adopted in Continental Europe and later spread to many of former European colonies, has been characterized as inquisitorial due to its historical development from Roman Catholic canon law.\textsuperscript{25} Its classical components involved the establishment of a judicial state official—an investigating magistrate—who replaced the victim or the victim's family.\textsuperscript{26} This medieval judicial official conducted the questioning of witnesses, the tor-

\begin{itemize}
\item \textsuperscript{20} See id. arts. 59(5)(c), 60.
\item \textsuperscript{21} See id. arts. 8(1), 15, 15.
\item \textsuperscript{22} See id. arts. 83, 175-76.
\item \textsuperscript{23} See id. arts. 113, 199, 200.
\item \textsuperscript{24} See id. arts. 150, 154, 176, 178.
\item \textsuperscript{26} See id. at 1096 (describing replacement of adversarial system by Roman Catholic canon law and rediscovery of Roman law in Continental countries).
\end{itemize}
ture of the defendant, and the other investigative acts. The investigating magistrate reduced his results to writings placed in the dossier. The written contents of the dossier became the exclusive basis upon which the defendant's guilt or innocence was determined, without a public trial based on oral testimony. Therefore the formal procedures by which the dossier's contents were gathered and memorialized during the official investigation became the de facto rules of evidence. Once properly entered into the dossier, these reports and documents were effectively "in evidence." During the Napoleonic reforms, torture was formally eliminated and the public trial was restored in many civil law countries, but the dossier system with its written results of the formal official investigation has continued in civil law countries. At trial, the judge continues to rely heavily upon the written reports of the dossier or the public reading of its contents as evidence rather than the oral testimony of witnesses at trial.

Like many other former colonies of Continental Europe, Indonesia generally follows the civil law tradition. During the colonial period, the Dutch maintained a dual criminal justice system within Indonesia—one court system for the Dutch and other foreigners living in the colony and a second court system for indigenous Indonesians, the pribumi. Judges within the court system for Europeans applied the Reglement op de Strafvordering, which closely followed the criminal procedure code in the Netherlands, while in the indigenous local courts, Indonesian judges

27. See Comparative Approach, supra note 17, at 465.
29. See Doctrinal Issues, supra note 25, at 1097.
31. See Doctrinal Issues, supra note 25, at 1097.
32. See id. at 1097-98.
33. See Annemarieke Beijer, Cathy Cobley & André Klip, Witness Evidence, Article 6 of the European Convention on Human Rights and the Principle of Open Justice, in Criminal Justice in Europe: A Comparative Study 281, 287 (Phil Fennell et al. eds., 1995) (explaining that Dutch "courts base their judgments . . . mainly on the dossier, which contains the results of the pre-trial investigation" and the trial is more a "verification of the results of the prior stages than an active inquiry" of its own); Rudolph B. Schlesinger, Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience, 26 Buff. L. Rev. 361, 365-67 (1977).
35. See id. at 28 n.62.
applied a slightly looser version of Dutch procedure, codified in 1848 as the *Inlandsch Reglement*, and later revised in 1941 as the *Herzien Inlandsch Reglement*. During the Japanese occupation, the dual court systems were finally abandoned, and the now renamed *Herzien Indonesisch Reglement* became the national criminal procedure code. Following independence, in 1951, Indonesia formally adopted the *Herzien Inlandsch Reglement*, translating the code into the Indonesian national language, *Bahasa Indonesia*, essentially without change.

In 1981, Indonesia enacted the current criminal procedure code, *Kitab Undang-Undang Hukum Acara Pidana* ("KUHAP"). The KUHAP continues to reflect the Dutch legacy of criminal procedure although it adds some adversarial features. Overall, it takes a highly formalized approach to the justice system and strongly compartmentalizes the criminal process into three distinct stages—investigation, prosecution, and adjudication, led by the police, the prosecution, and the judge, respectively.

A. The Investigation

The investigation is controlled by the police. Like some other civil law countries, Indonesia has abandoned the investigating magistrate. Unlike most civil law jurisdictions that have

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36. See id. at 28 n.63.
37. See id.
38. See id. at 28 n.63, 178.
40. See generally KUHAP, supra note 39, pmbl. For an outline of the 1981 KUHAP's principles and objectives, see KUHAP, supra note 39, Elucidations I-3, I-4.
41. See generally *Indonesian Legal System* 87-98 (Supreme Court of Indonesia & University of Indonesia eds., 2005) (describing history of criminal procedure during colonial, early national and KUHAP periods).
42. See KUHAP, supra note 39, arts. 1(2)-(8).
43. See id. arts. 1(1)-(2).
44. During the Dutch colonial period, a native Indonesian prosecutor worked under the supervision of the judge, but this system was finally abolished in 1951. See *Pompe*, supra note 34, at 46-47. Civil law countries are, on the whole, generally moving away from the investigating magistrate model. For example, in France, Spain, and the Netherlands, magistrates with investigatory authority continue to exist, but they are used in only a small percentage of cases. The Dutch are considering ending the process of a judicial investigation. See A.H.J. Swart, *Netherlands, in Criminal Procedure Systems in the European Community*, 279, 298 (Christine Van Den Wyngaert ed., 1993). In Italy, Germany, and many Latin American countries, magistrates no longer lead investigations—magistrates now focus exclusively on judicial functions such as determining
eliminated the investigating magistrates, however, the prosecutors do not have a recognized role during the investigative stage except in corruption and human rights cases.45 Instead, the police conduct the official investigation and prepare the official investigative dossier with little prosecutorial or judicial oversight.46

Under the current KUHAP, the investigation stage itself is formally divided into preliminary and formal investigation phases.47 During the preliminary investigation, the “junior” investigator determines whether a crime has taken place.48 This stage most closely resembles an “inquest” used for certain types of crime in some common law countries.49

Based on the preliminary investigation findings, the case can progress to the formal investigation stage.50 Here, the KUHAP assigns a central role to the dossier. During the formal investigation, the investigator summons the suspect for examination, examines witnesses with personal knowledge, including witnesses proposed by the accused, conducts searches and seizures, requests expert reports, and conducts other investigative actions.51 The investigator then places all resulting witness statements, reports and seized documents in the dossier.52 The investigator is permitted to order pretrial detention of the suspect for up to twenty days, which the prosecutor may subsequently ex-

the legality of the investigatory actions taken by the police and/or prosecutors (e.g., searches and arrests), preserving testimony through depositions, and determining the admissibility of evidence. See Micah S. Myers, Note, Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations, 25 MICH. J. INT'L L. 211, 250-52 (2003); Doctrinal Issues, supra note 25, at 1099. Switzerland currently uses a mixed system that makes use of investigating judges in certain cantons and not in others. See Federal Office of Justice (Switzerland), Criminal Law and Law of Criminal Procedure Unit, http://www.bj.admin.ch/bj/en/home/die_oe/organisation/db_strafrecht.html (last updated Jan. 5, 2007). However, Switzerland plans to abolish the investigating judge in 2010 when it establishes a single code of criminal procedure at the federal level. See John D. Jackson & Nikolay P. Kovalev, Lay Adjudication and Human Rights in Europe, 13 COLUM. J. EUR. L. 83, 119 (2006).

45. Prior to the enactment of the KUHAP, prosecutors enjoyed a greater role in conducting the investigation. See INDONESIAN LEGAL SYSTEM, supra note 41, at 89-90, 110. With the enactment of the KUHAP in 1981, Indonesian prosecutors retained only the authority to investigate "special crimes"—corruption. See id. at 90.
46. See id. at 90.
47. See KUHAP, supra note 39, arts. 1(5), 102-08.
48. See id. arts. 102-05.
49. See Doctrinal Issues, supra note 25, at 1097.
50. See KUHAP, supra note 39, art. 1(5).
51. See id. arts. 1(2), 112-21.
52. See id. art. 8(1).
tend for an additional forty days, all without judicial involvement.\(^5\)

Indonesia's adoption of the traditional civil law approach has meant that few rights of the defendant are clearly articulated in the KUHAP. The KUHAP fails to make clear a right against self-incrimination or a standard of proof that protects the presumption of innocence. Equally importantly, there is no regular judicial avenue at the pretrial stage to assert that rights have been violated by the police or seek appropriate deterrent remedies such as suppression of illegally-obtained evidence.\(^4\)

Instead, the KUHAP places limits on the powers of the police by formally identifying what steps investigators are authorized to take, rather than allowing them to investigate in any manner not otherwise prohibited. As a result, rights are routinely violated, but there is no realistic avenue for redress. The quality of the police investigation also suffers—without express legal authority to conduct certain covert police activities\(^5\) Indonesian police are reluctant to either engage, or seek to use at trial, evidence from covert work or cooperating defendants.\(^6\)

For example, in the area of wiretapping, Indonesia has no general legislation authorizing the interception of telephone conversations.\(^7\) Nevertheless, in practice, Indonesian police are known to conduct wiretapping without legal authority. As a re-

\(^{53}\) See id. art. 24.

\(^{54}\) The KUHAP permits the defendant to challenge his detention shortly before trial. See id. arts. 79-81. However, by that stage the harm of pretrial detention is already done and financial compensation is the only remedy.

\(^{55}\) The KUHAP provides that investigators are authorized to "take other responsible acts in accordance with law." Id. art. 7(1)(j). The KUHAP's official commentary defines such other acts to mean, "such acts that: (a) are not contrary to a rule of law; (b) are consistent with the legal obligation which compels the taking of such official acts; (c) are proper and reasonable and within the scope of his office; (d) are considered suitable in compelling circumstances; and (e) respect human rights." Id. Elucidations art. 5. Despite the apparent authority to act subject to these provisions, investigators are unsure whether they have the legal authority to do so. Their cautious approach proved justified when the Constitutional Court held that telephone interceptions without express legal authority are illegal. See In re Mulyana Wirakusumah et al., Dec. No. 012-016-019/PUU-IV/2006, 73 (Const. Ct. 2006) (Indon.) (on file with Fordham International Law Journal).


\(^{57}\) See Regulation on the Technical Aspects of Interception, Ministry of Communications and Informatics, No. 11/PER/M.KOMINFO/02/2006, pmbl. (Indon.). In corruption cases, the Ministry of Communications promulgated regulations permitting
suited, the police cannot include the results of their interceptions in the dossier and any recordings cannot be later used as evidence at trial—the police are limited to using the intercepts as background criminal intelligence. This unregulated system perversely means both that citizens' privacy rights are not protected and vigorous gathering of probative evidence is hampered.

B. The Prosecution

The prosecution stage is similarly formalistic and compartmentalized. The investigator must present the dossier to the prosecutor for examination and approval. The prosecutor has seven days to study the dossier and may accept it or return it to the investigator for further investigation.

Because the police prepare the dossier without any input from the prosecutors, the prosecutor's role is essentially limited to either accepting or rejecting the finished product. As a result, the dossier sometimes shuttles back and forth between the police, who believe their work is done, and the prosecutors, who refuse to certify that the dossier is complete. Sometimes, the police simply choose to drop the returned case rather than investigate it further.

Once the dossier is formally accepted, the prosecutor prepares a bill of indictment for submission with the dossier to the district court for its review. The indictment itself must contain wiretapping and the use of its results in court but there is no express statutory authority to do so. See generally id.

58. But see id. art. 17 (allowing investigators in corruption cases to use wiretap information in order to "disclose a criminal act.").
59. See KUHAP, supra note 39, art. 110(1).
60. See id. art. 138.
62. See KOMISI HUKUM NASIONAL (INDONESIA), LAW REFORM POLICIES (RECOMMENDATIONS) 125 (2003) [hereinafter LAW REFORM POLICIES] ("Another problem that often arises is the passing back and forward of case files for one reason or another."); PRICE WATERHOUSE COOPERS, REPORT OF THE GOVERNANCE AUDIT OF THE PUBLIC PROSECUTION SERVICES OF THE REPUBLIC OF INDONESIA 102 (2001) ("Review and return of dossiers to investigations causes delay and may damage the working relationship between prosecutors and investigators.").
64. See KUHAP, supra note 39, arts. 139, 143.
tain a detailed explanation of the crime and can be altered only one time at least seven days before the trial. There are limited provisions for joinder of defendants involved in a single crime—the prosecutor must receive the dossier for each defendant at or about the same time from the police. As result, defendants, even when involved in a single conspiracy, are often charged and tried separately, leading to inefficiency and potentially inconsistent outcomes.

Overall, although the KUHAP purported to establish Sistem Peradilan Satu Atap ("Criminal Justice Under One Roof System"), the results have been the opposite. By establishing formal stages, each with sharp time limits, during which first the police and then the prosecutors are responsible for the case, the KUHAP highly compartmentalizes their respective roles, with the predictable result that the police and the prosecutors rarely cooperate.

C. The Trial

All Indonesian cases sent to court go to trial. There is no pretrial stage where legal issues can be resolved, a system of consensual resolution of criminal cases through guilty pleas, or the use of cooperating defendants.

The Indonesian trial, however, is often little more than a confirmation of the contents of the investigative dossier con-

65. See id. arts. 143, 144.
66. See id. art. 141.
67. See id. art. 142.
68. INDONESIAN LEGAL SYSTEM, supra note 41, at 88.
69. See id. at 110-11 ("[T]he reality is that [the 1981 KUHAP] has resulted in an increasing lack of cooperation between the police and prosecutors and the development of an unhealthy institutional rivalry."); Wagner & Jacobs, supra note 56, at 201-02; Surachman & Maringka, supra note 61, at 2.
70. See PRICE WATERHOUSE COOPERS, supra note 62, at 102.
71. See KUHAP, supra note 39, arts. 77-83. The Indonesian police developed their own informal plea bargaining system known as kasus cadangan ("reserve cases"). When a person is guilty of multiple crimes but the police want to obtain their cooperation, they seek to charge him with only one crime and save the others in reserve. If he fails to cooperate or engages in new criminal activity, they arrest him on one of the earlier crimes and do not have to worry about whether they have enough evidence to charge him on his post-release activities. This charge manipulation is done without court or prosecutor involvement. See Wagner & Jacobs, supra note 56, at 211. In one instance, the police contacted the judge directly to object to the sentencing recommendation made by the prosecutors to the court because they felt it was too high given the cooperation provided by the defendant.
ducted in a summary fashion.\textsuperscript{72} Courtroom procedures place significant limits on the adversarial nature of the trial. Armed with the dossier, the judge controls the order and questioning of witnesses as in the traditional inquisitorial model.\textsuperscript{73} The prosecution and defense\textsuperscript{74} may pose follow-up questions to the witness, but are not allowed to conduct cross-examination of witnesses through leading questions.\textsuperscript{75} The judge also determines whether expert witnesses should be called.\textsuperscript{76} Opening statements are limited to the prosecutor's reading aloud of the lengthy indictment\textsuperscript{77} and closing statements involve the reading by the parties of their respective proof and the making of sentencing requests.\textsuperscript{78}

The evidentiary rules contained in the current KUHAP also strongly reflect its Dutch roots.\textsuperscript{79} The KUHAP recognizes only four types of evidence—documents, witness statements, defense statements, and expert reports.\textsuperscript{80} Circumstantial evidence may be considered, but only if it comes from witness and defendant testimony or documents.\textsuperscript{81} Physical evidence can be considered by the judge in judging other evidence,\textsuperscript{82} but is not deemed evidence itself. Computer records, audio and video tapes, and other forms of evidence falling outside this statutory framework are not admissible. Evidence obtained abroad is also not readily admissible. While the judge must find the defendant's guilt to a

\textsuperscript{72} In this way, Indonesia's trial procedures echo their Dutch origins. See supra note 33 and accompanying text.

\textsuperscript{73} See KUHAP, supra note 39, arts. 160(1)(a), 160(2), 163, 165(1); see also Doctrinal Issues, supra note 25, at 1097 (describing general inquisitorial practice); Surachman & Maringka, supra note 61, at 6.

\textsuperscript{74} Indonesian defendants typically appear unrepresented by legal counsel in court. See U.N. Human Rights Council, Working Group on the Universal Periodic Review, Summary: Indonesia, ¶ 14, U.N. Doc A/HRC/WG.6/1/[IDN]/3 (Apr. 2008). While all defendants are entitled to retain an attorney, the Government provides free legal counsel only in cases where the potential punishment is greater than five years' imprisonment. See KUHAP, supra note 39, art. 56; see also Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, Country Reports on Human Rights Practices: Indonesia §1(e) (2005), http://www.state.gov/g/drl/rls/hrrpt/2005/61609.htm [hereinafter State Dep't Indonesia Report].

\textsuperscript{75} See KUHAP, supra note 39, arts. 165-66.

\textsuperscript{76} See id. art. 180(1).

\textsuperscript{77} See id. art. 155(2).

\textsuperscript{78} See id. art. 182(1).

\textsuperscript{79} See supra note 41 and accompanying text.

\textsuperscript{80} KUHAP, supra note 39, art. 184(1).

\textsuperscript{81} See id. arts. 184(1)(d), 188.

\textsuperscript{82} See id. art. 181.
moral certainty, the KUHAP tracks the old Dutch tradition of permitting a judge to find the defendant guilty only if there are at least two different categories of evidence present.\textsuperscript{83}

As a result of the lack of opportunity to engage in advocacy in establishing the facts, the prosecutors and defense attorneys are typically passive in court; their role in court is confined almost exclusively to legal argument rather than fact development. Instead, the verdict is determined by the judge's confirmation of the contents of the dossier through judicial questioning of certain witnesses.\textsuperscript{84}

Overall, this formalistic trial system leads to a quantitative (counting of types of evidence), rather than a qualitative, determination of the weight of the evidence by the judge. It hampers the ability of prosecutors to present important types of evidence, such as electronic, video or audiotapes, or physical evidence.\textsuperscript{85} It can result in acquittals where there may be strong proof of one type, but none in one of the other categories.

II. \textit{SEEDS OF REFORM}

During the colonial period and the subsequent authoritarian regimes of Indonesia's first two presidents, Sukarno and Suharto, the Indonesian legal system was focused on the mainte-

\begin{footnotesize}
83. \textit{Id.} art. 183. The Dutch requirement of two types of evidence (not simply two witnesses or two documents, but two different types of evidence) is a throwback to the old inquisitorial rules developed in Catholic Canon law. \textit{See Comparative Approach, supra note 17,} at 464-65 (requiring certain number of eyewitnesses to prove guilt). In the Netherlands these formalistic rules have remained part of the code, but have been eroded in practice. \textit{See Swart, supra note 44,} at 296. Elsewhere in Europe, the two types of evidence rule was largely abolished during the Napoleonic reforms and replaced by a "free evaluation of evidence" system where the judge finds guilt or innocence based on all of the evidence, not on a formula for the number or types of evidence. \textit{See Jackson \& Kovalev, supra note 44,} at 108 (describing emergence of "free evaluation" system in civil law countries).

84. Exclusive reliance on the dossier poses serious due process issues. For example, the European Court of Human Rights has held that the Dutch system of heavy judicial reliance on the contents of the dossier, upon which the Indonesian system was modeled, violates a defendant's right at trial to confront witnesses against him. \textit{See Kostonski v. Netherlands,} 12 Eur. Hum. Rts. Rep. 434, 447-49 (1989) (conviction based on anonymous witness statements violated fair trial); \textit{see also} European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(3)(d), Nov. 4, 1950, 213 U.N.T.S. 222 (recognizing right to confront witnesses); \textit{Comparative Approach, supra note 17,} at 472 (noting rise of civil law jurisprudence asserting right to confrontation).

85. \textit{See Wagner \& Jacobs, supra note 56,} at 211-13; \textit{Price Waterhouse Coopers, supra note 62,} at 101 (lack of KUHAP reform has led to lack of policies on "such matters as the use of DNA evidence, videotaped examinations, or electronic documents.").
\end{footnotesize}
nance of state control and national security. Indonesia’s Constitution recognized few individual rights; instead, it was designed to maximize government power and focused on the citizens’ duties to the State rather than the State’s protection of citizens’ rights. During the Suharto New Order era, the courts were controlled by the executive branch. The current KUHAP’s non-adversarial approach supported this system of crime control and state order, rather than ensuring due process through balancing law enforcement’s legitimate needs with individual rights.

With the downfall of Suharto and the collapse of the New Order in May 1998, Indonesia entered a new reformasi era of democracy and political reform. As part of this new spirit of reformasi, many Indonesians demanded comprehensive legal reform, including changes to the criminal procedure. Law enforcement officials and prosecutors have objected to Indonesia’s formalistic and compartmentalized pre-investigation, investigation, prosecution and trial stages and its limited list of admissible evidence and proof requirements. International human rights organizations have complained of Indonesia’s failure to observe internationally recognized rights of the accused or spell out the consequences if they are violated. Reformers generally have decried the absence of an integrated justice system other than in

87. See id. at 253-54.
88. See INDOONESIAN LEGAL SYSTEM, supra note 41, at 54-56, 107.
89. See Stockmann, supra note 18, at 56-57 n.6.
91. See Indonesian Legal System, supra note 41, at 87-98, 110-11 (outlining responsibilities of law enforcement officials and prosecutors under KUHAP); KEJAKSAAN REPUBLIK INDONESIA [Prosecutor’s Office of the Republic of Indonesia], Agenda of the Attorney General Office’s Reform 42 (2006) (describing commitment made by the leaders of Indonesia’s legal and law enforcement institutions to improve coordination and communication within various components of criminal justice sector); PRICE WATERHOUSE COOPERS, supra note 62, at 102-06.
A number of factors form the groundwork for criminal procedure reform—new domestic legislation, international conventions, judicial decisions, and organizational reforms.

A. Legislative Innovation and International Influences

Efforts over the past five years to revise criminal procedures relating to specific, high-profile crimes (*lex specialis*) have had the effect of preparing the legal landscape to accept broader, more general reforms. For example, five specific laws—the terrorism, money laundering, corruption, trafficking-in-persons laws, and most recently the cybercrime law—have expanded the concept of admissible evidence by adding electronic evidence to the list of admissible evidence to prove these specific crimes. While this change did not alter the overall approach of formally listing the types of evidence that can be considered at trial, these five laws reflected a willingness of Indonesian legal experts to accept that the rules of evidence needed to be revised to increase flexibility.

A sixth law, the Witness Protection Law of 2006, set the stage for the introduction of the concept of cooperating defendants (“crown witnesses”). This law, which was designed initially

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to focus on protecting victims, was expanded to encourage whistle-blowing, particularly in corruption cases.\textsuperscript{98} With respect to cooperating defendants, the law provides that while a "witness who is also an offender in the same case cannot be released from any legal charges if he/she is proven legally and convincingly guilty; nevertheless, his/her testimony can be used by the judge as a consideration to lessen the sentence."\textsuperscript{99} Similarly, a draft amendment to Indonesia's corruption law proposes even more explicit benefit to cooperating defendants.\textsuperscript{100} While still requiring that the cooperating defendant stand trial rather than plead guilty in anticipation of future cooperation, this draft provision reflects the willingness to reward cooperation with sentence mitigation, a form of plea bargaining.

International conventions have also advanced the cause of criminal procedure reform in Indonesia.\textsuperscript{101} For example, in 2005, Indonesia ratified the ICCPR, which obligates Indonesia to amend its domestic procedures to satisfy the requirement of the ICCPR.\textsuperscript{102} Article Nine of the ICCPR requires that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to


\textsuperscript{101} See Hamzah, \textit{supra} note 63, at 6-9 (noting role of international conventions in spurring criminal procedure reform in Indonesia).

exercise judicial power," a provision that has generally been interpreted to mean within a "few days." Thus, even under a very generous interpretation of the "margin of appreciation" doctrine, Indonesia's twenty days of detention without judicial review for defendants as permitted under the current KUHAP is not in compliance with the speedy presentment requirement of Article 9 of the ICCPR.

Beyond these reforms themselves, one of the characteristics of the Indonesian legal community is the small size of the expert legislative drafting community—many of the legal scholars and government officials authoring the anti-corruption and money laundering laws, for example, also serve on the committee to revise the KUHAP. Through these shared experiences, the authors of the legislative reforms are sensitized to some of the challenges, open to outside experience and more comfortable with new norms. As a result, they have become a central part of the

103. ICCPR art. 9(3).
106. See U.N. Hum. Rs. Council, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Mission to Indonesia 20, U.N. Doc. A/HRC/7/3/Add.7 (Mar. 10, 2008) (prepared by Manfred Nowak) (recommending Indonesia reduce "time limits in police custody to 48 hours in accordance with international standards."). Indonesia first recognized the need to place limitations on pretrial detention without judicial review in its new cybercrime law, which was influenced by the time limits contained in the proposed Draft KUHAP circulating at the time. See Undang-Undang Tentang Informasi Dan Transaksi Elektronik [Law on Electronic Information and Transaction] art. 43(6), Law 11/2008, available at http://www.legalitas.org/database/uuid/2008/uu11-2008.pdf (requiring judicial review within twenty-four hours of suspects accused of violating new cybercrime law).
driving force toward broader criminal procedure change.\textsuperscript{108}

Of course, not every legal change in Indonesia has necessarily advanced criminal procedure reform. The Terrorism Law, enacted following the September 11, 2001 attacks in the United States, liberalized the types of evidence that can be considered at trial, but also extended the period of pretrial detention without judicial review for defendants accused of terrorism to seven days of initial detention followed by up to six months of detention to permit the completion of the investigation.\textsuperscript{109}

B. Institutional Reforms

Existing institutions (or lack of institutions) matter greatly when the adoption of adversarial or inquisitorial features are under consideration.\textsuperscript{110} Institutionally, Indonesia has changed in a manner that makes the adoption and acceptance of new procedures more feasible.

1. The Judiciary

In March 2004, the Supreme Court assumed all organizational, administrative, and financial responsibility for the court system from the Department of Justice and Human Rights.\textsuperscript{111} This change provided Indonesia with an independent judiciary that it had previously lacked. By making the judges independent

\textsuperscript{108} For a discussion of the importance of individual legal reformers in criminal procedure change, see Revolution, supra note 1, at 653-55.


\textsuperscript{110} In Russia, for example, the Duma working group drafting its new criminal procedure code considered establishing investigative judges based on the French model, but concluded that it would not fit with the existing highly independent Procuracy inherited from Soviet and tsarist days. They likewise decided to maintain the unitary official inquisitorial investigation model out of concern that the criminal defense bar did not yet have the skills or the resources to conduct their own parallel investigations.

\textsuperscript{111} See generally Undang-Undang Tentang Perubahan Atas Undang-Undang Nomor 14 Tahun 1970 Tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman [Law on Amendment of Law No. 14 of 1970], Law 35/1999 (Indon.); see also Indonesian Legal System, supra note 41, at 55.
of the executive, it lessened the judges' instinct to view themselves as simply part of the law enforcement apparatus.\textsuperscript{112}

In addition, in 2003, Indonesia established a separate Constitutional Court with jurisdiction over constitutional questions.\textsuperscript{113} By establishing this specialized court, Indonesia created a forum that could focus on the violation of individual rights. Two recent judicial decisions by the Constitutional Court illustrate its role in promoting the need for criminal procedure reform.

In December 18, 2006, the Constitutional Court held that wiretapping in the absence of express statutory authority is illegal.\textsuperscript{114} The Court went further, outlining requirements for a constitutionally sufficient wiretap law including requiring judicial authority and setting necessary standards if the Government wished to continue using such evidence in the future.\textsuperscript{115}

Second, the Constitutional Court addressed the issue of whether detention itself under the KUHAP was a violation of human rights.\textsuperscript{116} While finding that detention was a necessary limitation on the liberty of the accused, the Court explicitly encouraged the need for criminal procedure reform and recognized the ongoing efforts already underway:

Considering whereas according to the expert Prof. Dr. Andi Hamzah, S.H., the KUHAP Renewal Team will make improvement by establishing commissioner judges so that the rights of defendants or suspects will be protected better . . . .\textsuperscript{117} [Therefore] it is clear that the existence of . . . detention can-

\textsuperscript{112} See Supreme Court of Indonesia, Blueprint for the Reform of the Supreme Court of Indonesia 7-11 (2003).


\textsuperscript{117} See Hamzah, supra note 63, at 10-11, 34-40. Professor Andi Hamzah of Trisakti University is the head of the Indonesian interagency working group established to reform the criminal procedure code.
not be removed from criminal procedure law.\footnote{In re Fatah, Dec. No. 018/PUU-IV/2006 at 20-21.}

2. The Attorney General’s Office

The Indonesian Attorney General’s Office (“AGO”) is better positioned to adopt more adversarial proceedings than in many other civil law countries because the AGO is already independent\footnote{See Indonesian Legal System, supra note 41, at 89. The Indonesian Attorney General occupies a cabinet-level position separate from the Minister of Law and Human Rights. \textit{Id}.} and not part of the judiciary. As a result, Indonesian prosecutors can more readily view their role as being a party in a criminal dispute, rather than simply being officials within the inquisitorial system.\footnote{See Transplants to Translations, supra note 2, at 57 n.58 (noting Italian prosecutors and judges are both members of judiciary, reflecting obstacle to adopting more adversarial model, whereas Argentine prosecutors and judges are separate, potentially moving Argentine system toward an adversarial model).}

In addition, Indonesian legal theory accepts the “opportunity principle”—a prosecutor has the discretion to decline to prosecute or may terminate a case if the case is not deemed in the public interest.\footnote{See Law on the Prosecution Service of the Republic of Indonesia art. 35(c), Elucidations art. 35(c), Law 16/2004, available at http://www.legalitas.org/database/puu/2004/uul16-2004eng.pdf; see also Indonesian Legal System, supra note 41, at 89. This principle was first established in the civil law system in Germany. See Markus Dirk Dubber, \textit{American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure}, 49 \textit{Stan. L. Rev.} 547, 575-76 (1997). It was later adopted by the Dutch. See Swart, supra note 44, at 294-95.} This principle contrasts with the “legality principle” of the orthodox inquisitorial model where prosecutorial discretion is an anathema and trial is required to “seek the ultimate truth.”\footnote{See Stephen C. Thaman, \textit{Legality and Discretion}, in \textit{Encyclopedia of Law \& Society: American and Global Perspectives}, 944, 945 (David S. Clark ed., 2007).} The opportunity principle offers the possibility that prosecutors view themselves as parties to a dispute, which makes the adoption of other adversarial features, such as consensual resolution of criminal cases through plea bargaining, more acceptable within the legal community.\footnote{See Transplants to Translations, supra note 2, at 57 (noting that in Argentina, opportunity principle—which has been lauded because criminal courts operate more efficiently—fosters development towards adversarial model).}

Prosecutorial discretion in Indonesia, however, exists far more in theory than in reality. Concerns of endemic prosecutorial corruption in Indonesia have placed both legal
and institutional limitations on such unfettered discretion. There is little room for dismissing even inconsequential cases. As a result, Indonesian prosecutorial policy is that "all cases in which the investigators have accumulated sufficient evidence will be prosecuted."\(^{124}\)

3. The Indonesian National Police

The Indonesian National Police ("INP") has also undergone a significant change. During the New Order era, the INP was incorporated into the armed forces with disastrous results for law enforcement.\(^{125}\) In 1999, however, the police and the military were separated.\(^{126}\) This institutional reform has allowed the police to develop into a more professional, civilian force focused on conducting criminal investigations in a domestic role, rather than part of a military force designed to preserve state authority. Much work, however, is still needed.\(^{127}\)

III. TRANSFORMATION OF THE KUHAP

Despite the general dissatisfaction with the 1981 KUHAP, the criminal procedure reform process in Indonesia proved slow. In 2000, the Ministry of Law and Human Rights ("MLHR") announced the formation of an interagency working group of government officials, practitioners, and academics ("Working Group") to draft a new code to replace the 1981 KUHAP.\(^{128}\) Although the Working Group met intermittently over the next

\(^{124}\) See Price Waterhouse Coopers, supra note 62, at 102; see also Wagner & Jacobs, supra note 56, at 54; Surachman & Maringka, supra note 61, at 4 (discretion very rarely exercised).


\(^{126}\) See Surachman & Maringka, supra note 61, at 1.

\(^{127}\) See generally ICG, supra note 125 (identifying major obstacles to police reform); Agung Suprananto, Polri: Financial Management Reform (2005).

\(^{128}\) See Order of Ministry, supra note 107. While the membership of the Working Group evolved over time, the key members during the critical 2006-07 period were Professor Andi Hamzah; Abdul Wahid, Director General of Law and Regulation, Ministry of Law and Human Rights ("MLHR"); Adnan Buyung Nasution, Presidential Legal Advisor; Justice Simanjuntak, Retired Justice of the Supreme Court; Muhammad Amari, Legal Bureau Chief of the Attorney General's Office; Raden Panggabean, Indonesian National Police; Sri Hariningsih, legislation expert for the Indonesian Parliament ("DPR"); Hadi Supriyanto and Pocut Eliza, Directorate of Law and Regulation, MLHR; and Professors Indriyanto Seno Adji and Teuku Nasrullah, University of Indonesia. See id.
seven years, its draft version did not differ substantially from the 1981 Code except in one significant respect—the group proposed to create one entirely new legal institution, the *hakim komisaris* or “commissioner judge.”

Some of the responsibilities proposed by the Working Group for the new institution of commissioner judge, such as review of search warrants and detention decisions, are broadly-recognized core judicial functions widely seen in both civil law and common law countries. The Working Group also considered giving the commissioner judges a more executive function by empowering them to determine whether a case should proceed to trial and to resolve disputes between the police and the prosecutors. These proposals would have aligned them more closely to the French/Dutch “investigating magistrate” tradition. Given the long tradition of civil and political rights abuses by the police during the Suharto New Order era and beyond, greater supervision of police activities would be an inevitable part of criminal procedure reform. The extent to which judges might become part of the law enforcement apparatus, however, remained to be resolved.

Criminal procedure reform, however, had stalled by late 2006. The Working Group had exhausted its drafting funds and was under pressure to submit its final version. In November 2006, the Resident Legal Advisor (“RLA”) of the U.S. Department of Justice’s Office for Overseas Prosecutorial Development, Assistance and Training (“DOJ/OPDAT”) met with Professor

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130. See *Doctrinal Issues*, *supra* note 25, at 1099. For example, in the U.S. federal system, these functions are generally conducted by a United States magistrate judge. *Id.* In a civil law country, a “liberty” or “control” judge increasingly fulfills this role, and plays a very different function from the investigating judge. *Id.*


133. The DOJ/OPDAT previously participated in various criminal procedure reforms in countries such as Colombia, Russia, Ukraine, and Georgia. See DOJ/OPDAT Latin America and the Caribbean Programs, http://www.usdoj.gov/criminal/opdat/lat-america/lat_am_caribbean_prg.html (last visited Sept. 20, 2008); DOJ/OPDAT Eurasia Programs, http://www.usdoj.gov/criminal/opdat/eurasia/eurasia-programs.html (last visited Sept. 20, 2008). Sometimes, the substantive contributions of foreign ex-
Hamzah and Abdul Wahid, the Director General of Law and Regulation at the Ministry of Law and Human Rights, to offer a combination of logistical support and international legal expertise to aid the Working Group’s efforts to finalize the draft code.\textsuperscript{134} That meeting resulted in a series of seven drafting sessions in Indonesia and one study visit to the United States that provided the Working Group with the opportunity to rework the draft KUHAP on a more basic level.\textsuperscript{135}

Over the next fourteen months, the Working Group revised the draft code to achieve fundamental reforms in nine areas: (1) establish a suspect’s right to remain silent and the presumption of innocence; (2) protect citizens’ liberty and privacy interests in the area of pretrial detention, search and seizure, and wiretapping; (3) remove the preliminary investigation stage and ensure better police/prosecutor cooperation; (4) develop a pretrial stage and clarify the role of the commissioner judge to preside over it; (5) simplify indictments; (6) promote adversarial trial procedures; (7) liberalize the rules of evidence; (8) introduce guilty pleas and cooperating defendants; and (9) assist victims in receiving compensation from wrongdoers.\textsuperscript{136} The Working Group called upon emerging domestic legal reforms, international conventions, and comparative criminal procedure experience in reaching its landmark draft.\textsuperscript{137}

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In May 2008, the Working Group submitted its final version to the MLHR. The Minister of Law approved the draft on September 8, 2008 and it awaits Presidential and Parliamentary approval.  

A. Right to Remain Silent

The Working Group addressed a number of substantive rights that are not clearly protected in the current KUHAP. The current KUHAP provides that a "suspect has the right to be examined promptly by the investigator." This provision does not envision the right of a defendant to remain silent—the concern of the provision is that the suspect will not be allowed to provide his version of the facts. At trial, "[i]f the accused declines to answer or refuses to answer a question addressed to him, the head judge at trial shall suggest that he answer and thereafter the examination shall be continued." The KUHAP does prohibit the use of coercion to obtain a statement from the suspect.

The Working Group reversed this presumption. They added an explicit statement of the right against self-incrimination. In addition, they established that the investigator was affirmatively required to provide Miranda-like warnings to the suspect to inform him or her of this right. Finally, they established that no adverse inference could be drawn against a suspect exercising the right to remain silent.

B. Pretrial Detention and Privacy Rights

Under the current KUHAP, a defendant can be detained by the police for up to twenty days without direct judicial review of his or her detention. However, under international norms and the ICCPR, which Indonesia ratified in 2006, forty-eight hours is considered the longest period a criminal detainee must

138. See supra note 19 and accompanying text.
139. KUHAP, supra note 39, art. 50(1).
140. Id. art. 175.
141. See id. art. 117(1).
142. DRAFT KUHAP, supra note 19, art. 90(1).
143. Id. arts. 22(1), 90(3).
144. Id. art. 90(2).
145. See KUHAP, supra note 39, art. 24(1).
wait before appearing before a judge. Nevertheless, the Working Group was concerned that it might be logistically impossible to bring a defendant before a judge in Indonesia's remote jungles or far-flung islands within this time period.

The Working Group eventually hammered out a compromise (over continuing objections from the police)—a defendant must be physically brought before a magistrate judge within five days of arrest to be informed of the charges against him and given an opportunity to seek pretrial release. The Working Group expressly required that the appearance of the detainee must be in person to deter police brutality and to satisfy the ICCPR. As part of the compromise, the Working Group also added an additional fifteen days to the time a defendant can be held in pretrial detention, if the magistrate judge approves, to allow the police sufficient time to carry out their investigation.

In addition, the Working Group expanded the reasons to detain suspects to include detention where there is a concern that the suspect may seek to influence witnesses.

The Working Group also addressed searches and seizures. Searches must be conducted pursuant to prosecutor's application and judicial authorization. Absent compelling reasons, they must also be executed between six in the morning and ten at night. The Working Group clarified the exigent circumstances under which the police were entitled to execute a search and seizure without first obtaining judicial approval, but provided that the police must seek retroactive judicial approval within twenty-four hours of such exigent searches.

The Working Group also clarified the area of undercover

146. See U.N. Hum. Rts. Council, supra note 106, at 20 (recommending Indonesia reduce "time limits in police custody to 48 hours in accordance with international standards.").
147. See Hamzah, supra note 63, at 24.
149. DRAFT KUHAP, supra note 19, arts. 60(1)-(4). This five-day presentment rule will not be applicable to terrorism cases because the specific terrorism law permits longer pretrial detention before review. See id. Elucidations art. 9(2).
150. See id. Elucidations art. 60(1), see also id. pmbl. §d.
151. See id. art. 60(5).
152. See id. art. 59(5)(c).
153. See id. art. 69(1).
154. See id. art. 68(2).
155. See id. arts. 69(3), (5).
activities. In order to address the reluctance of Indonesian police either to obtain or to seek to use at trial evidence from covert work, they expressly authorized the police to conduct surveillance. This addition essentially legalizes the basic undercover work already being conducted by the police.

Finally, the Working Group drafted a new provision to regulate the interception of electronic communications for the new code in response to the December 2006 decision of the Constitutional Court prohibiting wiretapping in the absence of express statutory authority. This new provision requires judicial approval for wiretapping based on a written application from the prosecutor, requires a showing of investigative necessity, and limits the duration of the interception to thirty days, with one thirty-day extension permitted. Out of concern that the wiretapping authority would still be abused, the Working Group limited its use to a list of serious offenses. Under emergency circumstances, an investigator can conduct a wiretap without prior judicial approval, but must retroactively seek such approval within forty-eight hours.

C. Structure of the Investigation

The Working Group addressed two significant problems relating to the investigation: the preliminary investigation stage and the lack of coordination between the police and prosecutors during the formal investigation.

The preliminary investigation did little either to advance

156. See id. art. 7(1)(i).
157. See id. arts. 83-84.
159. Draft KUHAP, supra note 19, arts. 83(3)-(6). Indonesia’s thirty-day requirement falls within international norms. See, e.g., Codice di procedura penale, art. 267(3) (It.) [hereinafter C.P.P.] (fifteen days with unlimited extensions of up to fifteen days); 18 U.S.C. § 2518(5) (2000) (thirty days with unlimited extensions of up to thirty days); Stafprozessordnung, art. 100b(2) (F.R.G.) [hereinafter StPO] (three months with one three-month extension).
160. See Draft KUHAP, supra note 19, art. 85(2). The Working Group elected to follow the German model in this respect. See StPO, supra note 159, arts. 100a(1)-(2).
161. See Draft KUHAP, supra note 19, art. 84.
162. See Hamzah, supra note 63, at 12, 21-22.
the case or to protect the rights of the accused.163 With the elimination of the investigating magistrate, the preliminary investigation had lost its original civil law purpose of a police investigation to aid the magistrate's later official investigation.164 Under the current KUHAP, there is little need for one law enforcement officer to conduct a preliminary investigation before another law enforcement officer conducts the formal investigation. Therefore, the Working Group decided to abolish the preliminary investigation stage entirely, deleting some six articles of the current KUHAP.165 This bold step will remove a largely redundant stage in the criminal justice system that serves little purpose other than to delay getting down to the real business of solving the crime.

The Working Group also took up the persistent problem of the lack of coordination between the police and the prosecutors during the investigation and the prosecution.166 They established the broad principle that the "Investigator shall work in coordination with Public Prosecutor."167 The commentary to the KUHAP further elaborates that this provision "intends that the public prosecutor should . . . [follow] the progress of the Investigation process from the beginning and . . . [should give] consultation for significant cases in order to create an integrated criminal justice system."168 During the investigation, the police remain primarily responsible, but "in executing the investigation, the investigator shall coordinate, consult, and inquire for direction to the prosecutor to ensure that the case dossier fulfills material and formal requirements."169 During the prosecution phase, the "Investigator[,] upon request from the Prosecutor[,] shall take certain legal measures to ensure the efficiency of the execution of the trial or the implementation of the ruling of the Judge."170 The police must also notify the prosecutor within two days of initiating or terminating an investigation.171

163. See supra notes 17-22 and accompanying text; see also supra note 54 and accompanying text.
164. See supra notes 14-17 and accompanying text.
165. The deleted articles are KUHAP arts. 4-5, 102-05.
166. See Hamzah, supra note 63, at 12, 21-22.
167. Draft KUHAP, supra note 19, art. 8(1).
168. Id. Eludication art. 8(1).
169. Id. art. 13(2).
170. Id. art. 15(3).
171. Id. art. 13(1).
To realize the goal of closer coordination, the Working Group also required the participation of prosecutors in seeking judicial approval before the police could conduct certain significant investigative steps. Once the investigation has begun, the prosecutor is responsible for submitting applications to obtain search warrants and wiretaps and for seeking continued detention from the commissioner judge and later the trial judge. Because the prosecutors now have an essential role in the investigation, the police will have to work with them while the evidence is gathered to ensure that it is gathered legally. A secondary benefit of this change is that the prosecutor will already be familiar with the case and have a vested interest in seeing the prosecution succeed when the police turn the dossier over.

D. Pretrial Stage and Commissioner Judge

One of the most significant changes that the Working Group has proposed for the new code is the development of a pretrial stage and the establishment of the new institution of the commissioner judge to preside over it. The Working Group established a specific list of responsibilities for the commissioner judge. These responsibilities included authorization of search warrants, electronic surveillance, detention and bail, and appointment of legal counsel, all traditional judicial functions generally lacking in the current Indonesian system. The Working Group also gave the commissioner judge an elevated status—a person could only become a commissioner judge if he had already been a trial judge for ten years.

The key debate within the Working Group was whether the commissioner judges should also have more “executive” functions similar to the Dutch or French “investigating magistrate.” Should these new officials resolve disputes between the

172. See supra notes 83-85 and accompanying text.
173. See id.
174. See Draft KUHAP, supra note 19, Elucidations I; Hamzah, supra note 63, at 10-11, 34-40. The concept of creating commissioner judges predated the involvement of DOJ/OPDAT with the Working Group, but during the course of 2007-08 meetings, the parameters of the pretrial stage and the role of the Commissioner Judge were developed. Compare Draft KUHAP, supra note 19, arts. 1(7), 111-22, with Draft of KUHAP dated Nov. 16, 2006, arts. 1(6), 73-78 (on file with Fordham International Law Journal).
175. See Draft KUHAP, supra note 19, art. 111(1).
176. See id. art. 115(b).
177. See Hamzah, supra note 63, at 34-36.
police and prosecutors and determine whether cases should proceed to trial or whether additional counts should be added? In the end, the Working Group decided to follow more closely "the judge of the investigation" model used in Italy.\(^\text{178}\) They did vest the commissioner judges with the authority to conduct a "preliminary hearing" to determine whether there is sufficient evidence for the case to proceed to trial, but, importantly, they restricted the right to seek this hearing exclusively to the prosecutors.\(^\text{179}\) The group decided not to give the judge the authority to add additional charges following the hearing or to resolve disputes between the police and the prosecutors.

In addition, the Working Group established basic procedures for pretrial practice before the commissioner judges. Both the prosecutor and defense may seek rulings by the commissioner judge (except as noted for sufficiency of the evidence), or the judge may do so on his or her own initiative.\(^\text{180}\) In addition, the commissioner judge can conduct suppression hearings and has the power to require sworn witness testimony and documents in order to resolve factual disputes.\(^\text{181}\) The commissioner judges are given two days to reach their rulings.\(^\text{182}\)

A final key change was in the area of remedies for the violation of rights. The Working Group authorized the commissioner judge to suppress illegally-obtained evidence and to order the release of wrongfully-held suspects.\(^\text{183}\) The commissioner judges were also allowed to award compensation where they find that the rights of the accused were violated.\(^\text{184}\) It was hoped that, armed with these new powers, the commissioner judges would protect individual liberties at the pretrial stage.\(^\text{185}\)

\(^178.\) Id.

\(^179.\) See Draft KUHAP, supra note 19, arts. 111(1)(i), (2)-(3). This provision illustrates well the continuing inquisitorial perspective in Indonesia—it assumes that prosecutors would want to request a preliminary hearing to see if they possessed sufficient evidence to proceed.

\(^180.\) See id. art. 111.

\(^181.\) See id. arts. 112(2)-(4).

\(^182.\) See id. art. 112(1).

\(^183.\) See id. arts. 113(2)-(3).

\(^184.\) See id. art. 113(5).

\(^185.\) In this respect, the Working Group followed Italy in creating a judge of the investigation with evidence suppression powers. By way of comparison, the new Russian Criminal Procedure Code of 2001 adopted Miranda-like requirements and a suppression remedy, but failed to establish a judicial officer to handle the pretrial stage, leaving
E. Indictments

The Working Group tackled the highly formalistic indictment process. Under the current KUHAP, the indictments themselves are lengthy and full of legalese, going far beyond what is necessary to give notice to the accused of the nature of the charges.\textsuperscript{186} The Working Group refocused the procedure to require indictments to be clear and concise statements of the offense charged.\textsuperscript{187}

In addition, the Working Group revised the KUHAP’s rules governing joinder of claims and parties in a single indictment. Unlike the old rule, under which dossiers had to be submitted to the prosecutor at or near the same time for claims to be joined,\textsuperscript{188} the draft code provides that the prosecutor may charge multiple defendants in a single indictment regardless of the number of dossiers so long as their criminal activity is interrelated.\textsuperscript{189} Similarly, the prosecutor can charge multiple crimes in separate counts in the same indictment.\textsuperscript{190}

In addition to making the indictment system more flexible and efficient by allowing joinder of claims and defendants, the new indictment procedures subtly change the prosecutor’s role. Under the old system, the prosecutor took a more bureaucratic approach—examining a dossier to see if it supported the charge proposed by the police and then preparing a lengthy charging instrument to pass onto court.\textsuperscript{191} Now, the prosecutor will be examining the dossier to see what criminal charges are supported by the facts and making strategic charging decisions about who to charge in which indictment.\textsuperscript{192}

F. Adversarial Trials and Liberal Rules of Evidence

One of the explicit goals of the Working Group was to make the new KUHAP more adversarial. This goal is enshrined in one of the early provisions of the draft code—“[t]he criminal proce-

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\item \textsuperscript{186} See \textit{Ugolovno-Protseessual’nyi Kodeks Rossii} [Code of Criminal Procedure], art. 75 (Russ.) [hereinafter UPK RF].
\item \textsuperscript{187} See KUHAP, supra note 39, art. 143.
\item \textsuperscript{188} See Draft KUHAP, supra note 19, art. 50(2)(b).
\item \textsuperscript{189} See Draft KUHAP, supra note 39, art. 141.
\item \textsuperscript{189} See Draft KUHAP, supra note 19, art. 49(3).
\item \textsuperscript{190} See id. art. 49(2).
\item \textsuperscript{191} See KUHAP, supra note 39, art. 14.
\item \textsuperscript{192} See Draft KUHAP, supra note 19, art. 42.
\end{itemize}
\end{footnotesize}
...dure covered in this Law shall be executed fairly and in an adversarial way."¹⁹³

This new adversarial emphasis is most evident at the trial stage. There, the Working Group proposed to make the trial, in the words of the head of the drafting team, "more adversarial, but not completely adversarial." Under the new draft language, the parties will now be given the opportunity to give short opening statements.¹⁹⁴ Then, the prosecution and the defense will call witnesses in the order they choose.¹⁹⁵ It will be the parties, and not the trial judge, who will initially ask questions of their respective witnesses followed by examination by the opposing party, although the judge will remain empowered to ask clarifying questions.¹⁹⁶ Finally, the parties will have an opportunity to make brief closing oral arguments.¹⁹⁷

The Working Group consciously recognized that the decision regarding who would initially ask the questions would be a factor in determining the adversarial or inquisitorial nature of the trial proceedings. They sought to obtain the benefits of both systems—giving the initial power to the parties, but reserving a role for the court to do some active fact finding of its own.¹⁹⁸

The Working Group also fundamentally changed the rules of evidence. The current KUHAP’s limited list of permitted forms of evidence was expanded to include electronic evidence and physical evidence.¹⁹⁹ At a more basic level, this expanded list of acceptable forms of evidence became exemplary, not exhaustive, leaving flexibility for prosecutors and defense attorneys to come up with potential new types of evidence to offer at

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¹⁹³. Id. art. 4. This provision was not adopted from a common law system, but rather from the former heart of the civil law system—France. See Code de procédure pénale, art. 1-P, available at http://www.legifrance.gouv.fr/initRechCodeArticle.do [hereinafter C. Pr. Pén.]; see also Draft of KUHAP dated Jan. 18, 2006, art. 3A (on file with author) (noting French origin). The French criminal procedure code has introduced more adversarial elements in recent years, such as guilty pleas, traditionally associated with adversarial systems, see C. Pr. Pén., supra, art. 41(2)-(3), and most recently allowing the prosecutor and defense attorney to question witnesses directly, but it is not yet clear whether these recent innovations have really shifted the inquisitorial approach of French judicial actors. See Transplants to Translations, supra note 2, at 59-63.

¹⁹⁴. See Draft KUHAP, supra note 19, art. 150(1).

¹⁹⁵. See id. art. 150(3).

¹⁹⁶. See id. art. 154.

¹⁹⁷. See id. art. 171(1).

¹⁹⁸. See id. arts. 154, 176, 178.

¹⁹⁹. See id. arts. 175(1), 176, 178.
The new standard for admissibility will be: (1) was the evidence legally obtained; and (2) does it tend to prove guilt or innocence? Evidence will no longer have to fall into a preexisting, statutorily-recognized category.

After extensive debate, the Working Group elected to keep untouched the current KUHAP's requirement of two forms of evidence to support a conviction. They concluded that, as a practical matter, this rule rarely prevented the prosecution from obtaining a legitimate conviction and did provide some additional protection for innocent defendants.

As the world's fourth largest nation by population with few land borders, Indonesia traditionally was not concerned with transnational crime and the current KUHAP lacked specific provisions for evidence gathered abroad. With transnational crime becoming a growing concern in Indonesia, the Working Group also took up the question of how to handle foreign evidence. Laws on the collection of evidence vary widely between different legal systems. The draft KUHAP addresses this fact by providing that evidence received from abroad "shall be consid-

200. See id.
201. See id. arts. 175(2), 176.
202. See KUHAP, supra note 39, art. 183; DRAFT KUHAP, supra note 19, art. 174.
203. See KUHAP, supra note 39, arts. 183-90.
ered valid evidence, if it is legally obtained based on the law of such other country" so long as "consideration [of] the evidence does not breach the Indonesian constitutions, laws or cooperation agreement."\textsuperscript{205}

The Working Group also changed the way in which the trial judge is selected. Under the current KUHAP, the chief judge of the court assigns a particular trial judge to a case.\textsuperscript{206} The current system permits abuse and potential corruption.\textsuperscript{207} To remedy this, the Working Group adopted random assignment of cases.\textsuperscript{208}

G. Case Dismissal, Guilty Pleas, and Cooperating Defendants

Although the current KUHAP recognized the possibility of dismissal of cases not in the public interest,\textsuperscript{209} usually all criminal cases, even petty prosecutions, were brought to court. The draft KUHAP specifically authorizes the prosecutor, if in the public interest, to dismiss minor cases, particularly where there has been reconciliation between the perpetrator and the victim.\textsuperscript{210}

The Working Group also adopted guilty plea provisions for the resolution of more serious cases.\textsuperscript{211} While the current KUHAP recognizes the need to consider "mitigating circumstances" at sentencing,\textsuperscript{212} a trial is still required.\textsuperscript{215} The Working Group adopted a procedure to permit a defendant to plead guilty and avoid a trial altogether.\textsuperscript{214} Rather than adopt a U.S.-style plea bargaining between the parties, the Working Group chose instead to follow the recently-reformed Russian criminal procedure code. Like the new Russian code, the Draft KUHAP's guilty plea provision is not available for the most serious

\begin{footnotes}
\footnote{205. \textit{Draft KUHAP}, \textit{supra} note 19, art. 183.}
\footnote{206. \textit{See KUHAP}, \textit{supra} note 39, art. 152.}
\footnote{207. \textit{See Supreme Court of Indonesia}, \textit{supra} note 112, at n.185 (current assignment system "opens the way for abuse of power" and has "potential for corruption;" recommending random assignment of cases).}
\footnote{208. \textit{See Draft KUHAP}, \textit{supra} note 19, art. 142(1).}
\footnote{209. \textit{See KUHAP}, \textit{supra} note 39, art. 140(2).}
\footnote{210. \textit{See Draft KUHAP}, \textit{supra} note 19, arts. 42(2)-(3).}
\footnote{211. \textit{See id.} art. 199.}
\footnote{212. \textit{See KUHAP}, \textit{supra} note 39, art. 197(1)(f). Mitigating factors include the defendant's acceptance of guilt.}
\footnote{213. \textit{See supra} note 72 and accompanying text.}
\footnote{214. \textit{See Draft KUHAP}, \textit{supra} note 19, art. 199(1).}
\end{footnotes}
crimes—it can only be used by defendants facing charges punishable by less than seven years' imprisonment.\textsuperscript{215} The plea will take place before a judge and the defendant enjoys certain procedural protections during the proceeding. The judge must inform the defendant of the rights he is giving up by pleading guilty and the penalties he faces.\textsuperscript{216} The court must also ensure that the defendant's plea is voluntary and supported by the facts.\textsuperscript{217} If the court is not satisfied, the judge also retains the power to reject the plea.\textsuperscript{218} Following the Russian model, defendants who choose to plead guilty receive a sentence of no more than two-thirds of the maximum statutory sentence.\textsuperscript{219}

The Working Group also addressed a variation on the guilty plea—the cooperating defendant, known as a "crown witness."\textsuperscript{220} In doing so, they followed the lead of Indonesia's Witness Protection Law of 2006 and incorporated language from a draft amendment to Indonesia's Anti-Corruption Law.\textsuperscript{221} This new provision envisions two situations. First, the draft code provides for immunity for the most minor participant in a conspiracy who provides information regarding his more culpable co-conspirators.\textsuperscript{222} Second, where there is no minor participant, the code provides for sentence reduction for a defendant who pleads guilty and then assists in disclosing the role of the other participants.\textsuperscript{223} Defendants, however, do not have an automatic right to become cooperating witnesses; rather, the designation is

\textsuperscript{215} Compare id. with UPK RF, supra note 185, art. 314 (Russ.); CRIMINAL CODE OF THE RUSSIAN FEDERATION art. 75 (4th ed. William E. Butler 2004).

\textsuperscript{216} See DRAFT KUHAP, supra note 19, art. 199(3).

\textsuperscript{217} See id. arts. 199(3)-(4).

\textsuperscript{218} See id. art. 199(4).

\textsuperscript{219} Compare id. with UPK RF, supra note 185, art. 316(2) (Russ.).

\textsuperscript{220} See DRAFT KUHAP, supra note 19, art. 200.

\textsuperscript{221} Andi Hamzah, Draft Bill on Combating Corruption Crimes, art. 52 (Jan. 30, 2007) (unpublished manuscript, on file with author). These draft anti-corruption amendments were also authored by Andi Hamzah, illustrating the cross pollination of ideas due to the small Indonesian legislative drafting community.

\textsuperscript{222} See DRAFT KUHAP, supra note 19, art. 200(1) ("One of the suspects or the accused having the lightest role may become the Witness in the same case and may be released from any criminal charge if the Witness helps disclose the involvement of any other suspect that should be sentenced for the offence.").

\textsuperscript{223} Id. art. 200(2) ("If there is no suspect or accused having a light role in the offence referred to in paragraph (1), the suspect or the accused who admits to being guilty based on Article 199 and who substantially helps disclose the offence and the role of any other suspect may have the sentence reduced at the discretion of the judge of the district court.").
under the control of the prosecutor.  

H. Rights of Victims

Finally, the Working Group strengthened the rights of victims. Under the current KUHAP, a victim must bring a parallel civil suit within the criminal case in order to receive restitution from the defendant. This system has not proved workable; Professor Hamzah noted during one of the drafting sessions that he was not aware of a single time in Indonesia where these provisions had been used effectively. The Working Group therefore adopted a proposal to replace those articles requiring a parallel civil suit with a system of mandatory victim restitution as part of the final criminal judgment.

IV. THE KUHAP—MOVING ADVERSARIAL?

The Working Group's Draft KUHAP makes fundamental changes to Indonesia's criminal justice system. Nevertheless, it would be simplistic to describe the resulting draft as part of an inexorable global movement towards an adversarial model of criminal justice. While some of the planned changes are associated with the common law tradition, they are not all necessarily intrinsic to the adversarial system, but rather some are secondary characteristics that can work equally well within both traditions. Other proposed changes to the KUHAP fit better within the inquisitorial tradition. While this may suggest a schizophrenic approach to reform, these changes are logical outcomes within the context of the existing Indonesian legal culture and legal institutions. The Working Group characterized the KUHAP as "an integration between the European Continental system and the adversarial system." The reception of this synthesis by the Indonesian legal community will ultimately determine where the

224. Draft KUHAP, supra note 19, art. 200(3).
225. See KUHAP, supra note 39, arts. 98-101.
227. Draft KUHAP, supra note 19, art. 133(1).
228. Indeed, the drafters still use the language of the inquisitorial system when characterizing their goals. See Hamzah, supra note 63, at 13 ("The aim of the future criminal procedure code is the pursuit of objective truth . . . .").
229. Draft KUHAP, supra note 19, Elucidations art. 4.
changes will lead and their consequences for the overall justice system.

Many of the pretrial rights-based changes, such as the presumption of innocence and the right against self incrimination, are major changes. The decision to firmly establish these rights could be seen as part of larger rejection of confidence in the inquisitorial model of a unified, neutral investigation by the State. This movement makes the Indonesian system decidedly more adversarial. In addition to this historical connection, the method of asserting these rights, which is through a pretrial motion before the commissioner judge, and the judicial remedy of suppression for rights violations are adversarial both in origin and outlook. The assertion of these rights is a paradigmatic change from the inquisitorial "search for the ultimate truth" model.

Indonesia's own recent authoritarian past is part of the explanation of the Working Group's adoption of these rights. Forced confessions, police brutality, and other recent human rights abuses remain very much a part of the legal consciousness in Indonesia. A harder question is whether these newly-articulated rights will change legal actors' conception of their legal system or whether they will be incorporated into the existing inquisitorial framework. For example, many European civil law systems have incorporated such rights through domestic legislation or the adoption of the ICCPR, yet have maintained their inquisitorial tradition.

230. See id. art. 90(2).
231. See id. arts. 22(1), 90.
234. See Berger, *supra* note 5, at 341.
The decision to create the new institution of the commissioner judge might make the system seem more inquisitorial and suggests a return of the powerful investigating magistrate just when many civil law countries are moving in the opposite direction. The Working Group, however, followed the adversarial practice (as well as the increasing practice in civil law countries) of limiting the commissioner judge's role to core judicial functions such as determining the legality of the investigatory actions of the police and/or prosecutors such as searches, arrests, and obtaining custodial statements. Overall, however, the commissioner judge is closer in function to the magistrate judge of the United States or the "judge of the investigation" model used in Italy than the "investigating magistrate" of some civil law countries such as the Netherlands and Spain.

However, one power—the power of the commissioner judge to stop a case during the pretrial stage—strongly suggests a return to the investigatory judge model. This gives the commissioner judge a screening function. Balanced against this is the fact that the commissioner judge's determination whether the case should proceed may be made only on the motion of the prosecutor. As a practical matter, this will substantially reduce the number of times the commissioner judge becomes involved in this determination and therefore would seem to limit the possibility that the commissioner judge will transform into an investigating judge. But at a more philosophical level, granting the prosecutor the exclusive right to make this motion reflects a continued inquisitorial conception of the role of the prosecutor. It assumes that a prosecutor would wish to have the commissioner judge decide whether to dismiss a case. It strongly suggests

235. See Draft KUHAP, supra note 19, art. 44.
236. See Hamzah, supra note 59, at 34-35.
237. See id. at 33-34.
238. See Draft KUHAP, supra note 19, art. 44(1).
239. In common law countries that make use of them, grand juries nominally serve a similar screening function. But there is an important distinction—prosecutors are required to present the case to grand juries in order to seek an indictment whereas, under the Draft KUHAP, Indonesian prosecutors would present their case to the commissioner judge because they would want an official imprimatur for bringing the case (or an official excuse for not doing so). When common law prosecutors use grand juries as an investigative tool, it fulfills an inquisitorial function, a formality which federal prosecutors would dispense with if they could obtain evidence through other means. See Robert G. Miller, Comparing the Annual Shareholders Meeting in the United States with that in Germany—Use of Yankee Concepts of Due Process Discerned by Alexis de Tocqueville,
that the principle of opportunity is not so ingrained in Indonesian legal culture, at least on the part of the Working Group members. The frequency with which this new provision is used will indicate whether Indonesian prosecutors see themselves as parties to a dispute (making the use of the provision unlikely) or as state officials seeking the "ultimate truth."

The changes to the trial procedures reflect the most significant movement toward more adversariness.\textsuperscript{240} The parties now have the power to select the witnesses and their order, ask the questions, and provide oral argument. This will make the judge a more passive listener,\textsuperscript{241} but the court will maintain overall control of the proceedings and may ask clarifying questions.

Of these changes, the parties' right to take the lead in questioning the witnesses may prove the most significant, but the hardest to implement successfully. The criminal procedure team's conscious goal was to balance the adversarial and inquisitorial systems by giving the parties a chance to ask the questions, but not making the judge into an entirely passive listener.\textsuperscript{242} The fundamental question is: Will the court and the parties make this system work harmoniously, or will one group dominate?

Based on their historical role in leading the questioning of witnesses, Indonesian judges may seek to retain their control of the trial by continuing to question witnesses themselves. By comparison, U.S. procedural law does not generally prohibit judges from asking substantive questions of witnesses, but rather U.S. legal culture frowns on such judicial activity because it is inconsistent with the U.S. conception of the role of the judge as the neutral referee.\textsuperscript{243} Indeed, one proposal that was discussed by

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\textsuperscript{19} N.Y.L. SCH. J. Int'l & Comp. L. 1, 94 (1999) ("The existence of a grand jury dispenses with the need for an investigative staff assigned to a public prosecutor.") (citing \textit{Alexis de Tocqueville}, \textit{Democracy in America} 79 (J.P. Mayer ed., George Lawrence trans., Doubleday (1969) (1835)).
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\textsuperscript{240} See Hamzah, \textit{supra} note 63, at 40.
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\textsuperscript{241} See id.
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\textsuperscript{242} See \textit{id.} ("[T]he active role of the judge to direct the trial is decreased.").
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\textsuperscript{243} See \textit{Transplants to Translations}, \textit{supra} note 2, at 9 ("[C]ommon law judges participate in the interrogation of witnesses much less than do their Continental colleagues, not only because procedural rules give them less power to do so, but also because the role of the judge is understood differently in the common law system. Whereas the inquisitorial judge is understood and perceived as an active investigator with, consequently, the duty to be active in these interrogations, the adversarial system
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the Working Group was to jettison the investigative dossier entirely as the trial judge's review of the investigative dossier before trial may limit his capacity to remain impartial. The draft KUHAP, however, reduces the role of the dossier, but does not eliminate it. Indonesian judges will continue to be in possession of the facts of the investigation necessary for the judges to remain the dominant questioners of witnesses. If the prosecutors wish to take control, they will not only need to develop the necessary skills, but must also change their outlook.

If the prosecutors do take the lead in witness questioning this may well lead to greater pretrial interaction between the prosecutors and their witnesses. Such "witness prep" is a hallmark of the U.S. trial system, and it builds the sense between prosecutors and government witnesses that they form a team. Pretrial consultation between the prosecutor and the witnesses is not an inherent aspect of all adversarial systems—the English system prohibits barristers from meeting with witnesses out of court precisely to maintain distance between the parties and the witnesses.

The proposed reforms to the rules of evidence do not move the Indonesian code in an adversarial direction; rather, they make it less formalistic. The common law system has developed a series of sometimes arcane evidentiary rules to ensure the opportunity for adversarial confrontation of opposing witnesses and to prevent otherwise potentially probative evidence from being presented to the jury. By contrast, the civil law tradition of judicial fact-finding has no need for such limitations; the investi-

judge is usually understood as a passive umpire who is not supposed to participate actively in the interrogation of witnesses.

244. See Comparative Approach, supra note 17, at 471.
245. See Hamzah, supra note 63, at 22 ("[T]he case dossier is not as important today, since verification principally occurs in the court session.").

246. See Transplants to Translations, supra note 2, at 15 ("If the written dossier did not exist because, for instance, it was suppressed through a legal reform, the trial judge could not behave in such an active way; she could not organize the trial in advance, interrogate the witnesses effectively, etc., and the parties would gain procedural powers at her expense.").

247. See Hamzah, supra note 63, at 42.
248. See Van Kessel, supra note 11, at 435, 444-45 ("Ethical rules prevent the barrister from interviewing witnesses, thereby guarding against the danger of counsel drilling or coaching his witnesses.").

gating magistrate or the trial judge is a judicial officer and does not need any intermediary to determine what evidence could be considered. The proposed KUHAP moves the new evidentiary rules closer to the "free evaluation of evidence" paradigm of the inquisitorial system. Even this change, however, is tempered by the continued requirement of two types of evidence to support a conviction and the introduction of suppression of illegally obtained evidence, a traditionally adversarial concept.

Because of its history and pervasiveness, the introduction of guilty pleas can be seen as the addition of a quintessential element of the adversarial system. The traditional plea bargain is a consensual resolution of the case between two conflicting parties with little or no judicial involvement that reflects a very adversarial conception of justice. Plea bargaining, however, was not always part of the U.S. system. It arose in the United States as a necessary response to the crushing burdens that providing a full blown jury trial, with its entire panoply of rights in every criminal case, would place on the criminal justice system.

By contrast, the inquisitorial system traditionally did not recognize a "guilty plea" as a reason to stop the determination of guilt or innocence by the court, rather it was simply a courtroom confession that the court could weigh in the same manner it evaluated a post-arrest confession in determining the defendant's guilt. However, many civil law jurisdictions have moved towards adopting such consensual resolution procedures in part to respond to their own growing crime rates. Civil law coun-

250. See Jackson & Kovalev, supra note 44, at 108-09 (explaining that civil law countries exercise more permissive rules of evidence because they do not use lay adjudicators).

251. See Comparative Approach, supra note 17, at 473.

252. See Draft KUHAP, supra note 19, art. 174. Andi Hamzah observed that Indonesia needed to maintain the two types of evidence rule for twenty years as a safeguard while the judges adjusted to the free evaluation of evidence concept contained in the KUHAP. See Andi Hamzah, Address at the KUHAP Socialization (Apr. 8, 2008) (unpublished notes, on file with author).

253. See Combs, supra note 17, at 12-16 (describing development of plea bargaining in the United States).


tries adopted these provisions later than common law countries only because their existing trial system had proven more efficient in resolving cases quickly.256

Interestingly, however, the Working Group members did not articulate a need for dismissal of minor cases and guilty pleas for more serious one in order to relieve the burden on the courts. Instead, they relied upon a deeper Islamic cultural value in building group harmony through restorative justice (dias)—the consensual resolution of a criminal case.257 The particular plea model the Working Group has chosen, the Russian Criminal Procedure Code, makes sense for Indonesia, a country also plagued by corruption and suspicion of the Attorney General’s Office.258 Under the Draft KUHAP, there is no negotiated secret sentencing deal between the prosecutor and defendant facing a very lengthy jail sentence if convicted at trial. Rather, the Working Group adopted a simplified and more transparent proceeding where the judge continues to have an active truth-corroborating role and where the judge and the code, not the prosecutor, determine the maximum benefit the defendant shall receive.259

Similarly, the provisions do not fundamentally change the role of or balance of power between the different judicial actors. The judge maintains his position atop the hierarchy, while case processing is expedited.260 The prosecutor is not empowered to strike a bargain with the defendant—rather the new KUHAP seems to envision that the defendant will simply plead “straight up” to the charges without any agreement.261 At this stage, there is no bargain between the parties; the defendant continues to seek a mitigated sentence from a judge, but with a defined benefit set forth by the code, not given by the prosecutor.262 The

257. See Hamzah, supra note 63, at 29, 31.
258. See Wagner & Jacobs, supra note 56, at 196 n.7.
259. Many European countries have chosen to adopt such a statutorily-defined benefit guilty plea system. See Plea Bargaining, supra note 255, at 976-79 (surveying plea sentencing discounts provided in civil law countries).
260. DRAFT KUHAP, supra note 19, art. 199.
261. See Hamzah, supra note 63, at 46.
262. By some standards, Indonesia’s proposed guilty plea provisions might not constitute plea bargaining at all. They certainly do not go as far as other civil law countries, such as Germany and Italy, that permit bargaining for an agreed upon sentence. See Transplants to Translations, supra note 2, at 39-42.
adoption of the idea of guilty pleas may develop into "charge bargaining" in the future.

A bigger philosophical change may result from the provision for cooperating witnesses in the KUHAP. While the police have used charge manipulation to encourage cooperation and the courts have considered a defendant's cooperation as a mitigating factor at sentencing, the cooperating defendant provision reflects a significant shift in thinking. As drafted, this cooperating defendant provision is a tool for law enforcement, not for case management or offense mitigation, because it provides explicit sentencing benefits under the control of the prosecutor. The role of the prosecutor in exclusively determining eligibility for this provision should lead to greater out-of-court interaction between defense counsel, prosecutors, and the prospective cooperating defendant in evaluating whether a particular defendant is an appropriate candidate. This will not only pull the prosecutor deeper into the investigation—it makes him a party to the dispute.

CONCLUSION

The proposed Kitab Undang-Undang Hukum Acara Pidana has demonstrated an important fact: civil law systems have the flexibility to make fundamental changes to their criminal justice procedure. While the initial goals of the Working Group were relatively narrow—to update the existing KUHAP—their project evolved into a thorough examination of both the inquisitorial-based KUHAP and its underlying criminal justice values. The Working Group sought to address existing problems within the Indonesian criminal justice system by incorporating international conventions and comparative criminal procedure and thinking critically how to apply them to the Indonesian context.

The result is striking. Rather than seeking to create a purely adversarial system, the Working Group has synthesized the two traditions to produce a far more flexible criminal justice system. The draft KUHAP removes much of the current KUHAP's legal formalism that had been uncritically inherited from the Dutch system and replaces it with a hybrid system that is more adversarial but seeks to preserve part of its inquisitorial tradition. The

263. See Draft KUHAP, supra note 19, art. 200.
264. See id. art. 200(3).
question for the future is whether the Indonesian system will absorb these changes and maintain its inquisitorial structure or whether the inquisitorial justice system will be transformed by them.