
THE ABSENCE OF INITIAL INVESTIGATION PROCESS IN THE DRAFT OF INDONESIAN CRIMINAL PROCEDURE LAW (RUU KUHAP)

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Abstract

In 2013, the Government and the House of Representatives (DPR RI) began to discuss RUU KUHAP which has been developed since 1999. One of the discussion materials which caused pros and cons was the abolishment of initial investigation process in the RUU KUHAP. Pros and cons were not present only in the DPR's discussion session but it also took place beyond it, including the objection of a number of agencies, including KPK.

*KPK believed that the removal of initial investigation process will impede the law enforcement process on corruption crime and other extraordinary crimes and it also "weakens" KPK's authorities. On the other hand the government believed that RUU KUHAP is *lex generalis* so it does not weaken KPK's authorities to conduct initial investigation, investigation and prosecution. This writing will discuss what is meant by initial investigation existing the Criminal Procedure Law (KUHAP), KPK Law, or the RUU KUHAP as well as the recommendation to resolve the issues related to initial investigation.*

Keywords: Intial invesetigation, RUU KUHAP, KPK

A. Introduction

President of the Republic of Indonesia, Susilo Bambang Yudhoyono, through letter Number R-87/Pres/12/2012 dated December 11, 2012, has addressed RUU KUHAP to the Chairman of DPR-RI. Then, DPR-RI with their Decision No.04/ DPRRI/11/2012-2013 dated December 13, 2012 concerning National Legislation Program on 2013 Priority Bill, has included RUU KUHAP as the prioritized discussion ¹. And in assembly II, an RUU KUHAP Working Committee was

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¹ RUU KUHAP is on number 56 in the 2013 national legislation program, as stated in Appendix I of the decision letter. Read at http://www.dpr.go.id/complorgans/baleg/prolegnas_Daftar_Prolegnas_RUU_Prioritas_Tahun_2013.pdf

established to discuss materials in RUU KUHAP together with the Government Team.

Disagreement on RUU KUHAP then spread onto the surface, involving practitioners, academicians, civilians, and even law enforcement agencies and other governmental agencies. Among them are **KPK**, the Indonesian National Police (**POLRI**) and the **Supreme Court**². Objections expressed were related to the authorities in their respective agencies.

KPK's objection is reflected in the Letter of the Head of KPK Number B-346/01-55/02/2014 dated 17 February 2004 sent to the President, Chairman of DPR, Head of Commission III in DPR, Minister of Law and Human Rights, RUU KUHP Working Committee ("**Letter of the Head of KPK**"). In the executive summary as part of Appendix I from the Letter of the Head of KPK, especially regarding RUU KUHAP, the Head of KPK conveyed this opinion as follows:

“Several provisions in RUU KUHAP which will impede the law enforcement process on corruption crime and other extraordinary crimes and also “weakens” KPK’s authorities are:

- a. The abolition of authorities to conduct initial investigation wherein RUU KUHAP does not include initial investigation as part of the investigation due the lack of significant difference between the definition of investigation in RUU KUHAP and in KUHAP;*
- b. Shortened detention period at the level of investigation;*
- c. Very broad authority of the Preliminary Examination Judge in which they can even suspend detention at the level of investigation, halt investigation and prosecution, not based on the principle of opportunity and they can determine the appropriateness of case to be proposed to the court;*
- d. Complicated provisions on detention process;*
- e. Provisions on crown witness are different with the concept of justice collaborator (a witness perpetrator who cooperates) and whistle blower.*
- f. Reversal of the verification burden is not regulated and this will make it difficult in the verification process for corruption offence and money laundering offence as extraordinary crime;*
- g. Procedural law for corporate crime perpetrator is not regulated;*
- h. The authorities to conduct wiretapping in Article 84 which makes it difficult in the corruption investigation process, even in Article 84*

² The writer does not have the presumption that RUU KUHAP was intentionally made to weaken a certain institution, say the KPK. The drafting of the RUU KUHAP has been going on for quite some time, even before KPK was established.

which regulates wiretapping in urgent circumstance, it is only aimed at criminal agreement, it cannot be applied in corruption investigation or other crimes as completed offense, this will make it more difficult in the corruption, terrorism or other extraordinary crimes investigation process;

- i. The verdict on the cassation legal effort cannot be higher than the first level's verdict.*
- j. The authorities to conduct seizure shall be approved by the court.*

Additionally, RUU KUHAP has negated KPK's authority to conduct prosecution on corruption, this can be seen from the definition of Prosecution, Public Prosecutor, authorities to transfer court, the reading of conclusion in the effort of legal appeal and cassation (Article 234 and Article 254 of RUU KUHAP), only addressed to the AGO. KPK is also not authorized to carry out extended detention. “3:

Related to the view and attitude of KPK, the Minister of Law and Human Rights, Amir Syamsuddin, provided a letter of response. Regarding the objection of the Head of KPK, the minister provided the following responses:

- a. RUU KUHP is an effort of criminal law re-codification, so all principles of criminal law apply to all criminal act, whether regulated by KUHP or beyond KUHP. With the enactment of the new KUHP, Law beyond KUHP is not necessarily applicable because Law beyond the KUHP is *lex specialis*. This is clearly regulated in Article 757 and Article 758 of the RUU KUHP. Hence, RUU KUHP does not eliminate the existence of Law beyond KUHP and does not de-legitimate the existence of law enforcement agencies (including KPK).*
- b. RUU KUHP and RUU KUHAP is *lex generalis* so it cannot eliminate KPK's authorities to conduct initial investigation, investigation and prosecution as regulated in Law No. 30 Year 2002 and criminal procedure law regulated in Law No. 30 Year 2001 jo Law No. 31 Year 1999 which is *lex specialis*.*
- c. The application of restorative justice approach in RUU KUHP and RUU KUHAP, in line with the ECOSOC resolution on July 2000 concerning “basic principles on the use of restorative justice programs on criminal matters” adopted by ECOSOC as guideline for the implementation in the national penal system. This approach is basically addressed to criminal act which is not serious whose maximum sentence is five (5) years if the*

3 Copy of the letter of the Head of KPK can be accessed at <http://www.tribunnews.com/nasional/2014/02/19/surat-kpk-ke-presiden-dan-dpr-soal-ruu-kuhp-dan-ruu-kuhap>

perpetrator is 70 years old or older or compensation has been given. Hence, Article 702 RUU KUHP is not included as part of *restorative justice* and is not against Article 42 paragraph (3) RUU KUHAP.

- d. Related to the removal of initial investigation in RUU KUHAP, it is up to each institution which has been determined in their respective laws, for example in Article 43 and Article 44 Law No. 30 Year 2002. Additionally, initial investigation action carried out discreetly (intelligence action) that is undercover in nature is sufficiently regulated in their respective SOPs.
- e. Related to detention period, starting from the level of investigation, prosecution, examination at the court up to cassation, it only has 41 days difference between RUU KUHAP and KUHAP (Law No. 8 Year 1981). Detention period in RUU KUHAP is 360 days, while in KUHAP it is 401 days. Limitation on the number of detention days is adjusted with Law No. 12 Year 2005 concerning Validation of ICCPR which applies universally.
- f. Regarding justice collaborator and whistle blower, they are basically the same with crown witness (Article 200 RUU KUHAP). In order to compliment the stipulation, in RUU concerning Amendment to Law No. 13 Year 2007 concerning Protection for Witness and Victim has been referred to as justice collaborator and whistle blower.
- g. Regarding the procedural law for corporation, in RUU KUHP it is regulated generally in Book I Chapter II concerning Crime and Criminal Liability (Article 48, Article 50, Article 51 and Article 52).
- h. Regarding wiretapping, it can be defined that Article 3 paragraph (2) of the RUU KUHAP provides discretion to the Law outside of KUHAP regulating their respective criminal procedures. With this stipulation, KPK can conduct wiretapping without asking the permission from the court. This is in line with the stipulation in Article 39 paragraph (1) Law No. 30 Year 2002.
- i. Regarding the decision of Supreme Court which cannot exceed the decision of the court under it, this is based on the authorities of the Supreme Court itself which only examines the implementation of law from *judex jurist* (see Article 250 paragraph (3) of the RUU KUHAP).⁴

⁴ The government's response on the letter of the Head of KPK, addressed in a press release accessible at <http://www.kemenkumham.go.id/berita/headline/2200-press-release-tang-gapan-pemerintah-atas-surat-ketua-komisi-pemberantasan-korupsi-ri>

B. Problem

One of the materials being debated is the abolishment of initial investigation in RUU KUHAP. KPK opined that the removal of authority to conduct initial investigation will impede the law enforcement process on corruption crimes and other extraordinary crimes and it will also “weaken” KPK’s authorities. In the meantime, the Minister of Law and Human Rights opined that RUU KUHAP is *lex generalis* so it does not remove KPK’s authorities in conducting initial investigation, investigation, and prosecution as regulated in Law No. 30 Year 2002 concerning Corruption Eradication Commission (“**KPK Law**”) and criminal procedure law regulated in Law No. 20 Year 2001 jo Law No. 31 Year 1999 (“**Tipikor Law**”) which is *lex specialis*. Additionally, according to the Minister of Law and Human Rights, initial investigation action carried out secretly (intelligence action) that is undercover in nature is sufficiently regulated in its respective SOPs.

To assess the above matter, it would be better to understand what is meant by initial investigation, whether in KUHAP, KPK Law, or in RUU KUHAP. , and recommendation to solve the issues regarding initial investigation.

C. Discussion

1. Definition of Initial Investigation

Based on Article 1 point 4 of KUHAP, initial investigation is defined as “a series of actions by initial investigators to seek and find an event suspected as a crime in order to determine whether to conduct investigation or not in line with the procedures regulated in this Law.” Based on this definition, then the result of the initial investigation is: the finding of an event suspected to be a crime.

There is no definition of initial investigation in KPK Law. This is why, based on article 38 of KPK Law: : All authorities related to initial investigation, investigation, and prosecution regulated in Law No. 8 Year 1981 concerning Criminal Procedure Law also applies for initial investigators, investigators and prosecutors in the Corruption Eradication Commission”⁵. So the definition referred to by KPK is the definition of initial investigation as stated in KUHAP⁶.

⁵ Article 38 Paragraph (1) Law No. 30 of 2002:

⁶ The same thing also exists in other laws which provide investigation authorities to a government agency without defining investigation. For example in Article 71 of the Law of the Republic of Indonesia Number 35 of 2009 concerning Narcotics (“**Narcotics Law**”), it is stated that in conducting the task of eradicating the misuse and circulation of Narcotics and Narcotics Precursor, BNN is authorized to conduct initial investigation and investigation on the misuse

And now in RUU KUHAP initial investigation is abolished. With the abolishment of initial investigation process, then there is certainly no definition about initial investigation. With the removal of initial investigation in RUU KUHAP, can it be considered that initial investigation has been absorbed in investigation?

Based on Article 1 point 1 of the RUU KUHAP: “investigation is a series of actions by the investigators to seek and collect evidence by which can shed light on the crime and can find the suspect.” This definition is similar to the definition of investigation in KUHAO: “Investigation is a series of actions by the investigators and in accordance to the procedure regulated in this law, to seek and collect evidence by which can shed light on the crime and can find the suspect.” Hence, based on the definition in KUHAP or in RUU KUHAP, the expected results from an investigation are:

- (1) shed light on the crime, and
- (2) find the suspect

From two definitions above, it is clear that initial investigation in KUHAP is not absorbed into investigation based on the RUU KUHAP. Or, with a more straightforward statement, initial investigation, **whether as a definition or as an activity phase**, has been abolished in the RUU KUHAP.⁷

The definition of initial investigation as defined in KUHAP is to seek and find an event suspected to be a crime, this is one of the most fundamental things, and the earliest thing to be carried out, in a criminal justice system. This is reinforced by legal experts. For example, Mr. R. Tresna quoted the opinion of de Pinto, saying the following:

“What is meant by “investigating” a case? According to de Pinto, investigating is the initial examination by officials, thereby appointed by the Law immediately after, with any way, heard reasonable news that there has been a violation of law.

Examination covers matters of whether a crime was actually committed and who is the suspected perpetrator.”⁸ (words are bolded by the writer)

Regarding criminal procedure code, Prof. Dr. Andi Hamzah, S.H., said that:

and circulation of Narcotics and Narcotics Precursor. This Law does not mention the definition of initial investigation.

⁷ With the definition as stated in RUU KUHAP, then the investigator can arbitrarily, with- out a process, determine an event as a crime.

⁸ Mr. R. Tresna, *Komentar HIR*, Pradnya Paramita, Jakarta, 1986, page 77.

“Criminal procedure code is run when a crime has occurred.”⁹ Regarding this, R. Soesilo also said the following:

“The way how to take action if there is a suspicion that a crime has occurred, how to seek the truth about what crime has been perpetrated.

*When in fact a crime occurred what and how to seek by investigating the people suspected to be guilty of the said crime, how to arrest, detain and examine the person.”*¹⁰(words are bolded by the writer)

If we take a look at article 183 of KUHAP and article 174 of RUU KUHAP as follows:

Article 183 KUHAP

Judge shall not convict an individual unless he obtained confidence with at least two valid evidence that **a crime actually happened** and **the defendant is the perpetrator**. (words are bolded by the writer)

Article 174 RUU KUHAP

Judge shall not convict a defendant, unless the judge obtained confidence with at least two (2) valid evidence that **a crime actually happened** and **the suspect is the perpetrator**. (words are bolded by the writer)

Hence, the first thing to be carried out in criminal procedure law is to search and find an unexpected crime, which in KUHAP is referred to as initial investigation.

With the absence of initial investigation in RUU KUHAP, then the term initial investigation in KPK Law loses its meaning. What does initial investigation mean in KPK Law.

Next, in relation to the principles of *lex specialis derogat lex generalis*¹¹ in matters of *initial investigation*, it is clearly inapplicable. How could we apply the principles of *lex specialis derogat lex generalis* while the *lex generalis* itself is not present in the RUU KUHAP. The same thing goes with the Standard Operating Procedure (“SOP”) in initial investigation activity, it is now a way out which can justified. Based on Chapter I.C point 2 Appendix of the Regulation of the Minister of

⁹Dr. Andi Hamzah, S.H., *Pengantar Hukum Acara Pidana Indonesia*, Ghalia Indonesia, Ja- karta, 1983, page 16.

¹⁰ Bismar Siregar, *Hukum Acara Pidana*, Bina Cipta, 1983, page 46.

¹¹ Prof.Purnadi Purbacaraka, S.H. and Prof.Dr.Soerjono Soekanto, S.H., M.A., *Perundang-undangan Dan Yurisprudensi*, PT. Citra Aditya Bakti, Bandung, 1993, page 8-9.

Administrative and Bureaucratic Reform of the Republic of Indonesia Number 35 of 2012 concerning Guidelines for Developing Government Administration Standard Operating Procedure, it is stated that the Government Administration Standard Operating Procedure is the standard operating procedure from various processes of government administration implementations **“in line with the existing law and regulations”**.

That is why, if RUU KUHAP is signed into Law, it would be very difficult for KPK to develop an SOP on initial investigation activities by still complying to the regulation of PAN Minister and RB, *-in line with the existing rule of law -*, because RUU KUHAP (and also KPK Law) does not define what is meant by initial investigation.

2. Scope of Initial Investigation Authorities

Once we have assessed the definition of initial investigation, we can then review the scope of initial investigation authorities to assess whether KPK is weakened or not in the RUU KUHAP. Based on Article 5 paragraph 1 letter a of the KUHAP, the scope of initial investigator in conducting initial investigation activity is as follows:

- a. Accepting report or complaint from a person regarding a crime;
- b. Searching statement and evidence;
- c. Telling a suspicious person to stop and check their ID;
- d. Take other actions responsibly in accordance with the law

Based on article 12 of the Law on KPK, the initial investigator's authority in conducting initial investigation is expanded, covering:

- a. carrying out wiretapping and recording conversation;
- b. ordering relevant agencies to prohibit a person from travelling overseas;
- c. requesting statement to bank or other financial institutions regarding the financial position of a suspect or convict being examined;
- d. ordering bank or other financial institutions to block the account suspected to be the result of corruption owned by suspect, convict, or other relevant parties;
- e. ordering the leadership or supervisor of the suspect to temporarily halt a suspect's position;
- f. Requesting the data on wealth and taxes of a suspect or convict to the relevant agencies;
- g. Halting temporarily a particular financial transaction, trade transaction and other agreements or temporary revocation of license concession carried out/owned by a suspect or convict suspected to come from

- sufficient initial evidence related to corruption crime being examined;
- h. Requesting assistance from Interpol Indonesia or other law enforcement agencies from other countries to conduct searching, arrest and seizure of evidence in overseas;
 - i. Requesting assistance from the police or other relevant agencies to conduct arrest, detention, search and seizure in the corruption crime being handled.

The expansion of the initial investigator's authorities in conducting initial investigation activity in Law of KPK is the consequence of the following:

- KPK is not authorized to issue letter of order to hold the investigation and prosecution¹²;
- The requirement of sufficient initial evidence to conduct investigation that is tougher than what is regulated in the KUHAP¹³.

With the absence of initial investigation in RUU KUHAP, and in the meantime there is strict prerequisite to conduct investigation and the absence of authority to halt investigation, then it can be predicted that KPK will find it very difficult to start an investigation.

This is different with the INP investigator because as based on article 7 paragraph (1) letter h of the RUU KUHAP, INP investigators still have the authority to halt the investigation if later in the future it is found that the incident being investigated by the INP investigators is actually not a crime¹⁴.

¹² See article 40 of Law on KPK: "Corruption Eradication Commission is not authorized to issue letter of order to halt investigation and prosecution in a corruption crime case."

Compare with article 7 paragraph (1) letter i of the KUHAP: "Investigator as stated in Article 6 paragraph (1) letter a due to their responsibility have the authority to halt the ongoing investigation."

¹³ See article 44 paragraph (2) Law of KPK: "Sufficient initial evidence is considered present if there are at least two (2) evidences, including and not limited to information or data expressed, submitted, accepted, or stored, conventionally, electronically or optically."

Compare with the Explanation on article 17 of KUHAP: "What is meant by "sufficient initial evidence" is initial evidence to suspect that the presence of a crime, as stated in Article 1 point 14." KUHAP does not require the number of evidences to meet the criteria of "sufficient initial evidence", but it rather requires evidences which can be used to suspect the presence of a crime.

¹⁴ See Article 7 paragraph (1) letter h of the RUU KUHAP: "Investigator as stated in Article 6 letter a has the task and authority: conducting investigation."

D. Closing

In regards to the existing complication due to the abolishment of initial investigation in RUU KUHAP, the writer believed that one of these two alternatives can be chosen:

1. Reinstate initial investigation in RUU KUHAP, or
2. Combine the definition of initial investigation with the definition of investigation stated in KUHAP.

By following through one of the two alternatives, then the legal process for the criminal procedure law can run as it should be and the potential complication can be avoided.